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CULTURE CLASH: TEACHING CULTURAL DEFENSES IN THE CRIMINAL LAW CLASSROOM

SUSAN S. KUO*

“Toto, I’ve a feeling we’re not in Kansas anymore.”

- Dorothy Gale in the *Wizard of Oz*¹

For many entering students, law school can resemble L. Frank Baum’s land of Oz,² complete with flying monkeys and wicked witches. Law school is a unique place in and of itself, and, just as there is no place like home, there is no place quite like law school. The distinctive character of law school is derived chiefly from the crucible of the law school classroom,³ where first-year students begin their ritual journeys through the hallowed halls of legal education.

Many, if not most, students spend a good portion of the first year of their legal instruction trying to find a foothold in the unfamiliar territory of the law school classroom. In this classroom, the context for human conflict differs starkly from that which students experience in other disciplines as well as throughout their primary and secondary educations.⁴ Whereas in the non-law

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1. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939). L. Frank Baum does not actually give Dorothy’s last name in the original novel of *The Wizard of Oz*. Her last name was mentioned in the 1902 stage version of the story authored by Baum and in later adaptations of the book. MICHAEL PATRICK HEARN, THE ANNOTATED WIZARD OF OZ 107 n.24 (1973).

2. L. Frank Baum wrote over a dozen books about Oz, the land and its people, beginning with *The Wizard of Oz* (originally published as *The Wonderful Wizard of Oz*) in 1900. L. FRANK BAUM, THE WIZARD OF OZ (Henry Holt and Company, Inc. 1982) (1900).

3. The unique culture of the law school classroom has been captured in print and on film. See, e.g., LEGALLY BLONDE (Metro-Goldwyn-Mayer 2001); SCOTT TUROW, ONE L (1978); *The Paper Chase* (CBS television series, 1978); THE PAPER CHASE (Twentieth Century Fox Home Entertainment 1973).

4. See generally Lorraine Bannai & Anne Enquist, *(Un)examined Assumptions and (Un)intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1 (2003); Melissa Harrison, *Searching for Context: A Critique of Legal Education by Comparison to Theological Education*, 11 TEX. J. WOMEN & L. 245 (2002); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV.

school environment the complexities of cultural contexts are frequently highlighted and earmarked for discussion,⁵ the Socratic method of legal analysis removes the dispute at issue in a given case from its sociocultural context⁶ and takes the cultural backgrounds of the parties into account only when they “serve a particular legal argument.”⁷ Law students learn to identify and define people, places, and events by legal categories and to transform stories of conflict into legal arguments. By legally parsing facts, they learn to siphon off the emotional and cultural content—both in the stories themselves and in their reactions to the stories.⁸ The language of the law commands that they do this because of the enduring belief that the law is neutral and impartial.⁹ This confidence in the objectivity of the law instills our students with the notion that “legal analysis can be taught without directly addressing conflicts of individual values, experiences, and world views.”¹⁰ Accordingly, cultural conflicts are deemed irrelevant to legal analysis because laws are unbiased and “culture-blind.” This detached outlook has been termed

33 (2001); Susan F. Hirsch, *Making Culture Visible: Comments on Elizabeth Mertz’s Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 119 (2000); Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91 (2000).

5. For example, Professor Hirsch encourages her anthropology students to “think clearly about their own positioning in relation to any cultural context they study or encounter in their personal lives.” Hirsch, *supra* note 4, at 123. By inviting her students to consider their own cultural circumstances vis-à-vis the cultural circumstances of other individuals and societies, she makes culture “visible” in her class. *Id.* at 123-26.

6. This also happens in classrooms that rely on non-maieutic teaching methods. Mertz, *supra* note 4, at 99 (noting that “even classrooms that did not employ the Socratic method imparted the same decontextualized orientation to students”).

7. Hirsch, *supra* note 4, at 122.

8. Professor Mertz’s study of Contracts classes in eight different law schools revealed the distinctive orientation toward social conflict that is taught in the traditional law school classroom. Mertz, *supra* note 4, at 98-106.

9. Many challenge this claimed objectivity. See, e.g., Kim Brooks & Debra Parkes, *Law and Sexuality: Moving from the Back to the Front of the Classroom*, 1 SEATTLE J. SOC. JUST. 637, 642-43 (2003) (noting that “[w]ork by critical race scholars rejects the positing of an analytical stance that has no specific cultural, political, or class characteristics, and that lays claim to neutrality”); Margo Schlanger, *Teaching Torts: Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769, 778 (suggesting that teaching a reasonable woman standard in Torts may help “counter the alienation some law students report . . . caused by law school classes’ facade of ‘perspectivelessness’”); Mertz, *supra* note 4, at 109 (stating that “[i]n converting virtually every possible event or conflict into a shared rhetoric, legal language generates an appearance of neutrality that belies its often deeply skewed institutional workings”); Kimberle Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN’S STUD. 33, 46-49 (1994) (discussing the lack of racial perspective in anti-discrimination law).

