

MULTICULTURAL JURISPRUDENCE AND THE CULTURE DEFENSE

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Introduction

In regard, I presume, to North American and Western European jurisprudence, Sarat and Kearns name a few situations where the law “can and should respond to demands for cultural recognition and exemption from particular regulations that would denigrate or deny an important cultural practice”. In one, laws against discrimination safeguard statutorily protected racial, gender, and ethnic minority groups’ civil rights; in another, appeals made by groups for “exemptions from the reach of otherwise valid state regulations in order to preserve some element of their history or culture” receive judicial scrutiny (Sarat and Kearns 1999: 11). Sarat and Kearns’ essay accords generally with writing on disputes involving the cultural identities of litigants, in relating identities to *group rights*. Claims to cultural resources and civil rights protections predicated on membership of a subcultural group¹ include the most prevalent cases of cultural recognition appeals litigated in courts and commented on by scholars. The area of cultural identity claims-making covered in this paper - ‘the culture defense’ - has attracted relatively little notice from students of multicultural jurisprudence and political theory. A cultural defense, significantly, entwines cultural identities with *individuals’ responsibilities* rather than with groups’ rights. My analysis will pick out special challenges posed by the culture defense strategy for the broader study and practice of culturally pluralistic justice.

¹ Several examples of subcultures appear in this paper. ‘Subculture’ will denote a subnational group recognizable by its distinctive behavior-guiding norms, values, and practices.

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Among the objectives of this paper is the clarification of the essential characteristics of the culture defense. It sets forth the rationale of the defense and specifics those of its principles accepted without controversy by legal analysts. Writers habitually overlook those principles, and argue, in pursuit of a peripheral issue which creates unnecessary confusion. This red herring, and frequent source of mischief in discussions of multiculturalism, is the construct 'cultural assimilation', or simply *assimilation*. A survey of culture defense studies will reveal little concurrence among writers on the units, rates and other properties of assimilative processes. Following a review of these studies, a critique of the assimilation construct emerges, one aim of which is to coax legal scholarship towards the keystone of a culture defense and away from the issue of assimilation. As argued later, a culture defense embraces claims of *cultural dictation*, sometimes conflated with cultural determinism. Shifting reference terms from assimilation to cultural dictation will broaden the scope of the defense to include certain case types heretofore unrecognized as sharing common ground, and will, I hope, lay to rest standing convictions about the purview of the defense. This move also seeks to give a more psychological face to multicultural research on individual responsibility and the law. Thus the paper calls for a reconfiguration of a burgeoning field of socio-legal research with a view to both extending its scope and deepening its thrust.

Cultural Assimilation and the Cultural Defense

The term 'culture defense', surfacing in American law reviews in the mid-1980s, has made a name for itself in journalistic and scholarly writing on legal affairs. This section will describe the rationale, substance, and objectives of the culture defense strategy. It must be noticed first that there is no officially recognized or doctrinally elaborated culture defense analogous to established defenses such as necessity and self-defense. A culture defendant ordinarily petitions for judicial clemency by blaming the dictates of her subculture for her commission of an offense. She may claim that these dictates kept her ignorant of the law she violated or caused her to miscalculate its reach, although ignorance and mistake of fact are not usually the problem. Culturally-induced compulsion (*cultural compulsion*) is the more commonly attributed cause. Cultural compulsion, alternatively called *cultural dictation*, describes a state in which a person acts unlawfully under the irresistible sway of a *cultural dictate*. Culturally compelled actors face a choice of complying with the law or breaching a cultural dictate: dictate and law irreconcilably clash. Cultural dictates in the end prevail, as the price of disregarding them exceeds the costs imposed by legally enforced penalties. Legal compliance may jeopardize an actor's subcultural identity, if not her life. Or a dictate may produce an action automatically, without the conscious knowledge of

the actor. In either case the choice of doing otherwise, namely doing that which the law enjoins, is allegedly not a viable option. The dictate effectively deprives the actor of a choice to do otherwise, for which reason, she contends, the law should withhold its full measure.

Three premises undergird the *thesis of cultural dictation* conveyed in the culture defendant's signature excuse, 'my culture made me do it'. First, the action at issue has originated with a subcultural dictate. That dictate, secondly, has triggered the offending action. Third, given the extent of its control over her thoughts and actions, the dictate forecloses alternative actions permitted or required by the law. The terminology of 'cultural dictation' and 'cultural compulsion' receives more extended treatment later; a general understanding of what it signifies will suffice for now. Several accessory points arise in writings on the culture defense as practice. Thus a question arises as to what benefit a litigant gains from a culture defense. A culture defense can at most support a partial excuse and result in a reduced sentence, excepting perhaps the borderline cases mentioned later. One can appreciate the law's unwillingness to concede the culture defendant more than this. Cultural dictation defies the conception of autonomous, rational agency pivotal to the models of society entrenched in Western law and philosophy (Norrie 1993). A further question arises from the pervasive slippery-slope worry that 'my culture made me do it' defenses may overwhelm the legal apparatus if precedents are set (Unikel 1992). There is also an empirical argument: Since many citizens profess deep loyalties to one or another subcultural community, but few on that account break the law, why should a culture excuse-seeker fare better legally than other citizens would (Watson 1987)?

Analysts are fairly unified on the evidentiary requirements for a culture defense. The defendant must furnish proof that the cultural dictate she attributes to her act weighs with members of her subcultural community, that it gave rise to the action in dispute, and that doing otherwise was not a feasible option. But other preconditions which legal scholars take for granted are called into question in the following sections. According to conventional wisdom, culture defenses do not proceed unless the court admits cultural evidence into the trial process (Maguigan 1995: 85-86; Renteln 1993: 503-504). No doubt judges can muzzle or ignore testimony supporting the culture defense strategy. But we shall see that the culture defense can make its way into a proceeding and even succeed in spite of judicial obstruction. Hence, on the expanded conception offered here, a culture defense can satisfy the criteria outlined, and therefore it can go forward irrespective of the bench's disposition towards it or the results which follow from it.

Readers who browse through the literature will encounter other stipulations for which I can find little or no support. For example, commentators assume without

argument that, not being a *de jure* defense, the culture defense must be dependent on meeting the conditions of established defenses. Although that is in all likelihood the norm, it is not a necessary condition. Later I introduce culture defenses that freelance their way through trial proceedings in contravention of received wisdom. Another notion taken as an article of faith verges on fallacy. It sees the culture defense as a creature of the criminal law. Yet legal analysts do not specify the elements of the 'culture made me do it' argument that would necessarily exclude it from use in civil litigation. Whatever those reasons, they do not self-evidently follow from the linchpin of the culture defense, the thesis of culture dictation. Our project, however, focuses on a different issue, which could be called 'the fallacy of assimilation'. The next section documents a prevailing tendency on the part of legal analysts to wed the culture defense to norms of cultural assimilation, reserving it exclusively or primarily for recent immigrant minorities. To restrict the defense to culturally unassimilated parties is not justified by the premises of the defense. The principles of cultural dictation which operate in situations of conflict between societal laws and subcultural dictates are not limited in their reach to particular types of subcultural groups. Further, problems in assimilation discourse limit the usefulness of that notion as a criterion of eligibility to a culture defense. These problems will be specified in order to separate the culture defense from the discourse of cultural assimilation.

Cultural Assimilation in Culture Defense Research

It is taken as axiomatic that the culture defense befits "cases in which the defendant maintains a set of values alien to traditional American values" (Lain 1993: 50-51). According to Volpp, "The concept of a 'culture defense' rests on the idea of a community not fully 'integrated' into the United States..." (Volpp 1994: 61). Renteln sums up succinctly: "Underlying debates about the legitimacy of the culture defense are assumptions about assimilation" (Renteln 1993: 504). Likewise, Tomao makes a precondition of the defense "the extent that the defendant has assimilated herself to American culture" (Tomao 1996: 249), and Choi writes that "only those persons who legitimately have not assimilated the culture and values [of the dominant culture] should be allowed to assert the defense" (Choi 1990: 69).

