THE CURRENT CULTURAL DEFENSE FRAMEWORK: MISCONCEPTION OF MINORITY CULTURES AND DISREGARD OF GENDER ANTISUBORDINATION VALUES

XINYUE SHEN*

ABSTRACT

American courts tend to accept cultural defenses raised by minority defendants attempting to explain their sex-subordinating crimes when the sexist norms underlying their cultural claims converge with those norms still embedded in American society. When culture is used as an excuse in this way, establishing an effective mechanism to assess the authenticity of minority defendants' cultural claims is essential. Unfortunately, it is not the case in the American criminal courtroom today.

INTRODUCTION 1287

I. CULTURAL CONVERGENCE OF SEXIST NORMS 1288
A. WOMEN AS PROPERTY 1289
1. People v. Chen 1290
2. People v. Moua 1292
B. THE HYSTERICAL WOMAN 1294
1. People v. Kimura 1294
2. People v. Wu 1295

II. MISCONCEPTION OF MINORITY CULTURES 1297

III. SUGGESTIONS FOR REFORM 1301

CONCLUSION 1304

INTRODUCTION

Culture—a fascinating concept which embodies a variety of collective human achievements manifested through traditions, customs, social institutions, and arts. It is perhaps the most important form of historical heritage that lives through one generation after another as it shapes the beliefs, values, and lifestyles of members within the same cultural group. However, in the United States criminal justice system, culture is sometimes used to exonerate or mitigate horrible offenses committed by people in ethnic minority groups. This particular defense

* J.D. Candidate, May 2024. I want to thank Professor Cynthia Lee for her extensive guidance and feedback on my drafts of this Note. Also, a big shoutout to all my peers of the Criminal Law and Procedure Seminar in Fall 2023. I thoroughly enjoyed our discussions in class and those conversations sparked thought-provoking insights which eventually led to this Note.

strategy is called "the cultural defense," a legal argument asserting that cultural factors have played into a criminal defendant's state of mind, and therefore, the defendant does not possess the requisite *mens rea*.[1]

This Note focuses on gender. It argues that the success of the cultural defense in cases relating to gender subordination in minority racial groups is a misconception of minority cultures and an illustration of the retrograde sexist norms still embedded in our patriarchal society. It further argues that those successful uses of the cultural defense are predicated on antiquated cultural values of gender subordination with total disregard of antisubordination values[2] and reform movements within the cultures.

This Note proceeds in three parts. Part I presents and uses Professor Cynthia Lee's cultural convergence theory[3] to explain the success patterns of certain types of cultural defenses relating to gender subordination. It categorizes those cases[4] into two categories representing two retrograde sexist norms, respectively: (1) women as property, and (2) the hysterical woman. Part II examines the resistance and reform movements against patriarchy within ethnic minority cultures in the cases discussed in Part I, and the disregard of cultural antisubordination values when courts considered the cultural defense. Part III presents and examines possible policies to enact to ensure careful review of the cultural defense.

I. CULTURAL CONVERGENCE OF SEXIST NORMS

In 1980, Professor Derrick Bell coined the term "interest convergence" when analyzing the driving force behind the U.S. Supreme Court's decision in *Brown v. Board of Education*, and pointed out that "[t]he interest of blacks in achieving

1. Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 57 (1994).

2. While this Note makes multiple citations from Volpp, *supra* note 1, the term of "antisubordination values" which I use here means differently from that of "the value of antisubordination," *id.* at 97, which Volpp uses. I argue that courts should consider antisubordination values and reform movements within minority cultures to evaluate a defendant's cultural claim so that courts could have a more accurate understanding of the minority culture, and a particular defendant's identity would not be the emphasis of the court's analysis of the alleged cultural practice. In comparison, Volpp argues that the value of antisubordination should be a factor when courts decide whether to support the use of cultural factors in a defense, and a defendant's identity would be the emphasis of the court's decision-making because the antisubordination analysis should examine whether the defendant has been oppressed for their identity. *See id.* at 97–9.

3. *See generally* Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911 (2007).

4. Although all the cases that I discuss in this Note, including the footnotes, concern Asian cultures, I do not intend this Note to focus solely on Asians or Asian immigrants. Rather, I deem the problem which I point out in this Note prevalent in all potential minority cultural claims concerning sex-subordinating practices, and I intend my proposal for reform to be applied in courts' cultural defense framework for all minority cultures in the future. A reason that all these cases concern Asian cultures is that the cases in which cultural defense issues arise generally involve Asian immigrant defendants, and increased numbers of Asian immigrants can account for part of this trend. *See* Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1055 n.11 (1994) (citing Myrna Oliver, *Cultural Defense–A Legal Tactic*, L.A. TIMES, July 15, 1988).

racial equality will be accommodated only when it converges with the interests of whites."[5] The *Brown* decision, as explained by Professor Bell, reflected such convergence between the interests of people who are Black in achieving racial equality and the interests of whites in advertising America's commitment to freedom, equality, and democracy for all throughout its Cold War foreign relations and in persuading developing countries to convert to democracy.[6]

Using Professor Bell's interest convergence theory, which posits that social change for minority groups occurs when their interests align with those of the majority,[7] Professor Cynthia Lee coined the term, "cultural convergence theory," and pointed out that a cultural defense is more likely to succeed when the cultural norms relied upon by the minority defendant converge with the dominant majority cultural norms.[8] The cultural convergence theory explains the pattern of the successful application of certain types of cultural defenses relating to gender subordination. These types of cultural defenses prevail because the retrograde sexist norms underlying the minority defendants' cultural defense claims converge with those sexist norms which are still deeply embedded in American society. Professor Lee uses four types of cases to illustrate cultural convergence: (1) Asian immigrant men who kill their unfaithful Asian immigrant wives, (2) Asian immigrant women who kill their children in response to spousal infidelity, (3) a Hmong man claiming "marriage by capture," and (4) Black men who successfully argue "Black Rage."[9] This Note uses cases discussed in Professor Lee's first three categories and further analyzes them through the lens of gender to illustrate how the successful application of the cultural defense reflects the convergence of two retrograde sexist norms embedded in the minority cultures and in American mainstream culture: (1) women as property, and (2) the hysterical woman.

