
NARRATIVES OF CULTURAL COLLISION AND RACIAL OPPRESSION: HOW TO RECONCILE THEORIES OF A CULTURAL DEFENSE AND ROTTEN SOCIAL BACKGROUND DEFENSE TO BEST SERVE CRIMINAL DEFENDANTS

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INTRODUCTION

“Once upon a time, not so long ago, culture, in the lower case, was primarily an anthropological preoccupation. Not any more. It is hardly news that peoples across the planet have taken to invoking it, to signifying themselves with reference to it, to investing it with an authority, a determinacy, a superorganic unity of which even the most conservative anthropologist would be wary. Culture, now capitalized in both senses of the term, has come to provide the language, the Esperanto, of difference spoken in the active voice.”¹

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1. Jean Comaroff & John L. Comaroff, *Criminal Justice, Cultural Justice: The Limits of Liberalism and the Pragmatics of Difference in the New South Africa*, 31 AM. ETHNOLOGIST 188, 188 (2004).

The above observation comes from a pair of anthropologists, Jean and John Comaroff, who witnessed firsthand how marginalized communities wielded Culture in ways that proved disruptive for the majoritarian forces that acted against them. Though the Comaroffs express wariness at the determinative cohesion this employment of culture implies, their work also highlights how unsettling the notion of cultural difference can be for modernist notions of universalism and objective human rights. The Comaroffs lived and worked in South Africa as the nation grappled with how to restructure their post-apartheid criminal justice system. As noted by the Comaroffs, capital “C” Culture demands respect and recognition for identities that fall outside of those traditionally acknowledged. When this happens, a series of complex questions are raised about how to admit difference while simultaneously embracing, or at the very least maintaining, structured institutions such as a criminal justice system.² The Comaroffs were particularly interested in how a justice system modeled off Euromodern conceptions of universal rights and behavior was going to treat traditional African beliefs and practices. The history of apartheid oppression of black South Africans and their assertions of personhood could not be ignored. However, it was often the case that expressions of traditional or local African beliefs were at odds with the modernist scheme of rights utilized by the new justice system.³ The Comaroffs observed a strong inclination to disregard these traditional practices as being outside legal protection. There was uneasiness about these customs and what implications incorporating them would have. The new state’s desire to exclude them from recognition was the “kind of cultural policing . . . scandal that no modernist state can ignore; it inevitably calls forth efforts to police culture. And, yet, under the new South African Constitution, traditional African practices [could not] simply be criminalized. Herein then, at its most raw, lies the contradiction, the antinomy between Culture and the law”⁴ The Comaroffs identified an inherent contradiction between Culture’s demand to acknowledge legitimate difference and the modernist legal framework’s emphasis on universalism. This same antimony between culture and the law is also present in the United States’ criminal justice system.

2. *Id.* at 193–94 (observing that often, the contradiction between legal universalism and cultural difference leads to the “law saying one thing and doing another, muting its own convictions by commuting its sentences”).

3. *Id.* at 188–204.

4. *Id.* at 189.

Many anthropologists have written about how legal systems create, manifest, resist, but also just ignore Culture. Courtrooms are sites for the production of cultural meaning, as scenes from the justice system play out and actors both within and outside courtrooms are affected.⁵

The relationship between law and culture is commonly perceived as one in which law enforces a common morality or culture, in the interest of uniformity and stability. This enforcement is deemed necessary because “society is not something that is kept together physically; it is held by the invisible bonds of common thought. . . . A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.”⁶ For many jurists, this enforcement of common morality is the appropriate model for understanding how law and culture relate to each other. However, there is clearly something inherently coercive in the notion of common morality acting as form of bondage in society. First, it begs the question of who is tasked with constructing these “invisible bonds of common thought.” Additionally, it means that members of society who hold beliefs or practices that fall outside of these bonds will face some type of sanction; that is the “price” that must be paid. This price becomes apparent when analyzing particular criminal law statutes or by observing how courtrooms are run on a daily basis.

In the legal world, certain forms of argument, voices, and perspectives are legitimized, while others are viewed suspiciously or even barred outright. Only particular representations and identities can be recognized as having rights or even the ability to raise an objection when rights are violated.⁷ As a tightly regulated space, a courtroom not only has procedural rules to govern the conduct of those within, but also a constriction of laws and precedent that formulate the rights of actors within the system. These

5. Sally Engle Merry, *Courts as Performances: Domestic Violence Hearings in a Hawai'i Family Court*, in *CONTESTED STATES: LAW, HEGEMONY AND RESISTANCE* 35, 37 (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994) (arguing that looking at courtrooms as sites for the production of meaning “leads to asking questions about processes of domination and resistance in the social field of the court, about the effect of court processes on larger communities, and about the hegemonic functions of law and the processes which limit it”).

6. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 10 (1965).

7. Whether a litigant has legal standing to raise a claim is a complex and oft litigated issue, and not one that I will explore in-depth. However, examples of this are the various cases about who can invoke the exclusionary rule as a remedy to a Fourth Amendment violation. *Compare* *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978) (holding that passengers in a car stopped by police do not have a right to raise an objection for a Fourth Amendment right violation because only car owners and drivers have a reasonable expectation of privacy in a car), *with* *Minnesota v. Olson*, 495 U.S. 91, 96–97 (1990) (finding that overnight guests do have a reasonable expectation of privacy on the premise of a third party's home).

actors are “critical cultural agents,” whose interpretation of the law in the context of a particular individual’s case or within the greater scheme of precedent have an impact on how individuals and groups are treated within the criminal justice system.⁸

Because of these complexities, the “enforcement model” of law and culture is not a useful analytical tool for understanding all the ways in which culture and the law interact. It oversimplifies both law and culture. The law does not merely enforce static cultural norms in order to bind society together. It also creates and manipulates the development of particular cultural beliefs.⁹ Furthermore, culture is not a stable or monolithic concept that can be enforced in a singular manner. The notion that law is able to do so ignores the many ways in which culture is constantly shifting. While anthropologists previously may have viewed culture as a bound category, they have since consistently insisted that culture “is never a closed, entirely coherent system.”¹⁰ It is actually the places of contest, such as courtrooms, where questions about cultural identities are constantly raised and reimagined.¹¹ Indeed, more than enforcing culture in a particular way, there has been strong critique that what the law actually accomplishes is a suppression of cultural expression and cultural developments in difference.¹²

I argue that there is a crucial nexus existing between a cultural defense and what has been termed a “rotten social background” defense.¹³ This nexus is grounded in the ability of these two forms of argument to illuminate how seemingly neutral legal terms such as “objective” or “reasonable” actually inflict structural harm on large groups of criminal defendants. Cultural defense theories do cause concerns within the anthropological community and critical race theory scholars, and these worries should not be ignored. However, I still believe it is essential that

8. Merry, *supra* note 5, at 53 (arguing that “[j]udges, attorneys, clerks, bailiffs, and police are critical cultural agents, reinterpreting this law in the light of local circumstances and local categories of personhood”).

9. Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 487 (2003).

10. Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575, 582 (1998).

11. Carol J. Greenhouse, *Constructive Approaches to Law, Culture, and Identity*, 28 LAW & SOC’Y REV. 1231, 1240 (1994) (arguing that it is impossible “to conceive of cultural identity apart from the arenas of contest in which questions of identity arise and are perforce answered”).

12. Post, *supra* note 9, at 488.

13. See generally Richard Delgado, “Rotten Social Background”: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. 9, 11 n. 11 (1985) (using the term “rotten social background” to “describe conditions of socioeconomic and environmental adversity”).

defendants be able to introduce evidence that speaks to their cultural difference and important factors of their social history, without facing the evidentiary bars that currently undermine the introduction of such evidence. Drawing upon the vast body of legal anthropology that has delved into the relationship between culture and the law, I will also discuss the ways in which courtrooms operate not only as gatekeepers for the introduction of cultural evidence arguments, but also as inherent production sites for culture itself.