10. Crenshaw, *supra* note 9, at 35.

“perspectivelessness”¹¹ to denote a neutral, odorless, colorless non-perspective. In truth, however, this presumed objective or neutral viewpoint “is often the embodiment of a white middle-class world view.”¹²

To provide some perspective on this apparent perspectivelessness, I incorporate the issue of the cultural defense in my Criminal Law course. Discussing the use of or the potential for using cultural defenses creates space within the classroom discussion for considering perspectives other than those inherent in traditional legal analysis. This not only affirms the relevance of other worldviews, but also calls into question the illusion of objectivity that cloaks our laws. My hope is that, by addressing this matter, my students will learn to recognize the cultural assumptions imbedded in the cases they are reading and gain a deeper understanding of the law.¹³

There are practical, nuts-and-bolts reasons for addressing cultural defenses in Criminal Law. In particular, litigants often raise cultural issues in both civil and criminal cases.¹⁴ Plus, the extraordinary numbers of individuals from other countries who are currently prosecuted and incarcerated in the United States could give rise to more opportunities for courts to consider cultural arguments.¹⁵ In addition, the influx of immigrants into the United States in recent years will likely add to the cultural diversity already existing in our society.¹⁶ The majority of immigrants living in the United States come from

11. *Id.*

12. *Id.*

13. See Bannai & Enquist, *supra* note 4, at 6-7 (asserting that students must become “culturally competent” by learning “to recognize when and how their life experiences and personal views are being expressed in their analysis of legal problems so that their arguments are the result of conscious, knowing decisions”); Kellye Y. Testy, *Adding Value(s) to Corporate Law: An Agenda for Reform*, 34 GA. L. REV. 1025, 1030-31 (2000) (stating that “[c]onsideration of these issues [of race, gender, and class] provides a richer view of law and the society it serves, providing a more nuanced, sophisticated treatment of theory, doctrine, and policy”); Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 544-45 (1996) (arguing that discussion of diversity issues helps to develop a student’s intellectual depth and breadth); Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L.J. 140, 141-42 (1995) (emphasizing that requiring students to consider diversity issues helps to develop critical thinking skills).

14. For a thorough discussion of the large variety of cases in which cultural arguments have been made, see ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* (2004).

15. As of February 2004, more than 20% of the Federal Bureau of Prisons (“BOP”) population were non-U.S. citizens. BOP figures list 16.5% of the federal prisoners as citizens of Mexico, 2.1% from Colombia, 1.4% from Cuba, 2% from the Dominican Republic, and 6.8% from other countries or unknown. FEDERAL BUREAU OF PRISONS, QUICK FACTS, <http://www.bop.gov/fact0598.html> (Feb. 2004).

16. Recent census reports show that 11.5% (approximately 32 million of the more than 280 million people) of the non-institutionalized U.S. population is foreign-born. U.S. CENSUS BUREAU, *THE FOREIGN-BORN POPULATION IN THE UNITED STATES: MARCH 2002*, <http://www.census.gov/prod/2003pubs/p20-539.pdf> (Feb. 2003) [hereinafter CENSUS MARCH

non-Western-based traditions and legal principles,¹⁷ and nearly half of these foreign-born individuals have entered the United States since 1990.¹⁸

The people of this nation come from many different countries and many different cultural backgrounds.¹⁹ Considering that an individual's culture has an undeniable influence on his or her perceptions or behavior²⁰ and thus may impact an individual's motivations, litigants and their attorneys are likely to continue petitioning the courts to recognize cultural defenses. For this reason, including some coverage of cultural defenses in the first-year Criminal Law course will alert students to the possibility that these cultural issues will arise.²¹

2002]. Between 1990 and 2000, the number of foreign-born people living in the United States increased by more than half. U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION: 2000, <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf> (Dec. 2003).

17. Of these foreign-born individuals, 52.2% are from Latin America and 25.5% are from Asia. CENSUS MARCH 2002, *supra* note 16, at 1.

18. *Id.* at 3. Another 24.5% came during the 1980s, 14.2% entered during the 1970s, and the remainder of the foreign-born population immigrated prior to 1970. *Id.*

19. My reference to culture here is to the "customary beliefs, social forms, and material traits of a racial, religious, or social group." *Merriam-Webster OnLine*, at <http://m-w.com/cgi-bin/dictionary?book=dictionary&va=culture> (last visited Mar. 16, 2004). The Canadian UNESCO Commission set forth a similar definition of culture: "Culture is a dynamic value system of learned elements, with assumptions, conventions, beliefs and rules permitting members of a group to relate to each other and to the world, to communicate and to develop their creative potential." Canadian Commission for UNESCO, "A Working Definition of 'Culture,'" 83.

20. RALPH LINTON, THE TREE OF CULTURE 39 (1961). As explained by Linton:

No matter what the method by which the individual receives the elements of culture characteristic of his society, he is sure to internalize most of them. This process is called *enculturation*. Even the most deliberately unconventional person is unable to escape his culture to any significant degree. . . . Cultural influences are so deep that even the behavior of the insane reflects them strongly.

