(DE)CONSTRUCTING CULTURAL EXPERTS: A DISCUSSION OF CULTURAL EXPERTS IN AMERICAN COURTROOMS

JASON L. STERN, ESQ.*

RESEARCH ASSISTANTS:
JOSE V. GONZALEZ**
RAMIRO FLORES TURRUBIATES***

"We are caged by our cultural programming. Culture is a mass hallucination, and when you step outside the mass hallucination you see it for what it's worth."[1]

"[I]t is not so simply because an expert says it is so."[2]

I. INTRODUCTION 2
II. CULTURE AND THE USE OF CULTURAL EXPERTS UNDER THE FEDERAL RULES OF EVIDENCE 6
A. *The Federal Rules of Evidence and the* Daubert *Trilogy* 7
B. *The Use of Cultural Experts in Court* 9
III. UNPREDICTABILITY WHEN PLAINTIFFS USE CULTURAL EXPERTS IN COURT 12

---

* Jason L. Stern, U.S. Department of Homeland Security – United States Citizenship and Immigration Services, Refugee, Asylum and International Operations Directorate. The views contained herein do not reflect the views or policies of the federal government and are expressly that of the author in his individual capacity. The author would like to thank his two research assistants for their invaluable time and energy spent working on this piece.

** Jose V. Gonzalez, University of Tulsa School of Law, J.D. expected April 2019; University of Texas at Dallas, B.A. 2015. The research assistant would like to thank the author for the opportunity to take part in this unique project and for bringing forward issues that impact the Latino community.

*** Ramiro Flores Turrubiates, University of Texas – Pan American, B.A. 2015. The research assistant questions whether the outcome of the *Affluenza* case would have been the same if the defendant was Latino. *See infra* Section V.

1. Terence McKenna, American author, philosopher, and lecturer (1946–2000). He spoke and wrote about a variety of subjects, including human consciousness and culture. *See* Terence McKenna, Keynote Address at the Denver Whole Life Expo: Culture and Ideology are not Your Friends (Apr. 1999).

2. Merrel Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 712 (Tex. 1997).

IV. UNPREDICTABILITY WHEN DEFENDANTS USE CULTURAL EXPERTS IN COURT 14
V. THE CASE OF *AFFLUENZA* 16
VI. CALL FOR RESEARCH AND A TRUE GATEKEEPING STANDARD: CULTURAL EXPERTS 20
VII. CONCLUSION 21

I. INTRODUCTION

During the summer of 1963, sixteen-year-old Ruth Friedman went hiking one day with her friend, Jack, atop a mountain operated by a ski resort in upstate New York.[3] After spending a full day outdoors, the two decided that it was time to return home.[4] They got onto the chair lift at the top of the mountain and slowly began their descent.[5] As they rode down the mountain, the chair lift stopped moving; one of the resort's attendants, not realizing that the two were on their way down the mountain, had shut down the chair lift for the night.[6] Ruth and Jack were trapped, suspended twenty to twenty-five feet in the air.[7] They called for help, but no one came to their rescue.[8] Ruth became hysterical, jumped from the ski lift and fell to the ground.[9] Despite numerous injuries (a broken nose, a disfiguring injury to her left nostril, trauma to her left shoulder and whiplash), she walked down the mountain to the ski lodge, broke in and called for the police.[10] As a result of her physical injuries and subsequent "anxiety with nightmares," Ruth sued the state,[11] arguing that her ultra-orthodox Jewish upbringing and beliefs forced her to jump from the ski lift rather than spend the night alone with a man.[12] In *Friedman v. New York*, the court found for Ruth Friedman and stated:

> [I]t does not require much imagination or experience to determine that a lightly dressed 16-year-old city girl might become hysterical at the prospect of spending a night on a mountainside, suspended in the air and with no apparent reason to hope for rescue until the next morning. Secondly, we must add to the fact of expectable hysteria,

---

3. Friedman v. New York, 282 N.Y.S.2d 858, 859–861 (N.Y. Ct. Cl. 1967), *modified*, 297 N.Y.S.2d 850 (1969).
4. *Id.* at 860–61.
5. *Id.*
6. *Id.* at 861–62.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 862–63.
11. *Id.* at 866. Note that the State of New York operated the ski lift. *Id.* at 859.
12. *Id.* at 861–62.

> the moral compulsion this young lady believed she was under, not to spend a night alone with a man.[13]

The plaintiff called Rabbi Herschel Stahl to testify as an expert witness on Jewish law and orthodox cultural observance of Jewish law.[14] The Rabbi knew Ruth and her family and was familiar with the girl's upbringing.[15] Rabbi Stahl testified that a specific law, the Yichud, forbids a woman to stay with a man in private place.[16] He stated that violating the Yichud is a moral sin and a smear on the reputation of the perpetrator's family.[17] Rabbi Stahl's testimony established a cultural defense for Ruth Friedman's decisions, actions and increased hysteria beyond that which any "young girl might well experience" in the same situation.[18]

Nearly forty years later, in *United States v. Wilson*, defendant Ronell Wilson was charged with murdering undercover New York Police Department Detectives Rodney Andrews and James Nemorin on March 10, 2003.[19] One week before Wilson's 2006 trial began, the Government moved the court to order the defendant to provide "a written summary of testimony [he] intend[ed] to use as evidence at trial under [the Federal Rules of Evidence] . . . describ[ing] the opinions of the witnesses, the bases and reasons for those opinions and the witnesses' qualifications[.]"[20] Wilson notified the Government that he intended to call on his behalf Dr. Yasser Arafat Payne, a cultural witness, stating:

> [I]n light of the court's decision to admit various rap lyrics over defense objection, we plan on calling an expert in the field of rap culture to testify about the common use of lyrics suggesting/depicting violence as a defining feature of gangsta rap. We are in the process of confirming the availability of our expert and will provide you with their name and qualifications in short order.[21]

The Government argued that the notice that Wilson provided about his expert was insufficient under local court rules.[22] The court agreed and precluded Wilson's expert from testifying based on the improper notice, but suggested that even if Wilson *had* provided proper notice, the court still would have likely precluded Dr. Payne from testifying in court.[23] The court stated that "no court on the Second Circuit or any other circuit has consid-

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *See id.* at 862–63.
19. United States v. Wilson, 493 F. Supp. 2d 484. 488–89 (E.D.N.Y. 2006).
20. *Id.* at 485.
21. *Id.* at 486.
22. *Id.* at 488.
23. *Id.* at 489.

