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STUDENT NOTE

Provocation and the Reasonable Asian: Applying the Reasonable Person Standard to Asian Defendants Asserting the Provocation Defense

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Abstract
This Article examines the criminal law defense of provocation in the U.S., which employs an objective reasonable person standard, as applied to recent Asian immigrants. It discusses approaches taken in other countries and describes the cultural defense. The Article concludes with different possibilities for a hypothetical Asian defendant who was provoked: Improving education about U.S. laws as a preventative measure, using expert cultural witnesses at trial, and taking the defendant's characteristics into consideration during the sentencing stage.

Keywords: Reasonable person; provocation; criminal law; cultural defense; Asians; Asian Americans; immigrants; murder; manslaughter; expert cultural witnesses; defenses

A. Introduction

Q had four older sisters, and from an early age, he knew that he was his parents' hope, their only hope, of passing on the family line. He felt this weight when his parents—who could barely afford to feed themselves—scooped extra food on his plate, or when his grandparents showed special affection for him and proudly told their friends about his accolades. His father would tell him often, and sternly, that honor was of the utmost importance, and he must never dishonor the family.

Q grew up and got married to the apple of his eye, and through extraordinary good fortune was able to move to America, the shining land of opportunity. Although he struggled to communicate in English and could only find menial labor, he took pride in the opportunity to provide for his wife and hopefully future children.

Shortly after his move, Q grew discontent. He lacked community and would frequently encounter racist slurs or derogatory remarks at work. His wife was constantly criticizing him, and they never seemed to have enough money. Though they had been trying for a long time, no children came. Q felt like the little honor he had left was slipping away.

Q grew suspicious of his wife when she started to go out more and put more effort into her appearance, but he pushed aside his suspicions when he found out she was pregnant. Q was overjoyed, and every night he would pray that it would be a son, *a son, please let me have a son*.

One night, he found a pair of men's pants that did not belong to him in their bedroom and angrily confronted his wife in the kitchen. They argued, she said the child wasn't his, and she smirked, saying he must have a fertility problem and that he wouldn't be a good father anyway.

In a fit of rage, feeling his honor was irrevocably stolen, Q grabbed a nearby kitchen knife and stabbed her. His wife didn't make it, and neither did the child, who was later found to be a boy.

When Q later met with his attorney, he was told there was a defense he could raise to reduce his murder charge, and that the jury would decide whether a reasonable person would have been provoked if they had been in his situation. Q didn't quite know what the word "reasonable" meant, but he knew what it meant to be an honorable person, and he assumed it was the same thing.

This fictional and overly simplistic illustration presents a question: How should the reasonable person standard be applied to recent Asian immigrants in cases of provocation? As the U.S. continues to grow in diversity, state and federal courts should contemplate how to best administer justice to non-Americans or recent immigrants who seek to use the provocation defense, which takes a rigid view on what the "reasonable person" would do. In this Article, I focus specifically on Asian defendants who employ the provocation defense in criminal cases. I will discuss the reasonable person standard, give a brief history of Asians in the U.S., explain the provocation defense and cultural defenses, draw on concepts from other countries, and list possible solutions in this area.

B. The Reasonable Person

The reasonable person standard derives from English common law, first appearing in *Vaughan v. Menlove*, where the defendant had "the misfortune of not possessing the highest order of intelligence" and negligently set his neighbor's property on fire.[1] The 1837 case *R v. Kirkham* introduced the idea of "reasonable control," stating the law "will not indulge to human ferocity. It considers man to be a rational being, and requires that he exercise a reasonable control over his passions."[2] The reasonable person standard has equivalents around the world and in many areas of law.[3] *R v. Welsh* introduced the standard to the law of homicide in 1869, when "[t]he judge directed the jury as to provocation saying that in order to reduce the crime to manslaughter, there should have been serious provocation, 'something which might naturally cause an ordinary and reasonably minded man to lose his self-control.'"[4] The English test was purely objective and did not take any personal characteristics into account until 1978 when the House of Lords stated the jury should be instructed that they should consider "an ordinary person of the sex and age of the accused."[5]

Today, the U.S. standard takes some additional factors into account, such as physical disability,[6] but it is largely an objective test left to the finders of fact to apply.[7] One study indicated that potential jurors judge reasonableness as a combination of statistical and prescriptive judgments between the average and ideal.[8] This standard does not take ethnic or cultural factors into account, and no separate standard exists for immigrants. Instead, it seeks to be an objective standard of general application because a personalized standard would "swallow the rule."[9]

[1]Vaughan v. Menlove, (1837) 132 Eng. Rep. 490 (CP).

[2]Jeremy Horder, Provocation and Responsibility 98 (1992) (citing R v. Kirkham (1837) 8 C. & P. 115.).

[3]*See generally* Kevin P. Tobia, *How People Judge What Is Reasonable*, 70 Ala. L. Rev. 295 (2018).

[4]R v. Welsh (1869) 11 Cox CC 336. *See also* Delores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 Loy. L.A. L. Rev. 435, 448 (1981) (quoting Williams, *Provocation and the Reasonable Man*, 1954 Crim. L. Rev. 740, 741) ("The reasonable man was well recognized in the law of negligence, and there was a superficial attraction in allotting him a new task in the law of provocation.").

[5]DPP v Camplin [1978] AC 705 (HL) 718 (appeal taken from EWCA (Crim)).

[6]*See* Shepherd v. Gardner Wholesale, Inc., 288 Ala. 43, 46 (1972) (finding that a person with impaired vision is not held to the same reasonable person standard of someone who has normal vision, but only ordinary care is expected in a negligence case).

[7]*See* Oliver Wendell Holmes, Jr., The Common Law (1881) ("The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them . . . .").

[8]Tobia, *supra* note 3, at 297, 320.

[9]People v. Benitez, 2002 Cal. App. Unpub. LEXIS 8472, *11–12 (Cal. Ct. App. Sept. 9, 2002) (rejecting a "reasonable street fighter standard" to a defendant in claiming self-defense in a murder prosecution because a personalized standard would swallow the rule).

Once defendants start introducing personal characteristics, there is "no satisfactory stopping place short of remitting the matter to the open-ended discretion of the jury."[10] When making determinations of what the reasonable person would do, the fact finder is not to put themselves into the actor's actual shoes, complete with the actor's background, beliefs, and biases. Rather than placing themselves in the shoes that have been through a long journey shaped by a plethora of influences, the fact finder is to take on a new identity and imagine themselves in the actor's situational shoes: What would the mysterious fictional character, the reasonable "average" person, have done?

It has been suggested that this "average" person is "a particularly invidious kind of fiction that privileges the values of the dominant class."[11] Consider, for example, high power distance index countries, which have cultures that strongly respect authority.[12] One could imagine a recent immigrant from a country that imposes harsh penalties for noncompliance with law enforcement acting as a "reasonable person" would behave in accordance with the norms of their home country rather than the "reasonable American" when confronted by U.S. law enforcement officials.

Employing an inflexible reasonable person standard becomes difficult when judging defendants from a variety of backgrounds and cultures, particularly when they use the defense of provocation, which is a partial defense to reduce a criminal conviction.[13] Discussion about this standard in the context of provocation has existed for decades.[14]

In the 1980s, the reasonable person standard became more subjective in Australia as it incorporated attributes of the accused.[15] However, this trend came to an end in 1990 when the High Court of Australia expressed concern about undermining "principles of equality" in *Stingel v The Queen*.[16] In 1977, a dissenting Australian High Court judge in *Moffa v The Queen* wrote,

> The objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is . . . . It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing . . . capacity to kill under particular circumstances.[17]

Twenty years later in *Masciantonio v The Queen*, another dissenting Australian High Court judge "would hold that relevant matters arising from the ethnic or cultural background of the accused can be taken into account in determining whether an ordinary person would have lost his or her self-control as the result of the deceased's provocation."[18] Without incorporation of such characteristics, "the law of provocation is likely to result in discrimination and injustice."[19]

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[10]Sanford H. Kadish, Stephen J. Schulhofer & Carol S. Steiker, Criminal Law and its Processes 410 (8th ed. 2007).

