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## HONOR KILLINGS AND THE CULTURAL DEFENSE

JOHN ALAN COHAN\*

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\* B.A. University of Southern California, J.D. Loyola Law School (magna cum laude), Law Clerk for Charles H. Carr, Federal District Judge, former adjunct professor of law, Western State Law School. The author has written numerous articles in law review publications and philosophy journals. His current research includes international law, philosophy of society, anthropology, environmental law, criminal law, and legal theory.

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## INTRODUCTION

Anyone who immigrates to a new country is faced with the choice of whether, and to what degree, to assimilate into that country’s dominant culture. The disadvantage of acculturation is that this can result in the erosion of cultural traditions. On the other hand, acculturation can enhance social cooperation and respect, as well as acceptance by those within the dominant culture.

Often enough, immigrants, particularly the younger generation, will eagerly embrace American ways, including sexual freedom, feminism, and other patterns of behavior that their parents might find offensive. There can be a palpable tension between parents and children regarding language, customs, and morality.

Sometimes assimilation into a new culture is not sought voluntarily, but rather is thrust upon a people. The treatment of Native Americans exemplified forced assimilation,<sup>1</sup> and this practice has

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1. See *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992) (“The objectives of allotment were simple

been repeated in other parts of the world: indigenous people are pushed around, some of their customs are outlawed, they are deprived of political power, dispossessed of their lands, and subjected to forced resettlement and colonial plans for their absorption into the dominant society. Colonial authorities often have acted out a sort of ethnocentrism—the idea that one’s own way of life is to be preferred over all others.<sup>2</sup> A “social demoralization” develops when the dominant group “actively deprecates the things [others] hold to be of value.”<sup>3</sup>

The collision between cultural norms is at its greatest tension in the context of criminal law. An increasing number of criminal defendants have sought to defend themselves—to mitigate or exculpate criminal charges, or to argue for a more lenient sentence—by asserting what has come to be called the cultural defense.<sup>4</sup> Under this defense, not yet codified by any state, the defendant seeks to introduce evidence that his or her charged behavior was a customary way of dealing with a similar situation in his or her homeland—in other words, the behavior was reasonable in light of the defendant’s cultural background. “The rationale behind the cultural defense thus rests essentially on the fundamental criminal law principle that a defendant should not be held responsible for acts she committed without the requisite *actus reus* or *mens rea*.”<sup>5</sup>

This Article will focus on the cultural defense in the context of honor killings, in which women or girls are killed by family members because of provocative behavior that dishonors their families.<sup>6</sup> In

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and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.”).

2. JOHN H. BODLEY, *Victims of Progress, in* GENOCIDE: AN ANTHROPOLOGICAL READER 137, 145-48 (Alexander Labon Hinton ed., 2002); *see also* Agnes Heller, *Can Cultural Patterns be Compared?*, 8 DIALECTICAL ANTHROPOLOGY 269, 271 (1984).

3. MELVILLE J. HERSKOVITS, CULTURAL RELATIVISM: PERSPECTIVES IN CULTURAL PLURALISM 103 (Frances Herskovitz ed., 1972).

4. *See Note, The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986) [hereinafter *The Cultural Defense in the Criminal Law*].

5. James J. Sing, Note, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845, 1849-50 (1999).

6. Mazna Hussain, Note, *“Take My Riches, Give Me Justice”: A Contextual Analysis of Pakistan’s Honor Crimes Legislation*, 29 HARV. J.L. & GENDER 223, 225-26 (2006).

these cases, the defendant seeks to introduce evidence that such killings, under the circumstances, are customary in his culture.<sup>7</sup> Defendants argue the indignity occasioned by the improprieties of women or girls of traditional Muslim families can be so great as to drive others in the family, particularly male members, to kill the offending family member and thereby reinstate the family's honor.<sup>8</sup> This provocation may be fueled in large part by community pressures to deal with the situation.<sup>9</sup>

By tracing how provocation ties into honor killings in Pakistan, Jordan, and other Middle Eastern countries, this Article seeks to shed light on how cultural evidence might be understood in honor killing cases in the West. In fact, there have been a number of instances of honor killings in urban centers in the West, most notably in the United States, Canada and the United Kingdom.<sup>10</sup>

Part I introduces the general concept of honor, the nature of honor in both Arab and Western cultures, and why men, in particular, feel it is important to safeguard honor. Particularly, in traditional Muslim cultures, one who is dishonored feels compelled to regain honor by committing an honor killing, similar to the practice of challenging an offender to a duel in an earlier period in the West. Part II discusses honor killings: what they are, the rationale behind them, their justifications, and the extent to which they are normative in various cultures.

Part III traces how the common law principle of "sudden provocation" is applied in the context of honor killings. Such concept is a staple of jurisprudence in the showing of diminished capacity or other elements that may mitigate against a finding of first-degree murder. Part IV begins by observing how honor killings are dealt with

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7. See Martin P. Golding, *The Cultural Defense*, 15 *RATIO JURIS* 146, 149 (2002) ("[U]nder a cultural defense the perpetrator claims a reasonable good-faith belief in the propriety of his act, based on his cultural heritage or tradition. He believes that he did 'the right thing.'").

8. Hussain, *supra* note 6, at 225-26.

9. Yotam Feldner, "*Honor*" Murders—Why the Perps Get off Easy, *MIDDLE E. Q.*, Dec. 2000, at 41, 42-43.

10. Phyllis Chesler, *Are Honor Killings Simply Domestic Violence?*, *MIDDLE E. Q.*, Spring 2009, at 61, 61-69; see also Janet Keeping, *Honour Killings—Premeditated Executions—Must be Stopped in Canada*, *TROY MEDIA CORP.*, Nov. 18, 2009, <http://www.troymedia.com/?p=5854>.

in Pakistan and Jordan, two countries with high incidences of honor killings and where unique statutes take into account the importance of honor in those cultures. Part V explains the origin and rationale behind the cultural defense and how it relates to cultural relativism. Part V also takes a brief detour into the field of transcultural psychiatry, a discipline that aims to bridge cultural differences, and a discussion of the cultural defense in the specific context of honor killings.

Modern reported cases of honor killings are briefly discussed in Part VI, followed in Part VII with a discussion of arguments in favor of and opposed to the cultural defense. Part VIII concludes the article by discussing how the cultural defense is a growing component of American jurisprudence. More specifically, it discusses how the cultural defense appears to have no limitations on the type of cases to which it may be applied.

## I. THE NATURE OF HONOR

Stereotyped roles for men and women seem to be a universal phenomenon across cultures and historical eras. In some instances these stereotyped roles lead to prejudices and customary practices that are premised on the inferiority of women, who, in many cultures, still today “are considered a part of a man’s property.”<sup>11</sup>

A rift between younger and older generations, or between husband and wife, concerning the role of women in society, can cause not only fragmentation between those individuals involved, but also can affect the entire extended family, and in some cases the wider ethnic community. However, simultaneously, this Article will show many cultures regard women as moral standard bearers, upon whom the family’s honor rests.

### A. *The Importance of and Need to Safeguard Honor*

Honor is an important though somewhat intangible and elusive trait. It is not entirely clear how honor can be recognized or defined, whether honor is an intrinsic feature of one’s character, or whether it

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11. Hooma Shah, Comment, *Brutality by Acid: Utilizing Bangladesh as a Model to Fight Acid Violence in Pakistan*, 26 WIS. INT’L L.J. 1172, 1181 (2009).

is a virtue that is cultivated. The *Oxford English Dictionary* contains a number of definitions for the noun, “honour”: “High respect, esteem, or reverence, accorded to exalted worth or rank; deferential admiration or approbation; . . . (Of a woman) Chastity, purity, as a virtue of the highest consideration; reputation for this virtue, good name.”<sup>12</sup>

Honor is a measure of one’s social prestige in the community and depends upon the community’s collective “view” of the person.<sup>13</sup> That is, the degree of one’s honor seems to be measured through the eyes of the beholder. In the antebellum South, for instance, “a white man’s honor was measured not by what he thought of himself, but by what others thought of him.”<sup>14</sup> A person of honor is revered and esteemed by others, is held to have an excellent reputation, and is considered trustworthy. Honoring someone is to treat that person with special respect, even reverence. To honor the dead means that people will treat the corpse with dignity, participate in a respectful funeral rite, and the deceased will be praised in a eulogy. An honor student is one who has attained distinction in grades or other academic achievements.

Perhaps honor is an old-fashioned notion. Today people are rarely referred to as “honorable” or “dishonorable.” Or maybe, honor is similar to dignity. Human dignity is something that Kant thought of as a fundamental, intrinsic and unique feature of humanity.<sup>15</sup> However, honor, unlike the intrinsic dignity, with which every human being is constituted according to Kant,<sup>16</sup> is something a person can lose.<sup>17</sup>

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12. 7 *The Oxford English Dictionary* 357, 358 (John Simpson & Edmund Weiner eds., 2d ed. 1989).

13. See C. A. Harwell Wells, Note, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 *VAND. L. REV.* 1805, 1809 (2001).

14. *Id.* at 1822-23; see also EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* 13 (Oxford Univ. Press 1984) (“Southern men recognized the dictates of honor: a system of values within which you have exactly as much worth as others confer upon you.”).

15. IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 53-54 (Lewis White Beck trans., Bobbs-Merrill Educ. Publ’g 1981) (1785).

16. *Id.*

17. See Rachel A. Ruane, Comment, *Murder in the Name of Honor: Violence Against Women in Jordan and Pakistan*, 14 *EMORY INT’L L. REV.* 1523, 1530-31 (2000) (discussing honor as a “commodity,” or in terms of value, that can be lost or diminished).

Thus, honor seems to be an earned trait, along the line of virtues, namely: courage, magnanimity, kindness, and the like. One can both acquire and lose honor.

In a sense, honor is a latent trait. It is noticed more in its absence than in its presence. When honor is present in a person, others do not give it much thought; it does not stand out as a trait until someone commits a dishonorable act or in some other way suffers dishonor. The acts that cause a person to be stigmatized as dishonorable will vary across cultures, but in all instances to suffer dishonor is to be shamed. People shamed feel shunned, humiliated, and embarrassed. They may feel the need to go into seclusion to avoid being seen by others. People want more than anything to *regain* their lost reputations, to re-establish their statuses in the community. It is at these times that the *loss* of honor in oneself or in others is recognized.

The loss of honor both has an inner and outer quality. On the inner side, the individual may (or may not) feel a genuine sense of shame, guilt, or similar feelings after having breached some moral norm customarily embraced in a given culture. On the outer side, people in the community will form the opinion that an individual who has violated a customary code of behavior, or otherwise has done something dishonorable, has something for which he or she should be ashamed. Even if the individual still actually judges himself to be free of taint—for perhaps he does not embrace the traditional criteria that define honor—the humiliation imposed on him by the weight of public opinion in his culture may be too great to bear. He may feel compelled to take action to free himself of this taint, a taint that he may or may not believe is justified.<sup>18</sup>

The loss of honor is not accompanied only by humiliation, shame and disgrace, but also the loss of reputation. In modern times, reputation has become a kind of property right for which damages are recoverable under the law of defamation:

It is to be observed that it is reputation, not character, which the law aims to protect. Character is what a person really is; reputation is what he seems to be. One is composed of the sum of the principles and motives—be they known or unknown—which govern his

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18. Alison L. LaCroix, *To Gain the Whole World and Lose His Own Soul: Nineteenth-Century American Dueling as Public Law and Private Code*, 33 HOFSTRA L. REV. 501, 513-14 (2004).

conduct. The other is the result of observation of his conduct—the character imputed to him by others.<sup>19</sup>

In other words, character is the *real* person while reputation is the public's perception of the individual's persona.

In the context of honor, there is no boundary between individuals and their society. One's self-conception as an honorable person has little weight if other people in the culture do not concur. While one can bring dishonor on oneself by words or deeds, acts or omissions, dishonor can also result from the actions of others, however unfair this may seem.<sup>20</sup> For instance, consider the situation of the parent of someone who has been convicted of a heinous murder and sentenced to death. The disgrace of a family member is inevitably a humiliation to others in the family, despite their innocence of any wrongdoing. The negative feelings toward the child are, at least in some way, imputed to the parents.

In many instances, it is possible to regain honor after it has been lost, depending on the egregiousness of the circumstances that triggered such loss. If one has done something dishonorable, a period of time may have to elapse before the community will come to believe that honor has been restored. On the other hand, it may require the performance of some act of penance to restore honor: apologizing, paying blood money, going to jail, moving to a different community and starting a new life, or just biding one's time until the community gets over the dishonor.

In situations where dishonor is imposed by the action of a third party, one might be blameless but still feels a loss of honor simply because the community regards the situation to be one that causes people to lose face. To regain honor in such cases usually means to take some action against the offender.<sup>21</sup> This might mean a public airing of one's grievances, a lawsuit, a hearing before a tribal council,

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19. Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33, 33 (1904).

20. See, e.g., Marie D. Castetter, Note, *Taking Law into Their Own Hands: Unofficial and Illegal Sanctions by the Pakistani Tribal Councils*, 13 IND. INT'L & COMP. L. REV. 543, 550-51 (2003) (discussing how acts females can bring shame and dishonor on not only her family, but also her tribe).

21. See, e.g., LaCroix, *supra* note 18, at 502-03 (discussing practice of initiating a duel with the offender in order to reestablish honor).

or some other action that the community recognizes as making one whole again.<sup>22</sup> In some cultures it might mean self-help in the form of retaliation against the offender.<sup>23</sup> The primeval instinct, if it is to be called that, to wreak vengeance against those who have caused the dishonor or other harm, is familiar to all people in all periods of history: “[T]he basic urge for retribution is a cultural universal, across time and place, and it establishes itself early in life. Some evidence even hints that non-human primates experience a retributive urge.”<sup>24</sup>

Thus, to regain honor is not only to reestablish external validation from those in one’s culture, but also the ability once again to hold one’s head high, and be accepted as a worthy member of one’s community.

### *B. The Nature of Honor in Arab Cultures*

In Arab cultures, a distinct honor code, known as *parda*, calls for females to comply with social norms, under which they are required to be safeguarded from contact with unauthorized persons.<sup>25</sup> A man’s honor depends in large part on whether the female family members are vigilant in adhering to these norms.<sup>26</sup> In these cultures, “the ideal of masculinity is underpinned by a notion of ‘honour’—of an individual man, or a family or a community—and is fundamentally connected to policing female behaviour and sexuality.”<sup>27</sup> One commentator states the importance of women to family honor: “The woman holds all of the honor for the family and the social order depends upon her maintaining this honor. In addition, the woman’s honor or shame strongly affects the general standing of the tribe within the

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22. *E.g., id.* at 503 (discussing one of the purposes of dueling as a “public performance” to restore honor in the community: “[T]o duel was to perform the specific role of gentleman by asserting the right to vindicate personal honor in the realm of public notice.”).

23. *E.g., id.*

24. Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059, 1063 (2007).

25. Castetter, *supra* note 20, at 550-51.

26. Feldner, *supra* note 9, at 41-42.

27. Radhika Coomaraswamy, *Violence Against Women and ‘Crimes of Honour’*, *Preface to ‘HONOUR’: CRIMES, PARADIGMS, AND VIOLENCE AGAINST WOMEN*, at xi, xi (Lynn Welchman & Sara Hossain eds., 2005).

community.”<sup>28</sup>

Honor in these cultures is associated with Islam’s “male-dominated interpretations of concepts like female chastity and male authority.”<sup>29</sup> The following discussion of men’s honor epitomizes these interpretations:

As the embodiment of her family’s honor, women must guard their virginity and chastity—after all, “a man’s honor lies between the legs of a woman.” By engaging in a freely chosen illicit sexual relationship, a woman undermines the ownership rights of others to her body and challenges traditional social order.<sup>30</sup>

In these cultures there is often hostility with respect to “women’s human rights activism,” and women are “often treated as little more than human chattel.”<sup>31</sup>

In traditional Arab culture a distinction is made between two kinds of honor: *sharaf*—pertaining to dignity of an individual, tribe, or family—and *ird*—relating to the honor of women.<sup>32</sup> The failure of a person to adhere to proper moral behavior will weaken the dignity, and hence the social status, of one’s family or tribe, while dignity can increase if one is exemplary in hospitality, generosity, and similar virtues.<sup>33</sup> The concept of *ird* means “chastity” or “purity.”<sup>34</sup> Exemplary behavior of a woman cannot increase her *ird*, but misbehavior decreases it.<sup>35</sup> Moreover, “*ird* trumps *sharaf*: the honor of the Arab family or tribe, the respect accorded it, can be gravely damaged when one of its women’s chastity is violated or when her reputation is tainted. Consequently, a violation of a woman’s honor requires severe action . . . .”<sup>36</sup> The concept of honor held by women is

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28. Castetter, *supra* note 20, at 550-51.

29. Hussain, *supra* note 6, at 237.

30. Ruane, *supra* note 17, at 1531 (footnotes omitted).

31. Ann Elizabeth Mayer, *A “Benign” Apartheid: How Gender Apartheid Has Been Rationalized*, 5 UCLA J. INT’L L. & FOREIGN AFF. 237, 259-60 (2000/2001).

32. Feldner, *supra* note 9, at 41-42.

33. *Id.*

34. *Id.* at 42.

35. *Id.*

36. *Id.*

further discussed as follows:

Women serve their male guardians and families as vessels of honor; however, they do not possess any honor of their own. A woman is not in sole control of her honor. Instead, it is a combination of community norms and societal policing. Honor is maintained by constraining “[the] movement, conversations, friendships, choice of marriage partners, and so on,” of women. Likewise, when honor is supposedly betrayed or lost, disciplining, or even killing, the woman at fault may restore honor that has been damaged by a woman’s immoral or unchaste actions.<sup>37</sup>

Notably, modesty in women’s behavior is emphasized.<sup>38</sup> Women must cover themselves completely except for the upper part of their faces when going outdoors, and must be accompanied by a male family member.<sup>39</sup> The honor of the village group lies with the modesty of its women and the readiness of its men to protect this modesty.<sup>40</sup> In part, the modesty code is derived from the idea that men can become contaminated or defiled by women.<sup>41</sup>

In other cultures some of these norms may seem extremely antiquated: women out in public should not be heard; they must not speak or glance at other men; if a kinsman passes by he can address her only by such terms as “O Mother” or “O Daughter” or “O Aunt,” terms that imply sexual distance.<sup>42</sup> Women must not leave home without good reason.<sup>43</sup> Women do not enter shops but remain at the entrance communicating their request and passing on their money

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37. Stephanie Palo, *A Charade of Change: Qisas and Diyat Ordinance Allows Honor Killings to go Unpunished in Pakistan*, 15 U.C. DAVIS J. INT’L L. & POL’Y 93, 98 (2008) (alteration in original) (footnotes omitted).