ered whether to permit an expert in hip-hop culture to testify that [a defendant's writings were] 'not necessarily rooted in actual events' and [ ] instead 'based on imagination and fantasy, rather than on reality.' "[24] The court noted that while expert testimony about hip-hop culture can in some instances clearly "assist the trier of fact to understand the evidence or to determine a fact in issue,"[25] "[t]his case is different. [The cultural expert is not being used to prove that] Wilson's lyrics are not [ ] substantial[ly] similar[ ] to other lyrics."[26] Instead, Wilson wanted his expert to testify about general hip-hop culture and how being a member of hip-hop culture could influence one's beliefs and actions.[27] Based on the defendant's procedural error, the United States District Court for the Eastern District of New York precluded Wilson's cultural expert from testifying in court.[28]

The court's decision to admit Rabbi Stahl to testify in Friedman's case and the court's dicta that it would have precluded Dr. Payne from testifying in Wilson's case (irrespective of the defendant's procedural error) raise an interesting question about the admissibility of cultural experts in court. In *Friedman*, Rabbi Stahl provided testimony about the cultural mores of the ultra-orthodox Jewish community—and specifically, about the mores of the plaintiff, Ruth Friedman, and her family.[29] While the court did not rely on the Rabbi's testimony in finding that the state was negligent,[30] it did consider his testimony regarding Ms. Friedman's cultural upbringing when deciding whether the young girl was *contributorily* negligent, which it found that she was not.[31] With respect to Rabbi Stahl's cultural testimony, the court stated that "the point is not whether Rabbi Stahl gave us an absolutely correct interpretation of Hebrew law . . . but[ ] whether there is a branch of Judaism which believes in this interpretation; and, whether Miss Friedman is a member of this group."[32] In *Friedman*, Rabbi Stahl was a member of the community of which he was to provide testimony; he lived in the same community as Ruth Friedman and her family and was an "expert" in their very specific culture.[33]

In *Wilson*, the defendant wished to put forth a cultural expert to testify about "the common use of lyrics suggesting/depicting violence as a defin-

---

24. *Id.*

25. *Id.* at 489–90. The court describes copyright cases as one type of litigation in which the use of a hip-hop cultural expert is appropriate. *Id.* at 489.

26. *Id.* at 490.

27. *See id.*

28. *Id.* at 491.

29. *See Friedman*, 282 N.Y.S.2d at 862.

30. *See id.* at 865–66.

31. *See id.*

32. *Id.* at 861–863.

33. *See generally id.*

ing feature of Gangsta Rap, . . . that Rap music lyrics often describe violent and sexual acts, and other antisocial behavior, that are not necessarily rooted in actual events."[34] Dr. Payne did not live in the same community as the defendant, but given his education as a Professor of Black American studies and his extensive curriculum vitae, he likely had considerable knowledge of "rap culture" based on his formal training.[35] Had he testified, he likely would have provided details regarding a broad, widely observed culture. Although Friedman and Wilson called upon Rabbi Stahl and Dr. Payne to serve as "cultural experts" in their respective cases, the fact that one served and the other would not have been allowed to serve demonstrates how courts place value judgments on some cultures over others in a way that may not seem just.[36] These cases demonstrate that because cultural testimony is not scientific testimony, but rather, a form of specialized knowledge (and therefore, cannot be tested), courts can and do ferret out what they consider to be true specialized knowledge (and a true "culture") from that which they believe to be bogus. This judgment-making implicates several questions, including: What is culture? How and when are cultural experts used in court? How do courts weigh different cultural experts? Do courts evaluate cultural experts with an eye towards ensuring individualized justice and is there need for reform?

This Note explores the dimensions of cultural experts and the controversy surrounding their admissibility in American courtrooms. First, this Note presents the theoretical and legal bases for the use of expert witnesses in court.[37] Second, this Note addresses how plaintiffs and defendants each use cultural experts in their cases.[38] Third, this Note questions to what extent their experts help the trier of fact.[39] Fourth, this Note demonstrates that cultural experts generally offer vague, manufactured testimony that must be heavily scrutinized to avoid appalling judicial decisions (this Note offers, by way of example, the Texas *Affluenza* case).[40] This Note concludes by calling on courts to adopt more concrete standards that take into account a greater variety of "cultures" without compromising the judicial process.

34. *Wilson*, 493 F. Supp. 2d at 487.
35. *Id.* at 486.
36. *See* discussion *infra* of the FED. R. EVID. 702.
37. *Id.*
38. *See* discussion *infra* Part III.
39. *See* discussion *infra* Part IV.
40. *See* discussion *infra* Part V.

II. CULTURE AND THE USE OF CULTURAL EXPERTS UNDER THE FEDERAL RULES OF EVIDENCE

In the American justice system, examples of cultural differences between litigants and between one or both litigants and "mainstream America" (as in the case of Ruth Friedman described *supra*) are ubiquitous.[41] These differences affect everything from a party's actions that prompted the trial, to one's ability to understand Miranda rights, to a party's demeanor at trial.[42] Consider the following examples:

> Officers read a Navajo man his Miranda warnings while investigating his wife's death. At first, he seems to understand the warnings, but then admits that he murdered his wife. At court, a cultural expert explains that the Navajo translation of the Miranda warning captured the man's rights as, "You have the duty to sit quietly and answer my questions."[43]
>
> An Indian student studies at an American university and kills a young woman, his romantic interest.[44] At trial, the man called upon a cultural expert, who had lived more than twenty years in India, to testify as to the difficulties that many Indian students face when they come to American universities, including the cultural stresses associated with shifting from the simple culture in which he had lived "to the sophisticated milieu of an American university."[45] The man sought to mitigate his sentence.[46]
>
> A father is charged with assault after he beat his 16-year-old son with a piece of wood after confronting him over suspected gang involvement. The jury acquits the man of wrong-doing after a cultural expert testifies about the problems that single black fathers face in gang-infested communities.[47]
>
> An Afghani man was convicted of gross sexual assault against his eighteen-month old son. The appellate court found that the trial court abused its discretion in determining that the man's culture was not relevant when deciding whether the prosecution should have been dismissed under the state's *de minimus* statute. Several individuals testified that kissing a son's genitals is common in Afghanistan and that it is done to show love for the child. As a result of this cultural

41. Judith Mroczka, *Defending Culture*, CRIM. JUST. 5 (1994).

42. *Id.*

43. Cultural Background Experts Explain Influences, Effects, 6 Crim. Prac. Man. (BNA) 30–31 (1992).

44. People v. Poddar, 103 Cal. Rptr. 84, 88 (Cal. Ct. App. 1972), *vacated*, 518 P.2d 342 (Cal. 1974).

45. *Id.*

46. *Id.*

47. Judith Mroczka, *Defending Culture*, CRIM. JUST. 5 (Summer 1994).

> testimony, the Supreme Court of Maine vacated the judgment against the man.[48]