[11]Mayo Moran, Rethinking the Reasonable Person 210 (2003). *See also* Donovan & Wildman, *supra* note 4, at 466 ("The reasonable man standard is an example of the legal system's imposing a false legal reality onto a situation. The standard's underlying premise of equality of all citizens obscures the social reality of differentiation and inequality."). *See also* M.D.G., *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 Univ. Pa. L. Rev. 1021, 1038 (1958) ("This is a problem of subjective inquiry; there is no room for the reasonable man's inconsistencies.").

[12]*See* Malcolm Gladwell, Outliers: The Story of Success 204–06 (2008).

[13]Stephen Tierney, Accommodating Cultural Diversity 150–51 (Stephen Tierney ed., 2007).

[14]*See* Moran, *supra* note 11, at 209 ("The relevant controversy [about provocation] ignited when Stanley Yeo voiced strong criticism of the 1990 Australian High Court decision in *R v Stingel*.").

[15]Symposium, *Who Is The Reasonable Person? The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 Lewis & Clark L. Rev. 1233, 1255 (2010).

[16]*Id.*; Stingel v The Queen (1990) 171 CLR 312 (Austl.).

[17]Moffa v The Queen (1977) 138 CLR 601, 626 (Austl.) (Murphy, J., dissenting).

[18]Masciantonio v The Queen (1995) 129 ALR 575 (Austl.) (McHugh, J., dissenting).

[19]*Id.* at 15, para. 8.

The U.S. has millions of immigrants,[20] including over 14 million Asian immigrants as of 2019,[21] and its diversity and blend of cultures is one of its strengths. However, with these strengths come challenges and differences. While immigrants retain parts of their cultures, they are oftentimes expected to assimilate and integrate into the U.S. culture. Asians, sometimes considered the "model minority" in the U.S., have been shaped by cultures that differ from the dominant U.S. culture in various ways. As the U.S. becomes increasingly diverse, the "average" and "reasonable" person will inevitably go through various transformations. This has ramifications for Asians from diverse cultural backgrounds.

C. Diverse Asians in the U.S. Grouped and Othered

Asians have had a rocky history in the U.S. In the 1850s, Chinese immigrants hoping for better lives came to work in the mining and railroad industries but faced anti-Chinese sentiments.[22] Asians were also grouped with other minorities when convenient. In an 1854 case in which a white man was convicted of murder upon the testimony of Chinese witnesses, the Supreme Court of California held that Chinese immigrants were not allowed to testify in court because a statute that forbade a "Black or Mulatto person, or Indian . . . to give evidence in favor of, or against a white man" was sufficiently generic to include Chinese immigrants.[23] It found that "the word 'white' has a distinct signification, which *ex vi termini*, excludes black, yellow, and all other colors."[24] Asians are sometimes grouped together as fungible, which "not only fails to take seriously the cultural and historical diversity among Asian ethnicities, but also more dangerously helps people to envision Asian Americans as a faceless subhuman caste."[25] If Asians try to raise a cultural defense, they may encounter stereotyping of all Asians.

Restrictive immigration laws were often enacted in the U.S. during the 19th and 20th centuries, including the Chinese Exclusion Act of 1882.[26] The 20th century saw the internment of Japanese-Americans after the attack on Pearl Harbor and discrimination against Vietnamese-Americans after the Vietnam War.[27] Despite this history, Asian Americans have more recently been described as the "model minority" that has assimilated and succeeded in achieving the "American dream,"[28] which is argued to be the result of "equal parts truth, propaganda and self-enforcing prophecy."[29] However, since COVID-19, there has been an increase in anti-Asian hate crime incidents: There was a 77% increase between 2019 and 2020.[30] The model minority reputation may apply when convenient—to point to ideal behaviors—but not actually provide a model when controversies

[20]Steven A. Camarota & Karen Zeigler, *Immigrant Population Hits Record 46.2 Million in November 2021*, CTR. FOR IMMIGR. STUD. (Dec. 20, 2021), https://cis.org/Camarota/Immigrant-Population-Hits-Record-462-Million-November-2021.

[21]Mary Hanna & Jeanne Batalova, *Immigrants from Asia in the United States*, MIGRATION POL'Y INST. (Mar. 10, 2021), https://www.migrationpolicy.org/article/immigrants-asia-united-states-2020.

[22]*See* Brittany Hunter, *America's Tragic History of Discrimination Against Asian-Americans*, PAC. LEGAL FOUND. (2021), https://pacificlegal.org/americas-history-of-asian-discrimination/.

[23]People v. Hall, 4 Cal. 399, 399 (1854).

[24]*Id.* at 404.

[25]Gordon Allport, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1941 (1993).

[26]*See* Hunter, *supra* note 22; *see also* Jessica Pearce Rotondi, *Before the Chinese Exclusion Act, This Anti-Immigrant Law Targeted Asian Women*, HISTORY, https://www.history.com/news/chinese-immigration-page-act-women (last updated Sept. 28, 2023) (describing The Page Act of 1875 that prevented Chinese women from immigrating to the U.S.).

[27]Hunter, *supra* note 22.

[28]Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1084 (1994) ("A White House speech by then-President Ronald Reagan to Asian Americans . . . stated that Asian Americans have achieved the 'American dream.' They have helped to 'preserve that dream bedrock values' of America . . . .").

[29]Jeff Guo, *The Real Reasons the U.S. Became Less Racist Toward Asian Americans*, WASH. POST (Nov. 29, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/11/29/the-real-reason-americans-stopped-spitting-on-asian-americans-and-started-praising-them/.

[30]*2020 FBI Hate Crimes Statistics*, U.S. DEP'T. JUST., https://www.justice.gov/crs/highlights/2020-hate-crimes-statistics (last updated Apr. 4, 2023).

arise. Asian Americans have been referred to as "a wedge to create infighting amongst communities of color who are all disadvantaged by white-dominated institutions and society."[31]

Asians are not a homogenous group but immigrate from diverse cultural backgrounds with different laws, norms, and standards of reasonable behavior. They may be ignorant of many U.S. laws and social norms upon their arrival. What provokes a recent immigrant to lose their self-control may not provoke someone who has lived in the U.S. their entire life.

