

Balancing Liberal Ideals with the Use of a Cultural Defense

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INTRODUCTION

Scholars have long debated if and how liberalism can be balanced with multiculturalism; the use of a cultural defense in the courtroom illustrates the major issues of this conflict. In *People v. Moua*, a defendant's rape charges were successfully reduced based on the use of a cultural defense in which the attorney argued that the defendant's culture encouraged him to abduct a woman and consummate their marriage as part of a marriage ritual, despite her pleas for him to stop.¹ This case is one of many in which a defendant has used a cultural defense in the United States after committing an illegal act of violence, typically domestic violence against women and children, by stating that within their culture the actions they took are condoned.² The cultural defense is used to diminish the defendant's liability for the crime by arguing that his or her culture and belief system led him or her to believe those actions were acceptable or even encouraged, which in several cases has proven to be successful in reducing the charges and sentences against defendants.³ While this may be seen as promoting multiculturalism and allowing people the freedom to surround themselves with the ideals of their culture, it also allows defendants a loophole in the legal system, leads to unimaginable consequences for victims of domestic violence, and could even be seen as the legal system condoning this abhorrent behavior.⁴ Lawyers also likely have an ethical duty to consider regarding the cultural defense, how it is implemented, and their role in promoting the administration of justice. There is a distinction to be made between promoting violence and promoting multiculturalism - the two do not have to go hand in hand.

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1. See Carolyn Choi, *Application of a Cultural Defense in Criminal Proceedings*, UCLA PAC. BASIN L.J. 80, 83-84 (detailing the case of *People v. Moua*, No. 315972 (Fresno Super. Ct. 1985)).

2. See e.g., *The Cultural Defense in Criminal Law*, 99 HARV. L. REV. 1293, 1293 (1986) (detailing the case of *People v. Kimura*, No. A-091 33 (L.A. Cnty. Super. Ct. filed Apr. 24, 1985)); Alice J. Gallin, *The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. REV. 723, 729 (1994) (detailing the case of *People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. 1989)).

3. See Carolyn Choi, *supra* note 1, at 81.

4. Melissa Spatz, A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives, 24 COLUM. J.L. & SOC. PROBS. 597, 623 (1991).

For context, there is an inherent conflict between multiculturalism and liberalism on a bigger scale than the issue of whether or not to allow a cultural defense in the courtroom. Many prominent scholars have debated how best to promote multiculturalism within a liberal society, like the United States, or if it is even possible to do so. In particular, Will Kymlicka, the Canada Research Chair in Political Philosophy at Queen's University, has written about the intricacies of promoting multiculturalism in a liberal society.⁵ Kymlicka believes Not necessary tension exists between multiculturalism and liberalism because, "The basic principles of liberalism . . . are principles of individual freedom. Liberals can only endorse minority rights insofar as they are consistent with respect for the freedom or autonomy of individuals."⁶ However, Kymlicka believes minority rights and individual freedom can work hand in hand most of the time with the exception being when an illiberal minority group actively works to suppress individual freedom through a variety of means.⁷ Liberalism provides individuals with the opportunity to make decisions regarding how they want to live their life, but also allows them to change their mind as many times as they would like as they learn and grow.⁸ The whole point of liberalism is that exposure to different cultures, religions, and ways of life helps each individual decide what he or she believes is the good life.⁹ Kymlicka states that a liberal society promotes the idea that individuals must, "lead [their] life from the inside, in accordance with [their] beliefs about what gives value to life" and should "be free to question those beliefs" and adapt their vision of what they want their life to look like.¹⁰

A liberal society therefore must allow individuals not only the opportunity to choose how they want to live, but also to be exposed to various ways of life should they want to reevaluate their idea of the good life.¹¹ Because of this, it is necessary for a liberal society, like the United States, to embrace different cultures in order to provide the highest functioning liberal society possible focusing on the individualism central to liberalism. This could allow for liberalism and multiculturalism to coexist peacefully, which would create a more liberal society with better access to knowledge that allows for individual choice and freedom. As with many things, there is a balance needed between promoting liberalism and multiculturalism, which can be demonstrated by the complex factors that contribute to the issue the legal system currently faces regarding whether to allow for a formal cultural defense in criminal proceedings. In Part I, I will provide an

5. Queen's University, *Will Kymlicka* (last visited February 25, 2023), <https://www.queensu.ca/politics/people/kymlicka-will> [https://perma.cc/24PB-3R3L].

6. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 75–106, 75 (Oxford University Press 1995).

7. *Id.*

8. *Id.* at 80.

9. *Id.* at 80–81.

10. *Id.* at 81.