Culture plays a strong role in an individual's cognition and conduct in American society and in the American justice system.[49] In her book, *The Cultural Defense*, author Alison Dundes Renteln states that courts should be required to consider "cultural evidence."[50] This is important, she argues, because one's culture directly informs one's judgment and actions and thus, the amount of blame one deserves.[51] Today, cultural evidence[52] and cultural experts are popping up in courtrooms across the country with greater frequency and have become the subject of widespread debate.[53] While many scholars and practitioners have discussed how cultural testimony impacts the trajectory of a case (for instance, many scholars have examined how a cultural defense impacts sentencing), few people have examined cultural experts and their testimony – how one is able to declare oneself a "cultural expert," what sort of "culture" the individual has to be an expert in, and what type of training the individual must have acquired to be able to testify in court. Before examining the controversy surrounding the admissibility of cultural experts and their testimony, it is important to understand the general basis and rationale for admitting an expert witnesses into court.

A. *The Federal Rules of Evidence and the* Daubert *Trilogy*

Courts generally apply the Federal Rules of Evidence and case law[54] to determine the admissibility of an expert witness in court. The Federal Rules of Evidence provide:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise, if: (a) the expert's scientific, technical, or other *specialized knowledge* will help the trier of fact to understand the evidence or to determine a fact in issue, (b) the testimony is based upon sufficient facts or data, (c) the testimony is the product of reliable principles

48. State v. Kargar, 679 A.2d 81 (Me. 1996).

49. *See, e.g.*, ALISON DUNDES RENTELN, THE CULTURAL DEFENSE 6 (2004).

50. *Id.*

51. *Id.* at 6–7.

52. *See, e.g.*, United States v. Ross, No. 06-00637 (SBA), 2008 WL 4963045, at *11 (N.D. Cal. Nov. 19, 2008). In this case, the defense sought to introduce an expert witness who would testify about the culture of Internet chat rooms. The court ruled that the lower court properly excluded the witness from testifying based on "the defendant's own disclosures about the expert's background and qualifications as well as the scope of the testimony." *Id.* at *11.

53. *See, e.g.*, Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053 (1994) (explaining that a legal, social and ethical debate exists regarding the use of cultural experts in court).

54. *See* discussion *infra* notes 60–64 and accompanying text.

> and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.[55]

These factors encapsulate the expert witness's (1) area of expertise (knowledge), (2) training to acquire such expertise, (3) basis for testifying in court, and (4) the permissible scope of the expert's courtroom testimony. In the 1993 case, *Daubert v. Merrell Dow Pharmaceuticals,*[56] the United States Supreme Court held that Rule 702 of the Federal Rules of Evidence did not include the Frye "general acceptance" test[57] as a measure for assessing the admissibility of scientific expert testimony but instead held that the Federal Rules of Evidence incorporated a flexible reliability standard – that an expert's testimony must be the product of reliable principles and methods that are applied reliably to the facts of the case.[58] The *Daubert* court held that "*Frye* made 'general acceptance' the exclusive test for admitting expert testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials."[59] Instead, the court in *Daubert* considered a variety of factors when determining whether an expert's testimony was the product of reliable principles and methods including whether the test or principle: (1) could be reliably tested; (2) has been subject to peer review; (3) has a reasonably low error rate; (4) has professional standards controlling its operations; (5) is "generally accepted" in the field; and (6) was developed for purposes other than merely to produce evidence for the present litigation.[60]

Two subsequent cases, *General Electric Company v. Joiner*[61] and *Kumho Tire Company v. Carmichael,*[62] further developed *Daubert's* legal framework. In *General Electric Company*, the Supreme Court held that where there is too great an analytical gap between the data and the opinions proffered, a district court judge may exclude expert testimony.[63] In *Kuhmo Tire Company*, the Supreme Court held that the *Daubert* principles apply to "technical" or other "specialized" knowledge, thus making clear that all expert testimony must satisfy the "reliability factors."[64] These cases – *Daubert, General Electric*, and *Kumho* – form the legal bedrock that courts generally use to assess the admissibility of an expert witness's testimony.

---

55. FED. R. EVID. 702 (emphasis added).

56. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

57. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). Under *Frye*, the Court based the admissibility of testimony regarding novel scientific evidence on whether it has "gained general acceptance in the particular field in which it belongs."

58. *Daubert*, 509 U.S. at 589.

59. *Id.*

60. *Id.* at 592–94.

61. Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).

62. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

63. *See supra* note 61.

64. *See supra* note 62.

B. *The Use of Cultural Experts in Court*

While the Federal Rules of Evidence and the *Daubert* trilogy set up a nice framework for when an expert may testify, this framework does not apply so easily in the context of cultural experts. What type of "culture" one can be an expert in (area), what precisely makes a witness qualified as an expert in a particular "culture" (training), and whether and to what extent that witness may provide admissible cultural testimony in a court proceeding (scope) are questions that scholars, practitioners, and judges have had a hard time dealing with and have not clearly resolved.[65] On the one hand, scholars and practitioners have argued that although anthropology and cultural studies are not "hard sciences," this type of information may still be admissible under *Daubert*,[66] because knowledge about a particular culture meets the "specialized knowledge" requirement and individuals may form this knowledge based on "reliable principles and methods."[67] Others would argue, however, that this type of specialized knowledge is only admissible under the Federal Rules of Evidence and *Daubert* if the expert went through specific, formal training (e.g. university studies) to learn about a particular culture rather than learn about it through life-experiences and personal observations (e.g. growing up in the particular culture).[68]

Separately, others have questioned whether a cultural expert's testimony meets the narrow criteria under the Federal Rules of Evidence and *Daubert* at all, arguing that "culture" is a broad societal-construct that is vague and ever-changing, that it can never be precisely defined and tested, and that it cannot be defined by reliable principles and methods; these individuals would argue that culture is nothing but an individual's personal per-

---

65. *See, e.g.*, Christian G. Ohanian, *Blaming "Culture:" "Cultural" Evidence in Homicide Prosecutions and a New Perspective on Blameworthiness*, 7 AM. U. CRIM. LAW BRIEF 28 (2011) (discussing how the decision by some prosecutors and judges to introduce and allow certain cultural evidence in certain contexts has led to debate); *see also* Janet C. Hoeffel, *Deconstructing the Cultural Evidence Debate*, 17 U. FLA. J.L. & PUB. POL'Y 303 (2006) (offering scholarly critique of the use of cultural evidence in court).