Id. (emphasis in original). Numerous psychology scholars have also addressed the manner in which culture affects cognition and behavior. See, e.g., Shinobu Kitayama et al., *The Collective Construction of Self Esteem: Implications for Culture, Self, and Emotion*, in EVERYDAY CONCEPTIONS OF EMOTION 523 (James A. Russell et al. eds., 1995); Alan Page Fiske et al., *The Cultural Matrix of Social Psychology*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 915 (Daniel T. Gilbert et al. eds., 4th ed. 1991); Richard A. Shweder & Edmund J. Bourne, *Does the Concept of the Person Vary Cross-Culturally?*, in CULTURAL CONCEPTIONS OF MENTAL HEALTH AND THERAPY 97, 110-25 (Anthony J. Marsella & Geoffrey M. White eds., 1982).

21. I do not mean to imply that culture is a static concept and that immigrants do not adopt new values and traditions. Although acculturation and assimilation do occur, the extent to which they take place varies, depending on multiple factors, such as generation. Moreover, the general understanding among academics is that individuals are more likely to become bicultural or multicultural, as opposed to becoming entirely assimilated. See, e.g., José Szapocznik & William Kurtines, *Acculturation, Biculturalism and Adjustment Among Cuban Americans*, in ACCULTURATION: THEORY, MODELS AND SOME NEW FINDINGS 139 (Amado M. Padilla ed., 1980).

My teaching plan for this lesson contains three distinct points or issues:²² (1) the relevance of culture to the criminal law, (2) the propriety of cultural defenses in the criminal law, and (3) the culture of the law school classroom. To accommodate different learning styles,²³ I state these issues as well as list them on the blackboard.²⁴ For the kinesthetic learners,²⁵ I graphically describe the issues as lying one within the other like three concentric circles or spheres, with Issue One representing the smallest circle and the common center for all three issues. I also draw a figure that looks like a target on the blackboard and label the center circle as “Issue 1,” the middle circle as “Issue 2,” and the outside circle as “Issue 3.”²⁶ Issue One fits within the greater context of Issue Two, which, in turn, is situated within the greatest context of Issue Three.²⁷ I then commence the substantive lesson by beginning with the smallest point, Issue One—whether culture is relevant. We discuss several cases or fact patterns and consider how a cultural defense might be used in each situation. Next, we move to Issue Two and the students make arguments for or against the use of cultural defenses in our criminal legal system. This dialogue includes general reflection about our legal system and specific consideration of whether cultural assumptions are inherent in our criminal laws. Finally, I put Issues One and Two within the context of Issue Three. At this point, we mull over the process of legal education and the distinct culture of the law school classroom. The following discussion provides a rough idea of my line of attack. Hopefully, it will help generate ideas for others interested in teaching cultural defenses in Criminal Law.

22. My pedagogical approach in Criminal Law varies, depending on the particular subject matter to be discussed. Notwithstanding the stylistic differences in my teaching, however, I typically try to distill each lesson down to one or two central points or issues and then devote my lecture to supporting and developing these points. An adventurous class session may include an extra point or two. Based on this approach, I suppose that the cultural defense class session is a bit ambitious (relative to my more modest and usual maximum of two points per day).

23. See generally F. NOAH GORDON, *MAGICAL CLASSROOM: CREATING EFFECTIVE, BRAIN-FRIENDLY ENVIRONMENTS FOR LEARNING* (1995); HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE* (1993); FRANK EDWIN WILLIAMS, *A TOTAL CREATIVITY PROGRAM FOR INDIVIDUALIZING AND HUMANIZING THE LEARNING PROCESS* (1972).

24. Writing on the board aids visual learners who prefer images, pictures, colors, and maps. Learning-Styles-Online.com, *The Visual (Spatial) Learning Style*, at <http://www.learning-styles-online.com/style/visual-spatial/> (last visited Mar. 16, 2004).

25. Some hand gestures to roughly illustrate the layering of the concentric spheres are often helpful for kinesthetic learners. These individuals learn best through physical movement or physical sensation. Describing the physical feelings of an action or using metaphors to depict a concept or theory is also helpful for these learners. Learning-Styles-Online.com, *The Physical (Bodily-Kinesthetic) Learning Style*, at <http://www.learning-styles-online.com/style/physical-bodily-kinesthetic/> (last visited Mar. 16, 2004).

26. This illustration aids visual learners in their understanding as well.

27. Arguably, Issue Three fits within an even greater context—that of the U.S. legal system.

A. *Issue One: Whether Culture Is Relevant*

Individuals have invoked a cultural defense in numerous cases.²⁸ Consequently, interesting fact patterns abound for those wishing to incorporate cultural defenses in Criminal Law classes. I begin by using Socratic questioning to get the students to discuss and think about the holdings and analyses in the appellate cases that I have assigned. In one case, *State v. Williams*,²⁹ a cultural defense was not raised but arguably could have been; in the other, *State v. Aphaylath*,³⁰ cultural factors were vital to the defense strategy. We consider the potential for cultural issues to have influenced the result in *Williams*. With respect to *Aphaylath*, we discuss the use of culture by the defense and the court's consideration of the cultural argument. I then submit fact patterns from other cases and question students about the relevancy of culture in those cases.³¹

28. Alison Dundes Renteln compiles hundreds of these cases, both civil and criminal. RENTELN, *supra* note 14.

29. 484 P.2d 1167 (Wash. Ct. App. 1971).