The quintessentially unassimilated parties are recent immigrants in the view of many. The literature teems with statements saying in effect that, "[t]he culture defense... uses traditional defenses to help recent immigrants..." (Gallin 1994: 743; and Magnarella 1991, Spatz 1991; Lam 1993: 50-51; Volpp 1994: 57; Lyman 1986: 88; Sams 1986: 348; Anonymous 1986: 1299; Tomao 1996: 241; Shebyani 1987: 752; and Sherman 1986). Infrequent, cursory, varied: such are the

justifications given for limiting the defense to new immigrants. Renteln refers to unspecified processes of enculturation keeping new immigrants on the leash of tradition. Accordingly, “[t]he point of the culture defense is to recognize that the power of enculturation makes it exceedingly difficult for someone from another culture to make his conduct conform to standards of the dominant culture” (Renteln 1987/88: 21; Taylor 1997: 334; Anonymous 1986: 1300). By arguing that the cultural conventions on which they are brought up render immigrants incapable of assimilating new beliefs and modes of conduct rapidly, Renteln places stress on individuals’ assimilative capacities. Other analysts see opportunity constraints as impediments to inclusion: “A new immigrant.. has not been given the same opportunity to absorb - through exposure to important socializing institutions - the norms underlying this nation’s criminal laws”; hence, “[t]he principle of individualized justice demands that the law take this factor into account” (Anonymous 1986: 1299; also Lam 1993: 51).

What I call ‘the culture contrast argument’ joins this list. Maguigan designates Native Americans, African Americans, and new immigrants as eligible to use the culture defense. They all hold ‘cultural values’ different enough from the ‘dominant culture’ to meet it headlong in a “direct [cultural] clash” (Maguigan 1995). Renteln apparently is of much the same opinion. Having approved the defense for new immigrants and Native Americans, she adds “bonafide ethnic groups”, while emphatically prohibiting it for use by other subcultural groups, such as gangs, whose “world view is not radically different from the rest of society” (Renteln 1993: 497). For gang members, ‘a rotten social background defense’, which “has more to do with class difference than cultural differences”, may be more suitable (Renteln 1993: 498).² Echoing Renteln, a deputy district attorney in San Francisco cautioned that “an official cultural defense could expand to protect members of cults or gangs...” (deBenedictis 1992: 29). In a contemporaneous paper Renteln lowers the bar of eligibility by bringing Western

² The ‘Rotten Social Background’ syndrome receives its fullest treatment in Delgado (1985; see also Corrado 1994). While there may be uncertainty about the meaning which Renteln attaches to the class-culture dichotomy, Delgado leaves little doubt that the Rotten Social Background defense invokes a complex of “economic and cultural disadvantages’ producing pressures “often beyond the actor’s control [which] may increase the difficulty of conforming to social rules and behavioral expectations sometimes to the point of impossibility.” (Delgado 1985: 23; see also Harris 1997). I understand this to be a criminogenic *subculture* comprised of norms and behaviors shaped by or correlated with determinants of class - a culturally-patterned component of a class stratum analogous to Oscar Lewis’s well-known (and no less controversial) ‘culture of poverty’ subculture (Lewis 1966).

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European immigrants, Native Americans, and Christian Science faith healers within the scope of the defense. And what traits might these diverse parties share? In a word, “they are members of a group whose worldview differs substantially from that of the majority [and conflicts with it]” (Renteln 1994: 42). The culture contrast argument moves Chiu to argue that White Americans should be excluded from mounting a culture defense. They have no need for one, as “[m]odern American criminal law already embodies their mainstream values and mores” (Chiu 1994: 1125). “By its very terms,... the cultural defense is a strategy that is available only to those who have a culture different than white mainstream culture (Chiu 1994: 1101).

As a procedural matter, an assimilation cut-off point is needed to screen for culture defense eligibility. Once an immigrant or member of some other subcultural minority passes into the societal mainstream, her eligibility presumably expires. Whether that boundary line can be objectively drawn and where it belongs are questions upon which opinion is divided. Renteln’s plumps for flexibility. The references to cultural dictation which we spotted in her writing show that in her view certain immigrants may never overcome the force of tradition and assimilate into the mainstream.³ *People v. Kimura*, discussed below, convinces Renteln that “assimilation often does not occur as rapidly as many believe” (Renteln 1993: 463), or, for that matter, “within any finite time period” (Renteln 1994: 62), making it “inappropriate to limit [the culture defense’s] use as any time limit would be arbitrary” (Renteln 1993: 496). Likewise, Lam opts for an open-ended time frame: “The degree of the defendant’s assimilation into the mainstream culture must be so slow that it is unfair to punish her for not complying with the law” (Lam 1993: 51). A number of writers intimate indefinite restrictions. For example, Goldstein decrees that “the line must be drawn as to which immigrants to include within the borders of the defense and which to exclude” based on their degree of assimilation (Goldstein 1994-1995: 99; also Sams 1986: 348; Anonymous 1986: 1310).

³ The notion of cultural determinism embodied in Renteln’s conception of enculturation is not spelled out in her published papers, and a footnote in one of those papers leaves one wondering about her commitment to the proposition that enculturative influences can dictate individual behavior. She postulates that “[c]ultural conditioning influences behavior, but does not defeat free-will” (Renteln 1993:449). Continuing, she asserts: “Although individuals cannot choose their culture, they can choose from a range of actions consistent with their cultural upbringing [and] adopt attributes from other cultures through processes known as acculturation and assimilation” (Renteln 1993: 449). Had Renteln explained what she meant by free-will and cultural determinism or cultural dictation, it might have been possible to reconcile these evident contradictions.

Bolder and more concrete proposals issue from other quarters. A member of the bench unofficially hinted at a ten year period of eligibility for new immigrants (deBenedictis 1992: 29), and Ma sets her limits at “five years after a person had immigrated to the United States, but ten years for elders”. (Ma 1995: 462). Ma’s benchmarks partially follow federal government time lines which allow an alien to become a citizen after five years of residency in the United States - “[T]here is a rebuttable presumption that a person, after residing in the U.S. for five years, should understand one’s basic obligations as a citizen”, the chief exceptions being new retirement-age arrivals (Ma 1995: 482). Second and later generations are not qualified to enter a culture defense. Even if the descendants of immigrants grow up in relatively isolated subcultural enclaves, “they are exposed to American laws and values throughout their lives in schools, social occasions, and the media” (Ma 1995: 483). Ma favors blanket implementation of her guidelines; tracking progress case by individual case would create an administrative nightmare, she predicts. Sam holds a different view. Courts “must establish a termination point after which a defendant is considered to be enculturated”, but the cut-off should not be rigid: “the courts must make a separate inquiry into each defendant’s opportunity for orientation” (Sam 1986: 347; also Volpp 1994: 70; Anonymous 1986: 348).

Several writers oppose the assimilation construct for reasons involving theory construction and social policy. While the political repercussions of verdicts returned in culture defense trials are outside the scope of this essay, attacks on ‘culture’ and ‘assimilation’ construct-building clearly are closely related to the issues under discussion. Critics’ comments show that the assimilation framework is not embraced, or embraced wholeheartedly, by all. Critics reject the thesis of culture dictation and by extension the retributive foundation of culture defense theory and practice.⁴ Their arguments require serious consideration. So, while I generally share and duly note the critics’ views on assimilation discourse, the rationale of their criticisms raises challenges for my analysis that must be answered. We can hear from the critics now and answer them later.

Chiu thinks the cultural assimilation construct ‘untenable’ in theory and “unfeasible’ in practice (1994: 1102). Her analysis lacks detailed and systematic arguments, but contains instructive observations. Cultural assimilation presumes separation, ergo individuation, of cultural wholes, but that presumption is unfounded: “culture’ cannot be defined through bright line tests of concrete categorization because it is by nature ambiguous (Chiu 1994: 1101-1102;

⁴ Certain writers reject a culture defense on retributive grounds but offer it to immigrant women and children (Volpp 1994, 1996; Chiu 1994) or members of racial minorities (Armour 1997) on utilitarian (policy) grounds.

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Maguigan 1995: 52). What is more, cultures are many-faceted, and individuals differ in the speed and thoroughness with which they internalize a culture's inventory of elements. Therefore, to determine when a person has assimilated the contents of a culture "would be a difficult and subjective task at best" (Chin 1994: 1101-1102). Chiu's assault on assimilation rhetoric does not deter her, it may be noted, from insistently reserving the culture defense for select immigrant groups.