Part I focuses on how legal defenses grounded in cultural difference or a rotten social background have customarily been perceived. Part II discusses an alternative look at the cultural and rotten social background defense, in order to illuminate how these theories can be read together to find important connections between the two defenses. Finally, Part III provides an example of case where these two theories could have been argued together to present a defense for diminished responsibility of criminal defendants.

I. AN INTRODUCTION TO THE CULTURAL DEFENSE AND ROTTEN SOCIAL BACKGROUND DEFENSE

A. INDIVIDUAL RIGHTS FRAMEWORK VS. AVERAGE REASONABLE PERSON STANDARDS

Before beginning to describe how various authors and actors within the justice system have advocated for these two legal defenses, it is important to place them in the context of Anglo-American common law courts. Within these courts, criminal defenses fall into two categories: justifications and excuses.¹⁴ The end result of successfully arguing either a justification or excuse defense is the same: the defendant is acquitted. However, the theories underlying these two classes of defense are substantively quite different. A justification defense exists when the law tolerates or even encourages what would otherwise be unlawful or socially harmful conduct.¹⁵ For example, self-defense is argued as a justification defense.¹⁶ Normally, harming someone is illegal. However, the law establishes that individuals have the right to defend themselves under certain circumstances, and acts committed in the course of self-defense are

14. Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1157–58 (1987).

15. *Id.* at 1161–63.

16. *Id.* at 1163.

lawful.¹⁷ Alternatively, an excuse defense argues that even though an actor's conduct was wrongful, there should still be no punishment.¹⁸ There is a split between the actor and the act. The defense recognizes that while the act was wrongful, under various legal excuses, the actor should still not be held accountable for the harm caused. One of the most important excuse defenses is an insanity defense; defendants are acquitted because they have diminished mental capacities and cannot be held responsible for their unlawful acts.

In the American legal rights tradition, the primary focus has been on individual rights.¹⁹ Almost no legal rhetoric discusses the rights of communities or peoples, or even how an individual's membership in a certain group might impact that individual in ways that go outwardly unnoticed.²⁰ This insistence on maintaining a focus on individualization appears to be in tension with the glaring lack of particularity in the common law's consideration of acceptable legal defenses.²¹ Indeed, each time a jury reaches a decision under the common law guidance of the "reasonable person" standard, it is purporting to determine what would be offensive or contrary to "generally accepted standards of decency and morality."²² What can be masked during this analysis is the large degree of variance amongst jurors and defendants about what generally acceptable standards are for individuals. Arguing for an increased particularization of excusing conditions, Professor George Fletcher claims that the four most widely recognized legal excuses—mistake of law, necessity, duress, and insanity—are all bound together by a common theme of involuntariness.²³ They are united under a "felt distinction between condemning the act and blaming the actor," with an eye to the notion that something about a factual scenario makes it reasonable to believe the actor was operating under a framework of externally limited choice.²⁴ However, Fletcher outlines how this distinction does not seem to be recognized in common law courts in the United States. Not only are legal excuses rarely successful for defendants in criminal courts, but the few times they are recognized, the analysis

17. *Id.*

18. *Id.* at 1161–63.

19. Farooq Hassan, *The Right to Be Different: An Exploratory Proposal for the Creation of a New Human Right*, 5 *LOY. L.A. INT'L & COMP. L. REV.* 67, 69–72 (1982).

20. *Id.*

21. George P. Fletcher, *The Individualization of Excusing Conditions*, 47 *S. CAL. L. REV.* 1269, 1300–01 (1974).

22. Post, *supra* note 9, at 486–87 (citation omitted).

23. Fletcher, *supra* note 21, at 1271.

24. *Id.*

evades the question of whether or not to condemn the act but not the actor.²⁵

Much of this reluctance stems from the notion that the common law consists of nothing but rules and exception to rules.²⁶ Other legal systems are more likely to look to standards, as opposed to rules, in order to govern their decisions.²⁷ A standard would beg an evaluative question relating to whether or not a person was morally culpable for his or her act based on available information. Answering this question requires making a normative judgment about how much blame can be reasonably attributed to this particular person, which goes against the deeply ingrained legal positivism that defines American jurisprudence.²⁸ American common law turns instead to what the “average reasonable man” would do in a given situation. Doing so allows jurists to abstract the legal issues from the particular character or situation of the accused, and instead “think of the case as a recurrent problem—the type of problem that is amenable to solution by rules.”²⁹ The “average reasonable person” is a cornerstone of common law jurisprudence for this reason, but this framework is also an integral part of the debate on a cultural or rotten social background defense. Support for the average reasonable person standard argues that this fictional person was created to avoid passing evaluative judgments about a particular defendant’s character by replacing him or her with an objective standard.³⁰ However, proponents of cultural and rotten social background defenses point out that creating this fictional character inherently involves making normative judgments about which characteristics, attributes, fears, or response patterns should be incorporated into an average reasonable person framework.³¹ These normative judgments are inescapable; they are

25. *Id.* at 1272 (arguing that rather than making the nuanced distinction between actor and the act, the discussion of legal excuses by jurists sounds more like a justification, and they discuss the crime as if no wrong was committed at all).

26. *Id.* at 1299–1300.

27. Fletcher often compares the Anglo-American common law system to that of Germany, which he argues is much less troubled with distinguishing between act and actor. There is also a distinct lack of reliance in the German system on comparing the acts of individual defendants to abstract and objective ideals. *Id.* at 1280, 1300–01.

28. Fletcher argues that many practitioners and judges in the American legal system think there is something definitively “illegal” or “extralegal” about making decisions based of the individual considerations of a particular defendant. Doing so flies in the face of the old adage of “treating like cases alike,” and the equalizing consistency that such a uniform set of rules is meant to have on defendants. *Id.* at 1305–09.

29. *Id.* at 1299.

30. *Id.* at 1290.

31. ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 15, 36 (2004). *See also* Fletcher, *supra* note 21, at 1292 (arguing that the reasonable person test requires jurists to make moral judgments);

just made invisible by masking them in terms such as “objective” and “reasonable.”

Professor Alison Dundes Renteln has written extensively on how a legal cultural defense might manifest itself. In doing so, she has addressed the average reasonable person standard in the context of criminal law. She argues that being reasonable actually requires the consideration of evidence particular to a defendant’s circumstances, rather than its exclusion.³² Refusing to acknowledge the various ways that different cultures legitimately give meaning and direction to an individual’s life betrays the goal of being a neutral and unbiased observer. It does so by excluding information relevant to understanding a defendant’s intent and actions, which prevents jurors from completely analyzing a defendant’s criminal culpability.³³ Renteln argues that refusing to apply a culturally specific reasonable person test is actually a violation of equal protection.³⁴ It does not give defendants an equal opportunity to adequately defend themselves when their intent was influenced by norms that vary from mainstream culture.³⁵ Indeed, the norms of equal treatment and opportunity are driving forces behind the belief that cultural and rotten social background defenses are necessary to achieve a fair and just system of criminal judgment and sanctions.

B. INTRODUCTION TO THE CULTURAL DEFENSE

Cultural defense scholarship has grown considerably in the past decade, though relatively few scholars concentrate their work on cultural difference and its implications for the criminal justice system in the United

Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. Rev. 293, 298, 301–02, 317–334 (1997) (“The normative reasonable person acts as a surrogate for society, whose mandate is not the discovery of what the parties reasonably intended, but the discovery of what society believes they should have intended.”).

32. RENTELN, *supra* note 31, at 43–48.

33. *Id.* at 185, 196–97.

34. *Id.* at 36.

35. There are several cases in which defendants raised a claim for equal protection violation, but Renteln gives the most treatment to an unpublished homicide case from 1992, *Trujillo-Garcia v. Rowland*. *Id.* at 34–35. Eduardo Trujillo-Garcia was convicted of second-degree murder and received a sentence of fifteen years to life for killing a man who insulted his honor by using a culturally charged Mexican insult. Trujillo-Garcia argued that the jury should receive an instruction prompting them to evaluate the degree of provocation this insult had for an average reasonable Mexican man. Without this culturally specific reasonable person test, Trujillo-Garcia argued, the jury would not understand the full implications and offensiveness of the insult. This instruction was not granted, and while the appellate judge in the case acknowledged that the equal protection argument had some traction, she ultimately did not think Trujillo-Garcia had acted reasonably. *Trujillo-Garcia v. Rowland*, No. 93-15096, 1993 U.S. App. LEXIS 30441, at *1–2 (9th Cir. Nov. 10, 1993).