38. See Castetter, *supra* note 20, at 550.

39. *Id.*

40. See Richard T. Antoun, *On the Modesty of Women in Arab Muslim Villages: A Study in the Accommodation of Traditions*, 70 AM. ANTHROPOLOGIST 671, 687-88 (1968).

41. *Id.*

42. *Id.* at 675; see also Hamid R. Kusha, *Anti-Criminogenic Impacts of Culture on Female Gang Formation: The Case of Islam*, 19 J. HUM. BEHAV. SOC. ENV. 242, 247-48 (2009).

43. Antoun, *supra* note 40, at 675.

from the outside.<sup>44</sup> In public places they must walk a few paces behind their husbands.<sup>45</sup>

In these cultures, it is believed women are the initiators of illicit relations, and “[w]omen’s propensity for sexual license is attributed to the animalistic impulses that move them.”<sup>46</sup> In these Arab cultures, women’s lust is considered greater than that of men.<sup>47</sup> A woman is given a virginity test on the day of consummation, and if found to not be a virgin she can be punished, even put to death.<sup>48</sup> Further, women are never allowed to choose their husbands, as their minds are deemed of deficient capacity.<sup>49</sup>

As will be discussed in Part II, honor killings are often the means by which honor is restored to a family. The prevalence of and environment surrounding honor killings in Arab culture are highlighted by the following excerpt from a State Department report concerning Pakistan: “Significant numbers of women were subjected to violence, abuse, rape, and other forms of degradation by spouses and members of society. The Government publicly has criticized the practice of ‘honor killings’ but failed to take corrective steps, and such killings continued throughout the country.”<sup>50</sup> Killing the offending woman is considered an obligation of the aggrieved family: “[A] man, his family, and his tribe are obligated to take revenge for wrongs—either real or perceived—to redeem their honor.”<sup>51</sup>

### C. *The Nature of Honor in the West*

In the West there exists an entirely different culture of honor. An individual’s honor depends on a much less restrictive code of behavior. Women have a great deal more freedom—sexual freedom, reproductive freedom, freedom to marry or to date whom they wish,

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44. *Id.* at 676.

45. *Id.*

46. *Id.* at 678.

47. *Id.* at 679.

48. See Glenn E. Weisfeld, *Sociobiological Patterns of Arab Culture*, 11 ETHNOLOGY AND SOCIOBIOLOGY 23, 30, 41 (1990).

49. Antoun, *supra* note 40, at 678.

50. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, PAKISTAN 2001 (2002).

51. *Id.*

and entitlement to equal rights with men.<sup>52</sup> In contrast to Arab culture, a Western man's honor is not based on the behavior of women in one's family so much as it is on his own behavior.

There is a rich history of how honor has been conceived in the West. In the Sixteenth Century, the English conception of "natural honour" was defined as:

[T]he good opinion of others founded in the assumption that the person honoured by the good opinion was morally worthy of such esteem and respect. It was distinguished from acquired honour by the fact that, whereas acquired honour had positively to be earned, natural honour was established negatively: it was simply one's due if one had not *failed* in any principal virtue (particularly courage).<sup>53</sup>

For many years in the United States, honor was so important that men felt it was imperative to retaliate against someone who had impugned their honor.<sup>54</sup> An insult or perceived insult through words or writing, a disparaging gesture, a contemptuous sneer, a defamatory comment, other expressions of contempt, an assault or other affront to one's sense of autonomy and dignity, or lewd touching of one's wife, daughter, sister or a female companion—could easily cause dishonor to a man.<sup>55</sup>

Passions were hardly under control, and political arguments often advanced to stabbing.<sup>56</sup> Alexis de Tocqueville described the frontier of America as "a wild country where [men] must fight daily against all the miseries of life" and that this made "their passions still more irritable and violent and further removed from society."<sup>57</sup> "Men of

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52. In modern America, the Equal Protection Clause has been construed to accord equal rights to women in numerous contexts. *See, e.g.*, *U.S. v. Virginia*, 518 U.S. 515 (1996).

53. JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY* 26 (1992).

54. *Id.* at 26-27.

55. *See generally* JACK K. WILLIAMS, *DUELING IN THE OLD SOUTH: VIGNETTES OF SOCIAL HISTORY* 13-14 (Texas A&M Univ. Press 1980) (discussing grounds for a challenge to a duel in the antebellum South).

56. *See, e.g.*, CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM* 35 (Praeger 1999).

57. ALEXIS DE TOCQUEVILLE, *JOURNEY TO AMERICA* 285 (J. P. Mayer, ed., George Lawrence trans., Anchor Books 1971) (1957).

honour were expected to retaliate swiftly and forcefully in the face of an affront.”<sup>58</sup> “The act of retaliation, regardless of the consequences, would negate the threat to honor.”<sup>59</sup>

Consequently, dueling was an outgrowth of a culture of honor, and an accepted element of the social code.<sup>60</sup> It was the honorable and just mode of settling personal differences.<sup>61</sup> In fact, dueling was a retaliatory, even obligatory course of action.<sup>62</sup> Men participated in duels out of fear of what would happen to their reputation if they allowed an insult or a disagreement to go unchallenged.<sup>63</sup> Even after anti-dueling statutes were enacted in the Nineteenth Century, public sentiment made it rare to convict a man of killing another in a duel because jurors still regarded dueling as an appropriate response to insults, slander, and libel.<sup>64</sup>

Duels were motivated in fundamentally the same way as honor killings: “Participating in a duel communicated to others—it *meant*—that the duelists were men of honor. Duelists felt compelled by internal and external pressures to duel.”<sup>65</sup> Duels were thought to be the only way of repairing one’s honor that had been damaged by personal transgressions.<sup>66</sup> Men who had lost public favor were “likely to

58. HORDER, *supra* note 53, at 26-27.

59. Sing, *supra* note 5, at 1867 (discussing HORDER, *supra* note 53, at 26-27).

60. LaCroix, *supra* note 18, at 512-14.

61. See Jack Kenny Williams, *The Code of Honor in Ante-Bellum South Carolina*, 54 S.C. HIST. MAG. 113, 113 (1953). “What is more, the man of honour was not expected to retaliate reluctantly, out of a sense of duty or a fear of shame, in the face of a threat to his natural honour. He was expected to resent the affront, and retaliate *in anger*.” HORDER, *supra* note 53, at 27. “Anger, rage, and retaliatory measures, then, were culturally programmed reactions, . . .” Sing, *supra* note 5, at 1867.

62. Sing, *supra* note 5, at 1867.

63. LaCroix, *supra* note 18, at 516.

64. Wells, *supra* note 13, at 1823 (“For a man to turn to the legal system to repair his honor, perhaps by filing a libel or slander suit, was akin to a man admitting that he was unable to protect himself.”). “Anti-dueling laws were on the books in all states, but often ignored. Public opinion supported dueling, and until this changed the law would be a dead letter.” *Id.* at 1807.

65. *Id.* at 1810.

66. *Id.* at 1823.

The Southern attitude toward honor, personal transgressions, private violence, and the law is probably best summarized by a piece of advice given to Andrew Jackson

benefit if they won their duels and so gained attention. Indeed, some men entered into duels precisely to establish their claim to the status of a gentleman.”<sup>67</sup> The consensus about what a man should do to defend his honor has changed over time. Today it is no longer the case, as it was in the Nineteenth Century, “that a gentleman either defend his honor in a duel or else sacrifice the respect of his peers.”<sup>68</sup>

A difference between the loss of honor in American dueling culture and that of Arab cultures is that in the former instance a man could be made whole again if his offender apologized for making the insulting remark to the affronted party.<sup>69</sup> This would avert a duel and both parties would come away satisfied that the insult, whether it was an accusation of being a liar or some other challenge to a one’s integrity, was publicly acknowledged and withdrawn. But, in cultures where honor killings are normative, the act itself cannot be atoned for, no apology or acknowledgment of remorse will dissolve or repair the taint. The stain is indelible unless the offending party is killed. Then only may honor be restored.

## II. THE PREVALENCE OF HONOR KILLINGS

### A. *Honor Killings Defined*

Honor killings are a longstanding cultural practice in which family members will attack a female relative—by stoning, stabbing, beating or shooting, in order to kill her for bringing dishonor to her family or clan.<sup>70</sup> This practice is thought to be “rooted in patriarchal norms of male superiority and control and female inferiority and obedience, encased in familial and social and economic structures of inequality, terrorizing women and perpetuating gender conformity and

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by his mother. As he recalled it, she advised Jackson: “Never tell a lie, nor take what is not your own, nor sue anybody for slander, assault and battery. *Always settle them cases yourself.*”

*Id.*

67. *Id.* at 1823-24.

68. *Id.* at 1809.

69. *Id.* at 1822.

70. Leyla Pervizat, *In the Name of Honor*, HUMAN RIGHTS DIALOGUE, Fall 2003, at 30, 31.

oppression.”<sup>71</sup>

The dishonor is usually the result of violating sexual taboos such as: engaging in premarital sex or extramarital relations, elopement with a man not approved by her parents, or a romantic involvement with someone disapproved by the woman’s family.<sup>72</sup> “A man who feels such an act has dishonoured the family will kill the woman in question as a means of restoring that honour. Motives for honour killing, however, have started to expand beyond female adultery, targeting women for enjoying basic freedoms. . . .”<sup>73</sup>

Honor killings are a worldwide phenomenon, concentrated in Middle Eastern and Asian nations, including Pakistan, Turkey, Afghanistan, India, and Jordan.<sup>74</sup> While honor killings may be concentrated in certain regions, the following illustrates the worldwide nature of honor killings: “Honor killings have been reported in Bangladesh, Great Britain, Brazil, Ecuador, Egypt, India, Israel, Italy, Jordan, Pakistan, Turkey, [the United States,] and Uganda according to reports submitted to the United Nations Commission on Human Rights.”<sup>75</sup> Currently, the United Nations Population Fund estimates that there are 5,000 honor killings per year,<sup>76</sup> although the number is likely greater given the fact that these crimes frequently go unreported.<sup>77</sup> The accuracy of statistics on the number of honor

71. Rhonda Copelon, *International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking*, 11 AM. U. J. GENDER SOC. POL’Y & L. 865, 872 (2003).

72. Hussain, *supra* note 6, at 225-26.

73. Megan O’Toole, ‘Honour Killing’ Cases Spark Debates Over Religion, Racism; Practice Dates Back Centuries to Rural Pakistan, NAT’L POST (Can.), July 24, 2009, at A6.

74. Expert Group Meeting on Good Practices in Legislation to Address Harmful Practices Against Women, Addis Ababa, Eth., May 25-28, 2009, *Harmful Traditional Practices in Europe: Judicial Interventions*, p. 11-12, U.N. Doc. EGM/GPLHP/2009/EP.12 (May 21, 2009) (prepared by Carole Ageng’o) available at

[http://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2009/Expert%20Paper%20EGMGPLHP%20\\_Carole%20Ageng'o%20revised\\_.pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Carole%20Ageng'o%20revised_.pdf) [hereinafter Expert Group Meeting].

75. *Id.* at 11.

76. Colleen Carroll Campbell, Editorial, *Political Correctness is No Excuse to Ignore Honor Killings*, ST. LOUIS POST-DISPATCH, Feb. 19, 2009, at D7.

77. Christina A. Madek, Note, *Killing Dishonor: Effective Eradication of*

killings in given countries is further suspect because many murders are said to be hidden as suicide or accidents.<sup>78</sup>

It is estimated that in Pakistan honor killings account for hundreds of women's deaths.<sup>79</sup> In Istanbul, Turkey alone, it is estimated there were about 1000 honor killings in a five-year period.<sup>80</sup> In Turkey, the "honor suicide" has emerged as a way for parents to avoid engaging in killing their disobedient daughter: the parents seek to convince their daughter to kill herself in order to spare them a possible prison sentence for murder.<sup>81</sup>

In many countries, honor killings are cultural practices that members of the society do not readily question; they become part of the "rules of the game," in other words, a social norm, defined as:

[A] "social regularity," a behavior that is in fact widely adopted in society. What distinguishes these social regularities as social norms is that they are not only what people do, but what society holds that people should do. The particular actions constituting a social norm have larger cultural or social meanings, which lead other members of society to approve or disapprove of them. The meanings attached to a social norm cause members of society to feel obliged to conform to social norms, either because the meaning has become internalized or because to do otherwise would risk sanction from other members of society.<sup>82</sup>

Moreover, "[n]orms constrain an individual's behavior, but not through the centralized enforcement of a state. If they constrain, they

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*Honor Killing*, 29 SUFFOLK TRANSNAT'L L. REV. 53, 56 (2005).

78. Feldner, *supra* note 9, at 41.

79. Salman Masood, *Pakistan Begins Inquiry into Deaths of 5 Women Amid Dispute over Honor Killings*, N.Y. TIMES, Sept. 3, 2008, at A6; *see also* Peter Worthington, *No 'Honour' in Killings*, TORONTO SUN, Aug. 5, 2009, at 18 ("A conservative estimate has three women per day subjected to honour killings in Pakistan").

80. *Honor killings claim 1,000 lives in five years*, HÜRRIYET DAILY NEWS & ECON. REV., June 21, 2008, available at <http://www.hurriyetdailynews.com/h.php?news=turkish-press-scanner-2008-06-21>.

81. Dan Bilefsky, *How to Avoid Honor Killing in Turkey? Honor Suicide*, N.Y. TIMES, July 16, 2006, at 3.

82. Wells, *supra* note 13, at 1809-10 (footnotes omitted).

do so because of the enforcement of a community.”<sup>83</sup> In some instances an honor killing might be motivated simply because a woman believes, or is perceived to believe, in values that are in conflict with the norms of her culture.<sup>84</sup>

Once the family decides, rightly or wrongly, that an assault on the family’s honor has occurred, shame and humiliation cry out for swift revenge.<sup>85</sup> This revenge can only transpire through the death of the female family member who has violated the prevailing moral norms. “[H]er male relatives cannot walk in the village with heads high. To reclaim their manhood in the eyes of other men, they cleanse their honor by stabbing or sometimes stoning her [to death].”<sup>86</sup> However horrendous cultural outsiders may view this to be, adherents to the practice of honor killings believe this form of violence is a “family problem” or a “domestic situation.”<sup>87</sup>

Even a minor indiscretion, such as talking to a man who is not a relative, will bring dishonor,<sup>88</sup> not only upon the woman, but upon her husband, parents, siblings, children, aunts, uncles and cousins.<sup>89</sup> In tribal communities, this dishonor may extend to her entire clan or even the entire tribe.<sup>90</sup> Women are killed for their refusal to wear head coverings, having a love poem written in their name, calling a radio station to request their favorite song, or arguing with their parents over clothes.<sup>91</sup> Even failing to serve a meal on time or flirting can be

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83. Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662 (1998) (footnote omitted).

84. Pervizat, *supra* note 70, at 30.

85. *See id.* at 31.

86. *Id.*

87. *Id.* at 30.

88. *See, e.g.*, Feldner, *supra* note 9, at 42 (discussing the murder by stoning of a fifteen year-old Jordanian girl at the hand of her brother for “walking toward a house where young boys lived alone.”).

89. *See* Madek, *supra* note 77, at 54-55 (“From this tradition followed the belief that a male had a duty to protect the honor of his entire family by killing any female relative involved in an inappropriate sexual relationship.”).

90. *See, e.g.*, Castetter, *supra* note 20, at 543 (“In June 2002, a Pakistani tribal village council sentenced a woman to be gang raped in order to restore honor of an opposing tribe.”).

91. Pervizat, *supra* note 70, at 31 (discussing a females transgression of “calling the radio station and requesting her favorite song”); Worthington, *supra* note 79 (“Thousands of women are killed every year for reasons ranging from refusal to

perceived as destroying family honor.<sup>92</sup> In one bizarre case, a man killed his wife after he dreamed she was unfaithful, feeling the killing was justified on that basis.<sup>93</sup> In another case of a brutal honor killing, a man in Gaza City allegedly bludgeoned his daughter to death with an iron chain after learning his daughter owned a cell phone.<sup>94</sup> He suspected she used it to speak to a man not related to the family.<sup>95</sup> Disposition of this case is pending.<sup>96</sup> Despite what are likely considered heinous from a Western perspective, human rights groups indicate assailants of honor killings in the Palestinian territories usually receive light sentences.<sup>97</sup>

In Pakistan, a well-publicized honor killing involved Samia Sarwar.<sup>98</sup> After she was subjected to ongoing physical abuse at the hands of her husband (in her arranged marriage), she told her parents she was getting a divorce.<sup>99</sup> Her parents were upset about the shame this would bring the family, and soon everyone in the family turned against Sarwar.<sup>100</sup> Her mother, on a ruse, arranged to meet Sarwar at her lawyer's office.<sup>101</sup> The mother was accompanied by a hired gunman, who shot and killed Sarwar on the spot, and attempted to kill her lawyer as well.<sup>102</sup> The gunman was never arrested, and

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wear head coverings, to having a love poem written in their name, to having arguments over clothes.”).

92. Hillary Mayell, *Thousands of Women Killed for Family “Honor,”* NAT’L GEOGRAPHIC NEWS, Feb. 12, 2002, <http://news.nationalgeographic.com/news/pf/15061734.html>.

93. Manar Waheed, *Domestic Violence in Pakistan: The Tension Between Intervention & Sovereign Autonomy in Human Rights Law*, 29 BROOK. J. INT’L L. 937, 945 (2004).

94. Rizek Abdel Jawad, *Gaza Father Held in ‘Honor Killing’ of Daughter*, Associated Press, July 29, 2009, <http://abcnews.go.com/International/wireStory?id=8202225>.

95. *Id.*

96. *Id.*

97. *See, e.g., id.* (“In the West Bank and Gaza, ‘honor killing’ assailants serve between six months and three years in prison . . .”).

98. Waheed, *supra* note 93, at 944.

99. *Id.* at 944-45 (“The breaking point occurred when Samia became pregnant and her husband threw her down a flight of stairs.”).

100. *Id.* at 945.

