

2003

## Culture is no Defense for Infanticide

Michele Wen Chen Wu

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/jgspl>

 Part of the [Criminal Law Commons](#)

---

### Recommended Citation

Wu, Michele Wen Chen. "Culture is no Defense for Infanticide." *American University Journal of Gender Social Policy and Law* 11, no. 2 (2003): 975-1021.

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Journal of Gender, Social Policy & the Law* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

# CULTURE IS NO DEFENSE FOR INFANTICIDE

MICHELE WEN CHEN WU\*

Introduction.....	976
I. History of Infanticide.....	978
II. The Cultural Defense .....	981
A. Arguments in Favor of a Cultural Defense.....	984
B. Arguments Against the Cultural Defense.....	987
C. The Limited Use Intermediate Approach to Cultural Defense.....	991
III. Infanticide Cases Involving the Cultural Defense .....	994
A. <i>People v. Kimura</i> .....	994
B. <i>People v. Wu</i> .....	997
C. <i>Bui v. State</i> .....	1003
IV. The Cultural Defense in Infanticide Cases .....	1006
A. Protection for the Child Victim.....	1007
B. Weakness of Culture as a Defense to Criminal Liability.....	1010
C. Assuming Individual Responsibility.....	1011
D. Right from Wrong .....	1014
V. Proposal for the Use of the Intermediate Cultural Approach and a Consideration of the Nature of the Offense.....	1018
Conclusion .....	1020

---

\* J.D. Candidate, *Washington College of Law, American University*, 2003; B.A., *Stanford University*, 1998. I would like to thank Professor Ann Shalleck for her guidance and Brian Bailey for his encouragement and support.

## INTRODUCTION

Infanticide<sup>1</sup> is a cross-cultural crime that dates back to the early histories of both Eastern and Western civilizations.<sup>2</sup> Particularly in Western cultures, the most difficult cases to comprehend are those in which parents kill their own children, because the person least expected as a child's deadly attacker is that child's parent.<sup>3</sup> According to statistics issued by the U.S. Department of Justice, about two hundred children are killed by their mothers every year.<sup>4</sup> In terms of infanticides of children under five years of age, about fifty-six percent die at the hands of their own parents.<sup>5</sup> From 1976 to 1999, thirty-one percent of all children slain under the age of five were killed by their fathers, while thirty percent were killed by their mothers.<sup>6</sup> Several justifications and excuses exist to explain this crime, such as poverty, stress, shame, insanity, and post-partum depression;<sup>7</sup> but none is less compelling than the cultural defense.<sup>8</sup> The cultural defense, as elaborated in Part II, is an affirmative defense raised by defendants based on their cultural backgrounds

---

1. This Comment uses the term 'infanticide' to describe the killing of young children, regardless of their specific age. Other scholars have separately defined neonaticide as the killing of an infant at or within hours of birth, infanticide as the killing of a child up to one year of age, and filicide as the killing of child older than one year. See LITA LINZER SCHWARTZ & NATALIE K. ISSER, ENDANGERED CHILDREN: NEONATICIDE, INFANTICIDE, AND FILICIDE 1 (2000).

2. See *id.* at 1-38 (discussing the practice of infanticide in various cultures).

3. See Kevin Toolis, *There is a Word for It – Filicide – But it is never Used. Perhaps because we Find These Acts too Horrible Even to Name. As yet Another Family is Tragically Wiped Out, We Ask: What Drives Parents to Kill?*, EXPRESS (United Kingdom), Feb. 8, 2001, at 32 (voicing the horror of filicide). "The deliberate killing of a child by its parent is more than mere murder: it is the destruction of everything we hold precious in society; the love and nurturing of our children. It is a crime that shrieks to the heavens. Who could kill their own children?" *Id.*

4. Evan Thomas, *Motherhood and Murder*, NEWSWEEK, July 2, 2001, at 22.

5. *Id.* at 24.

6. Amy Pagnozzi, *Household Hazard: Infanticide*, HARTFORD COURANT, June 29, 2001, at A3 (presenting statistics from the Bureau of Justice).

7. See SCHWARTZ & ISSER, *supra* note 1, at 39-56, 91-101.

8. Immigrants use the cultural defense for several types of crimes. See generally Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141 (1994) (discussing several infanticide cases, including the following: a Japanese woman who drowned her two children in an act of parent-child suicide called *oya-ko shinju*; a Laotian refugee who was accused of abducting and raping his fiancé when he engaged in the Laotian form of marriage called *zij poj niam*; and a Chinese man who killed his wife with a claw hammer upon discovering that she was having an affair); see also Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986) [hereinafter *Cultural Defense*] (advocating the adoption of a formal cultural defense within substantive American law, regardless of the offense committed, be it executing one's wife or immolating one's children).

when charged with a crime. However, culture by itself is not an adequate defense to killing a child.

This Comment examines some recent cases of infanticide by Asian immigrants in which cultural defense played a role in how American courts dealt with this crime.<sup>9</sup> In analyzing the outcome of these cases and the recent use of culture as a criminal defense, this Comment argues that a child's right to live, and the particularly violent nature of infanticide, makes one's culture an inadequate defense. The cultural defense generally has no place in infanticide crimes because, despite differences in cultural attitudes toward the practice, the killing of children is not a legitimate activity in any culture.<sup>10</sup> Although cultural norms and differences should be respected and considered during criminal trials, a blanket cultural defense provides inadequate protection for children who are victims of infanticide.

A superior analysis for courts to apply is the limited use approach. Courts should not ignore cultural evidence completely, but should consider the cultural defense only insofar as it legitimately proves that the defendant was insane or did not have the requisite mental state at the moment of the act, so that charges may be mitigated, but not exculpated. In a broader sense, the cultural defense should not be considered properly as a criminal defense per se, but rather as a more comprehensive approach to intent that acknowledges cultural impacts on defendants. The child's right to live should be the foremost consideration because it is unjust to subject the child to the parent's cultural background when the child's life is directly in danger. Courts must draw a clear line between parents who take their own lives and those who take the lives of their children.

Part I of this Comment provides a brief overview of the history of infanticide in Western and Eastern cultures. Part II analyzes the arguments for and against adopting a formalized cultural defense, as well as the arguments for an intermediate or limited use approach, and offers alternatives for reconciling these two extremes of the cultural defense argument. Part III describes and analyzes three landmark cases, focusing on how the defendants used a cultural

---

9. See John C. Lyman, Note, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 91 (1986) (suggesting that most of the focus of cultural defense cases on Asians is due to the view that, compared with their European counterparts, Asian immigrants in the United States generally face a much greater disparity in social mores and cultural backgrounds because in many instances, the European cultural heritage is essentially that of mainstream America).

10. See SCHWARTZ & ISSER, *supra* note 1, at 2 ("At all times and in all places, child homicide was also a constant reminder of the fragility of the prevailing moral order."). All peoples, even those who practiced child sacrifice and exposure, abhorred child homicide. See *id.* at 3.

978 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

defense and thereby affected the court's decisions in the outcome of each one. In light of the cases described, Part IV presents arguments as to why culture itself is no excuse for parents who kill their children, and asserts that consequently, a formal cultural defense is an inadequate criminal defense. Finally, while considering the violent nature of infanticide, Part V proposes the use of the intermediate approach as the most adequate method of using a cultural defense for such crimes.

### I. HISTORY OF INFANTICIDE

Even before the Biblical stories of Abraham sacrificing his son,<sup>11</sup> there was evidence from burial grounds of urns of cremated children indicating that Phoenicians in 1600 B.C. killed their children in sacrifice to deities.<sup>12</sup> In Greek mythology, there is the account by Euripides in 431 B.C. of Medea, who killed her sons to spite her unfaithful husband.<sup>13</sup> Medea had betrayed her father and killed her brother to help her lover Jason obtain the Golden Fleece.<sup>14</sup> In return, he promised her marriage and love, but ultimately abandoned her for another woman.<sup>15</sup> Betrayed, she sought vengeance on Jason by killing their sons.<sup>16</sup> Later in history, in 6-4 B.C., in Bethlehem, King Herod the Great had his three sons executed in a struggle for power.<sup>17</sup>

In ancient Greece, the law required the killing of weak and

---

11. Stating a blatant example of the severe punishment of children by their parents:

If a man have a stubborn and rebellious son, which will not obey the voice of his father, or the voice of his mother, and that, when they have chastened him, will not hearken unto them: Then shall his father, and his mother lay hold on him, and bring him out unto the elders of the city, and unto the gate of his place; . . . And all the men of his city shall stone him with stones, that he die, so shalt thou put evil away from among you; and all Israel shall hear, and fear.

*Deuteronomy* 21:18-21.

12. See Karen Yourish & Gretel Kovach, *Infanticide: A History*, NEWSWEEK, July 2, 2001, at 22-23.

13. See *id.*; see also SCHWARTZ & ISSER, *supra* note 1, at 6-7 (illustrating the story of Medea as an example of child homicide portrayed in literature and opera that permeates our culture). It is from Euripides' story of Medea that we derive the term "Medea syndrome" as a paradigm of child homicide in legal and psychiatric literature. *Id.*

14. See *id.* at 6 (telling the story of Medea, a woman obsessed by her love for Jason).

15. See *id.*

16. See *id.*

17. See Yourish & Kovach, *supra* note 12, at 22.

deformed infants.<sup>18</sup> This practice continued in ancient Rome, where it was a common practice as well for poor parents to expose their children to death.<sup>19</sup> Roman law also gave the father the power of life and death over his minor children, based on the principle that “he who gave life also has the power to take it away” (*patria potestas*).<sup>20</sup> In the New England states of Massachusetts and Connecticut, during the seventeenth century, the parents of a “rebellious child” could legally put their child to death.<sup>21</sup> In most countries, infanticide was more prevalent among unwed women, female servants, and poor families.<sup>22</sup>

In contrast to the classical Greek and Roman cultures, however, Judaism condemned any practice of infanticide and child sacrifice, and these traditions were incorporated into the Christian, Catholic and Protestant doctrines.<sup>23</sup> This disapproval of infanticide is illustrated in the literature and fairy tales of these cultures, which reveal the horror of child murder.<sup>24</sup> In modern times, the crime of infanticide became perceived as an “unnatural act,” regarded as a mental disturbance.<sup>25</sup> Indeed, parents, particularly mothers, are seen as natural caregivers and are placed in a position of trust by the child. The violation of this confidence that occurs when a parent murders a child is viewed with horror; it is an aberrant act so contrary to the expected role of parenthood that it is construed as madness.<sup>26</sup>

18. See SCHWARTZ & ISSER, *supra* note 1, at 4 (noting that the examination of newborns was particularly enforced by law in Sparta). Weak and deformed infants were typically killed because of their imperfections, or because it was feared that they would become a burden to the state. See *id.*

19. See Yourish & Kovach, *supra* note 12, at 22 (explaining that in A.D. 315, the Roman Emperor Constantine issued an edict for public funds to help the poor who could not provide for their children, in an effort to limit the practice of child murder).

20. Todd Taylor, Comment, *The Cultural Defense and its Irrelevancy in Child Protection Law*, 17 B.C. THIRD WORLD L.J. 331, 331-32 (1997).

21. *Id.*

22. See SCHWARTZ & ISSER, *supra* note 1, at 28-32 (stating that in 19th century United States, the primary motivation for infanticide was poverty).

23. See *id.* at 5 (describing how the church in particular regarded child homicide with severity, and how churches issued harsh penalties when infanticide was detected, including death if the child was not baptized).

24. See *id.* at 6 (noting, for example, stories of parents who turned their children out to become beggars, sold their offspring to the devil, and abandoned their children to die).

25. *Id.* at 37. See also Janet Ford, *Susan Smith and Other Homicidal Mothers—In Search of the Punishment that Fits the Crime*, 3 CARDOZO WOMEN’S L.J. 521, 534-35 (1996) (“Killing one’s own child is generally not a random act of violence, particularly when the mother is the killer. It is an act, however, viewed with horror and disbelief. It is common to dismiss the act as something so bizarre and extraordinary that only a madwoman could do it.”).

26. See Ford, *supra* note 25, at 534 (explaining that this perception of madness affords mothers who kill their children more sympathy and leniency by the courts).

In the East, classical Chinese texts record evidence of infanticide and child abandonment as early as 2000 B.C.<sup>27</sup> China's first female ruler, Empress Wu, in A.D. 609-705, rose to power after smothering her daughter and implicating the emperor's wife in the crime.<sup>28</sup> Female infants in particular were the victims of infanticide in China and India, based on custom and economic necessity.<sup>29</sup> The Chinese philosopher Han Fei Tzu wrote in the third century B.C.:

Moreover, parents' attitude toward children is such that when they bear a son, they congratulate each other, but when they bear a daughter they kill her. Both come from the parents' love, but they congratulate each other when it is a boy and kill it if it is a girl because they are considering their later convenience and calculating their long-term interests.<sup>30</sup>

Population control has been a major factor in the practice of child abandonment and infanticide in China and India.<sup>31</sup> The need to modernize prompted the Chinese government in 1979 to institute its "one-child" policy.<sup>32</sup> This policy, combined with the cultural preference for male babies, resulted in widespread infanticide, particularly of female babies.<sup>33</sup>

In Japan, infanticide was practiced to increase the standard of living rather than to primarily control population growth.<sup>34</sup> The Japanese also have a distinct form of infanticide called *oya-ko shinju* (parent-child suicide).<sup>35</sup> *Oya-ko* means "parent-child" and *shinju*

---

and why in contrast, it would not be morally and legally worse to kill one's own child than another's child).

27. SCHWARTZ & ISSER, *supra* note 1, at 2.

28. See Yourish & Kovach, *supra* note 12, at 23.

29. See SCHWARTZ & ISSER, *supra* note 1, at 26. Sons were seen as the main support for aging parents, and girls were mostly considered a burden to the family's assets because girls needed dowries upon marriage, which they took to their new families. See *id.*

30. *Id.* at 2.

31. See *id.* at 26 (describing further the government regulation of childbearing, such as enforcing birth control policies with penalties, including fines and loss of privileges). In some castes, such as the Rajputs in India, the killing of offspring was also linked to the enhancement of the status and welfare of the family. See *id.* at 24.

32. See Yourish & Kovach, *supra* note 12, at 23. See also SCHWARTZ & ISSER, *supra* note 1, at 26 (explaining that this government policy allowed one child per family during the 20th century Chinese Revolution, and is only now being eased).

33. See SCHWARTZ & ISSER, *supra* note 1, at 26 (noting how opposition to the custom of infanticide co-existed with the practice and that there were attempts by the government to suppress infanticide, and ease birth control penalties and the one-child policy).

34. See *id.* at 27 (indicating that recent research has rejected the previously long-held belief that economic distress in the peasant population resulted in the Japanese limiting the size of their families).

35. The practice of *oya-ko shinju* has also been identified in the United States. See

means “center of the heart.”<sup>36</sup> In Japan, *oya-ko shinju* is conceptually different from infanticide (*kogoroshi*), which in Japanese literally means “child-kill.”<sup>37</sup> In *oya-ko shinju*, the death of the child and the parent is conceptualized as one act – one death, in which the parent and the child are one and the same victim.<sup>38</sup> Unlike infanticide, the child in *oya-ko shinju* is not considered to be victimized by the parents.<sup>39</sup> Furthermore, this merging of the parent and child’s identity, while focusing on the parent’s motives and the child’s experience, is only a peripheral inquiry.<sup>40</sup> The question ultimately becomes whether the parent was a victim of tragedy that justified the taking of his/her life (and incidentally, that of the child) or whether the parent’s action was not sufficiently justified.<sup>41</sup>

## II. THE CULTURAL DEFENSE

The cultural defense<sup>42</sup> is a “legal strategy that uses evidence about a

---

generally Taimie L. Bryant, *Oya-ko Shinju: Death at the Center of the Heart*, 8 UCLA PAC. BASIN L.J. 1 (1990) (discussing the case of Fumiko Kimura in California and examining the treatment of *oya-ko shinju* under Japanese law); Alison Matsumoto, Comment, *A Place for Consideration of Culture in the American Criminal Justice System: Japanese Law and the Kimura Case*, 4 D.C. L. J. INT’L L. & PRAC. 507 (1995) (proposing that in cases involving cultural factors, such as *oya-ko shinju*, American courts should consider a cultural defense at the sentencing phase of a case, where a judge will weigh it among other factors and then have discretion to sentence within a range of possible punishments).