States. There is a spectrum for how culture is dealt with by the law. At one end is the notion that law operates to enforce a stable and mutually agreed upon vision of common culture.³⁶ At the other end is the view that culture and the law are engaged in constant conflict, with a dominant group suppressing the cultural expressions of non-dominant parties.³⁷ Family law is a good lens for viewing how perspectives from both ends of this spectrum operate in our legal system. Family law can be a force that imposes a socially accepted set of familial norms, but it can also be used to open up space for multicultural families.³⁸ For example, recognition and prohibition of marital rape enforces “one side of a vigorous cultural dispute about the proper role of women within the family.”³⁹ Previously, marital rape was considered to be an impossibility. There was no actionable legal claim because, socially and legally, there was no crime.⁴⁰ It was a cultural shift triggered by women’s movements in the United States that created laws that criminalized rape within a marriage.⁴¹ The creation of criminal marital rape charges represents the enforcement of common, albeit new, cultural norms through the law.

Operating on the other end of the spectrum are laws that, rather than imposing cultural norms, instead “permit a discrete cultural minority to pursue its own vision of the family despite its inconsistency with dominant social norms.”⁴² In *Wisconsin v. Yoder*, an Amish family wished to be exempt from a state law mandating that children be sent to school until age sixteen.⁴³ The law was contrary to the Amish conception of family life.⁴⁴ Here, rather than imposing cultural norms, the court permitted accommodation for varying beliefs and completed a thorough inquiry into how Amish religious beliefs interacted with dominant beliefs about education.⁴⁵

36. Post, *supra* note 9, at 486.

37. *Id.* at 493–94.

38. *Id.*

39. *Id.*

40. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1392–93 (2000).

41. *Id.* at 1375, 1491.

42. Post, *supra* note 9, at 494.

43. *Id.*; *Wisconsin v. Yoder*, 406 U.S. 205, 205 (1972). The case was ultimately decided on First Amendment grounds because Amish parents argued that it was against their religion to send their children to high school. *Yoder*, 406 U.S. at 209–10.

44. Post, *supra* note 9, at 493–94.

45. See *Yoder*, 406 U.S. at 209–212 (describing in detail the Amish community’s beliefs and practices related to education).

These two examples, the development of marital rape laws and the weighing of state interest in education against minority community beliefs, are different deployments and challenges being made by the law and culture. It is important to recognize in each instance how culture is being mediated through law. Cultural defense arguments are most often clustered at the end of the spectrum with cases like *Windsor v. Yoder*, but these arguments cannot exist without recognizing what is happening at the other end of the spectrum.

The term “cultural defense” is in some ways misleading, considering there is no recognized legal defense that goes by this name. The term is often used to refer to arguments made by immigrants, refugees, and indigenous people to explain and describe how their customary practices, laws, and beliefs differ from majoritarian norms.⁴⁶ Professor Renteln, a primary advocate for a formal legal cultural defense, argues that:

A successful cultural defense would permit the reduction (and possible elimination) of a charge, with a concomitant reduction in punishment. The rationale behind such a claim is that an individual’s behavior is influenced to such a large extent by his or her culture that either (i) the individual simply did not believe that his or her actions contravened any laws (cognitive case), or (ii) the individual was compelled to act the way he or she did (volitional case). In both cases the individual’s culpability is lessened.⁴⁷

There is no evidentiary or substantive rule that currently governs the introduction of cultural evidence in a defendant’s criminal trial.⁴⁸ Instead, whether or not this evidence is admitted or considered depends primarily on the discretionary powers of prosecutors and the judges who preside over cases.⁴⁹ Sometimes a judge will permit the introduction of cultural evidence to demonstrate a defendant’s state of mind at the time of a crime or as evidence pertaining to the *mens rea* element of a criminal act.⁵⁰ This often comes in the form of expert witness testimony, which has been governed by two primary cases in the United States: *Frye v. United States*

46. Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN’S STUD. 437, 439 (1993).

47. *Id.*

48. Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 916–17 (2007).

49. Renteln, *supra* note 46, at 439; Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1294–95 (1986).

50. Lee, *supra* note 48, at 920.

and *Daubert v. Merrell Dow Pharmaceuticals*.⁵¹ The *Frye* test held that expert witnesses could only rely on scientific evidence after the scientific community had come to a general consensus that the techniques being discussed were valid and applicable to the case at hand.⁵² This test was later superseded by *Daubert* and Federal Rules of Evidence 702 and 703, which rely much more heavily on notions of falsifiability and the process by which information and theories are tested. The *Daubert* court isolated four main considerations for assessing the validity of expert testimony and scientific evidence: (1) whether knowledge can be and has been tested and proved viable; (2) whether the theory or technique being employed has been subject to peer review; (3) in the case of a particular scientific technique, the court should consider the rate of error and controlling standards to minimize error; (4) “general acceptance” of the ideas presented *à la* the *Frye* test.⁵³ These tests are clearly designed to review evidence from “hard” sciences. While there is a general consensus amongst anthropologists about how to work with subjects, a methodology called participant-observation, applying the notion of “rate of error” or proving information to be objectively true, makes for a poor fit with cultural evidence.

Consequently, judges in Anglo-American courts are often reluctant to permit the introduction of evidence from an anthropologist or social scientist about a defendant’s cultural background. The introduction of this evidence is always up to judicial discretion, but expert witness restrictions make it even less likely that evidence will be permitted during the trial phase of a case. More often, a judge will use discretion to consider cultural evidence during the sentencing phase of a trial, in order to mitigate punishment.⁵⁴ However, the inconsistency of this practice and the fact that it largely depends on the “luck of the draw” in terms of which prosecutor or judge a defendant receives makes this unsatisfactory in many ways.⁵⁵

51. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

52. *Frye*, 293 F. at 1013.

53. *Daubert*, 503 U.S. at 593–94.

54. Note, *supra* note 49, at 1294–95.

55. Maintaining the introduction of cultural evidence in the “ad hoc” realm of prosecutorial discretion and judicial sentencing denies defendants procedural safeguards and attorneys guidelines for how to fairly treat this type of evidence. The lack of transparency involved with these decisions makes it more difficult to review the introduction of this evidence or to understand that true impact that a cultural defense may have had on a defendant’s case. Defendants who are most likely to introduce cultural evidence already come from marginalized communities that have reason to be suspicious of the penal system, and so this further lack of consistency or predictability is particularly troubling. *Id.* at 1297–98.

Scholars have argued that a formalized legal defense, grounded in introducing relevant cultural evidence, is actually necessary to ensure equal protection of the laws for all defendants. This is because jurors who share a mainstream cultural framework with a defendant are able to better grasp the effects certain facts would have on these defendants. Jurors have more complete background knowledge or context to evaluate a defendant's actions. In order to treat all defendants equally, those whose lives and actions have been influenced by a culture that is not readily accessible to the majority of legal actors, primarily jurors, deserve to have this information presented as evidence to create the same complete picture. Not doing so places a defendant's actions outside of the appropriate context and disables them from receiving the same treatment that their majority cultural counterparts receive.⁵⁶ The cases described below will illustrate how introducing cultural evidence is necessary to level the playing field for certain defendants.

Cultural defense arguments have been made in several notable cases, though always under the auspices of a currently accepted legal defense theory. Professor Renteln provides a detailed explanation of the ways cultural evidence has been deployed using preexisting legal defenses.⁵⁷ There are two primary cases she analyzes, one of which I will highlight here and the other of which I will address in the section on the rotten social background defense⁵⁸, to help illustrate how cultural evidence has been used in criminal defenses. *State v. Butler* is a case from 1985 in which two Native American defendants were charged with first-degree murder of a Caucasian man.⁵⁹ Boiled down, the facts indicate that the decedent, Donald Pier, had been digging up Native American graves on Siletz land for years in order to sell authentic tribal artifacts.⁶⁰ Native American residents had been reporting these incidents to local law enforcement authorities, but no action was taken on their behalf.⁶¹ Tribal members attempted to take matters into their own hands by contacting those they suspected of robbing and desecrating gravesites and requesting that they return the artifacts.⁶² Many people complied with this request, but Pier denied any connection

56. Renteln, *supra* note 46, at 439–440.

57. *Id.* at 445–65.

