Loyola of Los Angeles International and Comparative Law Review

Volume 9 | Number 3 Article 8

6-1-1987

Cultural Defense: One Person's Culture Is Another's Crime

Malek-Mithra Sheybani

Cultural Defense: One Person's Culture Is Another's Crime

I. INTRODUCTION

On January 29, 1985, Mrs. Fumiko Kimura, along with her two children, waded into the Pacific Ocean ten days after learning that her husband had kept a mistress for three years.[1] Mrs. Kimura was saved.[2] However, her six-month old daughter and her four-year old son drowned.[3] The purpose of Mrs. Kimura's suicide attempt was culturally based.[4] Mrs. Kimura's actions stemmed from her desire to rid herself and her children of the shame caused by her husband having a mistress.[5]

The Japanese tradition of parent-child suicide, as well as other Asian culturally based acts, such as marriage by capture, were virtually unheard of by American lawyers, judges, and law enforcement officials until recently. However, due to the large influx of Asians into the United States, a clash between Asian cultures and the American criminal justice system currently exists.[6]

In 1975, as a result of the communist takeover in Vietnam, Laos, and Cambodia, nearly 800,000 Indochinese refugees were given permanent asylum in the United States.[7] Many of the newcomers had difficulties assimilating and learning the American culture and laws.[8] Consequently, those immigrants and refugees still maintain many beliefs and traditions of their native lifestyles, despite living in the United States for several years.[9] Legal problems often arise when these immigrants adhere to customs and traditions that constitute illegal acts under laws of the United States.

This Comment discusses whether the American criminal justice

1. L.A. Times, Feb. 24, 1985, pt. I, at 3, col. 1.
2. *Id.*
3. L.A. Times, Feb. 3, 1985, pt. II, at 3, col. 1.
4. Hayashi, *Understanding Shinju, and the Trajedy of Fumiko Kimura*, L.A. Times, Apr. 10, 1985, pt. II, at 5, col. 1.
5. *Id.*
6. Thompson, *Immigrants Bring the Cultural Defense into U.S. Courts*, Wall St. J., June 6, 1985, at 26, col. 5 (western ed.).
7. Sherman, *Legal Clash of Cultures*, Nat'l L.J., Aug. 5, 1985, at 26, col. 1.
8. *Id.* at col. 3.
9. *Id.*

system should recognize a "cultural defense."[10] Recognition of the concept of a cultural defense may exonerate the foreigner of any wrongdoing if an otherwise illegal act would have been acceptable in the foreigner's homeland.[11] This defense is especially urged in instances in which the foreigner maintains a set of values alien to traditional American values. Although United States courts generally do not recognize a specific "cultural defense,"[12] there have been instances where cultural differences were considered.[13]

This Comment initially focuses on two cases which illustrate the conflict that can exist between a defendant's culture and certain state laws. The first case concerns the conflict between a Japanese custom called parent-child suicide, *oyako-shinju*, and the California murder statute.[14] The second case concerns the conflict between a Hmong tradition known as marriage by capture, *zij poj niam*, and the California rape statute.[15] The Model Penal Code[16] is also applied to the above cases. In each instance there is a comparison between the application of the Model Penal Code and the California Penal Code. Finally, two different viewpoints on whether the American criminal justice system should accept a cultural defense will be explored.

II. DISCUSSION

A. Anatomy of a Crime

There are two general components to almost every crime: one is physical, the *actus reus* and the other is mental, the *mens rea*.[17] The

10. *See infra* text accompanying note 11 for a definition of cultural defense. It has been suggested that the courts adopt a formal cultural defense within the substantive criminal law. Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1311 (1986). The author points out that "America's commitment to the ideals of individualized justice and cultural pluralism justifies the recognition of the cultural defense." *Id.* at 1307. This Comment acknowledges that certain ethnic values need to be preserved in order to maintain a culturally diverse society. *See also id.* at 1301. However, the Model Penal Code provides a framework for considering a defendant's cultural values. This Comment specifically concentrates on two cases where the Model Penal Code would have acknowledged the defendant's cultural values in determining culpability and in sentencing the defendant. By adopting the Model Penal Code's approach, the courts and legislature need not attempt to formulate a cultural defense.

11. Thompson, *supra* note 6, at 26.

12. Sherman, *supra* note 7, at 26, col. 1.

13. A "1923 study of immigrants in the courts cited a number of cases in which the judges paid heed to a defense based on cultural differences." Thompson, *Cultural Defense*, STUDENT LAW., Sept. 1985, at 25, 26.

14. CAL. PENAL CODE § 187 (West Supp. 1987).

15. *Id.* § 261.

16. MODEL PENAL CODE §§ 210.2, 210.3, 213.1 (1967).

17. R. PERKINS & R. BOYCE, CRIMINAL LAW 831 (3rd ed. 1982). Conspiracy, solicita-

actus reus is best defined as the guilty act.[18] There must be an overt act or some open evidence of an intended crime before a person may be punished.[19] There also must be a harm to society which is protected by a criminal statute or by the common law.[20] Thus, there must be both a social harm and an act by the accused which was the cause of that harm.

