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ESSAYS

BLAMEWORTHINESS, INTENT, AND CULTURAL DISSONANCE: THE UNEQUAL TREATMENT OF CULTURAL DEFENSE DEFENDANTS

Nancy S. Kim[*]

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I. INTRODUCTION

Many scholars have debated the wisdom and meaning of the "cultural defense."[1] The use of the term itself is a misnomer as it is rarely used to advocate a formalized defense.[2] In this Essay, I use the term "cultural defense" to refer to any use of cultural evidence in criminal cases to justify, exculpate, or mitigate a defendant's actions. Multiculturalists are often positioned against feminists on the subject of the cultural defense because the victims of crimes giving rise to it are usually women and children.[3]

Much of the disagreement governing the admissibility of cultural evidence pertains to its misuse in certain high profile cases.[4] The fears of stereotyping and of perpetuation of violence against women and children are reinforced by cases excusing grievous acts based on flimsy cultural evidence. Other cases, however, illustrate how the exclusion of cultural evidence may result in unfair punishment to those defendants who act with the interests of the victim in mind. Most commentators, including this one,

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1. *See generally* Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996); Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101 (1997); Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminists and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36 (1995); Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57 (1994).

2. *See* Neil A. Gordon, Note, *The Implications of Memetics for the Cultural Defense*, 50 DUKE L.J. 1809, 1829-30 (2001); Volpp, *supra* note 1, at 57 n.1.

3. *See, e.g.*, Coleman, *supra* note 1, at 1094 (noting that the debate surrounding the use of cultural evidence pits "foreign customs and cultural practices directly against essential elements of contemporary American legal culture, including the antidiscrimination principle that is central to equal protection doctrine and related principles of universal rights that are at the foundation of feminist legal doctrine"). Coleman refers to the question of how to resolve these competing interests as the "Liberals' Dilemma." *Id. See also* Maguigan, *supra* note 1, at 36 ("While both feminists and multiculturalists have advocated for inclusion of a wider variety of voices in American jurisprudence, they have recently perceived themselves to be on opposite sides of a vigorously disputed issue: whether to permit criminal defendants to introduce cultural evidence"); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1312 (1991) (discussing how the "use of culture as a rationalization . . . and the various cultural beliefs and practices that support the family structure make women 'legitimate' victims — invisible targets of violence — and contribute to the community's failure to recognize domestic violence and rape as problems that must be addressed").

4. These cases are usually the paradigmatic cases, as discussed in Part II. *See generally* Coleman, *supra* note 1; Maguigan, *supra* note 1; Volpp, *supra* note 1.

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advocate for a "limited use" approach that would permit the introduction of cultural evidence to establish the criminal defendant's state of mind.[5] Elsewhere, I have proposed guidelines to minimize the misuse of cultural evidence.[6] Those guidelines, however, only address crimes as currently defined and were thus limited by the inadequacies of such definitions.[7]

This Essay suggests that because the definition of crimes (in particular, the definition of the mens rea element of the crime) fails to capture the moral blameworthiness of the defendant in cultural defense cases, judges (and juries) have rendered decisions lacking in cohesiveness.[8] Many decisions are unfair because they provide for a punishment disproportionate to the moral blameworthiness of the defendant or they conform to certain prejudices and stereotypes held by the judge and/or jury.[9] In other words, a decision-maker may adhere strictly to the definition of a crime which may unfairly punish a member of a cultural minority or, having decided that the crime does not adequately reflect culpability, the decision-maker makes a decision freed from the constraints imposed by the literal definition of a particular crime. In the latter case, the result is often based upon unreliable evidence that conforms to the decision-maker's biases and prejudices.

Criminal law assumes that the judge and jury share the same cultural and experiential framework as the defendant. Accordingly, crimes are defined with this assumption as an underlying premise. This assumption

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5. *See generally* Kim, *supra* note 1, at 103 (advocating "adoption of an evidentiary framework which would permit cultural evidence to be admitted to explain the defendant's state of mind at the time of the offense"); Kay Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 LAW & SOC. INQUIRY 39, 72 (2003) ("In order to fully evaluate the defendant's mental state at the time of the crime, the jury must be allowed to consider evidence of the defendant's reliance on cultural interpretations and practices, even if those interpretations and practices are directly at odds with U.S. traditions."); Maguigan, *supra* note 1, at 36 ("endorsing admissibility of cultural information to the extent the evidence is relevant to prove a defendant's mens rea") *but see* Doriane Lambelet Coleman, *Culture, Cloaked in Mens Rea*, 100 S. ATLANTIC Q. 981, 982 (2002) (arguing that the use of immigrant cultural evidence should not be permitted to show mens rea); ALISON DUNDES RENTELN, THE CULTURAL DEFENSE 200-01 (2004) (discussing why a formal cultural defense is necessary and arguing that courts should consider cultural evidence in all cases).

6. Kim, *supra* note 1, at 116, 139.

7. *See generally* Kim, *supra* note 1.

8. As Maguigan notes, the admissibility of cultural evidence has been inconsistent: "In some cases cultural information is excluded completely. In others, the information is received unchallenged during plea negotiations or at trial in a way that trivializes violence against women or family members as customary." Maguigan, *supra* note 1, at 87.

9. For an intriguing discussion of moral blame in the law, see Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992).

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is manifested by the well-established promise of the law to an accused of a jury comprised of "one's peers" which presumably safeguards against prejudice. This promise, however, has its limitations. A jury of one's peers is unlikely where, for example, the defendant is a Hmong tribesman.

The determination of mens rea may not reflect culpability because the *definition of the crime itself* fails to account for the cultural dissonance that often exists between the judge/juror and the accused. I use the term "cultural dissonance" to refer to differing sociocultural and experiential backgrounds. As the paradigmatic cases discussed in Part II illustrate, permitting cultural evidence to shed light on mens rea is only helpful if the definition of the crime is itself culturally neutral. Admittedly, attaining cultural "neutrality" is a difficult, if not impossible, task. Yet, a fuller understanding of the defendant's actions would at least enhance awareness of assumptions created by cultural dissonance.

In Part II of this Essay, I examine the (mis)use of cultural evidence in several well-known, paradigmatic cultural defense cases. In this part, I also explain how the treatment of cultural evidence in these cases exacerbates the debate between feminists and multiculturalists. In Part III, I examine the relationship between mental states and culpability in the law. In Part IV, I propose an analysis and reconceptualization of intent that bridges gaps in perception and understanding attributable to cultural dissonance. My proposal is admittedly a radical departure from the way that crimes are currently defined and analyzed. First, I propose making intent relevant to all crimes that currently have a mens rea element. Then I suggest an expanded notion of intent that recognizes and considers differences between the decision-maker and the defendant.

Discussions of cultural defenses are often framed around the issue of the primary purpose of criminal law — is it to punish morally blameworthy behavior, or is it to educate and deter harmful conduct? That question, while an important one, is not the focus of this Essay. This Essay assumes that one of the primary functions of criminal law is to provide individualized justice, an objective which reflects our society's commitment to the values of autonomy.[10] This is not the same thing as saying individualized justice is the sole function of criminal law, or that the goal of individualized justice is more important than the other goals of criminal law. Rather, the thesis of this Essay is that *to the extent* that we

10. *See* Sanford Kadish, *The Decline of Innocence*, *in* BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 65, 77 (1987) ("Much of our commitment to democratic values, to human dignity and self-determination to the value of the individual, turns on the pivot of a view of man as a responsible agent entitled to be praised or blamed depending upon his free choice of conduct.").

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recognize that criminal law should provide individualized justice, we should implement steps to ensure that our judgment and understanding of the conduct in question is appropriately contextualized to accomplish that objective.

The law establishes that, for most crimes, an action must be accompanied by a particular mental state. An understanding of the defendant's mental state is incomplete without an understanding of cultural context. A broader understanding of the defendant's mental state would *not* result in exculpation in all cultural defense cases nor does it defer to non-U.S. legal systems. What I am proposing in this Essay is not to excuse defendants who are members of cultural minorities from crimes that they have committed; rather, I am proposing that we examine more closely whether what we have sought to achieve by requiring the mens rea element in crimes is, in fact, accomplished where the defendant is a member of a cultural minority. Rather than providing a separate set of standards for defendants who are members of a cultural minority, my proposed reconceptualization of intent seeks to fairly apply the existing law. Currently, the actions of the defendant are understood and perceived through a "cultural lens" that is susceptible to distortion when there is cultural dissonance between the decision-maker and the defendant. My proposed three part analysis of intent strives to minimize the likelihood, or at least the degree, of that distortion without adopting a strong relativist position which prioritizes the culture of the defendant over the dominant norms of American society. In other words, recognizing cultural context does not favor cultural minorities. Such recognition simply levels the playing field by not *disfavoring* them. All actions do not carry the same cultural significance. In particular, actions may not carry the same significance that they might have in the dominant culture. By unveiling cultural assumptions, we move closer to a criminal justice system that treats defendants who are members of a cultural minority in the same way that it treats majority culture defendants.