30. 502 N.E.2d 998 (N.Y. 1986).

31. Many authors have addressed the use of culture as a potential defense, both in theory and in practice. See, e.g., Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociological Perspective on Cultural Defense Strategies*, 28 LAW & SOC. INQUIRY 39 (2003); Michele Wen Chen Wu, Comment, *Culture Is No Defense for Infanticide*, 11 AM. U. J. GENDER SOC. POL'Y & L. 975 (2003); Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829 (1999); Thomas D. Barton, *Troublesome Connections: The Law and Post-Enlightenment Culture*, 47 EMORY L.J. 163 (1998); Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J. 717 (1998); Michael Fischer, Note, *The Human Rights Implications of a "Cultural Defense,"* 6 S. CAL. INTERDISC. L.J. 663 (1998); Farah Sultana Brelvi, *"News of the Weird": Specious Normativity and the Problem of the Cultural Defense*, 28 COLUM. HUM. RTS. L. REV. 657 (1997); Todd Taylor, Note, *The Cultural Defense and its Irrelevancy in Child Protection Law*, 17 B.C. THIRD WORLD L.J. 331 (1997); Cathy C. Cardillo, Note, *Violence Against Chinese Women: Defining the Cultural Role*, 19 WOMEN'S RTS. L. REP. 85 (1997); Dan M. Kahan, *Ignorance of Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997); Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101 (1997); Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense*, 1997 BYU L. REV. 51; Cassandra Terhune, Comment, *Cultural and Religious Defenses to Child Abuse and Neglect*, 14 J. AM. ACAD. MATRIM. LAW. 152 (1997); Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996); Sharon M. Tomao, Note, *The Cultural Defense: Traditional or Formal?*, 10 GEO. IMMIGR. L.J. 241 (1996); Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573 (1996) [hereinafter Volpp, *Talking "Culture"*]; Susan Girardo Roy, Note, *Restoring Hope or Tolerating Abuse? Responses to Domestic Violence Against Immigrant Women*, 9 GEO. IMMIGR. L.J. 263 (1995); Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994); Alice J. Gallin, Note, *The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. REV. 723 (1994); Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American*

In *State v. Williams*, the defendants, husband and wife, were charged with the crime of manslaughter for negligently failing to obtain necessary medical treatment for their seventeen-month-old child.³² The child had been ill for twelve days, but the defendants did not realize how sick he was.³³ From prior experience, they knew that medical help was available, yet did not take the baby to a doctor for fear that the government would take the child away from them.³⁴ Thinking that he suffered only from a toothache, they gave him aspirin.³⁵ The baby's ailment, however, was an abscessed tooth, which became gangrenous and eventually led to his death.³⁶ Despite finding that the parents loved the baby but "were ignorant,"³⁷ the trial court found the defendants guilty of manslaughter.³⁸ On appeal, the Washington Court of Appeals upheld the lower court's judgment.³⁹ Although the defendants were unaware of the severity of the child's condition, the evidence adduced at trial showed that the baby was fussy and could not eat.⁴⁰ His cheek had become swollen and "turned 'a bluish color like.'"⁴¹ Following discussion of the parental duty to provide medical care for a minor child and the level of culpability required for statutory manslaughter, the court determined that the baby's symptoms and lack of improvement during the period that medical care could have saved him put the defendants on notice that medical attention was required.⁴²

Although not addressed in the *Williams* opinion, a potential cultural defense lurks in the court's recitation of the facts. The court described the husband as "a 24-year-old full-blooded Sheshont Indian with a sixth-grade

Criminal Justice System Formally Recognize a "Cultural Defense"?, 99 DICK. L. REV. 141 (1994); Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57 (1994) [hereinafter Volpp, *(Mis)identifying Culture*]; Donna L. Kotake, *Survey: Women and California Law*, 23 GOLDEN GATE U. L. REV. 1069 (1993); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991); Melissa Spatz, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597 (1991); Carolyn Choi, Comment, *Application of a Cultural Defense in Criminal Proceedings*, 8 UCLA PAC. BASIN L.J. 80 (1990); Malek-Mithra Sheybani, Comment, *Cultural Defense: One Person's Culture is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751 (1987); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986).

32. *State v. Williams*, 484 P.2d 1167, 1169 (Wash. Ct. App. 1971).

33. *Id.* at 1170.

34. *Id.*

35. *Id.*

36. *Id.* at 1173.

37. *Williams*, 484 P.2d at 1170.

38. *Id.*

39. *Id.* at 1174.