66. *See supra* note 57.

67. *See, e.g.*, Jeffrey T. Wennar, *Gang Prosecution: The Need for Qualifying Law Enforcement Officers As Expert Witnesses*, PROSECUTOR, April/May/June, 2008, at 30, 31; *see also* James G. Connell III, Cultural Issues in Criminal Defense, Using Cultural Experts, 815-44 (Linda Friedman Ramirez ed., 3rd ed. 2010) (discussing the how defense counsel often depends on cultural experts to ensure proper representation).

68. *See, e.g.*, Kathleen J. Ferraro & Noël Bridget Busch-Armendariz, *The Use of Expert Testimony on Intimate Partner Violence*, NAT'L RES. CTR. ON DOMESTIC VIOLENCE (Aug. 2009) http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=2062; *see also In re* Det. of Pouncy, 229 P.3d 678 (Wash. 2010) (noting that a trial judge in a previous, unrelated trial held that the current expert witness's methodologies did not enjoy general acceptance in the community of mental health professionals).

ceptions and therefore, such testimony should be excluded.[69] These individuals would likely say that no one could be a cultural expert. Finally, somewhere on this continuum is another group of individuals who would argue that some cultures are more definable and legitimate than others and thus, some cultural experts may be admissible depending on the subject matter of their testimony.[70] These perspectives have led to inconsistent and in some cases, unexpected results.

Given that these three schools of thought exist, it should be no surprise that judges have conceived different tests for determining whether an expert should be admitted to testify on a specific culture. For example, in Texas, Judge Harvey Brown endorses a specific framework in which a cultural expert's testimony "must pass [through] eight different gates to be admissible."[71] The gates include: helpfulness,[72] qualifications,[73] relevancy,[74] methodological reliability,[75] connective reliability,[76] foundational reliability,[77] reliance of inadmissible evidence used by other experts,[78] and Rule 403.[79] Elsewhere in Texas, some judges decide whether to allow a cultural expert to testify merely by considering whether the subject culture of an expert's testimony is a "legitimate one." For example, in *Castillo v. State*,[80] the Texas Court of Appeals affirmed the conviction of Raul Castillo, a *curandero* (a faith-healer) who sexually assaulted a young girl under the guise of healing her.[81] During trial, the prosecution called upon Marie Teresa Hernandez, a doctoral student in cultural anthropology to testify as an expert witness about cultural conditions that would have prompted a young

69. *See, e.g.*, Brief of Appellee at 16, Smith v. Sw. Bell Tel. Co., No. 11-10506 (5th Cir. Sept. 30, 2011) (arguing that testimony regarding FMLA culture was inadmissible given that such testimony would be vague, unsubstantiated and subjective); *see also* United States v. Tetioukhine, 725 F.3d 1, 8 (1st Cir. 2013) (noting that the lower court correctly ruled that "Russian culture is a very broad topic" and that the expert's testimony should thus be ruled inadmissible); *see also* Olabisi L. Clinton, *Cultural Differences and Sentencing Departures*, 5 FED. SENT'G REP. 348, 350 (1993) (stating that courts generally define culture as "a long-standing and detailed code of conduct and beliefs accepted as beneficial for both the individual and society").

70. *See supra* note 65 (acknowledging that some individuals favor some cultures over others).

71. J. Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 745 (1999).

72. *Id.* at 746, 751–57.

73. *Id.* at 757–73.

74. *Id.* at 773–78.

75. *Id.* at 748, 778–804.

76. *Id.* at 749, 804–11.

77. *Id.* at 749, 811–61.

78. *Id.* at 749–50, 875–79.

79. *Id.* at 750–51, 880–81.

80. Castillo v. State, No. 01-98-00080-CR, 2000 WL 38764 (Tex. App.—Houston [1st Dist.] Jan. 20, 2000, no pet.) (not designated for publication).

81. *Id.* at *1

girl like the one in *Castillo* to comply with a *curandero's* requests.[82] The defendant did not question the relevance of the cultural expert's testimony, but rather, the expert herself – whether her testimony was reliable and whether it could be tested against a rate of error.[83]

On appeal, the court concluded that the lower court properly admitted the expert's testimony during trial.[84] Yet it held that Hernandez's testimony was admissible not because it met the *Daubert* criteria, but because it met some separate threshold that the court said was appropriate to consider when social science testimony was at issue.[85] The court stated that scrutinizing the witness's "technique" or "theory" in this case was inapposite, since "culture" is not a hard science.[86] Instead, the court applied a three-prong test to determine the admissibility of the cultural expert's testimony: "(1) whether the field of expertise is a legitimate one; (2) whether the subject matter of the expert's testimony is within the scope of that field; and (3) whether the expert's testimony properly relies upon and/or utilizes [the] principles involved in the field."[87]

Judge Harvey Brown's test and the above-mentioned "*Castillo* test" demonstrate how courts are hesitant to readily admit cultural testimony. In *Castillo*, for example, the court created a distinct threshold for determining whether an expert's testimony was admissible – a threshold different than that required by Rule 702 and the *Daubert* test. The *Castillo* test contemplates that a court must deem a field of expertise legitimate before admitting the expert's testimony – that the court has to form an opinion over an entire field as opposed to merely determine whether the specific testimony proffered by the expert witness is based upon sufficient facts or data. While a cultural anthropologist (such as the one in the *Castillo* case) might be able to satisfy the three-factor *Castillo* test, someone else with an acute, specialized knowledge of culture but without formal training might be precluded from offering cultural testimony in court. This same sort of judgment-making happens when both claimants and defendants call upon cultural experts and, needless to say, has led to inconsistent and often unpredictable results.[88]

---

82. *Id.*

83. *Id.* at *3

84. *Id.*

85. *Id.* at *2.

86. *Id.*

87. *Id.*

88. *See* discussion *infra* Parts III, IV.

