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APPLICATION OF A CULTURAL DEFENSE IN CRIMINAL PROCEEDINGS

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I. INTRODUCTION: THE CULTURAL DEFENSE DEFINED

The United States is a culturally diverse nation, composed of persons from various nationalities and races.¹ This rich mix of cultural backgrounds has resulted in a "melting pot" of values, many of which have been incorporated into the American legal system to reflect society's values.² A difficult issue is introduced, however, when the values of foreign culture clash with the criminal laws and societal values of the United States.³

In recent years, the courts have faced such "clash of culture" problems more frequently. A Nigerian insurance salesman in Houston, accused of child abuse, received probation after he argued that putting pepper in the abrasions of a child was acceptable discipline in Nigeria.⁴ A Vietnamese family avoided child abuse charges after authorities determined that a boy's wounds were caused by *cao gio*, a folk remedy for curing headaches by massaging the back and shoulders with the serrated edge of a coin.⁵ In Oregon, three Indians of the Siletz tribe were accused of crushing the fingers and slashing the throat of a white man believed to have unearthed sacred Indian artifacts from graves. Some Indians have opined that the act of violence is either an act of war or of self-defense, in protection of sacred burial grounds.⁶ In Fresno, a Salvadoran man, trained in guerrilla warfare, believed that the friend was dying from a severe beating. He slit his friend's throat in an act of mercy. The Salvadoran defendant received a reduced sentence because the judge

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1. Note, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 88 (1986).

2. *Id.* at 102.

3. Sherman, *Legal Clash of Cultures*, NAT'L L.J., Aug. 5, 1985, at 1, col. 2.

4. Oliver, *Cultural Defense - A Legal Tactic*, L.A. Times, Jul. 15, 1988, Part I, at 13, col. 6.

5. *Id.* at 28, col. 1.

6. Sherman, *supra* note 3, at 1, col 3.

balanced the defendant's cultural understanding of his action with the need to protect society.⁷ In yet another case, an Ethiopian man, who shot a woman, explained that she was a *bouda* who used witchcraft to inflict pain upon him. After arguing that he had shot the victim in self-defense against her witchcraft, the defendant was acquitted of attempted murder, and found guilty of the lesser charge of assault with a deadly weapon.⁸

Interestingly, most cases which have arisen in this context involve immigrants from Asian backgrounds.⁹ This phenomenon can be partially explained by the increased numbers of immigrants and refugees from Asia: forty percent of all immigrants in the past twenty years have been Asian, and nearly sixty percent of the 4.1 million Asians in the United States are foreign-born.¹⁰ Asian cultural beliefs and practices can conflict dramatically with U.S. laws.¹¹

By contrast, European immigrants seldom encounter cultural differences which are counter to U.S. law because the laws of their native countries and U.S. laws have common roots. Also, Europeans have immigrated to the United States in large numbers for many years. They assimilate rapidly into American culture.¹²

When cultural values oppose the criminal law, a defendant may raise a "cultural defense" to excuse his or her criminal behavior.¹³ A cultural defense, by definition, negates or mitigates criminal responsibility for acts committed under a reasonable, goodfaith belief in their propriety, based upon the actor's cultural heritage or tradition.¹⁴ United States courts have not formally recognized the cultural defense as an excuse for crimes.¹⁵

II. CASES WHERE CULTURAL FACTORS ARE CONSIDERED

Several recent cases have received substantial media attention because of the serious nature of the crimes of which each defendant was accused, and because of the cultural background of each defendant, which explained the defendant's behavior on the occasion in question.

7. Sherman, "Cultural" Defenses Draw Fire, NAT'L L.J., Apr. 17, 1989, at 28.

8. Oliver, *supra* note 4, at 29.

9. *Id.* at 13, col. 4.

10. Sherman, *supra* note 3, at 1.

11. *Id.*

12. Oliver, *supra* note 4, at 13.

13. Sams, *The Availability of the "Cultural Defense" As An Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335 (1986).

