University of Denver
Digital Commons @ DU

Sturm College of Law: Faculty Scholarship | University of Denver Sturm College of Law

2004

Can I Call Kimura Crazy?: Ethical Tensions in the Cultural Defense

Rashmi Goel
University of Denver, rgoel@law.du.edu

Follow this and additional works at: https://digitalcommons.du.edu/law_facpub

Part of the Law and Society Commons, and the Legal Ethics and Professional Responsibility Commons

Recommended Citation
Rashmi Goel, Can I Call Kimura Crazy - Ethical Tensions in the Cultural Defense, 3 Seattle J. Soc. Just. 443 (2004).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Sturm College of Law: Faculty Scholarship by an authorized administrator of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

Can I Call Kimura Crazy?: Ethical Tensions in the Cultural Defense

Publication Statement

Copyright held by the author. User is responsible for all copyright compliance. Originally published as Rashmi Goel, Can I Call Kimura Crazy - Ethical Tensions in the Cultural Defense, 3 Seattle J. Soc. Just. 443 (2004).

Publication Statement

Copyright held by the author. User is responsible for all copyright compliance. Originally published as Rashmi Goel, Can I Call Kimura Crazy - Ethical Tensions in the Cultural Defense, 3 Seattle J. Soc. Just. 443 (2004).

This article is available at Digital Commons @ DU: https://digitalcommons.du.edu/law_facpub/476

Can I Call Kimura Crazy? Ethical Tensions in the Cultural Defense

Rashmi Goel[1]

Fumiko Kimura walked into the ocean with her two small children. She was fully aware of what she was doing. Distraught at discovering that her husband of six years had been having an affair for the last three, she knew that the only solution was to commit suicide, and to take her son Kazutaka, four years old, and daughter Yuri, six months old, with her. She would commit *oyaku shinju*[2]—an ancient Japanese practice of parent-child suicide. Kimura was saved. Her children were not. In California Superior Court, Kimura was charged with murder.[3]

Fumiko Kimura's lawyer interposed the defense of temporary insanity,[4] based in part on a belief that any mother who kills her children must be insane. And yet, what Fumiko Kimura did was anything but insane. Based on cultural imperatives, imperatives that shaped her conceptions of mothering, Fumiko Kimura engaged in conduct that was, though illegal, culturally permissible. Thus, the moment her attorney decided to craft a defense that characterized her act as deranged, her legal adventure became a clash of cultures in which her voice was submerged by her lawyer's voice, a voice that ultimately failed to explain her actions and failed to advocate for her future.

Because of the cultural implications for the client as a whole, lawyers faced with this unfamiliar territory of complex cultural difference must choose defense strategies carefully. In this case, Kimura's lawyer, Gerald Klausner,[5] chose to argue temporary insanity. Judged narrowly, this strategy was successful: the charge was eventually reduced to voluntary manslaughter for which Fumiko Kimura received a one-year sentence (time served awaiting trial) and five years of probation with mandatory

psychological counseling.[6] Yet, Klausner's approach was flawed because it did not take into account Fumiko Kimura's own cultural background as a basis for her decision to commit oyaku shinju. Fumiko Kimura hardly met the standard for temporary insanity,[7] but by proferring this defense, Klausner implied too much about Japanese culture.[8] If Kimura's actions constituted temporary insanity, despite their being in keeping with Japanese culture, wouldn't that make Japanese culture similarly insane? Judged broadly, such a defense is not only offensive, but harmful.

What does it say when a lawyer asserts in court, and even convinces the judge to hold, that a widely held cultural belief[9] is in fact insane? Do the ramifications of such a strategy matter? Such creative lawyering raises a host of ethical problems, not only because of its implications for the community but, foremost, because of its implications for the client. In the pages that follow, I endeavor to draw attention to this thorny ethical issue: in the context of the cultural defense, how should an attorney meet the strenuous obligation of mounting a zealous defense without compromising the cultural integrity of the client?[10]

The solution, I suggest, lies in our characterization of the client's interests. Both zealous advocacy and justice would be better served by a client-centered approach that perceives the client *beyond* her legal interests. In fact, I believe that the lawyer should seek the best *overall* outcome for the client, and in so doing, must understand and advocate for the *whole* client, ensuring that the client's voice is infused into the proceedings by taking into account the client's cultural background and personal values.

This essay is divided into four sections. In part one, I provide greater detail about Fumiko Kimura and her motivations for committing oyaku shinju. In parts two and three, I will touch on the duties of a lawyer to zealously advocate for the legal interests of the client and explore the dangers of ignoring culture in a client's defense. Finally, I will draw on legal ethics literature to suggest a way in which the whole client, including her legal and cultural interests, could be better served.

PART I: FUMIKO KIMURA—THE WHOLE CLIENT

Fumiko Kimura was one of six children from a broken home. Despite her strong interest in piano, she was unable to gain entrance into Japan's National Music University and, as a result, chose to leave Japan and pursue other interests in California. Though she enrolled in a community college, she never graduated. She married a Japanese American but divorced after eight years. She later met Itsuroku Kimura whom she married in 1979.[11] At the time of her oyaku shinju attempt, she had been living in the United States for fourteen years; however, she remained Japanese in her thinking and lifestyle, isolated from American culture.[12] Fumiko Kimura did not drive, knew nothing of her husband's business, and had no hobbies or close friends outside the family.[13] Ten days prior to her suicide attempt, Fumiko Kimura discovered that her husband had been having an extramarital affair for three years.[14] Fumiko Kimura decided to end her life, and to take her children with her.