11. *Id.*

overview of the state of the cultural defense in the United States today. Part II discusses the various arguments that must be considered when deciding how to implement the use of cultural factors into the legal system. Part III will detail how the use of a cultural defense undermines many of the steps taken to combat domestic violence. Part IV will lay out a framework for how an informal cultural defense could be used without providing a broad loophole to violent offenders. Finally, Part V examines how the *Model Rules* and other ethical obligations may play a role in how the legal system moves forward with the allowance of cultural factors as a defense. Overall, the use of a formal cultural defense may perpetuate violence against women and children, but cultural factors should still be considered as one aspect of a defendant's state of mind in order to respect the values and beliefs of minority cultures.

I. THE CULTURAL DEFENSE TODAY

Increased immigration to the United States throughout recent years and the subsequent diversity that it brings has elevated the question of whether the use of a formal cultural defense undermines law and public policy, particularly in Asian communities where most of the cultural defense cases have occurred.¹² A cultural defense would be used when defendants, “commit acts of violence that are illegal in the United States but which are condoned in the defendants’ homelands.”¹³ The goal of this defense is to diminish a defendant’s criminal liability because their culture may permit or even encourage the actions they took, so the defendant believed it was reasonable to act in the manner they did.¹⁴ There are several ways defense attorneys have attempted to implement a cultural defense into their argument, such as the mistake of fact defense or the diminished responsibility defense discussed below.¹⁵ So far, these efforts have mostly been through the use of an informal cultural defense, but some argue for the addition of a formal cultural defense as an option for defense attorneys to utilize in certain cases.

Since the United States criminal justice system has not created a formal cultural defense, defense attorneys have instead begun to incorporate an informal version by including cultural factors as part of already existing defenses relating to the defendant’s state of mind at the time of the crime.¹⁶ Under an insanity defense, it may be argued that a defendant’s “cultural values were so different from the majoritarian values reflected in the criminal law that ‘he lack[ed] substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.’”¹⁷

12. Choi, *supra* note 1, at 81.

13. Alice J. Gallin, *The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. REV. 723, 723 (1994).

14. *Id.*

15. *Id.* at 725.

16. *Id.*

17. *The Cultural Defense in Criminal Law*, *supra* note 2, at 1294 (brackets in original).

Defense attorneys have also used an informal cultural defense in an attempt to demonstrate that the defendant lacked the intent necessary to satisfy the definition of certain crimes.¹⁸ Specifically, cultural factors have been combined with the mistake of fact defense and the diminished responsibility defense.¹⁹ These defenses depend on demonstrating that “the defendant did not possess the mental state required to be convicted of the crime.”²⁰ If it can be shown that the defendant did not meet the requirement of intent, the defendant’s criminal liability will be diminished or even negated through the mistake of fact defense.²¹ The diminished responsibility defense works in a similar way as an attempt to show the defendant was not in the proper state of mind to be found guilty of the crime.²² To utilize a diminished responsibility argument, a defendant would argue, “that they suffered from a mental condition, which was insufficient to constitute legal insanity but nonetheless interfered with their ability to reason at the time the crime was committed. In other words, defendants argue that they suffered from a mental condition that affected their state of mind when the crime was committed, and thus prevented them from possessing the requisite mens rea.”²³ By combining this with cultural factors, an informal cultural defense would provide context regarding the defendant’s state of mind in order to diminish criminal liability, much like other background information about the defendant would be considered by the court.

Cultural factors have also been considered by prosecutors and judges when evaluating charges and sentences for defendants.²⁴ Prosecutors are able to “consider extenuating circumstances when charging the defendant with a crime or when plea bargaining with the defense attorney.”²⁵ Judges are given considerable discretion throughout the sentencing process, which has enabled judges to consider cultural factors prior to imposing sentences as a way of mitigating the punishment of particular individuals.²⁶ In particular, in *People v. Moua*, as discussed earlier, a Hmong tribesman from Laos argued that his cultural background led him to believe he was completing a marriage ritual when he kidnapped and raped his intended bride.²⁷ He stated that it was tradition to abduct the woman one intends to marry and consummate their marriage and that the ritual includes the woman rejecting his advances so that the man must prove himself worthy.²⁸ The court

18. *Id.*

19. Gallin, *supra* note 13, at 725.

20. *Id.* at 726.

21. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 5.1 at 405–06.

22. *Id.* at 405.

23. Gallin, *supra* note 13, at 727.

24. See *The Cultural Defense in Criminal Law*, *supra* note 2, at 1295.

25. *Id.*

26. *Id.*

27. Carolyn Choi, *supra* note 1, at 83–84 (detailing the case of *People v. Moua*, No. 315972 (Fresno Super. Ct. 1985)).

28. *Id.*

concluded that the defendant believed his victim had given consent since part of this cultural tradition involved the woman protesting any sexual advances, so he believed this was another part of the ritual instead of her actually saying ‘no.’²⁹ As a result, the judge reduced the rape charges against the defendant to false imprisonment charges.³⁰ Overall, the legal system has gotten creative in order to incorporate an informal cultural defense into preexisting criminal defenses. These strategies have allowed a defendant’s cultural background to be considered when evaluating their criminal liability, even without a formal cultural defense provided by the legal system.