III. UNPREDICTABILITY WHEN PLAINTIFFS USE CULTURAL EXPERTS IN COURT

Courts have inconsistently permitted plaintiffs to introduce a cultural expert's testimony in court and have applied different gate-keeping tests. For example, in *Bone Shirt v. Hazeltine*, the United States District Court for the District of South Dakota considered the legality of the state's plan to redraw voting districts.[89] Shortly after the state's plan became law in 2001, Alfred Bone Shirt and three other Native American voters sued the state in federal court, alleging that the state's actions violated provisions of the Voting Rights Act.[90] The plaintiffs sought to introduce into evidence the testimony of their expert witness, William Cooper, who stated that Native American communities would suffer discrimination as a result of the state's new voting districts and that they should be offered an alternative, less discriminatory voting plan.[91] The court stated that:

> even though Cooper has not taught at a college, written for a journal, and is not a sociologist, political scientist, economist, or econometrician, he is nonetheless credible and qualified as an expert . . . Neither his testimony nor his report require expertise in these social sciences for purposes of providing reliable testimony about alternative redistricting plans for South Dakota. He need not be an expert in anthropology, Sioux culture and history, or South Dakota history to reliably report on redistricting options in South Dakota. He can reliably base his analysis and conclusions on his experience in South Dakota and his knowledge of redistricting.[92]

In order to challenge the admissibility of Cooper's testimony, the Defendants stressed other nuances about South Dakota history and culture, "including differences between East and West River and differences between farmers and ranchers" in order to discredit Cooper's alternative to the state's voting plan.[93] However, the court noted that "Cooper has worked with various Indian communities in South Dakota relating to redistricting. In addition, he has researched socio-economic factors affecting Indians and voting rights" and stated that therefore, he was qualified to testify as an expert about the discrimination that would result in Native American communities.[94]

Here, the court permitted Cooper to testify about the discrimination that Native American communities would endure were the new voting plan to be adopted not based on any formal training, but based on Cooper's ex-

89. Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976 (D.S.D. 2004).
90. *Id.*
91. *Id.* at 987.
92. *Id.* at 989–90.
93. *Id.* at 994.
94. *Id.*

perience living amongst Native Americans.[95] The court explicitly made a determination that the area, training, basis and scope of Cooper's testimony was sufficiently reliable for the court to admit and consider.[96] The court did not rely on the *Daubert* factors per-say, it did not use a test like the one offered by the *Castillo* court, nor did it apply a new, unique test. Rather, it considered whether Cooper's testimony would aid the trier of fact and whether Cooper's testimony was sufficiently reliable.

Dissimilarly, in *Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School District*, a group of Native American students brought suit against their school district and school officials, challenging a policy that barred male students from growing their hair beyond a certain length.[97] The plaintiffs sought to introduce into evidence the testimony of Hiram F. Gregory, Ph.D., an anthropologist specializing in southeastern Native American tribes.[98] Gregory testified that for generations, many southeastern tribes practiced wearing their hair long as a symbol of moral and spiritual strength.[99] He informed the court that a haircut was equivalent to dismembering a part of one's body.[100] While the court noted that that Dr. Gregory was able to testify extensively "about the religious practices of southeastern Native American tribes in general," he lacked "detailed information about the Alabama–Coushatta Tribe's traditional beliefs."[101] Nevertheless, the court allowed Dr. Gregory to testify.

Here, this court applied a different standard to evaluate the worthiness of the plaintiff's expert witness. The court recognized that because Gregory held a Ph.D in anthropology and because he specialized in Native American tribes closely related to the one at the center of the litigation, he could testify in the present matter. The court recognized that Gregory had no specific knowledge of the Alabama-Coushatta Tribe and that his testimony would be more general.[102] Nevertheless, it stated that Gregory was able to provide

95. *Id.* at 995.

96. *Id.*

97. Ala. & Coushatta Tribes v. Trs. of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319 (E.D. Tex. 1993).

98. *Id.* at 1324.

99. *Id.*

100. *Id.*

101. *Id.* at 1325. Dissimilarly, in *United States v. Sebaggala*, the U.S. Court of Appeals for the First Circuit found that the lower court did not abuse its discretion in refusing to allow the defendant's cultural witness to testify. The witness had planned to testify about the specific linguistic and cultural traits of the Baganda tribe (to which the appellant belonged). The defendant argued that the expert's testimony, if allowed, would have aided the jury in understanding his ability to comprehend the forms that he signed. United States v. Sebaggala, 256 F.3d 59, 65 (1st Cir. 2001).

102. *See Ala. & Coushatta Tribes*, 817 F. Supp. at 1325.

"compelling evidence"[103] that aided its determination of whether the school violated Native American students' free speech and freedom of religion.[104]

While the issue of whether a cultural expert is qualified does not take up center stage in the *Bone Shirt* case and in the *Coushatta Tribes of Texas* case, these cases do illustrate how courts vary in recognizing "culture," evaluating of cultural experts, and applying differing gate-keeping standards. In the former case, the cultural expert had no formal training about Native American culture but was allowed to testify about discrimination against particular Native Americans based on his having lived amongst other Native American groups.[105] In the latter case, the cultural expert also testified about a broad group of people and had no specific knowledge about the cultural customs of the Native American plaintiffs but did have formal academic training.[106] The fact that each court allowed each expert to testify speaks to the judiciary's interest in individualizing justice, but highlights how "culture" and cultural experts do not allow courts to maintain a clear gatekeeping standard. Query whether this is a problem.

IV. UNPREDICTABILITY WHEN DEFENDANTS USE CULTURAL EXPERTS IN COURT

Just as plaintiffs seek to admit a cultural expert's testimony into evidence, defendants often seek to do the same and for many of the same reasons: to win a case, secure equal protection and emphasize multiculturalism.[107] In some instances, a defendant counsel's failure to raise a cultural issue may be so egregious that it constitutes an ineffective assistance of counsel.[108] Many defendants also seek to admit cultural experts with the hopes that doing so may enable the judge to render individualized justice.[109] For example, in *United States v. Bahena-Cardenas*, the defendant, an alien subject to deportation, sought to introduce a cultural expert to testify about Mexican transborder culture and about how many individuals along the

103. *Id.*at 1333.

104. *Id.*

105. *See supra* note 90.

106. *See supra* note 97.

107. *See* Ohanian, *supra* note 65, at 30.

108. *See* Mak v. Blodgett, 754 F. Supp. 1490 (9th Cir. 1991) (noting that the failure to use a cultural expert on Chinese immigration customs in this case could have been considered when determining whether counsel provided ineffective assistance); United States v. Ailemen, 710 F. Supp. 2d 960 (N.D. Cal. 2008) (holding that petitioner's failure to call an expert in Nigerian counsel did not give rise to an ineffective assistance of counsel claim).

109. *See* Ohanian, *supra* note 65, at 30. "Individualized justice" is the notion that judges should consider the "circumstances, characteristics, history, culture and a myriad of other subjective elements that affect the mind and behavior" when determining a defendant's blameworthiness.