14. Note, *supra* note 1, at 88.

15. Sams, *supra* note 13, at 337.

A. *People v. Kimura*¹⁶

On January 29, 1985, Fumiko Kimura, a young Japanese woman, took her children on a long bus ride to the beach in Santa Monica, California.¹⁷ She abandoned her baby stroller at the bus stop, and walked into the cold water of Santa Monica Bay, carrying her two children, ages 4 years and 6 months.¹⁸ Ms. Kimura was despondent, having recently learned that her husband had a mistress.¹⁹ She wanted to rid herself of the shame and humiliation of her husband's affair.²⁰ Revenge may have also tinged her motives.²¹

Tragically, the children drowned, but Ms. Kimura was rescued from the surf by passersby.²² Ms. Kimura was charged with first-degree murder in the deaths of her two children.²³

Ms. Kimura was attempting *oya-ko shinju*, parent-child suicide.²⁴ *Oya-ko shinju* is fairly common in Japan, and receives the same slight media attention in Japan that fatal traffic accidents receive in America.²⁵ Some commentators have posited the theory that the Japanese mother regards a child as a part of herself, and *oya-ko shinju* is thus caused by the inseparable parent-child bond perceived by the Japanese mother.²⁶ Parents who commit *oya-ko shinju* take their children's lives to save them from future humiliation and disgrace.²⁷ A mother who commits suicide and leaves her children behind is considered cruel and merciless in Japan.²⁸ *Oya-ko shinju* is illegal in Japan; a parent who survives is charged with homicide—the intentional killing of another person either by act or omission—and may receive a sentence of not less than three years.²⁹ Most women in Japan convicted of homicide receive suspended sentences.³⁰

16. *People v. Kimura*, No. A-091133 (L.A. Super. Ct. 1985).

17. Sherman, *supra* note 3, at 1.

18. *Id.*

19. Thompson, *Cultural Defense*, *STUD. LAW.*, Sept. 1985 at 24.

20. Sherman, *supra* note 3, at 1.

21. Bryant, "*Oya-ko Shinju*": *Death at the Center of the Heart*, 8 *UCLA PAC. BASIN L.J.* No. 1 —, —. Professor Bryant cites Dr. Masahiko Katori, former Chief Medical Examiner of Tokyo, who suggests that *oya-ko shinju* is committed by many mothers "to rebuke their husbands by insinuation, hoping that the husband's social position will be destroyed and that he will lose his job. Both consequences are, in fact, likely." Jameson, *Japan's Parent-Child Suicide Phenomenon Blamed on Social Change*, *L. A. Times*, Mar. 8, 1981, Part I, at 1, col. 1.

22. Sherman, *supra* note 3, at 27.

23. *Id.* at 1.

24. Oliver, *supra* note 4, at 30.

25. Hayashi, *Understanding Shinju, and the Tragedy of Fumiko Kimura*, *L.A. Times*, Apr. 10, 1985, Part II, at 5, col. 1.

26. *Id.*

27. *Id.*

28. *Id.*

29. Bryant, *supra* note 21, at —.

30. *Id.* at —.

The Japanese attitude toward suicide is highly romanticized. Rather than to live in humiliation, the Japanese prefer to die. Fumiko Kimura chose to die, rather than to live in humiliation. Seeing her children as an extension of herself, she took their lives to complete her suicide successfully.³¹

Four thousand members of the Japanese community signed a petition to the Los Angeles County district attorney, asking the prosecutor to apply "modern Japanese law" to the case. Such an application would result in a charge of involuntary manslaughter.³² The prosecutor declined to apply "modern Japanese law". Ms. Kimura's defense attorney, stating that no cultural defense is recognized by U.S. courts, argued that Ms. Kimura's behavior was psychological in origin, although it was directed by her culture.³³ Kimura pled no contest to two charges of voluntary manslaughter, for which she received five years' probation, one year in the county jail (which she had already served at the time of her sentencing), and intensive psychiatric treatment.³⁴ The district attorney's office agreed to the plea bargain because the psychiatric evidence indicated that Kimura's state of mind at the time of the tragedy was less than that required for a murder conviction.³⁵ Therefore, Kimura's charge was reduced, based on judgment of her lack of sanity during the commission of the crime, and not on cultural factors.³⁶

