ON THE BOUNDARIES OF CULTURE AS AN AFFIRMATIVE DEFENSE

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A "cultural defense" to criminal culpability cannot achieve true pluralism without collapsing into a totally subjective, personal standard. Applying an objective cultural standard does not rescue a defendant from the external imposition of values—the purported aim of the cultural defense—because a cultural standard is, at its core, an external standard imposed onto an individual. The pluralist argument for a cultural defense also fails on its own terms—after all, justice systems are themselves cultural institutions. Furthermore, a defendant's background is already accounted for at sentencing. The closest thing to a cultural defense that a court could adopt without damaging the culpability regime is a narrow de minimis rule.

INTRODUCTION

In recent years, the concept of a "cultural defense" has made increasingly frequent appearances in academia and the courts. This Law & Policy Note argues that applying a narrowed or shifted "cultural" standard of behavior fails to avoid the imposition of external values onto a defendant, thus negating the purpose of the cultural defense. Unless the cultural standard of behavior to be applied is tailored to the precise cultural views of a particular defendant, the problem of imposing external values onto a defendant—what the cultural defense aims primarily to avoid—remains. Even a jury comprised solely of persons who share a defendant's particular cultural beliefs could not apply a properly narrowed cultural standard without ensuring acquittal, because the jury's members would, of course, necessarily be selected based on the confluence of their views of reasonable behavior with those held by the defendant. Legislatures should put the argument to rest by codifying the principle that cultural differences cannot exculpate defendants who are not otherwise excused under existing doctrines.

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In Part I, we briefly recount traditional arguments against the recognition of an independent cultural defense in the criminal law. Part II shows that because the concept of "judgment" necessarily entails the imposition of external, objectively determined values onto an accused, the adoption of an independent cultural defense would necessarily fail to achieve its own ostensible aim: preventing the imposition of external values onto an actor. A cultural standard still does so to whatever extent the standard remains in fact a cultural standard, as opposed to a purely subjective individual standard. Finally, in Part III, we explore the potential space that remains for culture in criminal law and propose that legislatures codify the conclusion from Part II and that courts consider the conclusion in Part III. We believe this would maintain the integrity of the culpability regime while permitting a narrow, due process-based argument applicable to de minimis infractions in cases where a defendant not only has no actual or constructive notice of the law, but does not even suspect his[1] actions represent the kind of behavior that is criminally regulated.

I. TRADITIONAL ARGUMENTS AGAINST CULTURAL DEFENSES

Arguments against recognizing an independent cultural defense tend to concentrate on policy and doctrinal coherence. This Law & Policy Note illustrates that there exists an additional problem with an independent cultural defense—one based neither on policy considerations nor on maintaining coherence of the existing culpability-based affirmative defenses, but rather on the internal incoherence of the very concept of an independent cultural defense. In this Part, we begin by very briefly recounting traditional arguments against the recognition of an independent cultural defense.

Common policy-based arguments against cultural defenses include the erosion of the ability of the law to instruct and deter, the potential for abuse of the defenses, the protection of victims (including equal protection concerns), stigmatization of cultural groups, and the potential for anarchy without common standards of behavior.[2]

First, by allowing for an excuse based on cultural differences, opponents argue that the law will lose its ability to instruct and deter.[3] Members of a culture who witness punishment for certain behavior will likely adjust away from that behavior over time, or, at least, their children will. However, without a consistent, cross-cultural punishment regime, there will be little incentive to adjust behavior disapproved by society at large.

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1. Solely for the purposes of flow and consistency, we use only the masculine pronouns *he*, *him*, *himself*, and *his*, when referring to hypothetical characters (such as defendants) throughout this Note.

2. *See* ALISON DUNDES RENTELN, THE CULTURAL DEFENSE 192–94 (2004).

3. Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1303 (1986). One philosopher has even argued that a defendant has a right to punishment as recognition of his capacity for moral rationality and redemption through correction. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 100 cmt. (1820), *available at* http://www.marxists.org/reference/archive/hegel/works/pr/prwrong.htm ("[P]unishment is regarded as containing the criminal's right and hence by being punished he is honoured as a rational being.").

Second, individuals who have plausible connections to certain cultural practices, but whose actions were not in fact culturally motivated, might inappropriately take advantage of the availability of a separate cultural defense.[4] It will be difficult to determine in some cases whether a defendant "really" belongs to a certain cultural group or not, or whether the actions at issue were culturally motivated. Furthermore, what if the motivation is honestly cultural, but only partly so?

Third, there are equal protection concerns for both defendants and victims.[5] One defendant should not be exculpated based on a particularized motivation (that falls short of justification) while other defendants, no more or less culpable, are punished. It is also problematic that a victim might receive less protection from the law by way of punishment or restraint of his assailant simply because the victim and/or the perpetrator was born into a particular culture.