II. THE PARADIGMATIC CASES

In this part I have selected three of the most often discussed cases to illustrate the misuse of the cultural defense. Although there are other more recent examples of the cultural defense, I have selected the following as the paradigmatic cases because they best illustrate the problems that commonly arise with the use of cultural evidence in the courtroom. The categories are only intended to frame the discussion of the cultural defense; they are not intended to be mutually exclusive. In other words, I

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have selected one case to illustrate each "type" of cultural misuse, even though each case might also provide an example of one or more of the other types of misuse.[11]

A. *Cultural Difference as Insanity*

In *People v. Kimura*,[12] the defendant Fumiko Kimura attempted to drown herself and her two children after learning of her husband's adultery.[13] She had tried to commit the Japanese custom of *oya-ko shinju*, or parent-child suicide.[14] Although illegal in Japan, *oya-ko shinju* is recognized as an ancestral practice.[15] The Japanese-American community gathered a petition with over 25,000 signatures stating that had the act occurred in Japan, Kimura would have received at most a light, suspended sentence and probation.[16] Although originally charged with murder and felony endangerment under California law, the prosecution allowed Kimura's plea of manslaughter.[17] Instead, however, of arguing that her actions were reasonable given her cultural background, her attorneys argued that she was temporarily insane at the time she committed the crime.[18] Evidence of her practice of *oya-ko shinju* was deemed to be evidence of temporary insanity.[19] Even though culture was not expressly

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11. For example, while I use *People v. Chen*, No. 87-774 (N.Y. Sup. Ct. Dec. 2, 1988), to illustrate how cultural evidence was misused to reinforce an oppressive practice, it could also be used to show how such evidence was used to establish temporary insanity and to exoticize Chinese culture. *See* Part II (b) and (c).

12. No. A-091133 (Los Angeles Super. Ct., Nov. 21, 1985) (unpublished decision), *cited in* Taryn F. Goldstein, Comment, *Cultural Conflict in Court: Should the American Criminal Justice System Formally Recognize a 'Cultural Defense'?*, 99 DICK. L. REV. 141, 147-49 n.54 (1994). For further discussions of *Kimura*, see Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437, 462, 463-64,(1993); Rashmi Goel, *Can I Call Kimura Crazy? Ethical Tensions in the Cultural Defense*, 3 SEATTLE J. FOR SOC. JUST. 443, 443-44 (2004); Deborah Woo, The People v. Fumiko Kimura: *But Which People*, 17 INT'L J. SOC. L. 403 (1989).

13. *See* Goel, *supra* note 12, at 443; Goldstein, *supra* note 12, at 147.

14. *See* Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1100 (1994); Woo, *supra* note 12, at 404.

15. *See* Goel, *supra* note 12, at 443.

16. Spencer Sherman, *Legal Clash of Cultures*, NAT'L L.J. 1 (1985); RENTELN, *supra* note 5, at 25.

17. CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 121-22 (2003).

18. *See id.* at 122; RENTELN, *supra* note 5, at 25. The California legislature abolished diminished capacity as a defense in 1982 which explains why Kimura pled manslaughter even though the basis of the plea was "temporary insanity." CAL. PENAL CODE § 25 (Deering 1985).

19. *See* Ann T. Lam, *Culture as a Defense: Preventing Judicial Bias Against Asians and*

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acknowledged as a mitigating factor in the determination of Kimura's liability, the judge took it into account in accepting her plea.[20] Cultural evidence was not used to prove, or disprove, an element of mens rea, but to provide the defendant with a *de facto* substantive cognitive insanity defense.[21]

The decision in *Kimura* imposed an Anglo-American judgment on the defendant's actions that conflicted with her Japanese cultural views.[22] Given Japanese conceptions of shame, suicide, and parental obligations, Kimura's actions do not indicate mental insanity.[23] The evidence was introduced not to establish that Kimura acted contrary to the norms of Japanese culture, but that she was insane because she acted in conformity with them.[24]

The finding of "temporary insanity" in *Kimura* was compelled by the failure of the criminal law to define crimes to correspond with culpability.[25] Under California law, murder is defined as the unlawful

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Pacific Islanders, 1 ASIAN AM. PAC. ISLAND L.J. 49, 61 (1993).

20. Alison Matsumoto, *A Place for Consideration of Culture in the American Criminal Justice System: Japanese Law and the* Kimura *Case*, 4 J. INT'L L. & PRAC. 507, 526 (1995).

21. *See* Lam, *supra* note 19, at 60-61. *See also* Goel, *supra* note 12, at 443 ("Fumiko Kimura's lawyer interposed the defense of temporary insanity, based in part on a belief that any mother who kills her children must be insane.").

22. Goel, *supra* note 12, at 448 (stating that Kimura was judged "by a narrow Western conception of sanity, one she could not possibly meet because her own cultural views on suicide and mothering stood in stark contrast."); Woo, *supra* note 12, at 410-13.

23. *See* Goel, *supra* note 12, at 445-49. As Goel points out: "Kimura was not charged with the crime of attempted suicide, but with the murder of her two children. Under California criminal law, Kimura must be culpable precisely because she failed to recognize her children as separate entities .... Yet for Fumiko Kimura to acknowledge her children as separate entities would brand her a bad mother." *Id.* at 448-49. *See also* Yuko Kawanishi, *Japanese Mother-Child Suicide: The Psychological and Sociological Implications of the Kimura Case*, 8 UCLA PAC. BASIN L.J. 32, 34-35 (1990) (stating that Japanese mothers have an extreme form of ego extension with respect to their children and lack a sense of boundaries between themselves and their children as separate individuals).

24. This is not to say that Kimura's actions would have been condoned in Japanese society, but only that they would have been viewed in a different way — a way that would have been more sympathetic to her actions. *See* Kim, *supra* note 1, at 117; *see also* Robert W. Stewart, *Probation Given to Mother in Drowning of Her Two Children*, L.A. TIMES, Nov. 22, 1985, at B7; Renteln, *supra* note 12, at 463 nn.91-92.

25. Although the meaning of the word "insanity" differs depending upon the circumstances, in jurisdictions where it may be used as a defense to criminal prosecution, under the M'Naghten rule, an accused is not criminally responsible if, at the time of committing the act, she was "laboring under such a defect of reason . . . as not to know the nature and quality of the act he was doing, or if he did not know it that he did not know he was doing what was wrong." WAYNE R. LAFAVE, CRIMINAL LAW 7.2 (4th ed. 2003).

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killing of a human being with malice aforethought.[26] Voluntary manslaughter is the unlawful killing of a human being without malice and upon a sudden quarrel or heat of passion.[27] Malice is defined as "a deliberate intention unlawfully to take away the life of a fellow creature" or when "no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."[28]

Even though Kimura, in attempting parent-child suicide, was reacting to her husband's infidelity, there was no evidence that she was acting "upon a sudden quarrel" or "heat of passion." In fact, her actions indicated deliberation and premeditation.[29] Yet, the prosecution and the sentencing judge recognized that it would be unjust to punish Kimura for murder given that she did not act with the same evilness as one, for example, who kills another out of spite.[30] Rather than prosecuting Kimura for a crime that did not fit her culpability, the prosecution accepted a plea bargain for a crime that did not fit her actions. Because the definition of the crime of murder did not capture the culpability of the defendant, the prosecution disregarded the strictures of that definition and sought a punishment that fit the defendant's act. Although Kimura's actions constituted murder, punishment for manslaughter was deemed appropriate given her cultural background.

B. *Cultural Practices as Familiar Forms of Oppression*

The case of *People v. Chen*[31] illustrates how cultural evidence can be used to excuse behavior that reinforces oppressive practices or beliefs in the United States. In *Chen*, the defendant Dong Lu Chen killed his wife with a hammer after learning of her infidelity.[32] His attorney argued that

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26. CAL. PENAL CODE § 187 (West 2005).

27. § 192.

28. § 188 (West 1988).

29. *See* Kim, *supra* note 1, at 118. "Kimura took a bus from her home here in Tarzana, California to Santa Monica, a trip which took approximately two hours. She left the stroller at the bus stop, presumedly because she knew she would no longer need it. Kimura clearly intended to kill her children, as well as herself." *Id.* The deputy district attorney, Lauren Weiss, noted that, "[i]f in fact, she was doing everything according to cultural precepts, it would have supplied elements of the prosecution case, because then it would have showed she intended to kill her kids — intent to kill. I could have gotten a first-degree murder conviction." Woo, *supra* note 12, at 405.