One of the greatest contributions of the common law is the concept that there is no crime, as distinguished from a civil offense, without a mind at fault.[21] *Mens rea*, which means a culpable state of mind or the guilty mind, is the required mental element.[22] Nonetheless, the state of mind needed for criminal guilt is not the same for all offenses.[23]

B. California Law and the Model Penal Code: Parent-Child Suicide

1. Murder and manslaughter statutes

a. murder

California Penal Code section 187(a), which has adopted the common law definition of murder, states that murder is "the unlawful killing of a human being, or a fetus, with malice aforethought."[24] California Penal Code section 189 provides that if a murder is perpetrated by means of a destructive device, or by any other kind of willful, deliberate, and premeditated act, or is committed in the perpetration of a felony, then it is murder of the first degree inasmuch as each of these factors is an indicia of "malice aforethought."[25] Since California Penal Code sections 187 and 189 have incorporated common law concepts in the definition of murder,[26] it will be helpful to briefly overview the common law concept of malice aforethought.

Common law malice aforethought is classified by four different

---

tion and attempt to commit a crime seem to be a few of the exceptions to the concept that in a crime there has to be both a *mens rea* and an *actus reus*. In the above crimes, the requirement of *mens rea* alone may be sufficient for criminal guilt. *Id.* at 830.

18. *Id.* at 831.
19. *Id.* at 830.
20. *Id.*
21. *Id.* at 828.
22. *Id.* at 829.
23. *Id.*
24. CAL. PENAL CODE § 187 (West Supp. 1987).
25. *Id.* § 189.
26. *See infra* text accompanying notes 27-38.

states of mind.[27] The most important state of mind is an intent to kill.[28] "Intent [to kill] includes those consequences which (a) represent the very purpose for which an act is done (regardless of likelihood of occurrence), [or] (b) are known to be substantially certain to result (regardless of desire)."[29] Hence, when one acts "for the purpose of causing" a certain result, that person intends the result, whether it is likely to happen or not.[30] As to those consequences which were not the "very purpose" of one's act, one intends *only* those results which were substantially certain to be produced.[31] Accordingly, if one either intends or is aware that one's actions will result in the death of another, the killing is intentional, and the lack of desire of such consequence does not rebutt one's intent.[32]

The second common law category of murder is intent to cause grievous bodily harm.[33] Again, knowledge that the conduct was substantially certain to cause serious bodily injury would be construed as the necessary intent. The person would be prosecuted for murder if death actually was the result of an injury caused by grievous bodily harm.[34] The third category is sometimes called the "depraved-heart" murder.[35] It is unintentional murder under circumstances evincing a "depraved mind" or an "abandoned and malignant heart".[36] California Penal Code section 188 has incorporated this common law concept in defining implied malice, an element of second degree murder.[37] Thus, there is an implied or presumed intent to kill or injure if the accused exhibited a wanton and willful disregard of an unreasonable human risk. The fourth kind of common law malice aforethought is implied where there was an intent to commit a felony; it is the origin

27. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 210.2, at 14 (1980).

28. *Id.*

29. R. PERKINS & R. BOYCE, *supra* note 17, at 835 (footnote omitted).

30. *Id.*

31. *Id.* An example of intent to kill would be if an individual exploded dynamite for the purpose of wrecking a building and realized that another person was so close to the building that it was substantially certain that the person would die. *Id.* at 834-35.

32. *Id.* at 834.

33. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 210.2, at 14-15 (1980).

34. *Id.* at 15.

35. *Id.*

36. *Id.*

37. The California courts have consistently defined implied malice, which is a necessary element of second degree murder, as a lack of considerable provocation or the presence of circumstances indicating an abandoned and malignant heart. *See* People v. Watson, 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981); People v. Roy, 18 Cal. App. 3d 537, 95 Cal. Rptr. 884 (1971).

of the modern felony-murder rule.[38]

California Penal Code section 7 defines malice as "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."[39] However, the Model Penal Code does not use malice as an element of murder because the drafters greatly disfavored the word.[40] The Model Code substitutes specific states of mind (i.e. purposely, knowingly, recklessly or negligently) for "malice" when defining the elements of murder.[41]

Conversely, in California, malice is an important element of murder. Malice may be either express or implied.[42] Express malice is a deliberate intent to unlawfully take the life of another human being.[43] Implied malice, which is a necessary element of second degree murder, exists "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."[44] Furthermore, California Penal Code section 188 provides that if a death results from the intentional doing of an act with express or implied malice, no other mental state is needed to establish malice aforethought.[45]

It is essential to recognize that if a person knows that their act is wrongful, a good faith belief in the action would not negate malice.[46] As a general rule, proof of motive is not a determinant of guilt or

---

38. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 210.2, at 15 (1980).

39. CAL. PENAL CODE § 7(4) (West Supp. 1987).

40. R. PERKINS & R. BOYCE, *supra* note 17, at 860. The Model Penal Code's general requirement of culpability requires that a person act "purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." MODEL PENAL CODE § 2.02 (1962).

41. Under the Model Penal Code: "(1) [a] person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being. (2) Criminal homicide is murder, manslaughter or negligent homicide." *Id.* § 210.1. A person convicted of murder may be sentenced to death, if that jurisdiction has retained the death penalty, or imprisonment. *Id.* The prison penalty for first degree murder may range from one to ten years imprisonment to the maximum of a life sentence. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 210.2, at 42 (1980).

42. CAL. PENAL CODE § 188 (West Supp. 1987).

43. *Id.*

44. *Id.*

45. *Id.* Additionally, the statute was amended in 1981 and 1982 to further provide that "[n]either an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice." Act of Sept. 10, 1982, ch. 893, 1982 Cal. Stats. 3317, 3318; Act of Sept. 10, 1981, ch. 405, 1981 Cal. Stats. 1591, 1593.