40. *Id.*

41. *Id.*

42. *Williams*, 484 P.2d at 1174.

education”⁴³ and the wife as “a 20-year-old part Indian with an 11th grade education.”⁴⁴ Although the defendants’ respective levels of education appear to have been implicated in the court’s discussion,⁴⁵ their cultural backgrounds do not appear to have played any role in the ultimate determination. Notwithstanding this, the defendants’ cultural identities provided strong support for their fear of bringing the baby to the doctor. The Williamses had good reason to be frightened. During the early 1970s, state authorities had removed approximately twenty-five to thirty-five percent of Indian children from their homes.⁴⁶ These children were usually placed in non-Indian foster care or non-Indian adoptive families.⁴⁷ A leading factor motivating this practice was the common belief among social workers that an Indian reservation was not a proper place for a child to be reared.⁴⁸ That the defendants were aware of the risk that they might lose their child is clear—they testified that they had heard that the husband’s cousin had lost a child in this manner and that they were afraid the same thing would happen to them.⁴⁹ While this factor does not necessarily call for a different judgment, a defense based on these cultural considerations might well have been relevant to the determination of the Williamses’ culpability. At the very least, cultural concerns might have been taken into account in the decision to prosecute the defendants.

In *People v. Aphaylath*, the defense raised cultural issues for the purpose of mitigating a charge of intentional homicide.⁵⁰ The defendant, a Laotian refugee, stabbed his wife to death in a jealous rage because she had “display[ed] affection for another man and receiv[ed] phone calls from an

43. *Id.* at 1169.

44. *Id.* at 1169-70.

45. The court accepted the trial court’s finding that the defendants were ignorant. *Id.* at 1170.

46. William Byler, *Removing Children: The Destruction of American Indian Families*, C.R. DIG., Summer 1977, at 19. These statistics were taken from surveys of states with large Indian populations. The Association on American Indian Affairs conducted the surveys in 1969 and again in 1974. During this time, the Indian adoption rate was nineteen times greater and the foster care rate ten times greater than for non-Indian children. *Id.*

47. *See id.* at 20 (noting that approximately “85 percent of all Indian children in foster care were living in non-Indian homes”).

48. *Id.* at 22.

49. *Williams*, 484 P.2d at 1174.

50. 502 N.E.2d 998, 999 (N.Y. 1986). *People v. Poddar* is another case with similar facts. 518 P.2d 342 (Cal. 1974). Poddar was a member of the Harijan (untouchable) caste who was attending graduate school in the United States. *Id.* at 344. After a young woman with whom he believed he had a romantic relationship rejected him, he killed her. *Id.* at 345. At trial, he sought to introduce testimony about the cultural stresses he had experienced while adjusting from life as an untouchable to life as a student in the United States. *Id.* *See also* Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN’S STUD. 437, 469-71 (1993) (describing Poddar’s cultural claims).

unattached man.”⁵¹ Defense counsel argued that, under a Laotian worldview, the victim’s conduct “brought shame on [the] defendant and his family sufficient to trigger [the] defendant’s loss of control.”⁵² In support of this claim, the defense sought to introduce expert testimony about Laotian culture and the “stress and disorientation encountered by Laotian refugees in attempting to assimilate into the American culture.”⁵³ The trial judge disallowed the testimony because the experts had not evaluated the defendant and could only provide general information about Laotian culture and the adjustment problems experienced by refugees.⁵⁴ The defendant was convicted of murder in the second degree.⁵⁵ On appeal, the New York Court of Appeals found that “the admissibility of expert testimony . . . does not depend on whether the witness has personal knowledge of a defendant or a defendant’s particular characteristics.”⁵⁶ The court concluded, instead, that the relevancy of expert testimony is a determination to be made by the trial judge.⁵⁷ Accordingly, the court reversed the lower court’s decision and remanded the case for a new trial, directing the lower court to weigh the probative value of the testimony about cultural issues with respect to the facts of the case.⁵⁸

Other cases provide interesting facts for consideration of a cultural defense as well. For example, in the case of *People v. Kimura*,⁵⁹ a Japanese-American woman, after learning of her husband’s infidelity, attempted to commit *oyako-shinju* (parent-child suicide) by wading into the Pacific Ocean with her two young children. Although illegal in Japan, a parent survivor of *oyako-shinju* is rarely punished.⁶⁰ The act is based on the view that it is crueler to leave a child behind without a caretaker than it is to take the child with the parent into the

51. *Aphaylath*, 502 N.E.2d at 999.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 998.

56. *Aphaylath*, 502 N.E.2d at 999-1000.

57. *Id.* at 1000.

58. *Id.*

59. No. A-091133 (L.A. Super. Ct. 1985). *People v. Wu* has a similar theme. 286 Cal. Rptr. 868 (Cal. Ct. App. 1991), *rev’g* No. ICR 12873 (Super. Ct. Riverside Co. 1990). Helen Wu, a Chinese woman living in the United States strangled her son and then tried to commit suicide by slashing her wrists. *Id.* at 872. Her actions were motivated by her lover’s rejections and poor treatment of their son. *Id.* The defense argued that she acted to save her son and herself from shame and abuse and to be reunited with her son in the afterlife. *Id.* at 879, 886. *See also* Volpp, *(Mis)identifying Culture*, *supra* note 31, at 84-91 (describing Wu’s presentation of cultural information).