A. WOMEN AS PROPERTY

The cases *People v. Chen* and *People v. Moua* demonstrate society's view of women as property and how this gendered stereotype influences court outcomes. In *Chen*, a husband killed his adulterous wife and used a cultural defense successfully reducing murder charge to a second-degree manslaughter conviction with no jail time. In *Moua*, a man kidnapped and raped a female friend and used a cultural defense to successfully convince the judge to approve his guilty plea to false imprisonment instead of two felony charges.

5. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).
6. *See id.* at 523–5.
7. *See id.*
8. Lee, *supra* note 3, at 914.
9. *Id.* at 939–58.

1. People v. Chen

In 1989, Dong Lu Chen, a Chinese immigrant, was charged with second-degree murder for killing his immigrant wife by striking her eight times on the head with a hammer after she confessed to infidelity and refused to have sex with him.[10] At the bench trial, the defense attorney sought to establish a cultural defense by illustrating how Chen's cultural background rendered Chen much more volatile than an average American under those circumstances.[11] Chen's attorney called a white anthropologist named Burton Pasternak, who had done some fieldwork in China, to testify as an expert witness.[12] His testimony was intended to show that it was reasonable for Chen, as a Chinese man, to be provoked by his wife's adultery because traditional Chinese cultural values view a wife's infidelity as a stigma on the husband's manhood, and this demonstrates his inability to maintain the minimal standard of control over his wife.[13] Moreover, Pasternak testified that Chen's reaction as a stressed, provoked Chinese man was justified because divorce is virtually the end of a person's life in the Chinese context and both parties would have difficulty remarrying because the wife's adultery is a stain that damages both parties' personal reputation.[14] Pasternak testified on direct examination that he had witnessed similar incidents in China; however, he later admitted on cross examination that he could not recall having heard of any instance in which a man in China had killed his adulterous wife.[15] Nevertheless, he still suggested that such behavior was accepted in China.[16]

Brooklyn Supreme Court Justice Edward Pincus was nonetheless persuaded by Chen's cultural defense.[17] He found Chen guilty of second-degree manslaughter rather than murder, and sentenced him to only five years of probation.[18] Pincus concluded that Chen "was the product of his culture . . . . The culture was never an excuse, but it is something that made him crack more easily. That was the factor, the cracking factor."[19]

Furthermore, in the sentencing colloquy, Pincus indicated that he viewed Chen as an additional victim in this case:

> Based on the cultural background of this individual he has also succeeded in partially destroying his family and his family's reputation . . . . There are victims in this case: The deceased is a victim, her suffering

10. Chiu, *supra* note 4, at 1053.
11. Volpp, *supra* note 1, at 66.
12. *Id*. at 64.
13. *Id*. at 69.
14. *Id*. at 69 n. 55.
15. *Id*. at 70.
16. *Id*.
17. *Id*. at 64.
18. *Id*.
19. Chiu, *supra* note 4, at 1053.

> 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.[20]

Although Pincus's conclusion rests heavily on the premise that Chen held a different set of cultural values than the majority of Americans, Pincus's labeling of Chen as a "victim" alongside his murdered wife exposed the sexist norms embedded within our patriarchal society. Pincus, deep down, recognized the societal norm that a man's wife is his property. In other words, Chen's cultural defense prevailed because the sexist norm of a wife being treated as her husband's property underlying Chen's cultural defense claim converged with this surviving sexist norm embedded in mainstream society.[21]

This retrograde sexist norm is not unfamiliar to the U.S. common law. The common law doctrine of coverture, which held that a wife had no legal standing because her legal existence was completely incorporated into that of her husband, was imported from England into Colonial America.[22] Under the doctrine's influence, the U.S. common law had historically been lenient towards men who killed their adulterous wives, and their violent response to adultery was a legally accepted mitigating factor that reduced murder to manslaughter.[23] Although the doctrine of coverture and the automatic mitigation of a man's offense when he has killed his adulterous wife has been abolished in the U.S.,[24] its image endures over time. The longstanding tradition of American women taking their husbands' last names upon marriage is an example of existing remnants of the coverture doctrine.

As the doctrine of coverture underlying Chen's cultural defense claim and Justice Pincus' reasoning indicates, it is the husband's right to decide how to dispose of his property which has brought a stain on his manhood and honor. Therefore, not only was it reasonable for Chen to react violently towards his unfaithful wife, but he also deserved sympathy and leniency as an additional

---

20. Volpp, *supra* note 1, at 74.

21. Another case presenting similar circumstances is People v. Aphaylath, 502 N.E.2d 998 (1986). In 1982, May Aphaylath, a Laotian refugee, stabbed his wife to death out of jealousy when she received a phone call from an ex-boyfriend. The defense counsel sought to introduce expert witnesses to testify that under Laotian culture the conduct of the wife in displaying affection for another man and receiving phone calls from an unattached man brought upon the defendant and his family shame sufficient to trigger the defendant's loss of control. The trial judge excluded expert evidence and convicted Aphaylath of second-degree murder, and the Supreme Court, Appellate Division affirmed. Nonetheless, the Court of Appeals of New York reversed the decision and ordered a new trial by holding that it was reversible error to exclude testimony of expert witnesses concerning stress and disorientation experienced by the defendant when attempting to assimilate into American culture. *See id.* A new trial was not held as the prosecutor negotiated a plea bargain of manslaughter which Aphaylath accepted. Allison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437, 478 (1993).