Fumiko Kimura did not perceive her actions as wrong. Based on her own cultural ideals and values, she was doing the right thing. In Fumiko Kimura's case, conceptions of shame, suicide, and mothering coincided in a way that was uniquely Japanese and rendered her choice unavoidable.

A. Japanese Conceptions of Shame

Upon discovering her husband's affair, Fumiko Kimura was deeply ashamed and dejected. Rather than marking him as a philanderer or unscrupulous adulterer, Itsuroku Kimura's transgression indicated to Fumiko Kimura that she was a bad wife who was unable to please her husband despite all her efforts. This shame was perhaps even more pronounced because the affair had actually been revealed one year earlier, at which time Itsuroku Kimura had promised to end it.[15] In fact, he did not, so Fumiko Kimura was twice betrayed. Her efforts to be the perfect wife and mother had fallen short; otherwise her husband would not have returned to his mistress after promising to end the affair. Fumiko Kimura considered

other possibilities such as returning to Japan,[16] but none could save her or her children from the stigma of a failed marriage.[17]

According to sociologist Dr. Yuko Kawanishi, children in Japan do suffer ill effects from being fatherless or being from a one-parent family. In Japan, there are few orphanages and foster care facilities, and a mother would not want to leave her children at the mercy of a stepmother.[18] Sometimes these children are denied jobs even as adults because of the shameful family background.[19]

B. Japanese Conceptions of Suicide

Fumiko Kimura's decision to end her life was not necessarily a mark of mental illness. While suicide in the United States is generally considered a mark of mental instability, it is clear that the view of suicide in Japan is markedly different. In Japan, the symbolic sacrifice of human life simply takes on many more meanings than in the United States, where it is viewed as merely a sad tragedy or a mental illness. Though I hesitate to argue that suicide is a commonly accepted or an honored practice in Japanese culture, the actions of Fumiko Kimura, her husband, and the mistress, are at least illustrative of a unique readiness to see suicide as a solution in difficult situations. Itsuroku Kimura's mistress, Kazue Tanahashi,[20] personally revealed the ongoing affair to Fumiko Kimura by phone and even showed her love letters. Tanahashi later sent a letter to Fumiko Kimura on January 27, 1985, "offering to kill herself if that would help ease the family's pain."[21] Another report stated that Tanahashi was thinking of killing Itsuroku Kimura *and* herself.[22] According to Alfred Kriman, police reports revealed that, "Mrs. Kimura [then] made some attempts to apologize to the mistress.[23] She had a boy deliver a note containing an apology and offering to 'sacrifice *her own life* if the problem could be settled.'"[24] When Itsuroku Kimura learned of his son's death at the hospital, he threatened to take *his own* life.[25] At some point, every member of this love triangle offered to commit suicide. According to Dr. Kawanishi, suicide in Japanese culture

may be more readily perceived as an option (even though an option of last resort) because "there seem to be greater 'vocabularies of motives'" for suicide. One can commit suicide not only for self-destruction or self-hatred, but also from such motivations as punishing others, saving face, expressing apology, or loving another with such strong attachment that taking that person's life with one's own is necessary."[26]

C. Japanese Conceptions of Mothering

For Fumiko Kimura, one of her greatest motivators was her role as a mother. She was completely devoted to her children. She had all her furniture removed from her living room, including her piano, to avoid possible injury to the children should they fall. She even kept a schedule designating specific times to play with her son.[27] Such attention is consistent with the Japanese views of motherhood as a transcendent state of being that surpasses all other life roles.[28] Studies have found that mothers in Japan are particularly role bound in this regard, for instance, they generally mark stages in their own lives by their children's ages.[29] Fumiko Kimura knew that leaving her children behind,[30] motherless in a cruel world, would be a greater wrong than taking them with her. She could not abandon them in the world to remain without her care and protection.[31] She was particularly concerned that her children would suffer the stigma of her failure as a wife and mother and would be cruelly treated. Nor could she live with them and give them the care and protection they needed; she had nowhere to go and no means of support. Fumiko Kimura's failed marriage almost necessitated her suicide, and her great motherly love for her children necessitated that she take them with her. An examination of this belief is instructive:

> In Japan, the mother-child bond and the mother's dedication to the child are very important. Why then, is infanticide committed by the mother relatively common in Japan? Paradoxically, it is this very bond between mother and child that causes oyako shinju.

> According to Japanese logic, the suicidal mother cannot bear to leave the child to survive alone; she would rather kill the child because she believes that nobody else in the world would take care of the child better than she, and that the child would be better off dying with her.[32]

Indeed, to commit suicide alone, leaving her children behind, would not make Fumiko Kimura more caring but would confirm her failure as a mother and brand her with demonlike behavior.[33] Such abandonment would be beyond cruel and would stain the children with the shame of an adulterous father and a suicidal mother, who did not love her children enough to take them with her.[34]

D. Interdependence

When we view these three factors together, we find that the essential difference in Japanese societal mores is the deeply embedded notion of interdependence. Unlike the high degree of individualism prized and promoted in American culture, Japanese culture values relations and interdependence, where the self is submerged in the network of roles a person has in relation to others.[35] Therefore, for a mother, the deprivation of a child's life is an extended extinguishing of one's own life, not a violation of the child's individual rights. The child is not really an individual, but part of the mother. The child could not exist without the mother and is entirely dependent on the mother.[36] The mother is similarly dependent on the existence of the child.