Since the introduction of an informal cultural defense, the criminal justice system has seen many examples where defense attorneys have implemented cultural factors as part of their defense strategy to mitigate or negate their client’s criminal liability. For example, in *People v. Kimura*, after learning that her husband had an affair, a Japanese-American woman attempted to commit parent-child suicide, which her attorney argued is seen as, “an accepted means for a woman to rid herself of the shame resulting from her husband’s infidelity,” in traditional Japanese culture.³¹ In this case, the prosecutor decided to consider these cultural influences before trial and allowed the defendant to plead guilty to voluntary manslaughter instead of first-degree murder, even though the prosecutor believed the definition of first-degree murder was satisfied by the facts of the case.³²

The diminished responsibility defense in combination with cultural factors was used in *People v. Dong Lu Chen* to successfully mitigate the defendant’s sentence and reduce the charges against him.³³ In this case, a Chinese man learned of his wife’s infidelity and proceeded to beat and kill her.³⁴ After hearing expert testimony stating that, “when a Chinese man learns that his wife has committed adultery, he may threaten to kill her . . . [but] the rest of the community in China . . . stops him before he can carry out his threats”, the court found that his lack of community and the strong influence of Chinese culture immensely affected the defendant’s state of mind and, “made it impossible for him to form the intent necessary for murder,” even though there were several days between when he found out about the affair and when he attacked his wife.³⁵ After examining the evidence and the cultural factors that may have influenced the defendant, the judge chose to reduce the charges against Mr. Chen and sentence him, “to the lightest possible sentence for second-degree manslaughter—five years’ probation.”³⁶

29. *Id.*

30. *Id.*

31. *The Cultural Defense in Criminal Law*, *supra* note 2, at 1293 (detailing the case of *People v. Kimura*, No. A-o91 33 (Los Angeles Cnty. Super. Ct. filed Apr. 24, 1985)).

32. *Id.* at 1295.

33. Gallin, *supra* note 13, at 729 (detailing the case of *People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. 1989)).

34. *Id.* at 729–30.

35. *Id.*

36. *Id.* at 731.

Similarly, in *People v. Wu*, a Chinese woman attempted to commit parent-child suicide after learning of her husband's adultery.³⁷ The court held that, "a defendant is entitled to have the jury consider the defendant's cultural background when determining whether the relevant mental states existed in deciding if the defendant is guilty of murdering her son."³⁸ This was a much more explicit approval from the court towards the use of a cultural defense, which shows this defense may continue to become more accepted. However, the legal system must err on the side of caution when explicitly accepting an *informal* cultural defense so as not to seemingly endorse a *formal* cultural defense.

II. FACTORS TO CONSIDER

When arguing for the use of a formal cultural defense in criminal proceedings, there are several standard arguments mentioned by scholars. Some worry that the informal cultural defense allows too much discretion in the decision making process as it permits prosecutors and judges to make decisions about charging and sentencing without any specific guidelines, which may lead to inconsistency in their decision-making.³⁹ However, analyzing cultural factors on a case-by-case basis allows the criminal justice system to better balance the ideals of liberalism with multiculturalism because it allows prosecutors and judges to evaluate what crosses into suppressing individual freedom versus promoting cultural values. It is also argued that someone may have committed a crime, "solely because she was ignorant of the applicable law" or, "because the values of her native culture compelled her to do so."⁴⁰ By denying a formal cultural defense, it "may be perceived as evidence of disdain for an ethnic minority's cultural values," which may cause hostility between the majority culture and minority cultures.⁴¹

The court need not implement a formal cultural defense to combat these issues. Instead, the solution should be that the court balances individual freedom with the importance of cultural diversity and takes these factors into account as part of an overall defense strategy. The analysis should look at all evidence and should consider how a defendant's culture may have influenced the individual's state of mind, but should not focus solely on cultural factors as a formal cultural defense would. This balancing test also analyzes whether the criminal acts committed by the individual suppress another's freedom, which they would in the case of violent crimes like the recent cases the court system has come across that attempted to utilize—many successfully—a cultural defense. All these factors must be considered to evaluate a defendant's criminal liability, particularly to avoid encouraging

37. Gallin, *supra* note 13, 731 (detailing the case of *People v. Wu*, 286 Cal. Rptr. 868, 872–73 (Cal. Ct. App. 1991)).

38. *Id.*

39. *The Cultural Defense in Criminal Law*, *supra* note 2, at 1297.

40. *Id.* at 1299–1300.

41. *Id.* at 1305.

this behavior while acknowledging that a defendant's personal culpability for the crime may be different because of their cultural background.