58. *See infra* Part I.C.

59. *State v. Butler*, Case No. C-85-05-32135, Circuit Court of the State of Oregon for the County of Multnomah (Sept. 1985) (unreported decision).

60. Renteln, *supra* note 46, at 453 (citations omitted).

61. *Id.*

62. *Id.*

with the stolen items.⁶³ Upon his continued denial, the two defendants in this case allegedly smashed Pier's fingers and cut his throat.⁶⁴ At trial, the defendants urged their attorney to advance the argument that their actions were comparable to self-defense, based on Siletz beliefs about the sacred quality of ancestral burial grounds and spiritual tranquility for the dead.⁶⁵ The judge permitted testimony from a tribal member about how integral these beliefs were to the tribe's religious value system, and how the only way to restore order and peace to the tribe would be to either re-bury the stolen artifacts or spill the blood of those who had removed them.⁶⁶ Permitting this testimony was a rare display of cultural awareness on the part of the judge, but the cultural evidence presented did not end up being relevant in the outcome of the case—which was dismissed for lack of evidence.⁶⁷

However, Renteln indicates that had this evidence been dispositive, it would have posed serious legal questions and problems for the theory of self-defense.⁶⁸ Self-defense only permits the use of deadly force when it is necessary and proportionate. As the defendants' lives were not at stake in this case, their use of deadly force could not be justified under the traditional theory of self-defense. Renteln argues that accepting these cultural arguments in the realm of defense cannot be sustained in any modern legal system because “[e]ven if from their point of view disturbing ancestral lands is more opprobrious than homicide, in the United States the taking of life is considered the most grave offense.”⁶⁹ This tension between the introduction of cultural evidence and traditional legal defenses is why many scholars have argued that a separate defense for cultural arguments should be established.

Ultimately, however, the concept of “when in Rome, do as the Romans do” holds a strong appeal to those who believe that an individual should conform to the laws, as well as the moral and cultural underpinnings that give meaning to these laws, if they wish to also accept the benefits of living in a country such as the United States. This harkens back to the enforcement model of how culture and the law should interact. I will address this viewpoint when I discuss how traditional conceptions of a

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 454.

69. *Id.*

cultural defense can be transformed to illuminate why “cultural” evidence is misnamed as such. For the time being, it is worth noting that as our country becomes more legally pluralistic and multicultural, it also becomes more difficult to determine who exactly the Romans are and what they might do.

C. “ROTTEN SOCIAL BACKGROUND” DEFENSE

It was in D.C. Circuit Judge David L. Bazelon’s 1972 dissenting opinion to *United States v. Alexander* that the term “rotten social background” was first prominently used to argue that a defendant’s culpability should be considered in light of his or her social and economic background.⁷⁰ In *Alexander*, defendant Benjamin Murdock was convicted of shooting a marine who had called him a “black bastard” at a restaurant.⁷¹ The defense argued that the Murdock should be acquitted because certain factors of his “rotten social background” had compelled him to shoot.⁷² Referring in particular to Murdock’s childhood in the Watts neighborhood of Los Angeles, a low-income neighborhood known for a prevalence of drug use and intense gang violence, the defense relied on an expert witness.⁷³ This expert testified that while Murdock was not suffering from any hallucinations or recognized psychosis, he was “greatly preoccupied with the unfair treatment of Negroes in this country and the idea that racial war was inevitable.”⁷⁴ Murdock had emotional difficulties and severe impulse control problems that were closely tied to his experiences of racial oppression.⁷⁵ Being called a “black bastard” by the marine prompted Murdock to have an irresistible impulse to shoot.⁷⁶ Murdock’s conviction was upheld on appeal, but in his dissent, Judge Bazelon argued that the trial judge committed a reversible error when he instructed the jury on the issue of criminal responsibility.⁷⁷ The trial court judge told the jurors:

We are not concerned with a question of whether or not a man had a rotten social background. We are concerned with the question of his

70. *United States v. Alexander*, 471 F.2d 923, 926–65 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) (quoting the trial court judge, who used the term as part of his instruction to the jury on the matter of criminal responsibility).

71. *Id.* at 929.

72. *Id.* at 957–59. The defense was not the one to employ the term “rotten social background.” It was the trial judge who first used it in his instructions to jurors to disregard the arguments the defense made about Murdock’s social history. *Id.*

73. *Id.* at 957–58.

74. *Id.* at 957.

75. *Id.* at 957–58.

76. *Id.* at 957.

77. *Id.* at 960.

criminal responsibility. That is to say, whether he had an abnormal condition of the mind that affected his emotional and behavioral processes at the time of the offense.⁷⁸

Judge Bazelon believed that this instruction was a violation of fundamental fairness, though he struggled in his dissent to articulate the best way for this evidence to be presented and considered. A long-standing critic of the insanity defense and the various standards used under the M’Naghten rule⁷⁹ or the Model Penal Code, Judge Bazelon was wary about using social and economic history evidence to support an insanity defense, especially considering that this could lead to the civil commitment of these defendants. He did not reach a conclusion in his dissent, but in a subsequent law review article, titled “The Morality of the Criminal Law,” Judge Bazelon advanced an argument on the rotten social background defense and the concept of legal moralism.⁸⁰

Judge Bazelon argued that the incessant focus on the need for a mental disease to be diagnosed before a defendant could argue an insanity defense excluded valuable testimony on how social, economic, and cultural elements affected a defendant’s culpability.⁸¹ Bazelon argued that because moral condemnation forms the basis of criminal sanctions, we could only criminalize what we can condemn.⁸² The nature of this system, in Bazelon’s view, means that we must ask and grapple with the very difficult questions about the “relationship between crime and the accident of birth.”⁸³ Jurors must have information about the environment in which a defendant was raised, so they can understand how the circumstances of that individual’s life affected his or her choices.

A particularly striking passage of Judge Bazelon’s article is a point in which he describes being appalled at a particular decision made by a juvenile court judge, whom he had previously considered to be sensitive and well-reasoned. In essence, the juvenile court judge decided that a young woman who was impregnated at age ten and raped at age sixteen was “far less” traumatized from these experiences than another youth would have been because she was raised by a “criminal” family and had

78. *Id.* at 959.

79. The M’Naghten rule is a test used in most jurisdictions in the United States to determine if a defendant was cognitively impaired at the time of the crime. *See* Renteln, *supra* note 46, at 456.

80. Judge David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 389–90 (1976).

81. *Id.* at 394–95.

82. *Id.* at 388.

83. *Id.* at 405.

grown up in poverty.⁸⁴ I refuse to fit the experience of child pregnancy and rape into a comparative hierarchy predicated on socioeconomic status. However, if the justice system is going to claim that a defendant's "rotten social background" renders her less capable of experiencing severe trauma, then it only seems equitable, or at the very least logical, to extend the argument that defendants' backgrounds also impact their criminal responsibility and culpability.