30. The prosecution stated that "to punish somebody like this woman by sending her to state prison, I don't think society would benefit from it." Robert W. Stewart, *Probation Given to Mother in Drowning of Her Two Children*, L.A. TIMES, Nov. 22, 1985, at B7.

31. No. 87-7774 (N.Y. Super. Ct., Mar. 21, 1989) (unpublished decision), *cited in* Goldstein, *supra* note 12, at 151; Renteln, *supra* note 12, at 439, 480-81.

32. Celestine Bohlen, *Holtzman May Appeal Probation for Immigrant in Wife's Slaying*, N.Y.

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Chen, who was Chinese-American, suffered from diminished capacity as a result of his cultural background.[33] The defense argued that Chen's actions were "reasonable" under the circumstances because a wife's adultery is a stain upon a Chinese husband's honor.[34] Although originally charged with second degree murder,[35] the judge found Chen guilty of the lesser charge of second degree manslaughter[36] after he heard testimony that Chinese culture condemned adultery.[37]

Evidence of Chen's cultural background could have been used to provide an affirmative defense to second degree murder (*i.e.*, that he acted "under the influence of extreme emotional disturbance") which would have led to a conviction on the lesser offense of first degree manslaughter.[38] The facts, however, do not support a finding of second degree manslaughter. Second degree manslaughter under New York law is defined as "recklessly"[39] causing the death of another person.[40] Chen hit his wife in the head eight times with a hammer,[41] actions which clearly indicate something more deliberate than "reckless" behavior.

TIMES, Apr. 5, 1989, at B3.

33. Chen's attorney stated that the "basis for the defense was not that it's acceptable to kill your wife in China. The basis of the defense is the emotional strain based on cultural differences and the state of the defendant's mind." Leslie Gevirtz, *Immigrant Gets Probation for Killing Wife*, U.P.I., Mar. 31, 1989, *available at* LEXIS/NEXIS, News Library, UPI File (quoting defense attorney Stewart Orden).

34. *See* LEE, *supra* note 17, at 114.

35. Under New York law:

> A person is guilty of murder in the second degree [w]hen: with intent to cause the death of another person, he [or she] causes the death of such person or of a third person . . . except that it is an affirmative defense that: (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.

N.Y. PENAL LAW § 125.25(1) (McKinney 2005).

36. *See* Bohlen, *supra* note 32.

37. *Id.*

38. First degree manslaughter is defined as when a person "with intent to cause the death of another person, he [or she] causes the death of such person or of a third person under circumstances which do not constitute murder because he [or she] acted under the influence of extreme emotional disturbance." N.Y. PENAL LAW § 125.20(2).

39. N.Y. PENAL LAW § 125.15(1).

40. "Recklessness" is defined in New York as being aware of a substantial and unjustifiable risk and consciously disregarding that risk. *See* N.Y. PENAL LAW § 15.05.

41. Bohlen, *supra* note 32, at B3.

Consequently, it would have been more appropriate for Chen to be prosecuted for first degree manslaughter.[42]

While Chen's cultural background was appropriately used to provide an affirmative defense to murder (by showing "diminished capacity"), it was inappropriately used to change the nature of his actions. The judge in *Chen* stated that the defendant's cultural background made him more "susceptible to cracking under the circumstances."[43] Yet the issue of "cracking" is relevant only to defend against a charge of murder; it does not establish "recklessness." The judge in *Chen*, however, believed that the defendant's actions did not constitute first degree manslaughter, not because they failed to fit the technical definition of the crime (which they did), but because they did not warrant the punishment.[44] The judge used cultural evidence to cloud the issues that were relevant. Instead of using the evidence to determine whether Chen's background made him so enraged that he was extremely emotionally disturbed, the judge used it to further his own notion of justice. Under the guise of using cultural evidence to determine mens rea, he used it to distort the existing definition of manslaughter in order to reach his desired sentence for the defendant.

The judge in *Chen* stated that the defendant was "driven to violence by traditional Chinese values about adultery and loss of manhood."[45] What he failed to note, however, was that traditional American values also condemn adultery. Yet, as in the Chen case, punishment for "crimes of passion" (*i.e.*, where the husband killed an adulterous wife) has historically been treated differently from other types of killings.[46] As Cynthia Lee notes, "Chen's claim of reasonableness is very similar to claims of reasonableness made by American men charged with murdering their wives. American men who kill their wives, like Chen, often base their claims of reasonableness on the threat to masculine honor and identity posed by a wife's sexual infidelity."[47] In other words, the judge's lenience in *Chen* is similar to other cases involving non-immigrant men who kill their wives upon discovery of adultery. According to Lee, one possible explanation for the outcome in *Chen* is that "immigrant and minority

42. *See* N.Y. PENAL LAW § 125.20(2); *supra* note 38.

43. Goldstein, *supra* note 12, at 152.

44. *Id.*

45. *Id.*

46. Coleman, *supra* note 5, at 984-85. In fact, Coleman states that the New York legislature provided for extreme emotional disturbance as a defense to second degree murder specifically so such "crimes of passion" would be dealt with as manslaughter and not second degree murder. *Id.* at 985. *See also* James J. Sing, Note, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845, 1868-69 (1999).

47. LEE, *supra* note 17, at 114.

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defendant claims which serve the dominant culture are more likely to succeed than claims that do not serve dominant interests."[48] The judge's decision in *Chen* perpetuated existing dominant cultural norms of female sexuality and of a husband's proprietary interest in his wife. These norms are not reflected in the ideals and aspirations of American society — but they do reflect its realities.[49] In *Chen*, culture was a convenient way to obfuscate the judge's decision-making process. The result was a sentence that perpetuated familiar oppressive practices rather than eliminating them.[50]

C. *Cultural Evidence to Mystify and Exoticize*

People v. Moua[51] illustrates how cultural evidence may exoticize the defendant in such a way that the determination of the existence of the practice — or the commission of the practice — becomes forgotten. In *Moua,* the defendant was accused of the kidnapping and rape of a woman.[52] The defendant claimed that his actions were part of a Hmong marriage ritual.[53] The only data presented by the defense, however, was a twenty-two page pamphlet that cited only one reference.[54] It is unlikely that such flimsy evidence would have passed muster under the standards typically required for admissibility of expert testimony.[55] The judge eventually dropped the kidnapping and rape charges and the defendant pleaded guilty to false imprisonment.[56]

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48. *Id.* at 112. *See generally id.* (arguing that successful uses of culture in the courtroom can be understood as cases where the minority defendant's interests converge with dominant majority interests). The principle of interest convergence was first articulated by Derrick Bell. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest Convergence Dilemma,* 93 HARV. L. REV. 518, 522 (1980).

49. *See* Chiu, *supra* note 14, at 1113-14.

50. *See* Sing, *supra* note 46, at 1876-78 (noting that a "fixation on cultural symmetry suppressed the possibility that Chen's actions may not have been culturally typical, and thus likely caused the court to rely on racial stereotypes and antiempirical assumptions in identifying the defendant's cultural values.").

51. Case No. 315972-0 (Fresno Super. Ct. 1985) (unpublished decision), *cited in* Renteln, *supra* note 12, at 445 n.19.

52. Renteln, *supra* note 12, at 445 n.19.

53. *Id.*

54. *See* Kim, *supra* note 1, at 124; Deidre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California,* 4 S. CAL. INTERDISC. L.J. 1, 20 (1990).

55. Kim, *supra* note 1, at 124. Federal Rule of Evidence 702 as interpreted by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceutical, Inc.* 509 U.S. 579, 590-93 (1993) (requiring that expert testimony be based on good grounds to ensure that it is scientifically valid).