22. *See* Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 L. LIBR. J. 459, 459–60 (2002).

23. *See* Doriane Lambelet Coleman, *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1141–2 (1996).

24. *Id.*

victim suffering from an injured reputation. Meanwhile, as Justice Pincus articulated in court, "the deceased is a victim, her suffering is over."[25] Accordingly, in the eyes of Chen and Justice Pincus, the suffering of Chen's wife was over at the time Chen used a hammer to strike on her head eight times. Clearly, here the importance of male dominance outweighed the importance of the life of Chen's wife.

2. People v. Moua

In 1985, Kong Moua, a twenty-three-year-old Hmong man from Laos, abducted Seng Xiong, a nineteen-year-old woman, also a Hmong from Laos and a friend of Moua's, from her dormitory at Fresno City College in California.[26] He brought her to his family home and sexually assaulted her.[27] Moua was charged for rape and kidnapping, and he raised a cultural defense by asserting that he was following Hmong customary marriage practices of *zij poj niam* or "marriage by capture."[28] He claimed that he honestly and reasonably believed Xiong was consenting to sexual intercourse.[29] Under this custom, a Hmong man will take the woman he wants to marry to his family house and have sexual intercourse with her to consummate the marriage, and the woman is supposed to protest and say no to prove her virtue.[30] "According to Hmong culture, I didn't do anything wrong," Moua concluded his statement to the court.[31]

The prosecutors allowed Moua to plead guilty to false imprisonment, a lesser offense than either of the two felony charges, rape and kidnapping.[32] Subsequently, the sentencing judge, Gene M. Gomes, approved the plea and sentenced Moua to only 120 days in jail and a $1,000 fine.[33]

The only cultural evidence presented by Moua's attorney to establish Moua's cultural defense was a twenty-two-page pamphlet entitled "A Guide to Understanding Dating and Marriage in the Hmong Culture" (1983), written by a Hmong man working for the Laos Community Center in San Bernardino.[34] This pamphlet contained a superficial description of a few types of Hmong marriage practices, with only one reference cited, and it never used the phrase "marriage by capture" nor referred to rape or abduction.[35] Nevertheless, this document influenced Judge Gomes' sentencing decision, as he later described the case saying, "commission of a general intent crime by a refugee from another culture should

25. Volpp, *supra* note 1, at 74.
26. 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, 9 (1994).
27. *Id.*
28. *Id.* at 14.
29. *Id.* at 25.
30. *Id.* at 8.
31. *Id.* at 12.
32. *Id.* at 26.
33. *Id.*
34. *Id.* at 20–1.
35. *Id.*

not necessarily expose him to the same punishment that a convicted kidnapper and rapist from this culture would receive."[36]

Moua's cultural defense was supported by the sexist norm that women should be viewed as men's sexual prey and thus can be captured as new property and branded as men's wives through sexual intercourse. The woman's resistance to sex is a demonstration of her virtue to defend her virginity, and the man's successful taking of her virginity is viewed as proof of masculinity and as an official conquering of the woman's body and heart. Eventually, his conquering of her body and heart would result in a consensual sexual relationship. Moua's cultural defense prevailed because the underlying sexist norm in Hmong culture converges with the retrograde sexist norm still embedded in American society: the male sex-right, which men are "naturally" endowed with, as possessor of the female body.[37] Traditionally in Anglo–American society, the man was expected to take the initiative to pursue a woman, the woman was expected to say no or to be silent about the man's pursuit, and the man was expected to persist until the woman reluctantly submitted.[38] The traditional assumption of consent to sexual advances despite a woman's silence or affirmative statements of unwillingness[39] converges with Moua's cultural defense claim that he reasonably believed that Xiong had consented to the sexual intercourse according to Hmong customary practice of "marriage by capture."

Despite legislative reforms on restricting the traditional definition of consent in the context of rape in the U.S., even today in rape cases where American men are charged with raping female acquaintances or women they were dating, prosecutors are often reluctant to bring the cases to jury trials.[40] Prosecutors fear jurors will sympathize with the male defendant who claims that he honestly and reasonably believed his female acquaintance or the woman he was dating consented to the sexual intercourse.[41] An honest and reasonable belief of consent constitutes a complete defense to a charge of rape.[42] Prosecutors' fear of this kind reveals the inherent bias against women's sexual autonomy, which allows a man to infer a woman's consent to sex from a pre-existing friendly or intimate relationship. Therefore, like in *Moua*, prosecutors often chose to offer a guilty plea of a lesser offense than rape in order to avoid risking a complete acquittal.[43]

---

36. *Id*. at 26.

37. *See* Christina M. Tchen, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. & CRIMINOLOGY 1518, 1518–20 (1983) (noting that American courts have long held the belief that most women lie about their lack of consent in the alleged criminal sexual intercourse because they either desire forceful intercourse or use such accusations for revenge or blackmail).

38. Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1092–3 (1986).

39. Tchen, *supra* note 37, at 1519.

40. *See* Lee, *supra* note 3, at 955.

41. *Id*.

42. *Id*.

43. *Id*.

B. THE HYSTERICAL WOMAN

The cases *People v. Kimura* and *People v. Wu* demonstrate society's view of the "Hysterical Woman" and how this gendered stereotype influences court outcomes. In both cases, a mother killed her children and used a cultural defense that successfully resulted in lenient sentences.

