

2.2: Culture, Subculture, and Crime

In recent years the media has shown increasing interest in defendants who use a “cultural defense” to excuse, justify, or mitigate their criminal conduct. What is a cultural defense? Simply stated, it is the use of social customs and beliefs to explain the behavior of a defendant. It is sometimes called social framework or social context evidence. It is very similar to the black rage defense in its use of social, economic, and psychological evidence, but there are significant differences. The black rage defense is an explanation of how American racism impacts on African Americans. It has a powerful political message because it exposes the oppressive structure of American economic and social life. On the other hand, some cultural defenses offer an explanation of how a foreign culture affects a person, usually an immigrant, who currently resides in America, comparing that culture’s mores and legal standards with those of the United States. To a less frequent but significant extent, this defense is also used by America’s indigenous peoples and by those who are immersed in the country’s non-dominant cultures.

Just as the black rage defense has been used since the 1800s, the cultural defense is not new to American courts. For example, in 1888 Native American defendants were allowed to put their customs into evidence to show the absence of malice in their killing of a tribal doctor after having been instructed to do so by the tribal council. In the 1920s Italian immigrants used cultural evidence to defend themselves against statutory rape charges when they abducted for marriage Italian American women under the age of consent whose parents had not agreed to the marriages.

Like the black rage defense, use of the cultural defense increased in the 1970s and 1980s, for a number of reasons. First, the development of the battered woman syndrome, used to explain the actions of women who have defended themselves against physically assaultive men, has educated the legal community about the appropriateness of and need for social context evidence. The significant increase in minority and women lawyers, law professors, and judges has also opened the legal system to claims of racial, gender, and cultural bias. The result of this consciousness-raising is that the courts are more amenable to the introduction of social framework evidence.

Another reason for the rapid growth of the cultural defense is the influx of Asian immigrants who come from countries with cultural norms and beliefs dissimilar to America’s. Many of the cases discussed in the anthropological and legal literature involve people from Vietnam, Laos, and Cambodia. Much of this immigration is a consequence of the United States’ interference in and destruction of those countries during what the Vietnamese call “the American war.” A number of cases reported by the media and analyzed in the literature involve the Hmong people. The Hmong were tribal mountain people who were specifically recruited by the CIA and the U.S. military to fight against the Vietnamese National Liberation Front. After America lost the war, thousands of the Hmong who became at risk in their country had to relocate to this country, where at times the two different cultures have clashed. Although most of the attention has been on cases involving Asians, the cultural defense has also been used in cases involving Salvadorans, Nigerians, Puerto Ricans, Cubans, Mixtecs, Jamaicans, Ethiopians, Arabs, Alaska Natives, and Native Americans.

There is a good deal of misinterpretation of culture defenses, both inside and outside the legal system. A clear light piercing this veil of confusion is a brilliant law review article entitled “Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?”¹ by Holly Maguigan, professor of the criminal law clinic at New York University Law School. Maguigan was a public defender and then a criminal lawyer in private practice in Philadelphia, and she brings that real-life litigation experience and insight to her article.

Maguigan explains that the cultural defense is not an independent, “freestanding” defense. Some judges and many commentators have made the mistake of thinking that both black rage and cultural defenses are separate from conventionally recognized defenses. Working from that incorrect assumption, they posit horror stories of the law being abused by separate standards of conduct based solely on race or culture. In fact, both defenses must be part of a recognized rule, such as insanity, self-defense, mistake of fact, or diminished capacity. The cultural evidence must be relevant to the defendant’s state of mind when committing the crime. An example of a case in which a cultural defense was used as a persuasive part of a conventional legal rule involved a young man named Kong Moua. Moua was one of approximately thirty thousand Hmong people relocated to the San Joaquin Valley of California. In 1985 Moua was a student at Fresno City College. He abducted a Hmong woman whom he believed was to be his bride, took her to his cousin’s house and, in spite of her protests, had sexual relations with her. The woman reported the incident to the police, and the surprised Moua was charged with kidnap and rape. During plea negotiations between the district attorney and defense counsel, the explanation given by Moua was that he was fulfilling the custom of *zij poj niam*, the traditional Hmong marriage ritual. According to the cultural norms among the Hmong in their former homeland, the mountains of Laos, a man abducts his intended bride after informing her parents. Before the marriage a courtship takes place, including the exchange of small

gifts and chaperoned dates. On the chosen day, the man captures the woman, takes her to a family home, and consummates the union. The woman protests to show her virtuousness. The man, to display the strength necessary to be her husband, persists in face of the protests. Moua said he believed that his bride-to-be's protests represented the customary resistance, and that he did not intend to have sexual intercourse with her against her will.

If there was an independent cultural defense, a judge would instruct a jury that if they agreed that Moua honestly believed the woman was voluntarily engaging in the ritual of *zij poj naim*, they should find him not guilty. But since no freestanding cultural defense exists, Moua's attorney argued the conventional defense of mistake of fact. That is, Moua, because of his cultural beliefs, mistook the woman's protest to be part of the ritual and assumed she was actually consenting. The district attorney was convinced of Moua's sincerity but was unwilling to drop the charges because of the need to show the Hmong community that in America they must abide by American laws and customs. However, he reduced the charges to a misdemeanor of false imprisonment. Moua pled guilty. Before the sentencing, the judge educated himself as to the ritual of marriage-by-capture and consulted the elders of the victim's and the defendant's families. He sentenced Moua to ninety days in jail and one thousand dollars restitution. During the sentencing, the judge made it clear that his decision was not based on a cultural defense per se, but that the cultural beliefs of Moua and the Hmong community had influenced his lenient sentence.

