

2022

## American Kaleidoscope: An Intersectional Approach to the Cultural Defense

Lillian Mobley

Follow this and additional works at: <https://lawcommons.luc.edu/lucj>



Part of the [Law Commons](#)

---

### Recommended Citation

Lillian Mobley, *American Kaleidoscope: An Intersectional Approach to the Cultural Defense*, 53 Loy. U. Chi. L. J. 623 ().

Available at: <https://lawcommons.luc.edu/lucj/vol53/iss3/6>

This Comment is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized editor of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

# American Kaleidoscope: An Intersectional Approach to the Cultural Defense

Lillian Mobley\*

*The cultural defense is a controversial legal strategy that allows criminal defendants to offer evidence of their native culture to mitigate culpability. While courts usually decline to formally consider these defenses, cultural influences are increasingly present in the courtroom, demanding recognition in the midst of a Eurocentric legal system. The cultural defense can be an important tool for achieving justice in minority and immigrant communities. In practice, however, the defense can slip dangerously off-course, reinforcing white American norms and reductive stereotypes. Ultimately, an “official” defense allowing cultural evidence at trial may cause more harm than good.*

*Instead, this Comment advocates for the cultural defense as a mitigating factor in sentencing. The sentencing method serves as a safeguard against coercive assimilation while protecting the rights of crime victims. Moreover, this Comment argues that the cultural defense should be viewed through an intersectional lens. By analyzing defendants’ overlapping marginalized identities, intersectionality allows sentencing judges and juries to effectively balance cultural needs with the parameters of the criminal law. Culture belongs in the courtroom, and an intersectional approach will illuminate the kaleidoscope of influences within the individual and throughout American society.*

I. INTRODUCTION .....	624
II. BACKGROUND .....	629
A. <i>Cultural Subordination and Spousal Abuse: People v. Chen</i> .....	631
B. <i>Barriers in Cross-Cultural Communication: People v. Moua</i> .....	637

---

\* J.D. Candidate, Loyola University Chicago School of Law, 2023. Many thanks to the members of the *Loyola University Chicago Law Journal*—especially Katharine Roberts and Lauren Schneider—for their guidance, enthusiasm, and heart. In keeping with the spirit of this Comment, I recognize that my perspectives and biases as a white American woman undoubtedly influenced my research and writing process. I continue to explore how my experiences shape my view of the cultural defense, and I invite readers to do so as well.

C. <i>Culture as a State of Mind: People v. Kimura</i> .....	642
D. <i>Inconsistencies and the Need for Change</i> .....	647
III. DISCUSSION.....	648
A. <i>The Official Defense</i> .....	649
1. Arguments for the Official Defense.....	649
2. Arguments Against the Official Defense.....	652
B. <i>Culture as a Mitigating Factor in Sentencing</i> .....	656
IV. ANALYSIS .....	659
A. <i>The Sentencing Process</i> .....	659
B. <i>Challenges in Sentencing Consideration</i> .....	661
C. <i>The Need for the Cultural Defense</i> .....	666
V. PROPOSAL .....	667
A. <i>Intersectionality Defined</i> .....	668
B. <i>Intersectionality as Applied to Immigrant and Minority</i> <i>Defendants</i> .....	670
1. <i>People v. Nem: An Intersectional Case Study</i> .....	671
C. <i>Recommendations for Training and Implementation</i> .....	676
VI. CONCLUSION.....	679

## I. INTRODUCTION

In New York in the late 1980s, a Chinese immigrant beat his wife to death with a claw hammer after she allegedly admitted to seeing other men.<sup>1</sup> He was ultimately sentenced to five years of probation.<sup>2</sup> Through a tangle of unsubstantiated testimony from a white anthropologist, the judge came to believe that the defendant was a “victim” of his Chinese culture and that culture caused his volatile reaction to his wife’s adultery.<sup>3</sup> The decision was an attempt at cultural understanding, but it enraged both feminist groups and Asian American community activists.<sup>4</sup> They argued over whether culture should be banned from the courtroom completely or

---

1. E.g., Leti Volpp, *(Mis)Identifying Culture: Asian Women and “The Cultural Defense”*, 17 HARV. WOMEN’S L.J. 57, 64–66 (1994) (describing facts of *Chen* case in detail); Transcript of Record at 67, *People v. Dong Lu Chen*, No. 7774-87 (N.Y. Sup. Ct. 1989).

2. Volpp, *supra* note 1, at 64.

3. The judge stated, “Based on the cultural background of this individual he has also succeeded in partially destroying his family and his family’s reputation . . . . The defendant is a victim, a victim that fell through the cracks because society didn’t know where or how to respond in time.” *Id.* at 74; cf. Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1053 (1994) (asserting that Chen received a lesser sentence because he was considered a product of Chinese culture); see generally Transcript of Record, *supra* note 1.

4. See, e.g., discussion *infra* Section II.A (illustrating the conflict and perspectives surrounding the *Chen* decision).

used to contextualize the defendant's actions in limited circumstances.<sup>5</sup> The case, *People v. Chen*, raised urgent questions about whether a "cultural defense" can ever be used fairly and, if so, when it is best introduced into the adjudicatory process.<sup>6</sup>

The cultural defense is a controversial legal strategy that allows criminal defendants to bring evidence of their native culture into the courtroom to eliminate or mitigate culpability.<sup>7</sup> Though such a defense could theoretically be raised at any stage of the legal process, the cultural defense has remained somewhat mysterious; it is not formally recognized, and there is no statutory language regulating its use.<sup>8</sup> It is also difficult to track where and when the defense is employed,<sup>9</sup> despite the fact that courts have reckoned with cultural issues since the nation's inception.<sup>10</sup>

Because the cultural defense is so controversial, courts and legislatures are unlikely to formally recognize it.<sup>11</sup> Courts generally act on the presumption that criminal defendants are assimilated to Western culture—

5. While feminists and Asian American activists initially formed a coalition to challenge the ruling, the Asian organizations eventually withdrew their support because they did not want to annihilate the cultural defense. Volpp, *supra* note 1, at 77–78; Alexis Jetter, *Fear Is Legacy of Wife Killing in Chinatown*, *NEWSDAY*, Nov. 26, 1989, at 26.

6. For a detailed account of the *Chen* case, the expert testimony therein, and the subsequent public reaction, see discussion *infra* Section II.A.

7. See, e.g., Damian W. Sikora, Note, *Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695, 1699 (2001) (noting that the defense allows minority immigrant defendants to introduce cultural evidence); see also ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE 5* (2004) (explaining that the defense can be used in both civil and criminal cases, though most courts decline to consider cultural factors entirely).

8. See Kelly M. Neff, Note, *Removing the Blinders in Federal Sentencing: Cultural Difference as a Proper Departure Ground*, 78 CHI.-KENT L. REV. 445, 446 (2003) (“[N]o circuit has stated that a defendant’s degree of cultural difference, which might serve to justify or explain a defendant’s rationale for committing a particular crime, is an appropriate consideration for district court judges in making sentencing determinations.”); see also Deirdre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong “Marriage by Capture” Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1, 34 (noting that there is no “official policy” on use of cultural defenses, though they are frequently raised).

9. See Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?*, 49 ARIZ. L. REV. 911, 919 (2007) (noting that there is no database recording outcomes of cultural-defense cases, so success rate is hard to ascertain); RENTELN, *supra* note 7, at 7 (explaining difficulty in identifying cases focused on cultural issues because standard legal research tools do not specifically categorize such cases); Tamar Tomer-Fishman, *Cultural Defense, Cultural Offense, or No Culture at All?: An Empirical Examination of Israeli Judicial Decisions in Cultural Conflict Criminal Cases and of the Factors Affecting Them*, 100 J. CRIM. L. & CRIMINOLOGY 475, 481–82 (2010) (discussing lack of empirical research on judicial decisions in cultural-defense cases).

10. For example, the 1888 case *United States v. Whaley* considered the cultural differences of Native Americans. *United States v. Whaley*, 37 F. 145, 146 (S.D. Cal. 1888). In *Whaley*, a Native American defendant was charged with murder. *Id.* at 145. The court, reasoning that “the Indian nature, their customs, superstition, and ignorance” showed he acted without malice, reduced the defendant’s charge to manslaughter as he did not possess the requisite mental state. *Id.* at 146.

11. *Cf.* Lee, *supra* note 10, at 919 (predicting that legislation authorizing an official cultural defense is unlikely because of rising anti-immigrant sentiment).

the judiciary does not broadly welcome assertions to the contrary.<sup>12</sup> Further, the American legal system is largely glorified as an objective, “neutral” tool that applies equally to all people.<sup>13</sup> This perspective ignores the law’s foundations in Anglo-American culture and, consequently, its perpetuation of white values.<sup>14</sup> The illusion of neutrality often leads to an inference that the cultural defense is irrelevant to criminal defendants’ culpability.<sup>15</sup> Even when courts do consider cultural factors, their written decisions are often unpublished, indicating that the court does not want the case cited as precedent.<sup>16</sup>

Despite courts’ apparent aversion to the defense, cultural evidence has appeared in the courtroom with growing regularity.<sup>17</sup> In a progressively globalized and multicultural society, the cultural defense demands attention.<sup>18</sup> The United States claims to value cultural pluralism, but to create a respectful multicultural environment, we must work to combat our entrenched xenophobia and racism.<sup>19</sup> True cultural sensitivity requires

12. RENTELN, *supra* note 7, at 6 (asserting that “presumption of assimilation” poses most significant barrier when attempting to introduce cultural evidence).

13. See Susan S. Kuo, *Culture Clash: Teaching Cultural Defenses in the Criminal Law Classroom*, 48 ST. LOUIS UNIV. L.J. 1297, 1298 (2004) (“By legally parsing facts, [law students] learn to siphon off the emotional and cultural content . . . . The language of the law commands that they do this because of the enduring belief that the law is neutral and impartial.”).

14. The term “cultural defense” itself implies that the dominant white culture is *not* “cultural.” See generally Roxanna Azimy, *White People Have No Culture*, MEDIUM (June 9, 2020), <https://medium.com/illumination/white-people-have-no-culture-f9f8edd30533> [<https://perma.cc/VG2T-2Y5H>]; accord D. Chiu, *supra* note 3, at 1109 (“The entire system is white America’s privilege.”).

15. See D. Chiu, *supra* note 3, at 1108–09 (explaining that culture is often considered inappropriate for legal analysis because laws are meant to be unbiased and “culture-blind”); see also Kuo, *supra* note 13, at 1310 (“When asked why cultural traits were omitted [from their case briefs], students almost invariably respond that such qualities were unrelated to the legal analysis of the case. In their freshly trained legal minds, cultural factors have no place in the discussion.”); RENTELN, *supra* note 7, at 6 (reasoning that judges’ presumptions about assimilation may lead them to exclude cultural evidence as irrelevant).

16. Alison Dundes Renteln, the author of the only book solely devoted to the cultural defense, has likely conducted the most comprehensive research on the subject. RENTELN, *supra* note 7, at 8. In her book, Renteln explained that the lack of published cultural-defense decisions led her to rely principally on interviews and newspaper articles. *Id.* She hypothesized that the trend against publication “reflect[s] the ambivalence or possibly the antipathy of judges toward cultural claims. *Id.*; see also Lee, *supra* note 10, at 920 (noting that if cultural defense is successful at trial, appeal will not typically be filed, thus no published case record will exist).

17. See Myrna Oliver, *Immigrant Crimes: Cultural Defense—A Legal Tactic*, L.A. TIMES, July 15, 1988, at 1, 30 (stating that cultural defense is rare but increasingly used due to influx of immigrants from diverse backgrounds).

18. See Sikora, *supra* note 7, at 1698 (predicting that the defense will be an important focus as globalization increases, necessitating more interactions between those of different cultures).

19. See Livia Holden, *Cultural Expertise and Law: An Historical Overview*, 38 LAW & HIST. REV. 29, 38 (2020) (“The increasing demand for cultural accommodation in the first few decades of the twenty-first century has led to a significant development of legal pluralism.”); see also Sam Beyea, Comment, *Cultural Pluralism in Criminal Defense: An Inner Conflict of the Liberal Paradigm*, 12 CARDOZO PUB. L. POL’Y & ETHICS J. 705, 718 (2014) (explaining that pluralism keeps American culture “dynamic and creative,” and that acceptance of diversity is a defining quality of the United States).

thoughtful inquiry into other cultures, as well as an interrogation of personal biases.<sup>20</sup> The cultural defense presents this opportunity.

One problem with the current unregulated nature of the defense is that it is applied on an ad hoc basis.<sup>21</sup> This inconsistent application is harmful to defendants, leading to disparate outcomes and reinforcing bias.<sup>22</sup> To properly respect the interests of defendants and victims alike, guardrails should be established dictating when, where, and how the defense can be incorporated.<sup>23</sup>

Although the cultural defense is hardly ever used to completely acquit a defendant, it has been increasingly used to mitigate criminal responsibility.<sup>24</sup> When successfully raised, the defense uses evidence of a defendant's cultural background to either establish an affirmative defense or support a more lenient sentence.<sup>25</sup> Accordingly, cultural-defense advocates fall into one of two camps: those who support an "official" defense applicable in the trial phase, and those who believe cultural evidence should only be considered in the context of sentencing.<sup>26</sup>

First, under an "official" or "stand-alone" defense, cultural evidence is raised to support an affirmative defense during a criminal trial.<sup>27</sup> The

20.

Respect for [immigrants] requires that we view multiculturalism as a positive and even necessary factor in the debate about how to resolve these conflicts. Without the sensitivity that multiculturalism injects into the debate, we have little hope of understanding the social obstacles immigrants face . . . . Indeed, multiculturalism's twin caveats—that we recognize our natural tendency toward ethnocentrism, and that we tread gently if at all upon that which is at the core of immigrant cultures—are essential to the attainment of these objectives.

Doraine Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1166 (1996).

21. See, e.g., Sikora, *supra* note 7, at 1703 (noting that lack of a formal cultural defense leaves attorneys and judges with broad discretion as to cultural factors, and that current ad hoc system treats defendants inconsistently).

22. See Lee, *supra* note 10, at 916 (explaining difficulty in predicting whether judges will admit or exclude cultural evidence, hampering defense attorneys in advising clients and developing strategies); cf. Volpp, *supra* note 1, at 90 (arguing that culture can easily be reduced to stereotype, with emphasis on defendant's identity rather than their actions).

23. See Evans-Pritchard & Renteln, *supra* note 8, at 36–37 ("The current approach to such cases is dangerously schizophrenic. Weighing cultural evidence in the absence of any guidelines or any infrastructure of experts is a recipe for disaster.").

24. See, e.g., Carolyn Choi, Comment, *Application of a Cultural Defense in Criminal Proceedings*, 8 UCLA PAC. BASIN L.J. 80, 88 (1990) (contending that the defense is almost never used to completely absolve defendant of criminal responsibility); see, e.g., Lee, *supra* note 10, at 916 (explaining that defendants might introduce cultural evidence to support a plea bargain or lesser sentence).

25. Immigrant and minority defendants have used a wide range of affirmative defenses such as mistake of law, heat of passion or provocation, extreme emotional distress, diminished capacity, and insanity. Beyea, *supra* note 19, at 705–06.

26. See generally Beyea, *supra* note 19; Sikora, *supra* note 7.

27. E.g., Sikora, *supra* note 7, at 1695 (defining "stand-alone" cultural defense); see Choi, *supra* note 24, at 85–88 (discussing pros and cons of "formal" cultural defense).

evidence is offered to convince the fact-finder that the defendant was unaware of the illegality of their actions or that their culture compelled them to commit the crime.<sup>28</sup> On the whole, the canon of cultural-defense scholarship rejects the concept of an official defense.<sup>29</sup> Though the official defense has been argued to promote individualized justice and advance the interests of a pluralistic society, the consequences of admitting cultural evidence during trial outweigh the benefits to individual defendants.<sup>30</sup> An official defense is harmful to victims, promotes stereotypes, and is extremely difficult to apply consistently.<sup>31</sup>

Second, many contend that the defense should be used as a mitigating factor in sentencing.<sup>32</sup> With this approach, a convicted defendant could use the cultural defense to lessen their<sup>33</sup> punishment, but not completely absolve themselves of responsibility.<sup>34</sup> Overall, cultural evidence is best considered in the sentencing context because it protects victims, allows for maximum flexibility, and helps preserve the integrity of a multicultural society.<sup>35</sup>

However, even when cultural evidence is confined to the sentencing process, a number of challenges arise.<sup>36</sup> Because America's legal system is grounded in white-majority values, the application of cultural factors

28. See RENTELN, *supra* note 7, at 187–92 (advocating for an official cultural defense that functions as a “partial excuse,” used to reduce either a charge or a sentence); see, e.g., Sikora, *supra* note 7, at 1699 (“By using the defense, the defendant hopes to have his charges either reduced or thrown out because the act he is accused of either carries a lesser sentence or would not even be considered a crime in his native country.”).

29. See discussion *infra* Section III.A (discussing pros and cons of official defense and concluding that modern scholarship trends away from considering cultural evidence at trial); *contra* RENTELN, *supra* note 7, at 187–92 (arguing in favor of an official defense to be used as partial excuse during trial).

30. See discussion *infra* Section III.A (explaining arguments for and against official cultural defense).

31. *Id.*

32. See, e.g., Sikora, *supra* note 7, at 1714–15 (arguing that cultural defenses should be considered exclusively in sentencing); see also James K. Boehnlein et al., *Cultural Considerations in the Criminal Law: The Sentencing Process*, 33 J. AM. ACAD. PSYCHIATRY & L. 335, 340 (2005) (asserting that in field of forensic psychiatry, cultural evaluation and testimony are best considered in sentencing context); Neff, *supra* note 8, at 475 (concluding that courts should allow sentencing departures according to cultural differences).

33. This Comment uses the singular “they”—in lieu of “he” or “she”—to refer to a generic or unspecified individual. Both the *Chicago Manual of Style* and *Merriam-Webster* now allow this usage. *Chicago Manual of Style Q & A: Pronouns*, CHI. MANUAL OF STYLE ONLINE, <https://www.chicagomanualofstyle.org/qanda/data/faq/topics/Pronouns/faq0031.html> (last visited Jan. 21, 2022) [<https://perma.cc/3EV4-6SES>]; *They*, MERRIAM-WEBSTER (last visited Jan. 21, 2022), <https://www.merriam-webster.com/dictionary/they> [<https://perma.cc/6HZJ-QP9Z>].

34. See, e.g., Choi, *supra* note 24, at 88 (explaining that cultural factors in sentencing do not completely exculpate a defendant).

35. See discussion *infra* Section III.B (describing why cultural defense is a proper mitigating factor in sentencing).

36. See discussion *infra* Section IV.B (outlining dangers of using cultural evidence during sentencing process).

can produce and reinforce bias, further subordinating immigrant and minority defendants.<sup>37</sup> This Comment will explore the challenges inherent in cultural sentencing considerations, ultimately recommending that cases be viewed with an intersectional lens.<sup>38</sup> Intersectionality is a theory that analyzes the intricacies of bias, recognizing that a person's lived experience is often derived from the overlap of multiple marginalized identities.<sup>39</sup> Using an intersectional framework, sentencing judges and juries can effectively balance the aims of cultural pluralism and the objectives of the criminal justice system.<sup>40</sup>

Part II of this Comment will detail key cases that have employed cultural defenses and outline community responses to those decisions.<sup>41</sup> Part III will next provide an overview of the arguments for and against an "official" cultural defense and explain why cultural considerations should instead be raised during the sentencing phase.<sup>42</sup> Then, Part IV summarizes the challenges of factoring a defendant's cultural background into criminal sentencing and explains why the defense should nevertheless be available.<sup>43</sup> Part V calls for an intersectional approach when analyzing how a defendant's culture and other identifying characteristics may have affected their behavior.<sup>44</sup> Finally, Part V proposes solutions for implementing the intersectional framework, with the ultimate goal of reducing subordination of defendants and preserving our culturally kaleidoscopic society.<sup>45</sup>

## II. BACKGROUND

This Part begins by delving into the most infamous cases in the cultural-defense canon, highlighting the role of culture in each.<sup>46</sup> Then, this

---

37. See generally Lee, *supra* note 10; Volpp, *supra* note 22.

38. See discussion *infra* Part V (defining intersectionality and recommending courses of action for its implementation).

39. For a detailed account of the concept of intersectionality and its origins, see discussion *infra* Section V.A.

40. For a discussion of how intersectionality coincides with the virtues of the cultural defense, as well as suggestions for its implementation, see discussion *infra* Section V.B.

41. See discussion *infra* Part II (outlining *Chen*, *Moua*, and *Kimura* cases and cultural complications therein).

42. See discussion *infra* Part III (raising scholars' arguments on either side of "official" defense debate and concluding that sentencing phase is better fit for cultural evidence).

43. See discussion *infra* Part IV (describing sentencing process, predicting difficulties of using culture in sentencing determinations, and finding that cultural evidence should still be allowed as a safeguard against coercive assimilation).

44. See discussion *infra* Sections V.A (defining concept of intersectionality) and V.B (explaining why intersectional framework is an ideal tool for sentencing and providing a case study on effective implementation).

45. See discussion *infra* Section V.C (recommending steps to educate law students, attorneys, and judges on intersectional principles and providing further ideas to transition into a more culturally equitable sentencing process).

46. See discussion *infra* Sections II.A, B, and C (summarizing *Chen*, *Kimura*, and *Moua* cases).



Part briefly concludes by underscoring the inconsistencies in the cultural defense's application and the dangers therein.<sup>47</sup>

Before discussing this Comment's three central cases, which focus on rape and murder charges, it is important to note that the cultural defense appears in a multitude of other contexts.<sup>48</sup> For example, one subset of murder cases involves "witch killings," which members of indigenous cultures defend by explaining their belief in the supernatural.<sup>49</sup> Culture has also been used to defend against allegations of child abuse<sup>50</sup>—some assert that certain forms of touching are common practice in their countries of origin.<sup>51</sup> Others defend folk remedies like coining and cupping, which generally do not harm children but can leave suspicious-looking bruises.<sup>52</sup> Further, because many cultures give parents discretion over their child's marriageability, recent immigrants have claimed ignorance of American laws that set minimum ages for marriage.<sup>53</sup> Additionally, the defense is often used in drug cases where a substance was consumed for

47. See discussion *infra* Section II.D (explaining why cultural defense's current application is inadequate and highlighting need for change).

48. For an extensive discussion of the ways culture is featured in the courtroom, see RENTELN, *supra* note 7, at 23–182 (exploring cultural defense as it relates to homicide, children, drugs, animals, marriage, attire, and the dead).