U.S. – Mexico border do not have Mexican birth certificates.[110] The court noted that "[o]utside of the presence of the jury, the expert testified about a small-scale study she performed in which a small percentage of study respondents in Tijuana reported lying to Mexican officials in order to get a Mexican birth certificate."[111] The district court decided that the cultural expert could not testify before the jury, reasoning that the expert's study was "too small and did not involve practices in Guerrera, the [Mexican] state that issued Bahena–Cardenas' birth certificate."[112] Ultimately, the court held that the defendant's cultural expert could not provide testimony.[113] Because courts have not created a precise definition of "culture" and because they have not adopted a uniform way of assessing whether a cultural expert has a true expertise, the way in which defendants, like Bahena-Cardenas, for example, have been able to seek individualized justice and use cultural experts has varied, benefitting some and harming others.[114] Generally, defense attorneys argue that an expert's background and qualifications influence weight and not admissibility, though clearly, judges do not always agree.[115]

Scholars and practitioners have tried to answer important questions[116] about why courts bar cultural experts from testifying for defendants like Bahena-Cardenas.[117] In doing so, they have focused their inquiry on the difficulty of defining what would constitute an "accountable culture"[118] in a

---

110. United States v. Bahena–Cardenas, 411 F.3d 1067, 1078 (9th Cir. 2005).

111. *Id.*

112. *Id.*

113. *Id.*

114. *See* discussion *supra* accompanying notes 1–26. *See, e.g.*, United States v. Verduzco, 373 F.3d 1022 (9th Cir. 2004) (holding that the lower court properly excluded a cultural witness from testifying for the defendant, given that the witness "sought to establish the reasonableness of defendant's alleged fear of police, for purposes of his duress defense, solely by application of generic cultural and ethnic stereotypes and data"); United States v. Rubio–Villareal, 927 F.2d 1495, 1502 n. 6 (9th Cir. 1991) (holding that it was not an abuse of discretion to reject a cultural expert's testimony that the defendant's "failure to register his truck is a common phenomenon in Mexico"); Jinro Am. Inc. v. Secure Invs., Inc., 266 F.3d 993, 1007, *amended*, 272 F.2d 1289 (9th Cir. 2001) (holding that a cultural expert could testify that generally, most Korean businesses are corrupt and should not be trusted in order to convince the jury that the Korean litigant fit this stereotype).

115. Robin Walker Sterling, *Raising Race*, CHAMPION J. 24, 29 (Apr. 2011).

116. *See* Ohanian, *supra* note 65, at 31. Two such questions are: "1) What qualifies as a supposed 'accountable culture' and 2) What elements of a supposed 'accountable culture' would need to manifest in order" for an expert's testimony to be admissible?"

117. *Id.*

118. *Id.* The author states that in a defense context, an "accountable culture" is one that "has a significant enough influence on the defendant's mental state, decisions, and actions that resulted in a crime . . . that courts have found, or are likely to find, that the culture accounts in a significant way for the defendant's commission of the homicide." *Id.*

defense context.[119] For example, Diana C. Chiu noted, "[t]he defense also essentializes culture by defining it as the exclusive province of particular groups. Under affirmative defense proponents' conception of culture, some groups have culture, others do not."[120] As she notes, this inherent exclusiveness of culture makes it difficult for litigants to seek individualized justice and distinguish between valid and bogus cultures.[121] In a defense context, Chiu indicates that a court's inability to properly define culture often influences whether or not a cultural expert may be admitted to testify.[122] She states: "[d]efining the parameters of a group who could raise the defense would require crafting a rule that would take into account the innumerable permutations of race, ethnicity, language, education, religion, culture, gender, length of residence in the United States, and age."[123] That is why, according to Professor Nancy S. Kim of the California Western School of Law, most courts admit cultural experts who will testify about broad cultures:

> Given the difficulty in defining culture, the likelihood increases that expert testimony will, out of necessity, provide a broad, simplistic characterization of the defendant's culture rather than an accurate, contemporary depiction of the norms and mores that reflect the social progress occurring in the defendant's home country.[124]

If, as Professor Kim notes, our society is truly concerned about creating a system that embraces individualized justice based on a person's culture, courts should adopt a precise definition of culture that encapsulates *all* cultures – large or small – that could influence an individual's behavior.[125] This, in turn, will allow courts to develop a clear understanding of how culture impacts a litigant's cognition and conduct. Without these clear definitions, "cultural experts" may lead the court to reach results that some might find appalling and/or just plain confusing, as was recently the case in Texas.[126]

V. THE CASE OF *AFFLUENZA*

On February 6, 2014, a District Judge in Texas sentenced Ethan Couch, a Texas teenager who drove drunk, caused a crash and killed four

---

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *See* Chiu, *supra* note 53, at 1101–02.

124. Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 117–18 (1997).

125. *Id.*

126. *See* discussion *infra* accompanying notes 130–55.

people, to 10 years of probation rather than jail time.[127] An expert witness for the defense stated that the boy suffered from "*affluenza,*" a "bloated, sluggish and unfulfilled feeling that results from efforts to keep up with the Joneses."[128] The defense argued that because that the boy grew up in a culture where his wealthy, privileged parents never set limits for him, the justice system could not fault the teenager for his reckless criminal behavior.[129] "I'm used to a system where the victims have a voice and their needs are strongly considered. The way the system down here is currently handled, the way the law is, almost all the focus is on the offender,"[130] said Richard Alpert the prosecutor. "This has been a very frustrating experience for me."[131] Eric Boyles, who lost his wife and daughter in the crash similarly noted that "[t]here has been nothing from Ethan from these proceedings with regards to remorse on his part at all — that I do think would have helped. It would have helped the victims. No doubt about it, it would have helped."[132] Boyles' conclusion – that Couch showed a lack of remorse for breaking multiple laws – became an important defense theory and central focus of the case and caught the attention of the national media.[133]

In some respects, it should come as no surprise that the national media paid attention to Ethan's case. For years, the media, pollsters,[134] authors, politicians,[135] and television after-school documentaries[136] have paid attention to *affluenza*, noting Americans' anxiety and "dogged pursuit of the American dream."[137] In their 2002 book, *Affluenza: The All-Consuming Ep-*

127. Dana Ford, *Judge Orders Texas Teen Ethan Couch to Rehab for Driving Drunk, Killing 4*, http://www.cnn.com/2014/02/05/us/texas-affluenza-teen/ (last updated Feb. 6, 2004).