Some commentators have criticized the disposition in Kong Moua's case as an example of the legal system treating crimes of violence against women less seriously than other crimes. Maguigan agrees with this criticism. But she does not agree that abolition of the cultural defense is the answer. She shows that cultural evidence often works in favor of women defendants.

The murder trial of Kathryn Charliaga is a good example of the positive aspects of social framework evidence, both in educating the public to women's oppression and in winning a favorable disposition for women defendants. Kathryn Charliaga is an Alaska Native (the phrase used by Alaska's indigenous peoples to describe themselves). At the time of her case, she was a thirty-five-year-old preschool teacher living in the small Aleut community of Larsen Bay. She began dating Simeon Charliaga when she was just fifteen years old, and they were married when she was nineteen. After the wedding her husband began to beat her. For Kathryn it brought back memories of her father beating her mother and hitting and sexually abusing Kathryn when she was a small child. During the sixteen years of their marriage, Kathryn's husband had choked her, chased her with a knife and with a gun, and beaten her in public.

On New Year's Eve in 1990, Kathryn and Simeon were at home. They drank some brandy and began to quarrel. He locked the door and blocked it with a freezer chest so she couldn't run out of the house as she had done many times before. Kathryn testified at her trial that his eyes had the look of "a devil." Faced with his fury and his known potential for violence, she grabbed a knife and stabbed him repeatedly. Kathryn was indicted for second-degree murder and two lesser counts of homicide. She pled not guilty and went to trial arguing self-defense.

The legal problem Kathryn and most women face when they use a weapon to defend themselves against husbands or boyfriends is that the man is often unarmed. The law of self-defense requires that a person be in imminent danger of serious injury or death. It also requires that a "reasonable person" would have perceived the threat as imminent and would have reacted in the same way as the defendant. In order to help the jury understand a defendant's reaction, prior threats by the victim against the defendant are admissible. In battered women defenses, it is proper to admit "context" evidence. By explaining the prior instances of violence, and how the man tended to behave as he built up to the actual attack, the defense enables a jury to understand why it is reasonable for a previously battered woman to perceive that her life is in danger when the man is "just" yelling at her and has not yet physically attacked her.

The law of self-defense mandates that the force used be proportionate to the threat. One is allowed to use a weapon against an unarmed aggressor, but one's reasons must be very persuasive. Most juries convict women who have killed an unarmed man. Therefore, lawyers have used the battered woman syndrome to supplement conventional self-defense arguments. This allows the jurors to see how a woman may reasonably believe that she will be badly injured or killed and must use a weapon to defend herself against the man's usually superior physical strength and fighting experience. The battered woman syndrome also enlightens the jury as to why women do not leave their battering husbands, thereby negating the common feeling that the woman is at fault because she had the alternative of ending the relationship.

In Kathryn Charliaga's case, public defender Michael Karnavas called as a cultural expert Rena Merculieff, executive director of the Native Nonprofit Health Corporation. Merculieff testified that in Aleut villages a woman's role is one of subservience: "It's as if they [the men] own their wife and have a right to do whatever they want to them." One result of this philosophy is that battering is a common occurrence. Help is very difficult to find. In small, isolated villages, intervention is highly unusual and escape virtually impossible. People "expect a woman to do whatever the husband tells her."

The cultural evidence was persuasive in negating the jurors' feelings that Kathryn could have received help or gotten away from her husband in the years preceding the killing. The jury of seven men and five women deliberated for two days and reached a verdict of not guilty on all counts.

As more cases involving cultural defenses reach the appellate courts, we can expect more decisions favoring the admissibility of such evidence. This should also, by inference, allow evidence of African American culture as well.² Any lawyer planning to use a cultural defense should read the California Court of Appeals decision in *People v. Wu*.³ Helen Wu, a native Chinese woman, strangled her eight-year-old son and then unsuccessfully tried to commit suicide after she found out that her Chinese American husband was unfaithful and had been treating their child badly. The defense argued that the humiliation and shame felt by Helen Wu and her belief that she would be reunited with her child after death were strongly influenced by her cultural background. In an attempt to strengthen his contention that Wu was guilty of manslaughter and not murder, the defense lawyer offered a jury instruction that read as follows: "You have received evidence of defendant's cultural background and the relationship of her culture to her mental state. You may, but are not required to, consider that evidence in determining the presence or absence of the essential mental states of the crimes defined in these instructions." The judge refused to give this instruction to the jury, stating that he 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." The Court of Appeals reversed the trial judge, explaining in detail how the cultural evidence was legally *relevant* to the charges. The court pointed out that in a murder case one's mental state is an issue. The cultural evidence was relevant to motive, intent, and what kind of mental state Helen was in leading up to and during the homicide. It was also admissible to prove that she acted in the heat of passion, which, if accepted by the jury, would reduce first-or second-degree murder to voluntary manslaughter. The Court of Appeals concluded that "upon retrial defendant is entitled to have the jury instructed that it may consider evidence of defendant's cultural background in determining the existence or nonexistence of the relevant mental states."

At the first trial Helen Wu had been convicted of second-degree murder. At the retrial she was convicted of the lesser charge of manslaughter. She received a sentence of eleven years in prison. The decision in *People v. Wu* is an affirmation of the use of cultural evidence and persuasive precedent, which can also be used by judges and lawyers in black rage cases.