Norwegian social workers, teachers, and lawyers bent on rescuing their mostly immigrant clients from legal difficulties by enlisting testimony from cultural experts frequently contact the anthropologist Unni Wikan. When asked to "appear as an expert witness for the defense and say... *it's his culture*" that made him abuse his wife or do something else illegal, Wikan will reply, "this is not a question of culture" (Wikan 1999: 57). Excuses thus framed expose a mistaken "notion of culture as static, fixed, objective, consensual and uniformly shared by all members of a group..." (Wikan 1999: 62). They smack of cultural determinism rooted in the "idea that culture compels people to act in certain ways, as if they do not have motivation or will (Wikan 1999: 58). How reminiscent this is of Volpp's observations on the expert testimony given in *Chen*, explaining the tradition of wife-killing by cuckolded husbands as if it were endorsed and blindly followed by all males on the mainland of China. People everywhere "are not subsumed by culture but are in active negotiation with it" (Volpp 1996: 1584-1585). In the final analysis, culture is simply an "idea, a word that can be filled with various kinds of contents depending on one's vantage point" (Wikan 1999: 57).

Critiquing the Cultural Assimilation Construct

How inseparable the culture defense has become from cultural assimilation discourse is evident from the preceding literature survey. The survey also touches upon the difficulties of setting objective parameters for assimilation. Analysts have trouble agreeing on units, indicators, and intervals of time that can definitively differentiate culturally unassimilated from assimilated actors, so as to draw up guidelines for designating those people who deserve to benefit from a culture defense. This section seeks to explain why the notion of cultural assimilation is inherently imprecise at *the level of the individual actor*, and fails on that account to sustain a culture defense. The infirmities of this notion furnish an additional ground to reject the conventional approach of having a culture defense exclusively benefit new immigrants, *or other specific groups*.

Schema of cultural assimilation juxtapose a mainstream societal majority and a subcultural minority. Policy can be based upon such a bipartite scheme when the

units of assimilation are social groups and the indicators of assimilation are limited in number, quantifiable, and non-arbitrary. It is fairly uncontroversial practice in the social sciences to measure, for instance, the assimilation of Nigerian and Laotian immigrants or members of a religious sect by using literacy levels or inter-group marriage rates. The mainstream! subculture dichotomy holds up well enough where quantifiable traits of a group are isolable and speak just for themselves and not to demonstrate the totality of a group's character. So of Laotian refugee communities settled in Minnesota, one might find them becoming Americanized (assimilated) in terms of English language proficiency but slow to assimilate on other indices such as absorption into the regional labor force. Sector-wise research obviates the difficulties of assessing the assimilation of whole cultures. But in culture defense investigations, the units of assimilation are whole subcultural groups and persons. Writers hold forth on rates and degrees of assimilation into mainstream society *in toto*, and their analyses do not disaggregate the various parameters of assimilation. One result is that the societal mainstream is misrepresented as a concrete, unitary structure, something more than a theoretical construct discontinuous with observable divisions of the empirical world. Attempts to set up yardsticks of inclusion in or exclusion from the mainstream *in toto* beg the question of precisely what kind of object the subjects of study are being aggregated with or separated from. If indices of assimilation are confined to select parameters of intergroup difference and similarity, and the investigation limited to certain facets of group life, that issue is largely resolved. Chiu, Coleman, Volpp, and Wikan appear to dissent from analytical writing which treats the societal mainstream as a concrete and internally undifferentiated unit of assimilation.

Chiu, Coleman and other critics also are at odds with the tendency of courts and commentators to portray minority subcultures as cohesive units of organization hemmed in by tradition (for example, Renteln 1993; Taylor 1997). Their views, referred to above, accord with those of many critical legal scholars (Mertz 1994; Coombe 1998) to the effect that cultural and subcultural communities are permeable, mutable, and divisible entities - and anything but bounded, homogeneous wholes. In regard to the societal mainstream and a host of subcultural groups, the anti-holists seem right. But, as I argue later, their otherwise valid generalizations overlook such cohesive subcultural units as religious cults and youth gangs, as well as diffuse social groupings which instill collective values and norms into the motivations and perceptions of their members. These groups, as veritable strongholds of cultural dictation, are of considerable importance to the present analysis. Unless a culture defendant can attribute the offense charged to his affiliation with such a group, he will lack a basis for any claim of cultural compulsion.

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To recapitulate, students of the culture defense and legal practitioners are here urged on a number of grounds to abandon their preoccupation with assimilation. One ground for this argument stems from the core thesis of culture dictation. As long as a subcultural dictate can compel cultural insiders to commit unlawful actions, that dictate is grist for claims to a culture defense, no matter what particular subculture is in question. Assimilation processes are incidental to cultural dictation. Another ground of the argument deals with assimilation discourse in its own right. The assertion here is that the assimilation construct lacks the conceptual resources required of it vis-à-vis the culture defense. Some commentators wonder, like me, how one could superimpose the global inclusion/exclusion dichotomy of assimilation onto the fluid, overlapping subcultural divisions of nation-states. However, two aspects of their critique arc at cross-purposes with my proposals, in that they reject the thesis of cultural dictation and do not conceive of the existence of ‘holistically’ structured subcultural groupings. Consequently anti-holist writers are opposed to the culture defense, or would bar the established subcultural communities of a nation from asserting it. The rest of this section is given over to the failings of assimilation rhetoric to make good on its promises. It is argued that individual lives and social groupings do not fall neatly into the exclusive compartments of assimilation and separation. Thereafter I proceed to answer the anti-holists’ criticisms by defending the thesis of culture dictation, adducing cases of subcultural holism, and attempting to demonstrate the full scope of applications of the culture defense.

In *People v. Kimura*, a Japanese mother, Fumiko Kimura, became unhinged by news of her husband’s adulterous conduct (Woo 1989). Humiliated and depressed, Kimura took her two young children to a beach in Santa Monica where she waded into the ocean to attempt *oyako-shinju* (parent-child suicidehomicide). Kimura survived but both children drowned. Community leaders and experts on Japanese culture spoke up for Kimura before and during her trial, locating her motives within a system of Japanese values. At the guilt phase of her trial, the judge limited testimony to evidence on Kimura’s immediate state of mind, thereby depriving her of a full-scale culture defense. But testimony about cultural factors presented by Kimura’s team of psychologists, buttressed by a well-publicized rally of community support, probably moved the court to adjudge her temporarily insane and so lacking in malicious intent at the time of the tragedy. The experts agreed that mother-child homicide-suicide was a crime in modern Japan, but they asserted that it enjoyed a continuing life in that country, where it affords the spouses and children of adulterous men a possible if drastic means of escape from the blight of lasting shame and degraded status. They portrayed Kimura as “a traditional Japanese woman who strongly adhere[d] to her cultural upbringing” (Sheybani 1987: 769) and was “remarkably insulated from mainstream [American]

society (Woo 1989: 404). She received a reduced sentence of one year in jail, five years' probation, and an instruction to undergo counseling.

Renteln joins other commentators in concluding that "Kimura appears to have benefitted from a culture defense though she had resided in the United States for several years" (1993: 463).⁵ Since Kimura remained culturally isolated, "she had not become assimilated" (Renteln 1993: 463). But Renteln, Sheybani, and Woo may be jumping to unfounded conclusions from very limited evidence. How cut-off from American society and ensnared in Japanese tradition in fact was Fumiko Kimura? The exiguous record provides no conclusive answers. We know of her attempt at *oyako-shinju*, her inclination to fault herself for her marital woes and the lofty place of family honor in her scheme of values. But the traditions in which she steeped herself, the degree of their hold over her, and her knowledge of their significance in Japan (where today *oyaku-shinju* occurs rarely, being legally prohibited: Woo 1989) are unknown. Swallowed up in the Angelian or American cultural scenes Kimura assuredly was not. She was a homebody, cultivated few acquaintances, and did not drive or speak fluent English. Nevertheless, it would be farfetched to describe her as a social isolate, detached from her adoptive milieu. She had resided in the United States for fourteen years, during which time she had enrolled in a community college, acquired a working command of English, held down odd jobs away from home, and survived an eight-year marriage to a Japanese-American. She made the local rounds on shopping trips, doctors' visits, and the like, and, for all we know, may have owned a television set that gave her an eye on the whorl of activities and ideas around her.