III. THE PERPETUATION OF DOMESTIC VIOLENCE

To date, the cultural defense has most often been used in cases involving violence against women and children.⁴² Domestic violence has been and continues to be a very prevalent issue in the United States.⁴³ For a long time, it was simply tolerated, but similarly to how society has begun to protect women and children against domestic violence within the majority culture, immigrant women and children must be protected as well. Although it may infringe far less on another individual's freedom in many other cases, a cultural defense continues to be used mostly in this setting, which demonstrates a major difference between the liberal society of the United States and other cultures' attitudes towards women and children.⁴⁴ Recently, the United States has taken steps to actively combat domestic violence.⁴⁵ Although there is still a long way to go, "American society has acknowledged the violence occurring within the family unit and has taken steps to overcome such abuses . . . [including] the legal community's development of a defense strategy for battered women who kill their abusers."⁴⁶ With this increased advocacy calling for significant legal and societal changes to aid victims of domestic violence, the United States cannot provide an excuse like the formal cultural defense that would negate criminal liability for those who commit these heinous crimes solely based on their cultural background instead of looking at all the facts of the case. A formal cultural defense would completely undermine the work of activists and the legal community to better address the issue of domestic violence in the United States.⁴⁷

A major issue that many individuals and scholars have with a formal cultural defense is that it could be seen as tolerating certain violent acts and suggesting that violence is an inherent aspect of certain cultures, particularly violence against women and children, which goes against the fundamental beliefs of a liberal society.⁴⁸ Promoting violence is very different from promoting multiculturalism and

42. Spatz, *supra* note 4, at 626.

43. Even today with increased advocacy efforts, more than 10 million men and women are physically abused by an intimate partner each year. *Statistics*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE (last visited Mar. 20, 2023), <https://ncadv.org/STATISTICS> [<https://perma.cc/G4GM-ABCP>].

44. Myrna Oliver, *Immigrant Crimes: Cultural Defenses—A Legal Tactic*, L.A. TIMES (July 15, 1988), <https://www.latimes.com/archives/la-xpm-1988-07-15-mn-7189-story.html> [<https://perma.cc/9VYA-U5BA>].

45. Rosie Hidalgo & Cailin Crockett, *Recognizing National Domestic Violence Awareness and Prevention Month: The Biden-Harris Administration's Commitment to Ending Gender-Based Violence*, WHITE HOUSE GENDER POLICY COUNCIL (October 31, 2022), <https://www.whitehouse.gov/gpc/briefing-room/2022/10/31/recognizing-national-domestic-violence-awareness-and-prevention-month-the-biden-harris-administrations-commitment-to-ending-gender-based-violence/> [<https://perma.cc/5XEX-6VGJ>].

46. Gallin, *supra* note 13, at 724.

47. Spatz, *supra* note 4, at 623–27.

48. Leti Volpp, *Misidentifying Culture: Asian Women and the Cultural Defense*, 17 HARV. WOMEN'S L.J. 57, 94 (1994).

these two should not be equated. Violence should not be considered an inherent aspect of a culture that needs to be upheld as part of a culture's value system. However, cultural factors should be considered to better understand a defendant's state of mind when they committed a criminal act.⁴⁹ A more fluid version of the cultural defense, looking to cultural factors as part of the totality of the circumstances without a formal defense, considered on a case-by-case basis would allow for this. Unfortunately, the recent cases that have utilized a cultural defense to mitigate the consequences of violence against women and children have been seen in some communities as a statement of increased tolerance towards domestic violence,⁵⁰ and a formal cultural defense would only exacerbate this problem.

Since the decision in *People v. Dong Lu Chen*, there have been discussions about whether the court's holding sent the message to immigrant communities that, "the American judicial system will allow [immigrants] to get away with violence that may be illegal in the United States, but that ultimately can be attributable to their cultural background."⁵¹ Many activists have spoken out saying that the use of a cultural defense could have a negative impact on victims in immigrant communities.⁵² Activists point to the increase in domestic violence within Asian communities in New York after *People v. Dong Lu Chen* to support this position.⁵³ Several Asian women have come forward about their abusers' interpretations of the court's decision as allowing them to continue their abuse because there will not be repercussions.⁵⁴ One woman told a worker at the New York Asian Women's Center, "Even thinking about that case makes me afraid. My husband told me: 'If this is the kind of sentence you get for killing your wife, I could do anything to you. I have the money for a good attorney.'"⁵⁵ With this response from abusers, many victims of domestic violence in immigrant communities feel that they have no one to turn to and no way to stand up to their abusers—particularly not through the legal system, which should be a readily accessible way to address domestic violence.⁵⁶ This problem arises because of the way the cultural defense is used. Within a liberal society, individual freedom is at the forefront of the value system, so when individual freedom is suppressed, or in this case, entirely taken away at the hands of Mr. Chen,⁵⁷ the inherent tension between liberalism and multiculturalism shows itself very clearly. The decision in this case was made predominantly based on the potential cultural influence guiding Mr. Chen in his decision to kill his wife⁵⁸ but, in order to uphold

49. *Id.* at 95.

