

# Cultural Defenses in the Criminal Legal System

By Leti Volpp

## Culture and the Legal System

The context in which many of us may have interacted with the legal system around the question of culture may have to do with questions of child welfare and with immigration. For example, we may have filled out affidavits on behalf of battered women concerning cancellation or removal. We may have helped with visa petitions. Affidavits may have been written for women who are seeking gender based asylum or asylum for other reasons. Affidavits may have also been written on behalf of women fleeing persecution in other countries. We also are interacting with the legal system around criminal cases and cases involving inter-personal violence.

There are two main types of cases where questions of culture have emerged around inter-personal violence. (1) The first type involves male violence against women—when a man kills, rapes or assaults a woman. (2) The second type involves attempted parent-child suicide—where a mother kills or tries to kill her children and then is unsuccessful in actually killing herself. It becomes attempted parent-child homicide when the mother survives and she is prosecuted for either killing or attempting to kill her children.

What occurs in both types of cases is that criminal charges are brought and the defendant then tries to use culture to explain his or her behavior and says, “I should be treated more leniently. Consider what was going on in my head when I committed these acts. There is something about my cultural background that had an influence on my behavior.” Advocates against allowing cultural defenses say the acts are completely inexcusable and they do not want to let any information into the courtroom that would call this behavior cultural. They want to ban culture from the courtroom and not have any consideration of culture there.

These questions are actually more complicated than that kind of analysis permits. Basically, our legal system provides particular rights for criminal defendants. For example, someone who is facing an indictment and possibly will be convicted of a particular crime is provided with an attorney by the government at no cost to the defendant. This is very different, for example, from the immigration system where, if you appear in immigration court, you have to pay for your own attorney. The rationale for this is that the consequences of being a criminal defendant are so severe that we want to try and provide some protection for people. (We could argue that deportation is a very severe consequence but there is a lot of bad law that says deportation is not punishment

so you do not get a free attorney.) Another of the rights you get as a criminal defendant aside from an attorney provided by the state is the right to admit evidence in your defense that is considered relevant—meaning information that is potentially useful. So long as information is relevant, its probative value outweighs its prejudicial effect and does not have the tendency to mislead the jury, it will be admitted as evidence. The threshold for admitting evidence into a case is very low. One kind of evidence that can be admitted into a criminal case is the defendant’s beliefs and values that influenced his or her behavior, when his or her mental state is at issue in the case. Legal arguments that incorporate the defendant’s beliefs and values in this manner are referred to as cultural defenses (it is more accurate to talk about cultural defenses as opposed to a single cultural defense).

### **Cultural Evidence in the Courtroom**

Some people have argued that keeping cultural evidence from entering a criminal case is problematic because it discriminates against people of color. For example, if mainstream culture is already present in the courtroom and it is invisible in the ways that we have talked about, if we do not let cultural evidence into the courtroom, it could be considered racial discrimination. The system is set up so there are basically three parties that are potential lever points, who play roles in these cases.

(1) The first are defense attorneys who represent the defendant and who are ethically mandated to represent their clients zealously. They are supposed to do everything they can to get their client a better deal or to get them less time in prison. Generally the culture of criminal defense attorneys is that they do not focus on the broader questions that we are struggling with. Their sole ethical obligation is to one person. Community groups and people who work with battered women may have more leverage with the other two parties, namely prosecutors and judges. (Although there are cases where we may work more closely with a defense attorney when the case involves a defendant we are actually trying to assist—for example, in a parent-child suicide case.)

(2) In terms of judges, there is a lot of work that people have already done in terms of their education. Once evidence is admitted as relevant, which is often in the form of expert testimony, the judge has to decide how much weight to give to the testimony. The Family Violence Prevention Fund has put out a book called *Cultural Considerations in Cases of Domestic Violence*, which was specifically written for judges to help them think about questions raised here.

(3) Lastly, there are prosecutors, the individuals who are working for the state and who are prosecuting crimes. We have an important role in educating them, through our serving as experts, and in pressuring them to rebut the problematic way that defense attorneys are presenting depictions of culture. For example, if a defense attorney is presenting a story that an individual said: “My culture made

me do this because I come from “X” culture and everybody knows that “X” culture condones domestic violence”; it is very important for prosecutors to step in and say: “Here I have an expert from “X” women’s shelter who is asserting that in the “X” community there is in fact a lot of opposition to these practices as manifested by the very existence of the shelter”.