Fourth, both proponents and opponents of the cultural defense make variations of the cultural stigmatization argument. Proponents sometimes argue that subsuming a cultural defense into the existing excuse doctrine denigrates cultures by "[t]reating minority cultures as disabilities,"[6] and opponents of the defense sometimes argue that recognizing a defense based on culture may promote harmful stereotypes of certain cultural groups.[7] Commentators on either side of the argument argue that an independent cultural defense (or the lack of one) is degrading.

It is not clear which way this last argument should cut, but however sociologically interesting the discussion about stigmatization may be, it is probably irrelevant to the question of whether criminal law should formally recognize a cultural defense. The overarching purpose of Anglo-American criminal law has traditionally been retribution[8] (or "just desert"), though the purposes of deterrence,[9] restraint,[10] rehabilitation,[11] and restitution[12] have been recognized by

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4. Valerie L. Sacks, Note, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. L. 523, 545 (1996).

5. *Id.* at 534, 542–43.

6. *See, e.g.*, Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1369 (2006).

7. *See* RENTELN, *supra* note 2, at 193 (citing Leti Volpp, *(Mis)identifying Culture: Asian Women and the Cultural Defense*, 17 HARV. WOMEN'S L.J. 57, 100 (1994)).

8. *See* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 28–29, 83 (1997); *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-101(6) (2008) ("[t]o impose just and deserved punishment"); MODEL PENAL CODE § 1.02(2)(e) (1962) ("to differentiate among offenders with a view to a just individualization in their treatment").

9. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-101(2) (2008) ("[t]o give fair warning of . . . conduct proscribed and . . . sentences"); *id.* § 13-101 (5) ("preventing . . . offenses through the deterrent influence of . . . sentences"); MODEL PENAL CODE § 1.02(1) (d) (1962) ("to give fair warning of the nature of the conduct declared to constitute an offense").

10. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-101.01 (2008) ("to identify and remove from society persons whose conduct continues to threaten public safety through the commission of violent or aggravated felonies"); MODEL PENAL CODE § 1.02(1)(b) (1962) ("to subject to public control persons whose conduct indicates that they are predisposed to commit crimes").

contemporary penal systems. Pluralism, however, is nowhere among these purposes, nor should it be. All of the above-listed purposes of the criminal law are centered on punishing infractions, preventing them, or repairing the damage caused by them. An exception to culpability based on cultural differences will not serve any of the contemporary purposes of the criminal law, and it may, in fact, frustrate them.

There are, of course, additional arguments against recognition of an independent cultural defense, as well as additional rebuttals. We do not purport to set forth an in-depth discussion of these points but rather intend to introduce the debate. Part II attempts to illustrate an additional theoretical problem posed by creating a new affirmative defense founded upon cultural differences. Narrowing or shifting standards of culpability based on the particular cultural views of a defendant either (1) ensures acquittal by subjectivizing the standard of behavior, or, to the extent the applicable cultural standard remains objective, (2) fails to remedy the imposition of external values that cultural defense proponents seek to avoid.[13]

II. THE SCYLLA OF SUBJECTIVITY AND THE CHARYBDIS OF EXTERNAL VALUES IMPOSITION

A. A Narrowed Standard of the Reasonable Person

A cultural standard of behavior ostensibly applies the traditional reasonableness standard, but based on the standards of a cultural subgroup,[14] as opposed to the traditionally imposed behavioral standard of the relevant jurisdiction as a whole.[15] In theory, this transformation merely shifts or narrows the standard of reasonableness against which the defendant will be judged in order to balance "individual justice and cultural accommodation with the competing demands of social order and the rule of law."[16]

A closer examination, however, demonstrates that, far from serving the purpose of cultural accommodation while still maintaining the rule of law, this solution actually fails to achieve either goal. First, by basing the standard of a person's behavior on an examination of his cultural makeup, we stack the deck and impose subjectivity onto the standard. By making the standard of behavior depend to some degree on the background of the defendant, regardless of whether that background can be characterized as "cultural" or not, we make the defendant's own expected opinion about his behavior a part of the totality of the circumstances. This is a misapprehension of what "circumstances" or "situation" means under

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11. *See, e.g.*, MODEL PENAL CODE § 1.02(2)(b) (1962) ("to promote the correction and rehabilitation of offenders").

12. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-804 (2008) ("[T]he court, in its sole discretion, may order that all or any portion of the fine imposed be allocated as restitution to be paid by the defendant to any person who suffered an economic loss caused by the defendant's conduct.").

13. *See generally* Chiu, *supra* note 6.

14. *See* RENTELN, *supra* note 2, at 187–88.

15. *See* DAN B. DOBBS, THE LAW OF TORTS 277 (2000).