101. *Id.*

102. *Id.*

subsequently the lawyer and her law partner, both of whom are prominent Pakistani women's rights lawyers, were subjected to *fatwas* (religious edicts) by religious organizations in Peshawar, declaring them *kafirs* ("nonbelievers") thereby encouraging all Muslims to kill them.<sup>103</sup> The two lawyers have been subjected to ongoing death threats, while authorities have done nothing to protect them.<sup>104</sup>

Honor killings predate all modern religions, and originated among ancient desert tribes.<sup>105</sup> According to one Muslim tribal leader, "[m]en's honor comes before the Book."<sup>106</sup> The justification for honor killings is not based on the Koran or any related Muslim teachings.<sup>107</sup> However, Chapter 4:15 of the Koran states that if women are "guilty of lewdness, confine them to houses until death do claim them."<sup>108</sup> This does not seem to mandate homicide but simply suggests that some sort of severe punishment is in order for women who exhibit offending behavior.<sup>109</sup>

Honor killings are often based on false allegations.<sup>110</sup> Whether or not the woman in question has actually done something that defiles the honor of her family, or is simply the subject of gossip and false rumors, does not matter: "Only the public perception of honor matters and ultimately provides the catalyst for thousands of murders. If the woman shames the family, then she must die—only 'blood cleanses honor.'"<sup>111</sup> One troubling aspect of honor killings is that many of the

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103. *Id.* at 958-59; Ruane, *supra* note 17, at 1579 (defining *fatwas* and *kafirs*).

104. Ruane, *supra* note 17, at 1525.

105. *Id.* at 1530.

106. Pervizat, *supra* note 70, at 31.

107. *Id.*

108. Rachelle Cassman, *Fighting to Make the Cut: Female Genital Cutting Studied within the Context of Cultural Relativism*, 6 NW. J. INT'L HUM. RTS. 128, 132 (2007) (citing Kathleen A. Portuan Miller, *The Other Side of the Coin: A Look at Islamic Law as Compared to Anglo-American Law – Do Muslim Women Really Have Fewer Rights than American Women?*, 16 N.Y. Int'l L. Rev. 65, 91 n.153 (2003)).

109. *Id.*

110. See Kathryn Christine Arnold, *Are the Perpetrators of Honor Killings Getting Away With Murder? Article 340 of the Jordanian Penal Code Analyzed Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 AM. U. INT'L L. REV. 1343, 1360 (2001).

111. Ruane, *supra* note 17, at 1532.

killings are mistaken honor killings: “Lack of verification as to whether illicit sexual activity actually occurred results in a high percentage of mistaken honor killings, because male suspicion of immoral activity is often based on rumor and is factually unfounded.”<sup>112</sup>

According to Momen Hadidi, head of Jordan’s National Institute of Forensic Medicine, most female victims of honor killings stemming from accusation of illicit sexual relations are found to be virgins during their autopsies, bolstering the argument that most honor crimes turn out to be based on false suspicions.<sup>113</sup> Dr. Hadidi was quoted as saying that “killers based their judgements [sic] of the victims on mere suspicions that they had improper relationships.”<sup>114</sup>

Another aspect of honor killings pertains to the not uncommon practice in the Middle East for women or girls who have been victims of rape to be killed by relatives.<sup>115</sup> The following example is shocking, but not atypical: a sixteen-year-old girl in Amman, Jordan, became pregnant after being raped by two relatives.<sup>116</sup> After she delivered a baby boy, her uncle decided to kill her in the name of family honor.<sup>117</sup> He went to the girl’s room at night and shot her nine times while she was asleep.<sup>118</sup> She was pronounced dead on arrival at the hospital.<sup>119</sup>

Honor killings or other attacks against women are sometimes a means of punishing a man for wrongs *he* has committed. For instance,

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112. Arnold, *supra* note 110, at 1360. Of course, passions can be aroused based on a false belief, particularly if it is reasonably formed. “Such a belief, though a mistaken one, is calculated to induce the same emotions as would be felt were the wrongful act in fact committed.” Lama Abu-Odeh, *Comparatively Speaking: The “Honor” of the “East” and the “Passion of the “West,”* 1997 UTAH L. REV. 287, 298-99 (1997).

113. Hani Hazaimah, *No Legal Exemption for ‘Honour Crimes,’* JORDAN TIMES, July 10, 2009, <http://www.jordantimes.com/index.php?news=18296&searchFor=honor%20killings>.

114. *Id.*; see also Arnold, *supra* note 110, at 1369 (“More than ninety percent of honor killings occur based on *suspicion* or *rumor* of illicit sexual relations.”).

115. See, e.g., Rana Hussein, *Man Charged with Premeditated Murder of his 16-year-old Niece,* JORDAN TIMES, Aug. 12, 2009, <http://www.jordantimes.com/index.php?news=19146>.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

in 2002 a Pakistani tribal council heard the case of a twelve-year-old boy who was accused of having an illicit affair with a woman of another tribe.<sup>120</sup> To restore the honor of the woman and her tribe, the council ruled that a member of the boy's family needed to be disgraced.<sup>121</sup> They ordered the boy's sister to be gang raped in order to restore the honor of the woman of the other tribe.<sup>122</sup> The "sentence" was immediately carried out: his sister was dragged to a hut by men from the other tribe and gang raped while a crowd jeered.<sup>123</sup> She was then forced to walk home naked.<sup>124</sup>

There are many other instances where women have been used as vehicles for the restoration of honor, such as through acid throwings.<sup>125</sup> Like honor killings, acid throwings are invariably premeditated.<sup>126</sup> The significance of acid throwing in relation to honor is explained by the practice's purpose: "To change the appearance of a woman by maiming or burning her, or to sexually assault her or kill her, devalues her worth to the family and dishonors the family."<sup>127</sup>

Honor killings might be explained, to some degree, by the fact the State might not be prepared to punish the women who have denigrated the honor of their family. Although in some instances the government police step in and arrest the offending woman, for offenses including drinking in public, going about without an escort, and similar offenses to Islamic sensibilities. For an adulterer, stoning a woman to death might be endorsed by the Islamic courts, and for less egregious offenses public lashings might be imposed. For instance, in Malaysia, in a case that drew international attention in 2009, authorities sentenced a Muslim woman to whipping for drinking alcohol in the lobby of a hotel.<sup>128</sup> While Malaysia is a multi-cultural country with a

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120. Castetter, *supra* note 20, at 544.

121. *Id.*

122. *Id.* at 543.

123. *Id.* at 545.

124. *Id.*

125. Shah, *supra* note 11, at 1188.

126. *Id.*

127. Wendy M. Gonzalez, *Karo Kari: Honor Killing*, 9 BUFF. WOMEN'S L.J. 22, 23 (2000-2001).

128. Thomas Fuller, *Malaysia Postpones Whipping of Woman Who Drank Beer*, N.Y. TIMES, Aug. 25, 2009, at A6.

secular leaning, half of the twenty-seven million population is Muslim, and Islamic laws are on the books and enforceable against Muslims by a huge bureaucracy.<sup>129</sup> The family might be deeply resentful if the State refuses to punish the woman, or if the law does not even consider the wrong to be a crime.

Honor killings are mostly, but not always against women. Consider, for example, the honor killing in Turkey of a twenty-six-year old gay man.<sup>130</sup> Ahmet Yildiz chose to live an openly gay lifestyle.<sup>131</sup> This provoked his father to hunt him down in Istanbul, more than 600 miles from his hometown, shooting him to death as he left his apartment to buy ice cream.<sup>132</sup> Afterwards, his family refused to claim his body.<sup>133</sup> A cousin said in an interview, "Ahmet's father had warned him to return to their village and to see a doctor and *imam* in order to cure him of his homosexuality and get married, but Ahmet refused."<sup>134</sup> Ahmet had filed a complaint with the local prosecutor's office about his family's threats to kill him, but the office had refused to investigate his allegations or provide him with protection.<sup>135</sup> Another young man, Didar Erdal, also fled from Ahmet's home town and moved to the Netherlands after his family learned he was gay.<sup>136</sup> He said that his father had ordered him home so that the tribal elders could decide his fate.<sup>137</sup> Didar told a reporter, "I know all too well what the tradition demands must happen to me."<sup>138</sup>

### B. Honor Killings in Western Society

Honor killings are a worldwide phenomenon, occurring not only in Arab cultures, but also among Muslim communities in Western

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129. *Id.*

130. Dan Bilefsky, *Soul-Searching in Turkey After a Gay Man Is Killed*, N.Y. TIMES, Nov. 26, 2009, at A16.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (emphasis added).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

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urban centers. In recent years, episodes of honor killings have been increasingly reported among Muslim urbanites in the West, including the United States, Britain and Canada. The following is a list containing several recent instances of honor killings cases in both Canada and the United States.

- In Brampton, Ontario, two men—accused of a high-profile death of a sixteen-year-old girl, Aqsa Parvez, who was found strangled in her family’s home—were charged with first-degree murder in a case that drew international attention for the apparent clash between Muslim and Western cultures.<sup>139</sup> The girl had been at odds with her family over her refusal to wear the *hijab*, the familiar Islamic headscarf that is often worn by Muslim women.<sup>140</sup> She had reportedly spent time away from home, sleeping at various friends’ houses or community shelters.<sup>141</sup>
- In Kingston, Ontario, four young women, whose family thought the women had committed social transgressions, were found dead in a car in what was described as an episode of honor killing.<sup>142</sup>
- In Cleveland, Ohio two young men were prosecuted for murdering their cousin, twenty-one year-old Methal Dayem, who was living independently and had backed out of an arranged marriage the year before.<sup>143</sup> The trial ended in acquittal, apparently because gloves found at the crime scene had gunshot residue, but did not match DNA of either of the two defendants.<sup>144</sup>
- In October 2009, a Phoenix, Arizona man, born In Iraq, drove over and killed his daughter with a two-ton jeep because she was

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139. Louis Rosella, *Aqsa Parvez Father, Brother Charged with First-Degree*, SOUTH ASIAN FOCUS (Toronto), Sept. 17, 2009, at 5, available at <http://zoominlocal.com/pub-files/123640573049b20de2db76b/pdf/12531112834ab0f5f3444ba.pdf>.

140. *Id.*

141. Matthew Coutts, *Hearings Open in the Murder Trial of Asqa Parvez*, NAT’L POST (Can.), Jan. 8, 2009, at A2.

142. Andrew Chung, *Were Deaths of 4 Women a Matter of ‘Honour’?*, STAR.COM (Toronto), July 24, 2009, <http://www.thestar.com/news/ontario/article/671148>.

143. Amanda Garrett, *Cousin Acquitted in Killing*, PLAIN DEALER (Cleveland), July 26, 2000, at 1A.

144. *Id.*

“too westernized.”<sup>145</sup> The prosecutor told the court in a preliminary hearing: “By his own admission, this was an intentional act and the reason was that his daughter had brought shame on him and his family.”<sup>146</sup>

- Rifqa Bara, a seventeen year-old girl from Columbus, Ohio, born of a Muslim family, decided to convert to Christianity.<sup>147</sup> According to Shariah law, those who convert have engaged in apostasy, a capital offense.<sup>148</sup> The girl’s father threatened to kill her, so she fled to Florida by bus, and found a safe haven with two pastors she had met on the social networking website Facebook.<sup>149</sup> When the girl’s family discovered her whereabouts, they filed an action in the juvenile court in Orlando, Florida, to compel her to return.<sup>150</sup> Her return to her parents’ custody would have meant certain death at their hands.<sup>151</sup> Public outrage over the girl’s plight led the juvenile court to permit her to stay in the state system for ninety days pending investigation of the danger she might face if she were returned to her parents’ custody.<sup>152</sup>

- In Buffalo, New York, the founder of a television network, which was designed to improve the image of Muslims in the United States, was arrested and charged with murdering his estranged wife shortly after she had filed for divorce and a protective order barring him from their home.<sup>153</sup> There have been conflicting reports on whether he admitted to decapitating her in February 2009, in an apparent effort to restore his honor lost by

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145. Phyllis Chesler, *Honor Killings All Over America—Why Are the Islamists Suddenly Silent?*, CHESLER CHRON., Nov. 1, 2009, <http://www.pajamasmedia.com/phyllischesler/2009/11/01/honor-killings-all-over-america-why-are-the-islamists-suddenly-silent/>.

146. *Id.*

147. See Frank J. Gaffney Jr., *Stay of Execution; Shariah and Constitution Collide*, WASH. TIMES, Aug. 25, 2009, at A19.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Fred O. Williams, *Muslim Influence Speculated in Slaying; Estranged Husband Charged with Murder*, BUFF. NEWS, Feb. 17, 2009, at A1.

her filing for divorce.<sup>154</sup>

• Chaudhry Rashid, a Pakistani immigrant living in Clayton County, Georgia, strangled his daughter to death with a bungee cord in July 2008.<sup>155</sup> There is speculation that this murder was an honor killing. He said that his daughter was planning to end her arranged marriage, and that she was having an extramarital affair.<sup>156</sup>

These represent just a fraction of cases involving honor killings that can be culled from news sources throughout the world.

### III. THE CONCEPT OF “SUDDEN PROVOCATION” IN THE CONTEXT OF HONOR KILLINGS

In principle it would seem difficult to imagine how a father or a brother could be prompted to kill his daughter or sister, or how a husband could kill his wife over what some may categorize as relatively minor indiscretions. However, some Arab states consider honor killings to fall within the “crime of passion” category, where the defendant is blinded by rage, operating under sudden provocation or other mitigating circumstances.

It is a time-honored common law principle that one’s state of mind is crucial in establishing elements of specific intent crimes. This reflects society’s recognition and understanding that some situations can inflame the passions of an ordinary person to such an extent that killing is not an unexpected result. If someone kills another while acting under some sort of provocation, one’s criminal intent may be diffused, one’s ability to premeditate may be overcome by passion, and accordingly, “homicides committed as a result of provocation

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154. Compare Chelsea Schilling, *Was New York Wife Alive During Beheading*, World Net Daily, Feb. 23, 2009, <http://www.wnd.com/index.php?pageId=89824> (“While CNN reports Hassan admitted to killing Aasiya, Hassan’s defense attorney, James P. Harrington, claims his client never confessed to the murder.”), with *TV Owner Accused of Beheading Wife Says He was Abused*, YNN (Buffalo), Jan. 22, 2010 (stating that Hassan admitted to killing his wife).

155. Austin Fenner & Hasani Gittins, *‘Honor’ Killing for God - Dad’s Sick ‘Confession,’* N.Y. POST, Aug. 6, 2008, at 15.

156. *Id.*

should be treated differently from other homicides . . . .”<sup>157</sup> The element of provocation is evidence of the defendant’s state of mind, suggesting that the defendant, in acting in the “heat of passion,” did not have the opportunity to deliberate about what he was about to do.<sup>158</sup>

The most serious provocation was thought to be catching one’s wife in an act of adultery.<sup>159</sup> Under common law, a killing in this circumstance was likely prosecuted as voluntary manslaughter—killing in the heat of passion—rather than murder in the first-degree.<sup>160</sup> The law recognizes provocative conduct by a spouse “could arouse a passion of jealousy, pain and sexual rage in an ordinary man of average disposition such as to cause him to act rashly from this passion.”<sup>161</sup>

As discussed in Part II, in traditional Arab cultures a woman or girl who commits an act that dishonors her family may cause shame, humiliation and public pressure that provokes the family to kill her, and thereby restore their honor.<sup>162</sup> However, in almost all instances, honor killings are committed after a period of time has elapsed from the provocative incident—after considerable discussion, planning and deliberation among family members.<sup>163</sup> “[A]lmost all honor killings occur after concerted planning and without actual observance of illicit sexual activity that might cause one to commit a crime based on experiencing a heat of passion or rage. In fact, often elaborate family planning occurs before a family commits an honor killing.”<sup>164</sup>

Only rarely do honor killings occur on the spot.<sup>165</sup> Thus, it would seem that honor killings rarely involve a situation where the killer acts in the heat of passion. The motivation for the killing may be the desire

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157. Abu-Odeh, *supra* note 112, at 296.

158. Jide Nzelibe, *Courting Genocide: The Unintended Effects of Humanitarian Intervention*, 97 CAL. L. REV. 1171, 1214 (2009).

159. R. v. Mawgridge, (1707) 84 Eng. Rep. 1107, 1116 (K.B.).

160. *Id.*; see also 4 WILLIAM BLACKSTONE, COMMENTARIES \*191-92.

161. People v. Berry, 556 P.2d 777, 781 (Cal. 1976).

162. See discussion *supra* Part II.A.

163. See discussion *supra* Part II.A.

164. Arnold, *supra* note 110, at 1368-69 (footnotes omitted).

165. See, e.g., *supra* notes 98-104 and accompanying text (discussing planned killing of Sania Samwar).

to reclaim honor that has been lost due to the provocative incident, but prevailing interpretations of provocation under the law would suggest that at the time of the killing the defendant had cooled off and killed in a deliberate and planned manner. As Blackstone observed, “in every other case of homicide upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder.”<sup>166</sup> Under prevailing Western legal principles:

[H]eat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances, and that, consequently, no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man. . . . For the fundamental of the inquiry is whether or not the defendant’s reason was, at the time of his act, so disturbed or obscured by some passion—not necessarily fear and never, of course, the passion for revenge—to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.<sup>167</sup>

There is also a subjective element. That is, the defendant must be under the actual influence of a strong passion at the time of the killing.<sup>168</sup> In many if not all instances, honor killings are conducted with cool deliberation,<sup>169</sup> rendering it difficult to convince a jury that an ordinary, reasonable person would have experienced a strong passion while committing the act of killing in that circumstance. Just the mere lapse of time between the provocative incident and the killing suggests the heat of passion has dissipated: “[I]f sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary

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166. 4 BLACKSTONE, *supra* note 160, at \*191.

167. *People v. Logan*, 164 P. 1121, 1122 (Cal. 1917).

168. *People v. Wu*, 286 Cal. Rptr. 868, 884 (Ct. App. 1991) (depublished).

169. *Arnold*, *supra* note 110, at 1369-70.

manslaughter . . . .”<sup>170</sup>

Thus, the defense must address the initial hurdle of whether an American jury would find an ordinary, reasonable person would be provoked to kill based on the particular conduct of the woman or girl who was killed. The decision would come under the standard instructions of provocation: the jury would need to find that the passion was such “as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances . . . .”<sup>171</sup> It is hard to imagine, for example, that an American jury would agree that a girl’s refusal to marry a man chosen by her parents would be sufficient provocation to inflame their passions and kill her.