D. Provocation

An accused person's mental state has determined their level of moral culpability for thousands of years.[32] The foundations for the defense of provocation were laid in the 17th century as provoked killings could be mitigated from murder to manslaughter if they fell into one of four categories: Grossly insulting assault; seeing a friend, relative, or kinsman being attacked; seeing an Englishman unlawfully deprived of his liberty; or seeing a man in the act of adultery with one's wife.[33] From late medieval times until the late 19th century, the English conception of honor underwent various changes.[34] Some theorists drew a distinction between "acquired" honor, which was proper reward for great deeds, and "natural" honor, which was negatively established, "simply one's due if one had not *failed* in any principal virtue (particularly courage)."[35] The importance of honor and means of protecting it has played various roles in different cultures.[36] Grievous insults and grave provocations set off chain-reactions that are "affairs of social networks and groups," particularly close patrilineal family members.[37]

Provocation differs from other defenses, including self-defense or duress, in that if successfully pleaded, it merely reduces the crime rather than completely acquits the defendant.[38] It is an excuse defense, as "the defendant was not legally responsible for his or her action—his or her conduct was not a product of his or her meaningful free will."[39] It has both a subjective component, whether the defendant was provoked, and an objective component, whether a reasonable person would have been provoked.[40] Rather than evaluating if a reasonable person would react in the same way to properly defend themselves, provocation asks if a reasonable person would also *overreact*, which does not warrant complete acquittal.[41] It is based in large part on "the law's concession to ordinary human frailty" that accounts for an ordinary person, who does not have a short nor saintly temperament, to become enraged or emotionally overcome.[42] One author put it, "[t]o expect reasonable behavior in the face of perceived threat, terror and rage is itself a most unreasonable

[31] *Not Your Wedge*, Asian Ams. Advancing Just., https://archive.advancingjustice-la.org/what-we-do/policy-and-research/educational-opportunity-and-empowerment/affirmative-action/not-your-wedge (last visited May 9, 2023).

[32] *See* Donovan & Wildman, *supra* note 4, at 440 ("For example, the distinction between slaying in cold blood and slaying in the heat of passion existed in Anglo-Saxon criminal law and survived the Norman Conquest in 1066.") (quoting Green, *The Jury And The English Law Of Homicide, 1200-1600*, 74 Mich. L. Rev. 413, 416 (1976)).

[33] Horder, *supra* note 2, at 23–24.

[34] *Id.* at 25.

[35] *Id.* at 25–26.

[36] *See* Daniel Krošlák, *Cultural and Religious Differences and Their Eventual Significance for Criminal Prosecution in Germany*, 10 Eur. J. Sci. Theology 39, 44 (2014) (explaining how in Turkish society, honor regulates relationships between genders and levels of authority).

[37] William I. Torry, *The Doctrine of Provocation and the Reasonable Person Test: An Essay on Culture Theory and the Criminal Law*, *in* Int'l J. Socio. L. 13 (2001).

[38] *See* Horder, *supra* note 2, at 57.

[39] Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. Rev. 101, 108 (1997) [hereinafter *The Cultural Defense*].

[40] Alison Dundes Renteln, *The Use and Abuse of the Cultural Defense*, 20 Can. J. L. & Soc'y 47, 51 (2005).

[41] *Id.*

[42] Joshua Dressler, *Why Keep the Provocation Defense: Some Reflections on a Difficult Subject*, 86 Minn. L. R. 959, 972 (2002).

expectation."[43] This defense reflects community norms or value judgments that assign levels of culpability to various circumstances.[44]

The Model Penal Code[45] mitigates murder to manslaughter if it was committed "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[46] The reasonableness is "determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."[47] It comprehends the defendant's "situation" in rape and murder cases, which can take cultural background into consideration.[48] A few categories that have fallen under provocation at common law are mutual combat, assault, and adultery.[49]

Courts differ on whether illegal arrest, injuries to third parties, and words conveying mere information of the occurrence of a legally sufficient act of provocation rise to the level of adequate provocation.[50] In a 1955 case, a half-Mexican and half-Puerto Rican defendant shot his wife when his wife refused to have children with him out of fear they would be black and emphasized her remarks by jabbing her finger at his shoulder.[51] The court ruled that this was not sufficient to free the defendant from the guilt of murder, as he was solely provoked by words and a "slight assault."[52]

In a 1991 Maryland case where a married couple had a strained relationship and the wife verbally insulted her husband, claimed she had filed charges against him, and stated that she did not love him, the husband killed her and was unable to use provocation to mitigate second degree murder to voluntary manslaughter.[53] Maryland's Rule of Provocation requires 1) adequate provocation; 2) the killing occurred in the heat of passion; 3) the killing was in the "heat of passion" before there had been a reasonable opportunity for it to cool; and 4) there was a causal connection between the provocation, passion, and fatal act.[54] The court cited an earlier opinion in which it held that "[i]nsulting words or gestures, no matter how opprobrious, do not amount to an affray, and standing alone, do not constitute adequate provocation."[55] However, words accompanied by conduct indicating a present intention and ability to cause bodily harm can be sufficient provocation.[56]

The defense of provocation was more widely discussed in the United States decades ago, but discussion in this area has more recently been initiated elsewhere.[57] Other countries have various approaches.

[43]Richard Restak, *The Fiction of the "Reasonable Man,"* WASH. POST, May 17, 1987 ("I'm convinced that they're the wrong questions—products of an outmoded mentality that places an overemphasis on empty intellectualization to the exclusion of those deep and powerful emotional currents of fear, self-preservation or territoriality that can surface in any one of us and overpower the cogitations of reason.").

[44]*See* Donovan & Wildman, *supra* note 4, at 447.

[45]*See Model Penal Code*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/model-penal-code (last visited Dec. 19, 2022) ("Conceived as a way to standardize and organize the often-fragmentary criminal codes enacted by the states, the MPC has influenced a large majority of states to change their laws.").

[46]MODEL PENAL CODE § 210.3.

[47]*Id.*

[48]*Id.*

[49]*See* Donovan & Wildman, *supra* note 4, at 446.

[50]*See id.* at 447. *See also Freddo v. State*, 127 Tenn. 376 (1912) (finding that a man with a strong aversion to profanity convicted of murder in the second degree when he killed another employee who continually directed epithets toward him).

[51]Commonwealth v. Cisneros, 113 A.2d 293, 295–96 (Pa. 1955).

[52]*Id.* at 296.

[53]Girouard v. State, 583 A.2d 718, 719–22 (Md. 1991).

[54]*Id.* at 721.

[55]*Id.* at 540 (quoting Sims v. State, 319 Md. 540, 573 A.2d (1990)).

[56]*See* Lang v. State, 6 Md. App. 128, 132 (1969) (citing Wharton, Criminal Law § 277 (Anderson ed.)).

[57]*See* Kate Fitz-Gibbon, *Homicide Law Reform in New South Wales: Examining the Merits of the Partial Defence of "Extreme" Provocation*, 40 MELB. UNIV. L. REV. 769, 770 (2017) ("In June 2012, debate surrounding the provocation defence reignited in New South Wales ('NSW') following the case of Singh v The Queen ('Singh').").

I. Culture is Not Considered in Some Cases of Provocation

In evaluating whether a defense of provocation applies, Canadian courts first use an objective ordinary person test followed by a subjective test to try a defendant.[58] First, the "wrongful act or insult suddenly inflicted must have been such as would have deprived an ordinary person of the power of self-control" and second, "the accused acted on the sudden before there was time for his passion to cool, i.e., that his or her self-control was actually lost."[59] Three Canadian cases illustrate how culture is largely not taken into account in cases of provocation.