128. PBS, AFFLUENZA (2014), http://www.pbs.org/kcts/affluenza/; *see also* Ashley Hayes, *'Affluenza': Is it real?*, CCN, http://www.cnn.com/2013/12/12/health/affluenza-youth/ (last visited June 7, 2016).

129. *See* Ford, *supra* note 127 (stating that Couch was the product of wealthy, privileged parents who never set limits).

130. *Id.*

131. *Id.*

132. *Id.*

133. *E.g.*, Mike Hashimoto, *New Ethan Couch Outrage? You Pay Far More Than His Parents*, DALLAS MORNING NEWS (Apr. 14, 2014, 3:53 PM), http://dallasmorningviewsblog.dallas news.com/2014/04/new-ethan-couch-outrage-you-pay-far-more-than-his-parents.html/; *No Jail For Rich 'Affluenza' Teen, Ethan Couch, After Deadly Wreck: Judge*, ASSOCIATED PRESS, http:// www.nydailynews.com/news/national/affluenza-teen-ethan-couch-due-back-court-article-1.16 02998 (last updated Feb. 6, 2014).

134. Interview by John de Graaf with Richard Harwood (1996), http://www.bkconnection. com/static/affluenza2-excerpt.pdf.

135. *See, e.g.*, Al Gore, EARTH IN BALANCE (1992).

136. *See, e.g.*, *Affluenza* (PBS Broadcast 1998), https://www.pbs.org/kcts/affluenza/show/ show.html.

137. Merri Mattison, Emancipation From Affluenza: Leading Social Change in the Classroom, 57 (Aug. 2012) (unpublished Ph.D. dissertation, Antioch University) (on file with the Antioch University Repository & Archive).

idemic, authors John de Graaf, David Wann, and Thomas H. Naylor explore the origins, evolution and symptoms of affluenza, a "cultural virus" which they state "has infected American society, threatening our wallets, our friendships, our families, our communities and our environment."[138] The authors name and describe common symptoms of *affluenza*: "shopping fever,"[139] "mall mania,"[140] dilated pupils,[141] and suggest that remedies like bed rest,[142] aspirin and chicken soup,[143] and fresh air[144] can cure the disease. However, "affluenza" is "not recognized as a medical diagnosis" by the Diagnostic and Statistical Manual of Mental Disorders (DSM) or by the American Psychiatric Association.

When the District Judge sentenced Ethan to probation in December of 2013, the New York Times stated that his case had become "an emotional, angry debate that has stretched far beyond the North Texas suburbs."[145] What made — and continues to make— the case of Ethan Couch notable is not that the defense raised *affluenza* as a creative lawyering strategy, but rather that the court, applying its gatekeeping function, allowed an expert to testify as to the validity and applicability of this "cultural disease" in Ethan's case. G. Dick Miller,[146] a psychologist and the defense team's hired expert witness, testified in court that Ethan was a product of *affluenza* and was unable to link his bad choices with negative consequences due to the way his parents raised him, instilling in him the belief that wealth may end

---

138. John de Graaf et al., AFFLUENZA: THE ALL-CONSUMING EPIDEMIC 2 (2nd ed. 2005).

139. *Id.* at 11.

140. *Id.* at 13.

141. *Id.* at 51.

142. *Id.* at 171.

143. *Id.* at 177.

144. *Id.* at 183.

145. Manny Fernandez & John Schwartz, *Teenager's Sentence in Fatal Drunken-Driving Case Stirs 'Affluenza' Debate*, N.Y. TIMES, Dec. 13, 2013, http://www.nytimes.com/2013/12/14/us/teenagers-sentence-in-fatal-drunken-driving-case-stirs-affluenza-debate.html?_r=1&. This case drew international attention in December 2015, after Ethan Couch and his mother Tonya Couch, were found in a resort in Puerto Vallarta, Mexico. Ethan and Tonya fled to Mexico after a video of Couch, drinking at a party, surfaced on social media (this was a violation of his probation). *See, e.g.*, Jana Kasperkevic, *'Affluenza' Teen Ethan Couch Sentenced to 720 Days in Jail*, GUARDIAN (Apr. 13, 2016), https://www.theguardian.com/us-news/2016/apr/13/affluenz-teen-ethan-couch-sentenced-jail. After being extradited back to the United States, Ethan Couch now faces 2 years in Tarrant County's prison. *Id.*; *"Affluenza Teen" Ethan Couch Moved to "Less Restrictive" Jail*, CBS NEWS (May 18, 2016, 10:50 AM), http://www.cbsnews.com/news/affluenza-teen-ethan-couch-moved-to-less-restrictive-jail/ (Tonya Couch is awaiting conviction for hindering the apprehension of a felon).

146. G. DICK MILLER PH.D – CONSULTING CLINICAL PSYCHOLOGIST (2014), http://www.gdickmillerphd.com.

all troubles.[147] Dr. Miller did not suggest that *affluenza* was a disease that could be tested and proven, nor did he suggest that he grew up in an environment where *affluenza* thrived.[148] This is a fairly analogous situation to the case of Ronnell Wilson (mentioned *supra*) where an expert sought to testify about a specific, very narrow culture that arguably impacted the defendant's belief and conduct. However, in this case, the court allowed the expert, Dr. Miller, to testify.

Many critics of his testimony, including psychologist Robin S. Rosenberg, noted that Dr. Miller should not have been allowed to testify about *affluenza*, stating that such is neither a psychiatric disorder nor a mental impairment, but rather a cultural construct – something that the defense team manufactured to save Ethan from a decade in jail.[149] In her article, "There's No Defense for Affluenza," Rosenberg notes that affluenza is not a science, that it cannot be tested, replicated or proven, and that it isn't even a type of specialized knowledge.[150] Rather, she states:

> [A]ffluenza . . . is not a mental disorder. It isn't identified by any mental health professional organization or diagnostic manual. It is not a diagnosis for a mental disorder. In the hands of this defense team, it is a fabrication invented to serve a specific purpose. Made-up psychological mumbo jumbo to mitigate responsibility reflects poorly on the mental health profession.[151]

And as another critic noted, "[Dr. G. Dick Miller] was simply doing his job as an expert witness for the defense."[152]

The question remains: To what extent are cultural experts an unfair advantage? Even more broadly, can all litigants, including Latinos, gain access to and afford individuals like Dr. Miller? Questions abound regarding who can access such experts and to what extent.

147. Josh Voorhees, *The "Affluenza" Psychologist's Frustrating Interview with Anderson Cooper*, SLATE.COM (Dec. 13, 2013, 11:03 AM), http://www.slate.com/blogs/the_slatest/2013/12/13/affluenza_cnn_s_anderson_cooper_interview_dr_g_dick_miller_defense_called.html.