46. People v. Weber, 162 Cal. App. 3d Supp. 1, 208 Cal. Rptr. 719 (1984).

innocence.[47] Motive is distinguishable from intent.[48] Motive is the ultimate purpose or factor which induces the defendant to do what he intended, such as killing the deceased.[49] However, intent relates to the method for achieving the ultimate purpose.[50] A defendant's motive may be hatred, revenge, love or jealousy.[51] In a case in which it is clearly established that the defendant both committed the offense, the *actus reus*, and had the requisite state of mind required for the particular offense, *mens rea*, proof of good motive will not save the defendant from conviction.[52]

Although every intentional killing is with malice aforethought, certain circumstances, such as legal insanity constitute a justification, an excuse or a mitigation.[53] In June of 1982, the California electorate approved an initiative measure, known as Proposition 8, which established a statutory definition of insanity.[54] California Penal Code section 25(b) provides:

> In any criminal proceeding . . . in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that [1] he or she was incapable of knowing or understanding the nature and quality of his or her act and [2] of distinguishing right from wrong at the time of the commission of the offense.[55]

The California Supreme Court, in *People v. Skinner*,[56] held that section 25(b) reinstates the M'Naghten test. The two prong test was intended to be applied as a disjunctive "or" rather than the conjunctive "and" test.[57] Additionally, the defendant is often found legally

47. R. PERKINS & R. BOYCE, *supra* note 17, at 928. Motive may be a determinant of guilt or innocence in an unusual case of homicide. For example, if someone kills a felon in order to prevent an atrocious felony, and his motive was to promote social security, the person is not guilty of murder, or any other offense, even though he had an intent to kill. *Id.* at 930.

48. *Id.* at 926.

49. *Id.*

50. *Id.* at 926-27.

51. *Id.* at 927.

52. *Id.* at 928-29. For example, one is guilty of bigamy if one intentionally takes two wives due to sincere religious convictions. *Id.* at 929. Similarly, when someone drowns his or her small children due to their love of those children, and they want to prevent them from living in poverty, that person is still guilty of murder. *Id.*

53. R. PERKINS & R. BOYCE, *supra* note 17, at 73.

54. CAL. PENAL CODE § 25 (West Supp. 1987); *see* People v. Skinner, 39 Cal. 3d 765, 768, 704 P.2d 752, 753, 217 Cal. Rptr. 685, 686 (1985).

55. CAL. PENAL CODE § 25(b) (West Supp. 1987).

56. 39 Cal. 3d 765, 704 P.2d 752, 217 Cal. Rptr. 685 (1985).

57. *Id.* at 775-77, 704 P.2d at 758-59, 217 Cal. Rptr. at 691-92.

insane when at the time of the offense he was so mentally deranged or diseased that he was not conscious of the wrongful nature of the act committed.[58] The Court in *Skinner* further clarified the concept of "wrong" in California Penal Code section 25(b) by stating that "a defendant who is incapable of understanding that his act is morally wrong is not criminally liable merely because he knows the act is unlawful."[59] Consequently, the concept of "wrong" is not limited to legal wrong.[60]

Furthermore, in California, a defendant charged with murder can no longer rebutt proof of malice aforethought by showing that his or her mental capacity was diminished by mental illness, mental defect or intoxication.[61] California Penal Code section 25(a) abolished the defense of diminished capacity.[62] Although the defendant is still permitted to produce psychiatric testimony regarding his or her mental condition, the ultimate issue on whether the defendant had the requisite mental state at the time of the offense is determined by the trier of fact.[63] Therefore, basically, the legislature has limited the use of expert testimony regarding defendant's mental condition.[64]

Unlike the California Penal Code, the Model Penal Code adopts a simpler and more direct method for the jury to determine whether a particular homicide is murder or manslaughter. Model Penal Code section 210.2(1) provides, in pertinent part, that "criminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life."[65]

Model Penal Code section 210.2(1)(a) focuses the inquiry on the defendant's subjective state of mind.[66] "[T]he prosecution must establish that the defendant engaged in conduct with the conscious objec-

58. *Id.* at 781-82, 704 P.2d at 762, 217 Cal. Rptr. at 695 (quoting People v. Willard, 150 Cal. 543, 554, 89 P. 124, 129 (1907)).

59. *Id.* at 783, 704 P.2d at 764, 217 Cal. Rptr. at 697.

60. *Id.*

61. *See* CAL. PENAL CODE § 25(a) (West Supp. 1987). The essence of a showing of diminished capacity is a "showing that the defendant's mental capacity was reduced by mental illness, mental defect or intoxication." People v. Castillo, 70 Cal. 2d 264, 270, 449 P.2d 449, 452, 74 Cal. Rptr. 385, 388 (1969).

62. CAL. PENAL CODE § 25(a) (West Supp. 1987).

63. People v. McCowan, 183 Cal. App. 3d 1, 14, 227 Cal. Rptr. 23, 30 (1986); People v. Whitler, 171 Cal. App. 3d 337, 341-42, 214 Cal. Rptr. 610, 613 (1985); *see also* CAL. PENAL CODE §§ 28-29 (West Supp. 1987).

64. *McCowan*, 182 Cal. App. 3d at 14, 227 Cal. Rptr. at 30.