Further, even if a jury believes the behavior of the woman or girl constituted something that would evoke a strong passion in an ordinary, reasonable person, it would seem difficult to convince them that the defendant was truly acting under that passion at the time of the killing, as perpetrators of honor killings usually strike after a period of deliberation, plotting and planning.<sup>172</sup> The killing usually occurs after what Blackstone referred to as a “sufficient cooling-time,”<sup>173</sup> so that an ordinary, reasonable actor would not likely be under a strong passion at the time of the killing. An ordinary, reasonable person, under Western standards, would not likely experience inflamed passions by the sort of conduct that might provoke people in traditional Arab cultures, and moreover the lapse of time, deliberation, and other factors that often exist would suggest that the heat of passion had turned into premeditation.

Thus, defendants in the West who wish to be successful in seeking mitigation of charges or leniency in sentencing must rely on some theory other than provocation. Part V will discuss that theory: the cultural defense.

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170. *Wu*, 286 Cal. Rptr. at 884.

171. *Logan*, 164 P. at 1122.

172. See discussion *supra* Part II.A.

173. BLACKSTONE, *supra* note 160, at \*191.

IV. PROVOCATION IN THE LAWS OF JORDAN AND PAKISTAN  
PERTAINING TO HONOR KILLINGS

It is noteworthy that in cultures where honor killings are not uncommon, perpetrators of the killings often go free or get off with mild punishment due to the strong societal norms that recognize the depth of shame families experience if faced with an incident of unchaste conduct by a female in the family.

The laws of various jurisdictions make successful prosecution of such cases very difficult. For example, Jordan, Syria, Egypt,<sup>174</sup> Pakistan,<sup>175</sup> and Iran, among other nations, have laws allowing for a partial or complete defense against criminal charges on the basis that the act was an honor killing.<sup>176</sup> Until recently, Syria's Penal Code allowed for a complete exemption from penalty for honor killings committed for "illegitimate sex acts."<sup>177</sup> As discussed below, the Jordanian Penal Code specifically allows exemption from penalties or reduced sentences for honor killings, including those situations where a man catches his wife or female relative in an act of adultery.<sup>178</sup> Additionally, in Pakistan, where honor killings have been criminalized, there are still tremendous hurdles in getting defendants prosecuted.<sup>179</sup>

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174. Lama Abu-Odeh, *Crimes of Honour and the Construction of Gender in Arab Societies*, in *FEMINISM & ISLAM: LEGAL AND LITERARY PERSPECTIVES* 141, 143-145 (Mai Yamani ed., 1996) (citing Jordanian Penal Code, Article 98) [hereinafter Abu-Odeh, *Crimes of Honour*].

175. See Moeen H. Cheema, *Judicial Patronage of 'Honor Killings' in Pakistan: The Supreme Court's Persistent Adherence to the Doctrine of Grave and Sudden Provocation*, 14 *BUFF. HUM. RTS. L. REV.* 52, 54-56 (2008) (discussing mitigated punishments for honor killings in Pakistan, as well as the *Qisas* and *Diyat* Ordinances, that allow for private settlement of these cases, and will be elaborated on in Part IV.B.2).

176. See Expert Group Meeting, *supra* note 74, at 11 (stating how honor killings are "given the tag of crimes of passion and are therefore heavily mitigated" in Iran and Iraq).

177. Syria: *Half Measures Against Honour Killings Not Enough* – HRW, IRIN NEWS, July 29, 2009, <http://irinnews.org/report.aspx?ReportID=85481>.

178. Arnold, *supra* note 110, at 1348.

179. See Yolanda Asamoah-Wade, *Women's Human Rights and "Honor Killings" in Islamic Cultures*, 8 *BUFF. WOMEN'S L.J.* 21, 21 (1999-2000).

### A. Prosecution of Honor Killings in Jordan

According to one account, Jordan has the highest rate of honor killings in the world.<sup>180</sup> Moreover, honor killings comprise about fifty-five percent of documented crimes against women and twenty-five percent of all homicides in Jordan.<sup>181</sup> In Jordan, honor killings are not only common, but according to one commentator, “[c]learly, honor murders enjoy the approval of the majority of Jordanian society.”<sup>182</sup>

In Jordan, the defendant of an honor killing can benefit from a reduced penalty or even avoid punishment altogether. Article 98 of the Jordanian Penal Code states: “He who commits a crime in a fit of fury caused by an unlawful and dangerous act on the part of the victim benefits from a reduction in penalty.”<sup>183</sup> This provides a general provocation rule that allows judges to impose lenient sentences for any crime committed in the heat of passion, and this provision is usually applied in cases involving honor killings.<sup>184</sup> The provision has been liberally construed by judges in cases of honor killings.<sup>185</sup> Judges construe an illegal, and to some extent dangerous act to mean illicit sexual relations or other indiscretions that violate norms of behavior expected of women and girls.<sup>186</sup> “[T]he court’s application of Article 98 allows judges to grant lenient sentences and total exoneration to perpetrators of honor killings by classifying the murder victim’s act, whether it is adultery, rape, or another act, as unrightful and dangerous.”<sup>187</sup>

The defendant’s “extreme anger” in the killing is implied from the circumstances even when, as is almost always the case, it is

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180. Arnold, *supra* note 110, at 1347.

181. *Id.* at 1347-48.

182. Feldner, *supra* note 9, at 45 (discussing a *Jordan Times* survey showing 62% of Jordanians opposed amending the law to inflict harsher penalties on those guilty of honor killings).

183. Abu-Odeh, *Crimes of Honour, supra*, note 174, at 158-59.

184. Rana Hussein, *Criminal Court Appoints Special Tribunal for Honour Crimes*, *JORDAN TIMES*, July 29, 2009 [hereinafter Hussein, *Special Tribunal for Honour Crimes*].

185. *See id.* (“[J]udges often consider a woman tarnishing her family’s honour as a dangerous and unlawful act, resulting in a reduced penalty for her killer.”).

186. *Id.*

187. Arnold, *supra* note 110, at 1366-67.

committed after a period of deliberation and planning.<sup>188</sup> Article 98, in effect, allows defendants the benefit of reduced penalties without requiring evidence that the honor killing was committed either in the heat of passion or some other sudden provocation.<sup>189</sup> “Jordanian courts have not enforced the requirement that the honor killing occur simultaneously with discovery of the illicit sexual activity, and critics argue that such application of the passion clause to premeditated murder cases completely disregards the entire purpose of the provocation defense.”<sup>190</sup>

Moreover, there is no requirement that the defendant in fact have witnessed the woman’s “illegal, and to some extent dangerous act” in order to benefit from a reduced penalty.<sup>191</sup> “Thus, fathers could kill their daughters after *hearing* that they were *pregnant*, and brothers could kill sisters *two days* after *hearing* that they were committing adultery, and still manage to be granted total excuse.”<sup>192</sup>

When the court allows the defendant to invoke Article 98 in an honor killing, the sentence will typically be as little as six months in prison.<sup>193</sup> It has been remarked that this provision is based on “the Islamic principle that allows a Muslim to defend his honor, property, and blood.”<sup>194</sup>

In addition to the provisions of Article 98, Article 340 of the Jordanian Penal Code contains a specific “defense of honor” provision that pertains to adultery:

- (i) He who catches his wife, or one of his female *mahrims* committing adultery with another, and . . . kills, wounds, or injures one or both of them is exempt from penalty . . . (ii) He who catches his wife or one of his female *mahrims* with another in an unlawful bed, and he kills or wounds or injures one or both of them, benefits

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188. Hussain, *supra* note 6, at 231.

189. Abu-Odeh, *supra* note 112, at 304.

190. Hussain, *supra* note 6, at 232.

191. *Id.* at 231.

192. Abu-Odeh, *supra* note 112, at 304.

193. *See, e.g.,* Feldner, *supra* note 9, at 45; *see also* Arnold, *supra* note 110, at 1366-67 (“[C]ourt’s application of Article 98 allows judges to grant lenient sentences and total exoneration to perpetrators of honor killings . . .”).

194. Feldner, *supra* note 9, at 47.

from a reduction in penalty.<sup>195</sup>

Thus, a man may achieve complete exoneration if he witnesses actual adultery of a female relative, whereas a reduction in penalty is available if a man catches a female relative in an unlawful bed, even without witnessing any sexual activity.<sup>196</sup> However, there is no comparable exculpatory provision for a woman who kills a husband or other male relative whom she catches in an act of adultery or finds in an “illegitimate bed.”<sup>197</sup>

Article 340 appears to be somewhat on par with Western “heat of passion” laws, requiring the elements of surprise, immediacy of action, and *flagrante delicto*.<sup>198</sup> However, unlike these seemingly similar Western laws, “Article 340 has been used successfully as a defense in cases in which the killer acted in cold blood.”<sup>199</sup> Article 340, like Article 98, is a provocation defense.<sup>200</sup> It allows the defendant to claim that he acted in an uncontrollable rage and that the court should be lenient in sentencing him.<sup>201</sup> But as mentioned above, the defendant in an honor killing almost always acts in a *premeditated* manner.<sup>202</sup>

Jordan’s treatment of perpetrators of honor killings is more lenient than that of other Middle Eastern countries in that it offers a complete, rather than a partial defense to a man who kills a female relative after finding her in an act of adultery.<sup>203</sup> In other Middle Eastern countries, a legal excuse exists only for a husband who finds his wife *in flagrante delicto*, whereas in Jordan any man enjoys the excuse with

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195. Hussain, *supra* note 6, at 230-31 (emphasis added). “Mahram is a person to whom marriage is forbidden by Islamic law. For men, this includes, but is not limited to, sisters, mothers, and daughters.” *Id.* at 230 n.51.

196. *Id.* at 231.

197. *Id.*

198. *Id.* *In flagrante delicto* is defined by *Black’s Law Dictionary* as: “[Latin ‘while the crime is ablaze’] In the very act of committing a crime or other wrong; red-handed.” BLACK’S LAW DICTIONARY 848 (9th ed. 2009).

199. *Id.*

200. Arnold, *supra* note 110, at 1367-68.

201. *Id.* at 1368.

202. *Id.* at 1368-69.

203. *Id.* at 1371-73.

respect to those women he is related to.<sup>204</sup> In the West, while the law of homicide is clear that killing in the heat of passion is unlawful, it accommodates human frailties so that the husband may be charged with manslaughter, but by no means exonerated.<sup>205</sup>

Article 340(ii) also provides a reduction in penalty for any male relative who kills a female relative after discovering her in “an illegitimate bed,” while again, in other Middle Eastern countries this defense is limited to the victim’s husband.<sup>206</sup> In addition to the wider array of Jordanian males that can take advantage of the exemption or reduction in penalty,<sup>207</sup> the perpetrator of an honor crime rarely witnesses an act of adultery or catches a female relative in an illegitimate bed. In fact:

[M]ost honor crimes perpetrators do not use the defense of honor crime exculpation or mitigation laws because such statutes often require proof that the perpetrator witnessed sexual activity. Since statistics indicate that most honor crimes occur on the basis of mere allegations, many perpetrators are unlikely to meet the evidentiary burden required by statutes like Section 340.<sup>208</sup>

Moreover, in what one commentator refers to as “improper application” of these laws, courts in Jordan have bent over backward to fit the defendant’s conduct under a defense to grant leniency in honor killing cases.<sup>209</sup>

The difficulty of prosecuting honor killings is exacerbated “by the Jordanian police’s failure to investigate or recommend prosecution of honor killings.”<sup>210</sup> It is suggested that these biases “encourage[] men to disobey the law and promote[] crime because honor killing can serve as a disguise for other criminal acts against women.”<sup>211</sup>

Recently, *The Jordan Times* reported that in the past two years judges have been less inclined to allow defendants to invoke Article

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204. *Id.* at 1363, 1372.

205. Abu-Odeh, *supra* note 112, at 296.

206. Arnold, *supra* note 110, at 1371-73.

207. *Id.* at 1373.

208. Hussain, *supra* note 6, at 231.

209. *Id.* at 1369-70.

210. *Id.* at 1388.

211. *Id.*

98 in honor killing cases.<sup>212</sup> Also, effective August 1, 2009, the Criminal Court established a special tribunal to hear honor crime cases, so as to ensure consistency in verdicts.<sup>213</sup> Jordan's Justice Minister, Ayman Odeh, is said to be in favor of amending Article 98 so there will be no exemption for honor crimes even if committed in a fit of fury, and it is expected that this will be debated by lawmakers in the near future.<sup>214</sup>

### *B. Prosecution of Honor Killings in Pakistan*

#### *1. Pakistan's Federally Administered Tribal Areas*

Crimes against women are rarely brought to justice in Pakistan because of the prevalence of tribal courts, known as *jirgas*.<sup>215</sup> The vast rural areas of Pakistan consist mainly of tribes that function somewhat like autonomous governments,<sup>216</sup> each with their own set of tribal rules.<sup>217</sup> *Jirgas* exist mainly in Pakistan's Federally Administered Tribal Areas (FATA), which include the region between the Pakistan-Afghanistan border and the North West Frontier Province.<sup>218</sup>

Honor killings are socially and morally sanctioned by tribal communities.<sup>219</sup> Moreover, "the State does not generally condemn these activities nor take action against the murderers."<sup>220</sup> Tribal rules are a product of traditional local customs, and these in turn trump national laws:

Ethnic, regional, caste, and family loyalties factor more in society than the national loyalty. . . . The people of Pakistan have always remained distant from the political system and they have been

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212. Husseini, *Special Tribunal for Honour Crimes*, *supra* note 184.

213. Omar Obeidat, *Penal Code 'An Endorsement for Murdering Women'-Rights Group*, JORDAN TIMES, Sept. 9, 2009.

214. *Id.*

215. Shah, *supra* note 11, at 1179.

216. Castetter, *supra* note 20, at 547.

217. *See* Shah, *supra* note 11, at 1179 (discussing the power and authority afforded the *jirgas*).

218. *Id.*

219. Castetter, *supra* note 20, at 551.

220. *Id.*

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unable to understand a Constitutional theory or relate to the idea of a consensual plurality or national identity. On the contrary, the citizens have continued to follow the local tribal leaders whom they trust.<sup>221</sup>

*Jirgas* are completely autonomous from Pakistan's judicial system because the Pakistani Constitution prevents the courts from exercising any oversight or jurisdiction in the tribal areas.<sup>222</sup> It has been suggested the reason why Pakistan's government has limited legal presence in the tribal areas is that "since its inception, Pakistan has experienced near constant social and political upheaval. . . . When decisions handed down by tribal councils have brought about human rights violations or severe physical harm, *jirga* members have not been held accountable by the State in any way."<sup>223</sup> Moreover, the Pakistani police have no authority in the tribal areas.<sup>224</sup> As a practical matter, enforcing human rights laws could cause uproar in tribal cultures, leading to a backlash, a wave of rebellion, and other repercussions against the national government.

These tribal councils are impaneled with men who determine legal issues that in urban areas are heard within the formal court system.<sup>225</sup> *Jirga* membership is based on political connections and land ownership, not legal training or other qualifications.<sup>226</sup> Violations of social codes that bring dishonor to a woman's family, such as adultery or seeking a divorce, are among the many issues heard in these councils.<sup>227</sup> Women have difficulty in achieving justice in *jirgas* because of their inferior social status.<sup>228</sup> *Jirga* law is customary law, handed down orally rather than codified.<sup>229</sup> Thus, it is not uncommon

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221. *Id.* at 552 (footnotes omitted).

222. Shah, *supra* note 11, at 1179.

223. *Id.* (emphasis added).

224. *Id.*

225. Hussain, *supra* note 6, at 233-34.

226. Shah, *supra* note 11, at 1180.

227. See Castetter, *supra* note 20, at 550-51; see also Shah, *supra* note 11, at 1180-81 ("A *jirga's* subject matter jurisdiction provides it with the authority to resolve disputes concerning *women*, money, and land.") (emphasis added).

228. See Shah, *supra* note 11, at 1181-83.

229. *Id.* at 1181.

for “arbitrary and inappropriate” decisions to result.<sup>230</sup> On top of the other hardships that women face under this system, the rulings of the *jirgas* cannot be appealed.<sup>231</sup>

## 2. *Pakistan’s Qisas and Diyat Law*

Outside the Pakistani tribal communities, where there are laws pertaining to honor killings and other instances of domestic violence, cases of violence against women are not pursued with any degree of earnestness.<sup>232</sup> The Pakistani authorities often regard domestic violence cases as private, family matters,<sup>233</sup> and many women endure wife-beating without going to the authorities to complain.<sup>234</sup> If a woman reports a case of domestic violence, she frequently will encounter police refusal to register the complaint, or even physical and/or sexual abuse.<sup>235</sup> Even if these difficulties did not arise, “the majority of police officials do not possess the requisite training to effectively deal with gender specific violence.”<sup>236</sup> Further undermining a woman’s pursuit of justice is the perception “[t]he Pakistani police are viewed as a corrupt organization. Their legitimacy and effectiveness has been seriously compromised by their reputation for accepting bribes in exchange for a perpetrator’s freedom.”<sup>237</sup> For all intents and purposes, the legal system in Pakistan grants “male family members a virtual license to kill their women on the pretext of ‘honour.’”<sup>238</sup>

If a complaint actually gets registered, frequently there are errors, irregularities, and tampering with the reports due to bribes by the

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230. *Id.*

231. *Id.*

232. *Id.* at 1182-83.

233. Palo, *supra* note 37, at 95.

234. Parveen Azam Ali & Maria Irma Bustamante Gavino, *Violence Against Women in Pakistan: A Framework for Analysis*, J. PAK. MED. ASS’N 198, 202 (2008).

235. Shah, *supra* note 11, at 1182-83.

236. *Id.* at 1182.

237. *Id.*

238. Sohail Akbar Warraich, ‘Honour Killings’ and the Law in Pakistan, in ‘HONOUR’: CRIMES, PARADIGMS, AND VIOLENCE AGAINST WOMEN 78, 83 (Lynn Welchman & Sara Hossain eds., 2005).