Such a belief system is entirely at odds with our own notions of independence and autonomy and, in particular, the notions of individualism and personal culpability that pervade our legal system. Kimura was not charged with the crime of attempted suicide, but with the murder of her two children. Under California criminal law, Kimura must be culpable precisely because she failed to recognize her children as *separate* entities, deserving of life without her, no matter how miserable. Yet, for Fumiko Kimura to

acknowledge her children as separate entities would brand her a bad mother. While Kimura's marital situation might have pushed her toward suicide regardless of her culture, it was her culture that propelled her to take the lives of her children. Fumiko Kimura was damned either way: by the California penal system for not recognizing her offspring as separate, or by her own culture for treating them as separate.

In choosing to ignore or discard the cultural factors involved in Kimura's act, Klausner (her attorney), the prosecutor, and the legal system itself, failed to acknowledge not only her background but also her motivations. Instead, she was measured by a narrow Western conception of sanity, one she could not possibly meet because her own cultural views on suicide and mothering stood in stark contrast.

PART II: THE LAWYER AS ZEALOUS ADVOCATE

Given this difficult and complex circumstance, what were Klausner's obligations to Fumiko Kimura? Did he make the right choice? The Preamble to the Model Rules of Professional Conduct refers to "A Lawyer's Responsibilities" and states, "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." [37] Later, the same preamble states:

> A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a *zealous advocate* on behalf of a client and at the same time assume that justice is being done.[38]

Practitioners and academics alike have long ascribed great importance to the lawyer's role of zealous advocate. They suggest that we recall the famous words of Lord Brougham (a nineteenth century lord chancellor of England and brilliant orator):

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by

> all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.[39]

Though spoken over one hundred years ago, Lord Brougham's advice remains the dominant approach in understanding the ethics of lawyering.

Generally, any limitations on zealous advocacy are articulated as an aspect of the other roles lawyers are required to play. Legal authors have long wrestled with the question of how to balance the roles of zealous advocate and officer of the court charged with the pursuit of justice.[40] While all agree there is some tension between these roles, most see the criminal trial as the one indisputable arena where the lawyer's obligation runs to the client and not to the world at large. The Model Rules and their most recent revisions seem to echo this view.[41] Even as an officer of the court in the criminal context, the defense lawyer's primary duty is to see that the client receives a zealous defense, because truly zealous advocacy is the client's only hope against the unyielding arm of the state. Within the boundaries of the law, we say that the lawyer should do everything within his or her power to achieve the best possible *legal* outcome for the client.

Much has been written about the parameters of such a pursuit, and I do not wish to reexamine it all here. My concern lies with this very narrow conception of the client and her interests. Why should our understanding of the client be limited to her legal interests and not to her other interests as well?[42] Modern-day academics have vigorously continued this debate.[43] I suggest that the best way to achieve the balance between zealous advocacy and the pursuit of justice is to *expand* our notions of the client's interests to encompass the client's non-legal interests and her future outside of the courtroom. Such a change is more likely to include a pursuit of justice simply because it looks beyond the legal realm.[44] In fact, by restricting the

understanding of the client to legal interests alone, we subject the client to a type of legal straightjacket and bind ourselves to a more limiting vision of the law's power. Opening ourselves to the client's other interests, especially cultural interests, frees us from such oppression and allows us to better serve the client as a whole, while still balancing zealous advocacy and the pursuit of justice.

PART III: THE DANGERS OF IGNORING CULTURAL EVIDENCE

Admittedly, Kimura's lawyer was faced with a very difficult choice. He chose to argue that Kimura was not in her right senses, and that despair and anxiety led her to snap and become desperate and irrational. He could have argued that Kimura was acting rationally, fully aware of her actions and their consequences. Such an approach would likely have resulted in a guilty verdict for first degree murder, with only the tragedy of the circumstances to mitigate her sentence. Lauren Weis, the prosecutor assigned to the case, understood this point perfectly when she responded in a TV interview, "[I]f Mrs. Kimura did in fact kill her children because of her cultural background, it would seem to show that she intended to kill them, and that she was competent, and that she was thinking of doing that, that she was deliberately doing that."[45]

I am not suggesting the attorneys in this matter were culturally ignorant. In fact, the following newspaper accounts demonstrate that the attorneys were acutely aware of the cultural evidence, which they decided not to present:

> Kimura's attorney, Gerald Klausner, is not inclined to stress the cultural angle, although he acknowledged that others believe it is her best defense.[46]
>
> 'They think that [the fact that] she's Japanese should be defense enough, that the defense should rest more on her culture,' [Klausner] said. Klausner hasn't decided whether or not to use insanity as a possible defense, although he describes

> his client as 'mentally deranged at the time—with a Japanese flavor, a Japanese fashion.'[47]
>
> The case, says Deputy District Attorney Lauren L. Weis, 'is very, very difficult,' but she rejects the use of Japanese law. . . . 'You're treading on such shaky ground when you decide something based on a cultural thing because our society is made up of so many different cultures. It is very hard to draw the line somewhere, but they are living in our country and people have to abide by our laws or else you have anarchy.'[48]