In the forty years that have passed since Judge Bazelon introduced these arguments, little has changed within the justice system, but inequality continues to grow unabated.⁸⁵ There has been a greater push for the legal acknowledgment of the link between crime and poverty, as several academic disciplines have found "that poverty is an important determinant of human action and one's life chances."⁸⁶ It is not always the case that this type of evidence is completely missing from a defendant's criminal trial. Particularly in death penalty cases, where a trial is split into guilt and penalty phases, a defendant is allowed to introduce experiences of abuse, malnutrition, neglect, lack of educational opportunities, and the general failure of social institutions to protect him or her as mitigating factors for jurors to consider in sentencing decisions. In fact, in 2000, the United States Supreme Court held in *Williams v. Taylor* that a defendant, Terry Williams, had a valid ineffective assistance of counsel claim because his attorney failed to investigate or present evidence about his diminished mental capacity or the extreme abuse and neglect Williams had experienced as a child.⁸⁷ The Court held that this failure was grievous enough that it passed the usually insurmountable *Strickland* test for ineffective assistance counsel claims.⁸⁸ This test requires defendants to show not only that the performance of counsel fell below an objective standard of reasonableness, but also that the defendant was prejudiced by the failure such that, but for counsel's errors, there was a reasonable

84. *Id.*

85. See, e.g., Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1, 4 (2011) (highlighting persisting problems of mass incarceration, racial inequality, and wealth gaps); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2010) ("We have not ended racial caste in America; we have merely redesigned it."). See generally BRIAN BARRY, *WHY SOCIAL JUSTICE MATTERS* (2005) (describing the need for a theory of social justice to address problems of inequality).

86. Delgado, *supra* note 85, at 11 (explaining that sociology has done significant research into how a person's social structure shapes and influences their ability to exercise "free will" and how psychology and neuroscience have worked together to understand how the brain is physically changed when it develops in conditions commonly associated with low socioeconomic status).

87. *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000).

88. *Id.* at 397.

probability that the outcome of the case would had been different.⁸⁹ The *Williams* decision effectively established a Constitutional right for capital defendants to present mitigation evidence about their social backgrounds during the penalty phase of a death penalty trial.⁹⁰ However, the right to present this evidence during the guilt phase of any trial is still not secure for the majority of criminal defendants.

Writing a decade after Judge Bazelon's dissent in *Alexander* and his law review article were published, Richard Delgado argued that unless society was comfortable accepting that people are poor because they are criminal, then we must consider the possibility that people turn to crime as a result of their poverty.⁹¹ Delgado laid out a thorough exploration of how characteristics of a "rotten social background," from factors such as malnutrition, unstructured home life, police targeting, racism, community isolation, and lack of legitimate upward mobility options affect the likelihood that someone will be convicted of a crime.⁹² He presented possibilities for a new legal defense based upon a defendant's experience with poverty and social marginalization, and ultimately concluded that an excuse defense that would exculpate the actor, but not the act, would be best suited for this type of defense.⁹³ However, even as impoverished communities become more marginalized and there are fewer opportunities for individuals to break out of the cycle of poverty, a defense of this nature never materialized. In a more recent publication, Delgado reflects that this failure signals a disturbing lack of commitment or care for the most disadvantaged in our society.⁹⁴ He argues that we have created an entire group of "throwaway people," who, "[i]n fact, we throw . . . away twice, once when they are born into unutterable circumstances, and, later, a second time, when, having become monsters, they transgress our criminal law and we punish them without a second thought."⁹⁵ Refusing to work either to alleviate the circumstances of those born into poverty or to work toward guaranteeing people a fair trial raises serious questions about our authority to punish defendants who have "rotten social backgrounds." This brings me to my discussion of how the scholarship on a theory of cultural

89. See *id.* (citing to the *Strickland* test, established in *Strickland v. Washington*, 466 U.S. 668 (1984)).

90. Mythri A. Jayaraman, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327, 340 (2002).

91. Richard Delgado, "Rotten Social Background": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 10 (1985).

92. *Id.* at 23–37.

93. *Id.* at 75–78.

94. Delgado, *supra* note 85, at 22.

95. *Id.* at 15.

defense and the rotten social background defense can be read together in order to advocate for defendants whose cultural backgrounds are grounded in the experience of oppression and marginalization.

II. MOVING FORWARD AND BEYOND A CULTURAL AND ROTTEN SOCIAL BACKGROUND DEFENSE

A. ALTERNATIVE PERSPECTIVE ON THE UTILITY OF A CULTURAL DEFENSE

Many anthropologists are disquieted by the notion of a “cultural defense” or the general use of “culture” in legally strategic ways.⁹⁶ As the Comaroffs alluded to in their discussion of South African constitutional debates, culture has become a catchall phrase that can be made amenable to whatever special interest group has use for it. Much of the time, those using culture as a tool for argument present it as being some sort of monolithic, fixed concept that can be easily named and identified.⁹⁷ This in itself is highly problematic for most anthropologists, who have come to view culture as something with constantly shifting meaning. Culture involves new developments and internal inconsistencies that are just as much a part of what it means for people to understand the world around them as tradition or long-held practice. In fact, many anthropological ethnographies and theories published in the last twenty to thirty years can be read as directly oppositional to a cultural defense being used in the law. Fredrik Barth, a prominent social anthropologist who is particularly opposed to viewing cultures as bounded entities, wrote in an ethnographic study of Bali that, “‘Culture’ and ‘society’ come about through the practice of Balinese lives; and we must not use our constructs of these in turn as a kind of explanation for those very events, activities, and relations of which they are our representation.”⁹⁸ His argument is that we must view culture and society as a product that flows from human interaction, rather than viewing it as preceding these interactions. Contrary to his views, this explanation of events, activities, and relations is exactly what lawyers are attempting to do when they make cultural defense arguments. The goal is to present

96. Unni Wikan, *Culture: A New Concept of Race*, 7 SOC. ANTHROPOLOGY 57, 57 (1999) (recounting telephone calls from lawyers asking her to come testify to some cultural element of a case, and her refusal to do so).

97. *Id.* at 57–58.

98. FREDRIK BARTH, *BALINESE WORLDS* 95 (1993). Barth does recognize that there is utility in understanding traditional conceptions and customs as well as institutional constraints that are placed on people because of the communities or societies in which they live, but he believes that the focus should be on the interaction between people and interpreted experiences rather than on conceptual structures that an ethnographer uses for understanding culture. *Id.* at 96–97.

evidence to a jury about how a defendant's intent and actions must be understood within a certain culturally influenced framework. Consequently, these "constructs" of culture that Barth describes are being used exactly as he wished they would not be, to extrapolate and explain the motivations of human behavior.

A troubling and more pragmatic criticism of the cultural defense argument is that applying it in the legal world permits the majority to regard itself "as thinking, reasoning, acting human beings with the ability to reflect and respond to changing circumstance" while positing immigrants, or extra-cultural individuals, "as caught in the web of culture and propelled to do as culture bids" without the ability to adapt or reflect.⁹⁹ As in nearly every circumstance in which a group is otherized, the resulting distancing is dangerous and can lead to discrimination, animus, and general harm. This is especially true if this difference is somehow legitimized by the law or the state, which is what a cultural defense might do.

These criticisms must be addressed before continuing, particularly because criminal defense attorneys are not typically looking to impose this kind of harm upon their clients. Culture is a complicated and unwieldy concept to work with, both theoretically within the world of anthropological scholarship and pragmatically for a criminal defense attorney. However, this does not mean that arguments grounded in the presentation of cultural evidence cannot be used to reveal fundamental miscarriages of justice within our judicial system. It is not necessary to view culture as a fixed "artifact of certain kinds of legal arguments," which forbids creativity and agency on behalf of criminal defendants and their attorneys.¹⁰⁰ There are ways to discuss culture and socioeconomic status that persuade fact finders to acknowledge these elements in the legal defense context. It is the American reality that people, as individuals and communities, do not all live the shared experiences of the "average reasonable person." At a certain point, this fictional legal character needs to be challenged for the presumptive claims that it makes.

That defendants must argue for the introduction of "culturally specific evidence" in lieu of "traditional" evidence speaks to the disadvantaged position they begin from in the criminal justice system. Marking this evidence as representative of difference masks the reality that the current legal system is itself a composition of culturally specific ideals and beliefs

99. Wikan, *supra* note 96, at 58.

100. Melissa Demian, *Fictions of Intention in the "Cultural Defense,"* 110 AM. ANTHROPOLOGIST 432, 432 (2008).

that have developed over time. It is telling that the assumptions underlying the current reasonable person test are able to posit themselves as being somehow antithetical to, or at least different from, “cultural evidence.” These underlying assumptions have actually been “introduced, appropriated, deployed, reintroduced and redefined in a social field of power over a historical period,” in a way that has enabled “particular cultural conceptions and practices [to] become embedded in politically and economically powerful institutions such as legal systems.”¹⁰¹ Fundamentally, the average reasonable person that has been developed throughout Anglo-American common law is as much of a cultural artifact as any evidence that cultural defense proponents have been trying to admit in criminal courtrooms.