36. Bryant, *supra* note 35, at 4.

37. *Id.* Even though both *kogoroshi* and *oyako-shinju* involve the taking of a child’s life, their conceptual differences are also demonstrated linguistically, where the characters with which *oyako-shinju* are written do not contain any reference to death or killing, while the characters for *kogoroshi* contain the Chinese character for “kill.” *See id.*

38. *See id.* at 5 (explaining that the identity of the child as a victim collapses into the identity of the parent as a victim).

39. *See id.* *See also* Matsumoto, *supra* note 35, at 511 (explaining that *oya-ko shinju* represents the belief that the child is part of the family unit, viewed as a “parent’s possession” rather than as an independent being, and that it is better for the child to be killed with the parent rather than left alone, vulnerable to proceed in the world without protection); Bryant, *supra* note 35, at 23 (acknowledging that respondents in Japan, when asked how a mother could knowingly subject a child to death, replied that it is a far greater pain to be left behind as a child in a society where few people will take on the responsibilities of caring for someone’s else’s child). The mother who commits suicide without taking her child is labeled a (*oni no yo na hito*) “demon-like person.” *Id.*

40. *See* Bryant, *supra* note 35, at 5 (indicating the depth of identity without separation between child and adult).

41. *See id.* (concluding that the child’s experience of being killed comes into consideration only with respect to the parent’s reasons for killing, choice of method, and mental health).

42. *See* Leti Volpp, (*Mis*)Identifying Culture: Asian Women and the “Cultural Defense,” 17 HARV. WOMEN’S L.J. 57, 57 n.1 (1994) (noting that the author puts the expression in quotation marks since the use of the term is politically problematic and a misnomer because of the nonexistence of a singular, formalized cultural defense).



982 JOURNAL OF GENDER, SOCIAL POLICY &amp; THE LAW [Vol. 11:2

defendant's background to negate or to mitigate criminal liability," sometimes with a concomitant sentence reduction.<sup>43</sup> In a cultural defense strategy, the mitigation of culpability is based on a lack of requisite *mens rea*.<sup>44</sup> Defendants may utilize a cultural defense when arguing self-defense or mistake of fact to present evidence relating to state of mind.<sup>45</sup> The cultural defense primarily addresses the motivation for conduct, and its primary utility is as a factor to gauge an individual's state of mind.<sup>46</sup> It can illustrate the existence of facts which support a lack of specific intent, but it cannot negate a showing of general criminal intent.<sup>47</sup>

The underlying theory of the cultural defense is that the defendant, usually an immigrant to the United States, deserves leniency for acting according to the dictates of his or her culture.<sup>48</sup> The rationale behind the formulation of the cultural defense is that an individual's behavior can be so influenced by his/her culture that either the individual does not believe that his/her actions violate the law (volitional behavior) or that the individual's cultural upbringing compelled the defendant to violate a known law (nonvolitional behavior).<sup>49</sup> John Lyman summarizes the essence of the cultural

---

43. Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 102-03 (1997) (advocating the formal adoption of an evidentiary framework permitting cultural evidence to be admitted to explain a defendant's state of mind at the time of the offense).

44. In Latin, *mens rea* means "guilty mind." It is the state of mind (criminal intent or guilty knowledge and willfulness) that the prosecution must prove a defendant had when committing a crime in order to secure a conviction. See BLACK'S LAW DICTIONARY 999 (7th ed. 1999).

45. See Volpp, *supra* note 42, at 57 (stating that the theory behind the defense is that because a person acted according to her culture, she deserves leniency). See also Lyman, *supra* note 9, at 98 (reiterating that to establish criminal liability, the state must prove both criminal act (*mens rea*) and intent (*actus reus*)). The operation of a cultural defense must negate a showing of intent at the time of occurrence of the act charged. See *id.*

46. See Lyman, *supra* note 9, at 115.

47. See *id.* at 114-15 (explaining that whatever the cause or motivation compelling an individual's actions, the law will look to the person's intent, for it is this knowledge of consequences that embodies the legal concept of intent, and where it is present, general criminal intent is satisfied).

48. See *id.* See also Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 213-39 (1982) (presenting the idea that criminal responsibility deriving from one's culture conflicts with the basic criminal law tenet that guilt is based on individual responsibility while at the same time, the criminal law system recognizes certain affirmative defenses to criminal charges that may exonerate the defendant notwithstanding individual responsibility).

49. See Taylor, *supra* note 20, at 344. See also James J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845, 1851-52 (1999) (distinguishing between volitional (willed) and nonvolitional (automatic) behavior in cultural defenses). In volitional behavior cases, the individual may admit that he/she purposely or willfully committed the offensive act, but raises the cultural defense to demonstrate a lack of specific culpable intent. See

2003]

CULTURE IS NO DEFENSE FOR INFANTICIDE

983

defense by explaining: "A cultural defense will negate or mitigate criminal responsibility where acts are committed under a reasonable, good-faith belief in their propriety, based upon the actor's cultural heritage or tradition."<sup>50</sup>

The United States was initially populated largely by European immigrants, and the waves of immigrants to its shores continue to arrive, making it today one of the most culturally diverse countries in the world.<sup>51</sup> Given the large numbers of immigrants and cultures in the United States, one of the current continuing legal debates is how to reconcile the cultural defense with the American criminal law when immigrants commit acts that are deemed criminal in the United States.<sup>52</sup> The current legal system does not recognize a formal cultural defense,<sup>53</sup> and scholarship has focused on debating its recognition and proposing methods of its application in the American criminal law system. In general, there are three viewpoints on the debate: (1) proponents who advocate a formal adoption of the

---

*id.* Under the rationale of the volitional cultural defense argument, the defendant behaves consistently with the cultural norms of his/her homeland, and does not realize that the offensive behavior is illegal, therefore lacking the necessary criminal mental state. *See id.* In a nonvolitional cultural defense, the individual may be generally cognizant of the illegality or offensiveness of his/her behavior, but is simply unable to or has lost the capacity to control his/her actions, therefore not satisfying the *actus reus* component of the crime. *See id.*

50. Lyman, *supra* note 9, at 88.

51. *See* Veronica Ma, Comment, *Cultural Defense: Limited Admissibility for New Immigrants*, 3 SAN DIEGO JUST. J. 461, 461 (1995) (stating that prior to the 1880s, the majority of immigrants into the United States came from Northern and Western Europe). In the first decade of the twentieth century, about two million Italians, 1.6 million Russians and 800,000 Hungarians immigrated to the United States. Between 1970 and 1990, the total population of the United States increased by 22.4%, and the Asian-American population grew by 384.9% to reach 2.9% of the total population. *Id.* at 462.

52. *See* Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1054 (1994) (stating that in particular, the cultural defense highlights the tension between the need for clarity and generality in the criminal law's attempt to set limits on lawful behavior and the sometimes conflicting needs of diverse minority groups to express their cultural identities through practices that may embody values diverging from the values of the mainstream).

53. *See id.* at 1054 (noting that the current focus of debate is on whether there should be a cultural defense at all or whether the recognition of cultural factors should take a more limited form); *see also* Volpp, *supra* note 42, at 57-58 (remarking that there is no formal cultural defense and that individual defense attorneys and judges use their discretion to present or consider cultural factors affecting the culpability or mental state of the defendant); Jisheng Li, Comment, *The Nature of the Offense: An Ignored Factor in Determining the Application of the Cultural Defense*, 18 U. HAW. L. REV. 765, 765 (1996) ("While the American system has yet to formally recognize this defense, examples abound of cultural evidence being introduced in courts to bolster other established defenses."); Taylor, *supra* note 20, at 345 ("Currently, there is no formally recognized cultural defense in the American system of criminal justice.").

984 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

substantive cultural defense, (2) opponents who would prohibit the use of cultural evidence, and (3) “limited use” advocates who would allow the use of the “cultural defense” (cultural considerations) in certain circumstances to prove the *mens rea* element of traditional affirmative or negative defenses and to prove mitigating factors at sentencing.<sup>54</sup>

#### A. Arguments in Favor of a Cultural Defense

Those who favor recognizing the cultural defense urge the formal adoption of a substantive affirmative cultural defense in the criminal law.<sup>55</sup> In effect, the substantive cultural defense could excuse the defendant’s otherwise criminal act because the defendant’s cultural attributes induced the criminal behavior.<sup>56</sup> In other words, the defendant’s “actions are part of a legitimate tradition, the defendant relied on that tradition, and the tradition trumps the [criminal law in question].”<sup>57</sup> A person’s cultural influences are so deep that it can be “said that . . . culture shapes every person’s perception of reality, and as a result guides every person’s behavior.”<sup>58</sup>

Proponents of a substantive cultural defense argue that adopting a substantive cultural defense is not the same as informally considering cultural factors.<sup>59</sup> For example, the insanity defense is one way of accommodating cultural factors within the boundaries of an established criminal defense. However, the insanity defense would not produce as desirable a result as a formal cultural defense<sup>60</sup>

54. See, e.g., Kim, *supra* note 43, at 108-09; Chiu, *supra* note 52, at 1056-57 (exploring how the three differing viewpoints reflect cultural differences).

55. See *Cultural Defense*, *supra* note 8, at 1296 (arguing that the current criminal justice system, even taking into account the degree of discretion allowed during prosecution and sentencing, is not functionally equivalent to a formal, substantive cultural defense, and on balance, the principles that justify a cultural defense outweigh the arguments against it).

56. See *id.* See also Taylor, *supra* note 20, at 350-51 (defining culture and the effects of enculturation on a person’s behavior). Taylor defines culture as the “organized group of learned responses characteristic of a particular society.” *Id.* Enculturation is the conscious and unconscious process by which people learn the norms and values of their society. See *id.* Enculturation also means that while recognizing that individuals are capable of independent thought, feeling and action, this independence is limited and modified profoundly by an individual’s culture. See *id.*

57. Kim, *supra* note 43, at 109 (quoting Andrew M. Kanter, Note, *The Yenaldlooshi in Court and the Killing of a Witch: The Case for an Indian Cultural Defense*, 4 S. CAL. INTERDISCIPLINARY L.J. 411, 449 (1995)).

58. Taylor, *supra* note 20, at 351.

59. See *Cultural Defense*, *supra* note 8, at 1296-97.

60. See *id.* (presenting the functional differences between a substantive cultural defense and the informal consideration of cultural factors).

2003]

CULTURE IS NO DEFENSE FOR INFANTICIDE

985

because the insanity tests currently applied require that the proscribed conduct be the product of a mental disorder, whereas in most cultural defense cases the defendant may not be insane as defined by the American standard of mental disorder.<sup>61</sup> Also, a judgment of insanity by American standards may be an affront to the dignity of the defendant and the defendant's culture when the conduct condemned is accepted in the defendant's culture.<sup>62</sup>

Like the insanity defense, which rests on a finding of insanity to prove lack of criminal intent, arguing that the defendant lacked legal intent as a result of cultural factors is not exactly accurate because in most cultural defense cases, it is apparent that the defendant actually intended to commit the criminal act.<sup>63</sup> In addition, proponents of a formal adoption of a cultural defense argue that government officials have too much discretion when dealing with cultural factors in prosecutorial charging and judicial sentencing.<sup>64</sup> A formal cultural defense, on the other hand, would ensure a more structured and consistent method of considering cultural factors as well as guaranteeing that juries have the opportunity to consider cultural factors in all cases within specified parameters established by the judge's instructions.<sup>65</sup>

The other arguments supporting the cultural defense are based on two main philosophical concepts: individualized justice and cultural pluralism.<sup>66</sup> First, individualized justice in the context of criminal law

---

61. The insanity defense in the United States is an affirmative defense alleging that a mental disorder caused the accused to commit the crime. Unlike other defenses, a successful insanity defense results not in an acquittal but instead in a special verdict of "not guilty by reason of insanity" that usually results in committing the defendant to a mental institution. See BLACK'S LAW DICTIONARY 797 (7th ed. 1999).

62. See *Cultural Defense*, *supra* note 8, at 1296-97 (noting that whereas criminal incarceration is normally for a fixed period of time, a civil commitment for insanity may be indefinite).

63. See *id.* at 1297 (arguing that unlike recognizing cultural factors, a substantive cultural defense may be more effective in reducing the charges for a crime because in most instances the defendant is known to have committed the act they are being tried for).

64. See *id.* ("Prosecutorial charging and judicial sentencing . . . are by nature ad hoc, offering neither guarantees of procedural safeguards nor guidelines on the relevance of social factors."). This absence of procedural safeguards and guidelines leads to inconsistency in the treatment of cultural factors from case to case. See *id.*

65. See *id.* at 1297-98.

66. See *id.* at 1298-99 (discussing how courts recognize other criminal defenses, such as the battered spouse defense, consistent with the notion of individualized justice when traditional defenses such as self-defense and insanity are not appropriate because they do not adequately address the defendant's personal culpability). Furthermore, by judging each person according to the standards of his/her native culture and consequently preserving the values of that culture, the American legal system can maintain a culturally diverse society. See Li, *supra* note 53,

986 JOURNAL OF GENDER, SOCIAL POLICY &amp; THE LAW [Vol. 11:2

is the notion that punishments should be tailored to fit the degree of the defendant's culpability.<sup>67</sup> Proponents also argue that it is unfair to the immigrant raised in a foreign culture to be held accountable for an act when the act may have been committed through ignorance of the law.<sup>68</sup> Although in criminal law the standard principle is that ignorance of the law is no excuse for criminal prosecution, proponents of the cultural defense argue that "fairness to the individual defendant suggests that ignorance of the law ought to be a defense for persons who were raised in a foreign culture."<sup>69</sup>

Not only may an immigrant be ignorant of American law, but the immigrant defendant might also have been compelled to act because of his/her cultural values.<sup>70</sup> As a result, refusing to understand and admit cultural evidence can lead to inaccurate accounts of the facts and characterization of the defendant's behavior.<sup>71</sup> In addition, multiculturalists<sup>72</sup> expound the firm belief that all cultures are valued

---

at 768-71.

67. See *Cultural Defense*, *supra* note 8, at 1298-99 (asserting that the American legal system recognizes that due to mitigating circumstances, it may be unjust to punish a defendant to the limits of the law).

68. See *id.* at 1299 (arguing that an individualized judicial system is necessary because newly-arrived immigrants have not had the opportunity to learn and absorb the nature of America's criminal laws and judicial system).

69. *Id.* at 1299. The author further explains why it is unfair to impute knowledge of the American law to new immigrants:

It may be fair to impute knowledge of American law to persons raised in this country: various socializing institutions such as the family, school, and place of worship can reasonably be expected to have instructed these persons about the norms upon which society's law are based. A new immigrant, however, has not been given the same opportunity to absorb—through exposure to important socializing institutions—the norms underlying this nation's criminal laws.

*Id.*

70. See *id.* at 1300 (adding that mere awareness that an act is contrary to the law may not be enough to override one's adherence to fundamental cultural values). But see Valerie L. Sacks, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. L. 523, 544 (1996) (presenting a criticism of the reductive idea that defendants are propelled by cultural dictates to commit a proscribed act). "To use the words 'compelled' or 'propelled' or say that one follows the 'dictates' of one's culture, however, reinforces Western notions of a primitive, not quite autonomous 'other' who is too culture-bound to make reasoned judgments – implicitly unlike 'Americans.'" *Id.*

71. See Sacks, *supra* note 70, at 530-31 (providing as an example that imposing the Western concept of insanity on immigrants can generate "legal fictions when our psychological concepts do not have close analogues to those of the culture in question.>").