49. In *People v. Galicia*, a Mexican immigrant argued that he had murdered his girlfriend because he believed she was a *bruja* who had cast an *embrujada* over him. RENTELN, *supra* note 7, at 39. Galicia was from a part of Mexico where witchcraft received wide credibility. *Id.* The judge refused to admit expert testimony from a professor of intercultural psychology during the trial, deciding such testimony was more appropriate for sentencing. *Id.* Galicia's defense counsel dropped the witchcraft defense at trial, but the expert-witness professor testified at sentencing. *Id.*; see also *People v. Galicia*, 659 N.E.2d 398, 1994 Ill. App. LEXIS 1374, at \*9–\*11, \*15 (Ill. App. Ct. 1994), *withdrawn and republished*, 684 N.E.2d 1123 (Ill. App. Ct. 1994) (unpublished table decision) (discussing psychologist's testimony as a factor considered by trial-court judge at sentencing). In another witchcraft-related case, an Ethiopian refugee attempted to kill a woman whom he thought was a *bouda*—a witch with the power to cause him physical pain. RENTELN, *supra* note 7, at 39. Expert cultural testimony was allowed at trial and the defendant was found not guilty of attempted murder. *Id.* He was instead convicted of assault with a deadly weapon, a lesser charge. *Id.*

50. See generally R. Lee Strasburger, Jr., *The Best Interest of the Child?: The Cultural Defense as Justification for Child Abuse*, 25 PACE INT'L L. REV. 161 (2013).

51. For example, in *State v. Kargar*, an Afghan refugee was convicted of gross sexual assault for kissing his son's penis. *State v. Kargar*, 679 A.2d 81, 82 (Me. 1996). On appeal, the court found that the defendant had acted innocently and in conformity with his culture. *Id.* at 85. The appellate court did not expressly recognize the cultural defense but instead used Maine's de minimis statute to vacate the conviction. *Id.* at 83, 85. Another example is *State v. Jones*, where an Inupiat man was acquitted of molestation charges. Sikora, *supra* note 7, at 1701. While wrestling with his son, grandson, and another friend, the defendant "swatted" at the boys' "crotch areas" and tried to pull down their pants. *Id.* The court agreed with expert testimony that the defendant's behavior was "within the bounds of traditional [Inupiat] culture" and was not erotic in any way. *Id.* (citation omitted).

52. See Lynn Chen, *Cultural Competency in Mandated Reporting Among Healthcare Professionals*, 28 S. CAL. REV. L. & SOC. JUST. 319, 332–33 (2019) (describing processes of coining, cupping, and moxibustion, and explaining benign nature of these folk practices, though they result in skin discoloration).

53. See RENTELN, *supra* note 7, at 115 (noting that in some African, Asian, and Latin American countries, parents facilitate marriages for their daughters under the age of sixteen).

medicinal or religious purposes or where the defendant was unaware of the illegality of a traditional herb.<sup>54</sup> It is even raised in civil cases, such as custody battles, decisions about mandating medical treatment for children over parental objection, employment-discrimination suits, and cases alleging the negligent treatment of corpses.<sup>55</sup> While the three cases discussed in this Comment were well-publicized and engendered a significant public response, culture also plays a role in many “lower-profile” cases.<sup>56</sup> When analyzing whether and how to implement the defense, its broader scope should not be forgotten.

In practice, very few defendants attempt to use cultural defenses to excuse ignorance of the law.<sup>57</sup> Instead, most offer evidence to rebut a mental-state requirement or to support another defense.<sup>58</sup> In the cases below, each defendant used cultural evidence to speak to their mental state at the time of the offense.<sup>59</sup>

#### A. *Cultural Subordination and Spousal Abuse: People v. Chen*<sup>60</sup>

In 1989, Chinese immigrant Dong Lu Chen was sentenced to five years

54. See Emp. Div., Dep’t of Hum. Res. of Ore. v. Smith, 494 U.S. 872, 890 (1990) (holding that even under Free Exercise Clause, Oregon was free to prohibit peyote as a controlled substance); see generally RENTELN, *supra* note 7, at 73–93.

55. RENTELN, *supra* note 7, at 7.

56. See *id.* (acknowledging that cultural-defense discussions often hinge on a particular set of American homicide cases with Asian defendants, giving incorrect impression that cultural defense is an Asian phenomenon).

57. For a rare case in which an immigrant defendant claimed ignorance of the law, see Don Terry, *Cultural Tradition and Law Collide in Middle America*, N.Y. TIMES (Dec. 2, 1996), <https://www.nytimes.com/1996/12/02/us/cultural-tradition-and-law-collide-in-middle-america.html> [<https://perma.cc/J46J-MYMY>]. An Iraqi refugee father was charged with child abuse after facilitating the marriage of his thirteen- and fourteen-year-old daughters to older men. *Id.* The grooms, also Iraqi refugees, were charged with rape. *Id.* The article does not indicate whether the men were convicted, but it does note that the grooms’ lawyer planned to emphasize the cultural disconnect. *Id.*

58. Lee, *supra* note 10, at 920.

59. See discussion *infra* Section II.A (concluding that, based on cultural testimony, defendant did not have requisite mental state for second-degree-murder conviction); see discussion *infra* Section II.B (finding that based on defendant’s cultural understanding of victim’s protests, a false-imprisonment conviction was more appropriate than charged offenses of rape and kidnapping); see discussion *infra* Section II.C (reducing defendant’s first-degree murder charges to voluntary manslaughter on grounds that she was “mentally disturbed” when she attempted parent-child suicide).

60. *People v. Dong Lu Chen*, No. 7774-87 (N.Y. Sup. Ct. 1989) (unpublished decision). The details below are largely derived from court transcripts, newspaper articles, and scholars who have interviewed advocates. Although the transcript of Pasternak’s testimony was available, the majority of the case file was destroyed in a fire in the record storage facility. See Daniel Wiessner, *NYC Warehouse Fire Destroyed Files from 1 Million Court Cases*, REUTERS (March 3, 2015, 5:48 PM), <https://www.reuters.com/article/us-new-york-documents-fire/nyc-warehouse-fire-destroyed-files-from-1-million-court-cases-idUSKBN0LZ2QE20150303> [<https://perma.cc/4LL6-9NQX>] (noting that fire on January 31, 2015, destroyed about 85,000 boxes of case files, some of which predated Civil War).

of probation after beating his wife to death with a claw hammer.<sup>61</sup> *People v. Chen* has perhaps generated more public outrage than any other cultural-defense decision, offending feminists, Asian American activists, and legal scholars in one fell swoop.<sup>62</sup> Although the holding seemed to champion cultural sensitivity, the cultural-expert testimony was in fact unsupported and constructed from an educated white male perspective.<sup>63</sup> Therefore, the case subordinated Chen and his culture while silencing female voices and endangering future victims of gender-based violence.<sup>64</sup>

The following section relays Chen's story as presented by defense counsel at trial.<sup>65</sup> Because Chen rendered his wife unable to give her perspective, the facts below reflect Chen's version of events only.<sup>66</sup>

After Chen and his family immigrated to the United States in September 1986, Chen worked in Maryland washing dishes while his wife and three children stayed in New York.<sup>67</sup> According to his attorney, Chen did not have a clean bill of mental health—he had been hearing voices for almost twenty years, and doctors told him “something was wrong with his mind and central nervous system.”<sup>68</sup> He also had a difficult relationship with his wife, Jian Wan Chen, who was “cruel to him and yelled at him and told him to drop dead.”<sup>69</sup> During one of Chen's visits to New York, Jian Wan Chen refused to have sex with him and allegedly “became abusive towards him, including beating him.”<sup>70</sup> He became obsessed with the idea of his wife's affair, believing he heard the voice of his wife's lover, who planned to hurt him.<sup>71</sup> In June of 1987, Chen moved

61. RENTELN, *supra* note 7, at 34; Volpp, *supra* note 1, at 64; Rosie M. Williams, *Why the “Cultural Defense” Belongs to “Us”*, 22 ME. BAR J. 36, 37 (2007).

62. See RENTELN, *supra* note 7, at 34 (“Women's organizations, Asian American groups, and Elizabeth Holtzman condemned the decision.”); cf. Lee, *supra* note 10, at 942–45 (arguing that *Chen* decision may have been influenced by “cultural convergence,” the theory that legal decisions perpetuate American cultural norms and traditions—such as tendency to empathize with husbands who kill their adulterous wives).

63. See Volpp, *supra* note 1, at 70 (“Pasternak's description of ‘Chinese society’ thus was neither substantiated by fact nor supported by his own testimony. The description was in fact his own American fantasy.”).

64. See *id.* at 76 (finding that court failed to acknowledge gender bias inherent in Pasternak's testimony, fueling narrative of male violence against women).

65. Chen's attorney, Stewart Orden, presented Chen's story to expert witness Burton Pasternak in the form of an extended “hypothetical” about a Chinese immigrant. Transcript of Record, *supra* note 1, at 58–69. Orden did not dispute that the facts in the “hypothetical” were those of Chen's case. *Id.*

66. Chen did not speak English, but he communicated with his attorney through an interpreter who was familiar with the dialect in the region where Chen was born. *Id.* at 20–21.

67. *Id.* at 64. Chen was married twenty-three years prior in China as part of a traditional arranged marriage. *Id.* at 60–61. He and his wife had three children, who were between the ages of twenty-one and fifteen at the time of the trial. *Id.*

68. *Id.* at 61–62.

69. *Id.* at 61.

70. *Id.* at 64.

71. *Id.* at 65.

back to New York, where his mental state continued to deteriorate.<sup>72</sup> Jian Wan Chen removed all of her clothes from the apartment and would not allow her husband to touch her.<sup>73</sup> Eventually, she admitted that she was seeing another man.<sup>74</sup> Approximately two weeks later, Chen propositioned his wife for sex.<sup>75</sup> She refused, saying, “I won’t let you hold me because I have other guys who will do this.”<sup>76</sup> Chen felt dizzy and confused.<sup>77</sup> He picked up the claw hammer and hit Jian Wan Chen on the head.<sup>78</sup> Then, he lost consciousness.<sup>79</sup>

Chen was charged with second-degree murder.<sup>80</sup> At a bench trial,<sup>81</sup> the defense argued that Chinese cultural pressures provoked Chen into a diminished mental state such that he could not form the intent necessary for premeditated murder.<sup>82</sup> Burton Pasternak, a white anthropologist, testified that Chinese women face harsher punishment for adultery.<sup>83</sup> He claimed that “[i]f a Chinese knew or suspected his wife was having an adulterous affair and he didn’t do anything about it, people would think there was something wrong with the man. . . . It’s a terrible shame if he lets it slide. What kind of man is that?”<sup>84</sup> Because of this cultural attitude,

---

72. *Id.* Jian Wan Chen’s abuse allegedly worsened, and Chen claimed he was confused and had trouble thinking straight. *Id.* at 66–67. On one occasion in August, he “rushed into his wife’s bedroom, grabbed her breasts and vaginal area and . . . felt that these areas seemed more developed,” which he took as further evidence of the affair. *Id.* at 67.

73. *Id.* at 66.

74. *Id.* at 66–67.

75. *See id.* (“[O]n the date of the incident [September 7] . . . he confronted his wife . . . [and] told her they would have sexual relations sometimes . . . .”); *see also* Volpp, *supra* note 1, at 65 (stating that Chen confronted Jian Wan and wanted sex on September 7, 1987).

76. Transcript of Record, *supra* note 1, at 67.

77. *Id.*

78. *Id.*

79. *Id.*

80. *E.g.*, Lee, *supra* note 10, at 941–42.

81. Chen waived his right to a jury trial. Transcript of Record, *supra* note 1, at 8.

82. *E.g.*, Williams, *supra* note 61, at 37; *see also* Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 120 (1997) (“Marriage is a sacred institution in China . . . . When there is this kind of [adulterous] situation, the attendant shame and humiliation is magnified a thousandfold.” (quoting Chen’s attorney)).

83. Before Pasternak could serve as an expert witness, defense counsel was required to establish a relevant basis for Pasternak’s testimony. FED. R. EVID. 401. Chen’s attorney explained the following: “Part of the defense . . . [stems] from culture and society, of a Mainland Chinese individual who is married to a woman who he believes to have committed adultery and what effect that might have as opposed to the effects . . . that an American would have, the difference therein.” Transcript of Record, *supra* note 1, at 52. The judge found Pasternak’s testimony sufficiently relevant based on this justification. *Id.*; *see also* RENTELN, *supra* note 7, at 34 (discussing Pasternak’s characterization of adultery in China).

84. Transcript of Record, *supra* note 1, at 113–14. In another archaic portrayal of gender roles, Pasternak suggested that Chen was in danger of finding himself without a family because a Chinese woman would not want to marry a man who had been divorced, and a white woman would not want to marry a man who could not speak English. *Id.* at 103–04. However, Pasternak predicted that Jian Wan Chen would have had no problem finding a new partner: “Caucasians [sic] . . . are perfectly willing to marry an exotic Chinese lady.” *Id.*

Pasternak said, “one could expect a Chinese to react in a much more volatile, violent way to those circumstances than someone from our own society.”<sup>85</sup> Here, by distinguishing a “Chinese” reaction from an “American” one, Pasternak cemented Chen’s status as an outsider.<sup>86</sup> Further, Pasternak was skeptical of Chinese immigrants’ ability to assimilate to American ways.<sup>87</sup> He opined that “[o]f all the Asians who come to this country, from my experience . . . the people who have the hardest time adjusting to this society are Chinese.”<sup>88</sup> Unsurprisingly, when asked who he considered to be an “average American,” Pasternak pointed to himself—an educated white male.<sup>89</sup> Believing he was the “regular citizen” against whom Chen was to be measured, Pasternak confirmed that Anglo-American values were the baseline for his analysis.<sup>90</sup>

After establishing Chen’s identity as “other,” the defense proceeded to collapse Chen’s personal experience into that of a “normal person” from China.<sup>91</sup> Though Chen reportedly suffered from mental health issues, the defense suggested that the voices in Chen’s head were similar to voices of social control heard throughout Chinese society.<sup>92</sup> By claiming that all Chinese people heard these “voices of the community,” the defense further erased Chen’s individual experience.<sup>93</sup> Moreover, when Pasternak asserted that Chinese husbands were more likely to kill their wives due to cultural pressures, he implied that Chen’s motivation stemmed from

---

85. *Id.* at 74.

86. See Volpp, *supra* note 1, at 66 (noting that separation of “American” and “immigrant Chinese” depends on assumption that Asians in America are distinctly un-American).

87. See Transcript of Record, *supra* note 1, at 102 (relaying Pasternak’s assertion that Chinese immigrants find it difficult to adjust to American society, and that Japanese immigrants have an easier time).

88. *Id.* Volpp commented that “[Pasternak’s] response failed to problematize the concept of assimilation, and its complete lack of historical or contextual specification unmasked ludicrous generalizations.” Volpp, *supra* note 1, at 72. Later in Pasternak’s testimony, defense counsel suggested that Chen had not assimilated to American culture by referencing his behavior when he entered the courtroom. “Did you see him bow to everybody here?” he asked. “Do you have any conclusion at all as to the degree that this Chinese has [assimilated] himself as an American?” Transcript of Record, *supra* note 1, at 117–18.

89. When the prosecutor asked: “What would you consider your average American?” Pasternak replied: “I think you are looking at your average American.” Transcript of Record, *supra* note 1, at 76.

90. During this exchange, the prosecutor challenged Pasternak, countering: “Are you giving us the profile of a white Anglo Saxon male?” Pasternak responded, “It’s difficult to say what an average American is, but most of us are familiar with divorce. Most of us know something about adultery . . . we become inure[d] to this.” *Id.*; see Volpp, *supra* note 1, at 70–71 (asserting that when Pasternak identified his position as the “average American,” he abandoned an anthropologist’s objective perspective and established himself as a dominant force).

91. Volpp, *supra* note 1, at 67.

92. Pasternak quoted his Chinese friends as saying, “[T]here is no wall that the wind cannot penetrate,” in reference to the voices of the community. Transcript of Record, *supra* note 1, at 54.

93. The “voices of the community” motif was repeated throughout Chen’s trial. *Id.* at 53, 61, 65.

his barbaric culture rather than his own volition.<sup>94</sup> Although this was the basis of the legal argument that allowed Chen a more lenient sentence, the effect was to denigrate Chen's cultural background, painting him as a helpless victim of his upbringing.<sup>95</sup>

Ultimately, Pasternak acknowledged that his portrayal of adultery in China was unsubstantiated.<sup>96</sup> On the stand, he admitted that he could not recall any situation in which a man in China had killed his wife.<sup>97</sup> "In China, if a man accuses his wife of adultery, then he goes to the courts," reported an New York University doctoral student specializing in the comparative study of Chinese and American women.<sup>98</sup> "[Chen] has no right to kill his wife. It is absolutely not [a] part of Chinese culture."<sup>99</sup>

At the trial's close, Brooklyn Supreme Court Justice Edward Pincus found Chen guilty of manslaughter and sentenced him to five years of probation.<sup>100</sup> Pincus explained that that he was persuaded by Pasternak's testimony, stating that Chen "was the product of his culture. . . . The culture was never an excuse, but it . . . was the factor, the cracking factor."<sup>101</sup> Justice Pincus's ruling portrayed Chen as a victim of cultural forces.<sup>102</sup> However, Pincus's and Pasternak's vision of Chinese culture was fabricated from a white, privileged perspective.<sup>103</sup> Interestingly, Pasternak

94. Anti-domestic-violence groups criticize this "stress theory" of violence because it implies that the abuse is an automatic stress response beyond the abuser's control. Volpp, *supra* note 1, at 67.

95. *See id.* at 72 ("[Pasternak's] fetishization of 'difference' . . . [depicted] gender relations in China as vastly different from gender relations in the United States. The resulting image . . . rendered [Chen and his wife] unrecognizable and inhuman.").

96. Transcript of Record, *supra* note 1, at 107; *see* RENTELN, *supra* note 7, at 34 (noting that Pasternak also failed to present evidence showing how Chen's case would be dealt with under Chinese law).

97. Pasternak claimed that community members in China would likely prevent an enraged man from killing his adulterous wife. Transcript of Record, *supra* note 1, at 107. However, Pasternak testified he had personally observed a Chinese man beating his wife "on a perception of adultery. It was never really confirmed . . . and the neighbors came and stopped him from doing that." *Id.* at 106.

98. Jetter, *supra* note 5, at 26 (quoting Xiaolan Bao, doctoral student at New York University).

99. *Id.*

100. *Id.* at 4 (stating that Chen was convicted on a "reduced manslaughter" charge and sentenced to five years' probation); *but see* Lee, *supra* note 10, at 942 n.200 (noting competing accounts as to whether Justice Pincus reduced Chen's charge from murder to manslaughter, or whether charge was reduced from first-degree manslaughter to second-degree manslaughter (citations omitted)).

101. *See* D. Chiu, *supra* note 3, at 1053 (quoting Justice Pincus and explaining that he focused specifically on cultural evidence).

102. During Chen's sentencing, Justice Pincus justified his leniency by stating, "There are victims in this case: The deceased is a victim, her suffering is over. The defendant is a victim, a victim that fell through the cracks because society didn't know where or how to respond in time." Volpp, *supra* note 1, at 74; *cf.* D. Chiu, *supra* note 3, at 1053 (hypothesizing that Chen received lesser sentence because he was considered a product of Chinese culture).

103. *See* Volpp, *supra* note 1, at 73 (describing Justice Pincus's effort to integrate his "newly acquired, inaccurate and essentialized understanding" of Chinese culture into *Chen* holding).

was surprised by the decision; he told journalists he was “indignant about how it happened” and that he “didn’t know how it was going to work out.”<sup>104</sup>

The public response to the *Chen* decision was explosive.<sup>105</sup> Asian American activists said the ruling directly endangered Asian women in abusive relationships and protested Pasternak’s outdated and reductive testimony.<sup>106</sup> A Chinese woman seeking protection from domestic abuse at the New York Asian Women’s Center told her counselor: “Even thinking about that case makes me afraid. My husband has 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.’”<sup>107</sup> A coalition of feminist and Asian activist groups planned to challenge the ruling, but the Asian organizations withdrew their support because feminists wanted to ban cultural considerations from the courtroom outright.<sup>108</sup> Margaret Fung, the executive director of the Asian American Legal Defense and Education Fund, argued for the preservation of the defense, saying, “to bar the use of a cultural defense promotes the idea that when people come to America, they have to give up their way of doing things. That is a notion we cannot support.”<sup>109</sup> The *Chen* decision shows a darker side of the cultural defense. Though the court granted leniency on cultural grounds, the

---

104. Jetter, *supra* note 5, at 27. Pasternak also said he received death threats after the trial and did not plan to testify in a similar capacity in the future. *Id.*

105. See Volpp, *supra* note 1, at 75–76 (explaining that trial portrayed Jian Wan Chen as an adulteress, and implied that the taking of her life did not warrant jail time); see also Jetter, *supra* note 5, at 4 (“The ruling sent shock waves through the Asian-American community . . . and prompted calls for an end to the use of the so-called ‘cultural defense’ . . .”).

106. Jetter, *supra* note 5, at 26. Asian activists did not object to the use of anthropology in the courtroom, but rather to the “use of outdated and inaccurate descriptions of sexual mores in modern China . . .” *Id.*

107. *Id.* at 4. At the time of the *Chen* decision, immigration laws forced many immigrant women to stay with abusive spouses. The Immigration Fraud Amendment was passed in 1986, three years before Chen’s sentencing. *Id.* at 26. The Amendment required certain immigrants to prove they were living with their spouse or face possible deportation. *Id.* An immigration attorney called the law the “spousal hostage act.” *Id.* However, the Immigration Reform Act of 1990 created a waiver for battered spouses with conditional permanent residency based on their marriage to a U.S. citizen. Maxine Yi Hwa Lee, *A Life Preserver for Battered Immigrant Women: The 1990 Amendments to the Immigration Marriage Fraud Amendments*, 41 BUFF. L. REV. 779, 779–80 (1993). Additionally, the Violence Against Women Act now allows abused spouses to “self-petition” for permanent resident status without their abuser’s knowledge or consent. *Green Card for VAWA Self-Petitioner*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-avaa-self-petitioner> (last visited Jan. 22, 2022) [<https://perma.cc/ZEL7-545W>].

108. The National Organization for Women, the Organization of Asian Women, and the Committee Against Anti-Asian Violence planned to file a complaint against Judge Pincus with the New York State Commission on Judicial Conduct. Jetter, *supra* note 5, at 27. But the Asian organizations withdrew the night before, saying the petition was too broad because it sought to obliterate the cultural defense entirely. *Id.* The president of the New York City National Organization for Women chapter expressed frustration at the coalition’s breakup: “[Asian American organizations] were afraid that we were going to go around with a battering ram and destroy the whole concept of a cultural defense. But the judge needed to know that we did not find his statements acceptable.” *Id.*

109. *Id.* at 26.

expert cultural testimony was not founded in fact.<sup>110</sup> The decision adopted a reductive view of Chinese culture and was ultimately harmful to victims of domestic abuse.<sup>111</sup>

*B. Barriers in Cross-Cultural Communication: People v. Moua*<sup>112</sup>

Kong Moua was a Laotian immigrant charged with kidnapping and rape after abducting an eighteen-year-old Laotian American woman and having intercourse with her.<sup>113</sup> Moua asserted that he was following the Hmong courtship ritual of “marriage by capture,” and that in cultural context he honestly understood the victim’s protests as a form of consent.<sup>114</sup> After hearing cultural testimony, the court adopted a plea bargain allowing Moua to plead guilty to the misdemeanor of false imprisonment.<sup>115</sup> The rape and kidnapping charges were dismissed, and Moua was required to pay nine hundred dollars in restitution to the victim and spend 120 days in jail.<sup>116</sup> “Marriage by capture” has been reported in multiple Hmong communities in the United States, but Moua’s case has received the most extensive news coverage by far.<sup>117</sup> The case demonstrates the challenges

110. See Volpp, *supra* note 1, at 70 (describing Pasternak’s “bizarre portrayal” of divorce and adultery in China and concluding that it was not supported either by fact or by Pasternak’s own testimony).