In *R. v. Nahar*, the defendant claimed to have killed his wife in the heat of passion when he was provoked over disrespect and defiance during their marriage, which was contrary to the beliefs and customs of the Sikh community in which they were raised.[60] The trial judge determined that the witness the defendant called to give his opinion, a psychotherapist who was raised in the same village as the defendant, was not sufficiently qualified, and concluded that someone else faced with the same circumstances would not have lost his power of self-control, and the defendant's appeal was dismissed.[61]

In *R. v. Ly*, the defendant had been born and raised in Vietnam and strangled his common law wife after suspecting her of adultery.[62] He raised the defense of provocation, and the jury was properly instructed not to consider the cultural aspect of how an average Vietnamese male would have reacted.[63] The defendant claimed he lost "face" and "honor," and the chairman of a Vietnamese refugees association was called to explain those comments.[64] The trial judge instructed the jury to decide on two questions, the first of which was an objective test about whether an ordinary person would have lost their self-control, and if so, then determining if the accused acted on his provocation before there was a time for his passion to cool, in which they could take the defendant's background into consideration.[65] On appeal, the court affirmed the conviction and suggested that if a racial slur had been involved, "the fact that the husband was Vietnamese and came from a certain cultural background might have been relevant to the first question . . . but that is not the case."[66]

In *R. v. Humaid*, a Muslim defendant who stabbed his wife to death after an argument in which he believed she was cheating on him introduced expert testimony about Islamic culture, which places great significance on family honor and does not tolerate infidelity by women.[67] The couple were Canadian citizens but typically resided in the United Arab Emirates.[68] The trial judge held that this testimony was relevant to the subjective part of the provocation defense.[69] When asked for instructions on the "ordinary person," the judge told the jury that the ordinary person "should be regarded as a person of the same age, sex and with the same marital background and relationship history as the appellant, but should not be taken as a person sharing the appellant's religion, culture or customs."[70] The defendant was convicted of first degree murder and appealed, arguing that he acted under provocation.[71] The Court of Appeal for Ontario ultimately dismissed

[58] *See* R. v. Ly, [1987] 33 C.C.C. 3d 11 (B.C.C.A.).
[59] *Id.*
[60] R. v. Nahar, [2004] BCCA 77 (Can.).
[61] *Id.*
[62] R. v. Ly, 33 C.C.C. 3d 31 (1987).
[63] *Id.*
[64] *Id.* at 33.
[65] *Id.* at 34.
[66] *Id.* at 38, 40.
[67] R. v. Humaid, [2006] 81 O.R. 3d 456 (Can. Ont. C.A.).
[68] *Id.*
[69] *Id.*
[70] *Id.* at para. 76.
[71] *Id.*

the defendant's appeal, saying his beliefs that women are inferior to men are "antithetical to fundamental Canadian values" and that it can be argued,

> [T]hat as a matter of criminal law policy, the "ordinary person" cannot be fixed with beliefs that are irreconcilable with fundamental Canadian values. Criminal law may simply not accept that a belief system which is contrary to those fundamental values should somehow provide the basis for a partial defence to murder.[72]

Similarly, Germany's Federal Court of Justice stated that,

> [T]he standard for the evaluation of a motive . . . should be based on values of the legal community in the Federal Republic of Germany, before which court the defendant is tried, and not the views of an ethnic group, that does not recognize moral and legal values of this legal community.[73]

The standard that does not take culture into account in provocation cases is present in Europe as well as in North America.

In the U.S., mere words, such as insults and racial slurs, are not enough. In a Report and Recommendation, a California magistrate judge stated that "the reasonable person standard is that of an ordinarily reasonable person, not an ordinarily reasonable person with a family history of prostitution and/or with a Mexican cultural background."[74] In that 2010 case, the victim referred to the defendant's mother as a prostitute and the defendant as "the son of [a] whore mother" before the defendant stabbed him in the neck with a broken bottle.[75] At trial, the defendant "presented expert evidence that an accusation of prostitution by one's own mother in [his] Mexican culture is likely to result in violence."[76] Witnesses testified about how "such insults were inflammatory in the Mexican culture" and "were considered to be one of the 'highest insults' among Spanish-speaking people in the United States."[77] The magistrate judge recognized that while "accusing a person's mother and other family members of engaging in prostitution would be a serious and inflammatory accusation in any culture," there was no case holding "that cultural factors presented in this case would provide an objective basis for killing in the heat of passion."[78]

Racial slurs have not been sufficient to justify the use of deadly force in physical assault cases. In *State v. McOsker*, the 12th District Ohio Court of Appeals found that when the victim engaged in fights at a party and used racial slurs, "[t]he evidence of provocation presented by appellant was insufficient, as a matter of law, to support a conviction on aggravated assault."[79] The court stated, "Although [the victim's] use of racial slurs is deplorable, "[i]t is well-established that 'words alone will not constitute reasonabl[y] sufficient provocation to incite the use of deadly force in most situations.'"[80] However, state legislation can allow racial slurs to be used as a mitigating factor in physical assault cases: "While mere words have traditionally been inadequate provocation to serve as a defense to a physical assault, racial slurs may qualify as the kind of provocation contemplated by Tenn. Code Ann. § 40-35-113(2)."[81]

[72] *Id.* at para. 93.

[73] Krošlák, *supra* note 36, at 46 (quoting Bundesgerichtshof [BGH] [Federal Court of Justice], Neue Juristische Wochenschrift [NJW] 1995, 602 (Ger.)).

[74] *See Trejo v. Swarthout*, 2010 U.S. Dist. LEXIS 127450, at *22 (Ca. Dist. Ct. 2010).

[75] *Id.* at *3–5.

[76] *Id.* at *5.

[77] *Id.* at *23.

[78] *Id.* at *18.

[79] State v. McOsker, 2017-Ohio-247, 2017 Ohio App. -LEXIS- 244, at *8 (Ohio Ct. App., Clermont Cnty. 2017).

[80] *Id.* at *9 (quoting State v. Gray, 12th Dist. Butler No. CA2010-03-064, 2011-Ohio-666, para. 37).

[81] State v. Johnson, 909 S.W.2d 461, 465 (Tenn. Crim. App. 1995).

II. Arguments for Recognizing Culture in Cases of Provocation

While some courts do not accommodate culture in cases of provocation, other courts have recognized the dangers of applying the reasonable person standard to diverse defendants claiming the defense of provocation. In an Australian case, the dissenting judge said,

> [T]he law of provocation is likely to result in discrimination and injustice. In a multicultural society such as Australia, invocation [of the reasonable person standard] in cases heard by juries of predominantly Anglo-Saxon-Celtic origin almost certainly results in the accused being judged by the standard of self-control attributed to a middle class Australian of Anglo-Saxon-Celtic heritage . . . . [O]ne law of provocation for one class of persons and another law for a different class . . . must be the natural consequence of true equality before the law in a multicultural society where the criterion of criminal liability is made to depend upon objective standards of personhood.[82]

The judge argued "that without significant subjectivization, the objective test is profoundly inegalitarian."[83] Cultural and distinctive characteristics can come into play if someone is verbally provoked, such as if a Japanese American who interned in a detention camp during World War II experienced repeated racial slurs from the victim.[84] Those from different backgrounds may be much more likely to be provoked by insults that the objective reasonable person may not be provoked by. As one author put it,

> [T]o insist that all these different ethnic groups conform to the one standard of behaviour set by the group having the greatest numbers (or holding the political reins of power) would create gross inequality. Equality among the various ethnic groups is achieved only when each group recognises the others' right to be different and when the majority does not penalise the minority groups for being different.[85]

Some courts consider ethnicity when considering who the "ordinary" person is. In *R v Webb*, the South Australian Full Court proposed that "the ordinary man is apparently an ordinary man of the accused's 'ethnic derivation.'"[86] Ethnicity, if taken into account, would assess the gravity of the provocation and account for the defendant's response pattern.[87] The Indian approach also includes consideration of ethnicity; Indian courts have recognized that social class can influence the power of self-control of a reasonable person.[88] The Indian Supreme Court said in *Nanavati v. State of Maharashtra*, where a man murdered his wife's lover, that "[n]o abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values . . . the cultural, social and emotional

[82]Masciantonio v The Queen (1995) 129 Austr. L.R. 575 (Austl.) (McHugh J., dissenting).

[83]Moran, *supra* note 11, at 211. *See also* Renteln, *supra* note 40, at 52 ("This constitutes a serious violation of equal protection.").