16. *See* RENTELN, *supra* note 2, at 188.

objective tests; it means only the immediate circumstances surrounding the act at issue, not the defendant's background or beliefs.[17] Second, even if we were to agree that pluralism is a legitimate purpose of the criminal law, to the extent that the cultural standard we would apply was objective, it would still fail to achieve the goal of accommodation. Imposing a cultural standard narrower than the "at large" standard of the jurisdiction would still impose an external standard onto defendants.

B. The Trouble with Subjectivization

Applying a narrowed or shifted cultural standard different from that of the traditional reasonable person injects additional subjectivity, through the word "culture," into what is supposed to be an objective test. Culture is a word we use to generalize the behavioral patterns or viewpoints of many persons.[18] Every individual has his own personal experiences, beliefs, and patterns of behavior that we can aggregate to identify what we call culture. Although background and contextual development affects one's beliefs, each person is ultimately responsible for his own actions.[19] It is difficult to point to a culture in a vacuum, separated from the people who comprise it. It is easy to reify culture in this way and, from there, to make the error of division and measure a person's individual behavior by a standard that is itself a reification.[20] The traditional reasonable person test does not make this error because it simply asks members of a jury to determine directly if the defendant has acted reasonably. The jury members in such cases need not compare the defendant to any reified standard. They have the standard "in their heads," so to speak, and it is personal. This is the subjective component of the "objective" reasonable person test that no human mind can avoid. We ought not compound the difficulty in achieving objectivity by asking jurors to apply cultural standards to which they necessarily have only indirect and imperfect access.

Due to the natural tendency to reify culture, the conception of an objective test using a smaller cultural group for the standard of objectivity might seem plausible at first. The problem is that the scope of the culture to which a person belongs requires an ex ante examination of the person at issue. Because the scope of the culture to which a person belongs is based upon who the person is, this approach applies a subjective standard from the beginning. The culture against which the person will be judged is delineated based on the person. The only way

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17. *Cf.* DOBBS, *supra* note 15, at 280–81 (negligence law).

18. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 552 (1993).

19. *See* Volpp, *supra* note 7, at 91; Michele Wen Chen Wu, Comment, *Culture is No Defense for Infanticide*, 11 AM. U. J. GENDER SOC. POL'Y & L. 975, 1012–14 (2003).

20. The fallacy of division is the error one makes when one assumes that a part of a whole necessarily has the same characteristics as the whole itself. Logical Fallacies.info, Fallacies of Relevance - Fallacy of Division, http://www.logicalfallacies.info/fallacyofdivision.html (last visited Feb. 27, 2009). In this case, the error is presuming that each person affiliated with a culture shares identical viewpoints about proper behavior simply because the behavior can be averaged to posit a "group-based identity." *See* Volpp, *supra* note 7, at 91.

for a person to fail such a "reasonable culture member"[21] test would essentially be for the person to act out of character, because the culture against which he is tested must be based on an examination of who the person is from the beginning. This is not to say that no jury would hold such a person accountable even after being read a cultural instruction (simply because it hates what the defendant has done), but if we presume the jury would follow such instructions, it is difficult to see how it could find that the defendant acted unreasonably without also finding that he acted out of character. In this way, a cultural standard properly tailored to a defendant is analogous to a "stacked deck" because the use of culture as the standard of behavior necessarily injects an insurmountable degree of subjectivity into what is supposed to be a narrowed, objective test.

C. The Cultural Identification Problem

Consider the following example commonly used in cultural defense literature. On January 29, 1985, Fumiko Kimura attempted to kill herself and her two children by drowning in the Pacific Ocean.[22] Her children died, but she survived.[23] Kimura's husband had committed adultery.[24] She had determined to kill herself out of shame, and because she feared her two children would be forced to lead a life of hardship due to being motherless, she determined she would euthanize them (by drowning).[25] She argued in defense that the Japanese cultural practice of *oyako-shinju*, a form of parent–child murder–suicide, was accepted in Japan,[26] and so she should be judged according to that standard—in other words, it should be an affirmative defense if a reasonable member of her culture would find her actions "justified."

But what if modern acceptance of *oyako-shinju* in Japan is not complete, or even marginalized? At least one article indicates that the practice was actually considered a "problem" in Japan (where it is illegal, but not often punished)[27] in the years preceding the Kimura incident, and not a respected cultural practice:[28]

> [I]t should be emphasized that the adults involved in shinju do not represent the norm of Japanese society. These are usually individuals who become desperate due to a combination of a life stressor, concomitant psychiatric illness such as depression or

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21. See Chiu, supra note 6, at 1338 ("[T]he reasonable person will be imbued with a particular cultural background. . . . The standard could be even more specific . . . ."). "Reasonable culture member" is our term.