Kimura was evidently *somewhat* uninvolved in, uninformed about, and uncommitted to American cultural practices. Conversely, she was *somewhat* caught up in, conversant with, and dedicated to the practices and values of her adoptive milieu. It may be presumed that Kimura's Japanese cultural attachments were similarly relative. So where at the end of the day does the jury come down on Kimura's cultural identity? Does she answer to the descriptions of 'pure' Japanese, American, Japanese-American or does she fall between these categories? It is worth elaborating the reasons why one cannot incontrovertibly pigeonhole Fumiko Kimura. Terms such as 'American' and 'Japanese' are elliptical for 'typical American' and 'typical Japanese.' But Volpp (1994), Chiu (1994), and an impressive body of psychological research on social stereotyping (Leyens,

⁵ Woo (1989) and other writers also claim that Kimura "benefitted from a culture defense" in spite of the court's refusal to recognize the cultural testimony supplied by Kimura and her defense team. *Kimura* and *Goetz*, discussed later, undermine the widespread contention that culture defenses do not go forward at trial, let alone succeed, without authorization from the bench

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Yzerbyt, and Shadron 1994) argue that prototypicality is relative. Prototypes are partly artifacts of the subjective judgements people form about the attributes of a social category perceived by them to be prevalent, salient, relevant, or desirable, and these judgements typically reflect in part the perceivers' status and role identities.

Assimilation analysis is also susceptible to what I call the 'multireferentiality of culture traits' problem. A standard of comparison can underscore group differences under one description, but accentuate group similarities under another description. *Qyaku-shinju* is *prima facie* emblematic of Japanese and American cultural differences. It symbolizes Kimura's foreignness in that American canons of law and morality prohibit it, and it ostensibly infringes a sacred duty of maternal love. Regardless, its culturally structured motive - maternal-filial piety - gives *oyaku-shinju* an affinity to American family values and the ideal of respect for individual dignity. Seen in this light, Kimura's conduct may appear to Western minds less alien and more deserving of sympathetic treatment than it otherwise would. An analogous case confirms the point. *People v. Wu* dramatized the plight of a Chinese immigrant to the United States accused of killing her child and making an attempt on her own life in response to her spouse's abusive treatment of their son and his philandering ways (Volpp 1994). Two courts, following opposing readings of Wu's motives, arrived at different verdicts. The appellate court looked sympathetically on Wu's explanation of her motives (paralleling Kimura's) and overturned the more punitive decision of the trial court, informed by the presumption of malice aforethought. Neither case converts suicide-homicide into a badge of cultural assimilation. The point is that a standard of comparison such as *oyaku-shinju* may cause two groups to appear culturally more *or* less alike according to the description of it which a decision-maker adopts. In short, the multireferentiality of culture traits problem makes assimilation analysis problematic.

Kimura creates another difficulty for assimilation analysis. This is related to findings on the typicality of cultural traits. *Qyaku-shinju*, we learned earlier, is rarely reported in contemporary Japan, and Japanese law criminalizes it (Volpp 1994). If a practice is not prevalent in a culture, and hence is marginal to its identity, that practice does not provide a credible standard of cultural comparison *qua* assimilation. Whole cultures are compared and contrasted in terms of their prototypical features. Is *oyaku-shinju* not a curious criterion by which to judge Kimura's Japanese cultural identity if Japanese culture itself does not favour it? Clearly, assimilation analysis requires the analyst to legislate for membership of culture categories - a challenge which even cultural specialists may decline.

Other obstacles can stymie the quest for touchstones of assimilation. Treatises on assimilation recognize subjective and objective indicators of assimilation, which sometimes yield incompatible findings (Gordon 1964; Salins 1997). Suppose Kimura did not identify herself as American; by that subjective yardstick she is patently not Americanized (assimilated). But a more Americanized Kimura might emerge from an objective survey of her activities if it showed her participating without great difficulty in a matrix of relationships, products, and events provided by her American milieu. Contextual factors further confound holistic taxonomies, as ethnographies of social change and acculturation (assimilation) testify (Bernard and Pelto 1972; Rouse 1995). If Kimura resembles the multitude of subjects of these voluminous studies, she might behave in aggressively 'American' fashion at her places of work, yet show customary deference at home around elderly Japanese visitors, projecting an assimilated look here, and an unassimilated aspect there. She would take her place beside famously cosmopolitan Euro-Indian males who take brides in arranged marriages and live virilocally, and university-educated African civil-servants who consult diviners and shamans for political and medical advice. Lives thus embedded in crosscutting cultural worlds elude the global dichotomy of assimilation and separation. In reality many people are multiply cultured, in turns assimilated and unassimilated, depending on context and vantage point. Other relevant issues are missing from the moots on the culture defense. To give one instance of many, Gordon (1964) proposes as a criterion competence to function effectively in all normal adoptive cultural settings. Would we then judge Kimura to be less acculturated if she had failed dismally at school, marriage and more, than if she had negotiated her way through her social environment with consummate skill? And how are competencies to be ranked in order of importance, or to be correlated?

Further Failings of Assimilation Discourse: The Mainstream Offender as Culture Defendant

The assimilation perspective, I argue, fails to connect with the thesis of cultural dictation. Moreover, the applications of this perspective discussed above encounter formidable analytical obstacles. The sheer number and diversity of assimilation parameters on offer, the plurality of meanings any one of them can bear, and possible uncertainties regarding the prototypicality, *qua* cultural practice, soften the lines of demarcation between cultural groups *in their totalities*. Another glance at the rationale of the assimilation perspective will further explain the problem I have in connecting it with cultural dictation. The culture contrast and constrained opportunity arguments noted in the literature review indicate the reasons why analysts believe the culture defense applies only to relatively unassimilated parties, and especially to new immigrants and indigenous peoples. These are groups which

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have little in common with the cultural mainstream. The implication is that because they are culturally different, members of cultural minorities find it difficult to blend into mainstream society. Even if the 'hard because different' proposition held good, however, it would not entail cultural compulsion. Hard is one thing, and hard to the point of inability to do otherwise is quite another. Compulsion means literally or virtually without option. In short, cultural difference does not *per se* induce or betoken cultural compulsion.

Renteln possibly accommodates cultural compulsion within her scheme when she maintains, as we have seen, that "[t]he point of the culture defense is to recognize that the power of enculturation makes it exceedingly difficult for someone from another culture to make his conduct conform to standards of the dominant culture" (Renteln 1987/1988: 21). We have noted also her observation that that "[u]nderlying debates about the legitimacy of the culture defense are assumptions about assimilation" (1993: 504). Deconstruction of Renteln's reasoning reveals that two distinct points inexplicably mingle in her thinking. Enculturation (socialization) processes bind people to the dictates of their cultures, at least as far as unassimilated immigrant communities are concerned. Additionally, processes of enculturation and cultural assimilation work against each other. But do Renteln's claims, as understood here, withstand scrutiny? Why assume that 'assimilated' subcultural groups *ipso facto* lack enculturative and other mechanisms to secure social conformity? Why does mainstream cultural inclusion perforce preclude the dilemmas of cultural conformity which are envisaged to affect new immigrants and isolated native populations? By what mechanisms do conventions dictate individual thought and action? Under what conditions would subcultural conventions prevent compliance with these 'standards of the dominant culture'?

It remains for this section to present the mainstream in a different light from that projected by Renteln and several other culture defense analysts. The illustrations which follow attempt to reveal the nature of a societal mainstream which is suffused with subcultural dictates prohibited by law, but easily capable of compelling legal infractions. We turn afterwards to enculturative and other mechanisms which may conceivably produce culturally compelled behavior irrespective, *pace* Renteln and company, of their cultural and subcultural venues. These constructions and arguments, if successful, will help restore the cultural dictation thesis to its rightful role as the linchpin of a culture defense, and in the process dispose of the assimilation approach.