[84]Donovan & Wildman, *supra* note 4, at 438 (describing a hypothetical situation).

[85]Stanley Yeo, *Power of Self-Control in Provocation and Automatism*, 14 Sydney L. Rev. 3, 12 (1992). *See also* Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 Ariz. L. Rev. 911, 917 (2007) ("Defenders of cultural evidence argue that the United States is a multicultural and pluralistic society which should permit immigrants and minorities to show how their cultural backgrounds may have contributed to their actions.").

[86]Stanley Yeo, *Sex, Ethnicity, Power of Self-Control and Provocation Revisited*, 18 Sydney L. Rev. 304, 318 (1996) [hereinafter *Sex, Ethnicity, Power of Self-Control and Provocation*] (quoting R v Webb (1977) 16 SASR 309 at 314).

[87]*Id.*

[88]Chan Wing Cheong, Neil Morgan & Stanley Yeo, Criminal Law in Singapore 825 paras. 28.81 (LexisNexis, Singapore, 2022). *See also* Atma Ram v. State (1967) Cri LJ 1697 para. 17 ("The restraint which is generally shown by sophisticated per sons used to modern living is hardly to be expected in the case of a villager who still regards a wife as his personal property and chattel amenable at all times to his desire for sexual intercourse.").

background of the society to which an accused belongs."[89] As essentially homogeneous ethnic groups live in relative isolation from each other, they have recognized ethnic groups affect the self-control of an ordinary person.[90] In a Malaysian case in which the defendant was a lowly educated villager from Nepal and killed his employer, the court took his background into consideration "in order to put the stabbing of the deceased in its proper context and to explain why the [accused] lost self-control in the face of the words uttered."[91]

Outside of courts, other sources have seen the value in considering cultural backgrounds. The Penal Code Review Committee in Singapore saw a case for considering ethnicity when determining the accused's self-control, in light of how a person is molded by customs and traditions, which particularly affects new immigrants and foreign visitors.[92] In a 1999 study with 124 Australians, non-Anglo-Australian respondents "were either more understanding and accepting of the customary practices of foreign cultures or considered the ethnicity of the defendant as part of their construction of the 'ordinary person.'"[93]

Perhaps U.S. courts should draw principles from these countries when interpreting the standard as something that can allow components of ethnicity in. Cultural defenses are an area where this sometimes occurs.

E. Cultural Defenses

Ethnicity is part of culture, which is "the full range of human values, behavior, and social structures indigenous to specific groups around the world that are passed on from one generation to the next."[94] Culture plays a role in determining reasonableness, as it "greatly influences whether a certain set of beliefs, behaviors, or symptoms are considered pathological or merely lie along a spectrum of normality."[95] Using cultural evidence in some cases ensures "the fair and equitable administration of the law to all and maintain[s] the principles of fairness and individualized justice that form the bedrock of the American legal system."[96]

A "cultural defense," like a provocation defense, is "used to excuse, or partially excuse, criminal behavior."[97] The two defenses overlap, particularly in the area of considering the reasonable person. There is no formal cultural defense, but a defendant may present cultural factors to excuse their behavior or mitigate culpability due to a lack of the requisite *mens rea* because the defendant, oftentimes a recent immigrant, acted according to the dictates of their culture.[98] It asks three questions: 1) Is the defendant a member of the ethnic group? 2) Does the group have such a

[89]K.M. Nanavati v. State of Maharashtra, AIR 1962 SC 605 (1959) (India).

[90]Cheong, Morgan & Yeo, *supra* note 88, at 826 para. 28.83.

[91]*Id.* at 826 para. 28.84 (quoting PP v Subir Gole [2015] 2 MLJ 642).

[92]Penal Code Review Committee (Aug. 2018) (Submitted to Minister for Home Affs. & Minister for L.).

[93]Peter Papathanasiou & Patricia Easteal, *The "Ordinary Person" In Provocation Law: Is The "Objective" Standard Objective?*, 11 Current Issues Crim. Just. 53, 56, 60 (1999). The survey scenario reads:

> Demiko is a Japanese migrant to Australia. Upon discovering that her husband had been committing adultery, she attempted to drown herself and her husband's mistress Vuko in accordance with a Japanese custom that dictated these homicides to make up for the shame brought upon the wife by the husband's adultery. Demiko succeeded in killing Vuko, but she survived the attempt to kill herself due to the intervention of bystanders. *Id.* at 69.

[94]James K. Boehnlein, Michele N. Schaefer & Joseph D. Bloom, *Cultural Considerations in the Criminal Law: The Sentencing Process*, 33 J. Am. Acad. Psychiatry & L. 335, 335 (2005).

[95]*Id.*

[96]Aahren R. DePalma, *I Couldn't Help Myself–My Culture Made Me Do It: The Use of Cultural Evidence in the Heat of Passion Defense*, 28 Chicana/o-Latina/o L. Rev. 1, 18 (2009).

[97]*The Cultural Defense*, *supra* note 39, at 109.

[98]Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 Harv. Women's L. J. 57, 57 (1994). *See also* Joseph D. Bloom & Jacqueline L. Bloom, *An Examination of the Use of Transcultural Data in the Courtroom*, 10 J. Am. Acad. Psychiatry & L. Bull. 1, 2 (1982) ("However, opening the diminished capacity defense to arguments based on the inability to exercise free choice because of cultural imperatives is a step the courts have not been willing to take.")

tradition? 3) Was the defendant influenced by the tradition when he or she acted?[99] It does not give defendants license to claim they had a diminished capacity, such as a mental disorder, but provides another way for them to argue their cultural background has instilled a different conception of reasonableness that fundamentally differs from the U.S. one. It focuses on an abstract notion of culture rather than the defendant's subjective understanding.[100] The cultural defense can be taken into consideration at three stages: The prosecutorial discretion stage, trial stage, and sentencing stage.[101]

Proponents of the cultural defense argue it outweighs any harm it would cause as it provides fairness to diverse defendants by preserving cultural heritage and preventing judicial bias by promoting individual justice and liberty.[102] Cultural values, unlike religious values, do not have direct constitutional protection, so the justification for it lies in promoting equal citizenship and tolerating cultural differences.[103] In addition, the U.S. ratified the International Covenant on Civil and Political Rights ("ICCPR") and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD").[104] Article 27 in the ICCPR outlines the right for minorities to enjoy their culture.[105] The CERD protects groups from discrimination, including discrimination that occurs from seemingly neutral policies.[106] The right to culture should receive protections, but not when it undermines more significant human rights.[107]

Defense attorneys sometimes successfully use a cultural defense to show the defendant's mental state or culpability. One such case was *People v. Dong Lu Chen*, in which a white anthropologist concluded the traditional Chinese values against adultery and the loss of manhood drove the defendant to kill his wife.[108] The judge granted probation rather than imposing a jail sentence and took cultural considerations into account.[109] He said the defendant was the "product of his culture" and the culture was not an excuse but "something that made him crack more easily. That was the factor, the cracking factor."[110] Trial judges typically have broad discretion in determining whether to allow expert testimony.[111]

Another case is *People v. Beong Kwun Cho*, in which an expert in human development and family studies testified about Korean culture, including that suicide is considered shameful.[112] The defendant, a South Korean national, shot his childhood friend after the victim had repeatedly prodded him for over a year to help him commit surrogate suicide by staging his death to look like a robbery or accident.[113] When the moment arrived for the defendant to shoot him, he hesitated, and the victim taunted him by telling the defendant he had raped his wife and intended to rape his daughter.[114]

[99] *See* Renteln, *supra* note 40, at 49–50.

[100] Chiu, *supra* note 28, at 1101 n.303.