65. MODEL PENAL CODE § 210.2(1) (1962).

66. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 210.2, at 20 (1980).

tive of causing death of another or at least with awareness that death of another was practically certain to result from his [or her] act."[67] Such purposeful or knowing homicide demonstrates an indifference to the value of human life.[68]

Model Penal Code section 210.2(l)(b) is similar to California's second-degree murder statute, when the killing is commited with an abandoned and malignant heart.[69] This subsection includes homicides caused by *extreme* recklessness without a purpose to kill.[70] Basically, recklessness, as defined in Model Penal Code section 2.02(2)(c), presupposes that the defendant is aware of creating a substantial homicidal risk.[71] Nonetheless, the character of defendant's conduct, whether it is lawful or not, is relevant in determining whether taking the risk amounts to such a deviation from ordinary conduct as to justify a finding of recklessness.[72] Thus, "inadvertent risk creation, however extravagant and unjustified, cannot be punished as murder. . . . [T]he actor must perceive and consciously disregard the risk of death of another before the conclusion of recklessness can be drawn."[73]

b. manslaughter

The crucial distinction between murder and manslaughter is the requirement of malice aforethought.[74] Manslaughter, as defined in California Penal Code section 192, "is the unlawful killing of a human being without malice."[75] Voluntary manslaughter is the unlawful killing of a human being without malice, resulting from a sudden quarrel or while acting in the heat of passion.[76] It is punishable by imprisonment in state prison for three, six or eleven years.[77] Involuntary manslaughter is the unlawful killing of a human being without malice upon "commission of an unlawful act, not amounting to felony; or in

67. *Id.* at 21.
68. *Id.* at 21-22.
69. *Compare* MODEL PENAL CODE § 210.2(1)(b) (1962) *with* CAL. PENAL CODE §§ 188-189 (West Supp. 1987); *see* 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 210.2, at 22 n.38 (1980).
70. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 210.2, at 22 (1980).
71. *Id.* at 21.
72. *Id.*
73. *Id.* at 27-28.
74. People v. Roberts, 51 Cal. App. 3d 125, 123 Cal. Rptr. 893 (1975); People v. Beyea, 38 Cal. App. 3d 176, 113 Cal. Rptr. 254 (1974).
75. CAL. PENAL CODE § 192 (West Supp. 1987).
76. *Id.* § 192(a).
77. *Id.* § 193(a).

the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection."[78] It is punishable by imprisonment in the state prison for two, three or four years.[79]

The Model Penal Code in a manner similar to the California Penal Code, recognizes certain factors that mitigate a criminal homicide to the lesser offense of manslaughter. Under Model Penal Code section 210.3(1):

> Criminal homicide constitutes manslaughter when: (a) it is committed recklessly; or (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shal [sic] be determined from the viewpoint of a person in the actor's situation under the circumstances as he [or she] believes them to be.[80]

The kind of recklessness required under Model Penal Code sections 210.2(1)(b) and 210.3(1)(a) is substantially the same and differs only in degree of culpability.[81] The trier of fact ultimately determines whether a certain recklessness is sufficient to justify a murder charge or whether the act is to be punished as manslaughter.[82]

Model Penal Code section 210.3(1)(b) includes the common law doctrine of provocation-heat of passion, but in a broader scope.[83] The drafters of the Model Penal Code recognized the common law's firm stance against individualization of the standard for determining adequacy of provocation.[84] Yet, some characteristics of the defendant must be considered.[85] For example, "[a] taunting attack that would seem trivial to the ordinary citizen may be extremely threatening to the blind man."[86] Consequently, the Model Penal Code places far more emphasis on the defendant's subjective mental state.[87]

Under Model Penal Code section 210.3(1)(b), the jury is required to consider the "actor's situation" and the "circumstances as he [or

78. *Id.* § 192(b).
79. *Id.* § 193(b).
80. MODEL PENAL CODE § 210.3(1) (1962).
81. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 210.3, at 53 (1980).
82. *Id.* § 210.2, at 22.
83. *Id.* § 210.3, at 53-54.
84. *Id.* at 56-57.
85. *Id.* at 56.
86. *Id.*
87. *Id.* at 54.

she] believes them to be."[88] The term "situation" is to be interpreted with a certain flexibility; it includes blindness, extreme grief and shock from traumatic injury.[89] The court determines which aspects of the defendant's "situation" shall be a relevant mitigating factor.[90]

There is also an objective element which requires a *reasonable* explanation or excuse for the defendant's disturbance or mental condition.[91] However, section 210.3(l)(b) provides that the reasonableness of such explanation or excuse be assessed from the view of a person in the actor's situation.[92] Accordingly, given the defendant's "situation" the jury ultimately determines the "reasonableness" of the defendant's conduct and excuse.[93]

2. Parent-child suicide (*oyako-shinju*)

A recent controversial California case, *People v. Kimura*,[94] attracted nation-wide attention because the defendant, Mrs. Fumiko Kimura, was charged with the first degree murder of her two children after attempting parent-child suicide.[95] Mrs. Kimura was emotionally shattered by her husband's disloyalty.[96] In accordance with her Japanese culture, she attempted to rid herself and her children from such humiliation.[97] "[Mrs. Kimura] did not want the shame and humiliation of . . . divorce. Instead, she chose death. Seeing her children as an extension of herself, she took their lives to complete her suicide successfully."[98] In Japan, a mother who kills herself and leaves her children behind is criticized more harshly than the mother who also takes the lives of her children.[99]