111. *E.g., id.* at 76 (“Other Chinese immigrant women living with abuse at the hand of their partners and husbands . . . understood that violence against them . . . had the implicit approval of the state.”).

112. *People v. Moua*, No. 315972-0 (Cal. Super. Ct. Feb. 17, 1985) (unreported decision). The details below are partly derived from newspaper articles and scholars who have reviewed court transcripts.

113. Complaint, *People v. Moua*, No. 315972-0 (Cal. Super. Ct. May 15, 1984); see Oliver, *supra* note 17 (noting Moua’s “bride” was also Hmong but was more assimilated into American culture); but see Evans-Pritchard & Renteln, *supra* note 8, at 9 (stating victim was instead nineteen years old).

114. See Notice of Motion and Motion to Set Aside the Information Pursuant to Penal Code Section 995 with Points and Authorities at 2, *People v. Moua*, No. 315972-0 (Cal. Super. Ct. Nov. 29, 1984) [hereinafter Motion to Set Aside Information] (“Xeng told Kong that . . . he should take her to be his bride. Hmong custom and tradition require the girl to be shy and express reluctance and require the boy to press the issue . . .”); see also Evans-Pritchard & Renteln, *supra* note 8, at 25 (explaining defense’s argument that Moua had reasonable belief that Xiong consented to have intercourse with him in context of marriage); but see RENTELN, *supra* note 7, at 237–38 (arguing this was a marriage by elopement, not a “marriage by capture,” since Moua’s family thought Xiong had consented to marriage).

115. Change of Plea and Waiver of Rights, *People v. Moua*, No. 315972-0 (Cal. Super. Ct. Jan. 4, 1985); Evans-Pritchard & Renteln, *supra* note 8, at 26.

116. Additionally, Moua was ordered to pay one hundred dollars in restitution to the government and serve three years of probation. Sentencing Minute Order at 2–3, *People v. Moua*, No. 315972-0 (Cal. Super. Ct. Feb. 17, 1985). He was released from jail thirty days early to return to his work as a tutor, citing his family’s financial hardship. Probation Modification, *People v. Moua*, No. 315972-0 (Cal. Super. Ct. Apr. 11, 1985).

117. See RENTELN, *supra* note 7, at 237 (referencing accounts of “marriage by capture” in California, Colorado, Minnesota, and Wisconsin). In a different “marriage by capture” case in St. Paul, Minnesota, the prosecutor agreed to a plea bargain, concluding that, given Hmong tradition, it would be too difficult to convince a jury that the victim “really meant ‘no’ and had been taken away against her will . . .” Oliver, *supra* note 17.



courts face when attempting to weave cultural pluralism into their decisions.<sup>118</sup>

While accounts of the incident vary, the key events in the case are as follows.<sup>119</sup> Moua and the victim, Xeng Xiong, were both born in Laos and immigrated to the United States as teenagers.<sup>120</sup> They had met previously; Moua told police that the two had a romantic relationship, whereas Xiong contended they were only friends.<sup>121</sup> On the day in question, Moua and his brother-in-law went to Xiong's workplace at Fresno City College, put her into a car, and drove her to Moua's close relative's home.<sup>122</sup> Xiong remained there overnight, and she and Moua had intercourse several times.<sup>123</sup> The next day, Xiong spoke to the police and said she had not been sexually molested, declining to report the incident.<sup>124</sup> Shortly thereafter Xiong and Moua's families met to try to settle any disagreement.<sup>125</sup> Moua contended that the meeting took place because Xiong's mother did not approve of the marriage.<sup>126</sup> Xiong, on the other hand, said the families

---

118. See Evans-Pritchard & Renteln, *supra* note 8, at 30 (explaining that culture is awkwardly handled in American legal system and that *Moua* exemplifies such treatment).

119. For a complete account of both parties' version of events, see *id.* at 9–13; Motion to Set Aside Information, *supra* note 114, at 1–8; People's Opposition to Defendant's Motion to Dismiss Pursuant to Penal Code Section 995 at 1–2, *People v. Moua*, No. 315972-0 (Cal. Super. Ct. Dec. 17, 1985).

120. Evans-Pritchard & Renteln, *supra* note 8, at 9.

121. *Id.* at 10, 12; see Motion to Set Aside Information, *supra* note 114, at 2, 4 (relaying Moua's assertions that he and Xiong were engaged after meeting at a Hmong New Year's festival and exchanged tokens as proof of their intent to marry). Xiong apparently confirmed that she had agreed to marry Moua at the New Year's festival but meant it as a "friendly joke." *Id.* at 5–6.

122. According to Moua, it is customary to "send respectable persons with the boy to take the girl, to notify the girl's family that she is not missing but becoming a bride, and to deliver the dowry from the boy's family to the girl's family." *Id.* at 2–3. Moua reported that he and Xiong had a conversation about marriage and that she left with him willingly, whereas Xiong contended she was forced into the vehicle. Evans-Pritchard & Renteln, *supra* note 8, at 10, 12.

123. Moua asserted that Xiong communicated with her parents during this time, and that Xiong's mother did not approve of the marriage because Moua was an orphan. *Id.* at 11, 12. Xiong, on the other hand, said she was prevented from speaking with her parents. *Id.* At the preliminary hearing she also testified that she told Moua, "[n]o, you can't force me to sleep with you against my will," and Moua nonetheless forced himself upon her. People's Opposition to Defendant's Motion to Dismiss, *supra* note 119, at 1–2.

124. Evans-Pritchard & Renteln, *supra* note 8, at 12; Motion to Set Aside Information, *supra* note 114, at 3–4. Xiong later testified that she did not leave with the police because she was afraid and did not believe they would take her home. Motion to Set Aside Information, *supra* note 114, at 3–4, 8; see also RENTELN, *supra* note 7, at 237 (noting that when police arrived, Xiong told them that Moua was her husband and that she wanted to stay with him). The record is silent as to why the police were called, or who called them.

125. Motion to Set Aside Information, *supra* note 114, at 4; Evans-Pritchard & Renteln, *supra* note 8, at 11, 13.

126. According to Moua, he was allowed to stay on the couch at Xiong's family home that night. In Hmong tradition, marriages are solemnized when the bride and groom spend three consecutive nights together, and Moua hoped to achieve this by staying close to Xiong. Motion to Set Aside Information at 4; Evans-Pritchard & Renteln, *supra* note 8, at 11.

met to resolve the conflict over the kidnapping “in a Hmong fashion.”<sup>127</sup> The families did not reach a consensus, and eventually Xiong called the police.<sup>128</sup> Xiong alleged that she waited to press charges because her reputation was at stake.<sup>129</sup> If other members of the Hmong community knew she was no longer a virgin, she would have trouble finding a husband.<sup>130</sup> Moua relayed a different story: Xiong’s family had apparently asked him to pay restitution to compensate for her damaged reputation, and he refused.<sup>131</sup> According to Moua, his refusal prompted Xiong to call the police.<sup>132</sup>

Throughout the adjudication process, both Moua’s attorney and the judge made sincere efforts to understand the cultural issues involved in the case, though there were significant barriers to understanding.<sup>133</sup> First, there was no court interpreter who spoke Hmong, so a man from the Laos Community Center stepped in to translate at the preliminary hearing.<sup>134</sup> Folklorist Deirdre Evans-Pritchard and cultural-defense scholar Alison Dundes Renteln, upon reviewing hearing transcripts, reported:

[T]he court interpreter’s ability to translate from Hmong into English was in question. His clumsy phrasing of the witness’s words did little to clarify the facts for the municipal court judge, Victor N. Papadakis. At one point Judge Papadakis became aware that the court interpreter was doing more than translating! He was also interpreting the facts of the case without reference to what the witness was saying. Furthermore, because Hmong avoid discussing sex publicly, the Hmong interpreter and the witness did not answer all the questions directly. And finally, it is likely that the interpreter’s responses were somewhat guarded, considering the interpreter’s standing in the Hmong community and the

---

127. Evans-Pritchard & Renteln, *supra* note 8, at 13; *cf.* LISA ARONSON FONTES, CHILD ABUSE AND CULTURE: WORKING WITH DIVERSE FAMILIES 44 (2005) (“After holding [the young woman] for 3 days, [the man] arranges for a traditional Hmong go-between, called the *mej-koob*, to legitimize the marriage by arranging a bride price and performing a marriage ceremony.”).

128. Evans-Pritchard & Renteln, *supra* note 8, at 11, 13.

129. *Id.* at 13.

130. *Id.*

131. Moua claimed that “[a]ccording to Hmong culture if the boy doesn’t want to marry the girl then the boy will pay a certain amount but if the girl doesn’t want to marry the boy after the girl got to the boy’s house for a period of time then the girl have to pay the boy.” *Id.* at 12. *See also* Motion to Set Aside Information, *supra* note 114, at 8–9 (noting that Xiong herself demanded “reparation for her loss of face,” and that previously exchanged dowry and engagement tokens were returned).

132. Evans-Pritchard & Renteln, *supra* note 8, at 12; *but see* Motion to Set Aside Information, *supra* note 114, at 9 (instead stating that meeting ended when Xiong’s mother and grandmother “physically pulled” Xiong from home, declaring Moua unfit to be a husband because he was an orphan).

133. *See* Evans-Pritchard & Renteln, *supra* note 8, at 19 (explaining that Moua’s attorney and the judge made mistakes in their analysis despite their efforts toward cultural sensitivity); *but see* Lee, *supra* note 10, at 955 (asserting that although *Moua* is often framed in terms of its cultural understanding, the case instead perpetuated racism through its barbaric depiction of Hmong culture).

134. Evans-Pritchard & Renteln, *supra* note 8, at 18.

importance of clan relationships and community cohesion for the Hmong—the manner in which he translated statements might well affect his own future relationships.<sup>135</sup>

Apart from the problems with interpretation, Moua's defense involved overlapping cultural complications. In most jurisdictions in the United States, an honest and reasonable belief that the victim consented is an affirmative defense to forcible rape charges.<sup>136</sup> Moua claimed an honest belief that Xiong was a willing participant in a traditional "marriage by capture" ritual.<sup>137</sup> According to alleged tradition in Moua's tribe, a man takes his bride from her parent's home and brings her to his family home to consummate the marriage.<sup>138</sup> The woman is expected to prove her virtuousness and chastity by saying, "No, no, no; I'm not ready," and the man must persist to show his strength and virility.<sup>139</sup> The sentencing judge agreed to admit evidence of the ritual, saying, "I am surprised there are judges around who won't allow cultural defenses at least at the time of sentencing. It appears to me to be extremely relevant."<sup>140</sup> However, Moua's attorney only presented one piece of cultural evidence: a report called "A Guide to Understanding Dating and Marriage in the Hmong Culture."<sup>141</sup> The pamphlet, prepared by a Hmong man, contained short descriptions of marriage practices in Laos, such as arranged marriages, marriage by elopement, and marriage by "evidence of token."<sup>142</sup> The author did not use the term "marriage by capture" and only briefly raised the concern that Hmong marriage rituals might be viewed as kidnapping

---

135. *Id.* at 18–19.

136. Lee, *supra* note 10, at 955; *see also* Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 438 (1998) ("[I]f the defendant reasonably believes the [victim] consented, he is not guilty of the offense, *whether or not that belief is accurate.*").

137. *See, e.g.*, D. Chiu, *supra* note 3, at 1115 (explaining Moua's surprise at charges brought against him).

138. *See, e.g.*, Teng Moua, *The Hmong Culture: Kinship, Marriage & Family Systems*, at 20–21 (May 2003) (M.S. Thesis, University of Wisconsin-Stout), <https://www2.uwstout.edu/content/lib/thesis/2003/2003mouat.pdf> [<https://perma.cc/5X56-HJ6A>] (explaining that prospective Hmong husband and his "kinsmen" kidnap prospective bride and take her to prospective husband's family home); Williams, *supra* note 61, at 37 (describing "marriage by capture" ritual).

139. RENTELN, *supra* note 7, at 126. One of the many problematic facets of the ritual is that the "brides" are often girls, sometimes under fifteen years old. *Id.* at 128. Under United States law, underage girls cannot give their consent. *Id.* Further, using protest as part of the ritual means that it is impossible to tell whether a woman has consented or not. *Id.*; *see also* FONTES, *supra* note 127, at 44 (noting that Hmong girls involved in marriage by capture are commonly between fourteen and eighteen, while men are often between eighteen and thirty).

140. Oliver, *supra* note 17.

141. SHUR VANG VANGYI, *A GUIDE TO UNDERSTANDING DATING AND MARRIAGE IN THE HMONG CULTURE* (1983); *see* Evans-Pritchard & Renteln, *supra* note 8, at 20–21 (explaining that pamphlet was sole piece of cultural evidence presented).

142. VANGYI, *supra* note 141, at 9–12.

or rape.<sup>143</sup> The prosecution countered with an expert who testified that Laotian courts did not endorse marriage by capture.<sup>144</sup> Evans-Pritchard and Renteln found the expert testimony irrelevant because marriage agreements are handled within individual Hmong communities and do not typically reach the courts.<sup>145</sup> Neither the prosecution nor the defense provided cultural information to tackle the key questions at hand: (1) whether the incident qualified as a “marriage by capture,” and (2) whether Moua reasonably understood Xiong’s protests as a form of consent.<sup>146</sup>

Given the limited evidence available, the issues with translation, and Moua’s and Xiong’s conflicting stories, the court’s task was extremely complicated.<sup>147</sup> However, the sentencing judge, Gene M. Gomes, did his best to “tailor a sentence that would fulfill both [the court’s] needs and the Hmong needs.”<sup>148</sup> Judge Gomes explained that a plea-bargain arrangement gave him latitude to consider cultural issues.<sup>149</sup> He also noted that he preferred to use culture as a mitigating factor during sentencing rather than as a “pure defense” during trial.<sup>150</sup> The court therefore settled on a false-imprisonment conviction and dismissed the rape and kidnapping charges.<sup>151</sup> However, Gomes conceded that he was “uncomfortable acting as half judge, half anthropologist.”<sup>152</sup> With this statement, Gomes acknowledged that the lack of available anthropological information made it difficult to balance cultural pluralism with the rights of the victim.<sup>153</sup> Accordingly, Gomes found a middle-of-the-road solution: Moua’s punishment of 120 days in jail and a \$1,000 fine was much lighter than a sentence for a rape conviction, yet he pled guilty to a crime for which he

---

143. *Id.* at 11, 20. The pamphlet’s author acknowledged that Americans might mistake a “marriage by elopement” for a kidnapping and rape. Vangyi insisted that “[t]o the Hmong it is not. When a boy intends to take a girl for his wife, if she arrives safely at his home, she is legally his wife, and nobody can take her away from him except her parents.” *Id.* at 20.

144. Evans-Pritchard & Renteln, *supra* note 8, at 21.

145. *See id.* (arguing that expert testimony was also irrelevant because this was a marriage by elopement rather than “marriage by capture”).

146. *See id.* at 24 (“The central legal question in the *Moua* case was whether there was a mistake of fact as to consent.”).

147. *See id.* at 26 (explaining that judge likely wanted to devote attention to cultural issues because of area’s “rapidly growing” Hmong population).

148. *Id.* at 27.

149. *Id.*

150. *Id.*

151. Change of Plea and Waiver of Rights, *supra* note 115.

152. Evans-Pritchard & Renteln, *supra* note 8, at 27.

153. Gomes voiced support for both sides of the divide. First, he commented that “cultural defense is in keeping with a long history of criminal jurisprudence, and I think it’s great.” Oliver, *supra* note 17. But he also asserted that “if an act is harmful to society, we are not going to condone it. We can’t have Robin Hoods breaking the peace no matter how pure their motivations are.” *Id.*; *see also* Evans-Pritchard & Renteln, *supra* note 8, at 30 (explaining that *Moua* explored cultural issues in a “piecemeal fashion,” honoring neither Hmong culture nor American law).

may not have possessed the requisite intent.<sup>154</sup> Without more information on Moua, Xiong, and the cultural interplay between their families, it is impossible to know whether justice was done.<sup>155</sup>

C. *Culture as a State of Mind: People v. Kimura*<sup>156</sup>

In *Kimura*, after learning that her husband had been unfaithful, a Japanese American mother walked into the Pacific Ocean with her two small children in an attempt at *oya-ko shinju*, or parent-child suicide.<sup>157</sup> Kimura was rescued but both children drowned.<sup>158</sup> Charged with first-degree murder, Kimura raised a temporary-insanity defense.<sup>159</sup> With the Japanese American community rallying behind her, Kimura was allowed to plead guilty to voluntary manslaughter.<sup>160</sup> She was sentenced to one year

154. See Evans-Pritchard & Renteln, *supra* note 8, at 29 (raising questions as to conviction's appropriateness, when Moua's guilt was not necessarily proven beyond a reasonable doubt); but see Lee, *supra* note 10, at 955 (contending that *Moua* ruling had less to do with cultural content and more to do with Western tradition of "giving male rape defendants the benefit of the doubt").

155. Xiong's motivation for taking the case to court was never revealed: she may have adopted American values about sex and marriage, or pressed charges out of shame or parental pressure. Alternatively, as Moua suggested, the case may have been retaliation for Moua's refusal to pay restitution for Xiong's damaged reputation. It remains unclear whether Xiong truly felt that she was raped or instead sought to extricate herself from the Hmong marriage agreement. Evans-Pritchard and Renteln noted that "[t]he question is further obscured, because an assessment of [Xiong and Moua's] actions and testimonies must take into account the fact that the Hmong avoid shame whatever the cost." Evans-Pritchard & Renteln, *supra* note 8, at 29; accord Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1470 (2003) ("The questioners almost always presume that Hmong immigrants uniformly accept and defend this practice. But . . . many Hmong-Americans dissent from such traditions. . . . They 'sense an obligation to learn about and perpetuate their culture [but] want to do so on their own terms.'" (citation omitted)).

156. *People v. Kimura*, No. A-091133 (Cal. Super. Ct. 1985) (unpublished decision). The author obtained the original complaint, arraignment information, sentencing disposition, and plea from the *Kimura* case. The Superior Court of California, Los Angeles County, advised that the remainder of the *Kimura* record is sealed. Accordingly, the details below are largely derived from newspaper articles and scholars who have interviewed advocates and reviewed court transcripts.

157. See, e.g., Alison Matsumoto, Note, *A Place for Consideration of Culture in the American Criminal Justice System: Japanese Law and the Kimura Case*, 4 J. INT'L L. & PRAC. 507, 523 (1995); RENTELN, *supra* note 7, at 25; Leslie Pound, *Mother's Tragic Crime Exposes a Culture Gap*, CHI. TRIB. (June 10, 1985), <https://www.chicagotribune.com/news/ct-xpm-1985-06-10-8502060678-story.html> [<https://perma.cc/WUM3-H5BU>] (explaining facts and disposition of *Kimura*).

158. See, e.g., Matsumoto, *supra* note 157, at 507 (describing Kimura's rescue).

159. See RENTELN, *supra* note 7, at 25 (noting that six psychiatrists testified on Kimura's behalf, some emphasizing Kimura's inability to distinguish between her own life and those of her children); see Complaint at 1-4, *People v. Kimura*, No. A-091133 (Cal. Super. Ct. Apr. 24, 1985) (charging Kimura with two counts of murder and two counts of felony offense "endangering the life or health of a child").

160. Plea Report at 1, *People v. Kimura*, No. A-091133 (Cal. Super. Ct. Dec. 2, 1985); see, e.g., Matsumoto, *supra* note 157, at 524 (explaining that Kimura was allowed to plead guilty to manslaughter because her attorney presented testimony that she was mentally disturbed); see Katie Kaori Hayashi, *Kimura Sentenced to Probation, Released*, PAC. CITIZEN, Dec. 6, 1985, at 1, [https://pacificcitizen.org/wp-content/uploads/archives-menu/Vol.101\\_%2323\\_Dec\\_06\\_1985.pdf](https://pacificcitizen.org/wp-content/uploads/archives-menu/Vol.101_%2323_Dec_06_1985.pdf) [<https://perma.cc/8ZFFQ-54U8>] (describing Japanese American Community's outpouring of support for Kimura).

in jail, five years of probation, and mental-health counseling.<sup>161</sup> Although the judge said he relied on psychiatrists' testimony rather than cultural context, Japanese culture undeniably played a role in the courtroom.<sup>162</sup>

Fumiko Kimura immigrated to the United States at the age of twenty.<sup>163</sup> After her first marriage ended in divorce, she married Itsuroko Kimura and gave birth to two children, Kazutaki and Yuri.<sup>164</sup> Kimura was extremely introverted by nature, and she and her children were isolated within their apartment complex.<sup>165</sup> Her attorney said, "She had no friends at all . . . she was totally devoted to her husband, totally involved with the children."<sup>166</sup> Kimura's husband began an affair with another woman, Kazue Tanahashi, a relationship that carried on for over three years.<sup>167</sup> Eventually, the two decided to end the affair, and Tanahashi went to the Kimuras' apartment to talk with the couple.<sup>168</sup> After Tanahashi's visit, Fumiko Kimura's health devolved: she was unable to sleep and lost weight.<sup>169</sup> She felt she was responsible for the infidelity because she was a bad wife and mother.<sup>170</sup> Kimura said that she took her children into the water with her because she thought she was hated and that the children, as extensions of her, would be hated as well.<sup>171</sup> She believed that if her children were left behind, they would be abused as a result.<sup>172</sup>

---

161. Sentencing Disposition at 1, *People v. Kimura*, No. A-091133 (Cal. Super. Ct. Nov. 21, 1985).

162. See RENTELN, *supra* note 7, at 25 ("Though [Kimura's] attorney claimed that the favorable plea bargain relied on psychiatric testimony, commentators believe that cultural factors played a role in the process."); Robert W. Stewart, *Probation Given to Mother in Drowning of Her Two Children*, L.A. TIMES (Nov. 22, 1985, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1985-11-22-me-1070-story.html> [<https://perma.cc/R2V6-TNLB>] ("The judge said he had received petitions . . . supporting Kimura, although he said the petitions played no part in his decision."); Williams, *supra* note 61, at 38 ("Culture was influential in establishing Kimura's state of mind at the time she committed the crime and her ability to form the requisite malice aforethought to be found guilty of first-degree murder.").

163. Pound, *supra* note 157.

164. Kimura married in her early twenties and was divorced a few years later. *Id.*

165. Kimura's mother told police that her daughter was a "very introverted girl." *Id.* The property manager at the apartment complex described Kimura as a "warm, gentle woman"—she said she seldom saw Itsuroko Kimura, but Fumiko Kimura was "home all the time." *Id.*

166. *Id.*

167. The affair was so extensive that Itsuroko Kimura eventually set up an apartment for Tanahashi. *Id.*

168. Tanahashi initially called Fumiko Kimura to tell her about the affair, and then visited the apartment. *Id.* She reported that Kimura "looked normal" at the time of her visit. *Id.* But other reports indicated that Itsuroko Kimura promised his wife he would end the affair a year earlier. Hayashi, *supra* note 160, at 1. When Fumiko Kimura received the call from Tanahashi, she realized her husband had broken his promise. *Id.* at 1, 10. Tanahashi allegedly told Fumiko Kimura that Itsuroko Kimura had betrayed her, and that she was planning to kill him and commit suicide. *Id.* at 10. These threats started Kimura's initial spiral of depression and anxiety. *Id.*

169. See Pound, *supra* note 157 (noting that Kimura told her brother she could not sleep and had lost ten pounds).

170. Hayashi, *supra* note 160, at 1.

171. *Id.* at 10; Stewart, *supra* note 162.