### Cultural Defenses

Cultural defenses have been used in the two kinds of cases I mentioned, and there has been a lot of publicity around a handful of cases the media has chosen to cover. They are very interesting to the public and we have a situation where politically expedient stereotypes as to culture have been forwarded by attorneys on behalf of defendants, which play into already existing notions of how barbaric a lot of the cultures we come from are. Perhaps the most notorious case of this sort took place in New York City in 1987 when a Chinese immigrant beat his wife to death with a claw hammer and his attorney put on the stand a professor from Hunter College, named Burton Pasternak, who testified that because the defendant, Dong Lu Chen, thought his wife was having an affair, it was not surprising that he would react in this way because a Chinese man would react in a more volatile way than an average, meaning white, American. (Parenthetically, we do not know if it is true if the wife was having an affair because we only know the facts from the husband.) The judge, presumably attempting to be sensitive, sentenced the defendant only to probation. The prosecutor only weakly tried to dispute the evidence and failed to provide any rebuttal testimony by an expert who could have contested the idea that this was an accurate representation of Chinese culture.

The second kind of case, involves a Sikh woman from India, Narinder Virk, who tried to drown her two children and herself a couple of years ago. She is being tried right now (June 2002) in Ventura County, California. The previous attorney who represented her spoke with the media a couple of years ago when she was first arrested. The description of what that attorney planned to present was quite stark where basically she said that the defense theory she would use is to show Narinder Virk is from a culture that values complete subordination of women, as evidenced by arranged marriages, dowry deaths, bride burnings, and female infanticide, and that Virk’s culture drove her to madness.<sup>4</sup>

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<sup>4</sup> In September 2002, Narinder Virk was found guilty of attempted murder but legally insane at the time of the crime, sparing her a prison sentence. Jurors interviewed in the press reported that the testimony of experts, including on cultural evidence, was persuasive.

## Issues of Cultural Stereotypes

This raises some difficult questions for us. What do we do about this? What do we do about the descriptions that get invoked in these two different kinds of cases? I would ask us to think about what we want to accomplish in these situations and I want to present five issues that we might think about in considering these questions:

The first issue we face is the strong tension between helping an individual person and the broader effects of employing stereotypes. That is very apparent in the Virk case as the information was depicted by the media two years ago. In other words, we might decide we actually want to use stereotypes on behalf of an individual. But we should think about what the effects will be. There may be women like Narinder Virk in the context of an apparent child suicide case that we want to help. Also there may be cases where we are actually writing affidavits to explain why a woman is trying to leave a particular situation. We may argue, for example, that she is fleeing certain cultural traditions in her home country in the context of an asylum case. We also may argue that somebody did not flee her situation because she is passive, and because she comes from a particular culture. We may argue that she behaved in a way that seems irrational, but she did so because she comes from this particular culture. These are interesting and troubling questions concerning the role of culture in explaining acts that are shaped by historical ideas about culture and humanity in the United States and Europe. The idea of what it means to be human developed largely around the idea of people who had the capacity to reason; who could think rationally; or with the development of psychoanalysis, if you did not act rationally, it was because you had a psychological problem. However, there is an assertion that there is a whole other group of people in the world, who if they do not act rationally it is because of their culture.

What do we do then if we want to help an individual woman? Do we want to say that her horrific barbaric culture that condones these practices from which she has absolutely no escape, led to these bad acts or led to her being trapped, or led to her not fleeing? Are we using racism to get rid of sexism? Is there a way in which we are relying on certain kinds of problematic descriptions that buy into already existing preconceptions about our communities to help individual women? We know there are broader stereotypes out there and that is why we think they work and that is why we might use them. We need to consider these implications.

The second issue is that even if we decide it is worth it to stereotype in order to help a particular woman, we should consider that it might mean we are actually creating frozen descriptions of what a woman from a particular culture is, and therefore, other women who come along may not benefit from those frozen

descriptions. Let me give three examples. (a) There are women in the criminal context who have not been able to get access to cultural evidence because the judge says, “Well, only traditional people who have traditional beliefs, which are “X”, “Y” and “Z”, should be able to use this cultural information to explain their behavior. (b) Are the affidavits written on behalf of South Asian women that describe them in terms of being passive, victims, helpless, and virginal before marriage, come to bite us in the back in the context of a spate of cases of South Asian women who have murdered their partners?<sup>5</sup> Is the fact that they are considered so unlike this prevalent stereotype of South Asian woman involved in their getting severe punishment? (c) A third example is to look at women who fit assumptions about what a bad woman is, who may not get access to cultural evidence. If we create these frozen notions of what someone is so they can get access to cultural evidence, we may be creating difficulties for ourselves. Part of the problem is that the legal system really likes fixed categories. They want to slot people into something and they do not like things that are contextual and complicated. We may have assisted in creating a system where the focus sometimes becomes more on someone’s identity than on their acts.