1. People v. Kimura

In 1985, Fumiko Kimura, a Japanese immigrant woman walked into the Santa Monica Bay with her two young children in an attempt to kill herself and her children after she discovered her husband's long-term affair.[44] Kimura was rescued, but both her four-year-old son and six-month-old daughter drowned.[45] When Kimura was charged with two counts of first-degree murder and felony child endangerment, the Japanese–American community rushed to her defense and gathered more than 25,000 signatures asking for leniency based on *oya-ko shinju*, meaning joint parent–child suicide.[46] It is a traditional form of suicide in Japan which is primarily committed by Japanese mothers, usually in response to their husbands' infidelity.[47] A Japanese mother may commit *oya-ko shinju* for a number of reasons.[48] For example, she may wish to punish her husband, hoping that his social position will be destroyed.[49] Alternatively, she may feel obligated to kill her children so they would not be left in this world without a mother to raise them, and to spare them the subjection to social stigma.[50]

The prosecutor allowed Kimura to plead guilty to voluntary manslaughter, and the judge sentenced her to one year in jail and five years of probation.[51] Kimura was then released immediately since she had already served fifteen months in jail.[52] The cultural factors that played into Kimura's state of mind when she walked into the ocean and the consideration that Kimura's case would have been looked upon with extreme sympathy and leniency in Japan seemed to impact the prosecutor's choice to plea bargain and the judge's levying of a lenient sentence.[53] Moreover, both the judge and the prosecutor shared a view that surviving the death of her children was itself a harsh punishment for a mother. The judge declared that Kimura "will likely experience punishment for as long as she

44. *See* Deborah Woo, *The People v. Fumiko Kimura: But Which People?*, 17 INT'L J. SOC. L. 403, 403–4 (1989).
45. *Id.*
46. *Id.*
47. *Id.*
48. *See* Alison Matsumoto, *A Place for Consideration of Culture in the American Criminal Justice System: Japanese Law and the* Kimura *Case*, 4 J. INT'L L. & PRACTICE 507, 511 (1995).
49. *Id.* at 512.
50. *Id.*
51. Lee, *supra* note 3, at 951.
52. *Id.*
53. *Id.*

lives,"[54] and the prosecutor stated that "the pain and suffering Mrs. Kimura has inside is enough punishment."[55]

The lenient sentence Kimura received is consistent with that received by the majority of American women who kill their young children[56] because the sexist norm underlying the reasoning of Kimura's manslaughter conviction converges with the sexist norm viewing that women have a hysterical propensity, which is still prevalent in American society. On the one hand, deriving from gender stereotypes that women are "assumed to be inherently passive, gentle, and tolerant; and mothers are assumed to be nurturing, caring and altruistic,"[57] the cultural views of both Japan and America consider that a mother must have been "mad" to kill her children. Therefore, a mother will live in extreme anguish and remorse for the rest of her life for killing her children and surviving their death. On the other hand, deriving from the gender stereotype that women are overly emotional, irrational, and dependent on their male partners, the cultural views of both Japan and America consider that a mother, unable to process her husband's betrayal and seeking desperate revenge on her unfaithful husband, would be driven insane and kill her children to relieve her shame. Hence, mothers who kill their children are perceived to be victims of their own killings and, consequently, need sympathy and psychiatric treatment.[58]

2. People v. Wu

In 1989, Helen Wu, who was born in China, strangled her nine-year-old son to death and then attempted suicide.[59] Her son had been living with his father in America since he was a newborn because Wu feared the damage to her personal reputation that would come from her son being born out of wedlock.[60] Wu was convicted of second-degree murder following a jury trial.[61] She appealed, and claimed that the trial court committed prejudicial error by refusing to give a jury instruction that she requested, stating that her cultural background might have influenced her state of mind when she killed her son.[62] The appellate court agreed with her and remanded the case.

At her retrial, Wu raised a cultural defense and argued that in Chinese culture her actions were a result of "the mother's love, the mother's responsibility to bring a child together with her when she realized that there was no hope for her or a way for her to survive in this country or in this earth."[63] She claimed that she

54. Chiu, *supra* note 4, at 1116.
55. *Id*.
56. Lee, *supra* note 3, at 952.
57. Chiu, *supra* note 4, at 1117 (citing Robert W. Stewart, *Probation Given to Mother in Drowning of Her Two Children*, L.A. TIMES, Nov. 22, 1985, at pt. II, 1).
58. *Id*.
59. People v. Wu, 286 Cal. Rptr. 868, 870–2 (Ct. App. 1991).
60. *Id*. at 870.
61. *Id*. at 869.
62. *Id*. at 869–70.
63. *Id*. at 885.

killed her son and attempted suicide because her son had informed her that he was being mistreated by his father and his father was having an affair with another woman.[64] Accordingly, the defense counsel argued that from Wu's cultural perspective she was "moved by love, pity, and sympathy"[65] because her motives were fear that her son would be ill-treated in the future, and hope that she could take care of him in the afterlife.[66]

The jury found Wu's cultural defense claim convincing on retrial, and Wu was convicted of manslaughter instead of murder.[67] Wu's longstanding absence from her son's life did not seem to affect the jury's conclusion that Wu's cultural background influenced her state of mind and she killed her son out of a mother's love and sympathy. In comparison to Kimura's case in which Kimura was the primary caretaker as a housewife who provided the most daily care to her two children in the marriage, Wu had a weaker cultural defense claim because Wu had abandoned her son when he was a newborn and did not see him for years. Nonetheless, Wu's cultural defense still prevailed, which further demonstrates the convergence of the sexist norms underlying her claim and those embedded in American society. In Wu's case, the convergence was between the cultural assumption that all mothers are nurturing, caring, and altruistic, regardless of the time they have spent with their children, so mothers must have been mad to kill their children, and the gender stereotype that women are overly emotional and irrational and live for the love of their male partners, so it is understandable that women would be hysterical when they learn of their male partner's infidelity.[68]

---

64. *Id.*

65. *Id.* at 887.