172. Stewart, *supra* note 162.

Kimura was charged with first-degree murder “with special circumstances,” a modification applied to cases involving multiple murders.<sup>173</sup> If convicted, she could have faced life in prison without parole or the death penalty.<sup>174</sup> At the outset of the case, Kimura did not understand the charges; she thought her crime was “failed suicide.”<sup>175</sup> The defense relied on testimony from six psychiatrists alleging that Kimura was mentally disturbed when she walked into the ocean.<sup>176</sup> Importantly, although Kimura seemed to benefit from cultural considerations, the case was not argued from a cultural perspective.<sup>177</sup> The judge, prosecution, and defense all stated that the decision stood upon psychiatric testimony rather than culture.<sup>178</sup>

However, a petition with tens of thousands of signatures from the Japanese American community implored the court to consider Kimura’s actions in a cultural context.<sup>179</sup> The petition, organized by the Fumiko Kimura Fair Trial Committee, asked the District Attorney to charge Kimura with involuntary manslaughter and to offer her probation with “supervised rehabilitation.”<sup>180</sup> Kimura’s supporters noted that though *oya-ko shinju* is illegal in Japan, perpetrators typically receive a much lighter

173. Arraignment at 1, *People v. Kimura*, No. A-091133 (Cal. Super. Ct. May 17, 1985); Pound, *supra* note 157; Matsumoto, *supra* note 157, at 523–24. “Special circumstances” are a list of statutory factors that can elevate a crime to death-penalty eligibility. See Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1287 (1997) (“[A]ny one of thirty-two special circumstances suffices to make a first degree murderer death-eligible.”). Although capital punishment was suspended in California in 2019, at the time of Kimura’s case, those convicted of first-degree murder faced one of two punishments: life without parole or death. See Tim Arango, *California Death Penalty Suspended; 737 Inmates Get Stay of Execution*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/california-death-penalty.html> [<https://perma.cc/L72A-B6WA>] (describing moratorium on California’s death penalty); CAL. PENAL CODE § 190.2 (West 2019) (listing California’s “special circumstances” and options available for those convicted of first-degree murder).

174. Pound, *supra* note 157; Matsumoto, *supra* note 157, at 523–24.

175. Pound, *supra* note 157; see John Alan Cohan, *Honor Killings and the Cultural Defense*, 40 CAL. W. INT’L L.J. 177, 237 (2010) (explaining that because of her cultural background Kimura misunderstood charges brought against her).

176. See RENTELN, *supra* note 7, at 25 (“Six psychiatrists testified that Kimura was suffering from temporary insanity. Some based their conclusion on her failure to distinguish between her own life and the lives of her children.”); Matsumoto, *supra* note 157, at 524 (stating that defense attorney chose to rely on testimony emphasizing Kimura’s mental disturbance).

177. RENTELN, *supra* note 7, at 25.

178. See Stewart, *supra* note 162 (explaining that judge acknowledged petition from Japanese American community, though he said it did not impact his decision). Additionally, both the prosecution and defense stated cultural issues were not considered in plea bargaining. Stewart, *supra* note 162.

179. Compare Hayashi, *supra* note 160, at 1 (describing thirty-thousand signatures sent to Little Tokyo Service Center from twenty-four states and Japan), with Stewart, *supra* note 162 (reporting judge received petitions with twenty-five thousand signatures).

180. Following Kimura’s arraignment, the Fumiko Kimura Fair Trial Committee said they had already collected over one thousand signatures on their petition asking for more lenient treatment. Pound, *supra* note 157.

sentence than for murder.<sup>181</sup> This leniency is derived from the historical Japanese perspective that suicide is, on rare occasions, an option for people who face insurmountable challenges in life.<sup>182</sup> Kimura's brother said that the practice "happens many times in Japan. . . . I think it is an unhappy action, but in Japan, sometimes it is a cure."<sup>183</sup> Translated literally, "*oya-ko*" means "parent-child" and "*shinju*" means "center of the heart."<sup>184</sup> Elaine M. Chiu, a law professor who has written extensively at the intersection of culture and criminal law, explained:

If Fumiko Kimura had been successful in taking not just her children's lives but also her own life, her act of *oya-ko shinju* would have constituted one final act of good parenting. In other words, "it is more merciful to kill children than to leave them in the cruel world without parental protection. The mother who commits suicide without taking her child with her is blamed as an *oni no yō ha hito* (demonlike person)."<sup>185</sup>

Convinced by psychiatrists' testimony that Kimura was suffering from "psychotic depression and delusions" when she entered the water, the state took a sympathetic approach.<sup>186</sup> The prosecution recommended probation, concluding that Kimura acted impulsively rather than rationally, and that society would not benefit from her imprisonment.<sup>187</sup> She was thus permitted to plead guilty to voluntary manslaughter.<sup>188</sup> Superior Court Judge Robert Thomas supported the plea bargain, stating that "[e]verybody seems to agree Mrs. Kimura is likely to experience punishment as long as she lives. I feel that further incarceration would serve no useful purpose."<sup>189</sup> Kimura was therefore sentenced to one year in jail,

181. See Chen, *supra* note 52, at 339 (explaining that parent-child suicide is usually charged as involuntary manslaughter in Japan, and that perpetrators usually receive a very similar sentence to Kimura's); Matsumoto, *supra* note 157, at 513–23 (explaining how Japanese courts have historically dealt with cases of *oya-ko shinju*).

182. According to Elaine M. Chiu, Japanese culture does not share the American taboo against suicide. While the Japanese do not condone suicide, for those who have "failed in some way in life," it is considered a solution to escape greater harm. Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1352 (2006).

183. Pound, *supra* note 157.

184. E. Chiu, *supra* note 182, at 1352.

185. *Id.* at 1353 (quoting MAMORU IGA, *THE THORN IN THE CHRYSANTHEMUM: SUICIDE AND ECONOMIC SUCCESS IN JAPAN* 18 (1986)).

186. Stewart, *supra* note 162.

187. One psychiatrist described Kimura's behavior as "impulsive" and "unpremeditated." *Id.* Further, the prosecutor commented on the probation recommendation: "The statements [Kimura] made at the hospital showed she was not a rational person at the time, and to punish somebody like this woman by sending her to state prison, I don't think society would benefit from it." *Id.* The prosecutor was also quoted as saying: "[Kimura] can no longer see her children growing. I really believe the pain and suffering Mrs. Kimura has inside of her is sufficient punishment." Hayashi, *supra* note 160, at 1.

188. Plea Report, *supra* note 160, at 1; e.g., Chen, *supra* note 52, at 339–40 (explaining that Kimura accepted guilty plea for voluntary manslaughter, though her actions could have yielded first-degree murder conviction).

189. Hayashi, *supra* note 160, at 1.



five years of probation, and counseling.<sup>190</sup> But as she had already spent a year in jail awaiting trial, she received credit for time served and was released immediately.<sup>191</sup> The courtroom audience, mostly Japanese and Japanese American, applauded when the sentence was announced.<sup>192</sup> However, the lenient decision did not garner universal support.<sup>193</sup> “It doesn’t matter if you kill out of love or . . . out of hate,” said an assistant district attorney working on the case.<sup>194</sup> “[S]he had absolutely, positively no right to kill the children. . . . We’re talking about the life of another person. We have the right to demand that people who live in our society abide by our own rules.”<sup>195</sup>

*Kimura* exemplifies the elusiveness of the cultural defense.<sup>196</sup> Because the effects of culture in the courtroom are seldom formally acknowledged, it is difficult to assess the degree to which *Kimura*’s culture contributed to the decision.<sup>197</sup> Perhaps, as Daina Chiu suggested, *Kimura* aroused the court’s sympathy because her predicament was consistent with the *Anglo-American* idea that women who kill their children are “victim[s] ‘in need of sympathy, support, and psychiatric treatment.’”<sup>198</sup> The court stated that its ruling was expressly based on *Kimura*’s state of mind at the time of the incident.<sup>199</sup> Thus, if *Kimura* were a white woman, her sentence would theoretically have been the same.<sup>200</sup> However, *Kimura*’s sentence would likely have been almost identical under Japanese

---

190. Sentencing Disposition, *supra* note 161, at 1.

191. *See id.* (noting *Kimura* was released on November 21, 1985).

192. Hayashi, *supra* note 160, at 1.

193. *See* Pound, *supra* note 157 (quoting Louise Comar, assistant district attorney for Los Angeles County).

194. *Id.*

195. *Id.*

196. *See* Choi, *supra* note 24, at 86 (explaining that lack of procedural guardrails means cultural defense is inconsistently applied, as court has complete discretion over consideration of cultural factors).

197. In a similarly ambiguous 2002 case, a jury found that an Indian immigrant mother was legally insane when she tried to drown her children by pushing them off a dock. Tracy Wilson, *Jury’s Insanity Verdict Saves Virk from Prison Sentence*, L.A. TIMES, July 20, 2002, at B1. Although Indian culture does not have a tradition like *oya-ko shinju*, an expert in South and Southeast Asian studies testified on the significance of water in Indian spirituality. *Id.* at B12.

198. D. Chiu, *supra* note 3, at 1117–18. Chiu asserted that *Kimura* received a lenient sentence because the circumstances of her case conform to American “cultural precepts.” *Id.* “Women are ‘assumed to be inherently passive, gentle, and tolerant; and mothers are assumed to be nurturing, caring, and altruistic. It is an easy step, therefore, to assume that a “normal” woman could surely not have acted in such a way. She must have been “mad” to kill her own child.’” *Id.* (citation omitted).

199. *See* RENTELN, *supra* note 7, at 25 (commenting that favorable plea bargain relied on psychiatric testimony); *see also* Stewart, *supra* note 162 (explaining decision was based mostly on reports from seven psychiatrists).

200. *See* Stewart, *supra* note 162 (noting Judge Thomas’s contention that petitions from Japanese American community did not influence his decision).

law.<sup>201</sup> Although possibly coincidental, it is more probable that the sentencing judge was either consciously or unconsciously influenced by Kimura's cultural background when determining her mental state.<sup>202</sup>

#### *D. Inconsistencies and the Need for Change*

As *Chen*, *Moua*, and *Kimura* illustrate, the application of the cultural defense is controversial, challenging, elusive, and, above all, inconsistent.<sup>203</sup> All three cases involved cultural information that informed the courts' understanding of the defendant's mental state, leading to a drastic reduction in punishment.<sup>204</sup> However, each judge heard and incorporated cultural evidence very differently. The *Chen* court was influenced by unsupported information about Chinese spousal relations.<sup>205</sup> In *Moua*, communication issues and lack of evidence about Hmong marriage practices prevented the court from making a well-informed decision.<sup>206</sup> And in *Kimura*, while Japanese tradition was central to the facts of the case, the court refused to acknowledge that it had considered culture at all.<sup>207</sup> The judge in each case was unencumbered in his use of cultural evidence, with no requirement to disclose the extent to which culture influenced his decision.<sup>208</sup> This is a dangerous approach because charging and sentencing already involve the exercise of discretion by both prosecutors and judges.<sup>209</sup> With no procedural protections, cultural factors will receive

---

201. See Matsumoto, *supra* note 157, at 526 (explaining Kimura's sentence would have been "essentially the same" in Japan, and that defense would probably have used a similar "diminished capacity" theory).

202. *Id.*

203. See discussion *supra* Section II.A (where incorrect cultural information was used in trial phase to reduce Chen's charge); discussion *supra* Section II.B (where cultural evidence was used mostly to reduce Moua's sentence, with no clear notion of whether that cultural information was framed properly); discussion *supra* Section II.C (where cultural influences were undoubtedly present in *Kimura* case, but judge said they did not factor into his decision).

204. See discussion *supra* Section II.A (because culture was deemed the "cracking factor" in Chen's case, he received only five years' probation for killing his wife); discussion *supra* Section II.B (because court thought Moua may have understood his victim's protests as consent, he served just ninety days in jail); discussion *supra* Section II.C (Kimura received credit for time served and was released immediately, subject to five years' probation for killing her children, and culture likely played a subtle role in court's leniency).

205. See discussion *supra* Section II.A (explaining anthropologist Burton Pasternak's misinterpretation and reduction of Chinese culture and judge's subsequent reliance on that evidence).

206. See discussion *supra* Section II.B (outlining Judge Gomes's sincere attempt to understand how Hmong culture influenced case and finding resources available were inadequate).

207. See discussion *supra* Section II.C (reasoning that though culture did not play an officially-stated role in decision, judge was nonetheless influenced by cultural context and outspokenness of Japanese American community).

208. See Choi, *supra* note 24, at 86 (explaining that no procedural safeguards attach to cultural defense).

209. See *id.* (noting "unfettered discretion" that judges can exercise over defendants); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1297 (1986) (contending that charging and sentencing are "by nature ad hoc," leading to inconsistent consideration of cultural factors).

disparate treatment from case to case.<sup>210</sup> Cynthia Lee, a criminal law professor at the George Washington University Law School, commented that “[t]his lack of consistency and predictability is unsettling to defendants and makes it difficult for defense attorneys to advise their clients or develop appropriate strategies.”<sup>211</sup> Further, statistics emphatically show that racial bias plays a role in sentencing.<sup>212</sup> Allowing the defense to proceed without guidelines could perpetuate systematic discrimination against minority groups.<sup>213</sup> An unregulated defense could also lead to subordination of minority cultures, as seen in *Chen*.<sup>214</sup> If the cultural defense is to be used as a mitigating factor in criminal punishment, it must be brought into the light. The next Part will discuss options for incorporating the cultural defense and outline the arguments of its opponents.<sup>215</sup>

### III. DISCUSSION

This Part will introduce proponents’ prevailing suggestions for bringing the cultural defense into the American legal system: (1) the “official” cultural defense, and (2) culture as a mitigating factor in sentencing.<sup>216</sup> First, this Part will examine the arguments for and against the official defense.<sup>217</sup> Second, this Part explains why it is most beneficial to relegate cultural evidence to the sentencing phase.<sup>218</sup>

---

210. See Note, *supra* note 209, at 1297–98 (explaining problematic nature of leaving cultural defense to discretionary procedures).

211. Lee, *supra* note 10, at 916.

212. See Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System, THE SENT’G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/LQ5C-XNFK>] (“Prosecutors are more likely to charge people of color with crimes that carry heavier sentences than whites. Federal prosecutors, for example, are twice as likely to charge African Americans with offenses that carry a mandatory minimum sentence than similarly situated whites.”); see generally Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. F. 391 (2017).

213. See Note, *supra* note 209, at 1297–98 (“The combination of covertness and unfettered discretion is a particularly troubling method for dealing with cultural factors because this combination has historically presented an opportunity for officials to exercise prejudice against cultural minorities.”).

214. See discussion *supra* Section II.A (detailing how *Chen* ruling both subordinated Chinese culture and adversely affected victims of domestic violence).

215. See discussion *infra* Part III (listing arguments for and against “official” cultural defense and recommending that culture be relegated to mitigating factor in sentencing).

216. E.g., Sikora, *supra* note 7, at 1703–24 (reviewing two approaches and stating benefits and pitfalls of each); cf. D. Chiu, *supra* note 3, at 1056–57 (“This debate has three main camps: support for an affirmative cultural defense, opposition to a cultural defense, and an intermediate position that supports limited use of cultural factors to show a defendant’s state of mind or to mitigate punishment.”); see also Alison Dundes Renteln, *Raising Cultural Defenses*, in CULTURAL ISSUES IN CRIMINAL DEFENSE 423, 426 (Linda Friedman Ramirez ed., 2d ed. 2007) (noting that while it is “preferable” to designate cultural defense as an official defense, attorneys may benefit from raising cultural evidence at sentencing phase because relevancy requirements are more relaxed).

217. Discussion *infra* Section III.A.

218. Discussion *infra* Section III.B.

### A. *The Official Defense*

An official cultural defense would allow the accused to present cultural evidence at the trial phase to mitigate or eliminate responsibility.<sup>219</sup> Also referred to as a formal,<sup>220</sup> stand-alone,<sup>221</sup> or affirmative defense,<sup>222</sup> this approach provides that either a defendant was ignorant of the law in their jurisdiction, or that the defendant's culture caused them to commit the crime.<sup>223</sup>

Cultural defenses have rarely been used to justify a defendant's ignorance of the law and have hardly ever been used to acquit a criminal defendant on grounds of ignorance alone.<sup>224</sup> Therefore, an "official" defense would primarily be used to either rebut the mental-state requirement for the charged offense, or to support another defense.<sup>225</sup> Regardless of the method of application, a majority of cultural-defense scholars reject the official defense.<sup>226</sup>

#### 1. Arguments for the Official Defense

To understand the controversy surrounding the official cultural

219. *E.g.*, Choi, *supra* note 24, at 86 (explaining that defense would function like an excuse, acknowledging act's wrongfulness but nonetheless finding defendant lacked culpable mental state).

220. The following sources are among those that refer to this concept as a "formal" cultural defense: Choi, *supra* note 24, at 85; Chen, *supra* note 52, at 338; E. Chiu, *supra* note 182, at 1336; Note, *supra* note 209, at 1296.

221. In his article, Damian Sikora referred to an officially recognized cultural defense as the "stand-alone" cultural defense. Sikora, *supra* note 7, at 1697.

222. The following sources refer to an "affirmative" cultural defense: D. Chiu, *supra* note 3, at 1056; Beyea, *supra* note 19, at 715.

223. *E.g.*, Sikora, *supra* note 7, at 1699 ("By using the defense, the defendant hopes to have his charges either reduced or thrown out because the act he is accused of either carries a lesser sentence or would not even be considered a crime in his native country.")

224. The common-law maxim "ignorance of the law is no excuse" has an extremely strong hold in the United States—immigrant and minority defendants are unlikely to be exempted from this tradition. *See* Beyea, *supra* note 19, at 707–15 (chronicling history of "mistake-of-law" doctrine and noting that using cultural defense to counteract its effects is seen as inconsistent with "goals of progressive liberalism"); Lee, *supra* note 10, at 920 (stating that most defendants do not use cultural evidence to excuse their ignorance of the law, but instead to rebut a charge or support a defense).

225. Lee, *supra* note 10, at 920; *but see* Note, *supra* note 209, at 1299 (arguing under principle of individualized justice, ignorance of the law *should* be an excuse for those raised in a foreign culture).

226. Most scholars either reject the cultural defense outright or suggest an alternative to the official cultural defense. The major sources cited in this Comment conclude as follows: Coleman, *supra* note 20, at 1166 (rejecting cultural defense entirely); Julia P. Sams, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335, 346, 352–54 (1986) (also rejecting defense entirely); Sikora, *supra* note 7, at 1728 (suggesting, as in this Comment, that courts use cultural evidence as mitigating factor in sentencing); Beyea, *supra* note 19, at 735 ("Cultural evidence should be constrained . . . to a role as an ingredient in the diagnosis of a defendant's mental state."); Volpp, *supra* note 1, at 100 (recommending that culture be treated as an "informal factor" during deliberations, with some caveats to guard against subordination of defendant); D. Chiu, *supra* note 3, at 1054–55 (explaining that framework of cultural-defense discourse is improperly grounded in marginalization, and calling for new understanding of "sociopolitical context in which the cultural defense has arisen").

defense, it is helpful to begin with the arguments of its proponents.<sup>227</sup> First, advocates for the official defense assert that it advances the principles of individualized justice and proportionality, ensuring that the punishment more accurately fits the crime.<sup>228</sup> Alison Dundes Renteln, a major advocate for the official defense, has argued that proportionality is intrinsic to retribution, a key component of the criminal justice system.<sup>229</sup> By recognizing defenses that either eliminate or mitigate culpability, such as diminished capacity, mental illness, or heat of passion, the criminal justice system already prioritizes individualized justice.<sup>230</sup> Thus, proponents say, cultural information is a natural fit at this phase of adjudication: it tailors the system more closely to the defendant's culpability.<sup>231</sup> For example, if a defendant has been in the country for a relatively short period of time, and is truly unaware that their conduct is illegal, they are considered less culpable than a person who intentionally violates the law.<sup>232</sup> Of course, this approach saddles courts with the near-impossible task of determining the defendant's degree of assimilation.<sup>233</sup> As Renteln has acknowledged, assimilation is not necessarily proportional to the

---

227. The main proponents of the "official" cultural defense are Alison Dundes Renteln and Elaine M. Chiu. Renteln has argued that the defense should be used as a partial excuse, allowing juries to "decide whether cultural factors were determinative in a defendant's behavior, and if so, whether that is sufficient to warrant a lesser charge." RENTELN, *supra* note 7, at 347. Elaine M. Chiu has contended that the cultural defense should instead be used as a justification that could provide a complete defense. E. Chiu, *supra* note 182, at 1337–38. According to Chiu, the justification approach "introduce[s] a formal doctrine that allows defendants whose values are based on their cultural backgrounds to argue that they are not criminally liable because their acts were justified from the perspective of a reasonable person who shares their cultural attributes." *Id.* at 1338.

228. See Note, *supra* note 209, at 1298 ("[T]he ultimate aim of this principle of individualized justice is to tailor punishment to fit the degree of the defendant's personal culpability."); accord Chen, *supra* note 52, at 340 (noting that cultural defense should be formalized in some way because it is consistent with individualized justice as already shown in our laws); RENTELN, *supra* note 7, at 349 (arguing that proportionality is a controlling factor in adoption of official defense because culturally motivated defendants are less culpable and thus deserve leniency).

229. RENTELN, *supra* note 7, at 347; see also Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437, 500–01 (1993) ("Adherence to the principle of proportionality requires what has been called individualized justice. . . . [I]t militates in favor of the cultural defense as well as other new defenses.").

230. Cf. Beyea, *supra* note 19, at 717 (explaining that when the law allows for certain factors to reduce culpability, it exemplifies individualized justice because subjective inquiries into defendant's state of mind are allowed).

231. See E. Chiu, *supra* note 182, at 1371 (finding that United States goes to great lengths to protect individuals from state encroachment, and allowing defendants to explain their culture continues this aim).