Was it proper for the defense counsel to paint Fumiko Kimura as temporarily insane, when she was merely acting consistent with her own cultural values? I do not wish to understate the predicament facing the attorneys in this case, and, in fact, I do not dispute the correctness of the final legal outcome. Credit for time served and five years of probation with mandatory psychiatric counseling was a merciful sentence and one very similar to any she might have received in Japan.[49] The legal constraints at the time forced defense attorney Klausner to forego the introduction of cultural evidence. His choice, however, not to discuss the cultural motivations in the courtroom, had two undesirable effects: (1) he relegated any such discussion to the media frenzy surrounding the event; and (2) he deprived Kimura of the opportunity to be heard as a whole person and to preserve her cultural dignity.[50]

A. The Danger of Leaving Culture to the Media

By relegating the discussion of cultural factors to newspapers, magazines, and television, the media became the vehicle charged with accurate representation of Japanese culture and the complex facts surrounding Fumiko Kimura's oyaku shinju attempt. The views and values of the Japanese community were heard only in snippets and sound bites. The idea that morality might be culturally relative, as opposed to universal, was removed from the purview of the court, arguably the best place for such a conversation to occur.[51] Instead, placing this conversation in the forum of

public opinion leaves the conversation vulnerable to the use of stereotypes and untruth.

The media simply did not allow for full and nuanced discussions about Kimura and why she chose to do what she did. This is evidenced in the numerous and varied newspaper accounts of Fumiko Kimura's life and her oyaku shinju attempt. The newspaper reports seldom included a discussion of the relevant law or what the punishment, if any, might be in Japan.[52] Very few included any discussion of Fumiko Kimura's level of acclimation to American society.[53] Stereotypes about Japanese submissiveness were allowed to buoy entire stories. Several papers covering the events gave variant reports on Kimura's ability to speak English and her status in the country.[54] Given the short coverage allotted to cultural background in television and newspaper reports, it is not possible to explore in any depth the complexities of culture. Reporters are therefore forced to rely on stereotypes and the background knowledge, experiences, and misinformation that their audience possesses.

One is moved to ask what effect relegating cultural issues to the media reporting has on relations between cultures, especially if our conception of justice includes greater intercultural understanding.[55] In leaving this important discussion to the media, do we further or frustrate multicultural harmony? I would argue that, like racial and gender stereotypes perpetuated in the media, the misapprehension of *cultural* matters in the media causes harm, especially in a heterogeneous society such as ours. Cultural stereotyping is particularly pernicious and difficult to eradicate. Unlike with racial and gender stereotypes, most people lack a frame of reference with cultural stereotypes. In race and gender cases, the public has *some* personal experience to draw on—positive or negative. People may hold negative stereotypes about women ("all women are bad drivers") or about other races ("African American males are dangerous"), but there are tremendous daily opportunities to disavow such beliefs. For instance, one may have a mild mannered African American colleague, or may know a

woman who is an excellent driver. Even if some who hold such stereotypes about women and African Americans find only deeper proof in the exception, such beliefs are at least open to debate through the individual's own personal contact and experience with members of the other group. In other words, there is a greater likelihood that people will see through race and gender stereotypes based on their own personal experiences.

In contrast, stereotypes in the cultural context are unlikely to be counteracted in this fashion since people are much less likely to know, and to know about, individuals of differing cultural backgrounds. Even if members of the public do have personal experience with individuals who share the defendant's culture, they are unlikely to know significant facts about the culture itself because such matters are usually considered very personal. For instance, a Muslim coworker is unlikely to talk about the expectations he has of his wife, yet there is a pervasive stereotype that Muslim men are controlling and abusive toward their wives, daughters, and sisters. Similarly, there are strong stereotypes that Latino males are macho and hot tempered and that Asian women are submissive. As such, I suggest that the cultural stereotypes are more harmful than the racial or sexist stereotypes because the average person has little personal experience to counteract the reports given in newspapers and magazines.

In addition, cultural stereotypes are more dangerous because they fill the void of ignorance with a monolithic representation of something incredibly complex. The history of the cultural stereotype is bound up with colonialism, evangelism, world history, and modern politics. Culture, unlike race and gender, is an inherently dynamic characteristic, changing over time and place with historic events and shifts in population. Like stereotypes about race, cultural stereotypes take on a particular importance as they provide shorthand characterizations about other groups. Instead of promoting the search for truth, such portrayals capitalize on ignorance and fear. Furthermore, without some personal experience of the relevant

culture, an individual is unlikely to voice or hear objections to the use of cultural stereotypes.

Despite the large Japanese population in southern California, most people were unaware of oyaku shinju before the case of Fumiko Kimura. The miniseries *Shogun*, which aired in 1980 to captivated audiences, delivered a mesmerizing portrait of feudal Japan, and was the greatest cultural education about Japan around this time.[56] Although popular, the *Shogun* miniseries did little, if anything, to educate Americans about the Japan of the 1980s or the cultural imperatives that motivated Kimura.

The Japanese community itself felt that the justice system should know its side of the story and understand Fumiko Kimura as a whole person with a cultural background that profoundly influenced her actions. The Japanese American community responded to Fumiko Kimura's case with petitions in an attempt to educate the judge and the public. Members of the community rallied and circulated petitions explaining the history of oyaku shinju and asking that Kimura be judged by Japanese standards. The petitions garnered more than 25,000 signatures from people in the United States, Canada, Germany, and beyond.[57] The community did not want Japanese culture, including this small part of Japanese culture, to be portrayed as deranged, even if it was the best legal defense available at the time.