148. *See* Dana Ford, *'Affluenza' Defense Psychologist: 'I Wish I Hadn't Used that Term'*, CNN, *available at* http://www.cnn.com/2013/12/12/justice/texas-teen-dwi-wreck/ (last updated Dec. 12, 2013).

149. Robin S. Rosenberg, *There's No Defense For Affluenza: The Claim that a Rich Kid Didn't Understand Consequences is a Distortion Of Psychology*, SLATE.COM (Dec. 17, 2013, 3:27 PM), http://www.slate.com/articles/health_and_science/medical_examiner/2013/12/ethan_couch_affluenza_defense_critique_of_the_psychology_of_no_consequences.html.

150. *Id.*

151. *Id.*

152. Eric Nicholson, *Psychologist Who Introduced Affluenza Defense in Ethan Couch Trial Takes Victory Lap on CNN*, DALLAS OBSERVER (Dec. 13, 2013, 10:00 AM), http://blogs.dallasobserver.com/unfairpark/2013/12/ethan_couch_affluenza_dick_miller.php.

VI. CALL FOR RESEARCH AND A TRUE GATEKEEPING STANDARD: CULTURAL EXPERTS

Just as it is common practice for police departments to use narcotics experts to testify as to the presence of drugs in a seized vehicle, it has become common practice for attorneys to use cultural experts to "weigh in" on the presence of an individual's culture. Yet, unlike a narcotics expert, cultural experts have wide applicability (as many of the examples herein have shown) and may be used at pretrial, trial, sentencing and probation violation hearings.[153] Some attorneys even use cultural experts to work "in the field," educating individuals, including judges, about cultural beliefs and mores.[154] Moreover, unlike narcotics experts, cultural experts may testify about a wide variety of variables (e.g. conduct, cognition, history, religion, etc.) that fall beneath the umbrella of "culture."[155] This is because "culture" has become a murky word in our society.

At its core, "culture" consists of the knowledge that individuals have to live their lives and the way they go about doing it.[156] In 1871, author Edward B. Taylor first identified "culture" in his book *Primitive Society* and defined the term as a construct that individuals use to explain how they live their lives alongside others.[157] Yet, ever since then, people have wrestled with that definition asking: How does one acquire culture? Who must perceive the culture for it to be considered legitimate? Can culture be an environment? Is it organic? How can it be measured and validated? People have sought to define the term and, over the last century, anthropologists and ethnologists have created several constructs to identify the validity of cultures and the degree of intersection between variables that are purported to distinguish cultures.[158]

If indeed courts treat expert witness' knowledge as "more than subjective belief or unsupported speculation" how and why and under what condi-

---

153. *See* discussion *supra* notes 42–47.

154. *See* Sterling *supra* note 115, at 24–27. The author discusses how the San Francisco Public Defender's Office works to educate the juvenile court bench about Asian youth and families by using with cultural experts who aim to illuminate cultural values for the court as context or background in individual cases, trainings and workshops.

155. *See* John V. Jansonius & Andrew M. Gould, *Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility*, 50 BAYLOR L. REV. 267, 308 (1998) (noting that cultural experts "are generally sociologists, psychologists, or anthropologists who specialize in the behavior patterns, beliefs, habits, and all other products of human work and thought characteristic of a community or population.").

156. W. Penn Handwerker, *The Construct Validity of Cultures: Cultural Diversity, Culture Theory, and a Method for Ethnography*, 104 AM. ANTHROPOLOGIST 1, 106–22 (2002).

157. *Id.*

158. *Id.* Emphasis on the author's discussion of construct validity, cluster analysis, multidimensional scaling, correspondence and other tools. *Id.*

tions a cultural expert should be able to testify should be clearly defined.[159] There should be some way for courts to ensure that cultural experts have some basis for the testimony being presented and some knowledge that is superior to that of an ordinary juror, yet this is not always the case.[160] The fact that (a) there are so many uses for cultural experts, (b) such experts can testify on a wide variety of issues and (c) courts have cast their own judgment over the perceived legitimacy of one's culture demands attention. Furthermore, questions like how a litigant should supply a nexus between the expert's testimony and the individual client are all dimensions of a cultural witness's testimony that have gone untested. More research about cultural experts and the creation of a clear definition of "culture"[161] for the courts should be done to enable the courts to create clear guidelines for the use of cultural experts. Creating clear guidelines may help resolve situations like those occurring in California, where some judges have reacted to cultural experts poorly because they do not believe that experts are needed to understand Asian American culture, or because the judges are unwilling to admit that they are not familiar with the cultural variables that the cultural experts are explaining.[162] More research regarding cultural experts – and whether courts are apt to construct tests outside of *Daubert* to assess the validity of testimony – will also help to create more judicial efficiency in courts.

VII. CONCLUSION

The American justice system allows for the use of experts because it needs them; lawyers, judges, and policy makers recognize the inherent limitations in their capacity to understand the unique facts of every case and the unique identities of every litigant. While the presence of many diverse cultures in the United States enriches our society's ability to perceive and function in the world, the presence of culture in the courtroom has been controversial. The word "culture" itself is difficult to define and could apply to wide or narrow groups of persons, identities, and practices. While there is certainly justification for allowing culture in the courtroom, differ-

---

159. *See* Kim, *supra* note 124, at 123.

160. *Id.*

161. In *Blaming "Culture:" "Cultural" Evidence in Homicide Prosecutions and a New Perspective on Blameworthiness*, Christian Ohanian acknowledges that the way courts currently consider culture has led to inconsistent results. He offers this definition of culture which may provide courts with more clarity:

> Culture consists in patterned ways of thinking, feeling and reacting, acquired and transmitted mainly by symbols, constituting the distinctive achievements of human groups, including their embodiments in artifacts; the essential core of culture consists of traditional (i.e. historically derived and selected) ideas and especially their attached values.

See Ohanian, *supra* note 65, at 31.

162. *See* Sterling, *supra* note 115.

ent courts have adopted different notions of culture and have created different tests to determine the admissibility of cultural experts, varying the judicial process and outcomes. Though it is unlikely that most courts will expand the concept of "culture" too far – such as the Texas court that recognized *affluenza* – it is nevertheless imperative that we investigate how and why culture is used in courts. It is equally imperative that courts develop and adhere to one standard or test to assess whether a cultural expert should be admitted into court. Doing so will enable the court system and our society to make more carefully considered determinations of blameworthiness that individualize justice without compromising American values.