72. See Doriane Lambelet Coleman, *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1119 (1996) (defining multiculturalism as "aspiring toward a 'plurality of cultures with all members of society seeking to live together in amity and mutual understanding with mutual cooperation, but maintaining separate cultures.'" (quoting Robert C. Post, *Cultural Heterogeneity and the Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L.

2003] CULTURE IS NO DEFENSE FOR INFANTICIDE 987

to the same degree, and that because no culture is “better” than another, “each culture has the right to form its own identity and nourish its own sense of what is rational and humane.”<sup>73</sup> Consequently, it is only fair to judge a culture according to its people’s standards.<sup>74</sup>

Closely tied to multiculturalism is the second concept that supports the recognition of a formal cultural defense: cultural pluralism.<sup>75</sup> Cultural pluralism seeks to protect the cultural identities of immigrant groups within the larger society by preserving ethnic values while enhancing respect and tolerance of the various cultural backgrounds contributing to American culture.<sup>76</sup> Cultural pluralism favors the diversity of cultural identities in the United States, arguing that: (i) pluralism maintains a society’s “vigor” when it absorbs cultural elements from a broad spectrum of ethnic groups;<sup>77</sup> (ii) the American system of justice requires that equality be observed among the different ethnic groups by respecting each group’s rights to be different and not be penalized for it;<sup>78</sup> (iii) liberty demands that the diversity of cultures within the United States be preserved by allowing people to live according to their values;<sup>79</sup> and (iv) cultural pluralism may stand as a “bulwark against despotism.”<sup>80</sup>

### B. Arguments Against the Cultural Defense

Opponents of the cultural defense emphasize several problems that would arise with the adoption of a substantive cultural defense. They first argue that equality<sup>81</sup> and fairness mandate that courts only

---

REV. 297, 302 n.29 (1988)).

73. *Id.* (quoting Stanley Fish, *Boutique Multiculturalism or Why Liberals are Incapable of Thinking about Hate Speech*) (unpublished manuscript on file with the *Columbia Law Review*)).

74. See Coleman, *supra* note 72, at 1119-20.

75. See Goldstein, *supra* note 8, at 157 (stating that “proponents of cultural pluralism argue that it is hard to imagine a system more likely to convince a person that the majority regards his culture as inferior than one that punishes him for conforming to his own culture.”).

76. See *id.*

77. See *Cultural Defense*, *supra* note 8, at 1300-01 (commenting that the improvement of mankind and all of its works demands variety, not uniformity).

78. See *id.* at 1301.

79. See *id.* (stating that the degree of diversity in the United States is a testament to the value that the majority places on this nation’s commitment to liberty).

80. *Id.* (observing that at least one American judge has noted that modern dictators are quick to exploit societies in which the individuality of people’s ideas and lifestyles are subordinated to the impulse for a conformist, monolithic society).

81. *But see* Sacks, *supra* note 70, at 542-43 (summarizing the reasons why the cultural defense can undermine, rather than promote, the principle of equality). First, definitional problems (defining what is a cultural group for purposes of the

988 JOURNAL OF GENDER, SOCIAL POLICY &amp; THE LAW [Vol. 11:2

apply one standard of justice to all, regardless of ethnicity, and not allow some to use the cultural defense, but not others.<sup>82</sup> Allowing different rules for different people would lead to uncertainties as to which criminal standard courts should apply, resulting in a confusing legal standard and anarchy.<sup>83</sup> As the prosecution in *People v. Kimura*<sup>84</sup> stated:

You're treading on . . . shaky ground when you decide something based on a cultural thing because our society is made up of so many different cultures. It is very hard to draw the line somewhere, but they are living in our country and people have to abide by our laws or else you have anarchy.<sup>85</sup>

Second, opponents argue that a substantive cultural defense would frustrate the protective goal of criminal law.<sup>86</sup> Each individual has the responsibility of knowing and obeying the law,<sup>87</sup> and by treating immigrant defendants preferentially, the cultural defense would not be protecting the victims of those crimes.<sup>88</sup> For example, use of the cultural defense may result in immigrant would-be victims having less protection than non-immigrant would-be victims.<sup>89</sup> Leti Volpp alerts us to the danger of "underinclusiveness" and the fact that the use of the cultural defense by immigrant defendants may not protect the subordinated victims of cultural crimes, particularly women.<sup>90</sup> Volpp

---

defense and when the defense should be available) can make it difficult to have a systemic justification for allowing some cultural groups, but not others, to use the cultural defense. *See id.* Second, by treating cultural groups differently, the use of the cultural defense may actively promote contempt for immigrants and stereotyping rather than counteracting prejudice. *See id.*

82. *See Ma, supra* note 51, at 477-78 (arguing that since the present criminal system provides for such other defenses, such as proof of required mental state at the time of the crime, intent to commit crime and mistake of fact, which are available to everyone regardless of cultural background, disallowing the use of cultural defense seems to be fair and equal to everyone, preserving the essence of a democratic society).

83. *See id.* at 476-77.

84. No. A-09133 (L.A. Super. Ct. Nov. 21, 1985).

85. *Id.* (quoting Malek-Mithra Sheybani, *Cultural Defense: One Person's Culture is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751, 780 (1987)).

86. *See Kim, supra* note 43, at 110-11 (arguing that excusing criminal behavior on the basis of the defendant's cultural background violates the criminal law objective of preventing injury to the society at large).

87. *See id.* (concluding that for the legal system to function properly, each individual has the responsibility to know and obey the law); *see also* Goldstein, *supra* note 8, at 158 (explaining that opponents of the cultural defense advocate the "When in Rome" philosophy, which contends that immigrants to the United States have a duty to understand and adhere to its laws).

88. *See Kim, supra* note 43, at 110 (asserting that each member of society is entitled to protection from every other member for unlawful acts).

89. *See Sacks, supra* note 70, at 545.

90. *See Volpp, supra* note 42, at 58 (observing how "cultural defenses" that focus

2003] CULTURE IS NO DEFENSE FOR INFANTICIDE 989

argues that similar to the battered women's syndrome,<sup>91</sup> where creating a formalized separate standard can lead to defendants being refused access to expert testimony or being unable to adequately fit the characteristics of the "model" battered woman and benefit from that testimony, a formalized "cultural defense" could be disastrous for Asian women because the pertinent characteristics defendants would need to show to fit an "Asian woman" standard are likely to be based on reductive stereotypes, and the behavior or identity of many defendants would not fit the standard.<sup>92</sup>

Children are another group of victims vulnerable to abuse of the cultural defense.<sup>93</sup> Todd Taylor expresses the view that due to the rehabilitative nature of punishment within child protection law, the cultural defense is irrelevant in most cases of child abuse and neglect.<sup>94</sup> Furthermore, only a small percentage of immigrant populations would be protected under a blanket cultural defense policy. Women, for example, would not be protected from violence, and children would not be protected from abuse, or even death.<sup>95</sup>

Third, opponents of the cultural defense argue that a formal cultural defense would undermine the criminal system's goals of

---

solely on "cultural differences," with no analysis of gender subordination, serve to block out gender oppression and gender differences *within* Asian American communities). Volpp focuses solely on Asian women and the cultural defense, advocating the use of antisubordination analysis in admitting cultural information for immigrant defenses. *See id.*

91. *See* Chiu, *supra* note 52, at 1099 n.293 (distinguishing the cultural defense from the battered woman's syndrome). The cultural defense seeks to encompass a wide range of factors including social mores, beliefs, practices and religion. *See id.* The challenge of a cultural defense is in selecting from among all these cultural factors those that are relevant and applicable to the case, and trying to encapsulate the culture in a single defense. *See id.* The battered woman's syndrome, in contrast, has a defining factor which is battery by a husband or boyfriend. *See id.* Additionally, there are specific events, symptoms or repeated characteristics which must occur to find that a woman suffers from the syndrome. *See id.*

92. *See* Volpp, *supra* note 42, at 93..

93. *See* Goldstein, *supra* note 8, at 163 n.200 (observing that in many countries, unnecessary corporal punishment is considered an acceptable form of disciplining children, and that a cultural defense would operate to condone such human rights violations).

94. *See* Taylor, *supra* note 20, at 355 (finding that in child protection law, punishment of the abusive actor is expressly and intentionally rehabilitative in nature).

95. *See* Goldstein, *supra* note 8, at 162-63 (indicating how other countries condone violence toward women, such as Islamic countries that treat the murder of a wife less seriously than the murder of a stranger, or in India where many young wives are killed because of small dowries). These women would not be protected in the United States if a cultural defense can exculpate their husbands. *See id.* Furthermore, recognition of the cultural defense would demonstrate that the United States tacitly consents to the violence toward women that is practiced throughout the world. *See id.*



990 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

deterrence<sup>96</sup> and education.<sup>97</sup> Deterrence is premised upon the theory that criminal justice law compels obedience by imposing punitive sanctions that deter people from breaking the law.<sup>98</sup> Opponents of the cultural defense theory worry that immigrant groups would be less deterred by the law if their cultural values could excuse their transgressions in American courts, making punishments for their acts uncertain.<sup>99</sup>

Proponents of the cultural defense, however, disagree with this argument, stating that deterrence, both specific and general, would only be minimally impaired by recognition of the cultural defense.<sup>100</sup> In their view, specific deterrence is often needless in cases of culturally motivated crimes.<sup>101</sup> As for general deterrence, punishment will only serve as a deterrent in one of two categories of culturally motivated crimes.<sup>102</sup> In the first category, where the crime is committed out of ignorance of the law, punishment may serve to instruct others of the same culture that the law does not accept such behavior.<sup>103</sup> However, in the second category, where the defendant's act was motivated by moral or social compulsion, punishment may

---

96. See *Cultural Defense*, *supra* note 8, at 1303 (distinguishing between specific and general deterrence). Specific deterrence refers to punishing the defendant so that the defendant is discouraged from engaging in similar conduct in the future. See *id.* General deterrence refers to punishing the defendant and, as a result, dissuading others from emulating the defendant's same conduct. See *id.*

97. See Kim, *supra* note 43, at 111-12 (giving the example of a recent case involving a cultural defense that underscored its potential impact upon the criminal law's deterrence and education goals). For example, in Los Angeles the disallowance of a cultural defense to domestic abuse charges in the prosecution of several Vietnamese men for battery informed other members of the Vietnamese community that this practice, even if permissible in Vietnam, would not be tolerated in the United States. See *id.*

98. See *Cultural Defense*, *supra* note 8, at 1302 (arguing that societies usually regard the preservation of social order as a primary aim). To maintain this order, societies must lay down a body of positive law, including punitive sanctions, that compels the obedience of all, regardless of individual notions or morality. See *id.* Otherwise, if each person adhered to the law only to the extent that it was consistent with his or her own values, societies would tend toward anarchy. See *id.*

99. See *id.* at 1303.

100. See *id.*

101. See *id.* (stating that specific deterrence is unnecessary in situations where the defendant's culturally motivated conduct was triggered by extraordinary circumstances unlikely to recur). Furthermore, if the defendant is told that ignorance of the law will excuse his/her actions only once, the specific deterrent effect of the law will be preserved. See *id.*

102. See *id.*

103. See *id.* at 1303-04 (commenting that even in such cases, punishment may not be necessary to accomplish the educational function of instructing immigrants about American law). This suggests that local government efforts targeted at informing recent immigrant communities of the law and social norms would be a more far-reaching and effective method of deterrence. See *id.*

2003] CULTURE IS NO DEFENSE FOR INFANTICIDE 991

only marginally deter others from the same culture whose actions are similarly motivated.<sup>104</sup> For example, it is suggested that when consideration of the immigrants' benevolent cultural motive<sup>105</sup> is balanced against society's interest in protecting children, a more appropriate course of action may be to use education, warnings, or monetary sanctions to discourage the cultural practice, instead of prosecuting the immigrant according to the strict letter of the law.<sup>106</sup>

Lastly, opponents argue that the cultural defense hinders the assimilation of immigrants.<sup>107</sup> They suggest that disallowing the cultural defense and not excusing the immigrants' ignorance of American law will encourage them to adapt more rapidly to the legal system of the new homeland.<sup>108</sup> Furthermore, since word tends to spread quickly within ethnic communities,<sup>109</sup> enforcing the prevailing law would promote awareness of the American criminal standard, and eventually immigrants would act accordingly.<sup>110</sup> This viewpoint is also criticized. Forcing immigrants to assimilate and ignoring their cultural differences "smacks of xenophobia," and could eventually lead to the demise of foreign cultures that would otherwise contribute to and enrich American life.<sup>111</sup>

### C. *The Limited Use Intermediate Approach to Cultural Defense*

The limited use approach tries to reconcile the two opposite positions of the cultural defense debate by proposing the use of

---

104. See *id.* at 1304.

105. See Li, *supra* note 53, at 787 (describing the Vietnamese folk remedy of "coining" as an example of a benevolent cultural motive). "Coining" is a Vietnamese folk medicine practice to cure headaches that requires rubbing the back and shoulders with the serrated edge of a coin. See *id.* This practice leaves bruises, and even though the bruises may be temporary, coining is considered child-abuse in the American legal system. See *id.*

106. See *id.* (referring to the use of these sanctions as an approach to address the practice of coining).

107. See *id.* at 770 (explaining that proponents of this view believe that immigrants to the United States must conform their conduct to its legal norms even at the cost of surrendering the values of their home countries).

108. See *id.* at 771. See also Ma, *supra* note 51, at 477 ("Disallowing the use of cultural defense would provide an incentive for immigrants to learn the new laws, adapt better to the new homeland, and deter them from circumventing the law to commit crimes.").

109. See Ma, *supra* note 51, at 477 (noting that an entire Vietnamese community rapidly became aware of the consequences for spousal abuse after a man from the community was jailed for battering his wife).

110. See *id.* (reiterating that using a uniform set of laws would encourage all people's awareness of the prevailing law).

111. See Li, *supra* note 53, at 771 (adding that coercive assimilation intensifies the stress that immigrants experience when they come to a new country).

992 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

cultural factors to show a defendant's state of mind at the time of the criminal act without recognizing a separate cultural defense.<sup>112</sup> In essence, this intermediate approach uses cultural factors to support traditional defenses such as mistake of fact, diminished capacity, temporary insanity, and provocation.<sup>113</sup>

The intermediate approach illustrates how cultural factors can be used in each stage of the criminal procedure. For example, the defense can introduce cultural factors and prosecutors and judges can consider them during the charging and sentencing stages of the trial.<sup>114</sup> It is generally the trial judge's determination whether to permit expert testimony; the judge also has broad discretion regarding the admissibility of expert testimony.<sup>115</sup> Accordingly, the judge determines the admissibility of the presentation of cultural factors regarding the defendant's actions and beliefs to negate or mitigate the *mens rea* element of the crime charged and evaluates the cultural evidence during the sentencing phase of the trial to determine the existence of mitigating circumstances.<sup>116</sup> Additionally, during the plea bargaining phase, both the court and the prosecutor may consider cultural evidence to permit the defendant to plead guilty to a lesser offense.<sup>117</sup>

One commentator espousing the intermediate approach rejects the consideration of cultural evidence at trial and adjudication, proposing instead a consideration of culture during the sentencing phase.<sup>118</sup> She states that the best place for the consideration of

---

112. See *id.* at 774-75 (asserting that in the intermediate approach, cultural factors are used to support traditional defenses primarily in order to ascertain a defendant's state of mind).

113. See *id.*

114. See Li, *supra* note 53, at 777 (asserting that there may not be adequate protection for an immigrant defendant's fair trial when the consideration of cultural factors during trial and sentencing is at the discretion of prosecutors and judges because of inconsistency in the treatment of cases and the absence of procedural safeguards or guidelines in the consideration of cultural factors); see also Kim, *supra* note 43, at 115 (supporting the "limited use" cultural defense approach).