Oyako-shinju, which means parent-child suicide, is a common oc-

---

88. *Id.* at 62.
89. *Id.*
90. *Id.* at 72-73.
91. *Id.* at 50.
92. *Id.* at 62.
93. *Id.* at 72.
94. People v. Kimura, No. A-09133 (L.A. Super. Ct. 1985); Sherman, *supra* note 7, at 1, col. 3.
95. *See supra* notes 1-5 and accompanying text.
96. Hayashi, *supra* note 4, at 5, col. 1.
97. *Id.* at 5, col. 3.
98. *Id.* Mrs. Kimura explained that if she went without taking her children, the youngsters would be abused. The children would be seen as extensions of her and would be hated as well. L.A. Times, Nov. 22, 1985, pt. II, at 8, col. 3.
99. L.A. Times, Feb. 24, 1985, pt. I, at 3, col. 1. The observation was made by Dr. Mamoru Iga, a Japanese sociologist at California State University at Northridge. *Id.*

currence in Japan.[100] It has long been a part of Japanese culture.[101] The Japanese prefer to die rather than to live in humiliation, and suicide is considered an honorable way of dying.[102] "Parent-child suicide is caused by the inseparable parent-child bond."[103] Although *oyako-shinju* is not murder in Japan, it is still against the law.[104] *Oyako-shinju* is punishable as involuntary manslaughter and generally results in a light suspended sentence, probation and supervised rehabilitation.[105]

Consequently, 4,000 members of the Japanese community in Los Angeles filed a petition supporting Mrs. Kimura's actions due to their common cultural heritage.[106] The petitioners claimed that Mrs. Kimura's actions would not be considered murder in Japan.[107] Additionally, the petitioners asked the prosecutor to apply modern Japanese law since the roots of Mrs. Kimura's Japanese culture[108] were the underlying cause of her acts.[109]

Contrary to the petitioners' demands, the prosecutor, defense attorney, and presiding judge agreed not to consider Mrs. Kimura's cultural background.[110] Furthermore, Mrs. Kimura faced the death penalty because the district attorney's office had alleged the special circumstance of multiple murder.[111] Mrs. Kimura pleaded not guilty

---

100. Hayashi, *supra* note 4, at 5, col. 1. "In Japan, *shinju* is given the same slight media attention as fatal traffic accidents are given in America." *Id.*

101. *Id.* at 5, cols. 1-2.

102. *Id.* at 5, col. 3.

103. *Id.* at 5, col. 2. Mrs. Kimura seemed to embrace Japanese tradition even more strongly after the birth of her children. L.A. Times, Feb. 24, 1985, pt. I, at 30, col. 1. There was strong evidence in support of her devotion to her children. *Id.*

104. Sherman, *supra* note 7, at 26, col. 1.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* Although Mrs. Kimura had lived in the United States for fourteen years, she remained Japanese in her thinking and lifestyle. L.A. Times, Feb. 24, 1985, pt. I, at 3, col. 1. Suicide was a central theme in her recent marital troubles since she was not the only one considering it; not only did her husband's Japanese mistress threaten suicide, so did Mr. Kimura after his wife's suicide attempt. *Id.*

109. Sherman, *supra* note 7, at 26, col. 1.

110. The Deputy District Attorney, Lauren L. Weis, stated that the decision to accept Mrs. Kimura's plea "was not based on the fact that Mrs. Kimura was Japanese, or that this kind of thing does happen at times in Japan." L.A. Times, Oct. 19, 1985, pt. II, at 1, cols. 2-3. Additionally, after the court's holding, both Ms. Weis and Gerald L. Klausner, the defense attorney, stated that "cultural considerations played no role in the prosecution's recommendation of probation." L.A. Times, Nov. 22, 1985, pt. II, at 8, col. 3. Finally, the judge stated that the petitions supporting Mrs. Kimura "played no part in his decision." *Id.* at 1, col. 5.

111. L.A. Times, Apr. 19, 1985, pt. II, at 1, col. 6.

to two counts of murder and two counts of felony child endangering.[112] After entering into a plea bargain, Mrs. Kimura was allowed to plead no contest to two counts of voluntary manslaughter.[113] The court sentenced Mrs. Kimura to one year in prison and five years probation.[114]

According to the prosecution, the determinant factor which reduced Mrs. Kimura's charge was that "she was not a rational person at the time of the act."[115] Psychiatrists testified that Mrs. Kimura was suffering from psychotic depression and delusions when she attempted to commit parent-child suicide.[116] One of the doctors stated that it was an "impulsive, unpremeditated act."[117] Furthermore, psychiatric reports indicated that Mrs. Kimura failed to have the required malice aforethought at the time of the crime.[118]

Therefore, the court in *Kimura* refused to consider Mrs. Kimura's Japanese culture and instead opted to base its judgment on lack of sanity and concomitant emotional illness. The end result, in effect, was the same as if the case had been decided by a Japanese court, namely, that Mrs. Kimura was guilty of manslaughter. The *Kimura* court applied a different means to reach the same end.

3. Application of the California murder and manslaughter statute

a. first-degree murder

Mrs. Kimura would be guilty of first degree murder under the California Penal Code section 189 if she (1) intended to kill her children (with malice aforethought) and (2) premeditated and deliberated her suicide attempt.[119]

Mrs. Kimura's act of carrying her children into the ocean would create a strong presumption that she intended to kill herself and her

---

112. *Id.*

113. L.A. Times, Oct. 19, 1985, pt. II, at 1, col. 1.

114. L.A. Times, Nov. 22, 1985, pt. II, at 1, col. 5. When the court sentenced Mrs. Kimura to one year in prison, on November 21, 1985, she had already served her time. *Id.* She had been in custody for 297 days, plus she received 149 days for good conduct. *Id.* The judge further stated that Mrs. Kimura had to undergo counseling. *Id.*

115. *Id.* at 8, col. 3. This Comment assumes that the rational person standard as applied in this context means how the average rational person would act in the United States rather than in Japan. In the United States, the "reasonable man" probably would not commit parent-child suicide. *See* Howard, *What Colour is the "Reasonable Man"?*, 1961 CRIM. L. REV. 41.