66. *Id.* at 886.

67. Lee, *supra* note 3, at 953.

68. In Bui v. State, 551 So. 2d 1094 (Ala. Crim. App. 1988), the circumstances and outcome present a striking contrast to *Kimura* and *Wu*. Bui and his wife, both Vietnamese immigrants, had experienced marital difficulties for years and had several separations. *Id.* at 1099. Bui suspected that his wife was seeing other men, and when his wife was absent from the home in February 1986, Bui called and told her that she would have to return home within fifteen minutes if she wanted to see the children alive. *Id.* His wife called the police, and when the police entered Bui's bedroom, they discovered Bui bleeding from self-inflicted knife wounds and the bodies of his three young children. *Id.* at 1098. He admitted to the police that he wanted to "die with [his] babies" and "I cut my kids. I didn't want her to get them." *Id.* at 1106. At trial, he called a cross-cultural counselor to testify. *Id.* at 1099. The counselor concluded that Bui was depressed and concerned about the "loss of face" stemming from his wife's suspected infidelity, and the attempted suicide was a "face saving measure" which was not irrational but understandable in Vietnamese culture. *Id.* at 1102. As the jury and the court did not find the counselor's testimony convincing, Bui was convicted of the capital offense of murder and sentenced to death. *Id.* at 1118. Despite similar circumstances under *Bui*, *Kimura*, and *Wu* in which defendants killed their children and attempted suicide in response to their partners' alleged infidelity, the outcome in *Bui* was drastically more severe than that in *Kimura* and *Wu* because the underlying minority cultural norm in Bui's cultural defense claim contradicted with the mainstream American norm. Men in Anglo–American culture who kill their children are "perceived as 'wicked' and in need of punishment." Chiu, *supra* note 4 (quoting Ania Wilczynski & Allison Morris, *Parents Who Kill Their Children*, 1993 CRIM. L. REV. 31, 35 (1993)).

II. MISCONCEPTION OF MINORITY CULTURES

The success pattern of cultural defenses relating to gender subordination demonstrates that courts characterize minority cultural values as one-directional gender oppression, and that American society intrinsically recognizes certain retrograde sexist norms.[69] But we need to ask ourselves: are ethnic minority cultures established solely on patriarchy and gender subordination?

An affirmative answer to this question would be an assertion of static and homogenous cultures, and such assertion could only be derived from a pure masculine and heterosexual perspective. On the contrary, culture is dynamic and shaped by varied forces from different communities that interact with the culture, and different groups have different experiences within the same culture. As Professor Bic Ngo describes, "Rather than fixed or a given, culture is imagined, remembered, reinvented, created, and continued within communities and through relationships."[70]

Further, women have agency within the patriarchy. "[W]here there is oppression, there will be resistance."[71] Gender antisubordination exists in parallel with gender subordination in a patriarchal society. Women's resistance and reform movements against patriarchal systems and ideologies within ethnic minority cultures constitute the culture's antisubordination values. However, American courts constantly disregard cultural antisubordination values when considering cultural defenses when the retrograde sexist norms underlying the cultural defense converge with those still embedded in mainstream society. The disregard of antisubordination values, itself, is an act of reinforcing patriarchy.

This Note categorized the four cases discussed in Part I into two categories representing two antiquated sexist norms: (1) women as property and (2) the hysterical woman. Despite the two norms seeming to benefit different gender groups when used in cultural defense claims, as illustrated in the outcomes of the four cases, they share a common feature. Both sexist norms are established on the cultural assumption of women's intrinsic dependence on men. In *Chen* and *Moua*, the assumption of women's "legal" dependence on men created the man's "right" to dispose of his adulterous wife who brought stigma to his manhood, and the man's "right" to capture sexual prey whose resistance does not constitute rejection of his sexual advances. In *Kimura* and *Wu*, the assumption is women's emotional dependency on men is what created the woman's temporary insanity when she found out about her male partner's unfaithfulness and thus decided to kill her children and herself. As a result, in all four cases, the female victims and the female defendants were manifested as an object instead of a subject in the courts' reasoning. In *Chen*, she was someone's adulterous wife; in *Moua*, she was someone's future wife; in *Kimura* and *Wu*, she was someone's mother. In all these

69. *See* discussion *supra* Part I.

70. Bic Ngo, *Contesting "Culture": The Perspectives of Hmong American Female Students on Early Marriage*, 33 ANTHRO. & EDUC. Q. 163, 165 (2002).

71. ASSATA SHAKUR, ASSATA: AN AUTOBIOGRAPHY 169 (Lawrence Hill Books ed., 2001).

cultural defense claims, the woman involved was never just someone who could be seen and heard, free of sex-subordinating stereotypes.

In *Chen*, the court came to a conclusion with a complete absence of any female perspective, and thus a total disregard of antisubordination values. Dong Lu Chen, Chen's defense attorney, the expert witness Burton Pasternak, and Judge Pincus were all men who saw this case through Chen's perspective, and Chen's wife was only spoken of as a dead, adulterous wife who was a stain to Chen's manhood and honor.[72] Pasternak disregarded antisubordination values when he provided a description of Chinese cultural views of family life and women's adultery with "little basis in reality"[73] and a complete absence of women's perspective. Rather, his description was more of a white man's fantasy of an androcentric ethnic culture with little academic support.[74] To specify, Pasternak's portrayal of the Chinese cultural views of divorce and adultery was obsolete through disregarding reform movements within Chinese society. Since 1980, the number of divorces in China has risen steadily, and divorce has been losing its stigma.[75] One Chinese judge remarked that "[Chinese] don't think divorce is shameful anymore. It is the right of an independent man and woman. From this point of view the rate of divorce is a symbol of reform."[76]

Despite the inconsistencies of Pasternak's expert testimony regarding whether he was aware of any instance of a man in China killing his adulterous wife, his testimony, which overlooked the reform movements within Chinese culture, was accepted and given great weight in the judge's reasoning. Accordingly, Chen's wife was not only invisible in the cultural defense strategy, but also a stain that continued to destroy Chen's reputation while her own suffering ended at the time of her death.[77] The court's disregard of cultural antisubordination while assessing the cultural defense perpetuated patriarchal values sent a message to the battered immigrant Asian women community— that they had no legal recourse against domestic violence[78] because their abusive husbands would become victims and receive sympathy, even as batterers.