[101] Anh T. Lam, *Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 UCLA Asian Am. Pac. Islander L. J. 49, 49 (1993).

[102] *See* Lam, *supra* note 101, at 50.

[103] *Id.* at 65, 68 ("The purpose of taking cultural factors into consideration in criminal law is to prevent the majority culture from using the justice system to overpower and suppress a different culture or group.").

[104] *Where the United States Stands on 10 International Human Rights Treaties*, Leadership Conf. Educ. Fund (Dec. 10, 2013), https://civilrights.org/edfund/resource/where-the-united-states-stands-on-10-international-human-rights-treaties/.

[105] International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture . . . .").

[106] Leadership Conf. Educ. Fund, *supra* note 104.

[107] Renteln, *supra* note 40, at 66.

[108] Volpp, *supra* note 98, at 64.

[109] *Id.* at 73; *see also* Torry, *supra* note 37, at 21–22.

[110] Chiu, *supra* note 28, at 1053.

[111] *The Cultural Defense*, *supra* note 39, at 121.

[112] *See* People v. Beong Kwun Cho, 2018 Cal. App. Unpub. LEXIS 2785, at *3 (2018). *But see* Lam, *supra* note 101, at 63 ("[F]or Asian cultures, suicide is often the honorable way.").

[113] *See id.* at *2.

[114] *See id.* at *2–3.

The expert testified how South Korea "places great emphasis on social status and wealth" and "[w]hen two men have a close bond, the more dominant individual influences the weaker one."[115] In an unpublished opinion, the Orange County Superior Court judge mulled over the case for weeks on how to factor in the cultural defense, saying, "[i]t's hard to imagine a person born and raised in American culture convincing a jury this was a voluntary manslaughter."[116] The judge ultimately found the mitigating and aggravating circumstances were about evenly balanced, so he sentenced the defendant to the mid-range prison term for voluntary manslaughter.[117]

Cultural defenses are used in other murder cases outside of the provocation defense. In one case, a Laotian refugee, was tried for murdering his wife and sought to use the defense of extreme emotional disturbance to mitigate the homicide.[118] He attempted to include expert witness testimony about stress and disorientation that Laotian refugees undergo when attempting to assimilate.[119] The trial judge did not allow the testimony because the experts lacked knowledge about the individual defendant.[120] However, the appellate court reversed it because excluding expert testimony does not depend on whether the witness has personal knowledge about the defendant.[121] The court recognized the defendant "may have been deprived of an opportunity to put before the jury information relevant to his defense" and ordered a new trial.[122] While the defendant in this case did not use a provocation defense but a defense of extreme emotional disturbance, it illustrates how expert witnesses can be used to testify about how culture may affect defendants.

In another case, a Chinese woman killed her son, who was born out of wedlock and mistreated by many family members.[123] She requested evidence on her cultural background and relationship to her culture to be considered in determining her mental state, but the trial court refused to use this instruction, as it "did not want to put the 'stamp of approval on [the defendant's] actions in the United States, which would have been acceptable in China.'"[124] The appeals court reversed the judgment on other grounds and stated it would "address the issue of the propriety of an instruction pinpointing the cultural background theory of defendant's case . . . on retrial."[125]

While defendants sometimes successfully use a cultural defense, courts do not always allow it.[126] In addition, there are dangers in applying cultural defenses to certain situations.

I. Dangers in Applying a Cultural Defense

There are opportunities to abuse this defense if a defendant does not adhere to their cultural background.[127] Cultural claims should be verified to prevent fraud.[128] If a practice is no longer

[115] *Id.* at *3.

[116] Victoria Kim, *Man Who Said He Did His Childhood Friend a Favor By Killing Him Is Sentenced To 10 Years*, L.A. TIMES, Sept. 23, 2016 https://www.latimes.com/local/lanow/la-me-ln-anaheim-korean-friend-killing-sentencing-10102020-snap-story.html#:~:text=California-,Man%20who%20said%20he%20did%20his%20childhood%20friend%20a%20favor,court%20at%20his%20sentencing%20hearing.

[117] *Id.*

[118] People v. Aphaylath, 68 N.Y.2d 945, 946 (N.Y. Ct. App. 1986).

[119] *Id.* at 946–47.

[120] *Id.* at 947.

[121] *Id.*

[122] *Id.*

[123] People v. Wu, 235 Cal. App. 3d 614, 618 (1991).

[124] *Id.* at 634–35.

[125] *Id.* at 634.

[126] *See, e.g.*, Trejo v. Swarthout, 2010 U.S. Dist. LEXIS 127450, at *18 (Cal. C.D. Ct. 2010) ("No case, however, has held that cultural factors presented in this case would provide an objective basis for killing in the heat of passion.").

[127] *See* Renteln, *supra* note 40, at 55–56 (explaining how a defense could be abused if non-Sikhs disguise themselves as Sikhs to wear a "religious dagger" in public or marijuana farmers claim a religious defense when they are not in the group).

[128] *See id.* at 56–59 (recounting how a woman from Ghana sought asylum in the U.S. to avoid female genital mutilation and received prominent support but turned out to have stolen an identity and mutilation was not practiced in the tribe she claimed to be a part of).

common in the home country, it may not be sufficient to use as an excuse.[129] Such a standard must adequately balance creating just outcomes for diverse defendants and preserving the effectiveness of the criminal system. A defendant must fit into at least one of four categories to use the defense: Their home country or culture distinguishes them from American society; their current attitudes and feelings about being a minority creates problems; the degree of their assimilation into the mainstream culture is extremely low; or the criminal act reflects important values from the defendant's culture that should be protected.[130]

An additional concern is the potential danger that can arise by reinforcing stereotypes about different groups. One writer described the white anthropologist's description of "Chinese society" in *People v. Dong Lu Chen* as "neither substantiated by fact nor supported by his own testimony. The description was in fact his own American fantasy."[131] Domestic violence may be explained as "cultural" for Asian communities, "when a similar description is rarely given to domestic violence in the heterosexual white community."[132] A cultural defense could become "a vehicle for the crystallisation of common prejudices within legal standards or a way of justifying the judge's position by accrediting it with a veil of objectivity."[133]

Just because some people in a group follow a particular tradition does not mean the whole community does, especially as customs evolve.[134] Slavery was once seen as "an integral part of southern 'culture.'"[135] Defendants' actions are defined through a group-based cultural identity.[136] A law professor said, "This kind of thinking reinforces patriarchal and racial stereotypes—which don't even exist in China today. This is like saying, 'My goodness, Americans lynch blacks, let's let them do it,' just because lynchings have happened in the past."[137] Negative stereotypes about aggression, emotional volatility, and other traits may promote racism. For example, in Australia, Aboriginal people used to be regarded as having a lower capacity for self-control, which promoted a negative stereotype of them being at a lower order of the evolutionary scale.[138] However, their reactions could have been due to the racist and violent environment many of them grew up in.[139] A defendant may claim there are varying responses to grave provocation, and the jury could take the view that Aboriginal defendants may take longer to cool down after being provoked, such as in *R v Nelson*, a Northern Territory Supreme Court case.[140] A distinction which could reduce stereotyping can be drawn between the capacity for self-control and the response to being provoked; while both may lose self-control at the same time, those with different response patterns might take a longer time to cool down or otherwise react differently.[141]

Experts must reach a certain level of proficiency and not merely stereotype a culture based on their personal experiences. In a case where a South Korean corporation sued to recover for a

[129] *See id.* at 64 (questioning whether a system should accept the cultural defense based on a discarded tradition, such as where ritual scarification is "dying out" in Nigeria). *See also* People v. Khaimchayev, 2002 Cal. App. Unpub. LEXIS 3359, at *2, *5–6, *9 (finding that while a Russian immigrant defendant argued he found it difficult to assimilate, was persecuted in Uzbekistan, and was burdened by supporting his parents, "[l]osing one's job would not provoke a reasonable person to kill his employer").