115. See Kim, *supra* note 43, at 121 (noting the trial judge's role in making threshold determinations about whether to admit expert testimony, including the admissibility of cultural evidence); see also Sacks, *supra* note 70, at 548 ("Right now, decisions as to whether or not to allow the cultural defense in a given case have been largely, if not entirely, a question of judge-made law.").

116. See Kim, *supra* note 43, at 121. See also *Cultural Defense*, *supra* note 8, at 1295 (declaring that sentencing statutes often give judges considerable latitude in fixing appropriate sentences, which may or may not be influenced by extenuating cultural variables).

117. See *Cultural Defense*, *supra* note 8, at 1295 (explaining that the prosecutor is permitted to weigh extenuating circumstances when charging the defendant with a crime or when plea bargaining with the defense attorney).

118. See Matsumoto, *supra* note 35, at 530-34 (proposing the creation of a federal

culture is at the sentencing phase of a case because the broad discretion of the prosecutors during charging and the uneven results of applying cultural factors during trial are more likely to potentially result in a misuse of a formal cultural defense.<sup>119</sup>

Other solutions to the cultural defense debate from the intermediate position have been expounded as well. For example, in cases of non-violent crimes<sup>120</sup> motivated by cultural factors posing no threat to public safety, it may not be necessary to recognize a formal cultural defense if there are established defenses to relieve defendants from other cultures.<sup>121</sup> However, for violent crimes,<sup>122</sup> the suggested intermediate solution is to admit cultural evidence to explain the defendant's state of mind and then decide the case on its merits, subject to the caveat that any attempt to mitigate a defendant's culpability by using cultural background renders the defendant's culture subject to close scrutiny at trial.<sup>123</sup>

Another limited use approach advocates using the Model Penal Code ("Code") because it focuses more on the defendant's mental state<sup>124</sup> and certain provisions within the Code allow cultural evidence to be admitted to shed light on the defendant's state of mind without pathologizing behavior which might otherwise have a reasonable explanation if reasonableness were assessed "from the viewpoint of

---

sentencing guideline under Chapter 5, Part H of the Federal Sentencing Guidelines, that addresses the factor of culture as relevant in the determination of a sentence).

119. *See id.* at 534 ("The adoption of a new specific offender characteristic under the sentencing guidelines would curtail unwarranted sentencing disparity and in turn ensure certainty and provide just punishment.").

120. *See Li, supra* note 53, at 778 (defining non-violent crimes as those in which a defendant acts under the imperative of his/her own culture in violation of laws in the United States, but the acts do not pose any physical threat to others).

121. *See id.* at 780 (providing as an example the freedom of religion as constituting a complete defense to the charge of transporting game illegally taken for a defendant from the Alaskan Athabascan culture). *But see id.* at 781 (admitting that many cultural practices or customs of racial minorities do not have a religious overtone, and that a cultural defense based on a religious freedom alone may leave most cultural claims unprotected).

122. Violent crimes are "crimes characterized by extreme physical force such as murder, forcible rape, and assault and battery by means of a dangerous weapon." *Li, supra* note 53, at 782.

123. *See id.* at 787-88 ("This scrutiny may lead to a trial focusing on the 'validity or moral precepts of the individual's native society.'). Theoretically, the ultimate inquiry at trial when a cultural defense is invoked concerns the defendant's state of mind, but when confronted with testimony on the general characteristics of a culture, a jury may shift focus to determining only the culture's collective psyche instead of the defendant's state of mind. *See id.* at 789. Additionally, descriptions of defendants' cultures may be based on anecdotes reflecting bias and reinforcing stereotypes. *See id.*

124. *See Sacks, supra* note 70, at 547 (advocating the advantages of using the Model Penal Code as an intermediate approach).

994 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

one in the actor's situation under the circumstances as he believed them to be."<sup>125</sup> Not only is the Code flexible enough to admit cultural evidence, its greatest advantage is that it does not require one to employ "assumptions about 'culture,' [such as] who has one, who does not, and of what this 'culture' consists."<sup>126</sup>

Other intermediate approaches propose a restriction in the scope and applicability of the cultural defense, including allowing the use of the defense only for refugees, or only when consensual members of the same community are involved, or when immigrants have recently arrived in the new country.<sup>127</sup> However, these proposals are all criticized for being flawed in several important aspects: (1) they neglect to address the practical question of how society can function in an orderly manner when there is a balkanization of the criminal law; (2) equal protection problems inherent in the use of cultural evidence are not addressed; and (3) they place too much weight on the merits of pure multiculturalism while not resolving much.<sup>128</sup>

### III. INFANTICIDE CASES INVOLVING THE CULTURAL DEFENSE

This Part will discuss and analyze three child homicide cases, showing how the courts addressed the presentation of cultural factors in assessing the defendants' state of mind when they killed their children. These cases also reveal how the courts have not yet reached a consensus in how to integrate a cultural defense into the criminal law system and the difficulties they face in finding a place for the cultural defense in such cases.

#### A. *People v. Kimura*<sup>129</sup>

On January 29, 1985, Fumiko Kimura, a Japanese immigrant, took her six-month-old daughter Yuki, and four-year-old son Kazutaka, to the Santa Monica Beach to commit suicide (*oya-ko shinju*) with her children.<sup>130</sup> She had learned that her husband of eight years had

125. MODEL PENAL CODE § 210.3(1)(b) (2001). Using the Code, any defendant would be entitled to present evidence regarding the social and psychological circumstances that influenced the decision to commit the act in question. See Sacks, *supra* note 70, at 547.

126. *Id.* The Code's main purpose is to serve as a model providing guidance to states in drafting their own laws. See *id.*

127. See Coleman, *supra* note 72, at 1148.

128. See *id.*

129. No. A-09133 (L.A. Super. Ct., Nov. 21, 1985).

130. See Matsumoto, *supra* note 35, at 523. See, e.g., Leslie Pound, *Mother's Tragic Crime Exposes a Culture Gap*, CHI. TRIB., June 10, 1985, at 1C (describing how Kimura loved her children almost obsessively, and took them everywhere with her, even to die).

been keeping a mistress for the past three years, and, despondent over the affair, she chose to drown herself and her children to rid herself of the shame and humiliation of her husband's adultery.<sup>131</sup>

Kimura survived, although both her children died.<sup>132</sup> She was charged with two counts of felony child endangerment and two counts of murder for the deaths of her two children, and pled not guilty to both charges.<sup>133</sup> However, after entering into a plea bargain, Kimura pled no contest to lesser charges of voluntary manslaughter.<sup>134</sup> Four-thousand members of the Los Angeles Japanese community signed a petition in support of leniency in Kimura's case, asking the prosecutor to apply "modern Japanese law" to the case and claiming that the Japanese legal system would treat Kimura leniently had she committed *oya-ko shinju* in Japan.<sup>135</sup> The prosecutor, defense attorney, and the presiding judge declined to apply Japanese law to the case.<sup>136</sup> The court sentenced Kimura to one year in prison (which she had already served during the pre-trial detention) and released her with five years of probation with psychiatric counseling.<sup>137</sup>

---

131. See Goldstein, *supra* note 8, at 147. See also Kim, *supra* note 43, at 117; Pound, *supra* note 130 (explaining that *oyako-shinju* occurs in Japan when someone feels they are in a situation of "losing face" or that they are a burden to society, and committing suicide is deemed more acceptable). Upon learning of her husband's affair, Kimura believed herself to be a failure as a mother, a wife, and a person, and probably considered *oyako-shinju* to be the only honorable course to take. See *id.*

132. See Matsumoto, *supra* note 35, at 523 (describing how Kimura submerged the children's faces in the water and stating that the "ceremonial drowning" would have been successful if two college students had not intervened to pull Fumiko and the children out of the water); see also Michael Reese, *A Tragedy in Santa Monica*, NEWSWEEK, May 6, 1985, at 10. Kimura survived, but was consumed with anguish and resentment at herself and those who saved her. See *id.* She thought, "They must have been Caucasians. Otherwise, they would have let me die." *Id.*

133. See Matsumoto, *supra* note 35, at 523. Kimura did not even realize that she was accused of murder when the police filed charges against her. See Goldstein, *supra* note 8, at 147 n.63. She thought that her crime was failed suicide. See *id.*

134. See Goldstein, *supra* note 8, at 148; see also Robert W. Stewart, *Probation Given to Mother in Drowning of Her Two Children*, L.A. TIMES, Nov. 22, 1985, at 1 (reporting that Kimura could have been sentenced to as much as thirteen years in prison, and noting that the decision by the district attorney's office to accept pleas on the lesser charges of voluntary manslaughter were based largely on psychiatrists' reports).

135. See Spencer Sherman, *Legal Clash of Cultures*, NAT'L L.J., Aug. 5, 1985, at 1, 26 (stating that the petition asserted that Mrs. Kimura's actions were directed by "the roots of her culture," and that in her native land of Japan, she would have been charged at most with involuntary manslaughter "resulting in a light, suspended sentence, probation and supervised rehabilitation").

136. See Sacks, *supra* note 70, at 527. For a detailed analysis of how Kimura would have been treated by the Japanese legal system, see Bryant, *supra* note 35, at 10-31.

137. See Bryant, *supra* note 35, at 2; see also Matsumoto, *supra* note 35, at 524 (noting that Kimura was also eligible to face the death penalty due to the special circumstances of the multiple killings alleged by the district attorney).

Although both the prosecution and defense attorney denied that cultural factors played a role in the prosecution's recommendation of probation,<sup>138</sup> it is arguable that cultural considerations were used to prove that Kimura did not have the required mental state for murder charges<sup>139</sup> and to reduce her sentence.<sup>140</sup> Kimura's attorney argued an insanity defense instead of using a formalized cultural defense,<sup>141</sup> relying on psychiatric testimonies to show that she was mentally disturbed when she attempted *oya-ko shinju*.<sup>142</sup> Despite the statement that no cultural defense was asserted, the insanity defense presented was permeated with cultural factors relating to the practice of *oya-ko shinju*.<sup>143</sup> As Kimura's own attorney contended, she was "mentally deranged at the time—with a Japanese flavor, a Japanese fashion."<sup>144</sup>

Furthermore, as one commentator correctly argued, without considering the cultural evidence of *oya-ko shinju*, the prosecution's determination that Kimura did not have the requisite *mens rea* for murder would be otherwise illogical.<sup>145</sup> With no understanding or evidence of Kimura's cultural background, it would be very difficult to prove that her actions were the result of temporary insanity or

---

138. See Ma, *supra* note 51, at 467. But see Matsumoto, *supra* note 35, at 526 ("Even though culture was not taken into consideration as a mitigating factor in the determination of Mrs. Kimura's criminal liability, the sentencing judge consciously or unconsciously seemed to have taken it into account in accepting Kimura's diminished capacity at the time she committed the crime.").

139. See Kim, *supra* note 43, at 118 (stating that the circumstances of the case "believe the prosecution's claim that cultural evidence was not used to establish Kimura's mental state at the moment of the crime").

140. See Goldstein, *supra* note 8, at 148 ("Although the defense attorney did not argue a formal cultural defense, cultural factors still contributed to the reduced charge and sentence."); cf. Matsumoto, *supra* note 35, at 526 (concluding that the sentencing judge apparently considered Kimura's diminished capacity at the time she committed the crime, despite the fact that culture was not deemed a mitigating factor). In addition, Matsumoto suggests that even though cultural factors were considered by the judge in sentencing, it did not really matter that Japanese law was not used because Kimura's sentence would have been essentially the same under Japanese law as under U.S. law, and would have been decided under approximately the same principle of diminished capacity. See *id.*

141. See Goldstein, *supra* note 8, at 148.

142. See Matsumoto, *supra* note 35, at 524; see also Ma, *supra* note 51, at 467 (stating that the court's decision in accepting the plea and sentencing was based on the reports of seven psychiatrists reflecting that Kimura did not have the required malice for murder).

143. See Goldstein, *supra* note 8, at 148 ("It is evident that in Mrs. Kimura's case, the state of mind defense such as insanity was closely aligned to that of culture.").

144. *Id.*

145. See Kim, *supra* note 43, at 118 (arguing that the facts of the case demonstrate that the prosecution's assertion that cultural evidence was not used to establish Kimura's mental state does not logically reconcile with the prosecution's finding that Kimura did not have the requisite *mens rea* for murder).

2003] CULTURE IS NO DEFENSE FOR INFANTICIDE 997

“heat of passion.”<sup>146</sup> On the contrary, her actions<sup>147</sup> taken outside the cultural context, have all the indications of deliberation and premeditation, satisfying the requisite *mens rea* for murder.<sup>148</sup>

Ultimately, cultural evidence was used to establish that Kimura, in adhering to the Japanese practice of *oya-ko shinju*, was “temporarily insane.”<sup>149</sup> Apart from the petition signed by the Japanese community on behalf of Kimura, educating the court about the cultural context of the defendant’s acts, the defense also presented evidence that Japanese culture recognizes and understands *oya-ko shinju*, even if it does not actually promote the practice.<sup>150</sup> Her defense attorney also stated that Kimura’s behavior was “psychological in origin, but cultural in direction. Culture shaped or directed her actions.”<sup>151</sup>

### B. *People v. Wu*<sup>152</sup>

Helen Wu was born in 1943 in Saigon, China.<sup>153</sup> She moved to

---

146. *See id.* The prosecution stated that Kimura was “not a rational person at the time.” *Id.*

147. Kimura took her children on a two-hour bus ride from her home in Tarzana, California to the beach in Santa Monica to commit *oya-ko shinju*. *See id.* She left the baby stroller behind at the bus stop, presumably because she knew that she would not need it anymore. *See id.* Her actions indicate that she clearly intended to kill her children as well as herself. *See id.*

148. *See id.*; *see also* Lyman, *supra* note 9, at 98. Intent to commit the crime which constitutes the *actus reus* of the crime charged must be shown as part of the state of mind necessary for criminal liability to attach. *See id.*

149. Kim, *supra* note 43, at 118. Kim proceeds to criticize the misuse of cultural defense in Kimura’s case. *See id.* at 119. She argues that cultural evidence was used to prove that Kimura was mentally unstable at the time of the offense instead of being used to show that cultural beliefs shaped Kimura’s state of mind. *See id.* The author concludes that Kimura was not excused from her actions because *oya-ko shinju* would have been excused in her home country Japan; Kimura was excused because her adherence to *oya-ko shinju* was used to prove her temporary insanity which formed the basis for her substantive cognitive insanity defense and excused her actions. *See id.*

150. *See id.* at 117; *see also* Bryant, *supra* note 35, at 10-14 (explaining that in Japan, it is illegal to help someone commit suicide, although neither suicide nor attempted suicide is a criminal offense). Cases of parental infanticide (like cases of *oya-ko shinju*) in Japan are prosecuted as homicide, defined in Japanese law as the intentional killing, either by act or omission, of another person. *See id.* at 10. Infanticide is punishable by death under Criminal Code § 199, but there are ways by which penalties can be reduced. *See id.* at 10-11. Bryant also presents findings from the Research Committee in Japan that even without the mitigating factor of the mother’s intended suicide, relatively light sentences are given to mothers convicted of killing their own children. *See id.* at 14. In fact, killing an unrelated person carries more severe legal consequences than killing one’s own child. *See id.*

151. Kim, *supra* note 43, at 119.

152. 235 Cal. App. 3d 614 (1991).

153. *Id.* at 619.