56. RENTELN, *supra* note 5, at 127.

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The judge understood that Moua's cultural background affected his culpability, but was in a quandary with respect to how to use the cultural evidence presented by the defense. The Hmong marriage ritual was so unfamiliar to the decision-maker that it overpowered the limited purpose for which it should have been used — to establish whether a reasonable Hmong person would have mistaken the woman's actions for consent.[57] *Moua* involved a classic case of "mistake of fact" as to consent.[58] The law, however, requires that the mistake be an objectively reasonable one.[59] As Renteln explains, an "objective reasonable person would not have thought that [the victim] was consenting, even if the average reasonable Hmong person would have thought so."[60] Because an "objective" standard imposes an Anglo-American perspective on a non-Anglo-American act, the defense of mistake of fact fails to adequately protect cultural minorities.[61] On the other hand, that the objective standard disadvantages minorities should not mean that all charges should be dropped or that the defendant's version of events should prevail. In *Moua*, for example, the woman's family considered the defendant's action to be rape, not marriage.[62]

Moua is similar to date-rape cases which also involve mistake of fact analysis — but the parties involved were members of the Hmong community rather than the larger Anglo-American population. Even where both parties are Anglo-American, in a date-rape case, men and women may have conflicting views of what happened. The decision-maker is thus required to step outside his or her own gendered perspective in order to understand both sides of the story. In date-rape cultural defense situations, the decision-maker is required to widen his or her frame of reference to include gender, cultural, and gender-cultural differences. In *Moua*, because the determination of a reasonable mistake could not be accommodated within the existing legal framework, the judge stepped out of that framework. The judge, distracted by the foreignness of the cultural practice, abdicated responsibility for sorting through the morass of conflicting testimony. Because the Hmong marriage ritual was so different from Anglo-American methods of courtship and marriage, the judge had

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57. *See* CULTURAL ISSUES IN CRIMINAL DEFENSE § 7.3(a) (James G. Connell, III & Rene L. Valladares eds., 2000).

58. RENTELN, *supra* note 5, at 127.

59. *Id.*

60. *Id.*

61. *See id.* at 128 (stating that an obstacle to the use of the cultural defense is continued adherence to objective reasonableness because the "objective person is the persona of the Anglo-Saxon, or European, it will be virtually impossible for a defendant to avail himself of a defense in the criminal law which is theoretically available to all").

62. *Id.* at 127.

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difficulty evaluating the case (including the evidence of the existence of the ritual) the way that he would rape cases involving dominant culture parties. The foreignness of the cultural evidence so mystified and diverted the decision-maker that it made it hard to adequately judge its validity and relevance to the facts at hand.

In this part I have discussed three paradigmatic cultural defense cases to illustrate the predominant misuses of cultural evidence. Not surprisingly, each case could also be used as an example of more than one misuse. *Chen*, for example, could be used to show "cultural difference as insanity" because the cultural evidence was used to demonstrate that reasonable Chinese men are more apt to be driven "crazy" by their wife's infidelity than reasonable Anglo-American men. *Chen* also illustrates how cultural evidence can exoticize the defendant to such an extent that it so mystifies and diverts the decision-maker that its validity goes unquestioned.[63]

These three cases have intensified the multiculturalist-feminist debate concerning the use of the cultural defense. Because women are subordinated in most societies to men, and children are subordinated to adults, many of the cultural defense cases involve practices that harm women and children.[64] Yet, a failure to acknowledge the role that a defendant's cultural background plays in his or her actions by default assumes an Anglo-American perspective. Thus, a member of a cultural minority is not accorded the same treatment within the legal system as a member of the cultural majority.

In Part III, I examine how criminal law views the relationship between mental states and culpability, and culpability and punishment. I propose that because culpability cannot be fairly established without consideration of intent, most crimes should require an intent element. But my proposal goes beyond requiring intent as an element of a crime; it proposes an expanded analysis of intent. I argue that criminal law's current treatment of "intent" is too narrow, and fails to contextualize actions. Consequently,

63. Many commentators have criticized the evidence presented in *Chen* as an inaccurate depiction of contemporary Chinese culture. *See, e.g.*, Volpp, *supra* note 1, at 66-73; *see also* Dick Polman, *When is Cultural Difference a Legal Defense? Immigrants' Native Traditions Clash with U.S. Law*, SEATTLE TIMES, July 12, 1989, at A1.

64. *See* Melissa Spatz, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597, 626-27 (1991); *see also* Rimonte, *supra* note 3 (discussing how Pacific Asian culture may facilitate the decriminalization of violence against women); Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 867 (1999) (noting that "the area of sexuality and family relations in general is the ripest for potential cultural clashes because it is that aspect of life in which cultures often vary most significantly").

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a failure to adjust for cultural dissonance effectively discriminates against defendants who are members of cultural minorities.

III. INTENT, MOTIVE, AND CULPABILITY

Most crimes consist of an overt physical act, or actus reus, and a guilty mind, or mens rea.[65] Mens rea refers to the particular mental state required for a particular crime.[66] Different crimes require different mental states, with the more serious crimes typically requiring a more conscious state of mind. For example, under the Model Penal Code, murder is committed "purposely or knowingly" or "recklessly under circumstances manifesting extreme indifference to the value of human life."[67] Manslaughter is committed "recklessly" or under "extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[68] Negligent homicide is a killing committed "negligently."[69] The United States Supreme Court has commented on this correlation between mental states and crimes, stating that "[d]eeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."[70]

Theorists generally acknowledge the role of criminal law to punish according to moral wrongfulness, or a "will to injure."[71] The mens rea element of crimes reflects attribution of that moral blameworthiness.[72] This explains why duress, insanity, and self-defense are well established defenses to crimes — while the defendant may have committed the requisite criminal act, he or she is not as morally blameworthy because of some extenuating circumstance.[73]

65. *See* BLACK'S LAW DICTIONARY (7th ed. 2004) (defining actus reus as "the wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea*."); *see also* LAFAVE, *supra* note 25, § 3.4.

66. *See* BLACK'S LAW DICTIONARY (7th ed. 2004); *see also* LAFAVE, *supra* note 25, § 5.1.

67. MODEL PENAL CODE § 210.2 (2002).

68. § 210.3.

69. § 210.4.

70. Tison v. Arizon, 481 U.S. 137, 156 (1987).

71. *See* Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 9-10 (2002) (discussing Henry De Bracton's thirteenth century treatise on English law).

72. *Id.* at 11.

73. *See* Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984) (stating that even where all the elements of a crime are proven, exceptions "such as insanity, duress, and law enforcement authority, can exculpate an actor even though his conduct and state of mind satisfy the paradigm of the offense charged.") *Id.* at 612.

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In many jurisdictions, although not in those following the Model Penal Code, crimes are categorized as general intent and specific intent crimes.[74] Specific intent crimes require that the defendant had a further specified purpose or intent above and beyond the intent to commit the actus reus.[75] General intent crimes require that the defendant only had a general blameworthy state of mind at the time the act was performed.[76] Motive has long been deemed irrelevant to the determination of whether a crime has been committed.[77] Many scholars, however, debate the wisdom and even the accuracy of the maxim that "motive is irrelevant to the criminal law."[78] Guyora Binder remarks that "[t]he motive is irrelevant maxim has somehow survived a century of logical, descriptive and normative criticism."[79] Yet, even defenders of the "motive is irrelevant" maxim acknowledge that in certain cases, such as with specific intent crimes, criminal law does consider motive.[80]

As Wayne LaFave notes:

> It is often said that motive is immaterial in the substantive criminal law, and that the most laudable motive is no defense while a bad motive cannot make an otherwise innocent act criminal. On the other hand, it has sometimes been claimed that the substantive law frequently takes account of good and bad motives. These differing viewpoints, it would seem, are attributable to disagreement as to what is meant by the word "motive" and how it differs from "intention," a matter which has caused the theorists considerable difficulty for years . . . it is typical to clarify the definition [of

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74. LAFAVE, *supra* note 25, § 5.2.

75. Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law*, 29 W. ST. U. L. REV. 21, 32 (2001). These states include California, Colorado, Louisiana, and New Mexico.

76. *Id.*

77. *Id.*

78. *See* LAFAVE, *supra* note 25, § 5.3(a).

79. *See generally* Binder, *supra* note 71, at 1; Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653 (2005) (proposing that motive should be considered to determine both liability and punishment); Douglas N. Husak, *Motive and Criminal Liability*, 8 CRIM. JUST. ETHICS 3 (1989).

80. Chiu observes that defenders of the maxim often qualify its applicability in situations where motive is specifically made relevant as part of the definition of the crime or where there is an established defense that requires the establishment of a motive: "Although stated for the purpose of defending the irrelevance maxim, such qualifications are basically a concession that specific intent crimes, inchoate crimes, and the defenses of provocation, insanity, necessity and self-defense have long regarded the motives of a defendant in determining criminal liability." Chiu, *supra* note 79, at 663.