[130] Lam, *supra* note 101, at 51.

[131] Volpp, *supra* note 98, at 70.

[132] *Id.* at 94.

[133] Tierney, *supra* note 13, at 10.

[134] *See* Renteln, *supra* note 40, at 64. There are numerous other areas in which customs have evolved, such as in the area of homosexuality. *See* Commonwealth v. Carr, 398 Pa. Super. 306, 310–11 (1990); Moran, *supra* note 11, at 213–16; Shaw v. Hedgpeth, 2012 U.S. Dist. LEXIS 98686, at *5–8, *20–21 (California Northern Dist. Ct. 2012).

[135] *The Cultural Defense*, *supra* note 39, at 132.

[136] Volpp, *supra* note 98, at 95.

[137] *Id.* at 77 n.88 (quoting City University of New York Assistant Law Professor Sharon Hom).

[138] *Sex, Ethnicity, Power of Self-Control and Provocation*, *supra* note 86, at 316.

[139] *Id.* at 317.

[140] *Id.*

[141] *Id.*

breach of contract, the defendants claimed the transaction was a sham to cover up an investment program, and they relied on a non-Korean expert witness to testify about Korean law and companies, "particularly their alleged propensity to engage in fraudulent activity."[142] The witness lacked formal education or training in business or as a cultural expert, and his testimony was unreliable and based on his personal experiences and "hobby" of studying Korean business practices.[143] His "ethnic syllogism" was flawed because it "invited the jury to distrust [the corporation] by invoking an ethnic, national stereotype."[144] However, this court conceded that while expert testimony about race, ethnicity, or nationality risks racial or ethnic stereotyping, bias, and xenophobia, it can be admissible, as it is not "*inherently* prejudicial."[145] Some uses are more successful, typically when "there is convergence between dominant majority cultural norms and the cultural norms relied upon by the immigrant or minority defendant."[146]

There may also be a danger of stereotyping multi-faceted victims as provokers who are simplified for the purpose of creating a narrative. In *People v. Dong Lu Chen*, the victim was "flattened into the description 'adulteress'" as she was portrayed as a woman who provoked her husband.[147] Some feminist scholars oppose defendants using a cultural defense, as it is often used by male defendants who have harmed female victims to condone their actions.[148] Men who kill their wives in response to verbal taunts or discovering their adultery get convictions of manslaughter instead of murder more easily than women who kill men who abused them over a long period of time.[149] Provocation appears to strongly favor "a particularly male conception of anger, in terms both of what constitutes gross provocation and what constitutes loss of self-control."[150] Provocation could also happen in response to "humiliation, or revulsion, or some complex set of emotions."[151]

In addition, an absolute cultural defense that subjects immigrants to different standards and allows immigrant defendants to essentially plead ignorance of the law would create an unfair system that may lead to immigrant victims receiving less protection than non-immigrant victims.[152] Instead, it should be applied more narrowly to heat of passion defenses.[153]

F. Possible Solutions

I. Improve Education About Laws

Increased education is a potential preventative measure before a death occurs. Sometimes, immigrants may not adequately learn U.S. laws. Although resources exist to educate immigrants

[142]Jinro Am., Inc. v. Secure Invs., Inc., 2001 U.S. App. LEXIS 25987, at *2, *18 (9th Cir. App. Sept. 14, 2001).
[143]*Id.* at *18, *33.
[144]*Id.* at *41.
[145]*Id.*; *See also* Dang Vang v. Toyed, 944 F.2d 476, 481–82 (9th Cir. 1991) (allowing anthropologist testimony about a general explanation of the Hmong culture and the role of women in a case where refugee women claimed the defendant raped them).
[146]Lee, *supra* note 85, at 914.
[147]Volpp, *supra* note 98, at 75.
[148]Lee, *supra* note 85, at 917.
[149]Dennis Klimchuk, *Outrage, Self-Control, and Culpability*, 44 Univ. Toronto L. J. 441, 460 (1994).
[150]*Id.*
[151]*Id.* at 467.
[152]DePalma, *supra* note 96, at 14–15.
[153]*Id.* at 18. Beyond the scope of this Article but related concepts are "affluenza," referring "to the mental state of affluent teenagers whose permissive upbringing has caused them to believe that the rules of society do not apply to them," and "sportsfluenza," referring to the mental state of athletes. *See* Stephanie S.E. Smith, *"Sportsfluenza": The Result of Not Holding Athletes Accountable for Bad Behavior*, 40 Law & Psych. Rev. 345, 347–48 (2016).

and foreign visitors, the U.S. citizenship tests do not include a portion about U.S. laws.[154] Perhaps there should be more robust legal education for immigrants and foreign visitors, who may sometimes fall through the cracks and not adequately learn laws, norms, and customs through passive diffusion. For example, if someone arriving on a work visa comes from a culture in which authorities rarely get involved with domestic violence disputes, they may not realize that domestic violence is not acceptable in the U.S. until they find themselves arrested.

Before someone commits a crime, including murder in the heat of passion, they should have a reasonable opportunity to learn about U.S. laws as the reasonable person in the U.S. may substantially differ from the ordinary, reasonable, or average person in their country of origin. This would not mandate an additional test, unlike Germany's mandatory integration courses for certain immigrants,[155] but legal aid and other resource centers should consider how to educate people not only about immigration policies but also how to engage with U.S. laws that differ at times from other countries. Highly publicized cases could also be effective; when there was a "marriage-by-capture" rape trial, many Hmongs in the Fresno area followed the case closely and "modif[ied] their traditions to conform with the United States legal system."[156]

Preventing crime is always preferable to addressing it once it occurs. In the area of provocation, education may not make a significant difference, but it may nonetheless give someone pause in a heated situation if they have thought about how U.S. laws and standards differ from their country of origin. Perhaps before Q killed his wife, he could have received more instruction about laws and norms in the U.S., including how murder is not acceptable even if he were to find out about his wife's infidelity. Maybe this background knowledge would deter him for just long enough for his wife to leave the scene before she was killed. However, if he still killed his wife, he could next try to use expert cultural witnesses at trial.

II. Use Expert Cultural Witnesses at Trial

If an immigrant or foreign visitor is charged with murder and is raising a defense of provocation, they may be able to use expert witnesses to attest to cultural considerations that inform the application of the provocation defense, as the previously discussed defendants did in *People v. Dong Lu Chen* and *People v. Beong Kwun Cho*. Culture should not serve as a reductive explanation that the defendant acted within the confines of their culture, but it should explain their state of mind at the time of the act.[157]

Because of the difficulties in interpreting culture and distorting knowledge, it may be helpful to establish a code of ethics for expert cultural witnesses.[158] The American Bar Association gives some guidelines, such as to be free of financial incentives,[159] and the United Kingdom Ministry of Justice has a rule that experts have a duty to the court that overrides their duty to either of the parties,[160] but it would be helpful to have a more targeted code of ethics specifically for expert cultural witnesses.

If a defendant is indigent, the court may be required to provide access to a cultural expert. 18 U.S.C. § 3006A requires district courts to provide adequate representation to those who are

[154]*See Civics Test (2020 version)*, U.S. Citizenship & Immigr. Servs., https://www.uscis.gov/citizenship/2020test (last visited Dec. 20, 2022).