232. For example, two Iraqi men who had recently immigrated to Nebraska married two underage girls as part of a traditional arranged marriage. Sikora, *supra* note 7, at 1725. They consummated the marriages and were charged with statutory rape, carrying a sentence of up to fifty years' imprisonment. *Id.* Sikora commented that "[t]his result seems harsh considering the special cultural facts that the men only recently arrived in the country, that they lived in an isolated predominantly Iraqi community, and that marrying girls this young is widely accepted in Iraq." *Id.*

233. To measure assimilation, a definition of the word "assimilation" would need to be developed. D. Chiu, *supra* note 3, at 1102. Then, a system would need to be invented to measure a defendant's degree of assimilation. *Id.*

amount of time spent in the United States.<sup>234</sup> For instance, Fumiko Kimura had been in the United States for many years, but she remained culturally and personally isolated, so did not assimilate.<sup>235</sup> Some argued that Kimura's strong connection to Japanese culture should reduce her culpability,<sup>236</sup> while others thought the amount of time she had spent in the country should preclude her from raising culture as a defense.<sup>237</sup>

Second, proponents of the official defense point out that it prioritizes cultural pluralism, a defining characteristic of the United States.<sup>238</sup> Elaine M. Chiu has explained that pluralism is a continuation of any commitment to individualized justice.<sup>239</sup> She argued, "[pluralism] allows for individuals who are inculcated in different sets of norms to explain those norms to the legal system. . . . Thus, such explanations are necessary to assess which acts should be punished and to what degree."<sup>240</sup> Without an officially recognized defense, some argue that the legal system forces immigrants to assimilate, cutting against the idealized vision of America as a place where people from around the world are accepted and valued.<sup>241</sup> As the dominant culture is Anglo-American, criminal law perpetuates Anglo-American values, forcing immigrants into conformity.<sup>242</sup>

Third, supporters claim that the official defense can improve the

---

234. RENTELN, *supra* note 7, at 25. Though Renteln noted that assimilation does not correlate with time spent in the United States, she recommended no alternative method of measuring a defendant's degree of assimilation. *Id.* Chiu also acknowledged the issue:

First, "culture" cannot be defined through bright line tests or concrete categorization because it is by nature ambiguous. Defining the parameters of a group who could raise the defense would require crafting a rule that would consider the innumerable permutations of race, ethnicity, language, education, religion, culture, gender, length of residence in the United States, and age. Use of these factors to measure behavioral assimilation would be a difficult and subjective task at best.

D. Chiu, *supra* note 3, at 1101–02.

235. RENTELN, *supra* note 7, at 25.

236. See Pound, *supra* note 157 (describing widespread support garnered by Fumiko Kimura Fair Trial Committee, which asked district attorney to take Kimura's heritage into account and opt for involuntary manslaughter charge).

237. Kimura had apparently lived in the U.S. for "more than a dozen years," and the homicide detective who was called to the scene thought this should bar the cultural defense. *Id.*; see also Choi, *supra* note 24, at 89–90 (noting that because she had lived in the country for fourteen years, Kimura may not have been able to raise a cultural defense even if it were available).

238. See Beyea, *supra* note 19, at 718 ("The dual values of individualized criminal justice and pluralist respect for cultural diversity interrelate, and the cultural defense has developed in concert with them.").

239. E. Chiu, *supra* note 182, at 1371.

240. *Id.*

241. See Sikora, *supra* note 7, at 1707–08 (explaining proponents' argument that without an official defense, immigrants are forced to assimilate, cutting against American ideal of cultural pluralism); cf. E. Chiu, *supra* note 182, at 1368 ("Some . . . insist that no culture, dominant or otherwise, has had influence over the criminal law. . . . [But] [o]ne need only look to the category of justification defenses to discover that the doctrines reflect Anglo-American values.").

242. See E. Chiu, *supra* note 182, at 1368 ("Current criminal law is assimilationist."); Beyea, *supra* note 19, at 719 (stating that forcing defendants to sacrifice their values in favor of dominant morals hinders goal of pluralism).

accuracy of the *type* of defense raised.<sup>243</sup> Because no formal cultural defense currently exists, defendants may attempt to incorporate cultural factors using available defenses that do not fit their circumstances.<sup>244</sup> For instance, sane defendants have attempted to use the insanity or diminished-capacity defense as a vehicle for cultural evidence.<sup>245</sup> Equating cultural difference to mental deficiency is not only inappropriate, it also fails to assign proper punishment.<sup>246</sup> If a defendant is found legally insane, they could face up to a lifetime of civil commitment for their culturally-motivated crime.<sup>247</sup> Thus, resting on principles of proportionality, cultural pluralism, and accuracy, supporters of the defense claim it is an essential tool for justice in minority and immigrant communities.<sup>248</sup>

## 2. Arguments Against the Official Defense

Although some courts have allowed cultural evidence at the trial phase, it is more often excluded from the courtroom.<sup>249</sup> Similarly, the current trend in cultural-defense scholarship rejects the idea of an official defense.<sup>250</sup> The justifications for this rejection vary.<sup>251</sup>

243. See, e.g., Sikora, *supra* note 7, at 1706–07 (noting that an official defense could promote accuracy in relaying facts of a criminal case).

244. *Id.*

245. For example, in *Bui v. State*, a Vietnamese defendant murdered his children after his wife had an affair. *Bui v. State*, 551 So.2d 1094, 1098 (Ala. Crim. App. 1988). In a defense strategy like the *Chen* case, Bui’s attorney tried to use the insanity defense to introduce evidence of Vietnamese culture. *Id.* at 1100–02. He argued that cultural influences drove Bui to commit the murders as a “face saving measure” after his wife’s infidelity. *Id.* at 1102. On appeal, the court rejected the insanity defense and affirmed the jury’s death-penalty recommendation. *Id.* at 1125; *accord* Renteln, *supra* note 229, at 502 (“Though it may be possible on a rare occasion to introduce a cultural defense via a defense such as insanity, automatism, or provocation, even then it will be crucial to argue that the reasonable person should be interpreted as the reasonable person from the defendant’s culture.”).

246. See Note, *supra* note 209, at 1296–97 (“[A] judgment of insanity . . . is an affront to the dignity of the accused because it condemns conduct deemed acceptable by her culture. Indeed, being labeled a lunatic may be more degrading than being branded a criminal.”).

247. E.g., D. Chiu, *supra* note 3, at 1106 (explaining that civil commitment can last indefinitely).

248. See *Alison Renteln Speaks on Culture as a Human Right*, STAN. CDDRL PROGRAM ON HUM. RTS. (Mar. 3, 2011), [https://cddl.fsi.stanford.edu/humanrights/news/alison\\_renteln\\_speaks\\_on\\_culture\\_as\\_a\\_human\\_right\\_20110303](https://cddl.fsi.stanford.edu/humanrights/news/alison_renteln_speaks_on_culture_as_a_human_right_20110303) [https://perma.cc/T494-ZWZB] (describing lecture in which Renteln asserted that cultural defense is a critical component of human right to practice cultural traditions).

249. Interestingly, the U.S. Court of Appeals for the Ninth Circuit has approved the use of “cultural context testimony,” but still frequently finds cultural details irrelevant and inadmissible. PAUL H. ROBINSON, 1 CRIM L. DEF. § 61.50 (updated July 2021).

250. For various critical opinions of the official defense, see generally Coleman, *supra* note 20; Sams, *supra* note 226; Sikora, *supra* note 7; Beyea, *supra* note 19; Volpp, *supra* note 1; and D. Chiu, *supra* note 3.

251. Doriane Lambelet Coleman, quoted in a newspaper article, summarized the crossroads at which cultural-defense skeptics stand: “Legally, it can be a real balancing act. I think we must have a sensitivity to pluralism and multiculturalism, but, on the other hand, there are some real core American values that must be protected, such as liberty for women and children.” Terry, *supra* note 57.

Many argue that an official defense would create an exception to the deep-rooted tradition that “ignorance of the law is no excuse.”<sup>252</sup> According to this maxim, with very limited exception, litigants cannot defend themselves by claiming they did not know the law.<sup>253</sup> Opponents argue that the “mistake-of-law” defense would essentially create a separate body of law for immigrants,<sup>254</sup> discouraging assimilation into American society and presenting the danger that immigrants may never learn the law.<sup>255</sup> Invoking a different legal standard also fuels the perception of immigrants as “foreigners” or less than “real Americans.”<sup>256</sup> Further, criminal defendants still have traditional defenses at their disposal, such as diminished capacity or mistake of fact.<sup>257</sup> Those who reject the defense entirely claim that existing defenses are sufficient to meet the needs of such defendants without overstepping legal tradition.<sup>258</sup>

The most vehement argument against an official defense contends that it is harmful to victims.<sup>259</sup> While women and children are valued comparatively highly in American society, for example, other cultures may have a more subordinated view of these groups, leading to culturally motivated crimes.<sup>260</sup> If the perpetrators of these crimes go free, victims might be endangered again upon their release.<sup>261</sup> Moreover, the use of an official

---

252. *E.g.*, Sams, *supra* note 226, at 337 (finding that using cultural evidence as the foundation for an excuse affords immigrant defendants special treatment).

253. *See* Beyea, *supra* note 19, at 707–08 (explaining that “pragmatic and utilitarian policy reasons” underpin common-law rule).

254. Sikora, *supra* note 7, at 1712–13; *see also* Coleman, *supra* note 20, at 1098 (asserting that defense threatens a “dangerous balkanization of the criminal law”).

255. *See* Beyea, *supra* note 19, at 708 (noting that absent “ignorance of the law is no excuse” standard, individuals would be incentivized to claim they were unaware of the law); *see also* Terry, *supra* note 57 (“You live in our state, you live by our laws. I have yet to find a law [that says]: ‘Oh, and by the way, if you immigrate here from another country, none of this applies.’” (quoting a deputy district attorney)).

256. *See* Sikora, *supra* note 7, at 1713 (explaining that interpreting “reasonable person” standard via cultural lens otherizes immigrants living in United States).

257. *See* Sams, *supra* note 226, at 339–45 (discussing existing traditional defense theories that can be utilized by those who raise cultural defense).

258. *Id.*; *but see* Choi, *supra* note 24, at 86 (“[C]ultural factors may not be considered because some jurisdictions, such as California, have abolished the defense of diminished capacity or responsibility, the formal defense under which most courts might consider cultural factors.”).

259. *E.g.*, Choi, *supra* note 24, at 89 (explaining why official cultural defense would undercut victims’ rights); *see generally* Strasburger, Jr., *supra* note 50 (discussing cultural defense as applied to child abuse).

260. Sikora, *supra* note 7, at 1709; *cf.* Terry, *supra* note 57 (“If you allow the legal system to treat immigrant defendants differently . . . you are effectively treating the victims, who are overwhelmingly women and children, differently. You are giving the victims less protection.” (quoting Doriane Lambelet Coleman)).

261. *Cf.* Coleman, *supra* note 20, at 1096 (stating that recognizing official cultural defense has incidental effect of condoning “the chauvinism that is at the core of these traditions”).



defense could create disturbing precedent.<sup>262</sup> In *Chen*, Jian Wan Chen was brutally beaten to death.<sup>263</sup> But other domestic-violence victims were harmed as well.<sup>264</sup> Barbara Chang, co-director of the New York Asian Women's Center, said that battered women "used to threaten their husbands with 'I can take you to court' . . . but no more. They tell me their husbands don't buy it anymore because of this court decision."<sup>265</sup> In *Kimura*, although the public outcry was less emphatic, some regretted that the decision did not recognize the children's suffering.<sup>266</sup> The homicide detective who was called to the beach the day of the incident commented, "Nobody seems to remember that two children died. All they remember is the mother and how distressed she was. But how terrible it must have been to be drowned, forcibly drowned."<sup>267</sup> Ultimately, vigorous advocacy for victim protection has left the cultural defense with a negative connotation in some legal communities—when a New York University law professor asked her colleagues what they thought about the cultural defense, a number of them responded, "That's what makes men feel it's okay to kill their wives."<sup>268</sup>

Another argument against the official defense is that it characterizes minority groups broadly and thus promotes stereotyping.<sup>269</sup> In *Chen*, overbroad and inaccurate depictions of Chinese culture factored

---

262. See discussion *supra* Section II.A (discussing *Chen* and describing how it compromised women's safety); see also Volpp, *supra* note 1, at 93 ("[A] formalized 'cultural defense' could be disastrous for Asian women, since 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.").

263. See discussion *supra* Section II.A (relaying facts of *Chen*).

264. *Id.*;

Jian-wan Chen, to take only one example, died at the hands of her husband because she was having an affair. It is not enough to qualify endorsement of the cultural defense with the caveat that "[w]e just didn't agree with the use of a cultural defense in the Chen case." Such a disclaimer does little to lessen the impact of the defense on women's lives. Asian women in America are suffering, being beaten and killed under the rubric of tradition and culture, as the perpetrators invoke their cultural values.

D. Chiu, *supra* note 3, at 1121.

265. Jetter, *supra* note 5, at 26.

266. See Pound, *supra* note 157 (quoting homicide detective on case, who believed that Kimura's years in United States should preclude cultural defense).

267. *Id.* But one of the college students who pulled the family from the water saw Kimura as a victim of her circumstances. She said: "[Kimura] was a helpless victim, just like [the children] were. . . . I know her husband was having an affair and that she was socially alienated. I wish she had friends. I wish I could have been her friend." *Id.*

268. Jetter, *supra* note 5, at 27.

269. See Sikora, *supra* note 7, at 1708–09 (arguing that court's leniency in *Kimura* may have undervalued immigrant children and painted Japanese women as "unstable" and thus in need of different legal standard than American women); see also Lee, *supra* note 10, at 952–53 (hypothesizing that Kimura benefited from underlying Anglo-American norms regarding women as victims in need of sympathy over punishment); cf. Volpp, *supra* note 1, at 100 (arguing cultural testimony should be used to explain an individual's state of mind, not to fit a person's behavior into a cultural mold).

prominently in the judge's decision.<sup>270</sup> Scholars have argued that *Moua* followed a similar approach.<sup>271</sup> Cynthia Lee asserted that instead of promoting cultural sensitivity, the case depicted Hmong culture as "barbaric, an imagined place where men kidnap the women they want to marry, force them to have sexual intercourse against their will, and then the community endorses their marriage."<sup>272</sup> Relatedly, an official cultural defense could improperly shift the focus away from the defendant's state of mind and toward the virtues or shortcomings of their culture.<sup>273</sup> For juries, cultural bias can make it difficult to evaluate the evidence impartially.<sup>274</sup> A 2015 study, using a fact pattern loosely based on the *Kimura* case, suggested that cultural evidence can be detrimental to the defendant if jurors have an ethnocentric point of view.<sup>275</sup> The study found that jury verdicts were slightly harsher in the presence of cultural evidence.<sup>276</sup>

Finally, some scholars argue that the official cultural defense raises equal-protection concerns.<sup>277</sup> Allowing certain defendants to use a unique

270. See discussion *supra* Section II.A (explaining adjudication of *Chen* and ill-founded expert testimony used therein); see also Lee, *supra* note 10, at 949–50 (noting that *Chen* decision implicitly lauded Western culture for its fairness while painting Chinese men as barbarians).

271. See Evans-Pritchard & Renteln, *supra* note 8, at 13–14, 21 (emphasizing difficulty with correctly interpreting Hmong marriage customs, explaining why Hmong history exacerbates these issues, and outlining how pamphlet presented in *Moua* was insufficient cultural evidence).

272. Lee, *supra* note 10, at 955–56.

273. See Volpp, *supra* note 1, at 100 ("Creation of a formalized 'cultural defense' will result in fossilizing culture as a reductive stereotype, and lead to inquiries into whether a defendant's identity sufficiently matches that stereotype to merit expert testimony."); accord D. Chiu, *supra* note 3, at 1099 ("Cultural excuse would operate to mark Asian cultures as irreconcilably different from the American mainstream, isolating immigrants for that difference, and subjectively judging them on that ground.").

274. See Evelyn M. Maeder & Susan Yamamoto, *Culture in the Courtroom: Ethnocentrism and Juror Decision-Making*, PLOS ONE, at 1, 4 (Sept. 9, 2015), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0137799> [<https://perma.cc/97PU-RRM3>] (finding that ethnocentric viewpoints prevent jurors' fair evaluation of evidence, and that ethnocentrism likely affects all people to some degree).

275. In the study, participants were given a fictional trial transcript in which the defendant learned of their spouse's affair and subsequently lost consciousness behind the wheel, driving off a bridge and killing their two children. *Id.* at 5. In one group of transcripts, culture was offered as an explanation for the cause of the blackout. *Id.* at 7. In the other, culture was not mentioned. *Id.* The researchers used "path analyses" to evaluate two issues: (1) whether ethnocentrism affected participants' views of the defendant's credibility, and (2) whether ethnocentrism led to harsher verdict decisions. *Id.* at 6.

276. The authors found that "ethnocentrism is negatively related to credibility, which in turn relates to harsher verdict decisions, but only in the presence of cultural evidence. Hence, it does appear that cultural evidence played into how jurors evaluated the case, as a function of how much they viewed U.S. culture as 'right.'" *Id.* at 11.

277. See Coleman, *supra* note 20, at 1098 (asserting that "balkanization" of law risked by cultural defense offends Equal Protection Clause); Beyea, *supra* note 19, at 723 ("The principle of equal protection might support the cultural defense as an extension of individualized justice, but its purpose might more properly be to ensure for all persons, regardless of race, creed, or national origin, equal treatment before the law."); but see James J. Sing, Note, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845, 1881 (1999)

set of laws, they say, would deprive other Americans of equal protection under the law.<sup>278</sup> In particular, an official defense could allow judges to interpret the “reasonable person” from a cultural standpoint.<sup>279</sup> Stretching the boundaries of reasonableness to accommodate minority or immigrant defendants means that other defendants would not be equal before the law.<sup>280</sup> Thus, opponents of the official defense conclude that such an approach would give immigrant and minority defendants preferential treatment and threaten principles of fairness and equality.<sup>281</sup>

### B. Culture as a Mitigating Factor in Sentencing

A small group of advocates lobby for the recognition of an official cultural defense, while others ask that it be abolished entirely.<sup>282</sup> However, another contingent favors a third option: the use of culture as a mitigating factor in sentencing.<sup>283</sup> Proponents of this view assert that it addresses the concerns raised by opponents of an official defense, namely preserving victims’ rights and ensuring the accuracy of convictions.<sup>284</sup> Further, the approach retains many of the benefits emphasized by cultural-defense advocates, such as preserving multiculturalism and

---

(“[W]hile equal protection doctrine subjects governmental actions that benefit a racial group (and other suspect categories) to the highest level of scrutiny, not every law that takes account of these categories is constitutionally suspect.”).

278.

Section One of the Fourteenth Amendment was intended to ensure that the same crime would beget the same punishment, regardless of the race of the defendant or the victim.

[When] the same crime . . . begets different punishments because of the ancestry of the defendant and his victim, this original intent is largely, if not completely, eviscerated.

Coleman, *supra* note 20, at 1144.

279. See Renteln, *supra* note 216, at 462 (“The failure to allow culturally specific interpretations of the reasonable person arguably constitutes a violation of equal protection.”); Sikora, *supra* note 7, at 1713 (explaining that defining “reasonable person” by cultural standards violates equal protection and also furthers perception that immigrants in America are not part of American society).

280. *But see* D. Chiu, *supra* note 3, at 1109 (noting that American criminal law is already structured around white cultural values so notion that “everyone is equal before the law” is clearly fictional). Additionally, if defendants cannot introduce relevant cultural evidence to explain their mental state, this could raise due-process concerns. Cohan, *supra* note 175, at 242.

281. See Sikora, *supra* note 7, at 1714 (“Allowing a defense that may only be used by a limited group of defendants does not ensure fairness.”).

282. See discussion *supra* Section III.A (describing primary arguments for and against “official” cultural defense); see discussion *supra* note 226 (summarizing arguments of key players on each side of cultural-defense debate).

283. See, e.g., Sikora, *supra* note 7, at 1714–29 (finding that culture should be allowed only during sentencing phase, exploring benefits of such an approach, and applying them to case law); see Boehnlein et al., *supra* note 32, at 339 (“The sentencing is exactly the place where cultural evaluation and testimony can have significant impact on the final outcome of the case.”); see also Terry, *supra* note 57 (quoting Doraine Lambelet Coleman, and explaining that she supports cultural evidence in courtroom solely during sentencing).

284. See Sikora, *supra* note 7, at 1718–21 (identifying four key principles for sentencing: 1) protection of women and children, 2) obviating need for bright-line rule, 3) preventing balkanization of criminal law, and 4) reduction of stereotyping).

principles of individualized justice.<sup>285</sup>

Importantly, limiting cultural circumstances to the sentencing phase would protect victims' rights.<sup>286</sup> The defendant would still be convicted of the crime committed, leaving the value of retribution intact and helping to ensure that other victims are not harmed.<sup>287</sup> In *Chen*, if culture had been relegated to the sentencing phase, Chen would likely have been convicted of second-degree murder.<sup>288</sup> There would have been room for cultural expertise and sentencing leniency, but a clear message would have been sent: culture is not an excuse for killing or abusing a spouse.<sup>289</sup> This message is vital because immigrant and minority victims may face more obstacles to protection, such as language barriers and subservient cultural norms.<sup>290</sup> In cases where the offenders are *themselves* part of oppressed groups, such as immigrant mothers charged in female-genital-mutilation cases, the approach would establish a no-tolerance policy for abusive traditions while allowing leniency for first-time offenders.<sup>291</sup> Overall, limiting cultural considerations to the sentencing phase would ensure that defendants are convicted of the crimes committed, keeping the measure of guilt or innocence consistent with the law.<sup>292</sup>

Using cultural circumstances as a mitigating factor would also help to preserve the integrity of our multicultural society.<sup>293</sup> Principles of individualized justice would be maintained because the defendant's

285. See *id.* at 1722–24 (explaining that using cultural evidence during sentencing retains principles of fairness, maintains the law's deterrent effect, and improves cases' accuracy).

286. *Id.* at 1718–19; cf. Beyea, *supra* note 19, at 735 (finding that victims' rights cannot be sacrificed in service of remaining sensitive to needs of defendants).

287. See Oliver, *supra* note 17 (quoting Judge Gomes, who presided over Moua's sentencing hearing) ("Even without intent [to commit a certain crime], if an act is harmful to society, we are not going to condone it.").

288. See, e.g., Lee, *supra* note 10, at 941 (stating that Chen was originally charged with second-degree murder and that it was undisputed that he killed his wife).

289. Sikora, *supra* note 7, at 1719–20.

290. See Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community*, 3 ASIAN L.J. 151, 161–62 (1996) (outlining how battered Asian American women are different from white women and explaining problem of language barriers); see also Cathy C. Cardillo, Comment, *Violence Against Chinese Women: Defining the Cultural Role*, 19 WOMEN'S RTS. L. REP. 85, 88–91 (1997) (illustrating how Chinese culture has historically given women lesser value, and how this status persists today).

291. See Lori Ann Larson, Comment, *Female Genital Mutilation in the United States: Child Abuse or Constitutional Freedom?*, 17 WOMEN'S RTS. L. REP. 237, 248 (1996) (explaining that lesser punishment for first-time offenders honors legal parameters but leaves room for leniency).

292. See Sikora, *supra* note 7, at 1715–16 (favoring cultural evidence during sentencing because defendants would be convicted of relevant crime rather than a "diluted version"); cf. Oliver, *supra* note 17 (supporting idea of sentence reduction for immigrant or minority defendants when "it was a heinous crime but not a heinous motive").