The landmark *Rabidue v. Oceola Refining Company* exhibits all but one or two of the diagnostic features of a culture defense (see Ehrenreich 1990; also United States Court of Appeals 1986). Vivienne Rabidue filed a sexual harassment claim under Title VII of the Civil Rights Act against her employer for tolerating hostile

work environment conditions at her place of employment. She loathed the pornographic posters festooned across the office walls and hung in common work areas by male co-workers, and the sexual obscenities they showered on her and other women at the plant. Rabidue had complained to management in vain. The Circuit Court majority found against her. It saw .Oceola as epitomizing American working class culture, where boys will be boys at home, on television, and in all walks of life. Ehrenreich's construal of the majority opinion is that "the judges were informed by culturally-based notions" about blue collar conduct in the workplace arising from attitudes of misogyny induced by cultural conditioning (Ehrenreich 1990: 1193). In so many words, the majority pronounced the defendants innocent products of their blue collar subculture milieu who could not fairly be expected to do otherwise (Ehrenreich 1990: 1195- 1196). If this rendering correctly represents the majority's intuitions, it demonstrates that an unconventional culture defense was asserted in this case. Remarkable here, apart the mainstream identity of the parties involved, is the unusual manner in which the defense was raised: it was the court which entered it on behalf of the defendants.

The Battered Woman Syndrome (BWS) might also count as a culture defense. This defense serves in the United States as "a predominant means of defending battered women who kill or commit other serious crimes" against a male partner (Downs 1996: 15). As it has no *de jure* standing, defense attorneys usually piggyback BWS onto the doctrine of self-defense. This usually constitutes a partial excuse which can reduce the charge of first-degree murder to a lesser charge. For this defense to prevail, it must be shown that the defendant did not instigate the crime, she reasonably believed that she was protecting herself from imminent or immediate danger, her response matched the threat posed, and she had no alternative recourse, such as retreating to a zone of safety (Faigman 1986: 662-623). BWS is customarily introduced when a defendant is unable to satisfy one or more of the requirements of the doctrine. She may have reacted with deadly force after enduring a mortifying harangue, but nothing worse. Or after a serious altercation with the aggressor she may have waited until he dozed off or stepped into a shower before striking back. Sometimes a defendant has a mate gunned down by a hired assassin or kills in panic the first time he molests her.

To a judge and jury, BWS defendants who could possibly have quit an abusive relationship when it turned violent, or have escaped an attack and found refuge somewhere else, or have managed other options short of resorting to preemptive or disproportionate force, may seem guilty of culpable premeditation or use of excessive force. BWS anticipates these concerns. It allows the defense to argue that disengagement may be difficult for women who lack marketable skills, doubt the determination of police and court officers to protect them from abuse, regard the abandonment of a spouse as a symptom of a character flaw, or fear the

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contempt which desertion might elicit from family members. A syndromic battered woman stays alert for signs of danger, and learns to recognize how superficially harmless expressions of discontent from the batterer can escalate rapidly into physical violence. The stresses of hyper-vigilance reach a flashpoint where any aggressive gesture can spark an attack of panic fuelled by pent-up fear or anger. Catching the aggressor off-guard, in a non-confrontational setting, merely levels the playing field, which otherwise favors him with his advantage in size and typically superior experience in the use of deadly weapons.

Whatever its scientific validity, some commentators on the use of the BWS defense construe it as a culture defense, although they do not call it that. For instance, Rosen represents the battered woman who kills as “a victim of her social reality, responding to circumstances in accordance with the values of femininity and life-long marriage to which she was acculturated” (Rosen 1986: 41). Therefore, “[b]ecause [the] defendant responded to internal and external coercive pressures, for which she was not responsible but which were created by her social reality as a battered woman, she is not to blame for her conduct” (Rosen 1986: 43). Likewise, it is claimed, “[t]hose gender differences stemming from cultural expectations about women and those pertaining specifically to battered women create and inform battered women’s perceptions” (Crocker 1985: 128). Whether the BWS defense speaks for all battered women in America or a low-income subset, it apparently covers a large group overlapping the mainstream, and attributes to it a subculturally patterned complex of vulnerabilities, perceptions, and response modes.

The *cause celebre* of *People v. Goetz* is worth examining. Bernhard Goetz was a 37 year old New Yorker who had taken to carrying a gun wherever he travelled in the city after being mugged and seeing others harassed by feisty inner city youths. A gang of four Black teenagers accosted him with a request for money in a subway train he was riding. Goetz feared a holdup and possible assault, and pulled out his gun and emptied it into his presumed assailants. He was charged with murder. Its racial overtones notwithstanding, no one prosecuting the case called Goetz’s actions racially motivated, the defense team said nothing about race, and published court opinions avoided speculation about racial fears or animus (Fletcher 1988). Deep suspicion that “[r]ace . . . lurked beneath the formal arguments” presented at the trial suffuses the scholarly commentary on *Goetz* (Kennedy 1997: 167; also Sagawa 1986; Armour 1994; Tesner 1991). Armour identifies “numerous instances” in Fletcher’s authoritative monograph indicative of culturally induced racial stereotyping on the part of Goetz and his defense team (Armour 1994: 783). Even though “one hardly finds an explicit reference to the race of anyone” in the transcripts of the trial, “indirectly and covertly, the defense played on the racial factor” (Fletcher 1988: 206). Goetz’s lead attorney’s barrage

of slogans, branding the youths “the gang of four”, “the predators on society”, and “vultures” and “savages”, “carried undeniable racial overtones” (Fletcher 1988: 206). This freighted language conveys an invidious classification: true to their kind, the youths are menaces to society. The defense also manipulated racial fears by recruiting four Black members of the Guardian Angels as ‘props’ in an enactment of the shooting. Goetz was not allowed “to speak about the rational inference from being surrounded by four young black toughs”, but his attorney “designed the dramatic scene so that the implicit message of menace and fear would be so strong that testimony would not be needed” (Fletcher 1988: 130).

It seems clear that scholarly writing on *Goetz* imputes to the defense a subterfuge of a race-based culture defense disguised in colorblind language. *Goetz* appeared to fasten on the line of argument: (1) Whites are justifiably conditioned to perceive Black youths as violent; (2) the defendant is the product of a White culture of fear, and his fears of victimization draw upon compelling personal experiences; (3) so, Whites in *Goetz*’s shoes will fear for life and limb and reasonably strike first, automatically, at trouble makers whose mannerisms put them on guard. *Goetz* was not at liberty to address the issue of reasonableness, which is “the linchpin of a valid self-defense claim,” but that was the likely predicate of his defense (Armour 1984: 786). Armour’s analysis, based on cases akin to *Goetz*, delineates a medley of grounds on which litigants may in their defense assert reasonable racial fears induced by cultural conditioning (Armour 1994, 1997). However, his typology suggests a tendency for trial attorneys to deploy a culture defense strategy behind a facade of the ubiquitous Reasonable Man standard, both in civil rights cases and in self-defense cases where racial minority rights come under attack.

Rabidue, BWS, and *Goetz* are certainly a mixed bag. But that fact takes nothing away from the points they jointly illustrate. Schisms within societal mainstream normative and value systems can induce unlawful acts *and* coincide with subcultural boundaries. As new moral sensibilities broaden civil liberties without fully overcoming the discrimination they address, as cultural experiences based on gender are better understood, and as more is learned about religious cults, youth gangs and other subcultural bastions of social deviance, powerful intrasocietal conflicts come to light. Widely mooted treatises of this ‘cultural wars’ phenomenon (e.g. Hunter 1991) speak to the issue of competing moral visions even within the ‘mainstream’ segments of modern multicultural societies. Against that backdrop, *Rabidue*, *Goetz*, and BWS defenses unsurprisingly show that non-immigrant and non-indigenous litigants can insert claims of cultural conflict and compulsion into their defenses, and win favorable verdicts. Nevertheless, some caution is necessary with regard to this finding. Documentation being sparse and fragmentary on the associations formed by these defendants with their subcultural

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communities, it may be unwise categorically to declare their litigation strategies culture defenses.

In the case of *Goetz*, by all indications, a culture defense was argued incognito. But the veil of secrecy around Bernhard Goetz's game plan urges that the case must carry the more qualified classification 'putative culture defense'. Whether BWS gives rise to an authentic culture defense will depend upon empirical research on the cultural embeddedness, structure, and prevalence of its postulated elements. That possibility cannot be ruled out. *Rabidue* satisfies the criteria of the defense, save that the defendant refused to concede wrongdoing and claim an excuse, as would a paradigmatic culture defendant. The deployment in a litigant's defense of the argument 'my culture made me do it but I did nothing wrong' causes this case to qualify as a probable variant of the prototypical culture defense. *Goetz* and *Rabidue* will likely pass muster as culture defenses. But if even this conclusion does not entirely persuade, I see no reason why these types of cases should not be listed *in principle* as culture defenses, since there is no reason why they could not *conceivably* fill that bill. And this weaker claim is all that is needed to undermine the assimilation, culture-defense-as-criminal-defense, and defendant-as-culture-defense-instigator dogmas.