60. Maura Dolan, *Two Cultures Collide over Act of Despair: Mother Facing Charges in Ceremonial Drowning*, LOS ANGELES TIMES, Feb. 24, 1985, at 3. In the mid-1980s, approximately 500 cases of parent-child suicide or attempted parent-child suicide were reported annually in Japan. Gordon Dillow, *When Legal System and Culture Collide*, LOS ANGELES HERALD EXAMINER, Feb. 18, 1985, at A1.

afterlife.⁶¹ The woman, Fumiko Kimura, survived, but the two children died.⁶² She was charged with first-degree murder for their deaths.⁶³ Could she have raised a cultural defense and claimed ignorance or mistake of law?

In *People v. (Kong) Moua*,⁶⁴ the defendant, a Hmong-American man, carried off a young Hmong-American woman as part of a traditional Hmong *zij poj niam* or “marriage by capture” ritual. The custom of *zij poj niam* requires that the man and woman engage in sexual intercourse to consummate the marriage. Pursuant to tradition, the woman indicates her willingness to marry the man by protesting the sexual interaction.⁶⁵ Her protests are evidence of her purity. Correspondingly, the man is required to physically overcome her objections to prove his masculinity and readiness to become her husband.⁶⁶ In *Moua*, the defendant believed that the victim had consented to marry him and engaged in sexual intercourse with her. The victim’s resistance, however, was genuine, and she filed kidnapping and rape charges against the defendant.⁶⁷ Could Moua have claimed a mistake of fact as to her consent based on his misinterpretation of her protests pursuant to the Hmong marriage ritual?

Two other cases spark lively discussion. In *People v. Romero*,⁶⁸ the defendant, who had killed another man in a street fight, sought to raise a self-defense argument based in part on the role of street fighters in defending family honor pursuant to Hispanic culture.⁶⁹ In *State v. Kargar*,⁷⁰ an Afghani refugee, who was convicted of gross sexual assault for kissing his eighteen-month-old son’s penis, explained that “kissing a son’s penis is common in Afghanistan, that it is done to show love for the child, and that it is the same whether the penis is kissed or entirely put into the mouth because there are no

61. Dolan, *supra* note 60, at 3.

62. *Id.*

63. Dillow, *supra* note 60. Kimura claimed temporary insanity based on her inability to distinguish between her own life and the lives of her children. As a result of plea-bargaining, the murder charge was reduced to voluntary manslaughter. Many commentators cite cultural factors for the reduction in charge. RENTELN, *supra* note 14, at 25.

64. No. 315972 (Cal. Super. Ct. 1985).

65. Fischer, *supra* note 31, at 686.

66. *Id.*

67. *Moua*, No. 315972 (Cal. Super. Ct. 1985). In the end, Moua pleaded guilty to false imprisonment charges, and the kidnapping and rape charges were dropped.

68. 69 Cal. App. 4th 846 (Cal. Ct. App. 1999).

69. *Id.* at 852. In the illustrious case of *People v. Croy*, the defendant also presented a cultural defense in the context of a claim of self-defense. 710 P.2d 392 (Cal. 1985). The defendant, a Native American, killed a police officer during a police chase and argued that his conduct was a result of his life-long conditioning to distrust and fear white authorities. See Renteln, *supra* note 50, at 454-56 (describing Croy’s presentation of a cultural defense in the context of self-defense); David Talbot, *The Ballad of Hooty Croy*, L.A. TIMES, June 24, 1990 (Magazine), at 16 (summarizing the prosecution’s and the defense’s versions of the facts).

70. 679 A.2d 81 (Me. 1996).

sexual feelings involved.”⁷¹ In *Romero*, the court rejected the cultural argument,⁷² but in *Kargar*, the cultural claims led to a dismissal of the prosecution under a *de minimis* statute.⁷³

Cases such as these help students understand some of the ways in which culture may be relevant in a criminal case. Cultural arguments may be important in determining the level, if any, of a defendant’s liability, in mitigating a severe sentence, or in the reduction of a charge. Cultural issues might be pertinent to a claim of mistake of law or fact or to an argument of self-defense or defense of others.

B. Issue Two: Whether To Allow Cultural Defenses

After establishing a small range of cases in which individuals have or could have invoked a cultural defense, I turn class discussion toward developing the implications of allowing cultural defenses.⁷⁴ More often than not, students are eager to make the general arguments for or against the use of these defenses. Some students approve of the use of cultural defenses if the conduct at issue would be legal or excusable under the laws of the defendant’s native country. I elicit from these students the point that the United States is a culturally diverse nation and that allowing evidence of a defendant’s culture demonstrates respect for multiculturalism.

Other students counter that equality and fairness mandate that a single standard of justice apply to all persons, regardless of culture or ethnicity. These students argue that allowing cultural defenses would ultimately result in anarchy, because different legal standards would apply to different individuals for similar acts. Moreover, determining who could raise a cultural defense would be fraught with complexity. For example, would these defenses be limited to immigrants? If so, must these individuals have recently arrived in the United States? Would a culturally isolated individual who had spent a significant amount of time in the United States be able to raise a cultural defense? Related to this point is the contention that cultural defenses perpetuate racism by reinforcing negative stereotypes. What is more, these students argue that the majority of Americans lack distinct ethnic or cultural identities and thus would be unable to use a cultural defense. These

71. *Id.* at 83.