998 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

Macau around 1963, where she married and had a daughter.<sup>154</sup> Helen met Gary Wu that same year, but he moved to the United States and married another woman.<sup>155</sup> In 1978 or 1979, Gary contacted Helen in Macau, saying that he had heard that she was divorced and had a daughter.<sup>156</sup> He told Helen that he planned to divorce his wife because he was unsatisfied with his marriage and his wife could not have children.<sup>157</sup> Gary sent Helen money to apply for a visa to the United States, and asked her to bring the rest with her when she came.<sup>158</sup>

When Helen arrived in the United States in November of 1979, Gary told her that he would soon be divorced and would marry her.<sup>159</sup> Gary did in fact obtain a divorce from his wife soon after, but did not tell Helen.<sup>160</sup> Gary and Helen then had a child, Sidney, who was born in November 1980.<sup>161</sup> Gary still did not pursue marriage, and Helen became depressed.<sup>162</sup> Helen told Gary that she would return to Macau, hoping that he would persuade her to stay.<sup>163</sup> He did not ask Helen to stay, and in February 1981 she returned to Macau, leaving Sidney with Gary because she did not want to be humiliated by having people know that she had had a child out of wedlock.<sup>164</sup>

From 1981 to 1988, Helen repeatedly and unsuccessfully asked Gary to bring Sidney to visit in Macau.<sup>165</sup> Finally, in September 1987, Gary told Helen that he needed money for his restaurant business, and agreed to bring Sidney when she told him she would loan him

---

154. At the time of the trial in February 1990, Helen's daughter was twenty-five years old. *See id.*

155. *Id.* Gary married Susanna Ku in the United States and opened several restaurants in the Palm Springs area. *Id.*

156. *Id.* at 619.

157. *Id.* They discussed the possibility of Helen coming to the United States and conceiving a child for him. *Id.* Helen was in love with Gary and believed that he would marry her after his divorce. *Id.*

158. *Id.* at 619-20. Gary sent Helen money to deposit in a joint bank account and \$20,000 to apply for a visa. *Id.*

159. *Id.* When she arrived to the United States, Helen lived with Gary's mother, and Gary's wife believed that Helen was a family friend. *Id.*

160. *Id.* at 620. Gary and his wife Susanna were divorced in December 1979 or January 1980. *Id.*

161. *Id.* at 620.

162. *Id.*

163. *Id.* (adding that Helen had no support system in the United States, was unable to speak English and unable to drive).

164. *Id.* (elaborating that only Helen's closest friend knew of her pregnancy out of wedlock and that such a thing was considered particularly shameful in Chinese culture).

165. *Id.*

the money in exchange for the visit.<sup>166</sup> Gary brought Sidney to visit Helen in Hong Kong in 1988, and she then showed him \$100,000 cash and a receipt for a certificate of deposit of a million Hong Kong dollars that she borrowed from a friend.<sup>167</sup> Gary proposed marriage during the visit, but she declined.<sup>168</sup> She was so distraught that she attempted suicide.<sup>169</sup>

In 1989, when Helen was visiting the United States, Sidney's paternal grandmother, Gary's mother, told Helen that when she died, Helen should take care of Sidney because Gary would not take good care of him.<sup>170</sup> A month later, on September 1, Gary and Helen were married in Las Vegas. Helen was still convinced that Gary married her for her money, and on the drive back from Las Vegas, she asked him about his intentions and he responded that until she produced the money, she had no right to speak.<sup>171</sup>

Eight days later, on September 9, Helen interceded on Sidney's behalf when Gary hit him.<sup>172</sup> That same evening, as she was playing with Sidney, Helen's son told her that Gary would scold and beat him, that Gary called her "psychotic" and "very troublesome," that the house they lived in belonged to Gary's girlfriend and that Gary loved his girlfriend more than him.<sup>173</sup>

As she listened to Sidney, Helen began to experience heart palpitations and had trouble breathing.<sup>174</sup> She told Sidney that she wanted to die and asked Sidney if he would go too, and he cried and clung to her neck.<sup>175</sup> Helen cut off a cord from a window blind, returned to the bedroom and strangled her son.<sup>176</sup> Before attempting

---

166. *Id.*

167. *Id.* Sidney was then seven years old. *Id.*

168. *Id.* (stating that Helen declined because she was depressed over the fact that the proposal seemed motivated by the money and because she did not know whether Gary was still married or not).

169. *Id.* During Gary's visit in Hong Kong, he also suggested to Helen's friend, Chung, that he would sponsor her American citizenship and marry her if she would invest money in his restaurant. Chung rejected Gary's advances and did not tell Helen about them. *Id.* at 621.

170. *Id.* at 621. Gary's cousin gave Helen the same advice. *Id.*

171. *Id.* Helen told Gary that he would be sorry for his remark, that she would return to Macau and kill herself. *Id.*

172. *Id.* at 622 (recounting that Gary hit Sidney for not wanting to get out of the family car).

173. *Id.*

174. *Id.* (adding that Helen thought back to Sidney's grandmother and Gary's cousin's advice concerning her taking care of Sidney).

175. *Id.*

176. *Id.* According to Helen, she did not remember the strangling itself. *Id.* She stopped breathing, and when she started breathing again, she was surprised at how

1000 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

to strangle herself, she wrote Gary a note saying how he had bullied her too much.<sup>177</sup> When she failed to strangle herself, Helen slashed her wrist with a knife.<sup>178</sup> When Gary returned home several hours later, he found Sidney dead and Helen in an impaired level of consciousness.<sup>179</sup> Helen was later revived in an emergency room.<sup>180</sup>

Helen was first charged with murder under Penal Code § 187, convicted of second-degree murder by a jury of the Superior Court, and sentenced to prison for fifteen years to life.<sup>181</sup> She subsequently appealed, contending that the trial court erred in refusing to give two requested jury instructions, one related to the defense of unconsciousness and the other related to the effect that the defendant's Chinese cultural background might have had on her state of mind when she killed her son.<sup>182</sup> The Court of Appeals reversed Helen's conviction, holding that it was error for the trial court to refuse to instruct the jury on unconsciousness, despite the existence of evidence supporting the giving of such an instruction.<sup>183</sup> Furthermore, the trial court was ordered to grant the defendant's jury instruction allowing the jury to consider evidence of Helen's

---

fast her son had died. *Id.*

177. *Id.* The note did not mention Sidney's killing. *Id.* It did, however, state that she could die with no regret now that the air was vented. *Id.*

178. *Id.* Before lying down on the bed next to her son, Helen placed a wastepaper basket under her bleeding wrist so that the floor would not be dirtied with her blood. *Id.*

179. *Id.*

180. *Id.* at 622-33. The doctor who saw Helen in the emergency room testified that she had cut the veins in her wrist, but not the arteries, and that venous bleeding if not irritated or prevented from clotting, would stop and the person would not die. *Id.*

181. *Id.* at 623.

182. *Id.*

183. *Id.* at 634 ("[I]n conclusion, because the jury was not instructed on unconsciousness, despite the existence of evidence to support the giving of such an instruction, and because the issue of unconsciousness was not resolved adversely to defendant under the other instructions given, we must reverse her conviction."). The instruction on unconsciousness was as follows:

A person who commits what would otherwise be a criminal act, while unconscious, is not guilty of a crime. This rule of law applies to persons who are not conscious of acting but who perform acts while asleep or while suffering from a delirium of fever, or because of an attack of [psychomotor] epilepsy, a blow on the head, the involuntary taking of drugs or the involuntary consumption of intoxicating liquor, or any similar cause. Unconscious does not require that a person be incapable of movement. (Unconsciousness includes not only a state of coma or immobility, but also a condition in which the subject acts without awareness.) . . . If after a consideration of all the evidence, you have a reasonable doubt that the defendant was conscious at the time the alleged crime was committed, [he/she] must be found not guilty.

*Id.* at 623-24.

2003] CULTURE IS NO DEFENSE FOR INFANTICIDE 1001

cultural background in determining her mental state.<sup>184</sup> The Court of Appeals found that evidence of Helen's cultural background was clearly relevant to the issues of premeditation and deliberation as well as the issues of malice aforethought and the existence of heat of passion at the time of the killing, which would reduce an intentional killing to voluntary manslaughter.<sup>185</sup> This decision is consistent with the Model Penal Code approach.<sup>186</sup>

Initially, the trial court had refused to give the cultural defense instruction because it did not want to put the "stamp of approval on defendant's actions in the United States, which would have been acceptable in China."<sup>187</sup> The prosecution was worried that there was no appellate law or guidance on the subject of instructions on cultural defenses and that there was nothing in Chinese culture or religion that encouraged filicide.<sup>188</sup> In the prosecution's mind, Helen was not a traditional Chinese woman and was not affected by the relevant cultural influences, and had instead been motivated by a desire for revenge against her son's father rather than by a mother's love.<sup>189</sup>

The appellate court, however, found that there was indeed ample evidence of both the defendant's cultural background and how it could have affected her mental state at the time of the offense.<sup>190</sup> The

---

184. *Id.* at 646.

Because the requested instruction was, for the most part, a correct statement of the law, and because it was applicable to the evidence and one of defendant's two basic defenses on this case, 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.

*Id.* The defendant's instruction on cultural background was 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 the evidence in determining the presence or absence of the essential mental states of the crimes defined in these instructions, or in determining any other issue in this case.

*Id.* at 634-35.

185. *See id.* at 639-40. Manslaughter is defined as an unlawful killing of a human being without malice aforethought. *See* BLACK'S LAW DICTIONARY 976 (7th ed. 1999). Involuntary manslaughter is defined as an act of murder reduced to manslaughter because of extenuating circumstances such as adequate provocation causing "heat of passion" or diminished capacity. *Id.*

186. *See supra* notes 124-26 and accompanying text.

187. *Wu*, 235 Cal. App. 3d at 635.

188. *See id.* at 635-36 (arguing that the evidence that defendant had the values and motives of a traditional Chinese mother was contradicted by other evidence).

189. *See id.* at 636.

190. *See id.* at 639. Even though the appellate court found on retrial that the jury should be allowed to consider evidence regarding the defendant's cultural

1002 JOURNAL OF GENDER, SOCIAL POLICY &amp; THE LAW [Vol. 11:2

defense produced cultural evidence through testimonies from experts on transcultural psychology.<sup>191</sup> Dr. Ching-Piao Chien, one of the experts, testified that Helen's actions were done out of a mother's love and responsibility to bring her child with her to another heaven when she realized that her son was an unwanted child, uncared for by Gary, and that there was no hope for her or a way for her to survive on this earth.<sup>192</sup> Another expert, Dr. Terry Gock, a clinical psychologist, testified as well that Helen's cultural background was intertwined with her emotional state on the evening she killed Sidney and that in her culture, in her mind, there was no other option at the time but to kill her herself and take her son along so that she could devote herself to caring for Sidney in the next world.<sup>193</sup>

background, Volpp notes that a tailored jury instruction might not have been necessary since jury instructions in California are very flexible. See Volpp, *supra* note 42, at 86 n.133. In addition, the case may have been unpublished because there were no grounds for the appellate court's recommendation that "cultural difference" be a jury instruction under California law. See *id.*

191. See Wu, 235 Cal. App. 3d at 642. Transcultural psychology involves culturally sensitive evaluations and treatment recognizing variations in mental illnesses among ethnic groups. See Volpp, *supra* note 42, at 87 n.138.

192. See Wu, 235 Cal. App. 3d at 642-43. Dr. Chien testified that:

She thought the only way to find a way out is to bring this Sidney to go together so the mother and son can finally live together in the other heaven, other world if that cannot be done in this realistic earth. . . .

[S]he was under the heat of passion when she realized that her son was unwanted son, uncared by Gary, passed around from one woman to the other woman, and now the grandmother is dying and she was planning to leave, 'What will happen to Sidney?' . . .

Helen had some realistic reason to be 200 percent or 300 percent more guilty in addition to her normal guilt feeling that came from depression. She would feel that she couldn't really do the duty to the son, so the only way to fulfill her duty when she realized her son was neglected . . . she thought the way to go is to the heaven. . . .

[I]n my expertise as a transcultural psychiatr[ist] . . . and my familiarity with the Chinese culture . . . she thought she was doing that to bring a child together with her when she realized that there was no hope for her or a way for her to survive. . . .

It's a mother's altruism. . . .

But in the Asian culture when the mother commits suicide and leave the children alone, usually they'll be considered to be a totally irresponsible, and the mother will usually worry what would happen if she died, 'Who is going to take care of the children?'

*Id.*

193. See *id.* at 644-45. Dr. Gock stated:

[It] is very difficult to divorce ourselves from our culture and act in a totally culturally different way . . . [S]he in many ways is a product of her past experiences, including her culture . . . [S]ome of the information that she got from her son that evening, it was very distressful for her . . . And in some sense the kind of alternatives that she . . . saw how to get out of that situation [were] quite culturally determined. . . .

[P]erhaps in this country . . . a traditional woman, may see other options. But in her culture, in her own mind, there are no other options but to . . .

2003]

CULTURE IS NO DEFENSE FOR INFANTICIDE

1003

C. *Bui v. State*<sup>194</sup>

On June 12, 1986, Quang Ngoc Bui was convicted of murdering his three children, a capital offense under § 13A-5-40(a) (10) of the 1975 Alabama Code.<sup>195</sup> At the sentencing hearing, the jury returned an advisory verdict recommending that Bui be sentenced to death.<sup>196</sup> After considering the jury's recommendation and weighing the aggravating and mitigating circumstances, the trial court sentenced Bui to death by electrocution.<sup>197</sup>

Around midnight on February 5-6, 1986, the Montgomery police received a call from Bui's estranged wife expressing concern about the safety of her children.<sup>198</sup> At the time of the murders, Mrs. Bui was away from home and had called Bui several times.<sup>199</sup> During these phone conversations, Bui urged his wife to come home and made threats that if she did not, she might never see him and the children alive again.<sup>200</sup> Bui told his wife that she would have to get home within fifteen minutes if she wanted to see the children alive again.<sup>201</sup> Mrs. Bui heard one of the children crying in the background, and shortly after this telephone conversation, she placed the call to the Montgomery police to check on the children.<sup>202</sup>

When the officers arrived at the Bui residence, they discovered Bui and the bodies of the three children, Phi Ngoc Bui (age 8), Julie Quang Bui (age 7), and April Nicole Bui (age 4) lying dead on the

---

kill herself and take the son along with her so they could sort of step to the next world where she could devote herself, all of herself to the caring of the son.

That what she believed was that she was not exactly killing but, through death, both of them would be reunited in the next world where she could provide the kind of caring that Sidney did not get in this world.

*Id.*

194. 717 So. 2d 6 (Ala. Crim. App. 1997).

195. *See id.* at 10. Section 13(A)-5-40(a) (10) makes capital "murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct." *Id.*

196. *See id.*

197. *See id.* The Court of Criminal Appeals of Alabama and the Alabama Supreme Court affirmed Bui's conviction and death sentence. *Id.*

198. *Id.*

199. *Id.* at 11. Bui and his wife had experienced marital difficulties for several years, there had been several separations and Bui suspected that his wife was seeing other men. *See id.*

200. *Id.* One of these calls happened around 11:00 p.m. on the night of the murders. *Id.*

201. *Id.*

202. *Id.* at 10-11. Upon receiving the call, the police went to Bui's residence and at their insistence, were admitted into the residence by Bui's mother. *See id.*

1004 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

bed and covered with blood.<sup>203</sup> Their throats had been cut with a “large kitchen-type knife,” and Bui himself had cuts on each side of his neck, although these self-inflicted wounds were not life-threatening.<sup>204</sup>

While at the hospital receiving stitches, Bui admitted that after waiting fifteen minutes from the end of the phone call, he “lost his temper” and killed his children.<sup>205</sup> Later at police headquarters, he admitted that he killed the children because he was angry at his wife and did not want her to have them.<sup>206</sup> The appellant did not deny killing the children, but argued that he was guilty of manslaughter, not murder, because the acts were the result of a sudden heat of passion caused by provocation and he was insane at the time of the killings.<sup>207</sup>

In an attempt to mitigate the charges, Bui presented testimony of a psychiatrist and a “cross-cultural” counselor in support of his insanity plea.<sup>208</sup> The essence of the cross-cultural defense was that Bui’s values and perceptions were formed by the Vietnamese culture of which he was a product,<sup>209</sup> that he had experienced overwhelming difficulties in assimilating to life in the United States after his involuntary departure from Vietnam, that he was despondent because of his wife’s infidelities, and that his state of mind and actions in killing his children were to some degree understandable—even “normal”—in terms of Vietnamese culture, and that therefore the law should not hold him culpable to the fullest extent, or at least not culpable for capital murder.<sup>210</sup>

The defense called Dr. Quan Cao to establish the cross-cultural defense.<sup>211</sup> Dr. Cao testified that Bui had several risk factors from his

---

203. *Id.* at 11.