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suspect.<sup>239</sup> If the suspect's family is prominent in the community, the police will rarely act to pursue allegations of abuse.<sup>240</sup> Certain acts of violence against women are not recognized as crimes.<sup>241</sup> For example, presently there are no laws specifically criminalizing acid violence in Pakistan.<sup>242</sup>

In Pakistan, murder, attempted murder, and any crime causing bodily harm are prosecuted under the provisions of the *Qisas* and *Diyat* law.<sup>243</sup> *Qisas* is defined as "retribution,"<sup>244</sup> but it also can mean "equality" or "equivalence" for murder and other crimes resulting from intentional, reckless or negligent acts.<sup>245</sup> *Diyat* is the compensation provided to the victim or the victim's family by the guilty party,<sup>246</sup> essentially "blood money" that in effect pardons the killer. Along with the options of *Qisas* and *Diyat*, the deceased's heirs may also seek "total forgiveness of the victim."<sup>247</sup>

Under Pakistani law, the State cannot decide on its own to prosecute violent criminal cases.<sup>248</sup> Further, there is no mandatory punishment for murder and other crimes that inflict bodily injury.<sup>249</sup> Honor killings are viewed as private matters, and charges of murder must be brought, if at all, by individuals, not the State.<sup>250</sup> The *Qisas* and *Diyat* laws in effect "place the choice of prosecution wholly in the hands of the victim or her heirs, rather than the government."<sup>251</sup>

As a practical matter, since honor killings are almost always orchestrated and executed by close family members of the victim, there is no aggrieved party to press for prosecution, since the family as

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239. Shah, *supra* note 11, at 1183.

240. *Id.*

241. *See id.* at 1184.

242. *Id.*

243. *Id.* at 1187.

244. Palo, *supra* note 37, at 99.

245. Shah, *supra* note 11, at 1187.

246. *Id.*

247. Palo, *supra* note 37, at 100.

248. *Id.* at 93.

249. Shah, *supra* note 11, at 1187-88.

250. Palo, *supra* note 37, at 93-95.

251. *Id.* at 97.

a whole approves of the killing.<sup>252</sup> Thus, the killer only rarely gets prosecuted.<sup>253</sup>

If the victim's family decides to press for prosecution, they have a choice of asserting *Qisas* or "equivalence,"<sup>254</sup> associated with the ancient *an eye for an eye* justice; or the family can opt for *Diyat*, compensation in lieu of prosecution, which exonerates the perpetrator and the very crime itself.<sup>255</sup> In many instances the perpetrator may not even get arrested because the victim's family will accept *Diyat* before the matter even gets reported to the police, thus ending the matter.<sup>256</sup> Furthermore, the family can absolve the perpetrator of the crime, thus protecting the perpetrator from prosecution, at any stage of the proceeding.<sup>257</sup>

In Pakistani culture, women are not usually allowed to have a say in this matter, and men in the family may decide to accept *Diyat* "when the victim [of an attempted killing] would prefer to prosecute her attacker or may not consult with the female victim when determining the amount of the monetary compensation to request from the perpetrator."<sup>258</sup> As illustration, for some honor killings:

[T]he legal heirs of the victim have the choice of exercising *qisas*, that is capital punishment as retribution, or pardoning the offender either in *lieu* of compensation or even without any compensation. If the heirs choose to exercise their right of *qisas*, the state has no authority to pardon the offender or remit the sentence. However, if *any one of the heirs* pardons the offender and waives his or her right of *qisas*, *qisas* can not be enforced. The judge may, nonetheless, give a sentence of imprisonment of up to fourteen years as *tazir* (discretionary punishment under Islamic law) keeping in view the principle of *fasad-fil-arz*, *i.e.* if the offender is a previous convict, professional criminal or if the murder was

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252. *Id.* at 93-95.

253. *See id.* at 93-94 ("The prosecution[']s case collapses in almost all scenarios of an honor killing . . .").

254. Shah, *supra* note 11, at 1187.

255. *Id.* at 1187-88.

256. *See* Waheed, *supra* note 93, at 964.

257. *Id.*

258. Shah, *supra* note 11, at 1189.

committed in a brutal manner.<sup>259</sup>

This discretionary fourteen-year maximum sentence was increased to twenty-five years in a 2004 Amendment to Pakistan's Criminal Law, but, as a practical matter, judges are extremely lenient in sentencing for honor killings.<sup>260</sup>

Often enough, in Pakistan, intense poverty compels many families to opt for the financial compromise to be paid by the killer, who often is a relative.<sup>261</sup> A *National Geographic* documentary in 2002 depicted the plight of a Pakistani woman whose son-in-law killed her daughter in an honor crime.<sup>262</sup> "Although the elderly mother abhorred the man who killed her daughter, she accepted the financial compensation package he offered, amounting to the equivalent of two hundred U.S. dollars because she needed the money to support her other children."<sup>263</sup> The financial incentives to forgive the killer are buttressed by "the cultural obstacles and familial ties that deter them from seeking [criminal] redress. . . . [I]t is estimated that only three percent of honor crime cases actually result in convictions."<sup>264</sup>

*Diyat* is Pakistan's *wergild*, or blood money, which is a medieval practice of exacting compensation from perpetrators of homicide, whether murder, manslaughter, or accidental killing, as well as other crimes.<sup>265</sup> In medieval Europe *wergild* was formalized in the Anglo-Saxon legal codes, which Professor Emily Sherwin describes as follows:

Anglo-Saxon legal codes consisted mainly of schedules of payments for common types of wrongs, such as killing, maiming, and theft. They specified *gelds*, which fixed the value of things

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259. Cheema, *supra* note 175, at 58 (discussing PAKISTAN PENAL CODE [PAK. PEN. C.] ch. 16, § 302(a)) (emphasis added).

260. *Id.* at 65-66.

261. Hussain, *supra* note 6, at 233; Shah, *supra* note 11, at 1189.

262. Hussain, *supra* note 6, at 233 (discussing *World Diary: Honor Killings* (National Geographic Television 2002)).

263. *Id.*

264. *Id.*

265. See, e.g., BERTHA SURTEES PHILLPOTTS, *KINDRED AND CLAN IN THE MIDDLE AGES AND AFTER 148-51* (1913) (illustrating Northern Frisian *Wergild* allocation in the fifteenth century).

destroyed, and bots, which fixed payments for damage, including bodily harm. The payment due for killing a person was the wergeld (or wergild), or man-price. Wergelds varied dramatically with the status of the victim. A free peasant might have a wergeld of 200 shillings, while a noble might be worth 1200 shillings. Bots for injury were prescribed in colorful detail. The laws of Alfred, for example, prescribed payments of five shillings for slicing off a thumbnail, thirty shillings for cutting off a thumb, sixty-six shillings and six and one-third pennies for gouging out an eye, and thirty shillings for inflicting a head wound “if both bones . . . be pierced.”<sup>266</sup>

Historians agree that *wergild*, “at least in part, [was] a civilized substitute for violent revenge. According to typical accounts, codified compensation schedules supplanted a system of blood feuds, in which victims and their kin were entitled, and probably honor-bound, to retaliate against wrongdoers and their kin.”<sup>267</sup>

Eventually, *wergild* “was turned at a later day into a duty of prosecuting the murderer before the legal tribunals.”<sup>268</sup> *Wergild* is still operative not only in Pakistan, but exists on a local tribal level in many villages in the Middle East and Asia to help patch up feuds between families to avenge someone’s death.<sup>269</sup> In the village of Diyarbakir, Turkey, for instance, during a ten-year period an elderly man, Sait Sanli, brokered more than 500 deals for blood money between feuding families.<sup>270</sup> In many instances the payment of blood money is a way of ensuring that the families will not engage in tit-for-tat revenge killings.<sup>271</sup>

In modern society there is a counterpart to the custom of *wergild*: lawsuits for wrongful death where plaintiffs seek to obtain a financial judgment or settlement for the death of a relative due to intentional,

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266. Emily Sherwin, *Compensation and Revenge*, 40 San Diego L. 1387, 1398 (2003) (footnotes omitted).

267. *Id.* at 1398-99 (footnotes omitted).

268. GILBERT T. SADLER, *THE RELATION OF CUSTOM TO LAW* 7 (1919).

269. See, e.g., Nicholas Birch, *The Man Who Heals Deadly Kurdish Feuds; ‘Kurdish Kofi Annan’ Brings Sweet Voice of Reason to Halt Tradition of Bloody Vendetta*, INDEPENDENT (London), Nov. 18, 2008, at 24.

270. *Id.*

271. *Id.*

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reckless, or negligent conduct. Usually, however, redress for murder and other crimes is reserved for the state to prosecute in criminal proceedings. Still, people can, and do, sue for wrongful death in cases of intentional homicide. For instance, consider the civil suit against O.J. Simpson for wrongful death after he was acquitted of murder in a criminal trial.<sup>272</sup>

*Diyat* is also a factor in acid attacks;<sup>273</sup> in many instances “the victim opts to drop criminal charges because of external pressure or fear.”<sup>274</sup> As a result, most perpetrators of acid attacks are not prosecuted and may pay a very small amount of *Diyat*.<sup>275</sup> “The extreme economic hardship that afflicts a vast majority of Pakistan’s population forces the victims’ family members to make normally unconscionable compromises.”<sup>276</sup> Additionally, by law, women are only entitled to receive half the *Diyat* that men receive.<sup>277</sup>

The frightening reality is that the *Qisas* and *Diyat* laws of Pakistan allow the perpetrators of violent crimes against women to go unpunished.<sup>278</sup> These laws in effect excuse honor killings pursuant to Pakistani custom.<sup>279</sup> No doubt it is more a matter of custom, rather

272. Kenneth B. Noble, *In Civil Court, a Second Chance at Retribution*, N.Y. TIMES, Oct. 22, 1995, § 4 (Week in Review), at 5 (providing a legal context and a discussion of challenges for O.J. Simpson’s civil suit, which was pending at that time).

273. Acid attacks are common across South Asia, including Bangladesh, India, Pakistan, Cambodia, Nepal, and other areas. See Shah, *supra* note 11, at 1172. Acid attacks involve the disfigurement and blinding of women or girls by throwing acid in their faces. *Id.* at 1172. These women are left with almost no face: their eyes, nose, and mouth are all but gone, leaving a gruesome appearance. S. N. M. Abdi, *Following Bangladesh’s Example, Indian Authorities Are Beginning to Crack Down on Acid Attacks Against Women*, S. CHINA MORNING POST, Aug. 28, 2008, at 13. However, about ninety-five percent of acid attacks result in immediate death of the victim. Shah, *supra* note 11, at 1173.

274. Shah, *supra* note 11, at 1189.

275. *Id.*

276. *Id.* “The wealthy perpetrators take advantage of their victim’s extreme desperation and coerce the victim’s family members to waive *Qisas* in exchange for monetary compensation.” *Id.* at 1189-90.

277. *Id.*

278. Hussain, *supra* note 6, at 232-33; see also Shah, *supra* note 11, at 1187-90.

279. See Hussain, *supra* note 6, at 232-33.

than law, that explains why some jurisdictions allow perpetrators of honor crimes to go free or receive only minimal punishment. “[T]he judge *must*, in a sense, recognise some customs, if order is to be preserved. Customs which the people hold as sacred or essential to their life, or reasonable, must be recognised as law by the judge . . . .”<sup>280</sup>

In 2005 Pakistan’s Criminal Law, which had been amended the preceding year, provided for tougher punishments for honor crimes, including the death penalty in extreme cases.<sup>281</sup> However, the amended law has been referred to as “defective and incomplete” in light of the *Qisas* and *Diyat* laws, which continue to allow the victim’s family to “forgive[]” the crime and accept compensation, rather than a conviction.<sup>282</sup>

## V. THE CULTURAL DEFENSE

### A. *An Explanation of the Cultural Defense*

In her book, *The Cultural Defense*, Alison Dundes Renteln argues that evidence of a defendant’s cultural background should be admitted in civil and criminal cases to help explain the motivations behind defendants’ behavior.<sup>283</sup> Renteln states “culture shapes the identity of individuals, influencing their reasoning, perceptions, and behavior.”<sup>284</sup> The cultural defense takes into account whether the defendant’s culture has a tradition claimed by him or her and whether the defendant was influenced by this tradition when acting. A Note published in the *Harvard Law Review* in 1986 seems to provide the first detailed discussion regarding whether a defendant’s cultural background is relevant to the question of his or her mental state at the time of a crime.<sup>285</sup> At the time that Note was published, some judges allowed evidence of cultural factors for the limited purposes of establishing the defendant’s degree of culpability or in meting out

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280. SADLER, *supra* note 268, at 53.

281. Hussain, *supra* note 6, at 239.

282. *Id.* at 239-40.

283. See ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 14-15 (2004).

284. *Id.* at 10.

285. *The Cultural Defense in the Criminal Law*, *supra* note 4, at 1293-94.

appropriate punishments.<sup>286</sup> In addition, American prosecutors have taken into account extenuating circumstances based on cultural variations when filing charges or negotiating plea bargains.<sup>287</sup>

The cultural defense is used in connection with helping establish the defendant's mens rea—a matter of some importance in distinguishing murder from lesser species of homicide. “[E]vidence pertaining to a defendant’s cultural background may be pertinent regarding the state of mind of the defendant at the time of the act in question or the context in which the act was committed, context which might make the wrongful act seem to warrant less severe punishment.”<sup>288</sup> This is “in much the same way that the criminal law allows other information about a defendant’s life history to mitigate sentences or charges in a criminal trial.”<sup>289</sup>

In the context of honor killings, the cultural defense is important if the defendant hopes to show mitigating factors to convince the jury that the killing was manslaughter instead of murder. The cultural defense in such cases may allow evidence to help explain the mindset of the defendant on the crucial issue of mens rea.<sup>290</sup> The defense would “negate or mitigate criminal responsibility where acts are committed under a reasonable, good-faith belief in their propriety, based upon the actor’s cultural heritage or tradition.”<sup>291</sup> The perpetrator claims a reasonable good-faith belief in the propriety of the act, based on his cultural heritage or tradition. He believes that he did the “right thing” because it was something approved by his culture.

The cultural defense is allowed by courts on a case-by-case basis; it “has not been formalized—an attorney cannot walk into a courtroom and plead ‘the cultural defense.’”<sup>292</sup> Rejection of the cultural defense

286. *Id.* at 1294-95.

287. *Id.* at 1295.

288. Valerie L. Sacks, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT’L & COMP. L. 523, 523 (1996).

289. Leti Volpp, *(Mis)Identifying Culture: Asian Women and the “Cultural Defense,”* 17 HARV. WOMEN’S L.J. 57, 95 (1994).

290. See WAYNE LAFAVE, CRIMINAL LAW 240 (4th ed. 2003).

291. John C. Lyman, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 88 (1986).

292. Neal A. Gordon, Note, *The Implications of Memetics for the Cultural Defense*, 50 DUKE L.J. 1809, 1811 (2001) (footnote omitted); see also Sharon M.

might occur in the case-in-chief but still may be allowed as a mitigating factor in the sentencing phase.<sup>293</sup> Courts in the West usually recognize an array of mitigating factors in sentencing defendants.<sup>294</sup> Recently the Supreme Court, in *Porter v. McCollum*, ordered a new sentencing hearing for a war veteran who had been sentenced to death for murdering his former girlfriend and her boyfriend.<sup>295</sup> The Court said the trial judge should consider mitigating factors such as the intense stress and emotional toll of combat on the defendant, as well as evidence of post-traumatic stress disorder resulting from combat.<sup>296</sup> The Court specifically noted:

Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter.<sup>297</sup>

The cultural defense provides a legal basis in which immigrant defendants may introduce evidence of their cultural background to provide a legal excuse for an otherwise unlawful act.<sup>298</sup> Considering the cultural defense issue with regard to immigrants:

The defendant's actions, had they been committed in the defendant's home country and culture, either would not have been a crime under the laws of the defendant's native jurisdiction, or would not have been punished as severely. The defendant adverts to cultural influences and argues that her native culture would have

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Tomao, Note, *The Cultural Defense: Traditional or Formal?*, 10 GEO. IMMIGR. L.J. 241, 242 (1996).

293. See generally Damian W. Sikora, Note, *Different Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695 (2001).

294. E.g., *Porter v. McCollum*, 130 S.Ct. 447, 454-55 (2009).

295. *Id.* at 456.

296. *Id.* at 455.

297. *Id.*

298. Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1096 (1994).

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excused her conduct, that cultural factors or patterns of behavior are relevant to a determination of her state of mind at the time of the criminal act, or that cultural factors warrant reduced charges or punishment.<sup>299</sup>

The cultural defense considers that a defendant, born of a particular culture, “will feel compelled to follow the rules of this culture. . . . [E]vidence of cultural values can be introduced in order to demonstrate how a particular culture recognizes that, in certain situations, the actions of the victim are sufficient provocation to justify the criminal act.”<sup>300</sup> For those individuals caught between the divergent ideas of two or more cultures and/or legal systems, the cultural defense seems to act as a concession:

What is correct or even required by a folk law may be deemed a criminal act by the official legislation in force in the area. This could be the case in what was once colonial Africa or among the minority residents in urban London or New York City. Such instances serve as constant reminders of the continuing importance of folk law in the modern world.<sup>301</sup>

In effect, the cultural defense allows the defendant to interpose his or her culture’s norms as “an independent, substantive defense in criminal trials.”<sup>302</sup> This allows “a robust recognition of culture’s role in individual life, as well as a concession to the sociological fact of multiculturalism.”<sup>303</sup>

The cultural defense is *not* an argument that the defendant was ignorant of the law. “[The cultural] defense requires that the defendant have relied upon a positive, normative rule from his own cultural background, rather than merely having acted in ignorance of the dominant culture’s laws.”<sup>304</sup> Moreover, “[i]n most cases in which a

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299. *Id.*

300. Aahren R. DePalma, *I Couldn’t Help Myself--My Culture Made Me Do It: The Use of Cultural Evidence in the Heat of Passion Defense*, 28 CHICANO-LATINO L. REV. 1, 10 (2009).

301. 2 FOLK LAW 751-52 (Alison Dundes Renteln & Alan Dundes eds., 1994).

302. *The Cultural Defense in the Criminal Law*, *supra* note 4, at 1293-94.

303. James M. Donovan & John Stuart Garth, *Delimiting the Culture Defense*, 26 QUINNIPIAC L. REV. 109, 111 (2007).

304. *Id.* at 112.

cultural defense could be raised, there is little question that the defendant actually intended to commit the act for which she is being tried.”<sup>305</sup>

The cultural defense takes into consideration the effect that culture has in forming the individual, including aspects of reasoning, perception, and behavior.<sup>306</sup> The impact on jurisprudence, under this view, is that judges should assess responsibility and mete out punishment by taking culturally embedded propositions into account rather than presuming the dominant culture’s ideology wins the day.