Some cultural defenses have the same potential as the black rage defense to educate us about racism. A profound example of the constructive use of cultural evidence is the high-profile case of Patrick Hooty Croy. His case is a journey that begins with the Native American people of northern California in the 1800s, erupts in bloodshed in Siskiyou County in 1978, continues on Death Row at San Quentin Prison, and ends in a San Francisco courtroom in 1990. We start the journey in a small town named Yreka.

Yreka, California, is nestled in the Shasta Valley, 320 miles north of San Francisco. It is situated near the Oregon border and the beautiful Klamath River, where the U.S. government and Native Americans have fought for years over salmon fishing. Yreka prides itself in being "a city that exemplifies all that is grand about a 'small' town, U.S.A."⁴ The town was born in 1851 when gold was discovered in Black Gulch. Six weeks after the discovery, two thousand miners arrived and the life of the Tolowa, Yurok, Karuk, and Shasta Indians was forever changed. Reading the pamphlets and brochures from the Yreka Chamber of Commerce, you would hardly know of the history or the present-day existence of Siskiyou County's original peoples. There are only two references to Indians. The first is one line stating that the name "Yreka" is a Shasta Indian word for Mt. Shasta. The second reference is a description of "Indian Peggy" as one of the town's "famous personalities" who "is considered the savior of Yreka for warning the whites of an impending Indian attack in the '50's." It is not surprising that the Chamber of Commerce literature would leave out the fact that between 1850 and 1870 80 percent of the Native Americans in the county were killed. It is also no surprise that Indians in Siskiyou County still feel the same discrimination and prejudice their ancestors suffered.

Patrick Hooty Croy was born in Yreka in 1955. His parents were Native American, descendants of the Karuk and Shasta tribes that had lived there for centuries. His life was typical of an Indian boy in that county. He felt out of place in school, was harassed by the police, and was turned down for good jobs. He vividly recalled the police barging into his family's house and taking "poached" deer out of their freezer. He remembered seeing relatives coming out of the local jail with bruises from police beatings. Although he did fine in school, very little was expected of Indian kids, and he dropped out by the tenth grade. He got into minor troubles and was sent to the California Youth Authority for six months. He returned to Yreka, worked various jobs such as logging, and participated in the local Native American community. But essentially he was an alien in his own homeland.

There is an old saying: "If you want to understand someone, walk a mile in their shoes." Let us step into Hooty's shoes, go back in time to July 16, 1978, and begin to walk his path. On that Sunday evening, twenty-two-year-old Hooty decided to go to a party at the Pine Garden Apartments in Yreka. It was a typical party—there was some drinking and some marijuana. After a while Hooty went to sleep in one of the apartments. A small fight broke out between two people in the parking lot. The police were called by some white neighbors because of the loud noise, but soon things quieted down and the police left. Hooty woke up, and he, his sister

Norma Jean, and his cousins Jasper, Darrell, and Carol talked about going deer hunting; deer meat was one way Indian people in northern California supplemented their diet. Hooty went to his girlfriend's house and picked up his .22 caliber rifle. On their way out of town the group stopped at the Sports and Spirits liquor store in downtown Yreka. There, a scene was played out that occurs almost daily somewhere in America.

The white store clerk and Hooty's sister and cousin got into a verbal altercation. The clerk shoved Norma Jean, and she picked up a can opener and brandished it toward the clerk. Jumping to the conclusion that they were going to rob him, the clerk ran out of the store. Hooty was standing by the car and the clerk ran up to him and said, "I think they are going to rob me." Hooty tried to calm him down. "They are not going to rob you," he said. Then he went into the store to get his sister and cousin. But by now the historical burden of dysfunctional race relations had taken hold. A police car was driving by and the officer saw the clerk yelling that the store had been robbed. He was pointing at Hooty's car and shouting "get them!" One thing Hooty and his sister knew was that the police would never believe their side of the story. Hooty rapidly drove the car away, trying to get to the safety of their grandmother's cabin in the hills outside of town. Two police cars began a chase that would end in blood.

During the five-mile chase, Darrell leaned out the car window and fired one shot in a failed attempt to hit the police car's tire. After arriving at Rocky Gulch, Hooty and Norma Jean started running up a hill into the woods. Darrell grabbed the rifle and followed them. The police arrived and began shooting. Seventeen-year-old Jasper and eighteen-year-old Carol had not run into the hills; they surrendered and were handcuffed to some bushes. The police called for help, and soon there were twelve to fourteen cars with law enforcement personnel: California Highway Patrol, deputy sheriffs, and off-duty police. One of those off-duty policemen was Jesse "Bo" Hittson. He had won a stock car race earlier that evening and had gone to a barbecue where he had a few drinks. Hearing the police radio call, he rushed to the scene and jumped out of his vehicle, forgetting his bulletproof vest on the seat. He had his .357 magnum loaded with hollow-tipped bullets, which explode inside the body.

Hooty, Darrell, and Norma Jean were pinned down by the gunfire. Headlights and searchlights from the police cars were pointed at them as they crouched behind the same trees that had failed to offer adequate protection to their ancestors. Bullets from M-16s, AR-15S, shotguns, and revolvers were smashing into the trees. They had one small-caliber rifle. Darrell and Hooty passed the hunting rifle between them and fired five to ten shots. A few bullets hit the police cars; one policeman got shot in the hand. The police had no command center; there was no supervision. They just kept firing into the woods. Between 75 and 150 shots were fired at the three Indians. Darrell stood up, trying to surrender, and was shot in the groin. Norma Jean tried to run and was shot in the back.