22. Maura Dolan, *Two Cultures Collide over Act of Despair: Mother Facing Charges in Ceremonial Drowning*, L.A. TIMES, Feb. 24, 1985, at 3.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *See, e.g.*, Douglas Berger, Tokyo Meguro Counseling Center, *Suicide and the Unconscious in Japan*, *available at* http://www.healthhokkaido.com/article/counsel_suicidee.cfm ("Although the number of oyako-shinju has been declining since the 1950s as well, it is still a serious problem.") (distinguishing between voluntary and involuntary suicide pacts).

> psychosis, and premorbid personality vulnerabilities (possibly personality disorder) which then interact with certain cultural tendencies. *The average psychologically healthy Japanese would not consider* shinju *as a solution to their problems . . . .*[29]

This analysis, by Dr. Douglas Berger at the Tokyo Meguro Counseling Center, does not indicate that *oyako-shinju* is the reaction of a psychologically healthy Japanese adult. The fact that the practice still occurs in the culture, however, shows that there are some Japanese who find it acceptable (or at least tolerable), but many who do not. Which Japanese viewpoint—the one that views this behavior as acceptable in some circumstances, the one that views it as an abomination always, or the one that believes it is acceptable always—should an American jury (or judge) apply? In short, there is no single, collective "Japanese" viewpoint on the matter, and, in any case, it appears only to affect those who are psychologically incompetent, an excuse the criminal law already provides.

So when Kimura claims that she was not culpable for her behavior by the standards of her culture, how can this be proved or disproved when members of her own culture disagree? The claim can be neither correct nor incorrect; it is simply incoherent, because there *is* no correct answer as to whether what she did is acceptable in her "culture." This kind of determination requires an application of standards to facts about which reasonable persons, both within and without her cultural group, might disagree.

In Kimura's case or any other, there will be some percentage of the defendant's cultural group *A* who think that the circumstances in the case warrant the behavior at issue, and other members of cultural group *A* who think otherwise. There are a few ways to conceptualize this difference.

First, one could divide cultural group *A* into subcultures. In subculture *A1*, the practice is warranted under the circumstances. In subculture *A2*, it is not warranted. The defendant belongs to *A1*, by definition, so the *A1* standard is the proper one to apply if it is wished that the imposition of external standards be avoided; as such, the defendant would be acquitted, exemplifying the deck-stacking problem.

Second, it could be said that the defendant belongs to cultural group *A* only, recognizing *A1* not as its own subculture, but as a smattering of rebellious or nonconformist individuals within cultural group *A*. This, of course, would only confuse a jury with an impossibly nebulous standard. A court would ask the jury to judge the defendant's behavior against a cultural standard by which some cultural members would think the practice was warranted and others would think the opposite. In any case, a conviction of the defendant under cultural group *A*'s standards of behavior still imposes external values on the defendant, regardless of whether we give his *A1* attitudes the label of "subculture."

Third, we could solve the problem by filling the jury with members of cultural group *A*. This solution, however, is again stuck between the deck-stacking problem and the desire to avoid imposing external values. A properly tailored jury would almost certainly acquit the defendant, and a too-broadly tailored jury would

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29. *Id.* (emphasis added).

defeat the purpose of a culturally matched jury, which is to prevent the imposition of culture standards onto the defendant. Voir dire would be a way for a defendant to all but ensure acquittal, because the confluence of a juror's opinion on the standard of behavior to be applied at trial with the defendant's own predilections would itself be a criterion for service—an absurd situation.

Furthermore, this solution immediately conjures the constitutional *Batson* problem of the right of members of society at large not to be excluded from juries based on categorization within protected categories.[30] There is no recognized right to a jury of one's demographic peers.[31] Even if a legislature created such a right, it would clash with the federal equal protection right of citizens to serve on a jury regardless of their own membership in a suspect class.[32] It is difficult to see how to ensure a culturally tailored jury consistent with the equal protection rights of the members of the venire under *Batson*. This issue alone probably precludes the possibility of the culturally tailored jury in the United States; however, even in jurisdictions with no *Batson*-like restriction, simply narrowing or shifting the scope of the values to be applied does not avoid the fact that some values external to the defendant will be imposed on him. That is, even if we assume the *Batson* line of cases poses no legal impediment to a statute providing a culturally matched jury, we still have not successfully navigated the logical waters. If we have already shunned the assimilative rule of imposing cultural norms onto defendants who do not subscribe to them, by what justification can we apply a narrowed cultural standard (*A*) that is itself still broader than the cultural beliefs to which the defendant subscribes (*A1*)? Cultures change, and not every member of a cultural group will change his or her cultural beliefs at the same pace, especially within immigrant communities, where cultural change is likely to be much more dynamic and dramatic than in one's homeland.[33]

This is a logically fatal dilemma whether a court instructs a general jury to use a cultural standard of behavior or directly selects members of a particular culture to apply that standard. Once we have cast off the rule of cultural assimilation, how can we justify applying the standards of cultural group *A* to a defendant when culture *A* is still broader than the subculture to which the defendant belongs (*A1*)? Even if the defendant is conceptualized as a "rebellious member" of culture *A*,[34] as opposed to a member of a different or narrower subculture (*A1*), this only solves the problem semantically. Whether we choose formally to categorize him as a member of an identifiable subculture, the values of most members of culture *A*—values to which the defendant himself clearly does not subscribe—are still functionally being imposed on him.