293. See Beyea, *supra* note 19, at 706 (noting that American society's focus on multicultural plurality lends support to general idea of a cultural defense); see also Coleman, *supra* note 20, at 1158–59 (explaining that cultural evidence was rightly used to reduce Moua's sentence following his conviction, as long as sentencing judge accurately determined that his culture made him less morally blameworthy).

punishment would be tailored to their unique circumstances.<sup>294</sup> Moreover, both victims and defendants could make statements to the court before sentencing, helping to incorporate cultural perspectives into decision-making.<sup>295</sup> Therefore, the sentencing-consideration approach preserves victims' rights while integrating diverse voices.

Cultural evidence is also a natural fit for the flexibility of the sentencing process.<sup>296</sup> Sentencing affords more leeway to the judge, defense, and prosecution than at trial, allowing deeper consideration of cultural issues.<sup>297</sup> According to the Sentencing Reform Act, which sets forth advisory guidelines for federal sentencing, the first factor that a court should consider is "the nature and circumstances of the offense and the history and characteristics of the defendant."<sup>298</sup> In the context of mitigation, the defendant may offer any and all issues related to their character or extenuating circumstances.<sup>299</sup> Cultural factors may have a greater impact at this time because the law is less structured in the sentencing arena and focuses primarily on the defendant's life experience.<sup>300</sup> Defendants can also mention evidence that may have been excluded at trial due to irrelevance or hearsay concerns.<sup>301</sup> As long as the cultural information has "sufficient indicia of reliability to support its probable accuracy" by a preponderance of the evidence, it can be raised at a sentencing hearing.<sup>302</sup> This allows the defendant to present themselves as a multifaceted individual, painting

294. Sikora, *supra* note 7, at 1722.

295. See Boehnlein et al., *supra* note 32, at 336–37 (noting that defendants have opportunity to explain why their sentence should be mitigated in their cultural context, and detailing concept of victim-impact statements); *but see* discussion *supra* Section II.B (outlining how issues with interpreters and translation can cause communication problems between defendants and courts, as evidenced by *Moua* case).

296. See Boehnlein et al., *supra* note 32, at 339 ("It is in this less structured arena of the criminal law, and in the area of mitigation, that the defendant may raise [cultural issues].").

297. See, e.g., U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS 7 (2015), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510\\_fed-sentencing-basics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf) [<https://perma.cc/SE25-ZUBG>] (explaining that Federal Rules of Evidence and Confrontation Clause of Sixth Amendment do not apply at sentencing; thus, information that would have been inadmissible at trial can be presented).

298. 18 U.S.C. § 3553(a). Federal Sentencing Guidelines were mandatory until *United States v. Booker*, which held the Sentencing Reform Act unconstitutional because it allowed judges to find facts by a preponderance of the evidence rather than beyond a reasonable doubt. *United States v. Booker*, 543 U.S. 220, 243–44 (2005). After *Booker*, the guidelines were made advisory. U.S. SENTENCING COMM'N, *supra* note 297, at 3. Sentencing data since 2005 shows that about fifty percent of sentences fall within the range suggested by the Sentencing Reform Act. *Id.*

299. Boehnlein et al., *supra* note 32, at 339.

300. *Id.* (noting that legal rules are generally more relaxed during sentencing); *cf.* Sikora, *supra* note 7, at 1720 (explaining that use of culture at sentencing removes impossible task of creating bright-line rule for cultural defense, because courts look at each defendant individually and can consider any mitigating factors).

301. U.S. SENTENCING COMM'N, *supra* note 297, at 7.

302. U.S.S.G. § 6A1.3(a).

a complete picture of themselves at the time of the offense.<sup>303</sup> When presented in context at sentencing, cultural factors can have a significant effect on the sentence assigned.<sup>304</sup>

Building on this proposal, Part IV predicts some of the challenges of incorporating cultural influences into sentencing.<sup>305</sup> Despite these roadblocks, sentencing remains the most productive time to raise cultural evidence.<sup>306</sup>

#### IV. ANALYSIS

This Part begins with a brief explanation of the sentencing process.<sup>307</sup> Next, it discusses the problems that could arise when offering culture as a mitigating factor in sentencing.<sup>308</sup> Then, this Part concludes that cultural evidence should nevertheless be permissible as a sentencing consideration because it is an essential safeguard against coercive assimilation.<sup>309</sup> American society is ruled by Eurocentric values while claiming to champion cultural pluralism.<sup>310</sup> To rectify the balance, other cultural perspectives demand recognition.<sup>311</sup> The inevitable challenges can be overcome as we work to appreciate and uplift the “American kaleidoscope.”<sup>312</sup>

##### A. *The Sentencing Process*

After a criminal defendant is convicted, whether by guilty plea or at

303. See Boehnlein et al., *supra* note 32, at 339 (“[A]ll of these factors, whether biological or cultural, were interdependent in the process of understanding the defendant’s life history.”).

304. See discussion *infra* Section V.B.1 (detailing *People v. Nem*, in which defendant avoided capital punishment with comprehensive testimony that included cultural information).

305. See discussion *infra* Section IV.B (discussing challenges faced when culture is brought into courtroom, such as judicial bias, lack of education on cultural issues, tendency to perpetuate stereotypes, and shifting nature of “culture” itself).

306. See discussion *infra* Section IV.C (explaining why benefits of cultural defenses at sentencing outweigh challenges therein).

307. See discussion *infra* Section IV.A (providing explanation of sentencing as it relates to both “regular” cases and capital-punishment cases).

308. See discussion *infra* Section IV.B (acknowledging inevitable roadblocks and potential unintended consequences of weaving culture into sentencing process).

309. See discussion *infra* Section IV.C (highlighting importance of cultural defense in preventing coercive assimilation).

310. Cf. Sing, *supra* note 277, at 1845 (“Today, the modern inheritors of . . . [the assimilationist] school of thought argue that immigrant groups must be willing to sacrifice their cultural traditions to ensure a robust American society in which certain core values are shared by all of its members.”).

311. Cf. D. Chiu, *supra* note 3, at 1085–86 (explaining that America has experienced “failure of integration” because minority groups can only integrate if they adopt norms dictated by majority).

312. See discussion *infra* Section IV.C (explaining that metaphor of “American melting pot” is partially obsolete because America is more of a “kaleidoscope,” “salad bowl,” or “mosaic,” describing coexistence of many cultures); cf. Sing, *supra* note 277, at 1845–46 (“[T]he old ‘melting pot’ social metaphor, which privileges the erosion of cultural distinctness in the dominant cultural stew, is obsolete and at times discriminatory. . . . Thus, dominant American culture should learn from and help to celebrate . . . its immigrant groups.”).

trial, the defendant usually attends a sentencing interview.<sup>313</sup> There, an officer asks questions about anything that might relate to the sentencing decision: prior convictions, personal and family history, substance-abuse issues, health and financial circumstances, and employment history are commonly discussed.<sup>314</sup> An independent presentence investigation is also conducted, taking into account state or federal sentencing guidelines.<sup>315</sup> Then, the court and both parties receive a “presentence report” with the results of the interview and investigation, a guideline sentencing range, and any suggestions for departures from that range.<sup>316</sup>

Sentencing hearings are less rigid than trials, but they are adversarial nonetheless.<sup>317</sup> Thus, both the prosecution and the defense may call witnesses and present pertinent evidence.<sup>318</sup> Generally, the judge alone decides the sentence.<sup>319</sup> However, in cases with the possibility of capital punishment, a jury handles sentencing.<sup>320</sup> In both situations, the prosecution offers evidence of aggravating factors to suggest a harsher sentence, while the defense counters with mitigating factors to support leniency.<sup>321</sup> Specific aggravating factors, such as prior convictions, hate crimes, particularly vulnerable victims, or use of a weapon, may be articulated by statute.<sup>322</sup> With the exception of prior convictions, the fact-finder must determine any aggravating fact used to extend a sentence as true beyond a reasonable doubt.<sup>323</sup> Mitigating factors, on the other hand, are not limited by statute.<sup>324</sup> The defendant may present any relevant evidence,

313. U.S. SENTENCING COMM’N, *supra* note 297, at 5.

314. The defendant has both the right to counsel and the right to remain silent at the interview. *Id.* at 6; *How Courts Work: Sentencing*, AM. BAR ASS’N (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/sentencing/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/sentencing/) [<https://perma.cc/9RXU-RAFQ>] (referring to interview as part of presentence investigation).

315. Sentencing statutes vary depending on the state and the crime—some offenses carry minimum or maximum penalties. *Aggravating and Mitigating Factors in Criminal Sentencing*, JUSTIA, <https://www.justia.com/criminal/aggravating-mitigating-factors/> (last updated Oct. 2021) [<https://perma.cc/88BR-KNCE>]; see U.S. SENTENCING COMM’N, *supra* note 297, at 3 (noting that after *United States v. Booker* in 2005, federal sentencing guidelines became advisory rather than mandatory).

316. Both parties are permitted to submit objections (whether factual or legal) to the assertions and recommendations in the report. U.S. SENTENCING COMM’N, *supra* note 297, at 6.

317. *Id.*

318. Victims also testify at some sentencing hearings. *Id.*

319. *How Courts Work: Sentencing*, *supra* note 314, at 6.

320. *Id.*

321. *E.g.*, *Aggravating and Mitigating Factors in Criminal Sentencing*, *supra* note 315.

322. *Id.*

323. See *Cunningham v. California*, 549 U.S. 270, 288–89 (2007) (holding that California law authorizing judge to find sentence-elevating facts by preponderance of the evidence violated defendant’s constitutional right to trial by jury).

324. Some statutes contain a suggested list of mitigating factors, but the list is not exclusive. Micah Schwartzbach, *Mitigating Circumstances in Sentencing*, NOLO, <https://www.nolo.com/legal-encyclopedia/mitigating-circumstances-sentencing.html> (last visited Oct. 15, 2021) [<https://perma.cc/35T9-TAJW>].

subject to a preponderance of the evidence standard.<sup>325</sup> Therefore, as long as the sentencing judge deems the defendant's cultural background relevant to sentencing, cultural defenses may be raised and explained in detail.<sup>326</sup>

### B. Challenges in Sentencing Consideration

Regardless of how the cultural defense is incorporated into criminal proceedings, unintended consequences may present themselves. To fairly introduce culture into the courtroom, these challenges should be recognized in advance. One complicating factor is that the allowance and interpretation of cultural factors depends almost entirely on the perspective of individual judges.<sup>327</sup> As mentioned above, judges have discretion to bar cultural testimony at sentencing if they deem such testimony irrelevant.<sup>328</sup> And even where a judge *does* allow cultural evidence, lack of cultural competency can reinforce xenophobia in several ways.

First, most judges are white men from privileged socioeconomic backgrounds.<sup>329</sup> Judges will inevitably evaluate defendants' credibility through the lens of their own cultural norms; therefore, the lack of diversity on the bench could cause bias or obliviousness when it comes to cultural issues.<sup>330</sup> For example, in *Chen*, the judge was highly persuaded by

325. See *Lockett v. Ohio*, 438 U.S. 586, 606 (1978) (finding that death-penalty statute precluding consideration of relevant mitigating factors was unconstitutional); U.S. SENTENCING COMM'N, *supra* note 297, at 7 (noting that courts usually apply preponderance of the evidence standard to factual disputes); see generally *Aggravating and Mitigating Factors in Criminal Sentencing*, *supra* note 315 (listing common mitigating factors raised by defendants).

326. Cf. Boehnlein et al., *supra* note 32, at 339 ("It is in . . . the area of mitigation, that the defendant may raise all issues that may be relevant to his or her character or to any extenuating circumstances that may help to explain the crime in more human terms.")

327. Cf. Lee, *supra* note 10, at 919 (hypothesizing that because of rising anti-immigrant attitudes after September 11, elected judges may worry about supporting lighter sentences for those who commit culturally-motivated crimes).

328. See discussion *supra* Section IV.A (describing sentencing process and outlining judges' discretion as to relevance).

329. A 2020 study by the Center for American Progress found that across the federal judiciary, only twenty percent of sitting judges were people of color. CTR. FOR AM. PROGRESS, EXAMINING THE DEMOGRAPHIC COMPOSITIONS OF U.S. CIRCUIT AND DISTRICT COURTS 3 (Feb. 13, 2020), <https://americanprogress.org/wp-content/uploads/2020/02/Judicial-Diversity-Circuit-District-Courts.pdf> [<https://perma.cc/G9AH-XS7L>]. In the lower federal courts, only twenty-seven percent of sitting judges are female. *Id.* Moreover, federal courts are not nearly as diverse as the jurisdictions they serve. Though people of color make up about forty percent of the U.S. population, only about seventeen percent of sitting circuit-court judges identify as nonwhite. *Id.* at 7; see generally Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 (2013).

330. Of course, this Eurocentric legal lens predates the United States. Henry Maine, for example, was a British jurist and historian in the nineteenth century, said to be a pioneer of the study of comparative law and cultural jurisprudence. Holden, *supra* note 19, at 30. He advanced the theory that non-Western societies were best understood by measuring their legal features against prior stages of development of Western societies. *Id.* Maine's frame of reference erroneously assumed that other cultures are a less-advanced version of Western culture. *Id.*; see also D. Chiu, *supra* note 3, at 1108 (discussing how lack of diversity across legal system leads to indifference, insensitivity, and perpetuation of stereotypes).



unsubstantiated expert testimony that Chinese husbands are more likely to kill their adulterous wives.<sup>331</sup> This portrayal of Chinese culture was founded in stereotype rather than truth, constructed from a white and privileged angle.<sup>332</sup> Stereotypical or uninformed perspectives further the juxtaposition of “us” versus “them”: the “American” way as diametrically opposed to any minority culture.<sup>333</sup> The white majority is thus reinforced as the normative group, ostracizing those who are different.<sup>334</sup> Though the cultural testimony in *Chen* was given at trial rather than at sentencing, a nearly identical scene could have played out in the sentencing context.<sup>335</sup>

Second, using culture as a mitigating factor can reinforce bias because cultural claims tend to garner more leniency when they are consistent with white norms.<sup>336</sup> According to Cynthia Lee’s “cultural convergence” argument, successful cultural defenses usually have some element of confluence with American societal mores.<sup>337</sup> If a defendant’s cultural justification coincides with dominant ideas of racism and sexism, judges are far more likely to impose a lesser sentence.<sup>338</sup> Courts thus continue to view the defendant’s behavior through the lens of white American norms, again reinforcing negative stereotypes about the defendant’s cultural

---

331. See discussion *supra* Section II.A (detailing role of anthropologist Burton Pasternak in *Chen*); D. Chiu, *supra* note 3, at 1053 (stating that Justice Pincus’s decision relied on cultural evidence presented).

332. See discussion *supra* Section II.A (describing why Pasternak’s testimony was constructed from an “American fantasy” of Chinese culture); see also Volpp, *supra* note 1, at 73 (explaining how Justice Pincus incorporated his incorrect and “essentialized” understanding of Chinese culture into *Chen* decision).

333. See Phoebe S. Shen, A Critical Race Theory Intervention into the Cultural Defense Debate 7 (Dec. 14, 2016) (B.A. thesis, Scripps College), [https://scholarship.claremont.edu/scripps\\_theses/911/](https://scholarship.claremont.edu/scripps_theses/911/) [<https://perma.cc/TRH8-TN95>] (“[A]ttributing too much validity and power to such anthropological definitions of culture risks framing culture as the only factor in influencing behavior . . .”).

334. *Chen* was portrayed as both an outsider and a victim of his culture. See Volpp, *supra* note 1, at 66, 72 (describing how *Chen* was depicted as “un-American” and explaining that court’s constructed image of *Chen* deprived him of his humanity); see Shen, *supra* note 333, at 7 (explaining that otherizing immigrant and minority groups reinforces the “normative status” of the dominant culture).

335. See discussion *supra* Section IV.A (noting that sentencing hearings allow both parties to present evidence, including expert testimony, relevant to sentencing decision).

336. See Lee, *supra* note 10, at 941 (“The successful cultural defense both resonates with dominant cultural norms and is cabined or particularized through the cultural link so the legal decision-maker does not feel a favorable decision will open the floodgates to leniency.”).

337. Lee’s “cultural convergence” theory is based on NYU law professor Derrick Bell’s “interest convergence” hypothesis. *Id.* at 921. Developed in response to *Brown v. Board of Education*, interest convergence theory dictates that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.” Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

338. Lee, *supra* note 10, at 959.

group.<sup>339</sup> For instance, the manslaughter conviction that Fumiko Kimura received is actually congruent with the convictions of many non-immigrant women who kill their young children.<sup>340</sup> Kimura embodied the cultural perception that mothers who kill their children are not responsible for their actions, in need of sympathy and psychiatric treatment over punishment.<sup>341</sup> Further, Kimura was described as a passive and quiet woman, dually corresponding with traditional American and Japanese female stereotypes.<sup>342</sup> Kimura's conformity with mainstream American culture could therefore have affected the court's decision along with her Japanese background.<sup>343</sup>

Third, some judges who are sympathetic to immigrant and minority defendants may lack education on cultural issues in the communities they serve.<sup>344</sup> For example, at the time of Moua's sentencing hearing, the local Hmong population was expanding rapidly.<sup>345</sup> This likely contributed to the sentencing judge's motivation to acknowledge Moua's culture.<sup>346</sup> But as evidenced by the interpretation and communication issues in the courtroom, Judge Gomes was never presented with reliable information as to how Hmong culture impacted the case.<sup>347</sup> He attempted to "tailor a

---

339. *Id.* at 941 ("Judges, jurors, and prosecutors attempting to be culturally sensitive often end up reinforcing negative stereotypes about the racial or ethnic group of the defendant."). When the defendant, attorneys, witnesses, judge, and jurors are all white and non-immigrant American, the room will usually agree on the relevance of certain evidence. *Id.* at 920–21. But when the analysis requires the prioritization of one cultural value over another, evidence is less likely to be found relevant and the defendant's claim is thus less likely to be accepted. *Id.*

340. See Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 AM. CRIM. L. REV. 1, 20 (1996) (explaining that U.S. views infanticide as different from homicide, revealing sense of "moral condemnation" and yet an "ambivalence about punishment" that tends toward leniency).

341. See Ania Wilczynski, *Images of Women Who Kill Their Infants: The Mad and the Bad*, 2 WOMEN & CRIM. JUST. 71, 77 (1991) (describing infanticide cases in which defendant mothers were treated sympathetically and received probation); accord Pound, *supra* note 157 (quoting Kimura's attorney, who described her as "mentally deranged at the time—with a Japanese flavor, a Japanese fashion").

342. Kimura reportedly told her probation officer that she "considered herself to be a traditional Oriental wife." Stewart, *supra* note 162. The probation officer described the qualities of an "Oriental wife" as "submissiveness, passivity and a 'quiet nature.'" *Id.* In another case, a Chinese mother who killed her young son and then attempted suicide was able to reduce her second-degree murder conviction to manslaughter. *People v. Wu*, 286 Cal. Rptr. 868, 887 (Cal. Ct. App. 1991). Wu's cultural defense may have been successful because she conformed with gendered stereotypes about mothers and claimed to have been motivated by love and sympathy. See *id.* at 885 (recounting expert testimony in transcultural psychiatry, opining that defendant thought she was acting out of maternal love).

343. See D. Chiu, *supra* note 3, at 1117–18 (asserting that circumstances of Kimura's case were consistent with mainstream ideas, and that defense followed this line of reasoning at trial).

344. See discussion *supra* Section II.B (detailing cultural communication issues and other informational roadblocks in *Moua* case).

345. Evans-Pritchard & Renteln, *supra* note 8, at 26.

346. *Id.*

347. See discussion *supra* Section II.B (describing issues with securing reliable interpreter and noting that cultural evidence was never raised to illuminate case's two main issues).

sentence that would fulfill both [the court's] needs and the Hmong needs," but also admitted that he was "uncomfortable acting as half judge, half anthropologist."<sup>348</sup> Therefore, without more education on the relevant cultural issues, Judge Gomes could not have known whether the plea bargain satisfied the "needs" of Moua's community.

Finally, judges may struggle to determine what kind of "culture" qualifies for sentencing consideration. Because cultures are constantly in flux, it is challenging to concretize a cultural "norm" reliable enough to serve as a sentencing factor.<sup>349</sup> For example, many Hmong women in the United States oppose the "marriage-by-capture" tradition used as a defense in *Moua*.<sup>350</sup> The victim, Xiong Xiong, was a recent immigrant and by all accounts appeared closely in touch with her native culture.<sup>351</sup> But she had also been in the country for many of her formative years and was likely influenced by American gender roles.<sup>352</sup> Consequently, it is difficult to pinpoint Hmong "culture" as it applied to Xiong and Moua at the time of the alleged rape.<sup>353</sup>

Relatedly, questions have been raised as to whether subcultures or American-born cultures should qualify under the defense.<sup>354</sup> Scholars generally reject this idea, contending that the defense should only be

348. Evans-Pritchard & Renteln, *supra* note 8, at 27.

349. See Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multicultural Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 52 (1995) ("The issue of simply defining 'culture' and its relationship to criminal justice has long engaged the attention of anthropological scholars, one of whom suggests that it may be impossible, and it is difficult to imagine the criminal justice system doing a better job."); D. Chiu, *supra* note 3, at 1099 ("By designating culture as the operative factor for excusing the defendant's conduct, the position assumes that culture is a static element that can be quantified and neatly summarized. Rather, culture is a fluid, constantly evolving concept.")

350. D. Chiu, *supra* note 3, at 1099–1100.

351. Xiong explained that she waited to call the police because if the Hmong community knew she was no longer a virgin, she would not be able to find a husband. Evans-Pritchard & Renteln, *supra* note 8, at 13. Additionally, after the alleged rape, Xiong's family met with Moua's and attempted to resolve the conflict in a "Hmong fashion." *Id.* at 9, 13.

352. See *id.* at 9 (noting that Xiong came to United States sometime during her teenage years, and that she "apparently rejected" Hmong marriage practices); VANGYI, *supra* note 141, at 1 (explaining that traditional Hmong marriage practices described do not necessarily apply to younger Hmong immigrants in United States); see also D. Chiu, *supra* note 3, at 1099–1100 (noting that generally, Laotian Hmong women in U.S. have increasingly opposed "marriage-by-capture" tradition).

353. Cf. Evans-Pritchard & Renteln, *supra* note 8, at 13 ("It is unclear . . . just how binding some of the traditional ways of getting married are, . . . how frequent elopements and abductions are, and for how long marriages achieved through these means have been standardized in Hmong culture.")

354. At a conference for the National Association of Women Judges in the early 1990s, some were concerned that the defense could be used by gang or cult members. Don J. DeBenedictis, *Judges Debate Cultural Defense: Should Crime Acceptable in an Immigrant's Homeland be Punished?*, A.B.A. J., Dec. 1992, at 29. A former tribal judge also argued that Native Americans should be able to access the defense. *Id.*

accessible by cultural groups with *drastically* different values.<sup>355</sup> However, certain American subcultures, including religious groups, hold radically different views than the mainstream.<sup>356</sup> Depending on their separation from and understanding of the legal system, these Americans could conceivably raise a cultural defense.<sup>357</sup> For those raised in mainstream U.S. culture, the defense has a disturbing tendency to reinforce stereotypes about American minority groups. For instance, a “Black Rage” defense, though rarely used and even more rarely successful, has been asserted on some occasions.<sup>358</sup> As explained by Cynthia Lee, “[t]he defense . . . rests on the argument that after years of racial discrimination and unequal treatment, a Black person who explodes in a fit of anger should not be held responsible for his conduct because the environment in which he lived contributed to his criminal acts.”<sup>359</sup> In this context, the cultural defense is actively harmful because it reinforces and perpetuates negative stereotypes about Black Americans as violent criminals.<sup>360</sup> The “Black Rage” defense takes advantage of judges’ and juries’ implicit biases,

---

355. See RENTELN, *supra* note 7, at 207 (“Gang members do not believe in witchcraft, coining, or other customs integral to a markedly different conceptual system.”); accord Sams, *supra* note 226, at 346 (“The first stage of problems in defining defendant groups will arise if the courts are bombarded with people who see the ‘cultural defense’ as a privilege or advantage by which to circumvent the criminal justice system.”); see also Matsumoto, *supra* note 157, at 528 (imagining troubling theory that a white supremacist, raised in isolation, could hypothetically raise cultural defense).