116. L.A. Times, Nov. 22, 1985, pt. II, at 8, col. 1.

117. *Id.*

118. L.A. Times, Oct. 19, 1985, pt. II, at 3, col. 5.

119. *See supra* text accompanying notes 24-28.

young children. Mrs. Kimura wanted to rid herself and her children of the shame and humiliation of divorce.[120] Thus, one could infer from the facts that Mrs. Kimura realized that her actions would result in her death and the death of her children.

On the other hand, one could argue that Mrs. Kimura did not intend to kill her children since she considered her children to be an extension of herself.[121] Consequently, when Mrs. Kimura committed *oyako-shinju*, she only intended to kill herself.[122] However, it is highly unlikely that a California court would ever accept such an explanation. Instead, a court, without considering Mrs. Kimura's culture, would probably find that she intended to kill her children.[123]

The California Supreme Court in *People v. Anderson*[124] recognized that the legislative classification of murder into two degrees would be meaningless if premeditation and deliberation were construed as requiring more reflection than may be involved in a specific intent crime.[125] In *Anderson*, the three types of evidence sufficient to sustain a finding of premeditation and deliberation were identified as: (1) facts showing that the defendant engaged in planning activity *prior* to the killing; (2) proof of the defendant's *prior* conduct with the victim from which the jury could reasonably infer a motive for a planned killing; and (3) evidence that the manner of the killing was so particular and exacting that the jury could infer that it was carried out according to a preconceived design and for a specific reason.[126]

In *Kimura*, the evidence fails to support the conclusion that Mrs. Kimura's actions were premeditated and deliberate. The evidence of planning activity is especially weak. The day Mrs. Kimura attempted to commit suicide, she took her children to their appointment with the pediatrician.[127] She left the office after she was told to wait for the doctor.[128] Mrs. Kimura then went to a travel agency to purchase airline tickets for herself and her children to go back to Japan.[129] From there, Mrs. Kimura rode the bus to the Santa Monica beach.[130] From

120. Hayashi, *supra* note 4, at 5, col. 3.
121. *Id.*
122. *See* L.A. Times, Feb. 24, 1985, pt. I, at 3, col. 1.
123. *See supra* text accompanying notes 112-14.
124. 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968).
125. *Id.* at 26, 447 P.2d at 948, 73 Cal. Rptr. at 556.
126. *Id.* at 26-27, 447 P.2d at 949, 73 Cal. Rptr. at 557.
127. L.A. Times, Feb. 24, 1985, pt. I, at 30, col. 2.
128. *Id.*
129. *Id.*
130. L.A. Times, Nov. 22, 1985, pt. II, at 8, col. 5.

these activities, it is arguable that Mrs. Kimura was not acting pursuant to a preconceived design to commit parent-child suicide.

Additionally, Mrs. Kimura was devoted to her children's safety and care.[131] Her entire life revolved around taking care of her children.[132] "She kept a written schedule of each day's activities, alloting specific times for cleaning, cooking and playing with her son."[133] Therefore, Mrs. Kimura had no apparent motive to harm her children.

Finally, the fact that Mrs. Kimura walked slowly across the Santa Monica beach heading towards the ocean is inconsistent with the notion that the *manner* of the killing was so particular or exacting as to infer a preconceived design on Mrs. Kimura's part to kill her children.[134] The reason is that in a public area there is a strong likelihood that someone would detect the danger and save her children from drowning.

Nonetheless, a jury may disagree that Mrs. Kimura's actions were hasty and impulsive. Instead, the jury, in recognizing Mrs. Kimura's cultural background and the prevalence of parent-child suicide in Japan,[135] may infer that Mrs. Kimura premeditated the suicide attempt during her bus trip to Santa Monica. Under the first prong of the *Anderson* test, the duration of time between the calculated, deliberate judgment or plan and the act itself is not the determinative factor.[136]

> The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes . . . those homicides . . . which are the result of mere unconsidered or rash impulse hastily executed.[137]

Additionally, the jury may find that Mrs. Kimura had a strong motive to commit parent-child suicide. Due to Mrs. Kimura's Japanese culture, she felt obligated to take the lives of her children in or-

---

131. L.A. Times, Feb. 24, 1985, pt. I, at 30, col. 1.

132. *Id.*

133. *Id.*

134. *Anderson*, 70 Cal.2d at 27, 447 P.2d at 949, 73 Cal. Rptr. at 557.

135. Hayashi, *supra* note 4, at 5, col. 1.

136. People v. Velasquez, 26 Cal. 3d 425, 435, 606 P.2d 341, 346, 162 Cal. Rptr. 306, 311 (1980).

137. *Id.* (citing People v. Thomas, 25 Cal. 2d 880, 900-01, 156 P.2d 7, 18 (1945)).

der to save them from future disgrace.[138] Consequently, if the jury considered Mrs. Kimura's cultural background, she might have been found guilty of first degree murder.

b. second degree murder

Assuming a court maintains that there is insufficient evidence to support a finding that Mrs. Kimura premeditated and deliberated the suicide attempt, she could be convicted of second degree murder. For second degree murder, malice may be implied where there is a showing of an abandoned and malignant heart.[139] Such a condition is met when the defendant commits an act with a: (l) high probability that it will result in death; (2) base anti-social motive; and (3) wanton disregard for human life.[140]

Although there was substantial evidence of Mrs. Kimura's love and devotion to her children,[141] the jury could still hold Mrs. Kimura guilty of second degree murder. The courts have consistently stated that "[i]ll will toward or hatred of the victim are not requisites of malice."[142] However, there was certainly a high probability that Mrs. Kimura's act of walking into the ocean with her two young children would result in her children's tragic death. Therefore, the jury could infer that Mrs. Kimura acted with wanton disregard for the lives of her children.

c. voluntary manslaughter

"[V]oluntary manslaughter in the heat of passion is unique in that the statutory definition of the offense specifies the circumstances in which the law will presume the absence of malice, the element which distinguishes murder from manslaughter."[143] The reason for such a presumption is that the legislature has recognized the frailty of human nature when subject to great provocation and has decided to impose a lighter penalty under such circumstances.[144] Thus, even though a killing was intentional, absence of malice is presumed if it

---

138. *See supra* text accompanying notes 96-99.