In *Moua*, the only cultural evidence presented to support Moua's cultural defense claim was a twenty-two-page pamphlet written by a Hmong man, which contained "a superficial description" of certain Hmong marriage practices with only one reference cited and does not even use the phrase "marriage by capture" nor refer to issues of rape or abduction.[79] However, this document, with insufficient information and questionable academic value, influenced Judge Gomes' decision to approve Moua's guilty plea to a much lesser offense. Like in *Chen*,

72. Volpp, *supra* note 1, at 76.
73. *Id*. at 70.
74. *Id*.
75. *Id*. at 70 n.58.
76. *Id*. (quoting from Teresa Poole, *China Divorce is Too Close for Comfort*, INDEP., Apr. 13, 1993).
77. *Id*. at 74–5.
78. *Id*. at 76.
79. Evans-Pritchard & Renteln, *supra* note 26, at 20–1.

there was insufficient female perspective on this Hmong marriage practice as Moua, the defense attorney, the author of the pamphlet, and Judge Gomes were all men, and Xiong's resistance to Moua's abduction and sexual advances presented in Xiong's testimony was not given sufficient consideration.

Moreover, the court failed to consider antisubordination values within Hmong culture in analyzing Moua's cultural defense of "marriage by capture." Hmong communities usually settle disputes over marriage through negotiations within their clan system because going to court is deemed a denial of their traditional authority and unnecessary exposure of internal Hmong affairs to outside interference.[80] However, "the Hmong have not been able to contain their disputes within their communities since they took refuge in the United States."[81] "Some Hmong individuals, especially women," have sought the intervention of American authorities.[82] Here, Xiong called the police and asked the American legal system to intervene.[83] These actions represent resistance against Hmong traditional marriage practices and thus antisubordination values upheld in Hmong culture, which the court also disregarded. As Professor Stacey Lee's research shows, the history of accommodation, resistance, and transformation that the Hmong have undergone as an ethnic minority in the U.S. demonstrates that the so-called "traditional" cultural practices are not fixed,[84] but are rather being negotiated, disrupted, and transformed and thus should not be treated as static fixtures by courts.

Unlike *Chen* and *Moua*, at first glance *Kimura* and *Wu* seem to be examples of how the cultural defense strategy could be synthesized from women's perspectives and become a mitigating factor for female defendants. However, Kimura's and Wu's cultural defense claims were established based on the gender stereotype of the caring and altruistic nature of motherhood that is derived from the assumption that women are emotionally dependent on their male partners.[85] Killing their children and attempting suicide after discovering their male partners' infidelity were not acts of resistance against patriarchy; instead, these actions accorded with the patriarchal views that women are overly emotional and irrational (and thus likely to act hysterically in response to their partners' infidelity) and that women are inherently passive, gentle, and altruistic as mothers (and thus must have been insane to kill their children). The logical flaws in these two assumptions about women's nature are stark: how can women be both inherently passive and constantly acting out in response to their emotions at the same time? The *Kimura* and *Wu* courts did not recognize the logical flaws embedded in their reasoning as they accepted the cultural defense claims as mitigating factors. In

80. *Id.* at 16.
81. *Id.*
82. *Id.*
83. *Id.*
84. *See* Stacey J. Lee, *The Road to College: Hmong American Women's Pursuit of Higher Education*, 67 HARV. EDUC. PUBL'G. GRP. 803, 809 (1997).
85. *See generally* Woo, *supra* note 44, at 403; People v. Wu, 286 Cal. Rptr. 868, 870–2 (Ct. App. 1991).

addition, no cultural evidence was presented to support the cultural defense claims in either *Kimura* or *Wu*. The two cases are examples of how prevailing gender subordination values could benefit certain women under specific circumstances at the cost of disregarding women's collective resistance and reform movements against these gender stereotypes.

The lenient decision in *Kimura* seemed to be greatly influenced by the cultural practice of *oya-ko shinju* and the belief that Japanese mothers who survive after committing *oya-ko shinju* usually receive extreme sympathy and great leniency.[86] However, similar to the expert witness' fantasy of Chinese cultural views in *Chen*, the belief that Kimura's case would have been looked upon with extreme sympathy in Japan was also a foreigner's fantasy of Japanese cultural views. An overall examination of *oya-ko shinju* cases in Japan does not produce a definitive conclusion about the legal treatment of these cases under Japanese law.[87] Moreover, "one study in which Japanese and foreigners residing in Japan were asked their opinions about Japanese mothers who kill their children" reveals that:[88]

> Almost 83% of the Japanese respondents, as compared to 52% of the foreign respondents, said that [this behavior] was not acceptable under any circumstances. The foreigners' responses reflected much more respect for what they understood to be an aspect of Japanese society that they either accepted as being appropriate within the Japanese social context or could not judge from their position as foreigners.[89]

Although *kogoroshi*, or infanticide, the term used by this study to describe mothers killing their children, is broader than *oya-ko shinju*, meaning joint parent–child suicide,[90] the discrepancy in the percentages of Japanese and foreign respondents who opined that it was unacceptable under any circumstances indicates that foreigners tend to be more tolerant of what they imagine to be traditional cultural practices in a foreign culture, similar to the foreign perspectives endorsed by the prosecutor and judge in *Kimura*.