Despite the remarkable efforts of the Japanese community worldwide, I firmly assert that by ignoring culture, the legal approach taken in this case did a tremendous disservice to both the Japanese American community and the community at large. It relegated the discussion of culture to an environment where stereotypes could flourish and then left the Japanese American community to protect itself from the resulting harm.

B. The Fall Out of Depriving Fumiko Kimura of Her Cultural Voice

In this case, it is not even necessary to contextualize the impact in terms of the community, because Klausner's choice to assert a temporary insanity defense also had an effect on Fumiko Kimura herself. In suppressing

Fumiko Kimura's cultural story, Klausner deprived her of a dignified narrative. Removing her story from its cultural moorings rendered Fumiko Kimura malevolent or undeniably unbalanced in the eyes of American culture. Within an American cultural framework, her behavior cannot be understood as rational or based on a healthy desire to prove her love to her children. Such an explanation only makes sense in the context of Japanese culture. Her conceptions of shame, suicide, mothering, and interdependence, which motivated her actions, were left outside the courtroom door, and she remained silenced by a legal system that failed to take into account her unique circumstances.

Aware that the client will return to society and to her community, we must ask what effect any particular legal strategy has on her relationship with her community. If her lawyer portrays her culture as crazy in the courtroom, will her community ostracize her? If she is presented as a victim of an oppressive and unyielding set of traditions, will her own community judge her a traitor? Having assented to the role of a deranged person, will she ever be able to reclaim the title of deeply devoted mother that her community once bestowed on her? By placing her actions outside their cultural frame, Klausner effectively removed Fumiko Kimura from her place in her community and framed her as legally insane within the mainstream community. As a result, she became an outsider in both communities, losing her status as a mother and finding her only source of support to be the husband who betrayed her. More attention to Fumiko Kimura's non-legal interests could have rendered a more palatable solution.

PART IV: THE MIDDLE ROAD—A CULTURAL DEFENSE

I have stated that Klausner had two choices: 1) he could have argued that Fumiko Kimura was acting in her right senses, which would have subjected her to a probable guilty verdict; or 2) he could have argued that she was not in her right senses, but legally insane. He chose the second. But there was also a third option—a middle-of-the-road solution.[58] Klausner could have

argued that what Kimura did was not wrong and that our own notions of suicide, mothering, and interdependence should be reexamined. At a minimum, such an approach would have required a detailed and nuanced understanding of *who* Fumiko Kimura was and *why* she decided to commit oyaku shinju. In other words, it would have required introducing cultural evidence.

Since 1985 when Kimura was first charged, a number of cases have offered cultural evidence to provide context and background for the defendant's actions.[59] In general, there are two approaches to the cultural defense. The first approach proffers evidence to demonstrate that, given the defendant's cultural background, the defendant perceived the situation such that no crime was really committed. We might call this a cognitive cultural defense case. For example, due to his cultural background, one particular defendant believed that a woman was actually consenting to intercourse when in fact she was not.[60] Such defenses allow the defendant to utilize standard criminal defenses such as mistake of fact. In the second approach, evidence is introduced to prove that the defendant's behavior, though reprehensible and criminal in the United States, is nonetheless legally or culturally permitted, or even required, in the defendant's home country. We might call this a normative cultural defense case. For example, an Iranian father may argue that in his culture it is appropriate to arrange and complete his young daughter's marriage at age twelve to a much older and established man. A host of questions arise from these two approaches. It is not my aim to address them here, only to say that in both scenarios we are forced to examine the whole client. In the second category of cases especially, we are forced to confront our own community values and notions of justice.

The tension between community justice lawyering and zealous advocacy has spawned a few solutions that might prove useful in the cultural context. Anthony Alfieri writes prolifically in the area of lawyering and racial stereotypes.[61] Alfieri generally prefers a strong version of "race conscious

lawyering"[62] that requires the lawyer to refrain from using "racialized" narratives[63] when the lawyer knows they might negatively affect the community. Alfieri argues that lawyers have a responsibility to prevent causing racial disharmony in the community. Such an approach clearly weighs heavily on the side of community justice rather than zealous advocacy.

Alfieri concedes that a weaker prescription might be a suitable compromise, for example, giving the client the power to make such decisions.[64] He recommends that the lawyer have a comprehensive conversation[65] with the client to explain the possible community repercussions, while allowing the client to make the decision. According to Alfieri, the client is the best person to judge how any particular strategy involving racial evidence would affect her, her family, and her community. Alfieri's approach recognizes that the client may have interests beyond the legal outcome of the trial, including racial harmony in her community. It also recognizes that the client is ultimately in the best position to decide whether or not to forgo those interests in favor of her legal and liberty interests.