50. *Id.* at 76.

51. Gallin, *supra* note 13, at 724.

52. *The Cultural Defense in Criminal Law*, *supra* note 2, at 1311.

53. Spatz, *supra* note 4, at 623–27.

54. Gallin, *supra* note 13, at 735–36.

55. Volpp, *supra* note 47, at 77.

56. *Id.*

57. *Id.* at 64–77 (detailing the case of *People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. 1989)).

58. *Id.* at 73.

liberal ideals, these cultural factors need to be equally balanced with an evaluation of the other evidence presented throughout the trial. By focusing solely on the cultural factors, the judge functionally instituted a formal cultural defense, as the outcome of the case reflected that of a successful formal cultural defense strategy.

There is also an inherent conflict between feminism and the cultural defense when the cultural defense is used in these cases. The feminist movement throughout the 1960s and 1970s brought significant attention to the problem of domestic violence in the United States.⁵⁹ With the opening of the first battered women's shelter in 1974 and expanded public awareness, the prevalence of domestic violence has become increasingly clear.⁶⁰ Statistics from the Federal Bureau of Investigation state that "twenty-eight percent of all women killed throughout the United States from 1985 to 1991 were the victims of present or former husbands or boyfriends."⁶¹ The Surgeon General of the United States also identified domestic abuse as the nation's single largest cause of injury to women as more knowledge relating to the high prevalence of domestic violence came to light.⁶² Since then, the United States has made significant changes to combat domestic violence, including legislation addressing violence against women, providing resources through women's shelters and hotlines for victims, and the admittance of the battered women's defense in the courtroom.⁶³ The battered women's defense works similarly to how an informal cultural defense works. It is typically used as more of a defense strategy that combines expert testimony with other evidence versus a formal criminal law defense. Therefore, it would not be difficult to implement a similar informal cultural defense in criminal proceedings as the court has already seen similar styles of defenses.⁶⁴

However, a cultural defense that seemingly condones violence may undermine the significance of the battered women's defense.⁶⁵ Particularly, with how far the United States has come in advocating for victims of domestic violence, the cultural defense in certain cases "ends up promoting those values at the expense of exactly what the battered woman's defense is trying to condemn: violence against women in domestic settings."⁶⁶ Admittedly, the United States still has a long way

59. See Mira Mihajlovich, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253, 1254 (1987).

60. *Id.* at 1254–55.

61. Gallin, *supra* note 13, at 737.

62. Antonia C. Novello, *A Medical Response to Domestic Violence*, 267 JAMA 3132 (1992).

63. See e.g., *Legislation*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE (last visited April 17, 2023), <https://ncadv.org/legislation> [<https://perma.cc/DJ8Y-MDLP>]; *Domestic Violence Resources*, D.C. METRO. POLICE DEP'T (last visited April 17, 2023), <https://mpdc.dc.gov/page/domestic-violence-resources> [<https://perma.cc/WAF8-R6JP>]; Jessica R. Holliday et al., *The Use of Battered Women's Syndrome in U.S. Criminal Courts*, 50(3) J. AM. ACAD. PSYCHIATRY L. 1 (2022).

64. Gallin, *supra* note 13, at 738.

65. *Id.* at 741.

66. *Id.* at 742.

to go in condemning domestic violence and violence against women, but there have recently been significant attempts to address the problem, like the battered women's defense, which must be continued and supported by the legal system.⁶⁷ Without the law to back up these changes, they will not be nearly as effective and there will be no deterrence effect. As seen by the responses of several batterers to *People v. Dong Lu Chen*, sometimes, "members of immigrant communities have interpreted courts' decisions as condoning violence against women, thereby undermining work done to reduce violence against women."⁶⁸ If immigrant communities interpret these court decisions as condoning acts of violence towards women and children, it becomes less likely that domestic violence will stop within these communities because there will be little to no consequences for abusers.⁶⁹ It may be argued that deterrence could come from the results of other domestic violence cases, but these men in particular are given a defense that others will not be given—and many of them know it.⁷⁰ This continues to perpetuate the cycle of abuse in households as immigrants' children see domestic violence in their homes without repercussions and may learn that this behavior is acceptable for them to use in future relationships as well.⁷¹ Individuals who witness abuse within their families growing up are statistically more likely to abuse their own families later on in life, so this could cause major problems within future generations as the acceptance of domestic violence may be passed down from generation to generation.⁷²

To balance liberal ideals with the use of an informal cultural defense, there should be a separation between violent acts that suppress another individual's freedom that may have been tolerated or even accepted within an immigrant's culture and the values of the culture that the criminal justice system should uphold. A formal cultural defense protects abusers and treats domestic violence as an inherent aspect of a culture, instead of as a problem regardless of if it has historically been accepted by a community. Acceptance does not always mean something should continue, as history has repeatedly proven. One example of this assumption that violence is an inherent part of a culture was clear in *People v. Dong Lu Chen* where, "domestic violence among Asian American communities [was] explained as 'cultural,' when a similar description is rarely given to domestic violence in the heterosexual white community."⁷³ It could be argued that violence against women has been rooted in communities in America throughout history as well, but the liberal society of the United States acknowledged this

67. *Id.* at 738.