Although one could argue that the more than 25,000 signatures[91] in support of Kimura gathered from the Japanese–American community was evidence that Japanese Americans share the same cultural view that Japanese mothers who committed *oya-ko shinju* should receive extreme sympathy and great leniency, this argument has two weaknesses. First, considering the signatures alone would be a dangerous generalization of the cultural view of the entire Japanese–

86. Lee, *supra* note 3, at 951; Woo, *supra* note 44, at 405.

87. *See* Taimie L. Bryant, *Oya-Ko Shinju: Death at the Center of the Heart*, 8 UCLA PAC. BASIN L.J. 1, 28 (1990).

88. *Id*. at 6.

89. *Id*.

90. *Id*.

91. Woo, *supra* note 44, at 951.

American community, given that the Japanese–American population was approximately 848,000 in 1990.[92] Second, as Japanese Americans are American citizens, their views are more likely to be similar to the views of the foreign respondents residing in Japan because Japanese Americans are not born and raised in Japan. Nevertheless, the core of the cultural argument advanced by Kimura and the Japanese–American community was that *oya-ko shinju* is a highly accepted traditional practice in Japan and a Japanese mother would receive extreme sympathy and leniency in response to these actions in Japan.[93] Because the opinions of Japanese Americans and foreigners residing in Japan differ so much from those of Japanese nationals, Japanese nationals' opinions of *oya-ko shinju* should be the focus of evaluations of Japanese cultural practice.

As indicated by the study, the so-called traditional cultural practice was not accepted by the majority of the Japanese respondents.[94] This vast opposition is a great reflection that culture is not composed of uniform values, but is rather created, disrupted, reinvented, and shaped by varied forces and groups. Despite the current Japanese public opinion, the court in *Kimura* made assumptions based solely on sexist norms and jumped to the conclusion that *oya-ku shinju* is a uniformly accepted cultural practice in Japan.

A similar yet even more severe problem was embedded in the court's reasoning in *Wu*.[95] Wu's cultural defense emphasizing the influence of cultural factors on her decision to kill her son and herself was based on a fabricated cultural practice, as there is no Chinese cultural practice of joint parent–child suicide similar to *oya-ko shinju* in Japan. The mitigated sentence was thus established solely on the basis of converging cultural assumptions of altruistic motherhood and women's irrationality. Without engaging in any sort of cultural analysis, the court simply assumed the existence of uniform values within Chinese culture and concluded that a reasonable jury would find Wu's actions were in line with those values if given a cultural defense jury instruction.[96]

III. SUGGESTIONS FOR REFORM

This Note does not oppose the use of cultural evidence entirely.[97] Rather, this Note highlights the misuse of cultural evidence by minority defendants who seek

92. ERIC YO PING LAI, THE NEW FACE OF ASIAN PACIFIC AMERICA: NUMBERS, DIVERSITY, AND CHANGE IN THE 21ST CENTURY 73 (Eric Yo Ping Lai & Dennis Arguelles eds., 1998).

93. *See* Woo, *supra* note 44, at 405.

94. Bryant, *supra* note 87, at 6.

95. People v. Wu, 286 Cal. Rptr. 868, 870–2 (Ct. App. 1991).

96. *See id*. at 885.

97. I agree with some arguments supporting the use of cultural evidence to a certain extent, such as the multiculturalist argument, *see*, *e.g*., Damian W. Sikora, *Differing Culture, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695, 1708 (2001) (arguing that "forced assimilation goes against the American ideal that cultural pluralism should be encouraged and that America is a place where people from all over the world can come, and their differences will be accepted and embraced"), and the individualized justice argument, *see*, *e.g*., Allison Dundes Renteln, *The Use and Abuse of the Cultural Defense*, 20 CAN. J.L. &

to use this strategy to explain their sex-subordinating practices, and courts' misconception of ethnic minority cultures due to their disregard of gender antisubordination values in their analytical framework. Accordingly, Part III attempts to present and examine possible policies to ensure that U.S. courts carefully review cultural defenses.

To prevent improper use of cultural evidence, courts should first assess the authenticity of minority defendants' cultural claims. It is crucial to establish a complex and accurate understanding of cultures as dynamic and transformative by avoiding imprudent generalizations of minority cultural values and rampant disregard of gender antisubordination values. One method to ascertain the validity of minority cultural claims is to establish a mechanism of subpoenaing neutral expert witnesses from a compiled list of experts specializing in the study of particular ethnic communities to assist courts with the analysis of traditional cultural practices.[98] It should be simple to seek such experts from professional associations of cultural studies such as the Society for Asian Studies and the American Anthropological Association, and from other institutions such as ethnic community centers and research universities.[99] This expert testimony would allow courts to better evaluate cultural arguments using more diverse academic perspectives rather than solely considering the testimony of the defense's expert witnesses. Moreover, subpoenaing neutral expert witnesses to analyze cultural values would be an effective way to prevent the abuse of the cultural defense when defendants' expert witnesses are "hired guns" who may be pressured to find ways to interpret or distort ethnographic knowledge to assist their clients.[100]

After courts can authenticate a minority defendant's cultural claim through different perspectives by analyzing the subordination values and antisubordination values against patriarchy within the minority culture, a trier of fact should reject such cultural evidence when the government's interest in protecting essential human rights outweighs one's right to culture. Cultural defenses should be disallowed when adherence to certain cultural traditions would create a severe impediment to equal enjoyment of essential human rights by men and women, or "involve irreparable harm to individuals belonging to vulnerable groups," such as women and children.[101] This proposed policy is consistent with both the federal government's commitment to reduce gender-motivated violence and the United Nations' international agenda. In 1993, the United Nations General Assembly adopted the Declaration on the Elimination of Violence against Women, which

---

SOC'Y. 47, 48 (2005) [hereinafter Renteln, *Use and Abuse of the Cultural Defense*] (arguing that "taking a person's cultural background into account is fundamentally no different from judges taking into consideration other social attributes such as gender, age, and mental state"). Nevertheless, my view is that courts must establish safeguards to avoid misconceptions of minority cultures and prevent the abuse of cultural evidence by minority defendants explaining their sex-subordinating practices.