While I find Alfieri's stronger position attractive in its idealism, his weaker prescription holds the most promise for cases involving cultural evidence. Such an approach would recognize the whole client beyond her legal interests and incorporate her personal and cultural interests as well. Alfieri's alternative prescription requires an attorney to have a comprehensive conversation with the client and then allow the client to make the ultimate decision regarding cultural evidence. In adopting this approach, an attorney must be sure to examine how such a conversation with the client will be carried out. Which implications should the attorney highlight? Should the attorney point out only the likelihood of success on the merits and the fact that the strategy may be controversial? Should the attorney ask the client for her views and feelings about having her cultural beliefs portrayed as insane? The comprehensive conversation should not

emphasize only the client's legal interests but should also include an acknowledgement of the limitations of the criminal law and also the battle between the value systems inherent in the legal strategy.

Should the attorney tell the client that a positive legal result from a temporary insanity plea will most likely result in psychiatric counseling that might challenge her core belief system? Should the attorney explain that in agreeing to this strategy, the client may in fact be acquiescing to Western notions of personal autonomy and independence (even for six-month-old infants) and shunning the notions of interdependence inherent in the cultural practice of oyaku shinju? This kind of approach would allow the client to assess the possible ramifications *vis-à-vis* her own culture and examine whether she is ready to either abandon them or at least pretend to abandon them. Should the attorney tell the client that her community might shun her if she chooses such a course or allow her to raise such a concern herself?

Unfortunately, in Fumiko Kimura's case, it does not appear that this conversation took place.[66] Devoted to the best possible legal outcome for his client, Klausner could not make room for Kimura's cultural voice. Understanding the client *beyond* her legal interests would necessitate such a conversation, however, and allow an opportunity to incorporate the client's voice into the adopted legal strategy.

PART V: CONCLUSION

In 1985, it was unlikely that a cultural defense would have worked; both attorneys were hamstrung by a system that acknowledged only legal wrongs[67] and left very little room for the cultural factors that affected Fumiko Kimura. Since that time the law has changed. Overall, the criminal justice system has moved further toward an individual standard and away from the reasonable person standard that peppered criminal law and precluded Fumiko Kimura from using cultural evidence.[68] Many attorneys who have since used cultural evidence insist that the time is ripe to thoroughly consider the effect of cultural background on individual

culpability. The last twenty years have spawned a number of cultural defense cases[69] and many judges now admit and consider cultural evidence. 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. For example, battered-woman's syndrome was allowed as a defense only by forcing open the doors of jurisprudence to encompass a battered woman's experience.

Today's lawyers are at least obligated to pay heed to the path forged by others. Legal academics urge us to further consider the *possibility* of law by examining its effect and potential for those oppressed through racial, gender, and cultural dynamics. The lawyer's responsibility is to heed this call, recognize the client *beyond* her legal interests, and, in the pursuit of justice, advocate for the *whole* client.

---

[1] Rashmi Goel is Assistant Professor of Law at the University of Denver College of Law.

[2] *Oyaku shinju* is generally translated as parent-child suicide. Interestingly, however, its literal translation contains no reference to death or killing. The term consists of two sets of characters, "parent-child" and "center of the heart." For an interesting explication of this, see Taimie L. Bryant, *Oya-Ko Shinju: Death at the Center of the Heart*, 8 UCLA PAC. BASIN L.J. 1, 4 (1990). While I italicize oyaku shinju in this first instance, I choose not to in future references. To do so seems to draw undue attention to the foreignness of the word. While the custom may indeed seem very foreign, my point is to draw attention to the universal question of moral relativism and its relation to culture, not to the foreignness of Kimura's choice.

[3] People v. Fumiko Kimura, No. A-091133 (Cal. Super. Ct. L.A. County Nov. 21, 1985).

[4] ALISON DUNDES RENTELN, THE CULTURAL DEFENSE 25 (2004).

[5] Maura Dolan, *Two Cultures Collide Over Act of Despair: Mother Facing Charges in Ceremonial Drowning*, L.A. TIMES, Feb. 24, 2004, § 1, at 3.

[6] Robert W. Stewart, *Probation Given to Mother in Drowning of Her Two Children*, L.A. TIMES, Nov. 22, 1985, § 2 (Metro), at 1. I find the mandatory psychiatric counseling portion of the sentence particularly invasive. We do not know whether Kimura's psychiatric counseling was primarily to help her deal with the grief and loss of her children (which is unlikely because it has little place in any sort of rehabilitative or punitive sanction) or to convince her that the values and beliefs that led to her action are dangerous and delusional. If the latter, the court is using medical science to force a woman to abandon her cultural beliefs. In fact, Kimura's beliefs and her action are not delusional but rather are cultural and widespread, as evidenced by her husband's remarks

when he learned of her attempt: he "was 'envious' his wife had such a strong bond with their children that she could hold onto them while she herself was drowning." Dolan, *supra* note 5.

[7] Under the California Criminal Code in 1985, the standard for temporary insanity was the M'Naghten test, which was also widely used as the legal standard for insanity. People v. Lawley, 27 Cal. 4th 102, 169–170 (2002) (briefly citing the legislative history of the M'Naghten test in California). This test is still in use in California. *Id*. Under the test, the defendant must suffer from a disease of the mind, and, as a result, either not know the nature or consequences of the act or not know that it was wrong (so far interpreted to mean "legally wrong"). CAL. PENAL CODE § 25 (West 1999).

[8] My sentiment is echoed by some in the field of sociology. *See, e.g.*, Sita Reddy, *Temporarily Insane: Pathologising Cultural Difference in American Criminal Courts,* 24 SOC. HEALTH & ILLNESS 667 (2002).