204. *Id.*

205. *Id.* He said: “I cut my kids. I didn’t want her to get them.” *Id.*

206. *See id.* Mrs. Bui testified that Bui had admitted to her that he killed the children because he was mad at her for not coming home and because he thought she was “running around on him.” *Id.*

207. *See id.*

208. *See id.* at 13-14. The defense’s strategy was to show that at the time of the offense, Bui was “unable to appreciate the consequences of his actions, could not distinguish between right and wrong, was out of touch with reality, and lacked the substantial capacity to appreciate the criminality of his conduct.” *Id.*

209. *Id.* at 13. Bui came to the United States in 1975 as a refugee from Vietnam, where he had been serving in the South Vietnamese army when the country fell to the North Vietnamese. *See id.*

210. *Id.* at 14.

211. *See id.* Dr. Cao was born in Vietnam and had a Ph.D. degree in cross-cultural training. *Id.* at 14-15. The court also noted that at trial, Dr. Cao did not hold himself out as a psychologist, stated that he was not qualified to pass upon the issue of Bui’s

refugee experience that caused stress in his life, that Bui was missing his family in Vietnam and was unable to communicate with them, that he was obsessed with the fact that his wife was unfaithful to him, and that he was still suffering from survivor's guilt, ten years after his experience in Vietnam.<sup>212</sup> Furthermore, Dr. Cao explained that in Vietnam, if a man's wife is running around on him, it would be considered a "loss of face" and had he been in Vietnam, he would have returned his wife to her family to "save face."<sup>213</sup> However, since Bui was living in the United States, the only way that he felt he could "save face" was by killing himself and his children.<sup>214</sup>

Neither the trial court nor the appellate court was convinced by the cultural defense.<sup>215</sup> The trial court found from the remaining evidence that the capital offense committed was especially "heinous, atrocious or cruel" compared to other capital offenses.<sup>216</sup> The court also found that Bui's cultural background was not the cause of the homicide because he had the capacity to appreciate the criminality of his conduct despite suffering from an emotional disturbance.<sup>217</sup>

Even though *Bui* almost mirrored *Kimura*—spousal infidelity causes shame and the betrayed parent kills the children and unsuccessfully attempts suicide—the outcomes are harshly divergent, as *Kimura* only received probation while *Bui* received the death penalty.<sup>218</sup> The judge and jury did not find any sympathy with the values underlying *Bui*'s actions because unlike women, men in the Anglo-American culture who kill children are perceived as wicked, particularly heinous and cruel, and in need of punishment.<sup>219</sup> This disparity in outcomes also

---

sanity, and was not allowed to testify as to his opinion concerning *Bui*'s sanity at the time of the commission of the offense. *Id.* at 19.

212. *See id.* at 13-15, 18. *Bui* was a surviving refugee of the Vietnam War but came into the United States involuntarily, not knowing if he still had living family members in Vietnam. *See id.*

213. *Id.* at 15; *see also* Coleman, *supra* note 72, at 1139 n.223 (adding that *Bui* also argued that because Vietnamese culture places such a high value on children being raised by both parents, when one spouse has an affair, the other often resorts to suicide or other violent acts to "save face").

214. *See Bui*, 717 So. 2d at 15.

215. *See Ma*, *supra* note 51, at 469 (reporting that the appellate court affirmed the trial court's decision not to allow the use of cultural evidence).

216. *See Bui*, 717 So. 2d at 29; *see also Ma*, *supra* note 51, at 469.

217. *See Ma*, *supra* note 51, at 469.

218. *See Chiu*, *supra* note 52, at 1118 (arguing that the divergent results in the two cases demonstrate "how the dynamics of the intermediate approach [to the culture defense] recognize only cultural similarity and punish dissimilarity").

219. *See* Kris Axtman, *Why Juries Often Spare Mothers Who Kill*, CHRISTIAN SCI. MONITOR, July 9, 2001, at 3 (reporting that mothers who are viewed as traditional nurturers of the family generally receive lighter sentences than fathers do, because men are not viewed as having the same intense bond with their children).



1006 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

reflects the courts' inability and inconsistency in their consideration of cultural factors and application of the cultural defense.

#### IV. THE CULTURAL DEFENSE IN INFANTICIDE CASES

Unlike British law,<sup>220</sup> American law has not created any uniform laws against infanticide,<sup>221</sup> and most child murder cases are prosecuted as homicide.<sup>222</sup> Absent a statute, in common law it is the general rule that if a child dies before birth, the act causing the death is not a crime.<sup>223</sup> However, if the child is born alive and thereafter dies from the effects of the defendant's felonious acts, the culpability is the same as that incurred in killing any other human being.<sup>224</sup> Furthermore, because defendants in most jurisdictions lack a presumption of mental illness, evidence of mental illness, diminished capacity, or other debilitating disorders (such as post-partum psychosis) must be asserted and proven in order to escape or mitigate harsh sentences.<sup>225</sup>

In cases of infanticide and filicide involving immigrant parents, as evidenced in the cases above, defendants have used a cultural defense to prove that they did not have the required *mens rea* at the time of committing the act in question in an attempt to mitigate or negate

---

220. See SCHWARTZ & ISSER, *supra* note 1, at 84. British law created the Infanticide Act of 1922 and the Infanticide Act of 1938, both identifying post-partum psychosis as a means of reducing the charges for neonaticide and infanticide from murder to manslaughter. *Id.*; see also Brenda Barton, Comment, *When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers*, 51 SMU L. REV. 591, 596 (1998) (identifying England as "the forerunner among countries that statutorily recognize and favor mothers who kill their young children for psychological reasons," and stating that England's Infanticide Act presumes that all women are ill if they kill their infants within the first twelve months of life).

221. See SCHWARTZ & ISSER, *supra* note 1, at 85 (claiming that unlike the British pattern, not only does each American state have its own laws for all imaginable infractions, but in some areas, as is true in infanticide laws, there may not even be a federal law that acts as a guideline). "In the absence of federal law dealing with neonaticide and infanticide, and in accord with the 10th Amendment, we are confronted with at least 52 different sets of statutes dealing with such an event." *Id.* at 116.

222. See Barton, *supra* note 220, at 597 (noticing that American courts historically were very harsh in their treatment of infanticide and that, unlike England, infanticide in America is not generally considered a separate class of crime, but is charged under murder or manslaughter statutes).

223. *But see* 40 AM. JUR. 2D *Homicide* § 9 (1999) (indicating that some courts have held that a viable fetus is a human).

224. See *id.* In other words, if the child can be said to have had an independent existence, the act of killing the child will be murder or manslaughter; otherwise it will not. See *id.*

225. See Barton, *supra* note 220, at 597-605 (describing the insanity defense in the United States as well as alternatives to the insanity defense that mitigate criminal culpability, such as a finding of guilty but mentally ill and diminished capacity).

2003] CULTURE IS NO DEFENSE FOR INFANTICIDE 1007

culpability.<sup>226</sup> There are several reasons, however, why the cultural defense should not be allowed to exculpate the intentional killing of a child.<sup>227</sup>

#### A. *Protection for the Child Victim*

Within the realm of child abuse that varies widely from culture to culture,<sup>228</sup> no culture explicitly promotes or legally allows children to be killed, which is a crime far more serious than corporal punishments, for example, where a child is temporarily bruised.<sup>229</sup> Recognizing a formal cultural defense in cases of child murder is an injustice to the child and fails to protect the victim<sup>230</sup> because “[t]he victims do not receive their own justice, and they are victimized a second time through the cultural defense.”<sup>231</sup> This makes the defense illogical since it does not protect the entire group of immigrants that the blanket cultural defense is supposed to protect.<sup>232</sup> In theory, as the proponents of the cultural defense would argue, the defense is consistent with the concepts of individualized justice embodied in criminal law and cultural pluralism.<sup>233</sup> However, when the defense does not protect the victims within the immigrant group that it is supposed to protect, the values of individualized justice and cultural pluralism are stripped of their integrity.<sup>234</sup>

It also seems unusually harsh to allow the children to be victims of their parents’ circumstances and actions when the children did

---

226. See *infra* Part II.

227. See discussion *infra* Part IV.A-D.

228. See Taylor, *supra* note 20, at 342 (reasoning that it has been difficult to reach an agreement on a definition of child abuse because each individual’s view of acceptable and unacceptable child-rearing practices depends to a large extent on the way he or she was raised and what was acceptable or unacceptable within his or her culture). Furthermore, as different cultures come into contact with each other and cultural child-rearing practices and beliefs clash in conflict, disputes can arise concerning the “correct” definition of child abuse. See *id.*

229. See *id.* at 338-41 (providing some statutory definitions of child abuse in the different American states, including physical injury or neglect, sexual assault, corporal punishment that is willfully “cruel or inhuman” or results in a “traumatic condition” and death, among others).

230. See Goldstein, *supra* note 8, at 162-64 (arguing that in reality, the defense harms immigrant groups by implying that “Asians value justice less”).

231. *Id.* at 163.

232. See *id.* (affirming that in reality, the concept of individualized justice is a mockery in the paradigm of a cultural defense because the result does not provide justice for many individuals).

233. See *supra* Part II.A.

234. See Goldstein, *supra* note 8, at 164 (noting that only a small percentage of immigrant populations are protected under a blanket culture defense).

1008 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

nothing to provoke the acts that resulted in their deaths.<sup>235</sup> Children need particular protection because of their vulnerability and dependence upon their parents, whom they need to provide for their care.<sup>236</sup> Jurisdictions that incorporate the “misdirected retaliation”<sup>237</sup> limitation to the provocation defense would refuse to recognize provocation based on cultural factors if the victims were known by the defendant not to be the provoking parties on the theory that the victims did not deserve the provoked retaliation.<sup>238</sup>

Furthermore, tolerance of the cultural defense in criminal cases also violates the principle of equal protection<sup>239</sup> which holds that all protections provided by the government must be provided to everyone equally without regard to race, gender, or nationality.<sup>240</sup> If the cultural defense is allowed to result in lesser punishments for immigrants than for non-immigrants in similar crimes, immigrant victims will be effectively denied the protection and vindication provided by the criminal law to similarly-situated victims who are not immigrants.<sup>241</sup>

This may be illustrated, for example, by examining *Kimura* in light

---

235. In none of the cases described above in Part III were the children in any way the source of provocation for their partners actions. See Sing, *supra* note 49, at 1874 (acknowledging that *Kimura*'s victims, her two children, were clearly not the source of the provocation).

236. Interview with Ann Shalleck, Professor of Law and Director of the Women and the Law Clinic at the *Washington College of Law, American University*, in Washington, D.C. (Oct. 24, 2001).

237. See Sing, *supra* note 49, at 1874-75 (identifying the primary justification for misdirected retaliation as the notion that reasonable people would not under any circumstances harm third parties, even when provoked).

238. *But see id.* (observing there is a strong argument that a cultural/provocation defense would trump a misdirected retaliation bar since the notion that reasonable people would not under any circumstances harm third parties when provoked is itself a culturally contingent concept). It is also argued that under the logic of the Model Penal Code, even in Anglo-American cultures a reasonable person might lash out at an third party if adequately provoked. See *id.* at 1875.

239. See Coleman, *supra* note 72, at 1135-36 (quoting Representative John Bingham on the principle underlying the Equal Protection Clause). “[T]he protections given by the laws of the United States shall be equal in respect to life and liberty . . . [for] all persons.” *Id.*

240. See *id.* (arguing that permitting cultural evidence to be dispositive in criminal cases violates the fundamental principle that society has a right to governmental protection against crime).

241. See *id.* (recognizing that proponents of the cultural defense would disagree with this characterization of the effects of the defense, arguing instead that the cultural defense is used out of respect for the inherent worthiness of the foreign culture). Coleman, however, believes that the effect of the violence on victims of immigrant crime is not different because of this benevolence and that whatever the motivation, immigrant victims are protected to a lesser degree than others who are not members of the groups at issue. See *id.* at 1141 n.231.

of the Susan Smith case.<sup>242</sup> If *Kimura* is divorced from its cultural context, all that is left is a narrative of a woman who was so despondent about her personal life that she wanted to die.<sup>243</sup> With this plan in mind, she took herself and her two children to the beach at Santa Monica to drown in the water.<sup>244</sup> Similarly, Susan Smith also drowned her two children, except that instead of physically holding them under the water, she sent her car with the children inside into a lake in South Carolina.<sup>245</sup>

Despite the similarities between the two cases, the reactions to and results of both were very different. Although both *Kimura* and Smith were initially charged with first-degree premeditated murder, in *Kimura's* case the murder charges were abandoned and she was allowed to plead guilty to the reduced charges of voluntary manslaughter.<sup>246</sup> *Kimura* spent only one year in jail, which she had already served during her trial. Consequently, she was set free on five years of probation and ordered to undergo counseling.<sup>247</sup> Smith, on the other hand, was not as fortunate. She was unable to get the charges of first-degree murder reduced, and was sentenced to life in prison for the similar drowning of her two children.<sup>248</sup> Even though

242. See *id.* at 1138 n.217 (stating that Susan Smith was charged by the state of South Carolina with first-degree murder of her two sons, Michael and Alexander Smith); see also *Grand Jury Indicts Susan Smith in Drownings*, CHI. TRIB., Dec. 12, 1994, at C2 (announcing that the grand jury spent less than three hours before indicting her on murder charges for pushing her car down a lake and drowning her two sons who were strapped inside). Smith was separated from the boys' father, and confessed to suicide because of problems in her relationship with another man, who had said that he was not ready to raise a family. See *id.*

243. See Coleman, *supra* note 72, at 1142 (adding that *Kimura* did not want to die without her children).

244. See *supra* Part III.A.

245. See Coleman, *supra* note 72, at 1142 (describing how the facts of the Smith case were, in all relevant aspects other than culture, the same as those in *Kimura*). Like *Kimura*, Smith claimed that she wanted to kill herself after she killed her children. See *id.* at 1142 n.236. *Kimura* killed her children in order to send them to a better place. See *id.* at 1142. Likewise, Smith claimed that by drowning her children, she was protecting herself and them from any grief and harm. See *id.* at 1142 n.236. Both women were also despondent because they had been rejected by someone they loved or were close to—*Kimura* by her husband and Smith by her lover. See *id.*

246. See Lyman, *supra* note 9, at 92 (explaining that in *Kimura's* case, while the suicide attempt was cultural in its methodology, psychiatric testimony was used to show that *Kimura* was "mentally deranged" and therefore lacked the required intent for first-degree murder since she lacked malice). It was felt that a cultural defense would only serve to put the culture on trial when it was *Kimura*, not the Japanese culture, who was on trial. See *id.* See also Coleman, *supra* note 72, at 1143 (noting that pursuit of the murder charges was abandoned after the defense and the Japanese-American community educated and sensitized the prosecution and the judge about the Japanese culture regarding *oyako-shinju*).