Darrell yelled out, "I'm wounded and Norma Jean is dying!" The police yelled back, "We'll give you a half-hour to surrender!" There was no more shooting. Hooty, now with the rifle, started making his way back to his grandmother's cabin to see if she and his elderly aunt were still alive. At the same time, Hittson and another officer began moving toward the cabin, although other police were yelling at them "get away, stay down."

Hooty made it to the cabin and started to climb in through the window. At that instant, Bo Hittson came running around the side of the cabin. Hittson opened fire at Hooty's back. One bullet smashed into Hooty's buttocks and traveled into the spinal area. The other hollow-tip bullet exploded in the back of his arm, tearing a hole through it. Hooty whirled around and fired one bullet. It hit the officer directly in the heart, killing him.

The other policeman arrived at the scene, but all he saw was Hittson falling backwards. Hooty managed to crawl behind a building, where he lay in his own blood. Hearing the gunfire, other police ran up to the area and began firing at Hooty's position. He tried to yell out, "I'm wounded, I'm wounded!" The police fired another barrage, but by some miracle he was not hit. A few minutes later they dragged him out, and Hooty, either in shock or unconscious, was taken by ambulance to a hospital. Norma Jean was arrested with Darrell and was given medical treatment.

Four days after the shootings, a funeral service was held for Jesse Hittson. Over a thousand people attended, including approximately three hundred uniformed law enforcement officers from all over northern California. Flags were flown at half-mast, and city offices were closed from ten in the morning until two in the afternoon.

Hooty and the four other Indians were charged with conspiracy to commit murder, first-degree murder, four counts of attempted murder, four counts of assault with a deadly weapon, and robbery. Under an aiding and abetting theory and a conspiracy theory, all five could be tried for actions the others took. Hooty, Norma Jean, and their cousin Jasper were to be tried in one group. Darrell and Carol were to be tried in another proceeding.

Six weeks after the incident, Hooty still had to be brought to court in a wheelchair due to the gunshot wounds. The defense lawyers had hired a sociologist from a nearby college to survey the community for potential bias. He testified that more than 25 percent of

those questioned believed that the defendants were guilty. He also concluded that the “drunk Indian stereotype is still quite strong in the county.” Based on his testimony and the pretrial publicity, the case was transferred to nearby Placer County.

Other than the public defender no lawyers from Yreka would defend Hooty, so a lawyer from another county was appointed. He was a former prosecutor who had a caseload mainly of civil cases and had never defended an Indian. He and Hooty had little or no communication. Hooty was sure the white man’s court would offer him no justice. Fatalistically, he accepted what history had taught him—Indians are killed. He assumed he would be executed by the State of California.

At Hooty’s trial two very damaging, but untrue, pieces of evidence were presented. First, white neighbors from the Pine Garden Apartments testified that they heard some Indians say, “Let’s get a gun and shoot some sheriff.” Legally, this testimony is considered hearsay because it is one person reporting on what another person said and therefore is susceptible to misinterpretation or outright falsehood. But it was allowed into evidence because there is an exception to the hearsay rule called a “declaration against penal interest.” This means that a statement overheard by another person can be testified to if it admits to a criminal act or intention. Although the words were not said by Hooty, they were admitted as evidence against him because a conspiracy to murder was charged. In a conspiracy case, the words of one conspirator can be used against a coconspirator even if the coconspirator was not present at the time the statement was made.

The second erroneous piece of evidence was the testimony of a police officer who was present at the hospital. He testified that when the doctor asked Hooty what happened, Hooty replied, “I got shot robbing the liquor store.” This hearsay statement was also allowed into evidence under the exception rule. Of course, Hooty did not rob the store, nor was he shot at the store, but that would make no difference to the jury.

The lawyers did not view this trial as a political case. Hooty’s attorney did not attempt to expose the racism or misconduct of the police, nor did he want to explore the social conditions that Native Americans lived under in Siskiyou County. Hooty was not advised that a powerful self-defense argument was possible. Instead, his lawyer presented a weak “diminished capacity” defense.

Hooty, resigned to what he believed was his historical fate, offered no real defense. When he took the stand, he said he had been drinking and did not remember what happened. Why did he testify in that manner? Probably to help Darrell, who was the one who actually brought the rifle from the car. Probably because he knew he was going to receive the death penalty and there was nothing he could do to stop it.

Hooty and Norma Jean were convicted of every charge except two attempted murders. Jasper was convicted of second-degree murder and sentenced to seven years. Hooty’s cousin Darrell was convicted of second-degree murder and sentenced to six years and six months. His cousin Carol was also convicted of second-degree murder and sent to a California Youth Authority prison for four years. Norma Jean was sentenced to life imprisonment. Hooty was sentenced to death.