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> motive and intention] with an illustration, such as that when A murders B in order to obtain B's money, A's intent was to kill and his motive was to get the money. Such an illustration might well suggest that "intent" is limited to one's purpose to commit the proscribed act . . . and that all inquiries into why one did the proscibed act are concerned with motive. This view has sometimes been taken. But, if this view is correct, then the notion that motive is immaterial in the substantive criminal law is wrong, for there are a number of instances in which this inquiry into why an act was committed is crucial in determining whether or not the defendant has committed a given crime. For example, if one evening A breaks into B's house, it is most important to know *why* he did so, as it is burglary only if he did so for the purpose of committing a felony. Likewise, if C shoots and kills D, it may well be important to determine *why* he did so, for if he acted in self-defense he is not guilty of murder.[81]

As the above illustration shows, the distinction between motive and intent is often puzzling and elusive.[82] The debate surrounding motive is part of the general confusion surrounding mens rea which has been referred to as a "baffling problem,"[83] "notoriously elusive,"[84] and a "quagmire."[85] Theoretically, criminal law punishes those who are culpable in the sense of

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81. LAFAVE, *supra* note 25, § 5.2.

82. Chiu states that the task of defining motive is complicated "especially when juxtaposed against the concept of intent or *mens rea*. This is an interesting juxtaposition because while both motive and intent refer to mental states, one has been deemed irrelevant to criminal liability while the other is central to it." Chui, *supra* note 79, at 664. Binder describes three types of arguments against the irrelevance of motive maxim:

> (1) logical critiques of the irrelevance of motive maxim as premised on a false dichotomy between motive and intent; (2) empirical claims that the irrelevance of motive was false as a description of established criminal law; and (3) normative arguments that criminal liability should be conditioned on motive because it is relevant to moral blame.

Binder, *supra* note 71, at 45.

83. *See* Frances Bowes Sayre, *The Present Signification of Mens Rea in the Criminal Law*, *in* HARVARD LEGAL ESSAYS 399, 411 (1934).

84. Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 637-38 (1993). Gardner states that "few conceptual pursuits in any area of the law have proven so beguiling as the attempt to give an accurate account of the so-called mental element required for criminal liability." *Id.*

85. *See* Miller, *supra* note 75, at 21.

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being morally blameworthy,[86] yet many state laws assign different terms to signify culpability for different crimes.[87] Thus, "culpability" often means something other than moral blameworthiness,[88] and mens rea can refer to either an element of a crime or a blameworthy state of mind.[89] The Model Penal Code, for example, defines four kinds of culpability: purposely, knowingly, recklessly, or negligently.[90] Punishment is apportioned pursuant to crime. Thus culpability, as statutorily defined, is intended to assign punishment according to moral blameworthiness.[91] Someone who acts purposely to injure another is more morally blameworthy than one whose negligent act results in injury to another. Accordingly, one who acts purposely to injure another should be punished more severely than one who injured only negligently. The concepts of culpability, blameworthiness and punishment are thus intertwined within the statutory definitions of crimes.[92] Yet, if culpability does not consider the defendant's motives, it fails to adequately consider the defendant's blameworthiness, and a failure to consider blameworthiness results in punishments that do not fit the crime.[93] For example, does a defendant who

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86. In fact, many scholars use the terms "culpable" and "blameworthy" interchangeably. *See, e.g.*, John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1026-27 (1999) ("I adopt this conventional definition of blameworthiness or culpability.").

87. As Kyron Huigens observes, the words "culpability," "responsibility," "blameworthiness," and "desert" are often used interchangeably even though they have different meanings, and each is often used to mean more than one thing. Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1195 (2000).

88. *See* Robinson, *supra* note 73, at 862-63.

89. *See* Gardner, *supra* note 84, at 641. Gardner identifies two levels of mens rea:

> one essentially describes the mental states necessary for the commission of various crimes, while the other embraces the moral principle that certain defendants cannot justifiably be punished even though their conduct and their state of mind meet the definition of a particular crime. Thus, while a defendant might possess the "mens rea" necessary to commit the offense as defined by the legislature, she may lack the "mens rea" essential for a finding of blameworthiness and punishability.

Id.

90. MODEL PENAL CODE § 2.02 (2002).

91. *See* Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 495 (1992).

92. *See* Arnold H. Loewy, *Culpability, Dangerousness and Harm: Balancing the Factors on Which our Criminal Law is Predicated*, 66 N.C. L. REV. 283 (1988).

93. Robinson explains the three primary functions of criminal law:

> First, it must define and announce the conduct that is prohibited by the criminal law. . . . It must decide whether the violation merits criminal liability . . . It

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purposely kills a terminally ill friend to end her suffering deserve the same punishment as a defendant who accidentally kills a stranger while trying to steal her purse?

The standards of negligence and recklessness further complicate the meaning of intent. Courts will often claim that intent is required, and then state that intent may be inferred from reckless or negligent conduct.[94] Wayne LaFave notes that "[i]t would make for clearer analysis if courts would merely acknowledge that for some crimes intent is not needed and that recklessness or negligence will suffice."[95] Yet, because the standards of negligence and recklessness require that the decision-maker interpret the defendant's actions through the lens of the majority culture's norms *without regard to her actual intent in so acting*, the decision-maker may incorrectly interpret those actions where the actor is a member of a cultural minority. As Guyora Binder asks: "[S]hould we really punish on the basis of the social meaning of offenses, rather than the offender's blameworthiness? After all, there can be a disjunction between the social meaning of an act and the actor's intent in committing it."[96]

What if an adult leaves her child because she cannot afford a babysitter and has to work the night shift? What if that adult comes from a country where extended family members and neighbors typically provide help with childcare — a support system that is missing in the United States? Even by majority cultural standards, is that parent as morally blameworthy as the parent who leaves her child at home to go drinking in a bar? Is that parent equally culpable? Should she be?

Crimes are defined by matching an act to a state of mind. The moral judgment of the community is reflected in the culpability assigned to the crime. Crimes committed negligently are not as "bad" as those committed intentionally. Culpability standards reflect and assume community norms, but which community? Whose norms?[97] If the answer is the dominant

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> typically assesses ex post whether the violation is sufficiently blameworthy to "warrant the condemnation of conviction." Finally, where liability is to be imposed, criminal law doctrine must assess the relative seriousness of the offense, usually a function of the relative blameworthiness of the offender.

Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U.L. REV. 857, 857 (1994).

94. LAFAVE, *supra* note 25, § 5.2(e) (citing Holmes, J., in Commonwealth v. Pierce, 138 Mass. 165, 52 AM. REP. 264 (1884)).

95. *Id.*

96. Guyora Binder, *Meaning and Motive in the Law of Homicide: Samuel H. Pillsbury's Judging Evil: Rethinking The Law of Murder and Manslaughter*, 3 BUFF. CRIM. L. REV. 755, 764 (2000) (book review).

97. One commentator has argued that "the failure to recognize cultural evidence in cases involving nonvolitional behavior violates norms of procedural fairness and betrays the spirit of the

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mainstream community — the "reasonable Anglo-American," — then culpability as currently defined does not reflect blameworthiness.[98] The socializing, normative-setting aspect of criminal law then trumps the goal of individualized justice.[99]

Yet, one of the normative goals of American society is the recognition of individual differences and freedoms.[100] The Declaration of Independence promises all citizens[101] certain inalienable rights including "life, liberty and the pursuit of happiness." Citizens are promised that no state shall deny them equal protection under the law.[102] American legal history is replete with attempts to balance the rights of society with the rights of individuals. The issues which have led to consideration of a cultural defense arise naturally as a result of the maturation of a society dominated by non-native citizens and populated by immigrants.[103] Ignoring the moral

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antidiscrimination principle." Sing, *supra* note 46, at 1880. Sing explains that since the provocation doctrine is essentially a "dominant cultural defense," denying foreign defendants the right to introduce cultural evidence effectively denies them use of the provocation doctrine. *Id.* at 1878.

98. The idea of an objective standard of blameworthiness is subject to debate. For example, Richard Delgado has argued that maintaining objective standards maintains the position of those already in power. *See* Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813 (1992).

99. John Diamond argues that contemporary criminal law is not a morality-based construct but "rather a mechanism by which society conveys its core ideology." John L. Diamond, *An Ideological Approach to Excuse in Criminal Law*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, (1999). In the area of excuses, for example, he states:

> the acceptance and rejection of particular excuse defenses can best be explained by recognizing the criminal law's social role in transmitting ideological rules and boundaries. The relative culpability of defendants or the deterrence potential of the criminal law are far less predictive of when and which excuses will be accepted.

Id. at 4.

100. *See, e.g.*, Renteln, *supra* note 12, at 441, 500-01.

101. In fact, the Declaration of Independence expressly promises such rights only to "all men," and by "men" meant Anglo-American men.

102. Many might dispute that America is in fact a country accommodating of individual freedoms. While the reality for many Americans may not reflect the rosy picture envisioned by our "Founding Fathers," the normative goals are clearly articulated.