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30. Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that the Equal Protection Clause prevents striking venire members based either on their own race or on an assumption that a particular group of jurors will be unable impartially to consider the prosecution's case against a defendant of a particular race).

31. Taylor v. Louisiana, 419 U.S. 522, 537–38 (1975) (citing Fay v. New York, 332 U.S. 261, 284 (1947); Apodaca v. Oregon, 406 U.S. 404, 413 (1972) (plurality opinion)).

32. *See Batson*, 476 U.S. at 89.

33. *See* Sacks, *supra* note 4, at 540.

34. *See* RENTELN, *supra* note 2, at 193–94 n.24.

If the population of a jurisdiction at large is wrong to impose cultural norms onto defendants through the criminal law, then a group of persons coincidentally related to the defendant by blood or ethnicity should not do it by proxy. To say the point is to "preserve [one's] culture" against assimilation[35] may be likened to assigning rights not to the defendant, but to the defendant's background, which is itself an abstraction, not a legal entity capable of rights. A defendant can only benefit from such an assignation of rights to the extent his actions are actually in accord with the recognized cultural background. If he is adjudged to have acted unreasonably according to the recognized background, then his own beliefs have still not been vindicated, but only the beliefs of others. A cultural defense does not avoid the external imposition of values onto a defendant simply because the group of others used to define the standard of behavior is not coextensive with the population of the jurisdiction in which a defendant is tried.

The following recent case illustrates problems of cultural identification and the potential abuse of an independent cultural defense. In 2007, Raul Padilla was convicted of cockfighting in the Pima County Superior Court in Tucson, Arizona.[36] Arizona had outlawed cockfighting by voter initiative in 1998.[37] Moreover, a year prior to the passage of the law, a poll indicated that 70% of Hispanic residents of Arizona did not believe that "cockfighting is an important part of Hispanic culture."[38] Yet, this did not prevent Mr. Padilla's attorney from arguing, "If some of the current residents of Arizona are offended by Hispanic culture, they can cede Arizona back to Mexico or move back to the colder climes from whence [sic] they came."[39]

First, this case illustrates well the dilemma of subjectivity versus values imposition. Of those identified as belonging to the Hispanic culture, *H*, only about 30% shared this defendant's *H1* beliefs about cockfighting, while about 70% were members of *H2*, believing that the sport was not an important part of Hispanic culture.[40] In fact, 95% of *H* members believed cockfighting was "cruel and inhumane."[41] If the defendant were tried against the standard of *H1* (his own standard) via a cultural defense, he would of course be acquitted—there would be no point in conducting a trial. If he were tried against the broader standard of *H*, he would likely be convicted, but even in the event of acquittal, he would still have

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35. *See, e.g.*, Chiu, *supra* note 6, at 1369 (quoting Amy Gutmann, *Introduction* to MULTICULTURALISM at 5 (Amy Gutmann ed., 1994)).

36. A.J. Flick, *Conviction in County's First Cockfighting Trial*, TUCSON CITIZEN, Dec. 14, 2007, at 2A.

37. *Id.*; *see* ARIZ. REV. STAT. ANN. § 13-2910.03 (2008).

38. Editorial, *Cruelty, Not Culture*, TUCSON CITIZEN, Dec. 18, 2007, at 1B [hereinafter *Cruelty*].

39. Flick, *supra* note 36, at 2A.

40. *Cruelty*, *supra* note 38, at 1B.

41. *Id.* The juxtaposition of these statistics would suggest that the majority of the 30% minority of Hispanic respondents who reported that they believe cockfighting is an important part of Hispanic culture also believe it is cruel and inhumane. We acknowledge, of course, that a close examination of the original poll is necessary to draw such a conclusion with confidence. Certainly, it seems odd that a person would respond that an important aspect of his own culture is cruel and inhumane. In any case, this highlights the difficulties with determining the meaning of cultural acceptance of a type of conduct.

had external cultural values (*H*), broader than those to which he subscribes (*H1*), imposed upon him the moment jeopardy attached.

Second, Padilla's attorney's outlandish suggestion vividly demonstrates the potential for abuse of an independent cultural defense. Some arguments for cultural defenses at least appear facially plausible, but these are clearly not good faith arguments for a change in the law, to say the least. Unfortunately, these kinds of arguments might become more prevalent if the independent cultural defense were to become a legitimate legal tool.