356. These could theoretically include Amish and other Mennonite groups, conservative Mormon religions, certain evangelical Christian congregations, or even people living isolated lives in rural regions like Appalachia. In one 1967 case, a sixteen-year-old Orthodox Jewish girl successfully sued the State of New York after throwing herself off a negligently operated ski lift and suffering serious injuries. The lift stopped twenty-five feet in the air, trapping the girl alone with a young man—a moral sin under Hebrew law. The court rejected claims that she was contributorily negligent and awarded her almost \$40,000. *Friedman v. State*, 282 N.Y.S.2d 858, 862–66 (1967).

357. Compare *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that First Amendment principles prevented state law from compelling Amish parents to send their children to high school), with *Reynolds v. United States*, 98 U.S. 145, 166–68 (1878) (holding that religious freedoms did not allow Mormon men to practice polygamy in violation of state law).

358. When the four officers charged with beating Rodney King were acquitted by a mostly white jury, violence broke out in Black and Latino communities in South Central Los Angeles. Lee, *supra* note 10, at 957. A white man, Reginald Denny, was badly beaten after he drove his truck into an intersection where a group had gathered. *Id.* After the attack, two Black men, Damian Monroe Williams and Henry Keith Watson, faced a slew of charges including attempted murder. *Id.* Both defendants argued that they lacked specific intent to kill Denny as a result of “Black Rage” and mob contagion. *Id.* The defense was successful in mitigating punishment: both men avoided attempted murder convictions. *Id.* Williams was convicted of simple mayhem (a felony) and four counts of misdemeanor assault, and Watson was convicted of one count of misdemeanor assault. *Id.*; see also *Williams, Watson Sentenced in Denny Beating*, UNITED PRESS INT’L ARCHIVES (Dec. 7, 1993), <https://www.upi.com/Archives/1993/12/07/Williams-Watson-sentenced-in-Denny-beating/7652755240400/> [<https://perma.cc/AT29-FTF8>] (explaining case and subsequent sentencing).

359. Lee, *supra* note 10, at 958.

360. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. OF PERSONALITY AND SOC. PSYCH. 876, 876 (2004) (studying implicit associations between Black people and crime as they relate to visual stimuli); see also Lee, *supra* note 10, at 958 (“The ‘Black-as-Criminal’ stereotype is . . . deeply ingrained in our subconscious . . .”).

suggesting that Black criminal defendants commit crimes involuntarily.<sup>361</sup>

As previously mentioned, although some of the illustrations in this Section have occurred in the trial context, the same issues can be applied to a sentencing hearing. Therefore, there are significant roadblocks to the fair implementation of culture as a mitigating factor in sentencing.<sup>362</sup> However, considering the benefits of the approach, its challenges are surmountable.<sup>363</sup>

### C. *The Need for the Cultural Defense*

Ultimately, the need for cultural voices in the courtroom outweighs the defense's troubling history. The cultural defense should be incorporated as a factor in sentencing mitigation because it is necessary as a safeguard against coercive assimilation.<sup>364</sup> Eradicating the defense entirely could force defendants to choose between adopting white norms and criminal prosecution, with no opportunity to offer cultural context.<sup>365</sup> One outdated assimilationist metaphor is the "American Melting Pot," implying that various cultural influences are stirred into one homogeneous American "stew."<sup>366</sup> In the process, minority cultural values are subsumed by dominant white norms.<sup>367</sup> Conversely, an American "kaleidoscope" or

361. See Lee, *supra* note 9, at 958 ("[T]he jury believed these two young Black men could not help acting in the deviant way they did.").

362. See discussion *supra* Section III.B (describing variety of challenges present when cultural defense is used to mitigate a sentence).

363. See discussion *infra* Section IV.C (concluding that policy justifications for cultural defense are not outweighed by difficulties in its implementation).

364. See D. Chiu, *supra* note 3, at 1104 (noting that without cultural defense, differing values will likely be eliminated through "historical method[s] of coercive assimilation" such as criminal prosecution); see also 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, 771 (1996) ("[The] assimilationist method, which ignores difference and demands conformity to the dominant norms, smacks of xenophobia."); but see Sams, *supra* note 226, at 348 (framing assimilation positively and explaining that rejecting cultural defense will encourage immigrants to adapt to American culture more quickly).

365. See D. Chiu, *supra* note 3, at 1095 (explaining that without the defense, adoption of white values is compelled "under penalty of criminal prosecution"); see also Volpp, *supra* note 1, at 81–82 ("To say that there should be no 'culture' in the courtroom is to claim that non-immigrant Americans have no 'culture.' It is impossible to hold on to this dichotomy without falling into the paradigm of the 'West' as somehow 'neutral' and 'standard.'").

366. The "melting pot" metaphor was popularized by a 1916 play and later by the 1977 "Schoolhouse Rock!" song. See generally ISRAEL ZANGWILL, *THE MELTING POT* (Project Gutenberg 2007) (1921), <https://gutenberg.org/ebooks/23893> [<https://perma.cc/H7BH-38DZ>]; see generally LORI LIEBERMAN, *SCHOOLHOUSE ROCK!, THE GREAT AMERICAN MELTING POT* (1996).

367. See Beyea, *supra* note 19, at 719 (explaining that melting pot metaphor serves to diminish cultural individuality in favor of "dominant cultural stew"); cf. Alison Dundes Renteln, *In Defense of Culture in the Courtroom*, in *ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES* 194, 195 (Richard Shweder, Martha Minow & Hazel Rose Markus eds., 2002) ("The forced assimilation or melting pot model is inherently coercive insofar as it requires individuals to give up traditions that are crucial for maintaining their cultural identity.").

“salad bowl” connotes the coexistence of many colorful influences.<sup>368</sup> These analogies accord with the use of the cultural defense in sentencing and are a proper fit for our pluralistic society.<sup>369</sup>

Respectful coexistence undeniably requires societal guardrails, and there is a need for some degree of uniformity in the law.<sup>370</sup> But the use of the cultural defense in sentencing will not provoke anarchy.<sup>371</sup> If a cultural tradition is harmful to others, the defendant will still face consequences.<sup>372</sup> To fairly incorporate the cultural defense into sentencing procedures, all involved in the justice system must be educated on diverse cultural values.<sup>373</sup> When culture is accurately portrayed and appropriately respected in the courtroom, the cultural defense will serve to push back against the racist foundations of our legal system.<sup>374</sup>

## V. PROPOSAL

This Part begins by explaining the concept of intersectionality and its origins.<sup>375</sup> Next, it explains how intersectionality can be effectively applied in the cultural-defense context, including possible difficulties with this methodology.<sup>376</sup> This Part then proposes solutions for implementing the intersectional approach and training recommendations for judges,

---

368. The “kaleidoscope” metaphor also reflects the principles of intersectionality, discussed *infra* Section V.A. See Timothy Taylor, *Analogies for America: Beyond the Melting Pot*, STARTRIBUNE (June 29, 2013, 5:34 PM), <https://www.startribune.com/analogies-for-america-beyond-the-melting-pot/213593491/> [<https://perma.cc/AMK3-8E8N>] (noting virtues of “salad bowl” analogy and humorously advocating instead for a “chocolate fondue” metaphor).

369. Cf. Beyea, *supra* note 19, at 720 (“[C]ommitment to pluralism necessitates that the law recognize the cultural defense.”).

370. See Malek-Mithra Sheybani, *Cultural Defense: One Person’s Culture Is Another’s Crime*, 9 LOY. L.A. INT’L & COMP. L.J. 751, 782–83 (1987) (explaining that uniformity is necessary because if culture was sole determinant of culpability, chaos would ensue).

371. Cf. D. Chiu, *supra* note 3, at 1105 (“The fear of anarchy recalls the nineteenth century belief that allowing the Chinese (and other Asians) to enter the United States would sound the death knell for democratic government in America.”); but see Cathy Young, *Feminists’ Multicultural Dilemma*, CHI. TRIB. (July 8, 1992), <https://www.chicagotribune.com/news/ct-xpm-1992-07-08-9203010682-story.html> [<https://perma.cc/HC9Q-X6HS>] (“[Cultural defense advocates’] real purpose is to denigrate and tear down Western civilization. We who cherish Western values must affirm the ideal of equal opportunity and individual rights—regardless of sex or race—as the fulfillment of the best in Western and American tradition.”).

372. See discussion *supra* Section III.B (highlighting that when cultural defense is used as mitigating factor in sentencing, defendants will still be convicted of crime they committed).

373. See discussion *infra* Section V.C (suggesting strategies for educating judges and advocates when implementing cultural defense).

374. See Coleman, *supra* note 20, at 1118 (“[T]he law necessarily emerges from the particular cultural milieu and orientation of its authors and, therefore, that existing American jurisprudence is principally Anglo-American, rather than objective and true in any grander sense.”).

375. See discussion *infra* Section V.A (chronicling roots of intersectionality concept and its original application and expanding concept to apply to all marginalized groups).

376. See discussion *infra* Section V.B (illustrating via case study successful use of intersectionality and culture in sentencing process and acknowledging inherent challenges therein).

students, and advocates.<sup>377</sup> A brief conclusion follows.

With the aforementioned challenges and objectives in mind, including culture in a sentencing hearing is a delicate balancing act.<sup>378</sup> Criminal defendants' cultural backgrounds must be carefully researched without leaning on stereotypes, and defendants must be seen as the complex individuals they are.<sup>379</sup> The immediate influences that led to the commission of the crime should be considered, as well as other factors such as age, race, gender identity, disability status, and familiarity with American customs.<sup>380</sup> Victims' perspectives must also be heard.<sup>381</sup> The concept of intersectionality encompasses each of these considerations and is an essential tool for applying the cultural defense. By recognizing each defendant's intersecting identities, an intersectional approach to the cultural defense will fight xenophobia while respecting the functions of the criminal justice system.<sup>382</sup>

#### A. Intersectionality Defined

Intersectionality is a framework that acknowledges the intricacies of a person's identity and explores how that person's interlocking identities affect their lived experience.<sup>383</sup> Law professor, philosopher, and civil-rights advocate Kimberlé Crenshaw invented the concept in 1989, focusing on the experiences and erasure of Black women in America.<sup>384</sup> Intersectional theory finds that people who inhabit multiple marginalized groups are often seen as experiencing discrimination deriving from one

377. See discussion *infra* Section V.C (providing recommendations for training judges, lawyers, and law students, as well as key considerations for collaborating with other professionals such as expert witnesses and interpreters).

378. See discussion *infra* Section IV.B (detailing challenges present in sentencing consideration, including judges' personal levels of privilege, danger of reinforcing bias, lack of cultural education on bench, and struggle to identify precise definition of "culture").

379. D. Chiu, *supra* note 3, at 1125; see Volpp, *supra* note 1, at 90 (finding that cultural defense can easily reduce culture to mere stereotype, and that investigation of culture often veers away from defendant as individual and toward judgment of culture as a whole).

380. See discussion *infra* Sections V.A and V.B (explaining concept of intersectionality and corresponding importance of understanding each aspect of defendant's identity).

381. Cf. Choi, *supra* note 24, at 89 (noting that many victims, including women and children, occupy marginalized identities).

382. Cf. Volpp, *supra* note 1, at 58–59 (noting that intersectionality is helpful in framing cultural-defense analysis because it recognizes layers of "group-based oppression" at play in case).

383. See, e.g., Bridie Taylor, *Intersectionality 101: What Is It and Why Is It Important?*, WOMANKIND WORLDWIDE (Nov. 24, 2019), <https://www.womankind.org.uk/intersectionality-101-what-is-it-and-why-is-it-important/> [<https://perma.cc/JBR9-TL2U>] ("Intersectionality is the acknowledgement that everyone has their own unique experiences of discrimination and oppression and we must consider everything and anything that can marginalize people—gender, race, class, sexual orientation, physical ability, etc.")

384. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. The word "intersectionality" was adopted by the Oxford Dictionary in 2015. Taylor, *supra* note 383.

identity at a time.<sup>385</sup> For instance, many Black women are thought to face bias either because of their race *or* their gender, but the combined effects of these two discriminations are rarely emphasized.<sup>386</sup> Because of this “unidirectional” view of discrimination, Black women’s experiences are seen as derived from those of Black men or white women.<sup>387</sup> Black women do face combined race and gender discrimination, but they also experience prejudice simply because they are Black women.<sup>388</sup> At its core, intersectionality is a reminder that identity markers like race and gender are inseparable.<sup>389</sup>

The same analysis can be applied to anyone who exists at the nexus of more than one defining identity, such as sexual orientation, socioeconomic status, disability status, race, ethnicity, religion, or cultural background.<sup>390</sup> The result of such an analysis shows that people who live within multiple marginalized categories have experiences that occur because of the *overlap* of these categories.<sup>391</sup> In other words, intersectionality allows individuals to be seen as their full, kaleidoscopic selves.<sup>392</sup> Unfortunately, the law tends to address identity categories one at a time, if they are addressed at all. For example, race, national origin, and citizenship are considered suspect classes in equal-protection analysis,

---

385. See Aisha Nicole Davis, *Intersectionality and International Law: Recognizing Complex Identities on the Global Stage*, 28 HARV. HUM. RTS. J. 205, 208–09 (2015) (explaining Crenshaw’s initial application of intersectional theory to Black women).

386. See *id.* at 209 (“Intersectionality recognizes that a group that inhabits multiple categories simultaneously has experiences that can be seen both as unique to that group and as a result of the overlap of individual categories.”).

387. *Id.* at 208. Crenshaw explored this point further:

The point is that Black women can experience discrimination in any number of ways and that the contradiction arises from our assumptions that their claims of exclusion must be unidirectional. Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.

Crenshaw, *supra* note 387, at 149.

388. Davis, *supra* note 385, at 209.

389. See Volpp, *supra* note 1, at 59 (noting that intersectional theory refuses to consider race and gender on an exclusive basis); see also Davis, *supra* note 385, at 208 (finding that intersectionality not only merges separate identities, but also analyzes distinctive identity formed as a result of that merge).

390. See Davis, *supra* note 385, at 209 (explaining that intersectionality analyses can include identity markers suggested by Crenshaw (race and gender) as well as others).

391. See *id.* (“[I]ntersectionality examines lapses in legal recognition of those existing in the overlap of multiple identity markers.”).

392. See Avtar Brah & Ann Phoenix, *Ain’t I a Woman? Revisiting Intersectionality*, 5 J. INT’L WOMEN’S STUD. 75, 82 (2004) (“Recognition of the importance of intersectionality has impelled new ways of thinking about complexity and multiplicity in power relations as well as emotional investments.” (citations omitted)).



whereas sexual orientation, poverty, and disability status are not.<sup>393</sup> This creates a “negative space” where the experiences of those occupying multiple minority groups are not covered by legal precedent.<sup>394</sup> While the cultural defense will not alter the foundations of American constitutional law, it can help to fill this “negative space” in the sentencing process.

*B. Intersectionality as Applied to Immigrant and Minority Defendants*

Intersectionality is the ideal framework for sentencing because those who raise cultural defenses almost always inhabit multiple marginalized identities. Further, the approach sees defendants as unique individuals subject to a variety of influences.<sup>395</sup> Consequently, intersectionality counterbalances the cultural defense’s tendency to reinforce and perpetuate stereotypes. When interlocking identities are simultaneously acknowledged, a person’s behavior cannot be boxed into preconceived notions about a certain ethnic or minority group.<sup>396</sup> Therefore, fair sentencing demands that judges learn how to view defendants’ behavior through an intersectional lens.<sup>397</sup> When properly implemented, defendants will receive sentences tailored to their unique lived experience and focused on preventing future harm.<sup>398</sup> As opponents of the “official” defense have indicated, lawmakers cannot realistically devise individual statutes to apply to every cultural group.<sup>399</sup> But implementing a uniform set of education requirements on the principles of intersectionality may be the next

---

393. *E.g.*, *Suspect Classification*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/suspect\\_classification](https://www.law.cornell.edu/wex/suspect_classification) (last visited Nov. 4, 2021) [<https://perma.cc/4XQQ-MDCU>] (listing categories of suspect classifications under Equal Protection Clause); *accord* Davis, *supra* note 385, at 212 (noting the legal field has been slow to implement intersectionality in comparison to other fields).

394. *See* Davis, *supra* note 385, at 211 (“Because the courts interpret[] laws banning sex and race discrimination as mutually exclusive, the interaction of both forms of discrimination in the lives of Black women [falls] into the negative space.”); *cf.* Crenshaw, *supra* note 387, at 150 (“[N]ot only courts, but feminist and civil rights thinkers as well have treated Black women in ways that deny both the unique compoundedness of their situation and the centrality of their experiences to the larger classes of women and Blacks.”).

395. *See* Shen, *supra* note 333, at 29 (explaining that cultural defense is best applied when narratives of marginalized communities are centered to avoid “one-dimensional ideal of identity”).

396. *Cf.* Volpp, *supra* note 1, at 58 (“[A]ny testimony about a defendant’s cultural background must embody an accurate and personal portrayal of cultural factors used to explain an individual’s state of mind and should not be used to fit an individual’s behavior into perceptions about group behavior.”).

397. *Cf. id.* at 98 (highlighting fact that a person’s actions cannot be truly understood without understanding her marginalized position in society).

398. *See* discussion *infra* Section V.B.1 (presenting case study on sentence effectively tailored to defendant’s lived experience).

399. Sikora, *supra* note 7, at 1728. Because culture is not a static concept, it transcends concrete definition; thus, it is impractical to base a law on an unbending interpretation of any one culture. *See* Maguigan, *supra* note 349, at 52 (explaining that “culture” is malleable and may be impossible to define); Renteln, *supra* note 229, at 498 (“Of course, cultures evolve, and so courts must guard against basing decisions on information that is anachronistic.”); *but see* Sams, *supra* note 226, at 353 (arguing that cultural defense prioritizes ideas of defendants and attorneys over lawmakers’ mandates, thus violating principle of legality).

best option.<sup>400</sup> Finally, while intersectional sentencing gives a fuller picture of the defendant as a person, it does not follow that all who raise a cultural defense will receive a lesser sentence. The theory simply serves to uncover the intersecting forms of oppression that may or may not have contributed to the defendant's actions.<sup>401</sup>

### 1. *People v. Nem*: An Intersectional Case Study<sup>402</sup>

*People v. Nem*, a capital murder case, illustrates the effective use of intersectionality in sentencing. The defendant, Soknoeun Nem, was a twenty-four-year-old Cambodian refugee charged with first-degree murder.<sup>403</sup> On the day at issue, Nem and a confederate knocked on the door of a home intending to commit an armed robbery.<sup>404</sup> After the victim's wife opened the door, the victim came downstairs with a revolver and instantly killed Nem's confederate.<sup>405</sup> Nem then shot the victim twice in the back, killing him.<sup>406</sup> The matter was tried as a death-penalty case and Nem was convicted.<sup>407</sup> At the penalty phase, the jury was tasked with determining whether Nem would spend life in prison or be subject to capital punishment.<sup>408</sup> Jurors weighed statutorily prescribed aggravating factors against any mitigating factors, which were not determined by

400. See discussion *infra* Section V.C (outlining how judges and advocates might be educated on intersectionality in the courtroom).

401. See Volpp, *supra* note 1, at 63 (asserting that anti-subordination should be part of advocate's calculus when deciding whether to use or support the defense).

402. The original *Nem* decision is not published; however, an appeal has been certified for partial publication. See *People v. Nem*, 7 Cal. Rptr. 3d 478, 479–482 (Cal. Ct. App. 2003) (summarizing facts and procedural history of case and affirming trial court judgment). There are no dissents and no concurrences in the case. The facts herein are derived primarily from news articles and from the writings of psychiatrist James K. Boehnlein, who served as a cultural forensic consultant during Nem's sentencing. See generally Boehnlein et al., *supra* note 32, at 337–40.

403. Boehnlein et al., *supra* note 32, at 337.

404. The confederate, Mesa Kasem, had recently delivered furniture to the victim's luxury home. Charlie Goodyear, *Jury Hears of Suburban Terror / Woman Describes Husband's Slaying During Alamo Home Invasion*, SFGATE (May 23, 2002), <https://www.sfgate.com/bayarea/article/Jury-hears-of-suburban-terror-Woman-describes-2833597.php> [https://perma.cc/7WLP-D7JG]. The victim, Kim Fang, was a popular plastic surgeon in the Bay Area. *Id.* Fang's wife, his two children, and their nanny were also at home. *Id.* Kasem and Nem did not know that Fang was a gun collector and an "expert marksman." *Id.*

405. *Id.* ("[Fang] . . . emptied his five-shot titanium revolver at Kasem, who allegedly fired first and was killed instantly by shots to the head and heart.")

406. *Nem*, 7 Cal. Rptr. 3d at 480. After he was shot, Fang continued to "grapple" with Nem, who was carrying a nine-millimeter pistol. Goodyear, *supra* note 404. Fang's wife was also injured, hit in the chest by a bullet that had passed through her husband's body. *Id.* The family beat Nem with a kitchen pot and managed to tie him up with an extension cord from their Christmas tree. *Id.*

407. *Nem*, 7 Cal. Rptr. 3d at 481.

408. Charlie Goodyear, *Penalty Phase Begins in Alamo Murder / Killer Was Born in War-Torn Cambodia*, SFGATE (July 2, 2002), <https://www.sfgate.com/bayarea/article/Penalty-phase-begins-in-Alamo-murder-Killer-was-2800967.php> [https://perma.cc/37DV-WB99].

statute.<sup>409</sup> To inform the jury's mitigation analysis, the defense offered a complex range of expert testimony, integrating the biological, social, and cultural variables that affected Nem's life.<sup>410</sup>

James K. Boehnlein, a psychiatrist who served as a cultural consultant for the defense, co-authored an article on the details of Nem's case and the cultural evaluation process.<sup>411</sup> Although Boehnlein does not specifically use the term "intersectionality," the approach used in Nem's case certainly explores how his intersecting identities influenced his behavior.<sup>412</sup>

Nem was born in rural Cambodia during the rule of Pol Pot and the Khmer Rouge.<sup>413</sup> His parents were worked to near starvation in a work camp, and an infant Nem was strangled by Khmer Rouge soldiers when he cried too loudly.<sup>414</sup> During this time, Nem also had numerous seizures caused by fever.<sup>415</sup> After escaping to Thailand, Nem and his family spent years in refugee camps before settling in the United States.<sup>416</sup> Nem did not speak English and immediately fell behind in elementary school.<sup>417</sup> His parents noticed that Nem was "slower" than his other siblings.<sup>418</sup> Additionally, he showed signs of PTSD and suffered two head injuries at

---

409. Nem was found death penalty-eligible because of the aggravating circumstances of attempted robbery and burglary, as well as for discharging a firearm that caused great bodily injury or death. *See Nem*, 7 Cal. Rptr. 3d at 480–81 (describing all counts that Nem was charged with and special circumstances therein); *see, e.g., Aggravating and Mitigating Factors in Federal Capital Cases*, CAP. PUNISHMENT IN CONTEXT, <https://capitalpunishmentincontext.org/resources/ada88aggit> (last visited Nov. 4, 2021) [<https://perma.cc/92QY-G65T>] (providing examples of mitigating and aggravating factors, as well as federal statute governing jury instructions).