68. *Id.* at 743.

69. *Id.*

70. *Id.*

71. See Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 275 (1985).

72. *Id.*

73. Volpp, *supra* note 48, at 94.

was a major problem and has made attempts to combat domestic violence as there became more awareness of the severity of the problem.⁷⁴ Although it may be commonplace in some communities, the legal system still should not tolerate or accept domestic violence as a cultural practice. Instead, the legal system should work to protect victims and should see this as a problem in the same way as it does in heterosexual white families in the United States. Claiming domestic violence is an important part of someone's culture also further separates the majority culture from minority cultures, even though the majority culture has also had major problems with domestic violence.⁷⁵ This, in turn, sets the majority on a pedestal that it did not earn.⁷⁶

Cultural diversity is incredibly important, and the legal system should reflect that. The legal system must evaluate whether our liberal society is "willing to tolerate cultural diversity to the extent that it encourages violence against women and children."⁷⁷ Instead, in order to promote cultural diversity within the United States, the legal system must protect the women and children of minority cultures and provide an informal cultural defense, particularly to defend practices and rituals that have deep meaning for members of minority cultures.

IV. BENEFICIAL USE OF CULTURAL FACTORS

However, there may be cases in which a defendant's cultural background plays an important role in promoting justice and cultural diversity. For example, in *Church of Lukumi Babalu Aye v. City of Hialeah*, the Supreme Court held that a city could not ban the ritual sacrifice of animals within city limits.⁷⁸ Although the city of Hialeah argued that the ordinance in question used neutral wording that did not discriminate against a particular religion or culture, the Court believed the effect and objective of the law was to suppress the ritual of animal sacrifice, regardless of whether the text itself explicitly indicated this was the intention.⁷⁹ The Court further stated that "official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."⁸⁰ Because of the record in the case and knowledge of the reasoning behind the ordinance, the court concluded that, "upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty

74. From 1994-2012, incidents of nonfatal domestic violence declined by 63 percent. Jennifer L. Truman, & Rachel E. Morgan, *Special Report: Nonfatal Domestic Violence, 2003-2012*, UNITED STATES DEP'T. OF JUST. BUREAU OF JUST. STAT. (April 2014).

75. Volpp, *supra* note 48, at 94.

76. *Id.*

77. Gallin, *supra* note 13, 744.

78. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993).

79. *Id.* at 534.

80. *Id.*

to the Constitution and to the rights it secures.⁸¹ The ordinance was found to impede the freedom of religion and culture that is so central to the liberal society of the United States.⁸² This case demonstrates circumstances where a cultural defense is used without impeding the freedom of another and instead is used to defend an individual's freedom to practice religious rituals.⁸³ There is no harm or violence done to another individual in this case and this holding could not be interpreted as condoning behavior that goes against the core values of a liberal society in the way violence against women and children does.⁸⁴ Other similar circumstances may arise in the contexts of an individual protecting land that has an important meaning to a minority culture and protesting against misuse,⁸⁵ whether individuals can excuse themselves from the work day to pray if their religion calls for prayer at certain times,⁸⁶ the use of particular drugs for a cultural purpose that are still illegal within the United States,⁸⁷ certain marriage rituals like arranged marriages that may be seen by a liberal society as limiting freedom,⁸⁸ an individual's choice of attire,⁸⁹ and the various ways different cultures choose to dispose of dead bodies.⁹⁰

The introduction of cultural factors as background information that provides context to the circumstances when deciding the outcome of a case, like *Church of Lukumi Babalu Aye v. City of Hialeah*, exemplifies the proper balance between protecting the cultural values of immigrants and liberalism. As Leti Volpp sets out in *Misidentifying Culture: Asian Women and the Cultural Defense*, the goal should be, “to mediate between a position that totally rejects the defense and a position that embraces a formalized ‘cultural defense’ from the perspective of cultural relativism,” which would be an informal use of cultural factors as one aspect of a defense strategy.⁹¹ Within a liberal society, the legal system should display a “commitment towards ending all forms of subordination” which “should inform the decision of whether or not to support the informal use of cultural information on behalf of a defendant in a given case.”⁹² The court's evaluation therefore becomes a test considering whether a defendant has limited another's freedom through their actions or behavior. Considering violence to be inherently

81. *Id.* at 547.

82. *Id.* at 546.

83. *See generally id.*

84. *Id.*

85. *See* Bryan H. Wildenthal, *Religion, Law, and the Land: Native Americans and the Judicial Interpretation of Sacred Land*, 16 J.L. & RELIGION 743 (2001).