In summary, a narrowed cultural standard does not solve the values-imposition problem unless the standard is narrowed so far as to guarantee acquittal (or a directed verdict) by making the standard purely subjective. Any rule, whether positive law or "social rule" of behavior, necessarily imposes external values on individuals within a group.[42] This should offend nobody but anarchists. The imposition of externally defined values inheres in the concepts of judgment and objectivity.

D. The Problem of Domestic Subcultures

Another problem with recognizing cultural motivations as exculpatory is the problem of domestic subcultures.[43] In 1984, Robert Elliott killed a man and was sentenced to life in prison after a jury did not accept his claim of self-defense.[44] After the trial, a public defender argued that Elliott's "buckaroo ethic" was a part of his "heritage" that should have exculpated him.[45] The chief deputy state public defender commented that if the incident had happened fifty years earlier, there would have been no charges filed.[46] Presumably, there was no reason to doubt the sincerity of Mr. Elliott's attitudes or that these attitudes reflected his upbringing and acculturation. Maybe Mr. Elliott was justified, but few people would agree that Mr. Elliott should be judged by a special standard based on his personal attitudes. Mr. Elliott's cultural differences were based on a chronological transplantation, and Ms. Kimura's were based on geography. The only real distinction between Ms. Kimura and Mr. Elliott is that we are more prepared to view Ms. Kimura as different because she is more visibly "other." This distinction is unfair both to Mr. Elliott's legal interests and Ms. Kimura's dignity.

Whether they agree with its commands, such defendants typically know the law. Even when they do not, their nonconforming attitudes or habits have never been an excuse for criminal behavior, much less a justification for it. One cannot plead contrary moral opinions as a defense to a crime. This is obvious in the above example, because the defendant is not sufficiently "other." We must be careful that our perception of an increased perception of "otherness" does not obscure our view of this point in such instances. There is no reason to claim that the member of a domestic subculture has any less of a right to his way of life than

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42. *See* H.L.A. HART, THE CONCEPT OF LAW 56–57 (2d ed. 1961).

43. *See* Sacks, *supra* note 4, at 539–40, 542–43.

44. Bill Curry, *Killer, 72, Seeks to Be with Blind Wife: Devoted Old Cowboy Faces Rough Ride in Parole Bid*, L.A. TIMES, Nov. 4, 1985, at 1.

45. *Id.*

46. *Id.*

a recent immigrant does. The members of both domestic and foreign subcultures have the same right to live according to their respective cultures, and the bounds of both are properly circumscribed by the criminal law. After all, Japanese women have no monopoly on anxiety for the well-being of their children, and Nevada buckaroos have no monopoly on concern for their own safety. Absent a claim of excuse based on mental incapacity having caused the behavior,[47] there is no good reason to excuse either of them, much less one and not the other.

E. Other Problems with the Argument for a Cultural Defense

A defendant's ignorance of particular prohibitions misses half the picture about notice in the context of cross-cultural imposition of values through the legal system. Cognizance of territorial-based imposition of cultural values through criminal sanctions is itself probably culturally universal, or nearly so. Likely no one from any culture who is aware that other cultures exist can plead ignorance of the principal that one will be subject to the laws of any nation when one walks on its soil, and that those laws may be strange to the newcomer.[48]

The argument for a cultural defense is analytically untenable because it requires simultaneous acceptance of opposing positions. Just as a defendant arguing hard determinism puts himself in a logically compromising position from which to complain of the actions of the police, the prosecutor, and the judge, the defendant who pleads culture as either a justification or excuse for his actions has staked out a peculiar piece of ground from which to fight the imposition of the cultural values of the dominant society. Because imposing the broader society's values through the legal system is an act of culture in itself—the kind of act a pluralist argues must be respected even by those who do not ascribe to the particular cultural belief being expressed—the cultural defense ultimately fails on its own terms. In other words, if the argument is, "I have the right to act consistently with my cultural values regardless of how it affects others," then on what basis can members of the dominant culture be stripped of this same right as expressed through their justice systems?

A response to this argument might be that aspects of the justice system itself, and not only particular laws within the system, reflect cultural values of the majority, so the entire system is culturally influenced. But if the pluralist wishes to maintain that acts of culture must be respected by those outside the culture, there is no cause to impugn culturally influenced justice systems any more than there is to impugn individual, culturally influenced rules, as argued above. If acts of culture

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47. *See* PAUL H. ROBINSON, CRIMINAL LAW 701–03 (2005).