Norma Jean appealed her conviction, but the California Court of Appeals ruled against her and her lawyer did not proceed any further in her behalf. Meanwhile, Hooty had been shipped to death row at San Quentin Prison. The prison was built on Punta de San Quentin, which was named after an Indian warrior who had led the Lacatvit Indians to their final defeat at the hands of the Mexicans. Fortunately for Hooty, the law provided that if a convicted person received the death penalty, there was an automatic appeal directly to the California Supreme Court. In 1985, the year of his appeal, the California Supreme Court, led by Chief Justice Rose Bird, gave meticulous care to each death penalty case and reversed a number of death verdicts, including Croy’s. In his case the conviction was reversed on the grounds that the trial judge’s instructions to the jury regarding the law of aiding and abetting were incorrect and prejudicial to Hooty’s right to a fair trial. In 1986, Chief Justice Bird, Justice Cruz Rey-noso, and Justice Joseph Grodin were recalled in an election rife with law-and-order rhetoric reminiscent of Reverend A. B. Winfield’s vitriolic preaching against judges sympathetic to defendants 150 years earlier during William Freeman’s case. Since that recall election the California Supreme Court has had one of the lowest rates of reversing death penalty verdicts in the country. Before the reversal of his conviction, Hooty had spent seven years on death row. Now the County of Siskiyou decided to put him on trial again. Norma Jean, meanwhile, was still serving her life sentence.⁵

The retrial would be a completely different political, legal, and human experience for Patrick Hooty Croy. Members of his family had been able to obtain the services of well-known attorney Tony Serra. Serra had grown up in San Francisco and attended Stanford, where he was on the football, baseball, and boxing teams while majoring in epistemology. In 1971, he had run for mayor of San Francisco on the Platypus party platform. His programs included terminating the draft, decriminalizing victimless crimes, returning police policies to the citizens, self-determination for communities, city-sponsored art activities, and other ideas that represented the politically aware segment of the flowering counterculture. He lost the election, but his charismatic personality, creative ideas, and colorful trials made him one of the most recognizable, and one of the best, criminal lawyers in America. In 1976

he went to trial as a defendant himself for refusing to pay income taxes as a protest against U.S. military aggression in Vietnam. He was convicted and spent six months in prison. Perhaps that experience strengthened his empathy for those facing the power of the criminal legal system.

Hooty's case reminded Serra of Choi Soo Lee, who had been given the death penalty for a shooting in Chinatown, based on mistaken identification of Lee by white tourists. Lee's cause had won the support of the Asian community, and eventually his conviction had been reversed. When the state decided to retry Lee, Serra defended him. In a high-profile trial, Lee was found not guilty and went from death row to freedom. Serra hoped he could do the same for Hooty.

Serra headed a defense team of several lawyers, experts on Native American culture, legal workers, and investigators. They immersed themselves in the facts of the case and in the history of Hooty's tribe in California. They understood that to win the trial they would have to get a venue change, and to do so they would have to break the image of colorblindness to which our legal system is wedded. In the hearing on the motion to move the trial to an unbiased venue, eight witnesses, including six Native Americans, testified. Their testimony exposed the historic oppression of Native Americans in Placer and Siskiyou Counties, as well as the racism that still permeated these counties. An interview following the first trial revealed that one juror stated during deliberations that "this is exactly what happens when an Indian gets liquored up or has too much to drink." The judge ruled in favor of the change of venue motion, stating, "The potential for residual bias against the defendant in the context of traditionally preconceived notions [regarding Indian people] raises a risk that prejudice will arise during the presentation of the evidence unrelated to the facts."

After another venue hearing showing anti-Indian feelings in the other northern California rural counties the case was transferred to San Francisco. Though the venue problem had been solved, Hooty still faced not only the robbery charge, but also the charges of assault on police and murdering a policeman. Even in a liberal city like San Francisco, jurors do not look sympathetically on killers.

The defense team realized it needed to explain why Hooty had fled from the scene of the alleged robbery, and why he and Darrell had fired at the police instead of giving up. With regard to fleeing the scene, the law provides that the prosecution can put forth such evidence as "consciousness of guilt"—that is, the defendant's act of running away from the scene of an alleged crime implies that the defendant is guilty of that crime. The judge can then instruct the jurors that they can infer guilt from an act of flight. However, this jury instruction is a two-edged sword that can also be used by the defense to cut away at the prosecution by showing innocent reasons for fleeing. In Hooty's case, this was a means by which the history of Indian-police relations could be placed before the jury. Such evidence would show that Hooty feared the police and did not think they would listen to the Indian side of the story. He fled, not because there had been a robbery, but rather because of his mistrust of the police.

Since the law of self-defense allows for testimony regarding the defendant's state of mind, the defense team hoped to be able to put forth a cultural defense. They made a motion to offer expert testimony on the historical and present relations between whites and Indians in northern California generally and Siskiyou County specifically. This testimony was relevant to Hooty's state of mind, that is, to the reasonableness of his belief that he was in imminent danger of death or serious injury. The defense filed a state-of-the-art brief that tied together the law of self-defense and the law regarding expert testimony with the black rage case of Stephen Robinson, more recent cultural defense cases, and battered women cases.⁶ The motion was granted, although the judge limited the number of experts—only five of the nine requested experts would testify.

The defense desired a jury made up of a cross-section of San Franciscans. Although there were no Native Americans on the jury, the jury selection process resulted in a good mix in terms of age, gender, and race. There were five whites, three African Americans, two Latinos, and two Asians. After eleven years in prison, Hooty was getting one last chance to win his freedom.

On November 30, 1989, opening statements began. The district attorney, who had been brought in from Stockton, California, to try the case, presented his opening statement. Then Tony Serra took his place before the jury box. In his late forties, with his cowboy boots and his graying hair tied back into a ponytail, Serra looked a bit like an aging San Francisco hippy. One of the reasons for Serra's success is that he looks different from the straight-arrow, mass-produced lawyer most juries expect to see. His oratorical skills rival any attorney in the country. His forceful and unique personality comes through to a jury, which creates the potential for real communication. Your ideas, your logic, and your sincerity have an impact. Jurors react favorably to skilled verbal advocacy; they react even more positively to authentic human interaction.