The third issue concerns whether it is ever correct to use stereotypes on behalf of a woman. When we use cultural terms to explain a particular individual’s behavior, what falls out of the picture? We know how culture is popularly conceived for people of color, for Asian Americans, for Asians, for Pacific Islanders. Mainstream culture is considered invisible unless it is ‘high’ culture (like opera) or ‘civilized’ culture, in contrast to minority communities that are presumed to be motivated by cultural dictates. As Sujata Warrier said, culture is thought of as a series of homogenous, unchanging practices that have gone on for millennia. We are all familiar with the ideas that Asian culture is “X”, even though when one speaks of Asia, we are not talking about a single nation but a huge region with fifty percent of the world’s population. Asian culture is “X”, Pacific Islander culture is “Y”. These massive generalizations do not even begin to deal with internal contradictions, nor with the different ways people are located within communities, and how this shapes their experiences. Culture for Asians and Pacific Islanders is also talked about in terms of rituals, traditions and practices—very anthropological terms that suggest we are always objects of anthropological study. If culture is not seen as unchanging rituals, traditions and practices that have been handed down for millennia, what might we instead see? Here are some examples of stereotypes: (a) She comes from a passive culture; she did not call the police. What is missing from this portrayal? It could be that the police do not speak her language; or she has witnessed police brutality; or she knows that the police do not pick up people from her community. She could know that the police are racist against people from her community; or her

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<sup>5</sup> Shamita Das Dasgupta was credited with providing this example.

partner is a police officer. There are certain ways in which we may make assumptions about why somebody did something if we rely on certain kinds of notions of culture. (b) A second example: Asian American and Pacific Islander women face cultural barriers in accessing services. What falls out in this description? Mainstream shelters may not provide culturally appropriate services; they may not have people who speak various languages; they may not have staff with Asian or Pacific Islander backgrounds; and their materials may not be translated into Asian languages. What falls out when we use these certain very limited notions of culture is the power system that's involved. Power affects the ways that as minority communities within a mainstream community our existences in this country are shaped by the latter.

These ideas about rituals, traditions, practices, etc. are an incomplete way of describing what influences a woman's life. Because these stereotypes are so dominant, other factors become invisible. The problem is this reduces the possibility for social change. If you think of something like violence as the effect of time honored practices within communities or the reason why someone cannot access services is because she comes from a culture that has been passive for generations, the solutions that you look for are going to be limited. The notion of culture becomes de-politicized when stripped of its economic and political implications. It is necessary to assert the economic and political realities of racial and gendered power when talking about culture.

The fourth issue is: What narratives or descriptions about culture work? What do people believe? What has traction? This is germane to the Narinder Virk case where Inderpal Grewal is supposed to testify as an expert witness to assist the defense. We were struggling with the question concerning what kinds of information should Grewal provide: should she try to explain why Narinder Virk did this; and how to conceptualize it. What if Grewal says she [Virk] was very marginalized; she spoke no English; she was starving; she was dumpster diving; or six months of the year there was no support by the state or by the community or by her family for her or her children. Her family owed his family money. She felt she could not return to India. Her husband was a police officer. Her husband was with other women. She had nowhere to turn and that is why she felt like she had to do this. There also is the question of what the attorney was asking Grewal to testify about: that in India they have arranged marriages and dowry deaths and Sati; and given that the Virk family is a traditional Indian family; a traditional Punjabi family; and a traditional Sikh family, they expect complete female subservience. Part of what we are struggling with is that we are reinforcing popular stereotypes, which actually will work in Virk's defense. If this is what people believe explains the experience of every single Indian woman on this planet, will that actually be the winning narrative to use to help her get

the better deal? We do not know what the answer is but it is a work in progress and we muddle forward.

The fifth and last issue is: What do we do about the fact that these ways that we think about cultural practices are not just mainstream assumptions, this is also how culture is talked about within our own communities? The women we work with use particular stereotypical descriptions of the cultures we feel various affiliations with. These are descriptions that have traction, that they feel to be real. We need language to describe cultural specificity. Not all violence is the same. We use a lot of universalizing language. It is like we are coming to the universal from our particular. There is a particular demonstrated by the ways that violence is experienced, is practiced, and the kinds of contexts we come from. It is not completely identical in every particular context. There is something very specific. It is not just about ethnicity but also our class background; are we disabled; what is our immigrant status; what is the role of the state; what is our particular history; our family; etc. There must be a way that we can talk about particular experiences and deal with social practices. There must be a language that grapples with these problems. In all of this, there are no answers. We need to think about this with more consciousness and consider the ramifications of what we are doing.

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