410. Testimony was given regarding interviews with Nem's older family members, school records, educational and psychological testing, the family's experience with war trauma and refugee camps, issues with assimilating into American society, and Nem's parents' psychiatric problems. Boehnlein et al., *supra* note 32, at 339. A cultural consultant synthesized the mitigating factors during testimony, emphasizing their interconnectedness for the jury. *Id.*; *see* Goodyear, *supra* note 408 ("[Nem's attorney] said the defense would show the effect Nem's tortured childhood had on his mental, emotional and criminal development.").

411. Boehnlein et al., *supra* note 32, at 338 (noting that Boehnlein served as consultant for the defense and focused his testimony on family dynamics influenced by culture, mental illness within the family, refugee status, and sociocultural environment).

412. *See id.* at 339 ("An accurate and comprehensive understanding of the defendant's behavior would not be possible if each of the factors was viewed in isolation or if either biological or cultural factors were artificially viewed as pre-eminent.").

413. *Id.* at 337.

414. Nem's mother was in a state of starvation before giving birth and while nursing. *Id.* Soldiers strangled Nem on two occasions—he cried because his mother worked in rice fields all day and was unable to nurse him. *Id.* She was also beaten by Khmer Rouge soldiers and had blood loss due to leeches. *Id.*

415. *Id.*

416. Nem, his siblings, and his parents encountered terrible "scenes of violence and death" during their escape. *Id.* at 337–38.

417. *Id.* at 338.

418. Nem also suffered from severe headaches and isolated himself when there was "sudden or persistent environmental noise." *Id.* By the time he reached middle school, Nem skipped school frequently. *Id.*

ages twelve and sixteen.<sup>419</sup> Nem's trauma throughout his adolescence likely caused brain damage.<sup>420</sup> With an IQ in the mid-seventies, Nem was deemed developmentally disabled by forensic psychiatrists.<sup>421</sup> Due to their own untreated mental-health problems, Nem's parents could not address his behavioral, medical, and academic issues.<sup>422</sup> Nem lived in poverty in a rough neighborhood and fell into an even rougher social group, leading to possible gang involvement.<sup>423</sup> While Nem's parents stayed isolated within their refugee community, learning almost no English, their children's Cambodian fluency diminished.<sup>424</sup> Thus, communication progressively broke down between Nem and his family throughout his childhood.<sup>425</sup>

Nem inhabited a wide range of intersecting identities that were important to consider in his sentencing determination. He was Cambodian, an immigrant, a refugee, developmentally disabled, had mental-health issues, and had spent his life in poverty.<sup>426</sup> Forensic psychiatrists used each of these identities to paint a picture of Nem's life for the jury.<sup>427</sup> Nem's psychiatric evaluation was conducted using a "Cultural Formulation" model that "contextualizes the patient's illness, includes both standardized and personalized elements, and . . . improves the appreciation of the subject's psychosocial environment."<sup>428</sup> Experts in nuclear medicine, neonatology, and neuropsychology assessed how Nem's early trauma contributed to his problems later in life.<sup>429</sup> Boehnlein, as "cultural consultant," spent time with Nem's parents to assess their degree of isolation and mental health as well as the neighborhood and environment where Nem

---

419. *Id.*

420. *See id.* (explaining that several instances of developmental trauma led to brain damage, low IQ, and academic and behavioral problems).

421. *See id.* at 338–39 (stating that Nem's parents' PTSD and depression impeded their ability to provide for their developmentally disabled child). Nem's attorneys highlighted the intelligence and manipulative nature of Kasem, Nem's confederate, but said Nem was "not at all a bright man." Goodyear, *supra* note 404.

422. Nem's parents were found to have suffered from "significant, untreated major depression and chronic PTSD." Boehnlein et al., *supra* note 32, at 338. Both parents had issues with focus and concentration because of "hypervigilance," "startle reactions," nightmares, and insomnia. *Id.* Finally, poverty, language barriers, and lack of experience with American culture prevented Nem's parents from addressing his childhood academic and medical problems. *Id.* at 338–39.

423. *See id.* at 338 (noting that Nem began to spend time with other truant children in middle school, and that he lived in a "rough," poverty-stricken area); *see also* Goodyear, *supra* note 408 ("Nem . . . was born amid Cambodia's 'killing fields,' . . . eventually settling in Stockton, where he fell into a life of street and gang crime.").

424. Boehnlein et al., *supra* note 32, at 338.

425. *Id.*

426. *See id.* at 337–39 (reciting the many facets of Nem's upbringing).

427. *See id.* at 339 (describing variety of analyses done in Nem's case, and emphasis placed on combined effects of all variables).

428. *Id.* at 337.

429. *Id.* at 338.

was raised.<sup>430</sup> Boehnlein was assisted by a Cambodian social worker who was familiar with the Khmer Rouge and its impact on families.<sup>431</sup> After gathering evidence from many areas of Nem's life, the defense team "integrate[d] the cultural psychiatric and neuroscience medical testimony, and . . . developed a compelling individual and family historical narrative that clearly unified mitigating factors for the penalty phase determination."<sup>432</sup> Boehnlein, who has expertise in Cambodian cultural history, repeatedly emphasized that all of the variables in Nem's history were interdependent.<sup>433</sup> He reminded the jury that if Nem's identities were viewed in isolation, it would be impossible to understand his behavior.<sup>434</sup> After five days of deliberation, the jury decided on a sentence of life without parole instead of the death penalty.<sup>435</sup>

The sentencing process in *Nem* sidestepped the difficulties that most often arise in the application of the cultural defense.<sup>436</sup> Because Nem was convicted of the crime he committed, the victim's rights were honored.<sup>437</sup> Further, Nem's culture was not essentialized and stereotyped as in *Chen*.<sup>438</sup> The cultural communication issues in *Moua* were also absent; the defense recruited the necessary experts and translators and visited Nem's family at length.<sup>439</sup> Finally, Nem's culture was explicitly and

430. *Id.*

431. Boehnlein and his assistant spent an entire day with Nem's parents, having reviewed their medical and psychiatric reports beforehand. The assistant also testified at trial. *Id.*

432. *Id.*

433.

Because of expertise in anthropology and the cultural history of Cambodia, the assessment and clinical care of war trauma among individuals and families, and the core principles of the general and forensic psychiatric assessment, [Boehnlein] was able to synthesize all of these mitigating factors for the court during testimony. Continual emphasis was placed on the fact that all of these factors, whether biological or cultural, were interdependent in the process of understanding the defendant's life history.

*Id.* at 339.

434. *Id.*; see Goodyear, *supra* note 408 ("There is a reason that Soknoeun Nem is not in his third year at Stanford getting his MBA. There is a reason he's in a courtroom on trial for his life. From conception, Soknoeun Nem had experiences that some of us can't comprehend." (quoting Nem's attorney)).

435. Boehnlein et al., *supra* note 32, at 339.

436. See discussion *supra* Section III.A.2 (detailing arguments against "official" cultural defense); see discussion *supra* Section III.B (identifying difficulties in using cultural defense as mitigating factor in sentencing).

437. See *People v. Nem*, 7 Cal. Rptr. 3d 478, 483 (Cal. Ct. App. 2003) (affirming Nem's conviction).

438. See discussion *supra* Section II.A (illustrating how use of cultural defense in *Chen* essentialized Chinese culture and subordinated defendant).

439. See discussion *supra* Section II.B (describing language problems and barriers to cultural understanding during Moua's sentencing hearing). Two highly qualified experts built a trusting relationship with Nem's family and spent a full day evaluating the environment where Nem spent his childhood. Boehnlein et al., *supra* note 32, at 338–39. One expert was Cambodian himself, had a master's degree in social work and forensic psychiatry experience, and was familiar with the impact the Khmer Rouge had on Cambodian families. *Id.* at 338. The other had expertise in

deeply discussed, unlike culture's ambiguous role in *Kimura*.<sup>440</sup> While an intersectional consideration of Nem's story undoubtedly required ample time and resources, Nem's life was spared, and this is invaluable.

Some may review the *Nem* analysis and conclude that such depth is completely impractical in the context of an average sentencing hearing. This is a valid concern. Hiring expert witnesses and other professionals was likely expensive, and time-intensive inquiries were required both in and out of the courtroom.<sup>441</sup> A death-penalty case with a full jury may afford more time for an intersectional approach, but most sentencing determinations are made by individual judges.<sup>442</sup> Many judges may be unwilling or unable to allow the breadth of testimony presented to the jury in *Nem*. Further, some judges may refuse to hear cultural evidence if they find it irrelevant to sentencing.<sup>443</sup> Even after cultural-competency training, some judges may not alter their practices. However, such massive changes need not occur overnight, and the extensive analysis in *Nem* will not be necessary for every sentencing decision. When using an intersectional lens, judges and juries are asked to shift their perception of identity.<sup>444</sup> This is a considerable mountain to climb, and gradual progress is acceptable.<sup>445</sup> As respectful cultural pluralism continues to establish itself as the norm, courts will become more open to intersectional approaches in sentencing.<sup>446</sup> And when such an approach is prioritized, time and funding will follow.

---

Cambodia's anthropological and cultural history and clinical experience with families suffering from war trauma. *Id.*

440. The judge in *Kimura* attempted to skirt the issue of culture entirely. Nonetheless, Kimura's Japanese heritage was inextricably involved in the case. See discussion *supra* Section II.C.

441. Boehnlein recommended that defendants undergo a cultural assessment from a qualified expert and a comprehensive forensic psychiatric evaluation before their sentencing hearing. Boehnlein et al., *supra* note 32, at 340. However, the detail required in Nem's case would likely not be necessary for every defendant.

442. See discussion *supra* Section IV.A (outlining general process for sentencing); see generally *How Courts Work: Sentencing*, *supra* note 314.

443. Judges have discretion to bar cultural considerations at sentencing if they find culture irrelevant to the proceedings. See Evans-Pritchard & Renteln, *supra* note 8, at 36 ("[W]hether a defendant can invoke a cultural defense depends almost entirely on the luck of the draw, that is, on who the judge is.").

444. See discussion *supra* Section V.A (explaining concept of intersectionality and its framework for understanding marginalized identities).

445. See Crenshaw, *supra* note 384, at 167 ("It is not necessary to believe that a political consensus to focus on the lives of the most disadvantaged will happen tomorrow . . . . It is enough, for now, that such an effort would encourage us to look beneath the prevailing conceptions of discrimination . . .").

446. The shift in rhetoric from an American "melting pot" to a "kaleidoscope" or "mosaic" exemplifies the country's focus on multicultural pluralism. See discussion *supra* Section IV.C (describing need for cultural defense in a world where differences are valued and explaining aforementioned metaphorical shift).

### C. Recommendations for Training and Implementation

Several key recommendations can speed and smooth the transition to a fairer sentencing process. First and foremost, judges and advocates need mandatory cultural-competency training, including specialized education on the cultures in their communities.<sup>447</sup> Deeper cultural understanding on an individual basis is vital; judges should not rely solely on experts to give cultural context. This education must begin as early as possible.<sup>448</sup> In the words of criminal-law professor Susan Kuo: “Teaching cultural defenses . . . sheds light on the dominant culture that reigns over the creation, construction, and enforcement of our criminal laws.”<sup>449</sup> Law schools should require a course in ethnographic study or, at the very least, include cultural analysis in required legal-ethics courses.<sup>450</sup> Cultural-competency training must be mandatory, not elective, for both law professors and law students.<sup>451</sup> Similarly, for attorneys, required portions of Continuing Legal Education courses should be devoted to cultural competency.<sup>452</sup>

Given their role in sentencing, educating the judiciary is the most important hurdle.<sup>453</sup> To begin, judicial colleges can hold seminars on cultural analysis, concentrating on local or regional cases posing key cultural dilemmas.<sup>454</sup> Further, states should introduce legislation requiring judges to attend certain training seminars relevant to their jurisdiction. For example, in Illinois, the proposed Judicial Quality Act would implement quarterly trainings, mandating that judges hear live testimony from

---

447. Alison Dundes Renteln opined that cultural-competence training “is unlikely to be sufficient . . . so long as the training is elective and the course is a matter of hours. To become a police officer, lawyer, or judge should be contingent upon significant knowledge of other folkways.” RENTELN, *supra* note 7, at 209.

448. See Kuo, *supra* note 13, at 1311 (explaining that discussing cultural issues in the criminal-law classroom helps first-year students visualize the law in context of communities where they live). Kuo also noted that discussing the cultural defense can help to disrupt students’ “illusion of objectivity” about the law and awaken sensitivity to the “cultural assumptions” inherent in the assigned case law. *Id.* at 1299.

449. *Id.* at 1311.

450. See Evans-Pritchard & Renteln, *supra* note 8, at 33 (recommending ethnographic law-school curricula and weaving ethnographic study into ethics requirements); *cf.* RENTELN, *supra* note 7, at 209–10 (suggesting that cultural-competence training include required courses, international homestays, or cultural questions on the bar exam).

451. ABA Law Student Podcast, *Cultural Competency—How to Handle Bias and Develop Understanding*, LEGAL TALK NETWORK (Apr. 1, 2019), <https://abaforlawstudents.com/2019/04/01/podcast-how-to-handle-bias-and-develop-cultural-competence/> [<https://perma.cc/Z6WK-QDFK>] (asserting that self-selection is insufficient when it comes to cultural education because only those with existing interest in cultural causes will choose to participate).

452. *Id.*

453. See discussion *supra* Section IV.A (detailing extensive discretion given to judges in sentencing, making this group key players when cultural defense is used as a mitigating factor).

454. Evans-Pritchard & Renteln, *supra* note 8, at 34 (“Since judges must require more extensive background materials for cases of [a cultural] nature, it would be advantageous to provide them with guidance on the analysis of cultural data.”).

individuals or organizations representing marginalized groups who have been sentenced to longer prison terms.<sup>455</sup>

All cultural-competency trainings must lead students, attorneys, and judges to form an awareness of their perspective based on their own intersectional identity.<sup>456</sup> To serve immigrant and minority defendants well, advocates need to interrogate how their own privileges affect their view of the world and commit to listening and constant evolution.<sup>457</sup> Patricia Martin, a former Cook County judge who presided over the child-protection division for twenty years, supports increased training requirements for judges.<sup>458</sup> “I think it’s a continuous learning curve,” she said. “[T]he person who decides to stop learning . . . they need to retire.”<sup>459</sup> Finally, taking a longer view, the judiciary must be diversified.<sup>460</sup> A broader range of perspectives on the bench can only serve to improve conditions for criminal defendants.<sup>461</sup>

While judges should develop personal knowledge about the cultural groups they serve, other professionals can be valuable resources. Reputable expert witnesses are an essential tool for educating judges and juries alike.<sup>462</sup> However, finding available and qualified cultural experts can be challenging, especially for cultures with minimal representation in the

---

455. The Act passed the Illinois Senate Executive Committee with flying colors, although the Illinois Supreme Court does not support the bill. Josh McGhee, *Illinois Lawmakers Clash with State Supreme Court over Bias Training for Judges*, INJUSTICE WATCH (Mar. 16, 2021), <https://www.injusticewatch.org/news/2021/judicial-quality-act-illinois-judges-training/> [<https://perma.cc/98BU-FXPJ>].

456. Cf. Boehnlein et al., *supra* note 32, at 340 (“[I]t is vitally important for the cultural consultant to be aware of his or her prejudices or overidentification involving ethnicity . . . or cultural belief systems, so that they do not adversely affect the objectivity of the forensic report or the expert testimony.”).

457. GRACE AJELE & JENA MCGILL, WOMEN’S LEGAL EDUC. & ACTION FUND, INTERSECTIONALITY IN LAW AND LEGAL CONTEXTS 34 (2020), <https://www.leaf.ca/wp-content/uploads/2020/10/Full-Report-Intersectionality-in-Law-and-Legal-Contexts.pdf> [<https://perma.cc/78VD-6TK8>] (“[U]nderstanding one’s positionality—or socio-political context—is a key part of effectively using an intersectional approach. . . . More importantly, there must be a willingness to continually evolve, with a focus on listening to *all* those whom the movement purports to represent.”).

458. McGhee, *supra* note 455.

459. *Id.*

460. See CTR. FOR AM. PROGRESS, *supra* note 329, at 3 (finding that in 2020, only twenty percent of sitting federal judges were people of color).

461. See, e.g., RENTELN, *supra* note 7, at 210 (“Until there is a much more diversified legal system, it is unlikely that culture conflicts will be minimized.”).

462. See Chen, *supra* note 52, at 343–45 (proposing a “medical legal partnership” in which cultural experts and medical professionals would inform each other on cross-cultural folk remedies and child-rearing practices, differentiating such practices from child maltreatment); *but see* RENTELN, *supra* note 7, at 206 (raising idea that experts should not be consulted because they are often not members of groups that are the subject of their testimony); *see generally* James G. Connell, III, *Using Cultural Experts*, in CULTURAL ISSUES IN CRIMINAL DEFENSE 467–93 (Linda Friedman Ramirez ed., 2d ed. 2007).



United States.<sup>463</sup> Deirdre Evans-Pritchard and Alison Dundes Renteln, who reported on the cultural-communication issues in the *Moua* case, suggested that the American Bar Association or the American Anthropological Association sponsor a network of experts on certain cultural groups.<sup>464</sup> They wisely recommended “a certification system as a safeguard to ensure that only individuals whose expertise includes the ethnic group in question are permitted to testify.”<sup>465</sup> Courts and attorneys should also seek input from organizations that work with the relevant marginalized groups, in the form of either expert testimony or an amicus brief.<sup>466</sup> Lastly, as demonstrated in *Moua*, available interpreters are absolutely necessary.<sup>467</sup> In that case, the Hmong population in Fresno County had been growing for some time, but the proper services were still unavailable.<sup>468</sup> As communities change, courts must respond to meet their needs. In-house interpreters are a good solution for the most common languages spoken; otherwise, many outsourced interpretation services exist.<sup>469</sup> Though changes in court procedure are usually met with skepticism, our rapidly changing sociopolitical climate presents the perfect opportunity to make room for these fundamental trainings and safeguards.<sup>470</sup> At criminal sentencing hearings, a person’s liberty is at stake. Any additional time and expenditures are worthwhile, as they ensure that defendants are heard, understood, and justly sentenced.<sup>471</sup>

---

463. See Connell, *supra* note 462, at 472 (suggesting that advocates turn to universities, consulates, and court interpreters in search of cultural experts).

464. Evans-Pritchard & Renteln, *supra* note 8, at 33–34.

465. *Id.* at 34; see also RENTELN, *supra* note 7, at 206 (“Because there may be concern about the ethical conduct of expert witnesses who appear to be ‘hired guns’ for lawyers on either side, a code of ethics for expert witnesses would be advisable.”).

466. Volpp, *supra* note 1, at 100.

467. See discussion *supra* Section II.B (explaining that as there was no available court interpreter for *Moua*’s case, a Hmong man from local community center served as interpreter, leading to significant communication issues).

468. See Evans-Pritchard & Renteln, *supra* note 8, at 26 (noting that Hmong population was expanding rapidly but remained “largely unfamiliar” to courts).

469. See Martha Carter-Balske, Leslie Kay, & Linda Friedman Ramirez, *Use of Foreign Language Interpreters*, in CULTURAL ISSUES IN CRIMINAL DEFENSE 35, 40–46 (Linda Friedman Ramirez ed., 2d ed. 2007) (outlining protocols for (1) determining the need for an interpreter, (2) finding an interpreter, and (3) the interpreting process itself); cf. Chen, *supra* note 52, at 344 (noting that interpreters are essential in medical-legal partnership clinics, and suggesting that clinics find federal and state reimbursement programs for interpretation services).

470. See Rashmi Goel, *Can I Call Kimura Crazy? Ethical Tensions in the Cultural Defense*, 3 SEATTLE J. FOR SOC. JUST. 443, 460 (2004) (“While not every lawyer is willing to wear the mantle of trailblazer, the law is not formed by precedent alone; the law’s power is its ability and willingness to respond to societal needs.”).

471. See Sikora, *supra* note 7, at 1728 (finding that use of culture as mitigating factor in sentencing is a proper balance between treating defendants fairly and preserving victims’ rights and the rule of law).

## VI. CONCLUSION

The cultural defense is an essential tool for explaining the actions of immigrant and minority defendants, yet courts rarely acknowledge cultural factors as they relate to the commission of a crime.<sup>472</sup> The United States' multicultural society demands that courts take a stance on when and how such evidence can be used.<sup>473</sup> Though the cultural defense may not be appropriate for the trial phase, it is an ideal match for the more flexible sentencing phase.<sup>474</sup> Ultimately, defendants should be convicted of the crimes that they commit.<sup>475</sup> But if cultural influences serve to reduce a defendant's culpability, their punishment should be appropriately mitigated during sentencing.<sup>476</sup> When framing the layered cultural, social, and other issues that may arise at a sentencing hearing, an intersectional framework serves the needs of defendants, victims, and courts.<sup>477</sup> Intersectionality offers an approach that recognizes each defendant's "kaleidoscopic" identity, which the criminal-justice system often fails to recognize.<sup>478</sup> The cultural defense, for all the controversy surrounding it, can be interpreted quite simply: courts should procure the time and resources necessary to see defendants for who they are. This process will take time, but as diverse cultures flourish and evolve under the weight of white norms, it is crucial to begin the journey now.

---

472. See RENTELN, *supra* note 7, at 5 ("In pluralistic societies ethnic minorities and indigenous groups sometimes ask the legal system to take their cultural background into account in criminal and civil cases. More often than not, courts refuse to do so.")

473. See, e.g., Beyea, *supra* note 19, at 719–20 ("The 'most radical forms of intolerance are those which . . . [take] for granted that the only acceptable system of values is our own, and [require] others to accept it without question.'" (citation omitted)); *but see* RENTELN, *supra* note 7, at 218 (noting that federal government may find multiculturalism threatening because it questions the "fiction of any national identity").

474. See discussion *supra* Section III.B (explaining why culture is best used as mitigating tool in sentencing).

475. *Id.*

476. *Id.*

477. See discussion *supra* Section V (defining intersectionality and discussing how it should be applied in sentencing context).

478. *Cf.* D. Chiu, *supra* note 3, at 1125 ("In the cultural defense debate and in larger society, the focus must allow for uncertainties and unknowns, and identities must be constructed, not essentialized. Identities of shifting, multiple selves, in which no aspect dominates. Identities in which contradictions and contradictory selves remain.").