Serra understood the overwhelming alienation and impotence a defendant feels in court. The accused sits there for days, sometimes for weeks, without being able to raise his own voice in his defense. You can find expression of this alienation in literature—think of the defendants in Albert Camus's *The Stranger* or Franz Kafka's *The Trial*. Recently a nationally known and respected lawyer,

Patrick Hallinan, was prosecuted for conspiring with a former client to import and distribute tons of marijuana. After his acquittal, he wrote an article in which he described how it felt to sit in the defendant's chair: "The hardest part of the six-week trial was sitting quietly at the defense table while I was being vilified by the prosecutor. In my mind I responded to every smear and allegation.... No amount of seasoning in the federal criminal courts prepared me for the level of raw and constant anxiety I experienced as a defendant."⁷

Aware that a defendant's voice is silenced, except when he testifies, Serra began his opening statement trying to give expression to Hooty's voice:

Ladies and gentlemen, a lawyer speaks with many voices in a case like this. And you'll hear I presume throughout the trial the voice of anger, perhaps, voices of sadness. But in opening statement and throughout the course of the trial the main voice that we lawyers speak, from that table, is the voice of Patrick Hooty Croy.

Some cases clearly involve racial issues. Henry Sweet's trial was one of those cases, and therefore Clarence Darrow could hammer home the racial themes. Stephen Robinson's bank robbery was not obviously related to race, and therefore I had to be careful in arguing the racial context to the jury. Hooty's crime, like Henry Sweet's, involved a person of color shooting a white person in self-defense. The racial issues involved in the case jump out at a lawyer, although it is important to note that Hooty's first lawyer either was unaware of or denied the racial reality of the case. Serra did not deny this reality, but rather made it the cornerstone of the defense. Within the first two minutes of his opening statement, he confronted the jurors with the theme of racism:

This is what the evidence will be. A white police officer shot an Indian twice in the back. This is what the evidence will be. A white police officer shot an Indian twice in the back during a cease fire, a de facto cease fire. That's what the evidence will be. A white police officer shot an Indian twice in the back during a cease fire, while he the officer was under the influence of alcohol. That's why we're here, and that's why, in essence, there are other people who aren't present. Perhaps, who are present symbolically, whose voices will resound during the course of the trial, much more than a trial for an alleged homicide. This will be a trial that will have profound issues regarding racial relations.

The defense team decided to put all five experts on the stand to testify to the history of Native Americans and to the continuing environment of discrimination that Indians face in the northern counties of California. The team felt it was important to use experts who were Native American, in order to break through the stereotype of the uneducated, simple Indian, and to let jurors experience authentic (i.e., not Hollywood) Indians. The public is aware of Crazy Horse and Sitting Bull. Paratroopers in World War II would yell "Geronimo" as they jumped out of their planes. The large reservations of the Lakota and the Navajo have had an impact on the public's consciousness of Indian culture and history in the Dakotas and the Southwest. But most people do not know that there are more Native Americans in California than in any other state. Because the California Indian population consists of many small tribes, and because of the state's failure to take responsibility for the history of genocidal attacks on its indigenous peoples, Indians are almost invisible to the public and to political institutions. The expert testimony made the life of Indians visible and created a framework for Hooty's contention that mistrust and fear of the police caused him to flee and fail to surrender.

An Indian historian, Jack Norton, testified how California's Indian population in the 1800s was reduced from two hundred thousand to only twenty thousand through massacres of tribes by gold miners, citizen volunteers, and the U.S. Army. He testified to historical incidents that live on in the memory and folklore of the northern California Indians. He told of a time when members of the Shasta tribe were invited to a feast to celebrate a new land allotment, but their food was poisoned and only a few survived. He told of how the coastal Indians in northwestern California were told they were to be relocated to a new reservation on the Klamath River. They boarded ships for the journey down the coast, but they were taken out to sea and dumped overboard. Treachery, betrayal, and murder marked the history of the white man's relations with the original inhabitants of California. This history had not been forgotten by Hooty's tribes, the Shasta and Karuks.

Other Indians, such as Susan Davenport, a former high school teacher who was head of the Tri-County Indian Agency, testified to the discrimination Indian children face in the school districts and in the criminal justice system. Ed Bronson, a non-Indian professor of political science, analyzed the image of Indians in the Yreka newspaper from 1970 to 1978 and explained to the jurors the negative stereotypes of the media coverage.

The jury seemed attentive and responsive to the expert witnesses. The blend of historical oppression and present-day discrimination made the testimony seem alive instead of a dead history lesson about times long ago.

The final piece of the cultural defense was to tie the generalities to Hooty's individual experience. As the Steven Robinson case showed, the life experiences of the defendant can come into evidence through the psychologist and through the defendant, if he takes the stand. In Hooty's case, a Native American psychologist named Art Martinez was allowed to testify even though a

psychiatric defense was not being used. Under the self-defense theory, Martinez was able to testify to Hooty's state of mind when the shootout took place. He was able to describe Hooty's experiences and perceptions of racism and how they influenced his behavior. Martinez was perceived as a professional with integrity and dignity, and his testimony helped give the jury a complete picture of Hooty as a human being, not a stereotyped Indian or a rhetorical symbol of Indian oppression.