86. *See* Will Mirane, *Compliance Check: Do Employers have to Allow Time for Prayer at Work?*, BERNIEPORTAL (July 22, 2022), <http://blog.bernieportal.com/do-employees-have-the-right-to-pray-at-work> [<https://perma.cc/MU5A-7XHR>].

87. *See* ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 137 (2004).

88. *Id.* at 213–258.

89. *Id.* at 259–296.

90. *Id.* at 297–340.

91. Volpp, *supra* note 48, at 59.

92. *Id.*

part of a culture is problematic and encourages batterers to continue their behavior and victims to suffer in silence.⁹³ With this test, domestic violence could not be excused or tolerated through a formal cultural defense, but rituals and traditions within a culture that do not strip another of their freedom would be considered by the court when evaluating criminal liability.

It is necessary to balance both liberalism and multiculturalism when considering the issue of whether to allow a cultural defense in criminal proceedings because the extreme positions of allowing a formal cultural defense and never considering cultural factors when evaluating a defendant's liability ignore the complexity of the issue and the various intricacies of cases that may arise. Both extremes, "fail to acknowledge that the multiple subordinations existing within immigrant communities are relevant to the choice of whether to support the use of the 'cultural defense' in any one case."⁹⁴ A formal cultural defense in domestic violence cases in particular proves to be especially troublesome, but the other extreme has serious consequences as well because, "[t]he position that a defendant's cultural background should never be taken into account not only denies that our legal system already has a culture, but also rests on other troubling assumptions."⁹⁵ By denying a cultural defense completely, the legal system ignores that this significantly benefits the majority culture and shows a level of disrespect towards minority cultures and their beliefs and values.⁹⁶

Although it may be difficult at times to find the specific line where an action goes too far and begins to suppress an individual's freedom, an individualized balancing test that considers how a defendant's culture may have influenced their behavior allows for consideration of the complexities that come with criminal cases. With that being said, a consideration of culture must be through informal factors and the court system must make every attempt to avoid stereotyping throughout discussions about cultural influences.⁹⁷ In order to do this properly, a court should look at how this particular individual perceived the influence of their culture and how this may have led to their actions, not just to what others might believe about another culture through stereotyping.⁹⁸ The use of expert testimony can help the court get a better idea of the individual's relationships and place within their culture, but it is important to also get an understanding of the particular individual's thoughts and perceptions.⁹⁹ Whether this be through testimony or an interview process, the court should understand specifically how culture contributed to this particular individual's state of mind when committing the criminal

93. *Id.*

94. *Id.* at 78.

95. *Id.*

96. *The Cultural Defense in Criminal Law*, *supra* note 2, at 1305.

97. Volpp, *supra* note 48, at 91.

98. *Id.* at 100.

99. *Id.* at 89.

act.¹⁰⁰ The court must also analyze each case that utilizes even an informal cultural defense by considering the impact of gender subordination and oppression within the culture, because focusing exclusively on cultural difference without this analysis undermines feminist and liberal ideals.¹⁰¹

In *People v. Dong Lu Chen*, the court focused solely on the cultural influence experienced by Mr. Chen, but barely acknowledged the violence suffered by Jian Wen Chen as a result of the subordination common within that community.¹⁰² Just because subordination has historically existed within a community does not mean that the court need not examine the root causes of and problems with the continuation of these practices.¹⁰³ In the same way the United States has begun working to combat domestic violence after years of perpetuating cycles of abuse, other communities should work to do the same, particularly in a liberal society where violence against women and children should not be tolerated. A cultural defense should not be used as an excuse for “racism, sexism and subordination in the form of violence,” because this diminishes the harms of domestic violence by providing a rationalization for this behavior.¹⁰⁴ Instead, consideration of cultural factors should focus on how culture influenced the particular individual’s state of mind, similar to the way information about an individual’s family life and overall life history may be provided to the court, in order to give context regarding the individual and their thought process.¹⁰⁵ This information could still potentially lead to courts mitigating sentences or charges under certain circumstances, but would provide a more holistic approach for each case and would balance the importance of protecting minority cultures with the need to impose consequences for abusers.

V. ETHICAL IMPLICATIONS

Another factor to consider may be the potential ethical implications of the use of a formal cultural defense based on the *Model Rules of Professional Conduct*. Defense attorneys and judges should consider the ethical implications of a cultural defense when it permits abusers to evade punishment for violent acts committed against women and children. On the other hand, attorneys and judges also want to avoid bias and discrimination towards minority groups, which is another ethical consideration to contemplate. These ethical considerations again demonstrate the importance of finding a middle ground and balancing the two contrasting ideals of liberalism and multiculturalism.

Rule 1.2(d) of the *Model Rules* states that, “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or

100. *Id.* at 95.