The culturally specific nature of the average reasonable person standard actually becomes more evident when cultural defense arguments are permitted in court. Studies have revealed that defendants are most likely to succeed with a cultural defense argument when their claim conforms to dominant, American cultural norms.¹⁰² This has been looked at most often in the context of a provocation defense. Early American common law held that a husband who killed his wife after catching her in the act of adultery was permitted to argue that he was legally provoked such that his murder conviction should be reduced to manslaughter.¹⁰³ Though not as explicitly condoned by law anymore, this “rage” provocation argument of male anger over female infidelity has seen continual validation in judgments received by Anglo defendants in American courts.¹⁰⁴ To an extent, there appears to be a commonly shared cultural belief that when a (white, American) man discovers his girlfriend or wife engaging in sexual activities with someone outside of the relationship, he might (legally “justifiably”) get so angry that he cannot help himself from committing acts of violence.¹⁰⁵ The defendants who have successfully argued this have never had to posit their evidence as “cultural” or somehow mark it as special or different. Instead, they are able to appeal to supposedly shared sensibilities that inform common law definitions and understandings of provocation, actors within the legal system, and perhaps

101. Sally Engle Merry, *Changing Rights, Changing Culture*, in *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* 31, 46 (Jane K. Cowan et al. eds., 2001).

102. Lee, *supra* note 48, 921.

103. *Id.* at 943.

104. *Id.*

105. *Id.* (citations omitted).

also members sitting on their juries. In short, they are permitted to make these arguments as part of an excuse defense—they were provoked.

There are many cases in which Asian American male defendants are facing the same charges. When these defendants make the same provocation arguments, they are often told by the court that they can only do so by bringing in cultural expert witnesses or cultural evidence about why, for example, a Chinese-American man from a particular community in China might be enormously provoked by spousal infidelity.¹⁰⁶ Because this evidence is marked nontraditional or specifically “cultural,” it is often barred from being introduced. In barring this evidence, the legal system posits this defendant as somehow other, inferior, or just different in a way that is not relatable or excusable in our legal system. This denial of opportunity to make the same argument, because evidence is barred for some defendants but not for others, implicates the equal protection issues raised by Professor Renteln, and it should be considered as fundamentally unfair.

Admittedly, it is controversial and risky to claim that it is “fundamentally unfair” that some defendants are unable to argue provocation for the killing of their partners. It is not only a jarring and unsympathetic position, but many would also argue that barring this evidence appropriately limits the class of defendants who are able to tap into patriarchal norms that value women’s lives less than male honor. However, my point is not to defend these norms or forms of argument for their content. I have chosen this example precisely because it has been such a lightening rod of criticism by feminist scholars when it comes to a cultural defense. However, I believe that grappling with this example will illuminate precisely the reason why cultural evidence must become part of the conversations taking place within the criminal justice system. A jury can absolutely reject a defendant’s argument that he should be excused because gender relations are understood in a certain way within his cultural context. Even if there are elements of truth to this type of excuse argument, a jury does not have to agree that these forms of relationships should be recognized as adequate provocation. Defense arguments are found to be unpersuasive all the time. However, what must not be permitted is for a jury to reject an argument, or never even consider an argument, solely because it has somehow been marked as “extra-legal” due to its representation as cultural evidence. This privileges defendants who can

106. *Id.* at 941–42 (describing the case of Dong Lu Chen, who was charged with the murder of his wife after she informed him she was having an affair).

claim to exist within the same cultural framework as lawmakers and fact finders because they are not forced to name their supportive evidence as having the cultural content that it does. When an Anglo defendant makes these provocation arguments, he is playing on the same type of patriarchal cultural and social norms as the defendants from perceptively different cultures are; he just does not have to name them as such.

Indeed, opening space for cultural evidence to be consistently introduced may make it easier to identify insidious patriarchal norms that lead to increased rates of violence against women. Rather than feminist organizations working in opposition to cultural defense advocates, the groups could work together to illuminate the pervasive, and often harmful, norms that help make up much of common law doctrine in the United States. Rather than letting it stay masked as part of some objectively reasonable perspective, these norms could begin to be teased out and exposed to fact finders for their evaluation. We have imbued juries with immense power and presumed that they are able to make fine and nuanced distinctions of fact and law, and at this point in our legal system, we have to trust their ability to do so.

In sum, there are valid reasons for issuing a word of caution about how to advance and propose the use of cultural evidence in legal argument. At times, cultural defense theorists fall prey to the criticism of the essentialism or otherization that can occur when culture becomes part of a legal defense strategy. However, these critiques are surmountable. The benefit that come from exposing norms and beliefs as being part of a system that is just as “cultural” as the evidence that lawyers are trying to introduce on behalf of their clients outweigh the potential costs.

B. THE INTERSECTIONS BETWEEN A CULTURAL AND ROTTEN SOCIAL BACKGROUND DEFENSE AND THE DEVELOPMENT OF A NARRATIVE OF DEFIANCE

There are important reasons for keeping the theories of cultural defense and a rotten social background defense distinct. There is a difference between arguing that a defendant’s actions were influenced by his traditional Siletz beliefs about the desecration of ancestral burial grounds and arguing about how a lifetime in a violent and run-down housing project affected a defendant’s actions. However, while these are distinct frameworks for understanding possible criminal defenses, they do not need to be strictly exclusive of one another. First, it is often the case that those who hold and practice cultural beliefs that differ from the majority are typically also those who face structural inequalities and

discrimination. Additionally, the cultural responses that people and communities have developed as a result of systemic poverty can be better understood, for the purposes of a legal defense, by analyzing where the theories of cultural defense and rotten social background defense intersect.

Still, there are serious and well-warranted historical concerns that contemporary scholars have about discussing a “culture of poverty.”¹⁰⁷ Earlier scholars have been strongly criticized for suggesting that people might overcome conditions of poverty if only they could change their culture.¹⁰⁸ However, more recent scholarship does not describe an individual’s response to poverty as stemming from particular cultural decisions. Instead, an individual’s response is viewed in terms of “the effects of prolonged exposure to cultural traits that originate from or are the products of racial [and social] exclusion.”¹⁰⁹ This scholarship must combat more than a century’s worth of popular and scholarly discussions on the causation of poverty, which have been framed in terms of individual failings and deficiencies.¹¹⁰ When polled, “Americans tend to rank individual reasons (such as laziness, lack of effort, and low ability) as the most important factors related to poverty, while structural reasons such as unemployment or discrimination are viewed as significantly less important.”¹¹¹ Even those who study poverty have focused more on individual capacities, such as lack of job training, instead of structural problems, such as the inability of the labor market to provide opportunities for gainful employment for all families and workers.¹¹² The importance of recognizing the structural components of poverty cannot be overstated, and it is also significant to understand how cultural responses to these systemic barriers affect those who are disadvantaged by them. This recognition does not have to involve victim-blaming or a primary focus on individual beliefs and behaviors. There are cumulative cultural experiences that can provide information and context for the “chronic economic insubordination and

107. Mario Luis Small et al., *Reconsidering Culture and Poverty*, 629 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 8 (2010).

108. *Id.* (citation omitted).

109. William Julius Wilson, *Why Both Social Structure and Culture Matter in a Holistic Analysis of Inner-City Poverty*, 629 ANNALS AM. ACAD. POL. & SOC. SCI. 200, 200 (2010).

110. See generally Mark R. Rank et al., *American Poverty as a Structural Failing: Evidence and Arguments*, 30 J. SOC. & SOC. WELFARE 3 (2003) (“Poverty researchers have in effect focused on who loses out at the economic game, rather than addressing the fact that the game produces losers in the first place.”).

111. *Id.* at 4.