48. *See, e.g.*, KINGDOM OF SAUDI ARABIA, MINISTRY OF FOREIGN AFFAIRS, TRAVELLER GUIDE, http://www.mofa.gov.sa/Detail.asp?InSectionID=2528&InNewsItemID=36544 (last visited Dec. 31, 2008) ("You must respect the law and the rules of the country you [in]tend to visit[,] and that requires you to head to the embassy of that country in Saudi Arabia and learn all about . . . these rules."); U.S. DEP'T OF STATE, SAUDI ARABIA COUNTRY SPECIFIC INFORMATION, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1012.html#criminal_penalties (last visited Aug. 25, 2008) ("While in a foreign country, a U.S. citizen is subject to that country's laws and regulations, which sometimes differ significantly from those in the United States and may not afford the protections available to the individual under U.S. law.").

must not be judged by extra-cultural standards, then culturally flavored secondary rules must be respected in the same way culturally flavored primary rules are (to use Hart's terminology).[49] The justice system includes both secondary and primary rules,[50] and the formal system of both secondary and primary rules can be viewed as a subset of all cultural rules across an entire spectrum of degrees of formality.

III. ROOM FOR CULTURE IN THE COURTROOM

Although we believe it improper to adjust the doctrine of culpability by adding an independent cultural defense, and that cultural considerations do not fit comfortably into existing doctrines of justification and excuse, this does not necessarily foreclose due process arguments based on cultural differences. In this Part, we propose that there may be space for culture in the criminal law in extreme cases under the federal due process clause or similar state guarantees of due process.

Excuse doctrine already accounts for those circumstances in which a defendant, because of a perceptive, volitional, or moral defect is not properly to blame for his or her actions,[51] and there is no good reason that culturally motivated defendants should be generally excused under this doctrine. Culturally motivated defendants are not persons whose wills are overborne or whose volition is defective, but rather are perfectly competent perceptively, volitionally, and morally, but who happen to have culturally linked motives.[52] Not only would inclusion of cultural motives be a plainly incorrect application of excuse doctrine, it would greatly stigmatize members of certain cultures as volitionally or morally defective by virtue of cultural habits.

The most extreme kind of proposal for a cultural defense is that culture should not be considered merely an excuse, but rather a justification.[53] But because justification is an objective determination by a jury, cultural motivation does not fit comfortably into such a mold. As discussed in Part II, adjusting the standard of justification to match the cultural expectations of a defendant would either ensure acquittal by collapsing the standard into a subjective one, or, to the extent the standard were to remain objective, fail to remedy the imposition of external values[54] that pluralism seeks to avoid.[55]

Does any room remain for a cultural defense outside of traditional justification and excuse defenses? Perhaps. There may be room for an argument[56]

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49. *See* HART, *supra* note 42, at 81.

50. *Id.* at 94–99.

51. *See* ROBINSON, *supra* note 47, at 657–61.

52. *See, e.g.*, Chiu, *supra* note 6, at 1349–51 (discussing the *Kimura* case). This, of course, does not mean that culturally motivated defendants should not have access to existing excuse defenses, but rather that cultural considerations should play no part in such an analysis.

53. *See generally id.*

54. *See id.* at 71.

55. *See supra* Part II.A–C.

56. The proposed defense is neither a hybrid of justification and excuse nor a hybrid of either of them with something else. It would be a defense based on due process

that draws from due process and mistake of law doctrines such that, in the case of a defendant accused of violating law *X*, it would offend due process to convict him under the following circumstances: (1) the defendant's cultural background would not reasonably lead him to suspect that *X* is the kind of behavior that may be regulated by the criminal law; (2) the defendant has neither actual nor constructive notice of the law; and (3) the state's interest in enforcing the law does not outweigh the due process concerns. The first prong provides a due process-based exception to the traditional mistake-of-law doctrine in cases where a defendant, based on his background, would have no reason to suspect the particular behavior at issue might possibly be considered an offense. The second prong prevents the defense from being used in cases in which a defendant is (or should be) cognizant that this type of behavior is criminally regulated in some way in his present jurisdiction. The third prong would help ensure the state's interest in enforcing common norms of behavior by confining the doctrine to de minimis offenses, probably those with no victims and no public damage.[57] Certainly murder and assault would be outside of the exception, because this is the kind of behavior that people of all cultures expect to be regulated criminally, even if they do not agree on particular rules. In other words, everyone is on notice that this is the *kind* of behavior that is regulated by the criminal law, so everyone knows he risks criminal punishment if one engages in these kinds of activities without familiarizing oneself with the local laws.

An example of a de minimis offense would be the case of Mohammad Kargar.[58] Mr. Kargar, an Afghan immigrant, was charged with and convicted of two counts of gross sexual assault in Maine[59] after he kissed his eighteen-month-old son's penis in what he believed to be an uncontroversial show of affection.[60] In that case, not only did the defendant have no harmful or prurient intent, but there was no victim in the sense that the child presumably neither felt pain nor shame or embarrassment.[61] The court evaluated the judgments based on Maine's de minimis statute, which allowed, but did not require, a court to dismiss a prosecution if a defendant's conduct:

> A. Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the crime; or
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> B. Did not actually cause or threaten the harm sought to be prevented by the law defining the crime or did so only to an extent too trivial to warrant the condemnation of conviction; or

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and the maxim *nulla poena sine lege* (no penalty without law), manifesting itself as a narrow exception to the mistake of law doctrine.