Cultural Dictation and the Culture Defense

Cultural determinism, or better, culture dictation, forms, by all accounts, the crux of culture defense claims-making (Renteln 1993; Volpp 1994: 63; Coleman 1996: 1136; Wikan 1999: 58; Tomao 1996: 254; Li 1996: 769; Taylor 1997: 354-355; Anonymous 1986: 1300; Lyman 1986: 99). At any rate no published studies for or against the defense argue to the contrary. It is all the more remarkable that, with so much riding on the meaning of culture dictation, analysts and jurists at most invoke the thesis or some parallel notion, but no one expounds it. The current practice of debating and using the culture defense in the absence of a theory of culture dictation is unacceptable if only because of the impossibility of giving proof of something one cannot clearly define, namely the situation in which one is made by one's culture to perform some act. This section begins an effort to make the 'culture made me do it' slogan intelligible. 'My culture made me do it' testimony encapsulates essentially two stories. One, accessible to the defendant, bears on what *she made happen*. She observed a subcultural dictate while incidentally (in standard cases) violating a societal law. The less accessible story relates what *happened to her* - what forces in her culture caused her to act. She should have little difficulty identifying her own causal contribution, but what happened to her requires an entirely different scheme of explanation, taking account of underlying mechanisms ignored in her version of events. Both roles, as

causal subject and causal object, are played out in the defendant's mind, with input from her cultural milieu.

The full sweep of cultural and psychological mechanisms and processes that may take part, as instruments of dictation, in the genesis of her action is staggering in complexity - There is therefore a need for a general model of *cultural and psychological mechanisms* that distinguishes culturally dictated from non-dictated minds and actions. Absent common, tractable guidelines as to causation, it is one party's word against the other's in regard to whether the defendant's culture 'made her do it'. We shall see that, as matters currently stand, determinations of cultural compulsion lean too heavily on guesswork. This section lays the basis for a theory or model of cultural dictation consonant with the practical and theoretical requirements of culture defense litigation and with recent advances in social and psychological theory. A cultural-psychological model of compulsion is not yet offered in the literature. Regrettably and surprisingly, this topic is not at the forefront of cultural and psychological research. Few theoretical models seek to elaborate the intricacies of culturally compelled conduct, and such as there are remain at preliminary stages of development. They provoke relevant insights, however, and the task ahead is to articulate their rudiments with the law's conception of compelled action. Describing their particulars, appraising their qualities, and prescribing uses for them at trial proceedings, however important, exceed the scope of this paper.

For technical reasons, 'culture dictation' is used here in place of the term 'cultural determinism' employed by several culture defense analysts. Synonymous with cultural causation in some fields, 'cultural determinism' is a misnomer. According to the reference standard of determinism accepted by philosophers of science and metaphysicians, deterministic causes *necessarily* beget their effects under invariant enabling conditions (Sorabji 1980; Honderich 1991). In the paradigm of quantum mechanics, this causal association is nomically governed, and deterministic causality occurs universally, not selectively, partially, or individualistically (Strawson 1982: 75; Morse 1994). Just as the laws of gravity and entropy apply deterministically in regard to all things natural, a cultural determinant, were it to exist, would impact on all people uniformly. Inherently probabilistic cultural processes do not conform to the canons of deterministic causality. So, rather than determinism, we are concerned with a form of causal efficacy in which the conditions go beyond those of necessity yet fall short of the joint necessity and sufficiency which are prerequisite for full-blown determinism.

'Cultural compulsion' (interchangeable with 'cultural dictation'), I suggest, fills the bill, besides capturing the gist of the culture defendant's rallying cry, 'my culture made me do it'. Indeed, psychologically and legally speaking, '...made me

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do it' signifies compulsion (Moore 1984, 1985). Even if this analysis were to take no interest in the legal context of behavior, it would consult legal treatises for standard definitions of compulsion. The great value for us of legal theory lies in its synthesis of the normative and psychological benchmarks of compulsion. Legally speaking, to compel is to impede free choice. Because legal agency presupposes free choice, indicia of compulsion inform legal reasoning about individual responsibility. Strict liability policy aside, Western legal doctrines never let the apple of responsibility fall far from the tree of choice (Moore 1992). Two forms of compulsion sufficient to excuse wrongful conduct are broadly recognized in jurisprudence and moral philosophy (Moore 1985; Audi 1974; Dworkin 1968). *Physical compulsion* can unavoidably impel an unlawful act, as when a brain tumor sends an actor into a homicidal rage. The physically compelled literally cannot choose of their own accord to obey a law. *Psychological compulsion*, in contrast, leaves room for choice. However, the licensed options so vastly exceed an actor's capacities, that from a legal standpoint they are, in effect, closed to him. Provocation, self-defense, diminished responsibility, and duress are defenses of psychological compulsion which can acquit, diminish culpability, or mitigate punishment. Cultural dictation is understood to engender psychological compulsion, rather than physical compulsion; cultural dictates do not compel in the pattern of natural forces and physical objects. Most importantly, they do not expunge freedom of the will. Free will is compatible with cultural dictation. However, the actor who is subject to cultural dictation cannot exercise her options without extreme difficulty. She will perceive the option which is contrary to that culturally dictated as out of reach, or subconscious controls will defeat it, and the court will deduce that any reasonable person in her place would do likewise. Compulsion clearly incorporates objective (normative) and subjective (psychological) elements.

Cultural dictation obviously implies cultural dictates. The properties of a culture dictate are worthy of an essay in their own right, but technical details need not detain us. Building on the pioneering work of psychological anthropologists Melford Spiro (1951, 1965) and Roy D'Andrade (1990, 1992), we may consider cultural dictates as imperatives for action which are selectively applicable within a cultural group. Dictates project significant costs and rewards which are made salient through structures of group influence, and hence confer injunctive force. Infractions can invite ostracism, corporeal punishment, and even death. Compliance attracts rewards in the avoidance of punitive sanctions or the significant improvement of the lot of an actor. We need not follow D'Andrade and Spiro in characterising dictates as formal moral commands. If, for example, the 'hypervigilant' behavior manifested by battered American women translates into a cultural pattern, the norm of hypervigilance will count as a cultural dictate albeit lacking formal moral authority.

Another insight Spiro and D'Andrade offer, and which is obliquely reinforced in the research on social identity and stereotyping by psychologists John Turner and his colleagues (Oakes, Haslam and Turner 1994), pertains to the scope of a dictate's injunctive force. We learn that: (1) not all dictates compel every member of a group; (2) dictates are not equally obligatory; and (3) group members vary in susceptibility to a dictate's demands. Susceptibility is conditional on processes of self-group identification, or in other words, *social identification*. A person who identifies with his group in name only is not inclined to acquiesce out of compulsion to dictates which the group promulgates. Every so often, having nothing better to do, he may go along with a dictate or observe it just to stay in others' good graces. Possibly his associates sometimes coerce him into doing a dictate's bidding on pain of injury. In the first instance he is not compelled; in the second, the instrument of compulsion is not the cultural dictate. Dictates compel from the outside and inside of a mind. We should elaborate on these points.

The inside/outside mind dichotomy suggests a pivotal distinction between culturally-compelling and self-compelling motives. A culture defense stands or falls in theory on the verifiability of its core predicate, that the action taken arose from culturally compelled motives rather than self-compelled impulses. We see this point foreshadowed in earlier commentary on *Kimura*. Had either of the following conditions obtained, Kimura's act of *oyaku-shinju* would have rated as purely self-compelled: (1) Japanese rarely observe the dictate; (2) Kimura gave no indication of having faith with the dictate. As to point one, we must wonder how Kimura can be held to have been culturally compelled by a dictate which was for the most part ignored by her native culture. A more plausible supposition is that her alleged susceptibility was *all* in her mind. The second scenario when considered gives rise to doubt about Kimura's susceptibility to this dictate. From this consideration we derive some of the desiderata of cultural compulsion, framed in the idiom of social identification. A dictate is culturally prevalent and will leave its mark on the biography of an actor.