72. *Romero*, 69 Cal. App. 4th at 854-55.

73. *Kargar*, 679 A.2d at 85-86. Generally speaking, *de minimis* statutes provide courts with flexibility in administering criminal statutes in unusual cases to avoid injustice. For an extended discussion of *Kargar*, see Wanderer & Connors, *supra* note 31, at 836-50.

74. Students will invariably attempt to challenge the use of cultural defenses during the initial discussion of Issue One. I usually request that they hold their comments until we move on to Issue Two, so that we can first fully discuss the various occasions on which a cultural defense may potentially be raised.

individuals would be held to a higher standard than those able to raise cultural defenses.

Opponents of the use of cultural defenses also argue that allowing such defenses would undermine the deterrent and protective goals of the criminal justice system. Immigrants would be less inclined to comply with the law if their cultural views excused their criminal behavior. The protective goal of the criminal laws would be impaired because the allowance of cultural defenses devalues the lives or safety of the victims by bestowing preferential treatment on the defendants.⁷⁵ Finally, students reason that rejecting cultural defenses will speed up the process of assimilation by promoting awareness of and conformity to the United States laws.

The idea of this debate is not only to assay the pros and cons of allowing cultural defenses, but also to discuss cultural defenses within the larger context and culture of our criminal laws. Underlying the arguments on both sides of the discussion is the unstated assumption that the criminal laws of the United States are devoid of culture—a notion that fails to recognize that “law itself is an expression of social values.”⁷⁶ Even those in favor of allowing cultural defenses appear to assume that our laws are objectively neutral, but that permitting arguments based on culture promotes tolerance for difference. “This failure to acknowledge the multiplicity of American identity leaves American identity, and specifically the identity of United States law, a neutral and unquestioned backdrop.”⁷⁷ In reality, however, our legal standards embody the values of the dominant perspective in our society.

Developing this point calls for deeper reflection on the part of the class about the inherent subjectivity of our legal standards. The formal neutrality of the law conceals its innate bias. As a result, “while dominant perspectives are granted the protection of apparent objectivity, minority perspectives are identified as such and viewed as subjective and biased.”⁷⁸ Seeing beyond the apparent neutrality of our laws helps make room for minority perspectives. Although individuals may disagree about the propriety of allowing a cultural defense in any given case, acknowledging the validity of contrasting views reveals the subjectivity of legal doctrine in its construction and application.

This exercise in “cultural competency” encourages students to be mindful of the cultural assumptions contained in the cases that they read.⁷⁹ Furthermore, in investigating the manifestation of bias in legal doctrine, students learn to recognize their own biases. Being cognizant of their own

75. Some students argue that allowing the use of cultural defenses justifies and even condones violence against women and children.

76. Bannai & Enquist, *supra* note 4, at 5.

77. Volpp, *(Mis)identifying Culture*, *supra* note 31, at 61.

78. Crenshaw, *supra* note 9, at 46.

79. Bannai & Enquist, *supra* note 4, at 4.

preconceptions may make them more receptive to different perceptions about what is fair or persuasive.⁸⁰ At the very least, it helps to ensure that their arguments are the result of conscious decision-making.⁸¹

Discussion of Issue Two is highly participatory but not lacking in structure. Depending on the specific context in which a cultural defense is raised, the persuasiveness of the arguments for or against allowing its use may vary in potency. Although I do not assign theoretical analyses of the use of culture in criminal law, my own understanding stems from the work of others. For some scholars, a formalized cultural defense or an absolute rejection of the defense fails to consider the “fluid and shifting nature of American identity.”⁸² Another point, made by Leti Volpp, is that individual members of a particular community experience culture in different ways.⁸³ Considering the continuum of individual experiences, expert testimony proffered to explain a particular individual’s state of mind may present the best option for resolving the difficult problem of allowing cultural defenses. Thus, the propriety of raising a cultural defense would be determined on “a case-by-case basis examination of cultural representation.”⁸⁴

C. *Issue Three: The Culture of the Law School Classroom*

The third and all-encompassing point⁸⁵ that bears mentioning concerns the process of legal education and its attendant “blind eye” to cultural difference.⁸⁶ Legal education focuses attention on legal authority and the facts or circumstances of a case that fit within the relevant legal context. To link a new set of facts with legal precedent, students must filter out facts that do not lie

80. See Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 368-69 (1996) (“Most of us are prejudiced—some of us more or less so than others. The extent to which we act upon our prejudices, however, may depend in part upon our awareness and understanding of the stereotypes that inform our daily lives.”).

81. See Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 736-37 (1995) (arguing that making stereotyped views explicit enhances the decision-making process).

82. Volpp, *(Mis)identifying Culture*, *supra* note 31, at 61.

83. *Id.* at 76-77, 84, 93-94 (examining how discussions of culture and cultural defenses can erase competing perceptions of culture).