B. *People v. Moua*³⁷

Hmong tribesmen in the mountains of Laos practice a form of marriage called *zij poj niam*, or marriage-by-capture.³⁸ *Zij poj niam* is akin to elopement, and is an accepted ritual in Hmong culture.³⁹ According to custom, a man has the right to abduct the bride of his choice, although he must inform her parents.⁴⁰ Prior to the marriage, a courtship ensues with flirting, exchanges of tokens of affection and love letters, and chaperoned dates.⁴¹ On the date chosen

31. *Id.* The Japanese attitude towards *oya-ko shinju* can best be understood in the analogy of the cherry blossom, the most beloved flower in Japan. The cherry blossom does not die with dark, shriveled petals exposed to the world, but simply falls in the wind, with its beauty intact; the ephemeral beauty of the cherry blossom remains cherished in memory.

32. Sherman, *supra* note 3, at 26. For a detailed analysis of how current Japanese law would have dealt with Ms. Kimura, see Bryant, *supra* note 21, at —.

33. Sherman, *supra* note 3, at 26.

34. L.A. Daily J., Nov. 22, 1985, at 17, col. 1.

35. *Id.*

36. Sheybani, *One Person's Culture is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751, 762 (1987).

37. *People v. Moua*, No. 315972 (Fresno Super. Ct. 1985).

38. Sherman, *supra* note 3, at 26.

39. Oliver, *supra* note 4, at 13.

40. *Id.*

41. Thompson, *supra* note 19, at 27.

for the marriage, the man abducts the woman and takes her to his family's home, where the union is consummated. In keeping with Hmong tradition, the woman must protest at the last minute that she is not ready, in a display of virtuousness. The man must persist in consummating the union, despite her protests, in order to appear strong enough to be her husband.⁴² Once a marriage is consummated, the woman is considered unmarriageable by other Hmong men.⁴³

In the San Joaquin Valley of California, where 30,000 Hmong have settled, *zij poj niam* has resulted in kidnapping and rape charges against several men.⁴⁴ In the only case to proceed to a formal disposition, a Hmong man pled guilty to the misdemeanor of false imprisonment.⁴⁵ The defendant was reported to be greatly surprised when the victim filed a criminal complaint.⁴⁶ He believed that he had received the proper cultural signals from the victim, signifying her agreement to the marriage ritual.⁴⁷ The prosecutor and the judge believed both the defendant, who genuinely thought the woman wanted to participate in the marriage ritual, and the woman, who genuinely did not consent.⁴⁸ However, the prosecutor asserted that the woman had a right not to be kidnapped or raped.⁴⁹

After considering the evidence and reviewing a doctoral dissertation on Hmong marriage rituals, the judge sentenced the defendant to ninety days in the county jail.⁵⁰ The defendant was also fined \$1,000.00, with \$900.00 allotted to the victim as reparation.⁵¹ Thus, the defendant avoided a lengthy state prison term that he might have received for kidnapping and rape.⁵² The prosecutor believed that the court considered the cultural aspects of the defense's argument in determining the sentence.⁵³

C. *People v. Chen*⁵⁴

On September 7, 1987, Mr. Chen, who had immigrated from Canton, China one year earlier, confronted his wife about their sexual relationship. Upon learning that she was having an extramarital

42. *Id.*

43. Sherman, *supra* note 3, at 27.

44. *Id.* at 26.

45. *Id.* at 27.

46. Sherman, *supra* note 7, at 28.

47. Sheybani, *supra* note 36, at 774.

48. *Id.*

49. Thompson, *supra* note 19, at 27.

50. *Id.* at 28.