112. *Id.* at 4–5.

displays of disrespect” that affect how people interpret what has happened to them in their lives.¹¹³

Regina Austin discussed the phenomena of cultural framing within disadvantaged communities in her article, “*The Black Community, Its Lawbreakers, and a Politics of Identification*.”¹¹⁴ Her interviews with people within what might nebulously, and tentatively, be defined as “the black community” illuminated the complicated relationship that many people have with the lawbreakers in their communities. Even as crime is condemned and the destructiveness of violence is recognized, Austin observed a

tempered identification [with black criminals, which] persists among those with whom they live and work and among blacks who observe them from afar. This is partly because so much hypocrisy is entailed in labeling some activities illegal and other equally dangerous, detrimental, and larcenous activities not. There is also no other overtly political alternative that constitutes as provocative, creative, crass, hard-nosed, and daring an assault on the status quo as does the culture of young black male criminals. Blacks who would never think of emulating the risky entrepreneurial activities of lawbreakers nonetheless ambivalently admire them and point to their example when the subject turns to resistance.¹¹⁵

The hypocrisy that Austin notes, and the ambivalence it engenders in many people who view members of their communities simultaneously as dangerous aggressors but also as forms of resistance, merits careful consideration. It demonstrates how concepts such as fairness and justice are perceived by those who witness inconsistent law enforcement practices. It can develop into a powerful narrative about the experience of living in oppressed communities. Tommie Shelby discusses this ambivalence as well, arguing that certain laws enforced in what he calls the “dark ghetto” are at best hypocritical and at worst dehumanizing.¹¹⁶ Shelby relies on John Rawls’s *Theory of Justice*, in which Rawls asserts that unjust societies impose a form of violence on the oppressed, to argue that even if these oppressed communities outwardly consent to be governed, they are not

113. Wilson, *supra* note 109, at 211.

114. Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 S. CAL. L. REV. 1769, 1774 (1992).

115. *Id.* at 1787.

116. Tommie Shelby, *Justice, Deviance, and the Dark Ghetto*, 35 PHIL. & PUB. AFF. 126, 127–28 (2007). Shelby takes the term “dark ghetto” from Kenneth B. Clark’s *Dark Ghetto: Dilemmas of Social Power*, a sociological and psychological study of African-American urban neighborhoods.

bound by the laws of the society that wrongs them.¹¹⁷ Shelby focuses on the conditions of ghetto poverty, which he describes as being “(1) predominantly black, (2) urban neighborhoods, (3) with high concentrations of poverty.”¹¹⁸ The circumstances of ghetto poverty are deeply alienating, and Shelby argues that those who live in this environment often experience feelings of desperation, shame, and anger.¹¹⁹ Shelby discusses an array of responses that people have to deal with these circumstances. A primary response is the development of a subculture of survival and gamesmanship, which Shelby identifies as involving two (admittedly limited) descriptive identities: the gangster and the hustler.¹²⁰ Shelby’s ultimate argument, however, is that social justice can be analytically split to recognize civic obligations that citizens owe to one another as a form of political reciprocity and natural duties that humans owe to each other as moral agents.¹²¹ Shelby argues that the United States supports a quasi-feudal order that “does not warrant the allegiance of its most disadvantaged members, especially when these persons are racially stigmatized. Indeed, the existence of such an order creates the suspicion that, despite the society’s ostensible commitment to equal civil rights, white supremacy has simply taken a new form.”¹²² Shelby is not legitimizing crimes of violence or harm against others because he still believes that everyone has natural duties as moral agents to not harm others, but he argues that political systems must hold themselves accountable for the injustice they tacitly, and sometimes directly, support.¹²³ This has far reaching consequences for the criminal justice system, and is a potential strain of argument that can be incorporated into criminal defense strategies.

After the announcement of the Rodney King beating verdict, the riots that began in South Central Los Angeles resulted in the arrest and

117. *Id.* at 126 (citations omitted).

118. *Id.* at 134.

119. *Id.* at 136.

120. *Id.* at 137–38. Shelby is quick to argue that many who live in ghetto poor conditions value conventional morals and strongly believe in following the law. He does not wish to stereotype members of ghetto poor communities, but instead wants to demonstrate how the alienation from living in these communities is what often leads people to resort to criminal activities. Shelby acknowledges that people of all races, classes, and types of neighborhoods engage in criminal behavior, but when “persons from the ghetto choose crime, . . . they do so under conditions of material deprivation and institutional racism. Thus their criminal activity might express something more, or something other, than a character flaw or a disregard for the authority of morality.” *Id.* at 136.

121. *Id.* at 144–45.

122. *Id.* at 134.

123. *Id.* at 154.

prosecution of several African American individuals who were allegedly involved in committing acts of violence.¹²⁴ In his article, *Defending Racial Violence*, Anthony Alfieri describes the case of two defendants who were arrested during this time, Damian Monroe Williams and Henry Keith Watson.¹²⁵ Williams and Watson were charged with twelve counts of aggravated mayhem, felony assault, robbery, and attempted murder.¹²⁶ Their attorneys took two different approaches to their defense, arguing mistaken identity and diminished capacity as a result of “group contagion” stemming from mob violence.¹²⁷ The second defense claim was raised to mitigate responsibility and punishment for the most serious charges, aggravated mayhem and attempted murder.¹²⁸ It could only operate as a partial excuse that would not exculpate the defendants.¹²⁹ The attorneys wove two different narratives to describe the actions taken by their clients. These narratives, at their core, can be described as either communicating a message of deviance or a message of defiance.¹³⁰ Though they often intersect or are deliberately combined, a narrative focused on deviance emphasizes the image of uncontrollable rage and violence associated with the rioting and suggests an individual emotional response to the Rodney King verdict.¹³¹ Conversely, a narrative emphasizing defiance conjures images of “a more rational, community-wide response to ‘a systemic set of social dynamics’ involving the ‘day-to-day subordination of the Los Angeles African American community.’”¹³²

A narrative of racial deviance is strikingly similar to the type of legal argument that alarms anthropologists in the context of a cultural defense. It naturalizes the notion that young black men, and black communities in general, have a pathological predisposition for violence.¹³³ Using legal discourse, defense attorneys uncritically engage in the perpetuation of racist stereotypes by arguing various forms of this uncontrollable “black rage” defense. This narrative is discussed in terms of individual responses to an event, and typically, the defendant’s race is never actually mentioned as the story is being told. There is a “colorblind” bend to this narrative that

124. Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1301–02 (1995).

125. *Id.*

126. *Id.* at 1301.

127. *Id.*

128. *Id.* at 1302.

129. *Id.*

130. *Id.* at 1304.

131. *Id.* at 1304, 1309–10.

132. *Id.* at 1304 (citation omitted).

133. *Id.* at 1310–11.

instead focuses on “irresistible impulses” suffered by a particular defendant who was caught up in a mob mentality.¹³⁴ Defense attorneys do not necessarily believe these narratives to be true, but they are using them for instrumental and strategic purposes, on a micro level, in hopes of achieving a favorable outcome for this particular client. In analyzing how Karen Ackerson and Edi Faal, the two lead attorneys for Watson and Williams, used these narratives, Alfieri challenges the notion that the defense stories used by criminal defense attorneys have no spillover effect outside of a case.¹³⁵ Faal used a narrative of racial deviance to negate the voluntary act element of Williams’s criminal charges by presenting Williams’s actions as parts of an “irresistible impulse.”¹³⁶ There are two forms of harm perpetuated by the use of a racial deviance narrative in this way, according to Alfieri. First, this narrative infers that “people of color lack the mind and moral character to engage in willful, voluntary acts,” a criticism which, as noted above, has also been voiced by those who oppose the use of a cultural defense.¹³⁷ Secondly, defense attorneys incorrectly assume that these forms of argument can be contained within the walls of the criminal courtroom. They assume individual defendants and their communities do not suffer harm from being told that they lack proprieties of the mind or moral agency. They fail to recognize how this racial deviance defense feeds into the “almost hysterical suspicion” that black men encounter daily while out in society.¹³⁸ Alfieri argues that there is active spillover from these defense tactics, and attorneys and clients should not assume that they can be shielded from accountability for pursuing these narratives.¹³⁹

Defiance narratives, on the other hand, are part of a race-conscious challenge to systems of oppression that are often masked within the day-to-day operations of the criminal justice system. Rather than focusing on a client’s inability to control him or herself personally, this narrative builds on racially restricted realms of choice. It places a “client’s capacity to exercise choice given his racial experience and the ‘particularistic modes of decision-making’ available under subordinating conditions.”¹⁴⁰ Advancing

134. *Id.* at 1308, 1314.