57. *See, e.g.*, MODEL PENAL CODE § 2.12 (1962).

58. State v. Kargar, 679 A.2d 81 (Me. 1996); *see also* Chiu, *supra* note 6, at 1341 & n.127, 1342 & n.128 (discussing *Kargar* and *Model Penal Code* § 2.12).

59. *Kargar*, 679 A.2d at 82.

60. *Id.* at 82–83.

61. *See id.* at 83.

> C. Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in defining the crime.[62]

The court vacated the judgments after finding that the act was not done for sexual gratification and that there was no victim impact.[63] The court noted explicitly that the activity was still criminally culpable behavior, and that the defendant did not argue he should be able to continue in the practice now that he had notice of the statute, but his cultural beliefs at the time of the crime coupled with lack of notice and the de minimis nature of the act warranted dismissal.[64] If accepted by courts, the due process argument outlined above might be a more ubiquitous and uniform way to obtain the same kind of flexibility achieved in *Kargar* via Maine's de minimis statute.

The potential due process-based defense we have outlined would operate as an excuse defense based on mistake of law, subject to the additional restriction of de minimis harm. Legislatures have made exceptions to mistake of law doctrine before,[65] and in extreme and narrow circumstances, courts have recognized that some kind of notice of illegality might be required before a conviction.[66] Furthermore, this proposed defense would be a question for a judge, not for a jury. It would manifest itself as a Fifth or Fourteenth Amendment-based pre-trial motion. Applicability could be restricted, for example, to de minimis, victimless offenses and to cases in which the defendant has not resided in the United States for some reasonable time period (e.g., six months or a year) providing constructive notice of the customs of the criminal law. Malum in se offenses, and cases in which a defendant knew or should have known that the behavior was of the type regulated by the criminal law, should fall outside the scope of any due process defense. This would allow for accommodation of cultural differences by slightly expanding the doctrine of mistake of law, so that the defense does not damage the culpability regime.

Additionally, we should note that there is already implicit consideration of cultural background during sentencing under the rubric of "background of the defendant."[67] Presumably, a defendant who "ought to know better" will have his background treated as an aggravator, whereas a defendant raised in a culture where the behavior was tolerated or encouraged might have his background treated as a mitigator. This allows for temperance without sacrificing the societal value of punishing morally culpable, socially harmful behavior.

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62. *Id.*

63. *Id.* at 85–86.

64. *Id.* at 85 n.5.

65. *See* 26 U.S.C. §§ 7201–03 (2006) (income tax evasion requires knowledge that one's actions are against the law). This is fair because the tax code is so voluminous and arcane that the average person is not expected to know its thousands of malum prohibitum requirements and prohibitions.

66. *See, e.g.*, Lambert v. California, 355 U.S. 225, 228 (1957) (violations resulting from "wholly passive" activity).

67. *See, e.g.*, ARIZ. REV. STAT. ANN §§ 13-701(D)(24) and (E)(6) (2008) (requiring courts to consider aggravating or mitigating factors that are "relevant to the defendant's character or background").

We should also note that the exception outlined above would not require the motivation for the infraction to be explicitly "cultural." Nor would it exclude such motivation. This avoids the problem of identifying motivations as "cultural" or not and respects the principle of individualized justice.

CONCLUSION

This Law & Policy Note attempts to show that even if one accepts the notion of the cultural defense, there is simply no way to apply a narrowed cultural standard without either ensuring acquittal or subverting the purposes purportedly served by the cultural defense. A standard properly tailored to a defendant's personal cultural beliefs is necessarily subjective, inevitably resulting in acquittal by a properly instructed, properly behaving jury. Furthermore, applying the standard of a broader cultural group to which a defendant belongs would result in the imposition onto the defendant of that group's collective cultural values—values to which the particular defendant may not subscribe—resulting in the imposition of values that it is ostensibly the purpose of the cultural defense to avoid.

Although adopting a separate cultural defense that makes every man a law unto himself is inappropriate, room may exist for an exception under the moniker of due process in an exceedingly narrow range of circumstances. Legislatures should preempt the potential for the use of exculpatory cultural defenses by explicitly declaring that there is no general, independent culture-based defense to culpability. At the same time, courts might consider something like the narrow, due process-based argument outlined in Part III in order to prevent the criminal condemnation of those committing relatively harmless acts that they never dreamed would be the kind of behavior that might be regulated criminally. This, to be sure, would be an exception to the longstanding principle of *ignorantia juris non excusat*, but it is an exception that, in some circumstances, may be demanded by the fundamental fairness guaranteed by the due process clause. We do not purport to have discovered the precise parameters such an exception should have, but rather hope to have identified a potential solution that allows for toleration of culturally motivated, de minimis infractions without the risk of compromising the principle of just desert.

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