[A]n ordinarily law-abiding person raised in a foreign culture may have committed a criminal act solely because the values of her native culture compelled her to do so. Mere awareness that her act is contrary to the law may not be enough to override her adherence to fundamental cultural values. . . . Thus, persons raised in other cultures, who are subject to influences that inculcated in them a different set of norms, will likely feel morally obligated to follow those norms. Once norms have acquired this moral dimension, conformity with conflicting laws becomes more difficult.<sup>307</sup>

The cultural defense is at odds with long-standing precedent stemming from the Supreme Court decision in *Carlisle v. United States*.<sup>308</sup> In *Carlisle*, the Court held that an alien who comes into the United States immediately adopts all the laws of the nation.<sup>309</sup> In its decision, the Court, quoting the words of former Secretary of State Daniel Webster, stated:

[E]very foreigner born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it, as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding of all civilized states, and nowhere a more established doctrine than in

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305. *The Cultural Defense in the Criminal Law*, *supra* note 4, at 1297.

306. RENTELN, *supra* note 283, at 10.

307. *The Cultural Defense in the Criminal Law*, *supra* note 4, at 1300 (footnote omitted).

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

309. *Id.* at 155.

this country.<sup>310</sup>

While the cultural defense is relatively new in the courtroom, it actually dates back to the early days of American jurisprudence. In *Ex parte Crow Dog*, the Supreme Court held that an Indian who was accused of murdering another Indian on their reservation was not subject to federal criminal law, but only to tribal law.<sup>311</sup> Two years later the governing law was changed, holding Indians to the same set of federal laws and penalties as other persons.<sup>312</sup>

Generally speaking, in Muslim cultures, upholding the honor of one's family is a fundamental value.<sup>313</sup> "Blanket repudiation of a cultural defense in a case in which a person's attempt to uphold that honor collides with the criminal law might be perceived as an official indictment of the principle of honor, rather than as a denunciation of the particular means of vindicating that ideal."<sup>314</sup> Thus, the cultural defense seems to be a way of mediating the clash between two systems. "Equality among different ethnic groups ultimately requires that each group respect the other groups' right to be different and that the majority not penalize a minority group simply because it is different."<sup>315</sup>

### *B. The Cultural Defense and Cultural Relativism*

There are tremendous variations in how people carry on their lives across cultures; people often live with unique or distinct norms that are at odds with those of other cultures. The cultural defense takes into account cultural relativism—an anthropological and philosophical

310. *Id.*

311. *Ex parte Crow Dog*, 109 U.S. 556, 570-72 (1883).

312. *See* 18 U.S.C. § 1153 (2006) ("Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely murder, manslaughter, kidnapping, maiming, [and other crimes] . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.")

313. *See generally* Peter C. Dodd, Family Honor and the Forces of Change in Arab Society, 4 INT'L J. MIDDLE E. STUD. 40 (1973) (discussing the importance of family honor in Arab society).

314. *The Cultural Defense in the Criminal Law*, *supra* note 4, 1302.

315. *Id.* at 1301.

account of the diversity of norms across cultures.

Cultural relativism holds that moral principles are relative, so that there is no such thing as a “one-size-fits-all” morality. Moral principles are not self-evident propositions that are truth assessable, final or certain. Terms such as “right” and “good” are relative terms so that if one says “X is good,” that simply means “One’s culture regards X as good.” A different culture might claim that “X is bad,” and this inconsistency is explained simply by the idea that there is no objective truth in the matter.

People tend to regard their own patterns and customs as “good,” and customs that contradict their own as “bad.” Some cultures might regard certain practices of other cultures as barbaric, bizarre, or cruel. For instance, cultures that impose female genital mutilation regard it as a “great moment in the life of women, [and] a celebration.”<sup>316</sup> Other cultures find the practice a form of torture and humiliation.<sup>317</sup> Here is the essence of cultural relativism: the fact that diverse cultures have different solutions to moral dilemmas makes it inappropriate to argue that a particular norm is good or bad for everyone. While people of one culture might disapprove of certain practices, in another culture these same practices might be morally approved.<sup>318</sup>

The cultural defense considers the practices of other cultures through the lens of cultural relativism, to enable the jury to consider the roles played by customs, the explanations of these customs, notions of honor, and other peoples’ ideas of right and wrong. Thus, in cases of honor killings, defendants of Islamic cultures will seek to show that “moral order is thought to be disrupted by alleged or actual sexual impropriety. Consequently, to restore the ‘social equilibrium and avoid feuds, the local culture requires the shedding of blood to

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316. Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. J. INT’L L. REV. 483, 492 (2002).

317. See, e.g., Nina Lakhani, *UK Fails to Halt Female Genital Mutilation*, INDEPENDENT (London), Dec. 20, 2009, <http://www.independent.co.uk/news/uk/home-news/uk-fails-to-halt-female-genital-mutilation-1845731.html> (discussing outrage in the United Kingdom over lack of prosecution of those that take girls overseas for the purposes of genital mutilation).

318. See Melford E. Spiro, *Cultural Relativism and the Future of Anthropology*, 1 CULTURAL ANTHROPOLOGY 259, 260-62 (1986).

wash away the shame of sexual dishonor.”<sup>319</sup>

### C. Cultural Relativism and Transcultural Psychiatry

An analogy of sorts to the cultural defense is the trend in psychiatry to take into account cultural differences in diagnosing mental disorders. Mental disorders are not universally defined across cultures because of fundamental differences in local social practices, values, and cultural and even scientific beliefs. Particularly in recent years, it is apparent that what constitutes a mental disorder depends entirely on context, on social identity, and on proper interpretation of cultural factors. Two people can perceive reality in entirely different ways, yet both be clearly sane.

Psychiatrists have come to recognize that symptoms of a mental disorder in the West might constitute normal behavior in other cultures. Behavior regarded as deviant in Western culture might be acceptable, even praiseworthy, in another. People in many cultures believe the world is populated by a variety of unseen creatures, ghosts, witches, spirits, and demons,<sup>320</sup> and that animals have souls that can come back and harm people unless amends are made to them after a hunt. One might find their criteria for perceiving reality to be fundamentally at odds with one's own reality, yet those belonging to other cultures are perfectly sane. The idea that illness is caused by malevolent spirits, the curse of an enemy, the evil eye, or the violation of taboos may seem to be preposterous in Western culture, but today these ideas are completely normative to many people in the world.<sup>321</sup> Thus, what is considered “dysfunctional” or “crazy” in the West (for example, seeing ghosts, hearing voices when no one is present, believing that a witch has cast a spell causing nervous symptoms or physical ailments, or attributing misfortune, ill health or nervous symptoms to violation of a taboo, or revenge from ancestral spirits

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319. Cassman, *supra* note 108, at 132 (quoting Carolyn Fluehr-Lobban, *Anthropologists Cultural Relativism, and Universal Rights*, CHRON. HIGHER EDUC. (June 9, 1995), <http://home.sandiego.edu/~baber/globalethics/CulturalRelativism.html>).

320. Karma Norjin Lhamo, *A Gathering of Ghosts and Demons: Generosity and Realization in Tibetan Buddhism*, LIVING SEASON, Oct. 20, 2009, <http://www.livinginseason.com/spirit/ghosts-and-demons/>.

321. *See id.*

who have been insulted by something, and so on) may be perfectly normal to people of other cultures.

Certain mental syndromes are unique to certain non-Western populations and may be misdiagnosed if based on Western psychiatric models. These syndromes are known as “culture-bound syndromes.”<sup>322</sup> Culture-bound syndromes are defined as “aberrant forms of behavior often interpreted as mental disorder by Western-trained observers, but nonetheless seemingly restricted to given cultural situations.”<sup>323</sup> With culture-bound syndromes, cultural explanations simply do not fit into Western psychiatric theory.<sup>324</sup>

Thus, Western psychiatrists find it important to take cultural factors into account in assessing whether a particular behavior is a mental disorder.<sup>325</sup> In many cultures the ways illnesses are explained and treated are completely different than in the West. Moreover, in native cultures the symptoms might be regarded as relatively benign or something to be treated with folk remedies or by a shaman or medicine man. In any event, the behavior patterns are unique to certain cultures, and are seldom ever found outside those cultures.

As psychiatry has come to recognize the importance of cultural factors in diagnosing mental disorders, the law, too, is coming to recognize the importance of cultural factors in assessing the motivations behind certain conduct that might be brought before the criminal justice system.

#### *D. The Cultural Defense in the Context of Honor Killings.*

The cultural defense accounts for the possibility that some immigrants’ acts, while seeming heinous to those in the West, reflect a normative pattern in their indigenous culture:

The values of individuals who are raised in minority cultures may at times conflict with the values of the majority culture. To the extent that the values of the majority are embodied in the criminal law, these individuals may face the dilemma of having to violate

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322. M. G. Kenny, *Introduction*, 21 SOC. SCI. & MED. 163, 163 (1985).

323. *Id.*

324. See AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR, Appendix I, 897-98 (4th ed. 2000).

325. *Id.*

either their cultural values or the criminal law.<sup>326</sup>

In the context of honor killings the cultural defense may be applied to show that the defendant acted in the heat passion, to thereby mitigate to manslaughter what would otherwise be murder.

Cultural evidence would be introduced for the jury to consider that the circumstances would have aroused the passions of a reasonable person *from the defendant's cultural background*. Evidence of the defendant's cultural background would help the jury evaluate how an "ordinarily reasonable man" *of this cultural background* would react under the given circumstances.

Many Americans are not familiar with the species of provocation that prompts men to commit honor killings. Some honor killings are provoked by what Americans would regard as fairly minor provocations, such as: dressing immodestly, refusing to marry a man chosen by her parents, or talking to a man who is a stranger. Without the benefit of the cultural defense, jurors would be limited to the American standard of what is a "reasonable man." Under that standard, provocation, as a mitigating factor in homicide, relies on what a "reasonable person" *of American culture* would do. "Naturally, if a member from an ethnic group is judged against the standards of the dominant culture, his or her traditions are likely to be condemned as unreasonable."<sup>327</sup> However, to various immigrant groups "[t]his reasonable person does not come from their neighborhood[,] but rather represents the standards of the dominant culture."<sup>328</sup> In other words, an *American* "reasonable person" may be a legal fiction to immigrants who have been taught traditions that differ from American principles of day-to-day living. The cultural defense allows the jury to weigh cultural evidence in "specifically applying a subjective approach to the reasonable-person standard. A subjective approach to instructing the jury on the reasonable-person standard allows jurors to compare the defendant's actions to those of a reasonable person from

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326. *The Cultural Defense in the Criminal Law*, *supra* note 4, at 1293.

327. RENTELN, *supra* note 283, at 15.

328. Deirdre Evans-Pritchard & Alison D. Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1, 34-35 (1995).

the defendant's culture."<sup>329</sup>

*E. Evidence of Social Pressures to Show Ongoing Provocation*

Even with the cultural defense, a jury still would have to be convinced not only that the act of dishonor was sufficient to provoke a person of the defendant's cultural background, but that at the time of the killing the defendant acted under the sway of passion. Usually, those who commit honor killings do so after a lapse of time, with planning and deliberation, lying in wait, or under other circumstances that suggest the defendant had cooled off and therefore had the requisite *mens rea* for murder, not manslaughter.<sup>330</sup>

Further cultural evidence would be needed to overcome this hurdle. The defendant would need to show that the stresses imposed by the community were so potent, so ongoing, the shame so utterly debasing that the element of provocation continued alongside the coolness with which the defendant acted. The father who kills his daughter is not likely to be acting in the heat of passion, but out of the cool necessity to avenge the dishonor. The actor feels compelled to act not because he has *flipped* but because of the culturally-imposed necessity of avenging the dishonor.

Just as social pressures during the period of dueling necessitated retaliation against another who had impugned one's honor—despite the fact that dueling was illegal long before the practice abated<sup>331</sup>—social pressures exist today in many cultures that endorse honor killings.<sup>332</sup>

Social pressures compel even the reluctant to commit honor killings.<sup>333</sup> After a woman or girl has done something perceived to dishonor her family, the family not only experiences humiliation and social ostracism, but there can be significant social pressures, particularly in tribal communities, to kill a woman who has impugned

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329. Rosie M. Williams, *Why the 'Cultural Defense' Belongs to 'Us,'* 22 ME. B. J. 36, 41 (2007).

330. Arnold, *supra* note 110, at 1368-69.

331. Wells, *supra* note 13, at 1807-09.

332. Feldner, *supra* note 9, at 42.

333. See, e.g., *id.* at 43 (discussing an Egyptian man who strangled his unmarried pregnant daughter because he could no longer deal with the shame and mocking of those in his village).

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her family's honor.<sup>334</sup> "Murderers repeatedly testify that their immediate social circle, family, clan, village, or others expected them and encouraged them to commit the murder. From society's perspective, refraining from killing the woman debases her relatives."<sup>335</sup>

For instance, a father who hesitates to kill his unmarried pregnant daughter will be subjected to jokes and mockery among the villagers and will be forced to endure unbearable shame until he yields to the pressure.<sup>336</sup> One perpetrator reported that he acted "in response to the will of society that would not have had any mercy on me if I didn't."<sup>337</sup> Another said that he was "under tremendous mental pressure," while a third stated that he acted "to get rid of what people were saying. They were blaming me that I was encouraging her to fornicate . . . ."<sup>338</sup> According to a psychiatrist at the Gaza Program for Mental Health, one who refrains from "washing shame with blood" is perceived as "a coward who is not worthy of living[,] . . . [often] as less than a man."<sup>339</sup> Once the killing is accomplished, the family regains its original social status.<sup>340</sup>

Even if a defendant knew the killing was unlawful under American law, the cultural defense would permit him to introduce evidence that cultural pressures compelled him to act, taking into account both his own sense of shame at the dishonor, and the unbearable humiliation and pressure from others in the community. The argument that the defendant was under the stress of "ongoing" provocation is a concept recognized in American jurisprudence.<sup>341</sup> Courts have recognized as relevant to a claim of heat of passion that the defendant was under the effect of "a series of events over a considerable period of time,"<sup>342</sup> so that he was under a "pre-existing

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334. *Id.* at 42.

335. *Id.*

336. *Id.* at 43.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* at 44.

341. See Sing, *supra* note 5, at 1869-70.

342. *People v. Borchers*, 325 P.2d 97, 102 (Cal. 1958).

stress.”<sup>343</sup> Heat of passion “need not mean ‘rage’ or ‘anger’ [but] . . . may be any ‘[v]iolent, intense, high-wrought or enthusiastic emotion.’”<sup>344</sup>

It is not contradictory that a defendant might act both under provocation and in a cool, rational manner, with no loss of self-control. The historical roots of the provocation doctrine do not suggest that the defendant must have acted “rashly or without due deliberation and reflection, and from this passion rather than from judgment.”<sup>345</sup> A “hot-blooded” impulse to act may co-exist with rational thought.<sup>346</sup> Indeed, modern psychology suggests that emotion and reason are “tightly linked” rather than at odds with one another.<sup>347</sup> In other words, one can commit a killing in the heat of passion while retaining full control of one’s rational thinking. Notably in the sixteenth and seventeenth centuries in England, the defense of provocation was viewed as follows:

[A] justification defense analogous to self-defense or necessity, suggesting that the defendant *should* have acted as he did. . . . [R]etaliatory measures were not viewed as the byproduct of a “temporarily irrational” state of mind. Hence, there is a strong argument that the defendant who retaliated in order to preserve his natural honor was eminently rational.<sup>348</sup>

This reasoning was equally applicable with dueling; “a ‘hot-blooded’ reaction was regarded as natural by the early modern code of honor, and did not correspond necessarily with a loss of rationality.”<sup>349</sup> Men who had been debased by another man’s offensive conduct sought to regain honor in a manner which “reflect[ed] not a loss of reason, but rather conformity to its dictates.”<sup>350</sup> Provoked by another’s offensive conduct, and reacting according to the code of honor that was the custom of the time, they retaliated out of a

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343. *People v. Pacheco*, 172 Cal. Rptr. 269, 274 (Cal. Ct. App. 1981).

344. *Borchers*, 325 P.2d at 102 (citation omitted).

345. *Id.*

346. *Sing*, *supra* note 5, at 1869.

347. *Id.*

348. *Id.* at 1870.

349. *Id.* at 1869.

350. *Id.* at 1870.

combination of outrage and reason.<sup>351</sup> “The defendant who raises a provocation defense points to the central significance of external factors, arguing that he behaved in a way that any ‘man of honour’ should have acted, . . . the way any reasonable person would have acted.”<sup>352</sup>

If cultural evidence is admitted, the jury would consider the element of provocation in a context that departs from its Western notion. Under the cultural defense, the jury “must engage in a more probing inquiry when presented with the ‘unfamiliar’ meanings that attach to emotions claimed by cultural defendants.”<sup>353</sup> In considering a provocation claim in the context of a cultural defense, the defense would urge the jury to recognize that the defendant has been influenced by his or her cultural background, that he may have acted coolly and after a period of time had elapsed, but that rage and reason are not incompatible. The defense would also urge the jury to recognize that there was ongoing provocation stemming both from the defendant’s own humiliation and from community pressures, and that “the defendant behaved in the same manner as any other similarly situated reasonable person.”<sup>354</sup>

## VI. MODERN REPORTED CASES THAT HAVE ACCEPTED THE CULTURAL DEFENSE

Many foreign and domestic courts have accepted some variation of the cultural defense. Some courts have taken an expansive view of what constitutes provocation that would militate against first-degree murder, based on cultural evidence. For instance, in *R. v. Awaba*, a Papua New Guinea judge decided that words alone could be sufficient to excuse an intentional homicide.<sup>355</sup> There, the defendant made a crude comment to a young girl.<sup>356</sup> The girl’s mother immediately

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351. *See id.* at 1869-70.

352. *Id.* at 1870 (footnote omitted).

353. *Id.* at 1874.

354. *Id.*

355. L.C. Green, “Civilized” Law and “Primitive” Peoples, in 2 FOLK LAW 753, 763 (Alison Dundes Renteln & Alan Dundes eds., 1994) (discussing *R. v. Awaba* (1960) (unreported case from Supreme Court of Papua New Guinea)).