103. Wanderer and Connors observe that:

> a cultural defense is simply one manifestation of the clash between the individual and society recognized and treated under our constitutional framework. Although "culture" may appear to be a new, "flavor-of-the-month" legal interest, associated with such contemporary concerns as diversity, pluralism, and political correctness, it is instead just a newly clothed context in which the core, individualistic legal principles upon which our nation was founded are exercised.

blameworthiness of an act for those actors who are not acculturated to the dominant culture unfairly discriminates against them and betrays the ideals of a democratic society.[104]

This does not, however, mean that in all cases the goal of individualized justice should *always* trump the goal of societal norm creation and enforcement;[105] it does mean, however, that in order to weigh the balance between the two accurately, the individualized elements should, in fact, pertain to the defendant. In other words, although moral blameworthiness is not always the most important consideration, where it *is* relevant, cultural differences should be recognized. In the next section, I propose a reconceptualization of intent that takes into account cultural dissonance and thus, better captures the moral blameworthiness of the actor.

IV. RECONCEPTUALIZING INTENT

The culpability standards of the Model Penal Code and state statutes fail to contextualize the defendant's actions, and thus fail to capture the true moral blameworthiness of those actors who fall outside society's dominant culture. Even those crimes that require specific intent only provide part of the entire picture if there is cultural dissonance between the decision-maker and the defendant. Just as acts are tied to the intent underlying them, intent is tied to context. What we hope to discover by examining intent is the blameworthiness associated with the act.[106]

Wanderer & Connors, *supra* note 64, at 870-71.

104. Other scholars have argued that notions of individual responsibility are misleading or inaccurate without a social context. *See, e.g.*, ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 29-144 (1975). For a discussion of the competing perspectives regarding individual responsibility, see Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245 (1992).

105. As Kadish notes,

> Justice for the individual is not an absolute [in that] it can conflict with the moral claims of other individuals. Consider, for example, the claim of the law-abiding for some reasonable government protection against crime. A legal system so scrupulous that nearly every defendant was acquitted would not only be inefficient and ineffective, it would be unfair to the citizens who rely on it to articulate and enforce standards of conduct. Thus, there are moral as well as pragmatic reasons why a perfect correspondence between an individual's moral fault and criminal liability is not an absolute value.

Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 271-72 (1987).

106. *See id.* at 257.

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Thus, for example, the Model Penal Code provides that one of the four culpability standards must apply in order for a crime to exist.[107] How blameworthy someone is for doing something depends on what he was thinking when he acted. When he extended his arms, did he mean to push the victim? Or was he merely stretching? If he did mean to push, did he intend to cause harm? Or did he push the victim to move her out of the way of the speeding car? A determination of intent requires consideration not only of the defendant's intent to commit the act, but of the defendant's intent to achieve the consequences of that act.

In some cases, the law already recognizes that one should no longer be held responsible, or as responsible, for one's actions. Intoxication, duress, self-defense and insanity are all examples where the law recognizes that the actor is not as blameworthy as one who is not intoxicated, under duress, acting in self-defense, or insane.[108] The context indicates that the actor did not possess the type of evil mind contemplated by the law. So why not contextualize intent in all cases?

Intent should be relevant to all crimes which require a mens rea element.[109] Crimes requiring only a "negligence" or "recklessness" standard are particularly troubling where the defendant is a member of a cultural minority because "negligence" and "recklessness" are based upon dominant cultural norms, without regard to the defendant's experiences and understanding. Thus, this Essay argues that before a decision-maker can determine whether the defendant acted negligently or recklessly, the decision-maker must understand what the defendant intended by her actions. Not only should intent be a relevant consideration in the determination of crimes, the meaning of "intent" should be examined to better understand the meaning of an action within a particular context. I

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107. MODEL PENAL CODE § 2.05 (2002). There are exceptions for certain offenses defined by statute where there is a clear legislative intent to impose strict liability.

108. Arenella observes:

> [duress] negates the actors' moral culpability because the defendant succumbed to coercive pressures that could have prompted a "reasonable person" to violate the law. Why is his moral culpability negated? Because we can not sustain our . . . attitudes of resentment and blame when we realize that a "reasonable person," someone with the appropriate attitudes of respect and concern for the moral norms implicated by the law, would have been compelled to violate the law despite these attitudes.

Arenella, *supra* note 9, at 1541-42.

109. As Kadish notes, it is not always clear whether mens rea requirements are essential elements in the definition of the crime or excuses in "mens rea clothing." Kadish, *supra* note 105, at 260-61.

propose a three step analysis of intent to create culpability standards that reflect moral blameworthiness. Each level presupposes a voluntary act by the defendant.[110] Conduct that is not voluntary is not, and should not be, criminalized as it serves neither the retributive nor deterrent goals of the criminal justice system.

My proposed reconceptualization of intent provides a context for the defendant's actions that takes into account the possibility of cultural dissonance. While cultural evidence currently is, and should be, considered at the sentencing stage, I believe that it is a critical aspect of determining whether a crime occurred at all. If a defendant lacks the requisite mental state, he or she should not be found guilty of the crime.[111] Furthermore, relegating the relevance of culture to the sentencing stage leaves too much discretion to the judge. As discussed above, a judge may be more lenient to those defendants who are members of a cultural minority who act in accordance with dominant cultural norms.[112]

A. *First Level Intent — Intent to Act*

In order to determine whether the defendant had the requisite mens rea, the decision-maker should first determine whether the defendant intended to commit the act.[113] First level intent is equivalent to general intent under

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110. Criminal law requires that the defendant's conduct be voluntary. *See* LAFAVE, *supra* note 25, §6.1(c).

111. *Id.* Likewise, neither would the revenge or retribution goals of criminal law be served by punishing involuntary actions. *Id.* As LaFave notes, "[t]o some extent, then, all crimes of affirmative action require something in the way of a mental element — at least an intention to make the bodily movement which constitutes the act which the crime requires." *Id.* § 5.2(e).

112. *See* Kelly M. Neff, Note, *Removing the Blinders in Federal Sentencing: Cultural Difference as a Proper Departure Ground*, 78 CHI-KENT L. REV. 445, 462 (2003) (stating that the Fifth, Ninth, and Eleventh Circuits have held that a defendant's culture may be considered in sentencing if the culture is consistent with that of U.S. cultural norms, yet noting that "a seeming double standard exists as courts allow a defendant's culture to mitigate a sentence if that culture coincides with the American majority but disallow mitigation if the culture differs from the majority's.").

113. Kadish notes that there are two ways to classify involuntariness:

> on the one hand, these cases can be interpreted as exculpatory because there was no actus reus, and hence no crime to excuse . . . When a person claims the involuntary-act defense he is conceding that his own body made the motion but denies responsibility for it. Therefore, however we characterize the involuntary-act exculpation, whether as a failure of the prima facie case or as a defense, the reason it exculpates belongs to the rationale of excuse: the defendant has no choice in the matter.

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some existing criminal law statutes.[114] For example, in order for the defendant to be found guilty of battery, the defendant must have intended to strike the victim, or at least intentionally flailed his arms about without regard to whether anyone was nearby.[115]

B. *Second Level Intent — Purposive Intent*

Second level intent is roughly equivalent to specific intent.[116] An inquiry into second level intent examines why the defendant committed the act and whether the defendant intended the consequences of her act. If the intent was to avoid a greater evil, the conduct should not be a crime. For example, imagine a defendant voluntarily pushes the victim. The defendant intends to extend her arm and intends to physically move the victim. If, however, the defendant's purpose in so acting is to move the victim out of the path of a speeding car, then she should not be liable for the crime of battery. Second level intent is currently reflected in the existing defense of necessity.[117] Where a person is confronted in an emergency with a choice of two evils, if the harm which will result from compliance with the law is greater than that which will result from violating it, she is justified in violating it.[118] The analysis of second level intent, however, is incomplete without examining third level intent.

Kadish, *supra* note 105, at 259.

114. As LaFave notes, however, the phrase "general intent," is also used to mean something other than the notion that "all crimes require a general intent." LAFAVE, *supra* note 25, § 5.2(e). For example, "general intent," may be used to encompass all forms of the mental state requirement or to characterize an intent to do something on an undetermined occasion. *Id.*

115. In addition, the defendant must have, in fact, struck the victim and the act must have caused bodily injury or amounted to an offensive touching. *Id.* § 16.2(a). The intent to strike the victim of course presupposes that the act was voluntary. If, for example, the defendant struck the victim while suffering from an epileptic seizure, there would be no crime but merely an accident.

116. As with "general intent," there are multiple meanings associated with "specific intent." *See* LAFAVE, *supra* note 25, § 5.2(e). The most common usage, however, is to designate a special mental element which is required above and beyond any mental state required with respect to the actus reus of the crime. *Id.* For example, common law larceny requires the taking and carrying away of the property of another with the specific intent "to steal" the property. *Id.*

117. *See* LAFAVE, *supra* note 25, § 10.1(a); *see also* Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397 (1999).