139. *See supra* text accompanying notes 36-37.

140. People v. Watson, 30 Cal. 3d 290, 299, 637 P.2d 279, 284, 179 Cal. Rptr. 43, 48-49 (1981).

141. *See supra* text accompanying notes 131-33.

142. People v. Sedeno, 10 Cal. 3d 703, 722, 518 P.2d 913, 926, 112 Cal. Rptr. 1, 14 (1974).

143. *Id.* at 719, 518 P.2d at 923, 112 Cal. Rptr. at 11.

144. People v. Washington, 58 Cal. App. 3d 620, 624, 130 Cal. Rptr. 96, 98 (1976) (quoting People v. Bender, 27 Cal. 2d 164, 181, 163 P.2d 8, 18 (1945)).

was committed in a heat of passion upon sufficient provocation.[145]

In the present case, there was evidence that Mrs. Kimura was continuously provoked by her husband's mistress. The mistress contacted Mrs. Kimura ten days before the drownings.[146] She disclosed to Mrs. Kimura the details of Mr. Kimura's infidelity; the mistress offered to take her own life.[147] Mrs. Kimura was in great anguish after realizing the extent of her husband's love for the mistress.[148] Mrs. Kimura felt that she was an inadequate wife and a bad mother.[149] Hence, it can be contended that due to the provocative conduct of the mistress and Mrs. Kimura's cultural background, Mrs. Kimura's reasoning was obscured by intense emotions during the suicide attempt.

However, in order for a court to find Mrs. Kimura guilty of voluntary manslaughter under the heat of passion theory, both the objective and subjective elements need to be satisfied.[150] The objective standard requires that the heat of passion:

> be such a passion as would naturally be aroused in the mind of an ordinary reasonable person under the given facts and circumstances, and . . . consequently, no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless . . . the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man. . . . For the fundamental . . . inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion . . . to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.[151]

"The subjective element requires that the actor be under the actual influence of a strong passion at the time of the homicide. . . . That (passion) need not mean (rage) or (anger) but may be any vio-

145. *Sedeno*, 10 Cal. 3d at 719, 518 P.2d at 923, 112 Cal. Rptr. at 11.

146. L.A. Times, Feb. 24, 1985, pt. I, at 30, col. 1.

147. *Id.* at cols. 1-2.

148. *Id.* at col. 2.

149. L.A. Times, Nov. 22, 1985, pt. II, at 8, col. 1.

150. *See* People v. Thomas C., 183 Cal. App. 3d 786, 798, 228 Cal. Rptr. 430, 437 (1986).

151. *Id.* at 798, 228 Cal. Rptr. at 438 (emphasis added by court in People v. Thomas C.) (quoting People v. Wickersham, 32 Cal. 3d 307, 326, 650 P.2d 311, 321, 185 Cal. Rptr. 436, 446 (1982) (footnote omitted)). California courts have strictly construed the reasonable man test. For example, in *People v. Washington*, the court held that the jury properly determined defendant's heat of passion defense by standards applicable to the average male rather than the average homosexual. *Washington*, 58 Cal. App. 3d at 625, 130 Cal. Rptr. at 98.

lent, intense, high-wrought or enthusiastic emotion."[152]

Mrs. Kimura's actions probably would qualify under the subjective test. She certainly was under the actual influence of a strong passion at the time of the suicide attempt.[153] This conclusion is supported by the psychiatrists' reports that Mrs. Kimura was suffering from psychotic depression and delusions.[154] Consequently, it would be difficult for the prosecutor to contend that the suicide attempt did not occur in the heat of passion because Mrs. Kimura had "cooled off."[155]

Nonetheless, the jury could find that the objective element had not been met. Although Mrs. Kimura was going through a tormenting period, the provocation may be insufficient to cause an ordinary man or woman of average disposition to harbor such an extreme passion. Accordingly, the court could hold that an ordinary reasonable man or woman would not act so rashly as to commit parent-child suicide after learning about their spouse's disloyalty.[156]

However, a Japanese jury applying an objective test would probably not find it unreasonable for a dedicated and loving mother to rid herself and her children from such a disgrace.[157] Mrs. Kimura's pain and suffering and sense of degradation would be readily understood under Japanese customs.[158] A Japanese jury might consider Mrs. Kimura's actions to be an honorable way of dying.[159]

Even assuming California law would recognize Mrs. Kimura's sense of shame in applying this objective test, the California Court of Appeals in *People v. Spurlin*[160] found that voluntary manslaughter generally applies to instances where the provocation was caused by the victim.[161] Although the California Supreme Court has not di-

152. *Wickersham*, 32 Cal. 3d at 327, 650 P.2d at 321, 185 Cal. Rptr. at 446 (quoting People v. Berry, 18 Cal. 3d 509, 515, 556 P.2d 777, 780, 134 Cal. Rptr. 415, 418 (1976)).