356. *Id.*

rebuked the defendant, telling him: “You cannot find a woman to marry, and if you talk like that to a girl child you will die still unmarried.”<sup>357</sup> The man took this to be so provocative a remark that he killed the woman.<sup>358</sup> The judge stated:

[In] western communities which apply common law principles, the view that words alone cannot be relied upon as a provocation has hardened since the seventeenth century. As a general proposition that thesis is hardly open to dispute, but it does not necessarily follow that the same principle should apply in a native community where sophistication does not approach to that of, say, seventeenth-century England, where a type of insult such as the one here in question is calculated and not infrequently intended to throw a man into an ungovernable rage.<sup>359</sup>

In Western courts, the cultural defense has been used with some degree of success in a variety of cases, suggesting “attorneys have increasingly sought to introduce cultural evidence for mitigating or exculpatory purposes.”<sup>360</sup> An example of a case illustrating use of the cultural defense is *State v. Kargar*.<sup>361</sup> In *Kargar*, a man, born in Afghanistan, faced charges of “gross sexual assault” for kissing the penis of his eighteen-month-old son.<sup>362</sup> Witnesses testified this act was “considered neither wrong nor sexual under Islamic law and that Kargar did not know his action was illegal under Maine law.”<sup>363</sup> The Maine Supreme Court upheld the dismissal of his case based on a statute which provides for a dismissal if the court “finds the defendant’s conduct . . . presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.”<sup>364</sup> In effect, *Kargar* represents a successful use of the

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357. *Id.*

358. *Id.*

359. *Id.*

360. Sacks, *supra* note 288, at 523.

361. *State v. Kargar*, 679 A.2d 81 (Me. 1996).

362. *Id.* at 82.

363. Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 838 (1999).

364. *Id.* at 837; *see also* ME. REV. STAT. ANN. tit. 17-A, § 12 (2009).

cultural defense.

In *People v. Moua*, a man abducted a woman of Laotian descent from a college campus in Fresno, California, and forced her to have sex with him.<sup>365</sup> The defendant, Moua, was a recent immigrant from Laos,<sup>366</sup> who belonged to a Hmong tribe, which practices marriage-by-capture, a ritual where a man abducts a woman, takes her home and “consummates” a marriage with her.<sup>367</sup> Moua was charged with kidnapping and rape.<sup>368</sup> In the Hmong tribe, it is customary for the woman to protest the man’s advances as a sign of her virtuousness.<sup>369</sup> At trial, Moua testified he did not think her protests were anything more than what would customarily be expected.<sup>370</sup> His attorney introduced into evidence a twenty-two page pamphlet entitled “A Guide to Understanding Dating and Marriage in the Hmong Culture,” which contained cursory descriptions of a few marriage practices in Laos.<sup>371</sup>

The judge agreed that Moua’s culture was such that the defendant truly believed the victim had consented to the traditional marriage ritual, and that Moua mistakenly believed the victim consented to this ritual.<sup>372</sup> Moreover the judge stated that when cultural factors are considered the idea of intent gets confusing.<sup>373</sup> The judge thus accepted a plea bargain, which allowed the defendant to plead guilty to a charge of false imprisonment while the charges of kidnapping and rape were dismissed.<sup>374</sup> The defendant was sentenced to ninety days in

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365. Golding, *supra* note 7, at 148 (discussing *People v. Moua*, No. 315972-0, (Fresno County Super. Ct., Feb. 7, 1985)).

366. See Evans-Pritchard & Renteln, *supra* note 328, at 9 (indicating that the defendant, who was twenty-three at the time of the crimes, moved to the United States from Laos as a teenager).

367. Golding, *supra* note 7, at 148.

368. *Id.*

369. *Id.*

370. *Id.*

371. Evans-Pritchard & Renteln, *supra* note 328, at 20-21.

372. Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a “Cultural Defense”?*, 99 DICK. L. REV. 141, 150 (1994).

373. *Id.*

374. Evans-Pritchard & Renteln, *supra* note 328, at 26.

jail and required to pay a fine.<sup>375</sup>

An additional example is the case of a Greek immigrant charged with murdering a man who raped his daughter, who was acquitted based on cultural evidence that in Greece his daughter's rape was a matter of honor to him, and he was therefore obliged to avenge the act.<sup>376</sup>

In another California case, cultural evidence helped an Ethiopian man, tried for attempted murder, to be found guilty of the lesser charge of assault with a deadly weapon for shooting an Ethiopian woman whom he claimed was practicing witchcraft on him.<sup>377</sup> The defendant claimed he assaulted the victim because he believed she had cast a spell on him, causing headaches and stomach aches.<sup>378</sup> There, an anthropologist testified as to Ethiopian customs.<sup>379</sup> The judge in the case said the following about cultural evidence:

[Cultural evidence] was important to show two things—to show whether his mental state was diminished by his belief and to show that he was not making this up. I thought it was similar to having a psychiatrist testify if a guy has a mental disease manifested by believing he's Jesus Christ.<sup>380</sup>

The cultural defense was also invoked in *People v. Chen*.<sup>381</sup> There, after learning his wife was having an affair, the defendant “left the room, returned with a claw hammer, knocked her onto the bed, and hit her on the head eight times until she was dead.”<sup>382</sup> The defense attorney argued the defendant had “diminished capacity” as a result of

375. *Id.*

376. Myrna Oliver, *Immigrant Crimes; Cultural Defense--A Legal Tactic*, L.A. TIMES, July 15, 1998, at 1.

377. *Id.* (discussing statement by Alameda County Superior Court Judge Richard A. Hodge regarding allowance of anthropological evidence, which resulted in a conviction on a lesser charge and subsequent lesser sentence for defendant).

378. See Harriet Chiang, *Profile*, L.A. DAILY J., Oct. 25, 1985, at 1.

379. Oliver, *supra* note 376, at 1.

380. *Id.* (quoting Alameda County Superior Court Judge Richard A. Hodge).

381. Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 119-121 (1997) (citing *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989) (unpublished decision)).

382. Goldstein, *supra* note 372, at 151.

Chinese cultural pressures regarding infidelity, and that he was unable to form the necessary premeditation to be found guilty of murder.<sup>383</sup> “The defense argued that ‘[m]arriage is a sacred institution in China . . . . When there is this kind of [adulterous] situation, the attendant shame and humiliation is magnified a thousandfold.’”<sup>384</sup>

A professor of anthropology testified as an expert witness that Chen’s reaction to his wife’s infidelity was culturally appropriate.<sup>385</sup> The anthropologist explained that “in the Chinese culture, a woman’s adultery is proof of her husband’s weak character and a source of great shame upon his ancestors. A husband often becomes enraged upon learning of his wife’s infidelity and threatens to kill her.”<sup>386</sup> The anthropologist also testified that when a fight erupts between husband and wife, people expect others will rush to intervene and thereby prevent the situation from escalating into a tragedy.<sup>387</sup>

The episode resulted in a death because, unlike what typically occurs in China, the community failed to intervene to prevent the tragic outcome. The dysfunctional element, therefore, was not Chen’s outburst—which in fact conformed to the cultural “script”—but rather the dissociation of the Chens from a culture in which other Chinese would have played their own parts in this tragic drama.<sup>388</sup>

The diminished capacity argument, supported by cultural evidence of Chinese norms regarding infidelity, resulted in a conviction for the lesser charge of second-degree manslaughter rather than first-degree manslaughter, and the defendant received five years probation.<sup>389</sup> The judge said this leniency was due to “cultural aspects” and “the effect of the wife’s behavior on someone who is essentially born in China, raised in China, and took all his Chinese culture with him to the United States . . . .”<sup>390</sup>

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383. *Id.* at 151-52.

384. Kim, *supra* note 381, at 120 (alterations in original) (footnote omitted).

385. Goldstein, *supra*, note 372, at 151.

386. *Id.* (footnote omitted).

387. *See* Donovan & Garth, *supra* note 303, at 121.

388. *Id.*

389. Goldstein, *supra* note 372, at 151-52, 156.

390. *Id.* at 156 (citing *People v. Chen*, No. 52587, Record at 302 (N.Y. Sup.

In traditional Japanese culture it appears joint parent-child suicide (*oyako-shinju*) is an acceptable way for a woman to rid herself of the shame of her husband's infidelity.<sup>391</sup> In Japan, *oyako-shinju* is not regarded as a serious offense, particularly where the motivation is to avert shame associated with marital infidelity.<sup>392</sup> Survivors are rarely punished.<sup>393</sup> A well-known case on this point is *People v. Kimura*,<sup>394</sup> where a woman was charged with murder for drowning her two children.<sup>395</sup> In the same act she tried to drown herself.<sup>396</sup> She did this in response to the shame of her husband's unfaithfulness.<sup>397</sup> Evidence of her mental state, revealed through evidence of Japanese custom, led to conviction of manslaughter instead of murder.<sup>398</sup> The evidence showed she was not able to appreciate the criminality of her actions "or take measures to conform it as a result of cultural pressures associated with spousal infidelity. In addition, because of Kimura's cultural background she did not even understand the charges brought against her; she believed she was being charged with a failed suicide attempt."<sup>399</sup> Mrs. Kimura was given a sentence of one year in prison, which was time she had already served, and was placed on probation.<sup>400</sup> After the trial Mr. Kimura forgave his wife and they reconciled.<sup>401</sup> Further, in several other California cases adult Japanese women who killed their children introduced evidence that the practice of *oyako-shinju* is not generally regarded as a serious crime in Japan,

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Ct. Mar. 21, 1989) (unpublished decision)).

391. *The Cultural Defense in the Criminal Law*, *supra* note 4, at 1293.

392. Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 *ASIAN L.J.* 1, 21 (2000).

393. Williams, *supra* note 329, at 38 n.35.

394. *Id.* at 38 (citing *People v. Kimura*, No. A-09133 (L.A. Sup. Ct. Apr. 24, 1985)).

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *U.S. Justice System Called Ambivalent on use of 'Cultural Defense' by Immigrants*, *L.A. TIMES*, Dec. 13, 1987, at 6.

401. *Woman Whose Children Died in Suicide Attempt Living Quietly*, *ASSOCIATED PRESS*, Apr. 6, 1986.

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and this evidence led to convictions of manslaughter instead of murder.<sup>402</sup>

In *People v. Wu*,<sup>403</sup> an appellate court held that the trial judge committed reversible error by refusing to instruct the jury on the effect the defendant's cultural background might have had on the issue of premeditation, malice aforethought, deliberation, or the existence of heat of passion at the time of the killing.<sup>404</sup> The defendant, Helen Wu, who had been born in China, strangled her son to death and then attempted to kill herself.<sup>405</sup> The boy was living with his father in the United States and the defendant, who gave birth to the boy out of wedlock, had left the boy with his father while she returned to her native Macau because she felt disillusioned that Mr. Wu had refused to marry her.<sup>406</sup> Eventually the couple did get married when she returned for a visit in the United States.<sup>407</sup>

At trial she argued her actions would have been acceptable in China because her son had informed her that he was being mistreated by his father, whom the son said was having an affair with another woman.<sup>408</sup> She had wanted to prove that the motive for her son's death was a desire for revenge against her husband, and fear that her son would be mistreated in the future.<sup>409</sup> She wanted to show that in Chinese culture what she did was "out [of] the mother's love, [the] mother's responsibility to bring a child together with her when she realized that there was no hope for her or a way for her to survive in this country or in this earth."<sup>410</sup> She wanted the jury to be able to consider that from her cultural perspective she was not doing anything "criminal or even wrong," that she was "moved by love, pity, [and] sympathy" because she was "removing someone from the wicked world before the wickedness has touched [her son]."<sup>411</sup>

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402. Oliver, *supra* note 376, at 1.

403. *People v. Wu*, 286 Cal. Rptr. 868 (Cal. Ct. App. 1991).

404. *Id.* at 883.

405. *Id.* at 872.

406. *Id.* at 871.

407. *Id.* at 872.

408. *Id.*

409. *Id.* at 870.

410. *Id.* at 885.

411. *Id.* at 887.

While the judge allowed testimony from various mental health professionals about her state of mind and about Chinese cultural practices, he refused to instruct the jury on the cultural defense.<sup>412</sup> Ms. Wu was convicted of second-degree murder.<sup>413</sup> The California Court of Appeal reversed the conviction, ruling that the defendant's cultural background was relevant in assessing mens rea in the case.<sup>414</sup> The Court further noted her cultural background was relevant because it "could have provided the trier of fact with a reasonable doubt that one of the necessary mental states existed."<sup>415</sup> The appellate court said the jurors should have been given the following instructions:

You have received evidence of defendant's cultural background and the relationship of her culture to her mental state. You may, but are not required to, consider that the [sic] evidence in determining the presence or absence of the essential mental states of the crimes defined in these instructions, or in determining any other issue in this case.<sup>416</sup>

Importantly, in any case where the cultural defense is allowed, cultural traditions of the defendant are presented by expert testimony.<sup>417</sup> In this instance, a professor of anthropology testified "a man considered 'normal' in the category 'Chinese' would react very differently from someone in the category 'American' to the belief that his wife was having an affair."<sup>418</sup> On retrial, Ms. Wu was found guilty of voluntary manslaughter, and the judge sentenced her to the maximum term, eleven years in prison.<sup>419</sup>

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412. *See id.* at 880-81.

413. *Id.* at 869.

414. *See id.* at 882.

415. Alice J. Gallin, *The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. REV. 723, 733 (1993).

416. *Wu*, 286 Cal. Rptr. at 879-80 (alteration in original).

417. *See, e.g.*, Volpp, *supra* note 289, at 87-90.

418. *Id.* at 67.

419. Mike Kataoka, *Indio Woman Who Strangled Son Sentenced to 11 Years in Prison*, PRESS ENTERPRISE (Riverside, CA), Oct. 31, 1992, at B1.

## VII. DISCUSSION OF PROS AND CONS OF THE CULTURAL DEFENSE

### A. *Arguments in Favor of the Cultural Defense*

Perhaps one of the best rationales behind the cultural defense is that the American ethos embraces pluralism and diversity. The goal is to “avoid repeating the ethnocentric excesses of its past and instead learn to accord respect to members of other cultural groups.”<sup>420</sup> In recent decades, the pressure to assimilate has been replaced somewhat by a more tolerant philosophy that “insist[s] that cultural pluralism has made this nation strong and that immigrant groups must not be compelled to sacrifice their unique heritages. Thus, dominant American culture should learn from and help to celebrate the unique customs, history, and languages of its immigrant groups.”<sup>421</sup>

Proponents of the defense argue that “cultural backgrounds should be considered because our society should respect cultural diversity, [and] thus the American legal system should not punish individuals from a culture that emphasizes different values . . . .”<sup>422</sup> The idea of “equal justice for all” suggests we are all equal before the law, that we must all be accorded uniform respect and dignity, and moreover, that personal differences should be respected by the judicial system. Individual differences matter in a great many contexts. We usually expect the differences of peoples’ attributes, abilities, and so on to be taken into account in ensuring an orderliness of the wheels of justice. An illustration:

Legal proceedings would otherwise be marred by any insensitively strict adherence to a preordained set of rules. For example, the financially impoverished are often assigned representation that would not otherwise be available to them; and speakers of foreign languages may be given access to interpreters. The American society has an established history of granting exemptions from general rules and laws to minority convictions of conscience, whenever doing so does not threaten the public interests (e.g., exempting the Amish from compulsory education laws, exempting

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420. Sacks, *supra* note 288, at 524.

421. Sing, *supra* note 5, at 1846.

422. Nicole A. King, *The Role of Culture in Psychology: A Look at Mental Illness and the “Cultural Defense,”* 7 TULSA J. COMP. & INT’L L. 199, 223 (1999).

Jehovah's Witnesses from mandatory recitations of the Pledge of Allegiance, and allowing Jews in the military to wear yarmulkes).<sup>423</sup>

Further, it is argued:

[D]enial of a cultural defense may be perceived as evidence of disdain for an ethnic minority's cultural values. When an ethnic group's cultural values are ignored by the mainstream society, the group is likely to become alienated from the majority culture. Alienation could, in turn, engender hostility and intergroup conflict that disrupt social order.<sup>424</sup>

Moreover, if the dominant culture vehemently rejects a deeply held tradition or custom of an ethnic community, this may impede the acculturation process of ethnic groups. "Ethnic groups may adjust more readily to the majority culture when the majority respects their ways . . . ."<sup>425</sup>

Cultural pluralism means "that each ethnic group is entitled to retain certain cultural values, thereby maintaining its own identity."<sup>426</sup> Perhaps this embracing of diversity "justifies the recognition of the cultural defense. Although society has countervailing interests in imposing common values on all of its members, . . . an appropriately defined cultural defense is consistent with the objectives behind these interests."<sup>427</sup>

One might also argue the cultural defense is a way of providing *equal protection* of the laws, a sort of reasonable accommodation for people of foreign cultures that helps juries recognize crucial differences among groups, shedding light on defendants' mental states, with a view towards ensuring a fair trial. Taking into account the cultural differences of foreign defendants provides the defendants "with the same basic protection 'in respect to life and liberty'

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423. Donovan & Garth, *supra* note 303, at 128 (footnotes omitted).

424. *The Cultural Defense in the Criminal Law*, *supra* note 4, at 1305 (footnote omitted).

425. *Id.* at 1306.

426. *Id.* at 1307.

427. *Id.*

available to all other persons.”<sup>428</sup> On the other hand, denying the cultural defense means the defendant lacks a meaningful opportunity to provide evidence of provocation, which in itself may well violate the Due Process Clause of the Fourteenth Amendment.<sup>429</sup>

One must keep in mind that the cultural defense is simply an evidentiary safeguard that protects the due process rights of the defendant. In a variety of other contexts, defendants’ rights may in a sense trump the rights of victims to see justice served. Often enough, a defendant will be acquitted or a case dismissed due to procedural technicalities: a coerced confession, botched evidence, a prejudicial lineup, a tainted jury, improper admission or exclusion of evidence, prosecutorial misconduct, and so on. In such instances, the defendant’s constitutional rights trump whatever rights the victim or her family have to seek just deserts.

### *B. Arguments Against the Cultural Defense*

Of course, there are understandable objections to the cultural defense. In this section, two major objections are discussed: the cultural defense offends the notion of uniformity of justice, and there is significant difficulty in delineating a culture or subculture and what norms are embraced by it. Also, two secondary objections will be touched upon: the cultural defense may erode women’s rights, and the anti-deterrent effect of the cultural defense.