118. LAFAVE, *supra* note 25, § 10.1(a). The defense of necessity, however, is only available in situations where the legislature has not itself made a determination of values regarding the weighting of the evils. *Id.*

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C. *Third Level Intent — Contextualized Purposive Intent*

Contextualized purposive intent requires a consideration of the defendant's larger purpose in acting and includes what is traditionally referred to as the defendant's motive. It asks why the defendant wants to achieve her purpose.[119] Thus, third level intent abolishes the distinction between motive and intent by conflating these two often indistinguishable concepts.[120] Contrary to what some may expect, third level intent analysis does not always work to the advantage of the defendant. In the example above, assume second level intent analysis demonstrates that the defendant pushed the victim in order to move the victim out of the path of the speeding car. If third level intent analysis demonstrates that the defendant pushed the victim out of the way of the speeding car because the defendant intended to later torture and kill the victim (*i.e.*, cause greater harm), then the defendant should be found guilty of the crime of battery (as well as any other relevant crimes such as attempted murder).[121]

All three levels of intent must be examined in order to successfully determine culpability. In some cases, public policy might dictate that no intent should be required in order to prevent harm to the larger public.[122] I do not wish in this Essay to examine the wisdom of strict liability crimes

119. This question reflects the view that an individual not only should act, or refrain from acting, but that she should do so for a certain reason. *See* Heidi M. Hurd & Michael S. Moore, *2004 Stanford Law Review Symposium: Punishment and Its Purposes: Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1093-96 (2004) (discussing how some proponents of hate crime legislation might argue that since it is "wrong to assault another, it is a greater wrong to assault another for a bad reason such as racial hatred.").

120. Many commentators have criticized the supposed distinction between motive and intent. Robinson has noted that "every time an offense definition contains the phrase 'with the purpose to . . . ,' the law takes the actor's motive as an offense element, the cause of his or her act." Paul H. Robinson, *Hate Crimes: Crimes of Motive, Character or Group Terror?*, 1992/1993 ANN. SURV. AM. L. 605, 606-07. *See also* Adam Candeub, Comment, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2104-06 (1994) (discussing the confusion surrounding the distinction between motive and intent but concluding that motives have a wider, broader view).

121. Frederick Lawrence has discussed the purported distinction between "intent" and "motivation" in the context of hate crimes and hate speech. *See* Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673 (1992). Lawrence observes that the distinction between motivation and intent is unclear and should be seen as "descriptive points on a continuum whose normative weight must be found elsewhere." *Id.* at 680. He further notes that "what is a matter of intent in one context, may be a matter of motive in another." *Id.* at 720.

122. Although the criminal justice system does not now require a showing of moral blameworthiness for all crimes, it does tie legal blame to moral blame for serious *mala in se* crimes. *See* Arenella, *supra* note 9, at 1513 ("To convict the individual of a *mala in se* crime, the state must provide proof of his moral culpability for breaching the law's commands.") *Id.*

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in general,[123] but because such crimes do not require intent at all, they do not pose the same cultural dissonance problems as those that do require intent.[124]

With the exception of cases involving strict liability crimes, the law does require and recognize different states of mind for different crimes.[125] The state of mind determines the crime or the punishment for a crime. But because crimes as currently defined assume that the judge and jury share the same cultural and experiential framework as the defendant, they often fail to adequately reflect the culpability of the actor in cultural defense cases.

Culture is often distilled to mean ethnicity, but can also refer to practices of a group of a particular region, socioeconomic class, or education level. These categories reflect distance from the mainstream of modern, middle class Anglo-America. Language barriers aggravate that distance.

To illustrate, let us imagine that a child severely injures her knee playing outside. The knee is cut to the bone. The child's mother does not take the child to the hospital, and the knee becomes infected. Is the mother guilty of child endangerment? For purposes of this analysis, let us assume that the act happened in California. California Penal code section 273a provides, in relevant part, as follows:

> (a) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.

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123. For a criticism of strict liability in the context of excuse, see Kadish, *supra* note 105, at 267-69.

124. This does not mean, of course, that strict liability crimes do not pose *any* discriminatory problems. As strict liability crimes often reflect community norms, they may disproportionately impact those who are unaware of those community norms.

125. *See* Dane S. Ciolino, *The Mental Element of Louisiana Crimes: It Doesn't Matter What You Think*, 70 TUL. L. REV. 855 (1996) ("Most crimes require culpability — proof that the offender committed the prohibited act with a specified blameworthy state of mind.").

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> (b) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.

The mother in our example acted "willfully" when she failed to take her child to the hospital. The term "willful" in this case does not require intent to injure the child but implies merely a purpose or willingness to commit the act, or make the omission referred to.[126] The standard of conduct is that of criminal negligence, which means that the defendant's conduct must amount to a reckless or gross departure from the ordinary standard of due care.[127] Yet, is the mother in our hypothetical the type of mother that the legislators had in mind when they drafted the statute? When her actions are viewed in isolation, the answer is likely yes because the factfinder superimposes his own world onto hers and makes certain assumptions about her life that are not necessarily true. But, let us contextualize the defendant's actions and assume that the defendant is a Korean immigrant who speaks very little English. Let us further assume that she lives in Los Angeles, does not drive and does not have health insurance. Imagine that the accident occurred in the evening, and that she has four other children all under the age of eight. She does not know her neighbors, she is separated from her extended family, her husband is away on business. What are her options? She could take the bus late at night with her five children — but would that not be more irresponsible? Do her actions still look the same as they did when we had no understanding of the context in which they were undertaken?

When the decision-maker first hears about her actions, would he not automatically assume that she could drive, that she had a car, that she had health insurance, that she did not have other children or that if she did, she had a spouse or neighbor that could watch them? In other words, would the decision-maker not make the assumption that she was like he?

Or perhaps, the decision-maker would conclude that she was so different that legal standards do not apply at all. Then, the defendant is at the mercy of a court, subject to its pity and its paternalism. Perhaps a court

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126. Deering's (2005) notes accompanying section 273a, citing People v. Pointer, 151 Cal. App. 3d 1128, 199 Cal. Rptr. 357 (1st Dist. 1984).

127. *See id.*

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might excuse her actions. Or perhaps a court might decide that she was ignorant and did not know how to raise children. What was that child doing playing outside at night anyway? Perhaps a judge would decide that her children would be better off if they were taken away from her and put into foster care. Perhaps the judge would decide that he knew better, better than this non-English speaking mother of five. But that determination fails to take into account her parenting abilities as a whole. It fails to take her actions into context. What matters is not what her actions looked like to an outsider, but what they meant. Did they mean that she did not care about her child? That she was not concerned about her child's health? That she was *incapable* of caring for her child?

The purpose of the child abuse statute is to protect children from abusive parents. Yet, where there is cultural dissonance, the statutes may fail to accomplish the legislative purpose. How can we properly judge our hypothetical mother's actions unless we consider her contextualized purposive intent? In other words, how do we know whether she acted negligently unless we know *why* she did what she did? Is it not important to view her actions in their actual context rather than superimposing upon them a context that is reflective of dominant culture norms but is in this case, artificial?[128]

The paradigmatic cases, *People v. Chen,* and *People v. Kimura*, are useful to illuminate how the proposed intent analysis would operate. In *People v. Chen*, defendant Chen voluntarily lifted his arm to strike his wife with a hammer, and his intent in doing so was to kill her, or to at least cause serious bodily harm — thus meeting the requirements of first and second level intent. Third level intent analysis requires us to ask why he intended to kill her. Cultural evidence is particularly useful here, provided that the evidence is accurate and meets the requirements of the codified rules of evidence.[129] The cultural evidence was used to demonstrate that news of his wife's infidelity would enrage a Chinese man more than it

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128. Joshua Dressler uses a similar example to illustrate how there are constant pressures on courts to "subjectivize" the "reasonable person": "For example, if the defendant, a man of low education or low mental acuity, is prosecuted for negligently causing the death of his child, the defendant may seek to have his conduct judged by the standard of a reasonable person with a similar level of education and/or mental acuity." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 132 (3d ed. 2001). Yet, as Dressler notes, the traditional rule is that "although a defendant's unusual physical characteristics . . . if relevant to the case, are incorporated into the 'reasonable person' standard, a defendant's unusual mental characteristics are not." *Id.*

129. Cultural evidence is often subject to much less rigorous scrutiny than other types of "expert" testimony. The intent analysis does not diminish the need to ensure that proffered cultural evidence is subject to the evidentiary standards of other types of evidence.