51. Oliver, *supra* note 4, at 13.

52. *Id.*

53. Thompson, *supra* note 19, at 28.

54. *People v. Chen*, No. — (N.Y. Sup. Ct. 1989).

affair, he bludgeoned her to death with a hammer.⁵⁵

An expert witness testified that in Chinese culture, a woman's adultery is proof of her husband's weak character and a source of great shame.⁵⁶ However, adultery seldom results in a wife's murder in China. The traditionally close-knit Chinese community intervenes and offers support before the situation becomes fatal. Unfortunately, Mr. Chen, having recently immigrated, was without resources for emotional support, and was "off the edge of the earth as he knew it."⁵⁷

The trial court found that Chinese culture explained why Chen became temporarily deranged upon learning of his wife's adultery. Chen was sentenced to five years' probation, the lightest sentence possible for second-degree manslaughter, a charge that had already been reduced from second-degree murder.⁵⁸

III. SHOULD A FORMAL CULTURAL DEFENSE BE RECOGNIZED

United States courts do not presently recognize a formal cultural defense.⁵⁹ The courts have refused to accept individual characteristics, such as cultural differences, as an excuse for ignorance of the law.⁶⁰ To recognize a formal cultural defense to a criminal charge would create an exception to the "ignorance of the law is no excuse" maxim of criminal law. Moreover, such a defense would be available only to a special segment of the population. However, some recognition of cultural factors in criminal charges and sentencing is undertaken by the courts, although it is unclear precisely what role the cultural factors play in criminal adjudications.⁶¹ Should the courts recognize a formal cultural defense in criminal proceedings?

A. Reasons for Recognizing a Formal Cultural Defense

In determining appropriate sanctions against a defendant the American criminal justice system focuses on the defendant's culpability for a crime.⁶² Almost every crime requires the physical element of an *actus reus*, or a guilty act, as well as the mental element of a *mens rea*, or a guilty mind.⁶³ The cultural defense goes to the

55. Sherman, *supra* note 7, at 28.

56. Sherman, *supra* note 7, at 28. The author notes that this is the opinion of only one expert witness, and is not necessarily an accepted fact throughout Chinese culture.

57. *Id.*

58. Sherman, *supra* note 7, at 3.

59. Sheybani, *supra* note 13, at 752.

60. Sams, *supra* note 13, at 337.

61. *Id.*

62. Sheybani, *supra* note 36, at 753.

63. *Id.* at 752-53.

culpability of the defendant's state of mind in committing the forbidden act.⁶⁴

The cultural defense would operate formally as an excuse for an otherwise criminal act, because the act would be recognized as wrongful, but the actor would be excused because he or she lacked the requisite mental culpability for the crime.⁶⁵ Presently, no guidelines or procedural safeguards exist for a defendant presenting a cultural defense; thus, cultural factors are inconsistently applied from case to case.⁶⁶ The result is that officials may exercise unfettered discretion over culturally diverse defendants.⁶⁷ Furthermore, cultural factors may not be considered because some jurisdictions, such as California, have abolished the defense of diminished capacity or responsibility, the formal defense under which most courts might consider cultural factors.⁶⁸

To achieve justice for the individual defendant, punishment must be tailored to fit the degree of the defendant's culpability.⁶⁹ It may be unjust to punish a defendant to the limits of the law because imputation of knowledge of a particular law to that defendant is unfair. When the defendant did not have the same opportunity as an individual who was raised in the cultural majority to know or learn of the law, it is unfair to impute knowledge of the law to the defendant. This factor must be taken into account by the law in order to achieve justice for the individual defendant.⁷⁰

Also, a defendant who is ordinarily law-abiding within his or her own native culture may have committed a criminal act because his or her values compelled him or her to do so. Laws are more effective when individuals internalize the moral values behind the laws. A just legal system should take into account the moral dimension of an individual defendant's act.⁷¹

Furthermore, the principle of equality, which is so central to the American system of justice, requires that we respect cultural pluralism. The majority should not penalize a minority group simply for being different.⁷² A legal system that punishes an individual for following the dictates of his or her culture sends out the message that the individual's culture is inferior.⁷³ For an immigrant to deny his or her original culture would mean denying his or her self-

64. Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1294 (1986).

65. *Id.* at 1296.

66. *Id.* at 1297.

67. *Id.* at 1297-98.

68. Sheybani, *supra* note 36, at 757.

69. Note, *supra* note 64, at 1298.

70. *Id.* at 1299.

71. *Id.* at 1300.