[9] While oyaku shinju is technically illegal in Japan, those who attempt it are generally treated leniently. In cases like Kimura's, offenders are convicted of something akin to involuntary manslaughter and to a suspended sentence of one to three years. The incidents are generally looked on with pity, not outrage, and are not generally reported in the media. *See generally* Bryant, *supra* note 2 (providing additional information on the criminal laws regarding oyaku shinju in Japan and an explication of several cases).

[10] Many legal and sociological scholars have devoted attention to the cultural defense. While work in the early 1990s focuses primarily on arguments for and against the cultural defense, later work has gone further to explore the implications and workings of the cultural defense. For example, Law Professor Leti Volpp has done significant work in exploring the implications of using cultural defense for minority communities, particularly the women within those communities. *See* Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"* 17 HARV. WOMEN'S L.J. 57 (1994). *See also* SUSAN S. SILBEY & PATRICIA EWICK, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998) (making a sociological exploration of different legal approaches). My work departs from these works in two significant ways: first, I look to the effect of the cultural defense on the client herself; and second, I use various modes of legal analysis (legal ethics in this case or in other cases criminal law theory) to explain how the cultural defense works and explore whether it in fact leads to results which are more just.

[11] Tamara Jones, *'Cultural Shock' Crimes Split Legal Experts U.S., Japan Views Differ on Mother-Child Suicide*, THE REC., N. N.J., Oct. 13, 1985, at A29.

[12] *Id*. *See also* Yuko Kawanishi, *Japanese Mother-Child Suicide: The Psychological and Sociological Implications of the Kimura Case*, 8 UCLA PAC. BASIN L.J. 32, 45–46 (1990) (addressing the effect of an endangered ethnic identity).

[13] Dolan, *supra* note 5.

[14] Stewart, *supra* note 6.

[15] *Id*.

[16] Deborah Woo, *The People v. Fumiko Kimura: But Which People?*, 17 INT'L J. SOC. L. 403, 412 (1989).

[17] Because this was her second marriage, the stigma on Fumiko Kimura was that much greater. *See* Rhoda J. Yen, 7 ASIAN L.J. 1, 20–21 (2000).

[18] Kawanishi, *supra* note 12, at 40.
[19] Janet Rae-Dupree & Jack Jones, *Children in Arms Mother's Trek Into Sea Stuns Her Neighbors*, L.A. TIMES, Jan. 31, 1985, § 2 (Metro), at 2.
[20] Leslie Pound, *Mother's Tragic Crime Exposes a Culture Gap*, CHI. TRIB., June 10, 1985, at C1; Posting of Alfred M. Kriman, akriman@darwin.helios.nd.edu, to Classics-L *at* http://omega.cohums.ohio-state.edu/mailing_lists/CLA-L/1998/08/0337.php (Aug. 11, 1998) (copy on file with author) (last visited Nov. 11, 2004).
[21] Pound, *supra* note 20.
[22] Stewart, *supra* note 6.
[23] Little examined is the guilt Fumiko Kimura might have felt for the pain endured by the mistress. Alfred Kriman further reports that the mistress had undergone an abortion because Itsuroko Kimura did not want any more children, only to discover that Fumiko Kimura later became pregnant and gave birth to a baby girl. *See* Kriman, *supra* note 20.
[24] Kriman, *supra* note 20 (emphasis added).
[25] Pound, *supra* note 20.
[26] Kawanishi, *supra* note 12, at 43.
[27] Dolan, *supra* note 5.
[28] Kawanishi, *supra* note 12, at 38.
[29] Alison Matsumoto, *A Place for Consideration of Culture in the American Criminal Justice System: Japanese Law and the Kimura Case*, 4 DETROIT J. INT'L L. 507, 538 n.8 (1995).
[30] Perhaps to be raised by her husband and his mistress.
[31] *See generally* Kawanishi, *supra* note 12, at 40 (discussing the social development of children who are not raised by their biological mothers).
[32] Yoshimoto Takahashi & Douglas Berger, *Cultural Dynamics and the Unconscious in Suicide in Japan*, *in* SUICIDE & THE UNCONSCIOUS 248, 251 (Antoon Leenaars & David Lester eds., 1996), *available at*
http://www.japanpsychiatrist.com/Abstracts/Shinju.html (last visited Nov. 11, 2001).
[33] Woo, *supra* note 16, at 411.
[34] *See* Kawanishi, *supra* note 12, at 40.
[35] *See generally* Matsumoto, *supra* note 29 (discussing these concepts in greater depth); *see also* Kawanishi, *supra* note 12.
[36] I have tried to imagine an analogous situation that would be understood in Western society. The bond between a parent and a terminally ill or physically disabled child is perhaps the closest. Americans can understand how the parent of such a child might feel the need to take the child with them in death, unable to ensure that anyone would properly care for the child after they are gone. Euthanasia cases involving such children evoke a tremendous amount of sympathy and lead to similar legal quandaries. *See, e.g.*, R. v. Latimer [2001] S.C.C. 41.
[37] MODEL RULES OF PROF'L CONDUCT Preamble 9 (1983).
[38] *Id.* at Preamble 11 (emphasis added).
[39] MARVIN E. FRANKEL, THE SEARCH FOR TRUTH–AN UMPIERAL VIEW 16 (1975).
[40] For an excellent account of the history of this debate, see Russell G. Pearce, *Lawyers as America's Governing Class:The Formation and Dissolution of the Original*

Understanding of the American Lawyer's Role, 8 U. CHI. L. SCH. ROUNDTABLE 381 (2001).