Hooty then took the stand. He testified about how his father had gone to Washington, D.C., to obtain original copies of the treaty of 1851, which was supposed to have protected the Shasta Indians. Like almost all such treaties, it had been violated by the U.S. government. His father had gone to court to argue that the treaty should be respected and enforced. Hooty remembered that the case had been lost.

One experience Hooty described was particularly moving and relevant. Often the police in Yreka would follow Indian kids. When Hooty was twelve or thirteen years old, the police began to chase him. He hadn't done anything, but he was so afraid he ran into the woods. It was winter, and he ran through the snow and jumped into a river that was frozen. Serra described the experience in closing: "He was there hiding. Think of that, he was a little Indian child hiding and his father is a leader, a wise man, a fighter. He has a right to be proud and be strong, and yet here he is, hiding as a child in the frozen river. He's wet and he's in pain. He hasn't done anything." Hooty was pulled out of the river by the police, who handcuffed him and took him to jail. He spent the night in juvenile detention and was released the next day. It turned out that the police had been looking for a different Indian boy.

The most dramatic moment of an otherwise relatively unemotional direct examination was when Croy described what he was thinking as the police were firing at him. "I realized that all the things my grandmother and father had told us were coming true, that they were going to kill us all."

Unlike his first trial, at the retrial Hooty was well prepared to testify. The cross-examination focused on his testimony at the earlier trial, in which he had said he could not remember what happened because he had been drinking. Hooty's explanation of that testimony was that he had not trusted his lawyer and felt he would not get a fair trial. It did not sound like a lie, but rather an understandable reaction of a young Indian man to hostile and dangerous circumstances. This was a theme that Serra would underscore in his closing. Hooty left the stand with his dignity intact. The defense team felt that the jury would be able to empathize with Hooty and understand why he had lied at the first trial.

Serra's closing argument was an example of his oratorical skills. He told parables, referred to philosophy, and discussed history. But he also kept in mind the facts and mixed his rhetorical flourishes with the relevant law. He began by confronting the negative racial stereotyping used by the prosecution.

Similarly, when the prosecutor elicited testimony about the party at the Pine Garden apartments he tried to leave the impression that it was a wild, drunken brawl. The image of the "drunken Indian" had a potent effect in the first trial, influencing the jurors against the defendants. Serra knew he would have to counter that potential influence in the second trial. He met the issue head on and turned it around to Hooty's benefit:

Has one witness come forward and said to you, "I saw Hooty shoot from the hill?" ... There's not one shred of evidence that says he shot. And all the Indians say he did not shoot, so the prosecutor has to say, "Don't believe the Indians; don't believe the drunk Indians; don't believe the dirty Indians." That's the bottom line Do you understand the real hoax, the real fabrication is on the side of the prosecution. If this case stands for anything, it stands for a proposition that everyone has to be treated equal. And that means in court too.

You must reach across racial lines when constructing a black rage or cultural defense. One way of doing this is to speak to shared experiences. The voir dire process in Hooty's case had produced a multiracial jury, more so than in the usual San Francisco trial. Facing this type of jury, Serra felt that some jurors had shared the experience of what he termed "institutional genocide."

The Indians were all exposed to institutional genocide. It's not just Indians, it's common to all sub-cultures; they're exploited, harassed, discriminated against, acts of brutality, acts of indifference. All sub-cultures have been exposed to that in this country. You mistrust authority. So if the white kids were beating you up, does the Indian call the police? No. The police take the whites' point of view; the police would arrest you. You don't go up to the police. You have to avoid—to run, so Hooty had instilled in him two things, avoid confrontation, and the instinct of flight. You can't win at any level of confrontation.... So there was no trust. No trust was engendered in Hooty or any young Indian.

Another means of reaching across racial lines is to let the jury know that people of the defendant's race are hoping that the jurors will overcome their stereotypes and do justice. This is a delicate proposition. You do not want to beat up the jurors for being of a different race or culture. You do not want to offend people by challenging them to prove they are not racist by deciding in your

client's favor. Serra walked a tightrope as he referred three different times to the Indian community and how it was looking to the jurors for justice, implying that a not guilty verdict would help heal the wounds of a racist past:

You heard the history of the Indian people. Their mistrust of authority. The fact that they have never, ever trusted the court system. They have never trusted lawyers; they have never trusted judges. For them, it is an extension of the early settlers, the military, the whites who have always perpetrated a form of genocide of them. They have never cooperated, they distrust, they disdain the judiciary. In this trial it has been reversed. They have come here with open hearts and open hands. They have told you the truth. They have once again placed their faith in white man's law and he, the prosecutor, says they have perpetrated, these Indians have perpetrated a hoax. He said that because he has no evidence!

Most juries take their responsibility seriously. If you invited twelve people to a dinner party and gave them the facts of a typical criminal case they would vote for conviction almost every time. But if you put those same twelve people in a jury box, approximately 10 to 15 percent of the time they will vote for acquittal or come to a divided verdict. One crucial difference between a dinner party and a jury trial is that jurors realize their decision has real consequences for another human being. Most jurors believe in the concept of reasonable doubt, and they will sometimes give a defendant the benefit of the doubt when analyzing the evidence. The democratic tradition in America is founded on the right of the individual against the power and encroachment of the government. In criminal trials, jurors are torn between their fear of crime and their duty to judge each person as an individual. Prosecutors often will speak to the jurors' fears by equating the defendant with the general violence and crime in society. Defense attorneys will focus on the individuality of the defendant and speak to the jurors' desire to give every person a chance before condemning him or her.