[155]*See Integration Courses in Germany*, Welcome Ctr. Germany, https://www.welcome-center-germany.com/post/integration-courses-in-germany.

[156]*The Cultural Defense*, *supra* note 39, at 136 (citing Mark R. Thompson, *Immigrants Bring the Cultural Defense Into U.S. Court*, Wall St. J., June 6, 1985, available in WESTLAW, Alinews database, 1985 WL-WSJ 251041, at *6.).

[157]Volpp, *supra* note 98, at 95.

[158]Renteln, *supra* note 40, at 65.

[159]*Article 4: The Ethics of Being an Expert Witness*, Ass'n Scis. Limnology & Oceanography, https://www.aslo.org/professional-ethics-statements-and-resources/the-ethics-of-being-expert-witness/ (last visited Dec. 19, 2022).

[160]Experts and Assessors, (2021) § 35.3, 2 Current Law (Eng.).

unable to afford it and includes a provision for "investigative, expert, or other services necessary for adequate representation."[161] The Supreme Court held that in a case where an indigent defendant's sanity was in question, the State must provide access to a psychiatrist.[162] When a defendant's mental condition is "relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense."[163]

Q's attorney could introduce expert witnesses about Q's home culture and values to explain his situation, including the emphasis of honor, importance of carrying on the family line, and other relevant factors that the jury may not otherwise know. If the judge allowed this testimony, the jury could consider it when deliberating.

Another possibility is that juries can be instructed with more subjective phrasing, such as "could the actor have been fairly expected to avoid the act of wrongdoing?" in determining whether the accused was understandably aroused to the heat of passion.[164] If such an instruction was accepted, the jury could consider what could be reasonably expected of Q as someone who was heavily shaped by his cultural background. However, if the expert cultural witnesses were barred from being used at trial and the jury received a typical objective test and found Q guilty of murder, he could introduce evidence of his cultural background during sentencing.

III. Take the Defendant's Characteristics into Consideration During Sentencing

If the defense fails and the sentence is not mitigated to manslaughter, the court may take culture into consideration when making sentencing determinations. It has been argued that provocation should be abolished in mitigating a charge and should merely be taken into consideration at sentencing.[165]

When imposing a sentence, Congress prohibited taking race, national origin, and creed into consideration.[166] The Sentencing Reform Act of 1984 directed the United States Sentencing Commission to limit the use of personal characteristics when determining sentences.[167] However, courts are to consider multiple factors, including "the nature and circumstances of the offense and the history and characteristics of the defendant."[168] Defendants are to be punished in proportion to their crime, and cultural factors are "most widely useful" when sentencing criminal defendants as opposed to during trial.[169] Forensic psychiatry literature has traditionally focused more on the concrete standards of competency to stand trial and the insanity defense, but in sentencing, parties can present more evidence, such as to explain motive, in order to help mitigate a sentence.[170] An evaluation that systematically takes culture into account may be instrumental in reaching a just sentence. The Cultural Formulation model takes cultural identity, cultural factors related to the

[161] 18 U.S.C. § 3006A(e)(1).

[162] Ake v. Oklahoma, 470 U.S. 68, 74 (1985).

[163] *Id.* at 80.

[164] Donovan & Wildman, *supra* note 4, at 467 (citing FLETCHER, RETHINKING CRIMINAL LAW 510 (1978)).

[165] HORDER, *supra* note 2, at 197 ("It is one thing to feel great anger at great provocation; but quite another (ethical) thing to experience and express that anger in retaliatory form. For you there can be no mitigation of the offence."). *See also* Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273, 296 (2015) ("One of the earliest and most popular discrimination-based critiques of the heat-of-passion defense argues that the defense, by its nature or as applied, disproportionately favors male defendants.").

[166] U.S. Sent'g Guidelines Manual § 5H intro. cmt., § 5H1.10 (U.S. Sent'g Comm'n 2021) [hereinafter *Guidelines*] ("These factors are not relevant in the determination of a sentence.").

[167] U.S. Sent'g Comm'n., FEDERAL SENTENCING: THE BASICS 1–2, 5 (2020).

[168] 18 U.S.C. § 3553(1).

[169] James K. Boehnlein, Michele N Schaefer & Joseph D Bloom, *Cultural Considerations in the Criminal Law: The Sentencing Process*, 33 J. AM. ACAD. PSYCHIATRY & L. 335, 336 (2005).

[170] *Id.* at 339.

psychosocial environment, and other cultural factors into account when assessing a patient.[171] It was used in a case where the defendant, a 24-year-old Cambodian refugee, was charged with murder during a home burglary and ultimately received life without parole instead of the death penalty.[172] During sentencing, "the full scope and power of a cultural evaluation can be brought most effectively to the attention of the court."[173]

Sentencing should avoid "unwarranted sentencing disparities" while also "maintaining sufficient flexibility to permit individualized sentences when warranted."[174] The United States Sentencing Commission Guidelines Manual says courts should not give these factors "excessive weight" and generally not sentence outside the guideline range but use them "for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence . . . and various other aspects of an appropriate sentence."[175] Sentencing guidelines are used to appropriately sentence defendants with reasonable uniformity and proportionality based on the severity of criminal conduct.[176] It considers the victim's wrongful conduct, if significant, to reduce a sentence, including "[t]he proportionality and reasonableness of the defendant's response to the victim's provocation."[177] During sentencing, Q's attorney could then introduce the expert witnesses and cultural factors that shaped Q and led him to act as he did. Even if Q was charged with murder, the judge could use his or her discretion to select a lower sentence within the sentencing guidelines.

G. Conclusion

The U.S. should not demand complete assimilation and integration, and by doing so lose the beauty and strength of different cultures, but it should still uphold the values that its laws seek to protect. Balancing fairness by introducing cultural backgrounds with justice for victims may require introducing expert cultural testimony at trial and during sentencing.

The inflexibility of the reasonable person standard in cases of provocation is found not only in the U.S. but also around the world. Some countries have more subjective standards that take personal characteristics into account. While other countries do not have systems that can be perfectly transposed onto the U.S. system, the U.S. can nonetheless draw on other principles while seeking to improve education for immigrants, use expert witnesses at trial, and consider cultural characteristics during sentencing.

Q was eventually sentenced to either manslaughter or, in the alternative, murder with a sentence on the lower end of the sentencing guidelines. Perhaps he would spend his time in prison expanding his narrow conception of honor and seeking to adopt the best part of American culture while retaining the best parts of his Asian heritage. Perhaps he would use his years of freedom after to productively contribute to society. Maybe Q wouldn't ever have the son he longed for, but he would father ideas, a unique blending of cultures, and a slightly bigger view of who the reasonable person really is.

[171] *Id.* at 337. *See also* Neil Krishan Aggarwal, *An Introduction to the Cultural Formulation Interview*, 18 FOCUS 77 (2020) (elaborating on the development, core, and mission of the Cultural Formulation Interview). *See also* Laurence J. Kirmayer, Cécile Rousseau & Myrna Lashley, *The Place of Culture in Forensic Psychiatry*, 35 J. AM. ACAD. PSYCHIATRY & L. 98, 99 (2007) ("The cultural formulation in Appendix I of DSM-IV provides a framework for organizing cultural information relevant to psychiatric assessment and . . . can be applied in forensic contexts.").

[172] *Id.* at 337, 339.

[173] *Id.* at 340.

[174] United States v. Booker, 543 U.S. 220, 264 (2005).

[175] *Guidelines*, *supra* note 166.

[176] U.S. Sent'g Guidelines Manual § 1A1.1, 1.3 (U.S. Sent'g Comm'n 2021).

[177] *Id.* at § 5K2.10(6).

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