101. *Id.* at 63.

102. *Id.* at 75.

103. *Id.* at 93–94.

104. *Id.* at 95.

105. *Id.*

fraudulent.”¹⁰⁶ It could be argued that using a formal cultural defense to mitigate or negate criminal liability for violence against women and children is assisting a client in continuing with that illegal behavior if the victim is not able to leave their abuser, condoning that behavior for others in the same community, and allowing for a loophole in the legal system. Instead of the defendant facing the consequences that come with those illegal and harmful actions, they are told the legal system will tolerate violence against women and children. Using a cultural defense in this way could therefore potentially violate this rule and could even be seen as fraud by supplying a way to manipulate the law and get away with violence, which is why defense attorneys and judges need to tread lightly and utilize cultural factors as part of a defense strategy in a way that promotes diversity, not in a way that perpetuates the cycle of abuse within a community.

In Rule 8.4(d) of the *Model Rules*, “engag[ing] in conduct that is prejudicial to the administration of justice,” is labeled as misconduct for attorneys.¹⁰⁷ By arguing for and providing an excuse for individuals who have committed violent crimes to either negate or mitigate their sentences and charges, attorneys may be violating this rule. Particularly in cases like *People v. Dong Lu Chen*, it can be argued that there was no justice for the victim, as her husband was only given five years of probation after brutally beating and killing her. It is difficult to see how this could possibly be upholding the administration of justice as it undermines many of our laws and the overarching goals of the legal system, such as due process and equal protection laws. There is also the possibility that this tolerance of domestic violence under certain circumstances may encourage others within various communities to continue that behavior or even escalate their violent behavior as they feel they are now protected by the legal system, which would be incredibly prejudicial to the administration of justice long term.¹⁰⁸

Rule 8.4(g) gives yet another example of misconduct that needs to be considered regarding the use of a cultural defense. It is considered misconduct to, “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”¹⁰⁹ If the court system were to outright refuse to consider any cultural factors when evaluating a defendant’s state of mind, Rule 8.4(g) might be violated. This potentially could be seen as discrimination towards a minority group and their cultural values. Not only might this violate the *Model Rules*, but it could lead to hostility between the majority culture and

106. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2018) [hereinafter MODEL RULES].

107. MODEL RULES R. 8.4(d).

108. Statistics show significant percentages of repeat offenders, with up to 60 percent of those arrested for domestic violence rearrested within 10 years. See Shelley Flannery, *Will Domestic Abuse Happen Again?*, DOMESTICSHELTERS.ORG (June 1, 2022), <https://www.domesticshelters.org/articles/identifying-abuse/will-it-happen-again> [https://perma.cc/RKZ8-G4PV].

109. MODEL RULES R. 8.4(g).

minority cultures as the minority culture may feel disrespected and alienated as a result.

VI. CONCLUSION

Overall, tolerance of domestic violence through a formal cultural defense goes against the most basic of democratic values within the United States, but also goes against the ethics rules lawyers are required to abide by. Since, historically, abusers have not been held accountable to the extent the law demands, a formal cultural defense seems to be just another way of tolerating violence against women and children. Providing this excuse encourages violent behavior and continues to perpetuate the cycle of abuse within different communities through generations. However, there is an important balance that must be struck. A complete refusal to consider cultural factors is incredibly harmful to immigrant communities and shows a level of disdain for others' cultural beliefs and values, which cannot be upheld in a liberal society that promotes diversity. It is important to listen to the voices of immigrants and immigrant communities, particularly women and victims of domestic violence, when looking at how to find the right balance when it comes to a cultural defense. A cultural defense can be used in an effective way to promote diversity in the United States without perpetuating violence against women and children. The focus of the legal system should be on finding the balance of how to do this, which starts with implementing an informal cultural defense into defense strategies, particularly in cases where the defendant has not suppressed the freedom of another individual. The inherent conflict between liberalism and multiculturalism rears its head in the discussion of whether to allow a formal cultural defense in criminal law proceedings as a way to mitigate or negate both charges and sentences. The legal system will continue to navigate the difficulty of finding the line between these two conflicting ideals. On the one hand, allowing cultural factors to be considered throughout criminal proceedings promotes diversity of thought and culture within a liberal society that benefits from the ability to choose various life paths. On the other hand, a formal cultural defense allows defendants to mitigate or even negate the consequences of committing brutally violent acts and may even be seen as the legal system condoning violence against women and children. Because of these considerations, a balancing test must be used to make a distinction between promoting violence and promoting multiculturalism, since the two must be separated, that includes allowing cultural factors to be considered by the court as one aspect of a defense that influenced the defendant's state of mind without providing the defendant with a formal cultural defense. Ultimately, the use of a formal cultural defense cannot be upheld in a liberal society, but an informal cultural defense should be, and cultural factors must be considered when evaluating the totality of the circumstances surrounding a defendant's state of mind.