72. *Id.* at 1301.

73. *Id.* at 1302.

teem and identity.⁷⁴ Of course, recognition of cultural values must be balanced against the maintenance of social order in enforcing the laws.⁷⁵ However, the principles of individualized justice and cultural pluralism require an assessment of the cultural values behind a prohibited act.⁷⁶

B. Reasons Against Recognizing a Formal Cultural Defense

Commentators have argued that, although not recognizing a cultural defense may seem unfair to immigrant defendants, recognition of a cultural defense would be unfair to the majority of defendants to whom the defense would be unavailable. Other traditional defenses are available, and courts have incorporated cultural factors into these theories.⁷⁷

The normal range of prosecutorial discretion as to the severity of the crime and the reasonableness of the defendant's mistake or level of intent should adequately serve to mitigate the charge and or sanction for the act.⁷⁸

The law reflects society's present values and moral understanding, and functions as a medium of social instruction.⁷⁹ The law is predicated on those customs which are approved by the majority of members of the society. No custom may excuse a criminal act where the effect is adverse to the foundational principles of the law itself.⁸⁰ Until a custom is accepted by the majority of members of a society, and is given effect as law, that custom must yield to the criminal laws of the jurisdiction.⁸¹ The rights and expectations of the rest of the society would be undermined by excusing illegal conduct on the basis of a defendant's subjective beliefs. A cultural defense would thus discriminate against the rest of society by giving preferential treatment to an alien.⁸²

For the purpose of social discipline, the distinction between acceptable and unacceptable conduct must be objective.⁸³ To allow subjectively held cultural beliefs to negate criminal liability would be to equate the expression of those beliefs with other "excuse" defenses, such as immaturity or mental defect.⁸⁴ Thus, subjective beliefs would be considered inhibitive of an individual's ability to

74. Hayashi, *supra* note 25, at 5.

75. Note, *supra* note 64, at 1302.

76. *Id.* at 1310.

77. Sams, *supra* note 13, at 337.

78. Note, *supra* note 1, at 105.

79. *Id.* at 102.

80. *Id.* at 111.

81. *Id.* at 115.

82. *Id.* at 116.

83. *Id.* at 100.

84. *Id.* at 101.

know or appreciate the consequences of his or her conduct, and would result in putting the cultural belief on trial, rather than the individual.⁸⁵ Blame for a criminal act would then be focused on the culture, rather than on the defendant's state of mind.⁸⁶

IV. CONCLUSION

Legal scholars agree that the cultural defense is most widely used to explain a defendant's state of mind or lack of intent to commit a crime, thus mitigating charges or sentences.⁸⁷ It is almost never used to acquit or completely excuse a defendant for violating a law in the United States.⁸⁸ However, cultural factors may still be considered in the criminal process under existing defenses, such as diminished responsibility or mistake of fact.⁸⁹

Prosecutors may take account of cultural factors in plea bargaining with or charging a criminal defendant.⁹⁰ Judges may take account of cultural factors in sentencing.⁹¹ Thus, cultural factors may mitigate the punishment for a crime, without serving to exculpate the defendant completely for his or her offense. Although an informal recognition of cultural factors leaves the defendant at the mercy of the prosecutor and the judge in using their discretion, a formal recognition of the cultural defense would not serve the interest of society as a whole.

The three cases discussed above illustrate the fact that cultural factors are considered by the prosecutor and the court, although no substantive cultural defense exists. In the *Kimura* case, the defense presented evidence of the defendant's temporary insanity to negotiate a plea to a lesser charge.⁹² The defendant's culture directed her actions, although her behavior was psychological in nature.⁹³ In the *Moua* case, the defense of a mistake of fact allowed the defendant to plead guilty to the lesser charge of false imprisonment; the defendant's cultural background evidenced the reasonableness of his mistake.⁹⁴ In the *Chen* case, the court was convinced of the defendant's temporary insanity because of evidence of his cultural beliefs.⁹⁵ The result was a mitigation of both the criminal charges and the sentence.⁹⁶ Thus, cultural factors are considered in criminal

85. *Id.* at 101-2.