247. See *supra* Part III.A.

248. See Coleman, *supra* note 72, at 1143 (indicating that, throughout the trial, the

1010 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

throughout Smith's trial there was much discussion of her psychological history and adverse personal circumstances, the public's focus of the criminal proceedings remained on her victims, her two sons.<sup>249</sup>

There is a troubling disparity in the way the legal system has responded to the similar acts of the two women: Kimura is set free because her drowning her children is viewed as being consistent with her native cultural practices, while Smith is charged with capital murder for essentially the same act.<sup>250</sup> Similarly, there is a disparity as well when shifting the focus on the child-victims of such crimes.<sup>251</sup> The criminal system failed to vindicate the drowning of Kimura's children, and the message that it sends to the Japanese-American children is rather dismal: that the cultural defense leaves them without the protection of the criminal law.<sup>252</sup> In comparison, the results of Smith's case show the legal system's apparent intent to vindicate fully the drowning of her two children.<sup>253</sup> Furthermore, the message sent in the Smith case is very different: that the legal system does value these American children's lives and the lives of others like them.<sup>254</sup>

#### B. Weakness of Culture as a Defense to Criminal Liability

In order to establish criminal liability, the state must prove the concurrence of both the *actus reus* (criminal act) and the *mens rea* (guilty mind).<sup>255</sup> The operation of a cultural defense must necessarily negate the showing of a presence of the requisite *mens rea* at the time of the act charged.<sup>256</sup> The criminal intent element involves an intent

---

prosecutor continued to pursue the death penalty, and although Smith was spared the death penalty, she was found guilty of murdering her children). *See id.*

249. *See id.* (revealing that even her defense attorney did not seriously attempt to obscure the focus on her victims).

250. *See id.* (observing the disparity in the legal system's response to these similar acts).

251. *See id.* (remarking that the cultural defense results in neither deterrence nor retribution).

252. *See id.* (commenting that this result serves neither the intent of deterrence nor that of retribution, and consequently, immigrant children are victims twice: once physically and then legally).

253. *See id.* at 1143-44 (stating that the Smith case sends a message that we value the children's lives).

254. *See id.* (emphasizing that even more narrowly, the value is placed particularly on other white American children, not just any American children).

255. *See Lyman, supra* note 9, at 98 (discussing that in criminal law, the *mens rea* and the *actus reus* must concur to constitute a true crime).

256. *See id.* (stating that in a prosecution for any crime, the *mens rea* element will only be sufficient if it can be shown that the defendant's state of mind at the time of the commission of the offense was "free from any factor which would be recognized

2003] CULTURE IS NO DEFENSE FOR INFANTICIDE 1011

to do that which constitutes a violation of the criminal law.<sup>257</sup> Intent, therefore, looks to those consequences that the act is done to accomplish, and that the actor knows, or should know, is substantially certain to result.<sup>258</sup>

Intent must be differentiated from motive, which is neither an element of nor a factor in determining criminal intent.<sup>259</sup> The underlying argument supporting a cultural defense stresses that cultural traditions either cause or guide the actor's conduct.<sup>260</sup> However, as defined above, the criminal intent relates to the actor's state of mind as regarding the consequences of his or her acts, and does not concern itself with the reasons that motivate such conduct.<sup>261</sup> Thus, it would seem that while evidence of cultural background may serve to elucidate a defendant's state of mind at the time of the crime, cultural factors may not act to obviate criminal liability as it relates more to motive rather than to knowledge of consequences.<sup>262</sup>

### C. Assuming Individual Responsibility

Most often, the reason an otherwise criminal act would not be found to violate criminal law is that it falls roughly into one of the broad criminal law defense categories of justification or excuse.<sup>263</sup> A conduct is justified if what was done was fully warranted by the

---

as sufficient for exculpation in such a case"). Additionally, the state of mind required to support criminal liability must include "a showing of intent to do the crime which constitutes the *actus reus* of the very crime, or some other mental element . . . recognized by law." *Id.*

257. *See id.* (describing how at early common law, *mens rea* may have meant little more than a general immorality of motive or blameworthiness, whereas today it is a particular kind of intent).

258. *See id.* (adding that every person is presumed to intend the necessary and legitimate consequences of what he or she knowingly does).

259. *See Lyman, supra* note 9, at 99 (declaring that no definition of criminal intent encompasses the motivation of the actor in committing the act charged).

260. *See id.* (calling attention to the fact that this underlying argument also assumes that the actor presumes his or her conduct not to be illegal).

261. *See id.* (indicating that this knowledge of consequences in criminal intent is narrowly defined and may be established if the conduct is performed "purposefully," "knowingly," "recklessly," or "negligently").

262. *See id.* *See also Sing, supra* note 49, at 1854-55 (stating that the logic of the cultural defense focuses not on the linkages between the culture and "irrational" mental defect, but rather on the very rational process by which culture influences people's behavior and that the introduction of cultural evidence attempts to answer the question of why the defendant acted as he or she did).

263. *See Lyman, supra* note 9, at 99-100 (setting forth the five basic categories of defenses to criminal responsibility: failure of proof defense, offense modifications, justifications, excuses, and non-exculpatory public policy defenses). For purposes of evaluating the cultural defense, the categories of justification and excuse would seem to offer the defendant the best potential to establish some factor that would be recognized as sufficient for exculpation. *See id.* at 100.

1012 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

circumstances as viewed from a general, objective perspective.<sup>264</sup> In contrast, to excuse a person's conduct is to acknowledge a wrongful act while negating any criminal liability, since the actor for some reason was "not to blame."<sup>265</sup> These excuses are viewed from an "individual, subjective perspective."<sup>266</sup>

The distinction, therefore, between justification and excuse must lie with a distinction between warranted and unwarranted action because justification speaks to the rightness of an act while excuse asks whether the actor is accountable for a concededly wrongful act.<sup>267</sup> For purposes of evaluating the cultural defense, the criterion for this distinction must be objective.<sup>268</sup> Otherwise, allowing a person's subjectively held cultural beliefs to negate criminal liability would suggest that these beliefs inhibit one's capability of knowing or appreciating the consequences of one's own conduct, putting the culture itself on trial as much as the individual.<sup>269</sup> Certainly, this is neither the purpose of a criminal trial nor the objective of criminal law.<sup>270</sup>

The criminal law, however, does serve as an important medium for transmitting to the public the standards of conduct that are socially acceptable<sup>271</sup> and as such, the law should reflect the society's present

264. See *id.* at 100-01 (explaining that a justification defense involves warranted action, encompassing action which could be properly performed by others, which others could assist, or which could not be interfered with by those capable of stopping them). An essential element of the justification defense is that a direct causal relationship be reasonably anticipated to exist between the defendant's action and the avoidance of harm. See *id.* at 100-01 n.87.

265. *Id.* at 101 (noting that the usual reason not to convict a person for a crime committed is due to an inability to formulate the requisite intent due to, for example, mental defect, disease or immaturity).

266. *Id.*

267. See *id.* (observing that using subjective beliefs to negate criminal liability equates such beliefs with the excuse defenses of immaturity or mental defect).

268. See *id.* at 101-02 (commenting that the objective cultural defense must operate as a justification or it will not stand). Permitting a subjectively held cultural belief to negate criminal liability would be "in effect to permit every citizen to become a law unto himself" and government could not in actuality exist in such circumstances. *Id.*

269. See *id.* (equating the subjective expression of cultural beliefs with other "excuse" defenses such as immaturity or mental defect).

270. See *id.* at 102; see also *id.* at 92 n.24 (subjecting the culture itself to scrutiny at trial would tend to focus not on the individual's state of mind, but on the validity of the cultural precepts of the individual's native society).

271. See *id.* at 97; see also Sacks, *supra* note 70, at 541-42 (using *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989) (unpublished decision) to describe the harmful influence of cultural defense cases within an immigrant community). In *Chen*, the court allowed a Chinese immigrant who killed his adulterous wife to use cultural defense to prove the lack of intent necessary to sustain the original charge of first-degree murder for murdering his wife by hitting her in the head several times with a claw hammer. See *id.* Reportedly, the *Chen* decision had the effect of

values and moral understanding.<sup>272</sup> As an instrument of social instruction, the doctrine of criminal liability is founded on a particular sense of blame that serves as a society's expression of approval or disapproval of an action.<sup>273</sup> This sense of blame entails a judgment of responsibility for one's actions.<sup>274</sup> While it is recognized that a person is not immune from social influences, an individual also possesses volition with regard to his/her actions, and these actions are "his and his alone, not those of his genes or rearing."<sup>275</sup> On this premise, the cultural defense would effectively try the culture that influenced the defendant when the cultural motivation for one's actions is not the intent nor the factor to be tried.<sup>276</sup> It does not make the crime any less heinous that Kimura and Wu killed their children for seemingly altruistic motives or that Bui cut up his children as revenge upon his wife.<sup>277</sup> If there is to be any "blame," it belongs with

---

declaring "open season on Chinese women," leading to increased domestic violence within some Asian communities in the aftermath of the decision. Sacks, *supra* note 70, at 541-42. One battered Chinese woman said, "Even thinking about that case makes me afraid. My husband told me, 'If this is the kind of sentence you get for killing your wife, I could do anything to you. I have the money for a good attorney.'" *Id.*; see also Kim, *supra* note 43, at 119-20 (finding Chen guilty of the lesser charge of second-degree manslaughter subsequent to hearing the defense argument that Chen's Chinese background resulted in his diminished capacity to form the intent necessary for premeditated murder and that Chinese culture condemned adultery).

272. See Lyman, *supra* note 9, at 97 (acknowledging that while society's concepts of what is right and wrong may change with time, the basic premise remains that it is against the prevailing standard that an individual's conduct must be measured). Lyman also states that an individual, regardless of custom or belief, must conform his or her conduct to the societal norm as reflected in the state's criminal codes. See *id.*

273. See *id.* at 87 (arguing that social values foster norms or standards of conduct that are reflected within the criminal codes of each nation, and that these norms of conduct must derive from that body of moral or societal values which are subscribed to by the society as a whole).

274. See *id.* at 102-03 (listing two prerequisites for the concept of individual blame as, first, that the act be subject to disapproval by the society as a whole, and second, that a person have the capacity to be responsible for his or her actions).

275. *Id.* (arguing that the reality is that criminal liability is determined by the state of mind of the individual, not by the individual's environment or heritage).

276. See *id.* at 103 (supporting the argument that since an individual's intent must relate to knowledge of consequences, regarding an individual as completely a product of the forces that shaped him or her would misdirect criminal scrutiny to the culture while trying to establish a causal link between the defendant's state of mind and the result of the conduct).

277. See Mackenzie Carpenter, *Why do Parents Kill their Children? Warped Altruism Most Common Cause, Revenge Least Common, Experts, Studies Say*, PITTSBURGH POST-GAZETTE, July 25, 2001, at A11 (setting forth five different categories of filicide: altruistic, revenge, acutely psychotic, unwanted child, and accidental). The most common motive for parents killing their children was what the parent believed to be altruism: the suicidal mother or father who thinks that they cannot abandon the child, or who kills to alleviate the child's suffering, whether real or imagined. See *id.* The least common type of filicide involves spousal revenge, when parents kill their offspring in a deliberate attempt to make their spouses suffer. See *id.*



1014 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2  
the individual, not with the culture.<sup>278</sup>

#### D. Right from Wrong

Criminal codes, as a means of social instruction and reflection of socially acceptable conduct, are promulgated based on two opposing points of view. The determinists view holds that there is a fundamental moral truth which may be derived from abstract principles and that it is the duty of the law to uphold these principles.<sup>279</sup> Determinists argue that human behavior is caused by factors beyond an individual's control<sup>280</sup> and, in the context of cultural defenses, a person's behavior would result from "unconscious drives and conflicts shaped by cultural experiences."<sup>281</sup> However, determinists will generally hold an individual responsible for his or her actions when they are the result of "practical reasoning."<sup>282</sup> Thus, only when this ability to reason practically is impaired may a person be said to be insane and be excused for his or her criminal actions.<sup>283</sup>

On the other extreme, cultural relativists argue that a value acceptable to one culture does not necessarily have any validity to another.<sup>284</sup> Accordingly, the relativists have the view that no basis exists upon which one set of beliefs or understandings about the world can be said to be correct and another mistaken.<sup>285</sup> Hence, there is no moral truth of right and wrong which transcends

---

278. See Lyman, *supra* note 9, at 103 (arguing that the cultural motivation for one's actions is not intent).

279. See *id.* at 105 (remarking that this view may picture an individual's actions as chemical reactions within the body).

280. See Lyman, *supra* note 9, at 106 (recognizing that such factors may also include chemical reactions within the body which are beyond an individual's control).

281. *Id.* (emphasizing that the determinists' view that actions are a mechanistic response to external stimuli suggest that most, if not all, behavior is a product of "unconscious drives and conflicts shaped by childhood experiences").

282. *Id.* (relaying that hard determinists take the view that internal or external factors compel a person to act in a certain way, but that even then, a causal factor is not a compulsion unless it interferes with a person's practical reasoning process).

283. See Lyman, *supra* note 9, at 107 (reasoning that although an individual's subjectively held cultural beliefs may appear unintelligible to another society, unintelligibility alone cannot serve to exculpate one's behavior because otherwise, a "rational" individual from an alien or isolated subculture might be excused on insanity grounds merely for engaging in his normal behavior because of its unintelligibility to the majority). Insanity is gauged by the individual's "irrationality," or lack of an ability to reason practically. See *id.*

284. See *id.* at 106 (stating that this view is not in keeping with the function of social instruction in criminal law).

285. See *id.* at 106-07 (explaining that as to values, relativists would maintain that there are no universal standards of right and wrong).

cultures.<sup>286</sup> In a purely relativist world, the cultural defense would let the doctrines of criminal liability predicate on individual truths rather than moral truths valid for a culture or society.<sup>287</sup> However, using culture to defend infanticide or filicide may be problematic for the relativists because it appears to be a moral wrong that transcends cultures.<sup>288</sup> Even in Japan, where most parent-child suicide cases are reported, *oyako-shinju* is not legal.<sup>289</sup> How then can *oyako-shinju* be culturally justified in the United States if it is not generally accepted within its own culture? Outside of Japan, parent-child suicide is rare in other Asian cultures.<sup>290</sup>

Regardless of whether criminal codes are predicated on moral or legal standards, the important point to be determined is whether the defendant possessed knowledge of wrongfulness of the acts charged.<sup>291</sup> In the case of a person acting out of a belief in the validity of his or her culture, the knowledge of wrongfulness must relate to the state of mind and knowledge as to the consequences of the act.<sup>292</sup> With the exception of insane persons, if through the operation of a cultural defense a defendant could negate criminal liability<sup>293</sup> by the

286. See *id.* at 107 (noting that determinists, on the other hand, believe that a truth exists but cannot be defined or grasped by reasoned analysis or abstract principles).

287. See *id.* (arguing that an individual's subjectively held cultural beliefs may appear unintelligible to a society other than his/her own).

288. See Rochelle D. Jackson, *The War Over Children's Rights: And Justice for All? Equalizing the Rights of Children*, 5 BUFF. HUM. RTS. L. REV. 223, 225 (1999) (describing that the United Nations Convention on the Rights of the Child has been signed or ratified by all but one country, Somalia). The Convention assumes that the child possesses fundamental rights and basic liberties and that the child is a human being and not a germ of a human being. See *id.* at 236.

289. See Lyman, *supra* note 9, at 87-88 nn.1-2 (premising that because a country's codified criminal proscriptions on conduct within a given nation is indicative of the normative standard of acceptable conduct for that society, the fact that Japan makes *oyako-shinju* punishable indicates that it is not a norm generally accepted by Japanese society).

290. See Nancy Wride, *A Mother's Final Deadly Act; Slaying: "Altruistic" Killings Carried Out in the Throes of Depression Appear to be the Common Thread in Last Year's Five Family Murder-Suicides*, L.A. TIMES, Jan. 12, 1992, at E1 (suggesting that the link between the immigrant mothers in Southern California who killed their children was not culture, but that they suffered depression from pressure and stress of adjusting to a new life in a new land).

291. See Lyman, *supra* note 9, at 109 (declaring that assuming no mental defect is evident, whether criminal codes are predicated on moral or legal standards is in reality of no particular importance provided the person possessed a requisite knowledge of consequences).

292. See *id.* (providing that as long as a person has this requisite knowledge of consequences, it does not matter whether criminal codes are predicated on a moral or legal standard).