135. *Id.* at 1305–06.

136. *Id.* at 1314.

137. *Id.* at 1314–15 (“Faal contended, for instance, that ‘but for his ignorance[, Damian Williams] would not have attacked . . . Reginald Denny.’ Ignorance, according to Faal, ‘is what brought Damian Williams before the court.’”).

138. *Id.* at 1308 (citations omitted) (“The repetition of race-talk pushes racially subordinate images outside of the criminal courthouse into the mainstream of popular culture and society.”).

139. *Id.* at 1310.

140. *Id.* at 1335.

these narratives challenges what Alfieri calls the “perspectivelessness” of colorblind defense strategies for crimes in which defendants’ actions are expressive of or intertwined with racial violence.¹⁴¹ This perspectivelessness takes root when underlying social, political, and institutional factors that influence the framing of legal issues go presumptively unchallenged. Alfieri advocates against colorblindness or perspectivelessness in a similar fashion to the arguments made against calling certain evidence “cultural” and not marking other evidence as such.¹⁴² It masks the cultural formation of supposedly objective standards. In an interesting look at American Bar Association (“ABA”) Model Codes of Professional Responsibility and ABA Model Rules of Professional Conduct, Alfieri complicates the colorblind focus on zealous advocacy and nonaccountability encouraged by these bodies.¹⁴³ He argues that while they do not expressly sanction destructive racial narratives, they do make criminal defense practice susceptible to their use.¹⁴⁴ Alfieri advocates instead for an injection of race into the ethical considerations of criminal defense attorneys, wherein clients would oppose lawyer-devised theories of racial deviance and outside critique would also be leveled at this defense strategy.¹⁴⁵

Overall, there are distinct points of overlap between the objectives of cultural defense theorists and those who wish to bring social and racial oppression to the forefront of criminal defense strategies. This nexus is focused on revealing institutionalized mechanisms that force certain defendants to make harmful arguments or prevent them from accessing the same privileges as Anglo defendants. Understanding how and where these theories overlap can help defense attorneys represent clients whose experience of difference and oppression also overlap and whose current inability to consistently introduce supporting evidence is linked to the positions of disadvantage they often occupy in and outside of the courtroom.

141. *Id.* at 1337–38.

142. *Id.* at 1388.

143. *Id.* at 1320–21.

144. *Id.*

145. *See id.* at 132.

III. CONCLUSION: *PEOPLE V. CROY* AND INCORPORATING NARRATIVES ON CULTURE AND SOCIAL HISTORY INTO LEGAL PRACTICE

A case that exemplifies an attempt to reconcile a cultural defense and a rotten social background defense is found in *People v. Croy*.¹⁴⁶ In this case, a defendant struggled to present how both his experiences of cultural and social marginalization were important to understanding the events that led to his arrest. Professor Renteln discusses this case in the context of cultural arguments that have been made within preexisting defenses, but she also expresses her dissatisfaction with calling Croy's defense theory a cultural defense.¹⁴⁷ In *People v. Croy*, a self-defense argument was raised on behalf of Patrick Croy, a Native American who was part Karuk and part Shasta.¹⁴⁸ Croy lived in Yreka, California, during the late 1970s.¹⁴⁹ At this time, the town had experienced long-standing conflict between the Anglo and Native American communities.¹⁵⁰ Upon entering a local liquor store on Sunday evening with several friends, Croy was accused by the store clerk of owing him two dollars in change from a previous purchase.¹⁵¹ In the resulting conflict, the clerk claimed that Croy's companions attempted to rob the store.¹⁵² No one was injured in the alleged robbery. However the clerk's phone call to local law enforcement resulted in Croy and his companions being chased by twenty-seven police officers.¹⁵³ During the chase, Croy killed a police officer in what he claimed was self-defense.¹⁵⁴ Croy was subsequently convicted and sentenced to death on a felony-murder charge.¹⁵⁵ The California Supreme Court overturned his conviction six years later and granted Croy a new trial.¹⁵⁶

At this new trial, Croy presented a different self-defense argument. He incorporated cultural evidence about his experiences of racism as a Native American and his conditioning not to trust white authorities.¹⁵⁷ He argued

146. *People v. Croy*, 710 P.2d 392 (Cal. 1985).

147. Renteln, *supra* note 46, at 455 (arguing that the case was inappropriately characterized as a cultural defense case because it "did not deal with any issue of culture conflict as much as it dealt with race relations").

148. *Id.* at 454.

149. *Id.*

150. *Id.*

151. *Croy*, 710 P.2d at 395.

152. *Id.* at 396.

153. *Id.* at 395; Renteln, *supra* note 46, at 454.

154. Renteln, *supra* note 46, at 454.

155. *Id.*

156. *Id.*

157. *Id.*

he was predisposed to perceive that his life was in danger.¹⁵⁸ Croy's attorney later commented that it was essential that the jury "be informed and educated about the factors that affected defendant's perception of danger and his ability to defend himself, including any physical, psychological, historical or cultural characteristics he may have possessed."¹⁵⁹ Renteln observes that while this case incorporated discussions and testimony about cultural genocide and discrimination against Native Americans, she was uncomfortable asserting that this was a case of cultural conflict or competing norms.¹⁶⁰ Even with cultural evidence being introduced, she believed this case was more focused on race relations.¹⁶¹ The argument was not that Croy, as a member of the Karuk or Shasta tribes, held cultural beliefs that justified killing the police officer. Rather, the focus was on his cultural experiences as a member of a marginalized community that had been systematically oppressed by white law enforcement authorities for more than a century. These experiences are what formed the basis of his excuse defense and what were used to contextualize his response to having twenty-seven police officers chase him as the result of a dispute over two dollars.¹⁶² Ultimately, Croy was acquitted of all charges in his new trial.¹⁶³

This case cannot be understood without looking at both cultural difference and race. Not because Croy's cultural understandings of killing were relevant. But because it was precisely his perceived cultural differences and cultural history that were integral to the marginalization he experienced as a Native American and the fear he had of white sheriffs. It was a lifetime of experiencing a culture of oppression that created the cultural clash in this case, not a case of competing norms or conflicted race relations. Defendants do not live in bounded categories where they necessarily experience forces of cultural conflict and racism separately or uniquely. Instead, it is exactly these lived, daily interactions of defendants, such as Patrick Croy, that are outside the realm of common law understandings and the experiences of most legal actors. These experiences deserve to be better represented within a defense theory. It is not about creating a special rule or marking a distinct category of evidence for only certain defendants. It is about permitting access to the same privileges that

158. *Id.*

159. *Id.* at 455 (citation omitted).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 455.

defendants have if their cultural, racial, and social experiences are more closely aligned with majoritarian legal structures.

It is not just that Patrick Croy should be entitled to explain to jurors, and fit into a legal paradigm, why he feared for his life after being chased by twenty-seven law enforcement officials because of a dispute that resulted over pocket change. It is that Patrick Croy should be entitled to explain what it was to grow up Native American in a Californian community with a long history of inter-group conflict. He knew that as soon as a white liquor store attendant ran from the store, screaming about being robbed, things were not going to end well for him and his friends. It is the context in which he made his decisions that should be presented to jurors. It informs the essential elements of “reasonable” fear and the *mens rea* of defendants like Patrick Croy. These subtle cues, otherwise missed by fact finders who would not even know to look for them, will inform the narratives that defendants tell about their experiences. There has to be room within these two defense theories to recognize the nexus they share and a way to introduce narratives about the intersection between traditional notions of cultural difference and cycles of race oppression. Without these defenses, defendants across our criminal justice system are being denied equal protection and the due process rights to which they are guaranteed.