The prerequisites of cultural compulsion do not end here, as another look at *Goetz* will show. Goetz certainly seemed like a man submersed in a subculture of racial prejudice and apt to be ruled by the dictate 'strike first, ask later' in Black-on-White confrontations. *Goetz* exhibits our first two prerequisites of cultural compulsion. But did the 'strike first' dictate inevitably block Goetz from doing otherwise? Could he not have switched seats on the train or turned some charm on his aggressors? And did the moral pillars of his subcultural community require the carrying of guns and their use, vigilante-style, for protection from pesky Black youths? A racially biased White male placed in the circumstances of Bernhard Goetz might have been expected to show more forbearance than he did. All things considered, it is more likely that Goetz was affected by strike-first

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reasoning than compelled *by it* then and there.⁶ The act, we trust, says more about

⁶ Distinguishing self-compelled from culturally-compelled behavior seems to be a sticking point in adjudicating ‘Black Rage Syndrome’ defenses and cases such as *Poddar*, where a psychotic state induced by cultural influences instigates a criminal act. *People v. Poddar* involved the brutal murder of a young American woman by an Indian graduate student, Prosenjit Poddar, who had been seeing her, on and off, for some months (California Reporter 1972; Blum 1986). Poddar developed an obsessive fascination for his victim Tanya Tarsoff, whom he fantasized marrying. A provincial Harijan (Indian untouchable), Poddar had never dated and was for some time unaware that Tanya was trifling with his affections. Poddar’s ingenuousness about affairs of the heart and American courtship protocol, his tendency to exaggerate the significance of Tanya’s perfunctory gestures of interest in him, and his misconstrual of her acceptance of the gift of a sari he made her as consent, in accordance with Hindu tradition, to betrothal stemmed in part, no doubt, from his cultural background. Yet Poddar was constantly and persistently advised by Indian friends on campus, and later by psychologists at a nearby clinic, that he was out of touch with reality, and that the frenzy he was working himself into over Tanya could turn dangerous. Anger and humiliation drove him over the edge, and he finally shot and stabbed Tanya to death in her house. Poddar pleaded diminished capacity and received a jail sentence before the conviction was overturned on a technicality. Renteln, who does not distinguish self-compelled from culturally-compelled acts of disobedience, holds that “diminished capacity tied to his [Poddar’s] cultural background did prevail in the end (Renteln 1993:470). A formal cultural defense, she reasons, would be “consistent with” diminished capacity defenses such as Vietnam Veteran’s defense (Renteln 1993: 471). This analysis argues otherwise. The trial and appellate courts apparently paid little attention to cultural evidence in *Poddar*. More significantly, judging by the evidence in plain sight, West Bengali cultural dictates in no way stood behind this bloody crime.

Because Poddar’s act was predominantly self-compelled rather than culturally-compelled, it should not have entitled him to a cultural defense. Indeed, I would argue against Renteln that the same can be said for all so-called post-traumatic syndrome defenses, including Black Rage (Harris 1997, Weintraub 1997), Rape Trauma, and Gambler’s syndrome (Dershowitz 1994; Wilson 1997). Black Rage sufferers, for instance, are typically urban Black males in their 20s or 30s who suffer a succession of setbacks caused, they believe, by systematic racial injustices. Their culturally nurtured hostility festers until a traumatic event one day puts them into a dissociative state in which they randomly attack a White target. Harris’s analysis treads cautiously. This “is not a simplistic environmental defense”, he insists, as the vast majority of African Americans “never commit

Goetz's personality than his culture. *Goetz* is in this respect no different from other published cases. One can comb the literature and find not a shred of evidence of cultural compulsion. I hasten to stress that I am not questioning the status of *Goetz*, *Kimura* and the other cases as instances of culture defenses. The trouble stems from limitations in the evidence; none of it passes the threshold test of cultural dictation. These defendants may arguably have been affected by a cultural dictate. But were they compelled? And what litmus test will decide for us whether they were?

Cultural dictation seems to exist through interconnected external and internal pathways of causation. Social identification with his subcultural group renders an actor susceptible to group influences, which are sustained by systems of rewards and punishments. Had Goetz belonged to a racist hate group, been primed by his peers to make preemptive attacks on confrontational Black youths, built his life around group projects and ideals, and known that the group's opinion of him depended on his resolve to exercise the 'shoot first' option, we would have a *prima facie* valid argument for cultural dictation. (Goetz would not make that argument explicit, but others well might, as we shall see). But Goetz was probably not a product of regimented racist indoctrination, nor were the majority of cultural defendants on record apparently subjected to such robust cultural conditioning. There is, however, another, interior, pathway to cultural dictation which may be involved in a number of cases, and which emanates from (external) group influences but ultimately operates beyond their range. This route is embedded in mind-brain structures according to a substantial body of experimental and theoretical cognitive writing. Cognition is central to this discussion, as choice is grounded in cognition, and compulsion (dictation) denotes constrained choice. In other words, questions of compulsion, and so the culture defense, revolve around questions about freedom of choice.⁷ Cognitive theories tell us that culture lives in

crimes" (Harris 1997: 2). Still, "it cannot be denied that there is a causal connection between environment and crime" (Harris 1997: 2), which permits the defendant to assert in court that "[y]ou cannot convict me without hearing who I am and what shaped me" (1997: 37). Harris implies an inapplicable cultural determinism, for not one offense adduced in his study was directed by a cultural dictate. Black Rage, Rape Trauma, and BWS, interestingly, join the recently christened 'abuse excuse' genre of defenses which pit cultural against psychopathological interpretations of the causes of action (Wilson 1997; Morse 1995; Stocker 1999).

⁷ For several of the reasons elaborated in Morse's (1982) and Moore's (1984) incisive and methodical critiques of the forensic application of psychodynamic theories of unconscious motivation, I make no other references here to this body

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mental structures, and that within those structures it can have subjects do things by channeling their choices. Many models of cognitive architecture are under development in several disciplines, but we might profit from a synthesis of leading contenders with clout in anthropology and social and cognitive psychology.

The 'schema' construct is well established in cultural and social cognitive theory (Fiske and Taylor 1991; D'Andrade 1995). Schema provide models of the mental functions involved in eliciting attention, retrieving information from cultural resources and other objects of perception, and registering perceptual data in category-like formats coded for instruction, rumination, motivation, affect, intention formation, and action generation. Schema models are diverse. A 'connectionist' model, favored by a number of writers, represents schema as concatenated neuron-like networks of stimulus transmitting and inhibiting nodes and connections embedded in memory (Stillings et. al. 1995). Schema represent external 'reality' in mental code. If a schema 'recognizes' an external stimulus object as an exemplar of what it represents in prototype form (Black youths, say), it may immediately fire off inference-propagating signals to the schema in its network (for guns, death, racial group categories, and so forth), thereby expanding the perceiver's inferential horizons (reminding him, a *Ia* Goetz, of the need to guard against attack), and arouse in him associated emotions (such as fear), or even motivate him to perform, or settle on performing, a certain act (perhaps reaching for a concealed pistol). When triggered, the Black youth schema will deactivate other, inference-suppressing schema (White youth, amity, and the like). Using standard algorithms, a modeler can compute size, density, and processing speed properties of connected schema.

Functionally, schema form hierarchies of induction. In people generally, the self schema envelops and organizes practically all network processing infrastructure housed by a reasoning mind. *Ex hypothesi*, in so far as self and cultural group schema converge and become mutually referential - socially identified - to that extent a cultural dictate will elicit in the perceiver automatic responses when appropriate cues activate it. Activation of the combined 'Black' and 'male' and 'youth' (Black youth) schema, for instance, will immediately elicit the schema-encoded 'shoot first' dictate lodged in thick, high-speed networks of self and cultural group categories (family, neighborhood, honor, freedom, status and the like). These associations become consolidated in memory structures over extended periods of reinforcement through processes of social identification. Active and ramified, they acquire enough cognitive salience to trigger automatic responses

of writing. Impressionistic Freudian-derived theories do not provide the theoretical bases which would enable observers to isolate biologically realistic cognitive structures and functions and to specify their processing operations.

absent conscious, deliberative efforts on the part of the perceiver. A dictate can become so thoroughly 'programmed' in subconscious thought that it will induce a conditioned response even when the perceiver consciously disavows it and has separated himself from his subcultural group. In this respect as well, therefore, cultural dictates can compel action. Legal analysts are coming to recognize the value of having law-making and legal interpretation keep up with the learning curve generated by research on subconscious cognition, especially in the areas of civil rights and hate crime laws (Lawrence 1987; Krieger 1995; Wang 1995).