[41] *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 (2002).

[42] *See generally* Lucie E. White, *Subordination, Rhetorical Survival Skills, & Sunday Shoes: Notes on the Hearing of Mrs. G*, 1 BUFF. L. REV. 38 (1990) (identifying legal and social reforms that may enable a person thrust into the legal system to be better able to participate in decisions made; and, suggesting that procedural reforms may remedy substantive inequalities).

[43] Professors Stephen Pepper, William Simon, and David Luban have figured centrally in this debate. *See, e.g.,* Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, AM. B. FOUND. RES. J. 613 (1986); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083; David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, AM. B. FOUND. RES. J. 637 (1986).

[44] White, *supra* note 42, at 1.

[45] William Wetherall, *The Trial of Fumiko Kimura*, 2 PHP INTERSECT 6 (1986), *available at* http://members.jcom.home.ne.jp/yosha/suicide/kimuratrial.html (last visited Nov. 11, 2004).

[46] Pound, *supra* note 20.

[47] *Id.*

[48] Spencer Sherman, *Legal Clash of Cultures*, NAT'L L.J., Aug. 5, 1985, at 1.

[49] Stewart, *supra* note 6.

[50] While this case never went to trial because a plea bargain was reached just prior, the judge received cultural evidence not from the defense materials but rather from the media and petitions with 25,000 signatures, explaining Kimura's choice and requesting application of Japanese law. *Id.*

[51] *See also* Woo, *supra* note 16, at 418–19 (discussing the distinctions between and implications of legal guilt and moral guilt).

[52] *Contra* Rae-Dupree, *supra* note 19. *See also* Sherman, *supra* note 48, at 26 (describing the difference between how Kimura would have been charged under Japanese law, which her attorney petitioned for, and how she was charged under American law).

[53] *Cf.* Dolan, *supra* note 5 (briefly describing Kimura's childhood and limited experiences in the United States).

[54] *See, e.g.*, Dolan, *supra* note 5 (mentioning Kimura's time in an American community college).

[55] While this assertion itself may be controversial, I believe it is reasonable to have such a goal in a heterogeneous society.

[56] *Shogun* (Paramount Television 1980).

[57] Stewart, *supra* note 6.

[58] Such an approach might have proceeded by urging a reexamination of the M'Naghten standard and an expansion of legal wrong to include moral wrong, or urging the same reexamination of legal versus moral wrong without reference to insanity.

[59] *See* People v. Kong Moua, No. 315972-0 (Cal. Super. Ct. Fresno County Feb. 7, 1985) (finding defendant guilty of forcible confinement rather than kidnapping and rape based on the traditional Hmong practice of marriage by capture; defendant argued that he mistook the

victim's resistance for the ritual resistance required by the traditional ceremony, and therefore reasonably believed that the victim was actually consenting.); People v. Dong Lu Chen*,* No. 87-7774 (N.Y. Super. Ct. Dec. 2, 1988) (reducing charge from second-degree murder to second-degree manslaughter as a result of defendant's argument that a homicidal response to his wife's adultery was understandable in Chinese culture); State v. Kargar, 679 A.2d 81 (Me. 1996) (vacating a felony conviction for gross sexual assault in light of the cultural meaning of defendant's act).

[60] *See, e.g.*, Kong Moua, No. 315972-0.

[61] *See, e.g.*, Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); Anthony V. Alfieri, *Race-ing Legal Ethics,* 96 COLUM. L. REV. 800 (1996); Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001).

[62] *See* Alfieri, *Defending Racial Violence*, *supra* note 63, at 1307.

[63] Racialized narratives are those which utilize the rhetoric of race-talk in criminal defense advocacy, particularly employing deeply held negative stereotypes about particular races. *See* Alfieri, *Race-ing Legal Ethics*, *supra* note 61.

[64] *See id*. at 802.

[65] *See id*.; Alfieri, *Race Prosecutors, Race Defenders, supra* note 61, at 2265–2270. Like Alfieri, Stephen Pepper also understands that balance can be achieved by educating and learning from the client herself. *See* Pepper, *supra* note 43.

[66] Telephone Interview with Gerald Klausner, Attorney for Fumiko Kimura (Oct. 4, 2004). Several times Klausner was asked whether he had a conversation with Kimura asking for her opinion on the negative effects of her return to the community or the potential negative effects more generally. Klausner did not answer the question yes or no but generally evaded the question despite being asked in a number of ways and a number of times. This has led me to conclude that Klausner did not have such a conversation with his client.

[67] *See* discussion *supra* note 7.

[68] *See generally* MODEL PENAL CODE (2003) (consistently defining intent and mens rea from a subjective standard).

[69] *See, e.g.,* People v. Croy, 41 Cal. 3d 1 (1985) (allowing expert testimony by anthropological linguists and a Native American psychologist); People v. Rhines, 131 Cal. App. 3d (1978) (affirming rape conviction despite testimony of psychologist that there is "a cultural difference between races of people"); People v. Wu, 235 Cal. App. 3d 614 (1991) (permitting a jury instruction regarding the impact of culture on defendant's mental state during commission of crime); *see also* DUNDES RENTELN, *supra* note 4 (referencing many cultural defense cases).