293. See Bruce McLean, *Culture will Play a Big Part in Trial Drowning Attempt: But its use Raises many Questions*, VENTURA COUNTY STAR (Ventura County, Ca.), Feb. 16, 2000, at A1 (distinguishing between the two general kinds of cultural defense). The

1016 JOURNAL OF GENDER, SOCIAL POLICY &amp; THE LAW [Vol. 11:2

presence of a subjective belief in its moral justification, a “Pandora’s box” may be opened for other doctrines of criminal liability, and the use of the defense could possibly extend beyond actions motivated by cultural traditions.<sup>294</sup> While recognizing that laws are not a static body of rules in the United States, a modification of the laws to the extent that a person’s subjective or cultural beliefs may negate a criminal culpability reaches beyond reasonable expectations.<sup>295</sup> Even under the relativists’ view that no universal truths exist, a definable set of beliefs is necessary for the ordered functioning of any society.<sup>296</sup>

One of the main concerns in not recognizing a substantive cultural defense is that using other available legal defenses such as insanity, as was used in *Kimura*, leads to less accurate accounts of what actually happened.<sup>297</sup> By employing the temporary insanity defense, the conduct in question must stem from a mental disorder, while a cultural defendant might qualify as insane only under a strained definition of mental disease.<sup>298</sup> In *Kimura*’s case, her behavior thus became socially decontextualized as a “psychological pathology” rather than a “cultural reality.”<sup>299</sup> Furthermore, imposing the

---

first type of cultural defense involves defendants who carry out customs accepted in their native countries but outlawed in their new countries. *See id.* This type of “pure” cultural defense is rarely accepted. *Id.* The second type of cultural defense is when the defendant argues that his or her state of mind was heavily influenced by cultural factors. *See id.* This is the more accepted type of defense, and it is generally not used to free a defendant, but instead to reduce the charges and sentence, such as to bring a murder charge down to manslaughter. *See id.*

294. Lyman, *supra* note 9, at 109 (noting that such actions might incorporate those performed for religious or political reasons).

295. *But see* Lyman, *supra* note 9, at 97 (qualifying that this is not to say that cultural motivation is completely irrelevant as it may serve to elucidate a defendant’s state of mind when making the determination of whether the person’s conduct had the requisite intent).

296. *See id.* at 107 (maintaining that conduct must conform to dominant social norms); *see also* Joseph Tybor, *Eye of Newt, Wool of Bat: Is this what the Future Holds for American Courts?*, CHI. TRIB., Aug. 21, 1988, at 4C (providing the example that the United States has determined that certain things are against the law regardless of what a certain culture allows—whether it be running a red light, having multiple wives, or worshiping with a rattlesnake—and we can either force people to behave the way the system assumes or change the system, because a failure to do either one will lead to enormous social strife).

297. *See* Sacks, *supra* note 70, at 530-32 (describing the problems with accuracy when not admitting a cultural defense, such as an inaccurate characterization of a person as insane).

298. *See id.* (recognizing that the American concept of insanity may not have close analogues to those of the culture in question).

299. *Id.* at 531 (arguing that imposing our culturally-based concepts of insanity on immigrant defendants may be an affront to their dignity and culture); *see also* Sing, *supra* note 49, at 1855 (stating that the defense’s folly in *Kimura* was that it presented the defendant’s cultural claim in a way that attempted to do the impossible by providing a cultural explanation for insanity).

2003] CULTURE IS NO DEFENSE FOR INFANTICIDE 1017

American culturally accepted concept of insanity on immigrants may mischaracterize the concept, because other cultures' medical model of mental illness may be different.<sup>300</sup> For example, the Japanese approach to dealing with what the Americans call psychological problems is quite different in that their model, unlike the American model, treats mental illness not so much as an aberrational phenomenon that occurs in individuals because of their personal histories and psychological dispositions, but as the result of some kind of disharmony between a person and his or her society.<sup>301</sup>

However, a further complication to the cultural defense is that, unlike the temporary insanity model, the mental condition of the cultural defendant is not temporary.<sup>302</sup> Arguably, the defendant's culture constitutes a fundamental part of his or her rational functioning.<sup>303</sup> Thus, a cultural defendant, such as Kimura or Wu, is responsible for her actions in a way that the temporarily insane defendant is not.<sup>304</sup>

The problem with cultural explanations for behavior is that the notion of a culture or a cultural norm cannot be identified objectively and precisely.<sup>305</sup> Culture is not permanent, but is modified constantly, evolving over time to adapt to changing historical, political, and social circumstances.<sup>306</sup> In addition, it should be recognized that defining when a behavior is "cultural" is not a simple matter.<sup>307</sup> For example, problems arise when behavior that is

---

300. See Sacks, *supra* note 70, at 531 (suggesting that a defendant might also perceive the court's judgment that she was insane as an affront to her dignity); *cf. id.* at 531 n.69 (criticizing as ethnocentric and inaccurate the alternative argument that the concept of mental illness is not well-defined in the Japanese cultural understanding).

301. See *id.* at 531 n.69 (concluding that judging by the descriptions of the Kimura case, the Japanese model offers a more consistent account of Kimura's state of mind than does an American diagnosis of any particular psychological illness).

302. See Sing, *supra* note 49, at 1863 (arguing that in contrast to the temporarily insane defendant, the defendant's cultural behavior is not characterized by episodic and unpredictable occurrences).

303. See *id.* (arguing that culture, unlike insanity, is both "physically internal" and "part of the moral phenomenon called the self").

304. See *id.* (concluding that by definition, other members of the defendant's culture share her culturally influenced predisposition to commit the "offensive" behavior).

305. See Coleman, *supra* note 72, at 1162-63 (concluding that being unable to objectively and precisely define culture raises two sets of problems: the problem of defining the existence of the custom or practice and the problem of interpreting it).

306. See *id.* at 1163 (reasoning that because cultural identities have histories, like everything that is historical, they undergo constant transformation).

307. See generally Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89 (2000) (calling for an approach to combat gendered subordination across communities that neither attacks the cultures of colored communities based

1018 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

troubling is often causally attributed to a group-defined culture when the actor is perceived to “have” culture.<sup>308</sup> Because the tendency is to perceive white Americans as “people without culture,” when white people engage in certain practices, one does not associate their behavior with a racialized conception of culture; instead, one constructs other non-cultural explanations.<sup>309</sup>

#### V. PROPOSAL FOR THE USE OF THE INTERMEDIATE CULTURAL APPROACH AND A CONSIDERATION OF THE NATURE OF THE OFFENSE

Neither a substantive cultural defense that would exculpate the killing of a child based on cultural factors alone nor a complete denial of cultural factors to help explain a defendant’s state of mind at the time of the crime are adequate solutions for the criminal system in dealing with infanticide crimes. As emphasized in the discussion above, the cultural defense primarily addresses the motivation for a crime when the criminal law is not concerned as much with the motive for a crime as it is concerned with the intent to act criminally.<sup>310</sup> Unless the parent who kills a child can be proven to be insane, cultural factors and subjective beliefs, such as that a child is but an extension of oneself, cannot be allowed to excuse the act when the parent is fully cognizant of the consequences of his or her actions.<sup>311</sup>

In infanticide cases, the intermediate approach of using cultural factors to show a defendant’s state of mind at the time of the act without recognizing a separate cultural defense provides the best solution to the dilemma of how to apply cultural factors to a violent crime. This approach is illustrated in *Wu*, where the court allowed

---

on racial assumptions nor presumes that the United States is always a site of liberation).

308. *See id.*

309. *See id.* (stating that the result is an exaggerated perception of ethnic difference that equates it with moral difference from “us”). In cases involving immigrants, we label behavior that we consider problematic as “cultural” and understand this term to mark racial or ethnic identity. *See id.* at 90. In contrast, when a white person commits a similar act, we view it as an isolated instance of aberrant behavior, and not as reflective of a racialized culture. *See id.*

310. *See Lyman, supra* note 9, at 98-99 (stating that the motivation factor in committing an act charged is not encompassed by the definition of criminal intent). *But see Taylor, supra* note 20, at 349-50 (arguing that while a defendant’s motive is not necessary to determine legal guilt, it is critical in establishing his or her moral guilt or blame-worthiness for the violation and that the American legal system recognizes that justice is not always served by completely ignoring the defendant’s motive for acting).

311. *See Lyman, supra* note 9, at 103 (arguing that the presumption is that every person knows the law and as such, ignorance of the law excuses no one).

2003] CULTURE IS NO DEFENSE FOR INFANTICIDE 1019

for introduction of cultural factors to explain Wu's state of mind.<sup>312</sup> Helen Wu requested that the trial court instruct the jurors to consider her cultural background in determining the mental state required for murder.<sup>313</sup> The trial court refused to give the instruction,<sup>314</sup> but the appellate court reversed and decided that the defendant's cultural background was relevant on the issue of premeditation and deliberation, malice aforethought, and the existence of heat of passion at the time of the killing.<sup>315</sup>

Wu also illustrates that it is possible to incorporate the intermediate approach of cultural information into a pre-existing defense to ascertain a defendant's state of mind.<sup>316</sup> Although temporary insanity may not be a relevant traditional defense to use in culturally motivated crimes, other traditional defenses, such as the diminished capacity defense, may be used to raise a cultural defense, as seen in Wu.<sup>317</sup> The *mens rea* variant of the diminished capacity defense uses evidence of the defendant's mental condition to show the absence of the required *mens rea*.<sup>318</sup> The defense attorney argued that Helen Wu was, at the time of the killing, "in a highly overwrought state, and her emotional state could be explained by reference to the effect of her cultural background on her perception of the circumstances leading up to and immediately preceding the strangulation," leading the court of appeals to rule that Wu was entitled to have the jury consider evidence of her cultural background in determining the presence or absence of relevant mental states.<sup>319</sup>

In addition to considerations of cultural factors, in violent cases such as infanticide, where the killing of a victim is the crime charged,

---

312. See *People v. Wu*, 235 Cal. App. 3d 614, 646 (1991) (noting that the instruction was applicable to the evidence and one of the defenses used by the defendant).

313. See *Li*, *supra* note 53, at 774 (conveying that Wu was convicted for second-degree murder for strangling her son).

314. See *id.* (refusing to give the instruction because it did not want to put the "stamp of approval on the defendant's actions in the United States, which would have been acceptable in China").

315. See *id.* (noting that if the defendant committed suicide and left the children alone, she would be considered a totally irresponsible mother).

316. See *id.* at 775 (stating that the crux of the intermediate approach uses cultural factors to support traditional defenses such as mistake of fact, temporary insanity, provocation or diminished capacity).

317. See *id.* (arguing that the *mens rea* variant of the diminished capacity defense makes it relevant in establishing the defendant's mental condition in a cultural defense crime).

318. See *id.* (remarking that the defense sought to introduce cultural information to refute the presence of *mens rea* via the diminished capacity defense).

319. *Id.*

1020 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

distinguishing between the nature of the offense might be a useful framework in deciding how much weight to give to a cultural defense.<sup>320</sup> Depending on the nature of the offense, society's interest in enforcing the law may increase or decrease, tipping the scales for or against the use of the cultural defense.<sup>321</sup> Across cultures, violent crimes that physically harm others are more likely to be regarded as unacceptable than non-violent crimes.<sup>322</sup> Even if some acts that cause death, such as infanticide, are tolerated elsewhere in the world, American society has an interest in protecting life and bodily integrity, which militates against using cultural defense to excuse such acts either partially or entirely.<sup>323</sup>

A central idea of the cultural defense is that an individual should be held blameless if the act was motivated by a good faith belief in its propriety according to cultural belief or customs.<sup>324</sup> It is the defendant's reasonable belief in the "propriety" of the act that justifies judicial leniency.<sup>325</sup> However, most violent crimes, such as killing one's children, are not deemed to be "legal" in the defendant's native countries and it would thus be unjustified to allow the cultural defense if the practice is not tolerated in the defendant's own culture.<sup>326</sup>

#### CONCLUSION

In a society of diverse cultures, it is inevitable that the legal system will face cultural clashes, particularly when immigrants engage in

---

320. *See id.* at 778 (stating that a monolithic treatment of the cultural defense will cause injustice in some cases and undue interference with the enforcement of law in others).

321. *See id.* (arguing that the applicability of the cultural defense should be determined by balancing justice to the individual against the society's interest in enforcing the law).

322. *See id.* at 779 (expressing the feeling that non-violent crimes are more likely to be deemed acceptable in a cultural defendant's native country and there is a lesser need for deterrence for such crimes).

323. *See id.* at 782 (discussing the two major factors that militate against recognition of the cultural defense: the heightened need to deter the defendant and others from engaging in similar conduct and the respect for international human rights standards).

324. *See id.* at 782-83 (echoing Lyman's proposition that where due to a reasonable, good faith mistaken belief in the existence of certain facts, the defendant did not entertain a specific intent as to the consequences of his or her conduct, a cultural defense may stand).

325. *See id.* at 793 (reminding us that it is a cultural defendant's good faith, reasonable belief in the propriety of the act pursuant to cultural tradition which reduces his blameworthiness).

326. *See id.* at 783 (arguing that, for example, adultery is not a justification for killing one's spouse in modern China).

2003] CULTURE IS NO DEFENSE FOR INFANTICIDE 1021

customs or acts that are illegal under the American laws. The traditional view, as exemplified in the 1852 English case of *Regina v. Barronet*,<sup>327</sup> expresses the idea that persons who come into a new country must obey the laws of the country and place themselves in the same situation as native born subjects.<sup>328</sup> This view is still expressed today in *Kimura*, when the prosecution stated that “[m]urder must be considered murder in the United States and not mitigated by legal or cultural standards from other countries.”<sup>329</sup> The main objection to this viewpoint is that making foreigners conform to mainstream values hastens the demise of foreign cultural values and signals mainstream disrespect for the individual and his or her culture.<sup>330</sup> It also fails to understand the defendant’s state of mind.

A more recent approach to the cultural defense recognizes the defendant’s foreign culture and acknowledges that culture may be entwined with the defendant’s mental state at the time of the crime.<sup>331</sup> The modern view is that courts must consider the defendant’s cultural beliefs when analyzing the defendant’s state of mind, or *mens rea*.<sup>332</sup> This cultural approach provides a different view of how culture should be incorporated into the law and used to more accurately understand a defendant’s state of mind during a crime.<sup>333</sup>

There is a need for uniformity in the law because society may fall into a state of anarchy if each foreigner’s culture and law became the determinant factor of what is right and wrong.<sup>334</sup> A defendant should be penalized for the wrong or harm that he or she inflicted. However, the defendant’s state of mind is certainly an important component in determining culpability. Nevertheless, recognizing a separate substantive cultural defense may go too far in excusing or justifying violent crimes such as infanticide. To balance the social

---

327. 169 Eng. Rep. 633 (Q.B. 1852).

328. See Sheybani, *supra* note 85, at 779-80 (arguing that foreigners must be dealt with in the same way as natives and that a native’s ignorance of the law cannot be an excuse for a crime and cannot be urged in favor of a foreigner).

329. *Id.* at 780 (adding that the court rejected the application of Japanese law or the Japanese culture in *Kimura*’s case).

330. See *id.* at 781 (stating that to deny the newcomers their culture is to deny their self-esteem and identity).

331. See *id.* at 782 (arguing that courts should consider cultural defense out of a consideration of fairness to the defendant).

332. See *id.* (arguing that the defendant’s culture is entwined with his or her mental state as the time of the crime).

333. See *id.* at 782 (noting that considering the defendant’s culture supports the policy of fairness to the defendant).

334. See *id.* (arguing that a defendant’s cultural beliefs should mitigate the punishment).



1022 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:2

commitment toward cultural sensitivity and the desire to maintain law and order, and to protect the rights of victims, as well as those of defendants, the United States should adopt the intermediate approach of allowing cultural evidence to explain a defendant's state of mind. Although a person is influenced by his or her culture, culture by itself is no defense for infanticide.<sup>335</sup>

---

335. See Lyman, *supra* note 9, at 106 (arguing that just because what a person desires or believes is caused by his environment, it does not in any way make the exercise of the reasoning capacity practically difficult).