#### *1. The Cultural Defense Detracts From the Uniformity of Justice*

The cultural defense inevitably erodes the uniformity of justice because it leads to radically disparate treatment of defendants charged with identical crimes, depending on the cultural background of the actor. The cultural defense allows a court to apply a completely different set of standards to defendants who invoke it than to the rest of the population accused of similar crimes. The defense allows for special treatment of foreign defendants, while denying such consideration to members of the American homeland. One commentator posits the following questions of fairness that may arise

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428. Sing, *supra* note 5, at 1883 (footnote omitted).

429. *Id.* at 1879.

with the adoption of the cultural defense:

Why should I be severely punished for attacking my wife, but someone else not, when the principal difference between our two cases is that I acted out of personal delinquency while the second defendant modeled a cultural norm? Is not spousal abuse just as bad, and worth preventing and punishing, whatever the circumstances? Surely migrating from another culture should not be a sufficient excuse for acts criminalized in the new setting.<sup>430</sup>

By granting “special rights” to people based on group-based differences, the cultural defense “create[s] an unfair legal system that is skewed in favor of immigrant defendants, and one that provides immigrant victims less protection than non-immigrant victims.”<sup>431</sup> Turning the situation around, suppose a gay American couple emigrated to Iran or Saudi Arabia, where homosexuals are routinely punished, even tortured or executed.<sup>432</sup> Would the Iranian courts allow the cultural defense to apply? Surely not. In other words, their reliance on Islamic law is so great a cultural norm, and so embedded in their legal systems, that they would admit no exceptions.

By the same token, why should the American system give way to norms intrinsically offensive to its notions of justice? In other words, why should a perpetrator of an honor killing persuade the jury that the practice is normative in a foreign country, and get off lightly? Surely, even for those who advocate the doctrine of cultural defense, some limitations must be imposed.

If the cultural defense is allowed, then should it not also be allowed for non-immigrants who are members of urban subcultures? For instance, why not allow urban gang members to defend themselves against homicide charges on the grounds that it is a grave provocation for a gang member to snitch to the police on another member? Why not allow black men to defend criminal charges on the grounds that their behavior was influenced by forces such as racism?

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430. Donovan & Garth, *supra* note 303, at 123.

431. DePalma, *supra* note 300, at 15.

432. See Sanaz Alasti, *Comparative Study of Cruel and Unusual Punishment for Engaging in Consensual Homosexual Acts (In International Conventions, the United States and Iran)*, 12 ANN. SURV. INT’L & COMP. L. 149, 159 (2006); see also Ann Elizabeth Mayer, Book Review, 99 AM. J. INT’L L. 302, 304 (2005).

Should a terrorist who bombs innocent people be allowed to plead under the necessity defense—that the action was necessary under protocols established by his terrorist cell, in order to gain a political voice—that the action was the right thing to do? What about parents who wish to defend themselves against charges of child abuse when they refuse to provide the child with medical treatment, based on religious teachings that prayer is the answer? What about fundamentalist Mormons who seek to practice polygamy in violation of state laws, relying on their own code that customarily binds their membership?<sup>433</sup> Should Hassidic Jewish communities that hold rabbinic councils to adjudicate a variety of domestic issues, including suspected criminal offenses,<sup>434</sup> be insulated from the authorities just as their ancestors of past centuries?

In considering the cultural defense it is important to weigh society's interests in "imposing certain common values on all of its members—interests that include maintaining order and forging bonds between its people."<sup>435</sup> Providing a common set of values remains crucial to a society:

Perhaps the principal reason for imposing a set of common values is to maintain social order. Societies usually regard the preservation of social order—societal self-protection—as a primary aim. To maintain this order, it has been argued, societies must lay down a body of positive law that compels the obedience of all regardless of individual notions of morality: if each person were required to adhere to the law only to the extent that it was consistent with her own values, societies would tend toward anarchy.<sup>436</sup>

Moreover, other advantages may be attained by removing the uncertainty of application associated with the cultural defense:

By rejecting the "cultural defense," and therefore not excusing the immigrants' ignorance, the courts will encourage them to adapt

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433. Jerald Joersz, *Mormon Fundamentalism and Plural Marriage*, LUTHERAN WITNESS, August 2008, available at <http://www.lcms.org/pages/wPage.asp?ContentID=347&IssueID=24>.

434. Paul Vitello, *Orthodox Jews Rely More on Sex Abuse Prosecution*, N.Y. TIMES, Oct. 14, 2009, at A1.

435. *The Cultural Defense in the Criminal Law*, *supra* note 4, at 1296.

436. *Id.* at 1302 (footnote omitted).

more quickly to the legal system of their new homeland. This hastened adaptation by the newcomers to unfamiliar laws may aid their assimilation into other aspects of life in the United States.<sup>437</sup>

The law should provide stability for social relationships and serve as a predictable means in which peoples' actions are judged. In assessing a defendant's conduct, objective standards applicable to all reasonable people provide the greatest measure of stability and predictability. Personal idiosyncrasies of the individual defendant ought not be entertained.

## 2. *The Difficulty of Delineating Cultural Norms*

There is a virtual Pandora's box of problems in defining what constitutes a "culture," belongs to a given culture, and what cultural practices are part of that culture. First of all, the definition of culture is somewhat vague. The United Nations Educational, Scientific and Cultural Organization (UNESCO) defines culture as: the distinctive traits, including the total spiritual, material, intellectual, and emotional traits that characterize a society or social group, and that include, in addition to arts and literature, their traditions and beliefs.<sup>438</sup> There may well be disagreement as to what "distinctive traits" exist in a population, who embraces them, and how longstanding the traits are. How important or significant is the particular cultural tradition that excuses or justifies the prohibited act, and how can this be presented to the jury with any degree of clarity? Accordingly, "[b]ecause a cultural defense confers a partial 'exemption' from an otherwise legitimate law, only values of sufficient importance to the defendant's culture should be protected."<sup>439</sup> Should any and all cultural practices be admitted as evidence if relevant to the defendant's guilt or innocence? Should child-rearing practices be allowed except for when they involve the killing of children?

Moreover, "[w]hich groups can be said to have a 'culture' such

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437. Julia P. Sams, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335, 348-49 (1986).

438. UNESCO Universal Declaration on Cultural Diversity, at pmb1., ¶ 5, UNESCO 31st Sess. (Nov. 2, 2001).

439. *The Cultural Defense in the Criminal Law*, *supra* note 4, at 1310.

that the defense should be available to its members, and why?”<sup>440</sup> How does one define the “boundaries of a culture in time, space, and person[?]”<sup>441</sup> Is the defendant really a member of the cultural group, or merely a descendant of ancestors who lived in that culture? “Every individual has his own personal experiences, beliefs, and patterns of behavior that we can aggregate to identify what we call culture.”<sup>442</sup>

It is a daunting challenge to present reliable expert testimony as to various norms, traditions, and customs of the defendant’s culture or subculture.

Cultures are complex and symbolic systems, and an understanding of culture is important in gaining an understanding of an individual. Explanations of what constitutes a person, the internal and external forces that animate or affect a person, and beliefs about how these forces interact with an individual are all a part of the person’s culture.<sup>443</sup>

To what extent is the culture in question homogeneous? It seems people of different status within a community experience culture differently. For example, in many cultures there are tribal units that not only have different languages, but rely on different marriage rites, different taboos, different gods, different ways of raising their children, and so forth.<sup>444</sup> Particularly in Middle Eastern cultures, there are varying attitudes and diverse laws with regards to honor killings—some being more tolerant about the practice than others.<sup>445</sup>

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440. Sacks, *supra* note 288, at 534.

441. *Id.* at 538.

442. Eliot M. Held & Reid Griffith Fontaine, *On the Boundaries of Culture as an Affirmative Defense*, 51 ARIZ. L. REV. 234, 241 (2009).

443. Kaustubh G. Joshi, Richard L. Frierson & Tracy D. Gunter, *Shared Psychotic Disorder and Criminal Responsibility: A Review and Case Report of Folie à Trois*, 34 J. AM. ACAD. PSYCHIATRY L. 511, 514 (2006).

444. *See generally*, MAX GLUCKMAN, POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY (Aldine Transaction 1968) (illustrating traditions in different tribal societies); *see also* 2 FOLK LAW, *supra* note 301, at 751.

445. Laure Moghaizel, *The Arab and Mediterranean World: Legislation Towards Crimes of Honor*, in EMPOWERMENT AND THE LAW: STRATEGIES OF THIRD WORLD WOMEN 174, 174-80 (Margaret Schuler ed., OEF International 1986); *see also* Melissa Spatz, *A “Lesser” Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597, 598-606 (1991).

Perhaps an undesirable side effect of the cultural defense is that it presents a “problem of negative stereotyping of members of the defendant’s culture, to the detriment of all members of that culture.”<sup>446</sup> A further difficulty is the degree to which the defendant has become acculturated to American ways. Should there be different degrees of allowing the cultural defense, depending on whether the defendant grew up in the United States, or had lived in the country of origin? If the defendant was raised in the United States, attended public schools, and had an upbringing that departed, to some degree, from the cultural traditions of the old country, the individual may not be an appropriate candidate to invoke the cultural defense, simply because the old traditions may no longer hold currency for that individual. Presumably, some degree of cultural change, depending on the degree of acculturation, would apply to immigrants who had lived in the country for a period of years.

On the other hand, many immigrants choose to live in urban neighborhoods where others of their culture have established a haven, and they might stick to their traditional way of life, customs, beliefs, values and norms, despite contrary pressures by the dominant culture. People want to preserve obscure languages, traditional apparel, cuisines and other elements of their culture. As to just where an individual defendant falls in the acculturation continuum is a matter for the jury to determine, and this is no easy matter.

### 3. *The Cultural Defense May Erode Women’s Rights*

The rights of women would be eroded if the defense could apply to defend an honor killing. As discussed in Part II, often such killings occur for what many of us would view as trivial provocations, such as getting a divorce or choosing to marry a man against the wishes of the woman’s parents.<sup>447</sup> Moreover, provocation claims are often “demonstrably false and rely on a belief system that validates male control of wives and lovers.”<sup>448</sup> Moreover, there is an argument set

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446. Janet C. Hoeffel, *Deconstructing the Cultural Evidence Debate*, 17 U. FLA. J.L. & PUB. POL’Y 303, 304 (2006).

447. See, e.g., *supra* notes 98-104 and accompanying text.

448. Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN’S STUD. 71, 94 (1992).

forth by feminists that “the provocation defense has historically been selectively available to men and therefore registers an adversely disproportionate impact on women.”<sup>449</sup>

If the cultural defense is allowed in cases of honor killings or other instances of domestic violence, what voice if any is given concerning the right to life of the victim? Any discussion of her at trial would focus on her behavior that provoked the killing. The perspective is that the male violence takes a back burner to her provocative conduct. The trial is likely to lack any female perspective. Such an approach sends a message to other immigrant women that they might have no recourse against domestic violence. Fundamentally, the question is: whose rights should prevail over whom?

#### 4. *The Anti-Deterrent Effect of the Cultural Defense*

It could be argued that the cultural defense sends the message to foreigners that their criminal behavior is acceptable. In turn, the criminal law fails to serve a deterrent function, particularly since such cases usually get high media exposure that no doubt increases the immigrant community’s awareness of the leniency accorded to them. Therefore:

Courts may oppose the cultural defense because they feel that it would undermine the specific deterrent effects of the law. A person punished for breaking a law would normally be less likely to misbehave again than one who received no punishment. . . . According to some observers, general deterrence is most effective when punishment for committing a proscribed act is certain. Thus, members of immigrant groups might be less deterred by the law if their transgressions could be excused by their cultural values.<sup>450</sup>

At the same time, people who are compelled to commit certain crimes based on cultural practices may not be deterred, whether or not the cultural defense is available. For example, like other culturally related crimes:

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449. Sing, *supra* note 5, at 1865.

450. *The Cultural Defense in the Criminal Law*, *supra* note 4, at 1303 (footnote omitted).

[Honor killings are] motivated by a sense of moral and social compulsion—punishing the defendant may only marginally deter others . . . whose actions are similarly motivated. Further, to the extent that extreme acts induced by adherence to cultural mores . . . are relatively rare, the threat to social order, and thus the need for deterrence, becomes less pressing.<sup>451</sup>

In other words, for people set on vindicating honor perceived to have been lost as a result of a woman's impropriety, the drive may be so compelling, the community pressure so great, the humiliation so unbearable, that "the threat of punishment may have only a marginal deterrent effect."<sup>452</sup> One interesting wrinkle that may hint that there would be more of a deterring effect to not allowing the cultural defense comes from an idea of Jordanian Minister of Social Development, Hala Latouf: family honor is often given as the reason for killing to hide "motives involving inheritance, extortion or other disputes among relatives."<sup>453</sup>

In the end, the anti-deterrent effect may not matter one way or the other, for by the very nature of these crimes, the offender is not likely to repeat them. In the case of honor killings, for instance, the likelihood of recurrence is rare.<sup>454</sup>

### VIII. CONCLUSION

It is not unusual for American jurisprudence from time to time to introduce new legal concepts such as the cultural defense. "The battered spouse defense, for example was created in response to situations in which convicting the defendant would be unfair, but traditional defenses of self-defense and insanity would not be entirely appropriate."<sup>455</sup> The cultural defense is a useful evidentiary tool, where appropriate, "to shed light on the defendant's state of mind or the circumstances surrounding" the act in question.<sup>456</sup> The cultural defense might be viewed as a vindication of what happened repeatedly

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451. *Id.* at 1304 (footnote omitted).

452. *Id.*

453. Hazaimah, *supra* note 113.

454. *Id.* at 1303.

455. *Id.* at 1299.

456. Sacks, *supra* note 288, at 548.

to indigenous populations at the behest of colonialists: “When colonial imperialists moved to an area of colonization, they took their law with them. When refugees from a culture moved to escape persecution, they were usually required to leave their folk law behind them.”<sup>457</sup> In North America, Australia, New Zealand and South Africa colonists who essentially invaded the regions made the territory their own, established a government and set of laws, even without intending to make the place their permanent home.<sup>458</sup> There was “no hesitation about imposing their own system of law,”<sup>459</sup> but the reverse does not hold: immigrants are expected to discard the laws of their homeland and conform to the laws of their adopted country.<sup>460</sup>

One should be mindful that “[t]he cultural values that conflict with criminal laws are often among the most fundamental, involving questions of life, death, and morality.”<sup>461</sup> If the cultural defense is allowed, say, in cases of honor killings, this could unfairly impact fundamental rights of women who are victims in these cases. The defense would appear to sanction such behavior among men who subscribe to the custom. The cultural defense would in effect allow the jury to condone and perpetuate violence against women. If the defendant is exonerated or given a lenient sentence, this would be a referendum of sorts on the social standing and worth of the victim. A failure to punish indicates perhaps indifference or even disdain towards the victim, and an enhanced social status for the perpetrator.

A fundamental dilemma with the cultural defense is whether it should be extended in all criminal matters where the defendant wishes to introduce cultural evidence in support of the defense, or whether it should be rejected in crimes that shock the conscience, such as honor killings. It has been suggested that the line be drawn by limiting the defense to:

[A]cts that have embedded within them the interests of the social group rather than those of the individual person. A sustainable dividing line could conceivably be drawn . . . between those acts

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457. 2 FOLK LAW, *supra* note 301, at 751.

458. Green, *supra* note 355, at 755.

459. *Id.*

460. See 2 FOLK LAW, *supra* note 301, at 751.

461. *The Cultural Defense in the Criminal Law*, *supra* note 4, at 1301.

performed for the purpose of cultivating and preserving socially valued relationships, versus those which are merely attempts at self-enrichment and personal advantage. Accordingly, crimes involving theft, armed or unarmed robbery, and other presumptively self-beneficial economic crimes would fall outside the scope of a properly delimited culture defense, as compared to crimes involving domestic relations.<sup>462</sup>

Honor killings would presumably fall under the category “involving domestic relations,” and thus the cultural defense would be available.

In the end, it seems to be reasonable for the cultural defense to be invoked in homicide cases where a central question is the defendant’s mens rea. The cultural defense in such instances can help the jury apply a reasonable person standard from the standpoint of the defendant’s culture, to help explain “how an individual reacts in a given situation.”<sup>463</sup>

While honor killings are a rarity in Western society, when they are reported they “may so shock moral sensibilities as to make the majority insist that the defendant’s culture immediately abandon such practices regardless of how little impact isolated incidents of such acts have on social order.”<sup>464</sup> It should be kept in mind that the “values that the criminal law seeks to impose on all ethnic groups may reflect fundamental aspects of a society’s dominant moral code.”<sup>465</sup> The law serves a “moralizing, educative function” in society.<sup>466</sup>

In convincing other cultures that they should change what Westerners may regard as barbaric practices, such as honor killings, it is important for Westerners to have a firm grasp on the rationale of those within other cultures. One wants to provide convincing arguments to arrive at a solution, rather than simply seeking to impose Western beliefs on other cultures.

Social movements of one form or another may be helpful in providing various communities with greater knowledge to help shift attitudes. But to successfully transform attitudes that lead to harmful

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462. Donovan & Garth, *supra* note 303, at 133.

463. DePalma, *supra* note 300, at 18.

464. *The Cultural Defense in the Criminal Law*, *supra* note 4, at 1306.

465. *Id.*

466. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1359-60 (1985).

practices against women, it is important to enlist support from “religious leaders, scholars, activists, and health care providers who are dedicated to the development of human rights, women’s rights, and child development.”<sup>467</sup>

It is important for Muslim leaders who preach from the pulpit to affirm that this kind of violence is unacceptable, and to help people reinterpret traditions that seem to endorse honor killings. They need to refrain from allowing religious texts to be used to justify honor killings and other acts of domestic violence. Muslim organizations have a moral obligation to speak out against those who commit such crimes. Reforming these long-standing practices may be futile if the efforts are limited to passing new laws for corruption, bribery, lax investigation, fear of reporting cases and the lack of interest on the part of judges and prosecutors in domestic violence cases, in Pakistan and Jordan for instance, militate against that.<sup>468</sup> It may take a long time, or at least a new generation of police and investigators, before the cultural acceptance of bribery and corruption may turn the tide.

Some might argue for a compromise position that may allow the cultural defense in the sentencing phase of criminal cases, but not as a substantive defense in the case in chief.

It is difficult for proponents to argue that the cultural defense should be allowed in some cases but not others where a reasonable person of the defendant’s culture would excuse or justify the conduct in question. The cultural defense is still in a tentative stage, and appears to be a growing component in jurisprudence.

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467. Cassman, *supra* note 108, at 147.

468. *See* discussion *supra* Part IV.