98. *See* Renteln, *supra* note 97, at 65.

99. *Id.*

100. *Id.*

101. *Id.* at 50.

was the first international instrument to address violence against women.[102] The Declaration made violence against women an international issue and urged states to "condemn violence against women and [not to] invoke any custom, tradition or religious consideration to avoid [this obligation]."[103] In 1995, the United Nations World Conference on Women in Beijing affirmed that "women's rights should supersede national traditions,"[104] furthering global recognition of the fact that women's enjoyment of basic human rights outweighs the right to engage in traditional cultural practices. Congress' passage of the Violence Against Women Act (VAWA) in 1994 and reauthorization of VAWA in March 2022 signal a federal intent to act concurrently with the international agenda to reduce gender-motivated violence, including violence that proponents claim is traditional within a culture.[105] VAWA provides funding for the education and training of judges and court personnel in state courts on topics including "sex stereotyping of female and male victims of domestic violence and dating violence, myths about presence or absence of domestic violence and dating violence in certain racial, ethnic, religious, or socioeconomic groups, and their impact on the administration of justice."[106] In December of 2022, the federal government released an update to the U.S. Strategy to Prevent and Respond to Gender-Based Violence Globally, recommitting to the critical work of preventing, mitigating, and responding to gender-based violence around the world.[107] This update further demonstrates the federal government's intent to act concurrently with the international agenda to eliminate gender-motivated violence. Therefore, although federal law does not currently preempt the states' development of the cultural defense, there is a strong argument to be made based on comity[108] that the states should reject cultural evidence when adherence to sex-subordinating cultural traditions would create a severe impediment to the equal enjoyment of basic human rights or invoke irreparable harm to individuals in vulnerable groups, such as women and children.

In order to determine whether certain cultural traditions would create such an impediment or invoke such irreparable harm, courts should evaluate two factors: the probability of recurrence and severity of the crime.[109] Firstly, the more likely the proscribed conduct is to recur, the greater the need to deter such conduct.[110] Consequently, courts should be less willing to hear a cultural defense in cases

102. *See generally* Declaration on the Elimination of Violence against Women, G.A. Res. 48/104 (Dec. 20, 1993).

103. *Id.* at Art. 4.

104. Seth Faison, *Women Carry Hopes As Conference Ends*, N.Y. TIMES, Sept. 16, 1995.

105. *See* Coleman, *supra* note 23, at 1153.

106. Violence Against Women Act, 34 U.S.C.A. § 12372(13) (2017) (LexisNexis 2024).

107. *See* U.S. AGENCY FOR INT'L DEV., UNITED STATES STRATEGY TO PREVENT AND RESPOND TO GENDER-BASED VIOLENCE GLOBALLY 2022 UPDATE (2022).

108. *See* Coleman, *supra* note 23, at 1155.

109. Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1309 (1986).

110. *Id.*

where the proscribed conduct is likely to recur.[111] Regarding the second factor, courts should consider three variables to assess the crime's severity:

> First, courts should consider whether the crime is victimless. Prohibition of self-regarding acts cannot readily be justified by considerations of societal self-protection. Second, if there is a victim, courts should inquire whether the crime is confined to voluntary participants within the defendant's culture. A cultural defense should more readily be admitted when the crime is limited to persons capable of meaningful consent who belong to that culture and subscribe to its tenets. Third, when there is a victim, courts should ask whether serious bodily or emotional harm was inflicted.[112]

By considering these factors, courts will be able to determine when and to what extent cultural evidence should be applied to achieve greater balance between cultural pluralism and justice for victims.

CONCLUSION

The current analytical framework of the cultural defense raised by minority defendants to explain their sex-subordinating practices is flawed. While the legal system should respect minority cultural values, courts must be conscious of their current biased tendency to accept cultural defense claims in accordance with the mainstream antiquated sexist norms. Courts must establish a system to assess the authenticity of cultural claims. In order to ascertain the validity of these claims, courts must not disregard gender antisubordination values within the minority cultures or ignore the collective resistance and reform movements against patriarchy within the cultures. Permitting the proliferation of sexist norms under the guise of respecting minority cultures reinforces these patriarchal ideologies in both minority cultures and mainstream American society. Furthermore, basic human rights, including the right to life and liberty, should not be undermined by the right to culture. As Professor Doriane Coleman observes, "For just as American law and culture once stood as a barrier to the advancement of American-born women, so too the patriarchal values brought to our country by some immigrants serve as a barrier to the advancement of women from these cultures."[113] Law should never function as a tool to erode the progress made by collective resistance and reform movements against gender-motivated violence and gender stereotypes within any culture. As communities in vulnerable groups struggle against oppression and strive to advocate for more progressive systems and ideologies within their cultures, the least the U.S. legal system can do is recognize their resistance and refrain from placing more obstacles in their way.

---

111. *Id.*
112. *Id.* at 1309.
113. Coleman, *supra* note 23, at 1140.