84. Volpp, *Talking “Culture,” supra* note 31, at 1596.

85. By “all-encompassing,” I mean that this third issue subsumes the first and second issues; the limited use of the cultural defense in the context of the criminal law is a sub-part of the larger issues surrounding the limited use of culture in the context of legal education.

86. For opening my eyes to this point, I thank Professors Kimberly Crenshaw, Susan Hirsch, and Elizabeth Mertz. See generally Crenshaw, *supra* note 9; Hirsch, *supra* note 4; Mertz, *supra* note 4.

within this legal framework and hone in on the legally controlling aspects of the case.⁸⁷

After several weeks of legal indoctrination, students become increasingly proficient at the process of sorting legally relevant facts. Their efforts often lead them to disregard factors, including cultural factors, that they might have previously considered as compelling to empathy or emotion. To draw this point out, I sometimes inquire as to whether the cultural background of the parties was something the students had included in their case briefs. Very often, this factor is overlooked and the persons involved in the case are reduced to “defendants,” “victims,” and “the government.” Their briefs omit any characteristics irrelevant to the legal arguments at stake. When asked why cultural traits were omitted, students almost invariably respond that such qualities were unrelated to the legal analysis of the case.⁸⁸ In their freshly trained legal minds, cultural factors have no place in the discussion. Further questioning reveals that many students initially considered these factors when reading the case but quickly discarded them in their haste to locate details important to the court’s discussion or to their own analyses.⁸⁹ Some will go so far as to admit they did not believe the court was fair in refusing to consider cultural factors, but that the law did not take such aspects into consideration. This discourse ultimately leads to a brief critique of legal education and its impact on the way students read, analyze, and understand the significance of cases.⁹⁰ Together we begin to appreciate how this legal process of sifting through the details of a case can obscure certain facts of human conflict that may be important to achieving justice in a given case.

In this essay as well as in the classroom, I do not quibble with the process that takes place in our legal education.⁹¹ Rather, I merely observe that the process exists and make note of how it functions. Even devoid of polemic or praise, this issue is not one that can be fully addressed during the fifty-minute segment I allot to covering cultural defenses. Nor is it one that can be easily or gently teased out of the class.⁹² Nevertheless, I make an effort to sally forth if

87. Mertz, *supra* note 4, at 98-110.

88. For example, students will argue that the language of state homicide statutes makes no mention about consideration of an individual’s ethnic or racial identity.

89. Sometimes, students will include these factors in their case briefs, but usually only for the purpose of emphasizing their lack of significance in the court’s study of the case.

90. I address this in a different way in my upper-class courses by inviting my students to submit “found poetry” in exchange for extra credit points. This optional assignment encourages students to read solely for the purpose of experiencing the power and beauty of the written word. For this wonderful and rewarding exercise idea, I am indebted to Professor Leonora Goodwin. For more information on found poetry, see *THE TEACHERS & WRITERS HANDBOOK OF POETIC FORMS* (Ron Padgett ed., 1987).

91. Of course, many others do. See, e.g., sources cited *supra* note 9.

92. I suspect that, earlier in the semester, students are more likely to be able to identify the process of legal education, or at least the impact of the process, on their constructions of the

only to stand and point at the tip of the iceberg. I do this because, as has been aptly stated elsewhere, “the spirit of education demands a more honest disclosure to students about both what they are learning and also the means of teaching employed.”⁹³

Even if teachers choose to forgo in-class discussion of the process of legal education, being mindful of how the law school classroom operates may lead more criminal law instructors to include coverage of cultural defenses on their syllabi. Teaching cultural defenses opens our students’ eyes to alternative and new arguments to be raised in the criminal law context. It also sheds light on the dominant culture that reigns over the creation, construction, and enforcement of our criminal laws. Finally, it offers the opportunity to provide students with a framework in which to contemplate their legal education and the legal process.

Here is a final appeal for incorporating Issue Three into class discussion—although deconstructing the law school classroom may seem to run counter to the goal of teaching first-year students to “think like lawyers,” a glimpse of the process, for both students and professors, may help somewhat to demystify the first-year experience by providing students with a context for legal education. A caveat, however, is necessary: Raising this in the classroom may have an effect similar to that achieved by Toto, Dorothy’s little dog in the 1939 film *The Wizard of Oz*, when he pulled back a curtain and revealed that the great and powerful Wizard of Oz was merely a screen-projected image created by a hapless side-show magician. Revealing the “man behind the curtain” was disappointing and disillusioning for Dorothy and her entourage. Likewise, a frank conversation about what truly goes on in the classroom may diminish the qualities of awe and wonder surrounding the rite of passage first-year students undergo. Nevertheless, providing this kind of insight achieves the worthy goal of helping beginning law students “learn how to put the law school classroom in its place within the larger context of the communities in which they live.”⁹⁴ In the same vein, unmasking the would-be wizard was enlightening for the party of four and constituted a positive step toward helping Dorothy find her way home.

cases. By the time that we have diligently worked through the elements of a crime, however, most students have become reasonably proficient in the cadence of the law school classroom and have learned to focus only on facts deemed relevant by the court.

93. Hirsch, *supra* note 4, at 122.

94. *Id.* at 128.