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would a man who was born and raised in the United States.[130] Thus, it offers an explanation for the defendant's behavior, but not one that exculpates him. In fact, the evidence disproves the conclusion that he acted "recklessly," rather than intentionally. Assuming for the sake of analysis that the evidence was accurate, it shows that Chen did in fact intend to kill his wife because even if an American-born man should not have been driven to murder, a Chinese-born man would have been. It also shows the mitigating condition of extreme emotional disturbance, that Chen was more upset by the news of his wife's affair than an American-born husband in the same situation.

An intent analysis might have provided a more satisfying exculpatory rationale for the defendant's actions in *People v. Kimura*. Kimura's actions meet the requirements for both first and second level intent — she acted voluntarily, and she intended to drown her children. Third level intent requires that the decision-maker ask why she intended to drown her children. The evidence regarding *oya-ko shinju* explains her third level intent — that she wanted to protect her children from public humiliation and the stigma of being motherless.

V. CONCLUSION

If one way that we can define culture is by shared assumptions in a given social context,[131] we know that judges and jurors are often not of the same "culture." A jury of one's peers does not mean Chen is entitled to a jury of Chinese immigrants, Kimura to one of Japanese housewives, or Kong Moua to one of Hmong tribemen. If a primary objective of the law is to establish and enforce social norms, how much should we acknowledge cultural differences? If a defendant committed an act because the act was legal in her home country, should we recognize this

130. There has been much discussion that the evidence offered in Chen was inaccurate and unreliable. *See* Coleman, *supra* note 1, at 1108.

131. Anthropologists have come up with various ways to define cultures. Etienne Vermeersch called it "the total way of life of a people, the social legacy the individual acquires from his groups." *See* Etienne Vermeersch, *An Analysis of the Concept of Culture*, *in* THE CONCEPT AND DYNAMICS OF CULTURE 10 (Bernardo Bernardi ed., 1977). Morris Freilich refers to culture as "all those historically created designs for living, explicit and implicit, *rational* and *irrational*, and *non-rational*, which exist at any given time as *potential guides* for the behavior of men." *See* Morris Freilich, *The Meaning of "Sociocultural,"* *in* THE CONCEPT AND DYNAMICS OF CULTURE, *supra*, at 89. *Webster's Dictionary* defines culture as the "customary beliefs, social forms, and material traits of a racial, religious, or social group." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 314 (1988).

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as a defense in the United States? The short answer is no, because the actions are occurring within the borders of this country and we have long established that ignorance of the law would not provide an excuse. But the issue of whether we can establish our own crimes should be made distinct from whether we should recognize moral responsibility in defining those crimes. We have long concluded that in the vast majority of cases, we should. We recognize for example, the immaturity of minors. We recognize self defense. So what about culture?

The cultural defense is a sticky issue because it raises the spectre of foreignness, of otherness. If a defendant commits a crime that would not be a crime in his or her home country, the legality of her actions in her home country does not impact her moral responsibility in this country. Her knowledge of the laws of this country is not relevant. But her intent in committing the act is relevant, just as intent is relevant for all defendants of most crimes. If the individual's understanding of the ramifications of an act is affected by that individuals' cultural upbringing, then it does affect her culpability. If, for example, the defendant believes that she is saving her child's soul by committing *oya-ku shinju*, is she not less blameworthy than a mother who kills her children so that she can run off with her boyfriend?[132] It would be artificial to conclude that there is no difference between those two situations.[133]

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132. *But see* Coleman, *supra* note 1, at 1142-43:

> Apart from the doctrinally inconsequential fact that Susan Smith drowned her two children by sending a car in to lake water in South Carolina, rather than by holding them physically under ocean water in California, the facts of the Smith Case were, in all relevant aspects other than culture, the same as those in Kimura. Despite these essential similarities, the States' reactions to the two cases were markedly different. . . . [W]hen Kimura is set free at least in part because drowning her children is consistent with her native cultural practices, while Smith is charged with capital murder for essentially the same act, there is a troubling disparity in the way the legal system is responding to the substantially similar actions of the two women.

133. As Lee points out, *Smith*

> while superficially similar, is not truly analogous to the *Kimura* case. First, Smith never intended nor tried to kill herself. She strapped her two young boys into their car seats and pushed the car they were in into a lake, never once putting herself in any danger. Second, the reason Smith killed her children was in order to please her boyfriend, who had made it clear that he was not interested in continuing a relationship with a single mother burdened with two young children. In contrast, Kimura not only intended to kill herself, but her primary intent was to kill herself. It was only because she thought she would be dead that she decided to kill her

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The proposed three-level intent analysis fits within the framework of what we, as a nation, hold dear. We already recognize that punishment is linked to culpability. But for some reason, culture has fallen into a special category because it has an exoticizing effect.

Our fear of relativism, of replacing our country's values with those of another country, has made us shun anything that resembles giving "special" treatment to anyone.[134] Feminists are wary of recognizing culture because in so many countries, women are subordinate to men.[135] Yet, we also fear the spectre of Western imperialism and colonialism, and are afraid of disregarding the values and virtues of multiculturalism. So into the abyss of the debate between feminists and multiculturalists, liberals and relativists, the relevance of culture falls when it should be nestled within the larger topic of the relevance of mens rea, of criminal intent.

Intent, while not always an element of a crime, has always been relevant to criminal law, but the way it has been defined and distilled, as mens rea and culpability, means that intent does not always capture moral blameworthiness. Actions do not always signify the same thing.[136] Our own culture is not neutral, it is not "sign-free."[137]

> children. In Japan, the mother is primarily responsible for child rearing. Children who grow up without a mother are viewed with distrust. Kimura felt a tremendous responsibility not to leave her children in this world without a mother.

LEE, *supra* note 17, at 123.

134. *See* Coleman, *supra* note 1, at 1135-45 (arguing that "the use of immigrant cultural evidence in criminal proceedings fundamentally conflicts" with the equal protection doctrine).

135. For example, an Amnesty International representative has remarked that one constant worldwide is the very low status of women. *See Hearing on International Human Rights Abuses Against Women Before the Subcomm. on Human Rights and International Organizations of the House of Representative Comm. on Foreign Affairs,* 101st Cong., 2d Sess. 91 (1990) (statement of Goler Butcher of Amnesty International, U.S.A.); *see also* Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism,* 25 COLUM. HUM. RTS. L. REV. 49, 90 (1993) (noting that because women are in most societies relegated to the private sphere, and political and social issues are resolved in the public sphere, participation by women in the creation of culture is often restricted).

136. Levine observes that "[a]lthough the law treats act and intent as distinct elements of a crime, often we presume intent from the behavior itself, based on our cultural traditions, understandings and taboos." Levine, *supra* note 5, at 47.

137. Linguists, psychologists, and literary critics have long wrestled with the "problem of meaning" or "signification" attached to words which mean something other than their literal definition. *See* ROLAND BARTHES, MYTHOLOGIES 111 (1958) (noting that "facts" are often "tokens for something else.") In fact, semiology itself is a "science of forms, since it studies significations apart from their content." *Id.*; *see also* FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (1972) (discussing how language is a "social institution . . . a system of signs that express ideas"). *Id.* at 15-16.

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We assign meaning to behavior,[138] even for those who do not share our social background. Cultural evidence is thus relevant because it helps us to understand that our assumptions may not be accurate, that the defendant in acting might not have meant what the decision-maker would have meant had the decision-maker done the same thing. A three-step analysis of intent forces us to look at the broader context without succumbing to the temptation to exoticize and misjudge.

Reconceptualizing intent does not treat cultural minorities "differently." Intent has always been relevant in determining guilt or innocence; levels of culpability have always affected punishment and sentencing. But the issue of intent has in recent years become more complex because the "who" has become more complex. Whose intent? We are no longer as similar as we have been in the past — if we were ever in fact so. It may be simply that now there is more a recognition, an awareness, of how we are not the same. We are not the reasonable man (*i.e.*, educated, Anglo-American, middle class) that academics and jurists of the past conjured up. So who are we? The question is an important one to ask because it lies at the core of what criminal law does (or should do) — assign accountability for acts based upon culpability, and assign culpability according to moral responsibility.[139]

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138. *See* Kenneth Karst, *Paths to Belonging*, 64 N.C. L. REV. 303, 307 (1986).

139. As Kadish notes, "To blame a person is to express a moral criticism, and if the person's action does not deserve criticism, blaming him is a kind of falsehood and, to the extent the person is injured by being blamed, unjust to him. It is this feature of our everyday moral practices that lies behind the law's excuses." Kadish, *supra* note 10, at 87.

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