Subconscious cultural compulsion can found a valid claim to a culture defense, provided the defendant has internalized the dictate in dispute, her culture embraces it, and the defense advances tenable criteria of cultural compulsion and persuasive evidence in support of the claim. Exactly what 'clicked' in the mind of a defendant when he committed his transgression is, for the foreseeable future, unknowable. Minds are too opaque, and cognitive models have not yet made minds homologous enough to the brain structures they functionally represent to enable proof-positive diagnoses of cultural compulsion. But neither are we totally in the dark. It should be possible to simulate the mechanics of cultural compulsion with the kind of network models just mentioned. Controlled laboratory experiments that put the defendant through enactments of his offense will surely be impracticable. But short of that, the defendant's account of his act and comparable actions on his part, collated with recall data from in-group peers who underwent similar experiences, and case study data derived from laboratory research can be assimilated to generic connectionist models of minds primed for the spontaneous, and hence, compelled generation of action. Necessarily oversimplifying, the mental profile thus constructed may reveal whether the circumstances sufficed to release the triggering mechanisms for subconsciously compelled action. Given that kind of profile, developed, I suspect, mainly by expert witnesses and consultants, legal decision-makers will have objective tools by which to judge the reliability of claims of cultural compulsion in specific instances. Again, neither the most sophisticated of models nor the best of databases will conclusively settle the argument for cultural compulsion. Nevertheless, systematization of the cognitive fundamentals of culturally compelled action must advance progress towards the aim of gauging a defendant's culturally molded predispositions to 'do it'. And that may be good enough for the practice of law. The best models will integrate inner and outer pathways of compulsion and work equally for culture defense attorneys who mount an explicit culture defense and for prosecutors who want to expose inculpatory motives and intentions concealed behind covert culture defenses engineered in defenses such as that of *Goetz*.

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It is doubtful whether the mechanisms of cultural dictation thus postulated could become part of the libertarian sociology of anti-holist critics, where culture is a purely abstract, amorphous category, and persons freely pick and choose among the cultural practices they observe. Were all subcultural groups so permissive and mutable, cultural dictation would never see the light of day in modern multicultural states. To be sure, Irish and Italian-American subcultural enclaves, cowboy subcultures, various counter-culture communities and subcultural groups of many other stripes do not hem in and hold down members' choices to act of their own accord. But not all subcultural groups fit this mold. There is ample ethnographic evidence that non-ethnic subcultural groups can be insular and can restrictively control their members' affairs. Rights of passage, enculturative folklore, dress standards, honor codes, rules of decorum, leadership structures, cryptic gestures and vows, elaborate sanctions, and stereotyped caricatures of cultural outsiders furnish these groups with tools to enforce conformity and maintain social solidarity. Ethnographies of youth gangs (Hazlehurst and Hazlehurst 1998), prison inmates (Coggins 1997), religious cults and sects (Galanter 1999), rightist hate groups (Ridgeway 1995), blue collar factory workers (Janes and Ames 1989), police department subcultures (Barker 1999), and self-betterment sodalities, including Alcoholics Anonymous (Holland et al. 1998: Chap. 4) supply a wealth of information on the implements of social identification and control incorporated by these units of subculture. But for their norms to be binding on the individual, subcultures need not be face-to-face communities like youth gangs or cults. For example, in so far as female victims of domestic battery form a genuine subcultural entity, they are another variant, which in this case is spatially diffuse and endowed with shared adaptive strategies imparted by society at large. Cultural dictation thrives among many subcultures, some far from, some near to the mainstream of society.

Discussion.

Groups' rights bulk large in legal writing on cultural practices. As the preceding sections illustrate, modern legal systems also take account of cultural conventions in their practices for assessing responsibility and allocating punishment. This discussion, I hope, conveys the point that the culture defense, as theory and practice, affords a venue *par excellence* for researching the cultural touchstones of individual responsibility assessment. The principal objective has been to provide a survey of that venue. We have seen that the inherent nature of the defence and the representation of it given by writers are not one and the same. Thus, in this review of fundamentals, prevailing misconceptions about the defense could not go uncontested. The paper has advocated the abandonment of unproductive debates on assimilation, and a shift of attention to the central construct of the defense,

cultural dictation. It has been argued that the essence of the culture defense is that the defendant attributes the commission of the offense for which she is on trial to her cultural background. This formulation eliminates a clutch of arbitrary restrictions on the scope of the defense. It allows that a culture defense can proceed without the court's authorization, that in principle it can accommodate diverse subcultural groups, and, recalling *Rabidue*, that it can be used in both civil and criminal proceedings and can originate from either the bench or the defense.

The enterprise of retrieving the culture defense from the misconceptions about it progressed in stages. It was first necessary to overthrow the dominant paradigm of assimilation. It would have been an oversight if I had not acknowledged the criticisms of assimilation discourse from within the field of culture defense scholarship, but giving the critics their due meant meeting their objections to the thesis of culture dictation and challenging their questionable sociology. The second part of the enterprise was to articulate the thesis of cultural dictation. Some readers may find the dictation thesis over-psychologized, obscure, and a shade technical, but I would recall that a culture defense is a state of mind defense, and one quite unlike others such as the defenses of intoxication, insanity, and duress. More precisely, it is a state of mind-in-culture defense which asserts that culturally inculcated motives and intentions are implicated causally in sequences of action. The idea of culture making us do things, I have noted, conjures up an improbable, counter-intuitive determinism which tends to provoke skepticism in jurists. That places on the proponents of the defense a heavy burden. Those legal commentators, judges, and even expert witnesses (Volpp 1994) who accept the 'culture made me do it' proposition unfortunately do not meet the obligation of making its assumptions explicit and setting them into a structure of argument.

It was necessary to elucidate the mechanisms of cultural dictation, and not only for academic reasons. As long as the nuts and bolts of cultural dictation are not accounted for, jurists will be unable to locate the threshold where an action affected by a dictate becomes an action compelled by it. Consequently legal decision-makers will proceed without ascertaining what constitutes proof of the defense's key elements. Proof of a viable cultural defense - essentially of cultural compulsion - resides in two sets of causal pathways related to the concept of social identification. Evidence of cultural compulsion can be gleaned from group influences that regiment the choices and actions of individuals who are demonstrably susceptible to their motivational force. Dictates can even have decisive effects on people who have walked away from their groups. They lodge within subconscious modalities of thought and trigger automatic responses to dictate-cuing objects of perception. Cultural dictates may indeed exhibit considerable staying power in minds which consciously reject them. The schema and connectionist models which have been set out have the merit of

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conceptualizing interaction between culture and cognition within the micro-cognitive formats that conceivably embody them.

Our foray into micro-cognitive modeling admittedly is sketchy and promissory. But in favor of this approach it may be said that it respects the fact that people most of the time put their cultural knowledge into practice automatically, as when performing routine speech acts and classifying objects by their color or value, and asserts that dictates are no exception (Strauss and Quinn 1997). Secondly, it seems that actions induced by subconscious cultural dictation can be no less material to the tenability of a culture defense than choices and actions induced by conscious compulsion. Thirdly, speculation is essential when pursuing mechanisms about which little is known. Multi-level models of cultural compulsion are still inchoate, and the modest, necessarily abbreviated start made here in employing some of the best in the task of explaining the culture defense will have served a useful purpose if it has helped replace unexamined intuitions with concrete proposals which may then be debated and further developed. Moreover, a strong assumption behind this paper is that if the thesis of cultural dictation in its fullest scope can be clarified, this will bring together disparate forensic case types which have at base a family likeness. Rotten Social Background, Battered Wife Syndrome, and Reasonable Prejudice excuses may be seen to join company with the brand-name cultural defenses initiated by immigrant offenders, having a common foothold in the thesis of cultural dictation. The thesis should then furnish a framework for integrating ostensibly unrelated facts, hunches, and rulings, enlarging the repertoire of analogous cases from which inquirers may extrapolate useful lessons.

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