A key method of helping the jurors get in touch with their desire to do justice is to remind them of the grave responsibility they carry. Even in a misdemeanor case, the lawyer can convey a feeling of seriousness, of moral weight, of the need to consider the evidence carefully and to respect the rule of reasonable doubt. Once in a great while a case comes along that screams out for righteousness. The Hooty Croy trial was such a case. The facts of self-defense were powerful, and the symbolism of the case was apparent. In this context, Serra was able to tap into the jurors' need to be part of something bigger than themselves:

We will never forget this case. In a certain way, maybe it will be one of the most meaningful things, the most meaningful decisions, profound decisions, decisions fraught with social and political content—the opportunity to do justice. You might never have another opportunity like this again. It might be one of the more meaningful events that you are going to participate in during your life.

Lawyers often get caught up in their own egos. They have an image of themselves as Spencer Tracy playing Clarence Darrow in *Inherit the Wind*, or Tom Cruise destroying Jack Nicholson during cross-examination in *A Few Good Men*. Caught up in their fantasies, they shout at neutral witnesses as if they were criminal conspirators. They wax eloquent about the American way of justice, when the facts point to a brutal act by an obviously guilty client.

Serra, on the other hand, was in an enviable position. His client actually was innocent and had been mistreated. Hooty had been a victim of a police force that had acted like Custer and the U.S. cavalry. Shot, arrested, and charged, he was then denied effective representation at his murder trial. Sentenced to death, he had been given another chance by a California Supreme Court that in 1985 had at its philosophical core a respect for individual liberty. The reality of the case allowed Serra to end his argument with an emotion and passion that was felt and understood by the jurors.

Hittson had to be crouched down; and he shoots, bang, bang, bang—at least three times, two of them going into Hooty, and one going up against the wall.... Hooty turned and there was this confrontation face to face and there was this shot. And then Hooty collapsed like he said, and he fell and then he started crawling.... That is the honest truth of what occurred. That's a truth that wasn't previously told. That was the truth that wasn't told because Hooty had no faith at that time in the system. So Hooty took the responsibility upon himself. There's no reason now to hide any of the truth. He's told everything exactly the way it was: From the bottom collectively of our team's heart, we urge you to do justice in this case. It is, in closing, reasonable doubt. It is a case that cries out singularly for justice. There have been long delays. Hooty deserves to be set free. This is a wonderful, wonderful case for justice—for you to administer justice. It's your almost sacred duty to find "Not Guilty on these charges." Thank you very much.

The jury deliberated for a full week, and then a second week. An optimistic defense team had expected a quick verdict. Some of the reporters covering the trial began to say that the times were too conservative to allow an acquittal for the killing of a policeman. On May 1, the jury filed back into the courtroom to deliver its verdict. Patrick Hooty Croy was found not guilty on all charges. After years locked away on San Quentin's death row, he was free.

Hooty is now a full-time student at San Francisco State University. He has continued to develop his artistic talents and is studying computer graphics.

After the trial, Karen Jo Koonan of the National Jury Project conducted intensive interviews with several members of the jury. There was no doubt that the cultural defense had created a context for the jurors to react favorably to the defense's presentation of evidence. One juror said that when he heard the charges they sounded "so damning" that he wondered how the defendant could respond. But as the testimony developed he felt that "the main issue was racism."

The interviews showed that the jurors had been influenced by the content of the testimony presented by the cultural defense witnesses. Even more than the content, they were impressed by the expert witnesses themselves. Clearly, the fact that most of these educated and articulate witnesses were Native American added to the impact of their words. The cultural defense succeeded in putting the jurors in Hooty's shoes. They were able to understand that any reasonable person in his situation would have responded in the same way. He would have run from the police even though he had not robbed the store. He would have been afraid to surrender to law enforcement once the shooting had begun. They comprehended the legal rule that if a policeman uses excessive force a person is entitled to respond with force to defend himself. They believed Hooty had acted in self-defense when he shot Hittson.

Hooty's case is an excellent example of taking the offensive when faced with damning evidence. In order to do so effectively, the defense team had to perceive the social conditions under which Hooty lived. They needed to feel those conditions, to grasp Hooty's life experience. The lawyer in the first trial failed to do this because he was blinded by his own prejudices.

The defense team approached the case politically. They consciously uncovered the historical, economic, and social roots of a conflict that led to one dead policeman, one wounded policeman, and three wounded Indians. With this perspective they were able to construct a persuasive cultural defense.

A few words of caution should be noted before lawyers leap into similar cultural defenses. Hooty's acquittal was won in San Francisco, where Indians are not highly visible, are not considered a social problem, and are not threatening to jurors of other ethnic backgrounds. Whether such a defense would have been as persuasive in Albuquerque, New Mexico, or Rapid City, South Dakota, must be left to lawyers, clients, and jury consultants who understand those specific environments.

The United States is a multiracial, multicultural society that is growing more diverse each year. Cultural defenses will be an expanding area of legal activity in both criminal and civil law. Like black rage cases, these cases will send a political message. Lawyers, always intent on winning, should recognize the content of the message they send. This awareness should inform their strategy, the types of experts they call, and how they frame the issues to the public. Sometimes there will be abuses of the cultural defense, but we cannot shy away from this potentially enlightening form of social reality evidence.

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