86. *Id.* at 103.

87. Oliver, *supra* note 4, at 28.

88. *Id.*

89. Sams, *supra* note 13, at 345.

90. Note, *supra* note 64, at 1294.

91. *Id.*

92. Oliver, *supra* note 4, at 30.

93. Sherman, *supra* note 3, at 1.

94. *Id.* at 27.

95. Sherman, *supra* note 7, at 3.

96. *Id.*

prosecutions and sentencing, although no substantive cultural defense is recognized.

The *Chen* case also serves to illustrate the most negative result that would come with recognition of a substantive cultural defense. A cultural defense can result in not punishing a defendant at all, even when extreme consequences result from the offense. Courts should consider the severity of the crime in reducing a sentence on the basis of cultural factors.⁹⁷ The informal system of recognizing cultural factors allows greater discretion by the court to weigh such considerations. Interestingly, the judge in the *Chen* case did not seem to place great weight on the severity of the crime.

Also, if we recognize a formal cultural defense, we would be undermining victim's rights. Many victims of cases arising out of cultural differences are members of subordinate groups. The mistreatment of subordinate groups, such as women and children with certain cultures, should be of great concern in considering the recognition of a cultural defense. Françoise Jacobsohn, president of the New York chapter of the National Organization for Women, commented that in the *Chen* case that "the sentence declares open season on women with a cultural defense."⁹⁸ The Committee Against Anti-Asian Violence and the Organization of Asian Women have joined Jacobsohn in filing a complaint with the Commission on Judicial Conduct.⁹⁹ The mistreatment of subordinated groups, such as women and children within certain cultures, should be of great concern in considering the recognition of a formal cultural defense.

There are other reasons for not recognizing a formal cultural defense. Lauren L. Weis, the prosecutor in *Kimura*, stated that "people have to abide by our laws or else you have anarchy."¹⁰⁰ Formal recognition of a substantive cultural defense would present our already overburdened courts with greater problems: (1) defining who may assert the defense; (2) maintaining the deterrent effect of the criminal law; (3) maintaining fairness to the majority who cannot assert the defense; and, (4) upholding legality.¹⁰¹

Defining the class of persons who may assert a cultural defense is a difficult task because only those persons who legitimately have not assimilated the culture and values should be allowed to assert the defense.¹⁰² Should the class include individuals who live in a homogeneous cultural setting, or only recent immigrants? In the *Kimura* case, even if a cultural defense were available the defendant

97. Sherman, *supra* note 7, at 28.

98. Sherman, *supra* note 7, at 3.

99. *Id.*

100. Sherman, *supra* note 3, at 26.

101. Sams, *supra* note 13, at 345.

102. *Id.* at 345.

might not have been able to assert one because she had lived in the United States for fourteen years.¹⁰³

Rejecting a cultural defense would encourage immigrants to become knowledgeable in the legal system of their adopted homeland.¹⁰⁴ Recent Vietnamese immigrants were incredulous when they were arrested for wife beating, but the entire community was educated when the arrests occurred, and further instances of domestic violence subsided.¹⁰⁵

The interests of the majority of the populace must be weighed against the individual interests of the defendant raising a cultural defense.¹⁰⁶ Because the majority of defendants would be unable to assert a cultural defense, and because cultural factors can be considered under the existing legal framework, a substantive cultural defense is unnecessary.

Furthermore, society should be able to rely upon the authority of the law.¹⁰⁷ The criminal law should be interpreted objectively, not subjectively, as a cultural defense would allow.¹⁰⁸

A defendant's culpability must be considered in charging and sentencing for a crime. The cultural factors behind a defendant's criminal behavior can be considered by the prosecutor and the court, without a formal cultural defense, as recent cases have shown. However, prosecutors and the bench should be educated about cultural differences, and their effect on a defendant's state of mind, to assure that some consideration is given to a culturally diverse defendant's mental culpability for a crime.

103. *Id.* at 347.

104. *Id.* at 348.

105. Oliver, *supra* note 4, at 31.

106. Sams, *supra* note 13, at 350.

107. *Id.* at 351.

108. *Id.*