153. L.A. Times, Oct. 19, 1985, pt. II, at 3, col. 6; *see also* L.A. Times, Feb. 24, 1985, pt. I, at 31, col. 1.

154. L.A. Times, Nov. 22, 1985, pt. II, at 8, col. 1.

155. *See* People v. Berry, 18 Cal. 3d 509, 516, 556 P.2d 777, 781, 134 Cal. Rptr. 415, 419 (1976). The cooling period is when "sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return." *Wickersham*, 32 Cal. 3d at 327, 650 P.2d at 321, 185 Cal. Rptr. at 446.

156. *See supra* text accompanying notes 95-99.

157. Hayashi, *supra* note 4, at 5, cols. 2-3.

158. *Id.*

159. L.A. Times, Oct. 19, 1985, pt. II, at 1, col. 2.

160. 156 Cal. App. 3d 119, 202 Cal. Rptr. 663 (1984).

161. *Id.* at 125-26, 202 Cal. Rptr. at 667. In *Spurlin*, the court found that the defendant was not entitled to a manslaughter instruction with reference to the killing of his son. *Id.* at

rectly ruled on this issue, decisions subsequent to *Spurlin* have required provocatory conduct from the victim.[162] Accordingly, in *Kimura*, a court following *Spurlin* would not entitle Mrs. Kimura to a heat of passion defense since the victims, her young children, did not cause the provocation.[163]

4. Application of the Model Penal Code

Under Model Penal Code section 210.2(1),[164] Mrs. Kimura could be convicted of murder. The jury could find that Mrs. Kimura was aware that walking into the ocean with her two young children would lead to their death.[165] The jury could also infer that due to the high homicidal risk of a parent-child suicide attempt, Mrs. Kimura's actions exhibited an *extreme* reckless disregard for the life of her children.[166]

However, according to Model Penal Code section 210.3(1),[167] a homicide which would otherwise be "murder" can be reduced to manslaughter if it is committed under the influence of an extreme emotional or mental disturbance for which there is a reasonable explanation.[168] Before the trier of fact determines the reasonableness of Mrs. Kimura's emotional or mental state, it is necessary to first comprehend her "situation".[169]

Mrs. Kimura's "situation" is quite different from that of the average American woman. Mrs. Kimura is a traditional Japanese woman who strongly adheres to her cultural upbringing.[170] She "embrace[d] Japanese tradition even more strongly after the birth of her children."[171] Unlike most American women, Mrs. Kimura felt compelled to blame herself for her husband's infidelity and refused to allow her children to bear the humiliation.[172]

126, 202 Cal. Rptr. at 667. The court reasoned that defendant's son had slept throughout the evening, thus he could not have provoked the defendant to a heat of passion. *Id.* However, the court stated that the trial court correctly gave the manslaughter instructions as to defendant's wife's death since she caused the provocation. *Id.*

162. *Thomas C.*, 183 Cal. App. 3d at 798, 228 Cal. Rptr. at 437-38.
163. *See supra* text accompanying notes 146-49.
164. *See supra* text accompanying note 65.
165. *See supra* text accompanying note 67.
166. *See supra* text accompanying notes 69-73.
167. *See supra* text accompanying note 80.
168. *See supra* text accompanying notes 88-93.
169. *Id.*
170. L.A. Times, Feb. 24, 1985, pt. I, at 30, col. 1.
171. *Id.*
172. L.A. Times, Nov. 22, 1985, pt. II, at 8, cols. 4-6.

After comprehending Mrs. Kimura's "situation", the jury could more fully evaluate the reasonableness of Mrs. Kimura's conduct and emotional state. Under all the circumstances, it would not be that unreasonable for a woman in Mrs. Kimura's situation to resolve her problems in the honorable, traditional manner of *oyako-shinju*.[173]

5. A comparative assessment of the codes

Under the California law, if the court found that the killing was intentional, Mrs. Kimura would be presumed to have harbored malice aforethought.[174] Mrs. Kimura would then be prosecuted for either first or second degree murder unless there was a mitigating factor.[175] Under the current California law, the provocation-heat of passion defense which reduces the gravity of the crime to voluntary manslaughter does not seem to apply to Kimura's case.[176] Consequently, Mrs. Kimura's attorney recognized that this mitigating factor was not available and contended that Mrs. Kimura was legally insane at the time of the incident.[177]

Model Penal Code section 210.3(l)[178] has various advantages over California Penal Code section 192.[179] First, unlike the California law regarding the doctrine of voluntary manslaughter-heat of passion, the Model Penal Code does not require that the defendant's emotional distress arise from the provocative acts perpetrated by the victim.[180] Instead, Model Penal Code section 210.3(l)(b) encompasses a greater variety of circumstances where the defendant is "adequately provoked."[181]

Second, under California Penal Code section 192, the legislature has conveniently reduced murder to manslaughter by concluding that heat of passion negates malice aforethought even when the defendant had the intent to kill.[182] More properly stated, the law recognizes the significance of inquiring into the reasons for the defendant's formulation of the intent to kill.[183] The Model Penal Code provides that

173. *See supra* text accompanying notes 100-02.
174. *See supra* text accompanying notes 27-32.
175. *See supra* text accompanying notes 42-45, 53.
176. *See supra* text accompanying notes 143-63.
177. L.A. Times, Mar. 29, 1985, pt. II, at 3, col. 2.
178. MODEL PENAL CODE § 210.3(1) (1962).
179. CAL. PENAL CODE § 192 (West Supp. 1987).
180. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 210.3, at 60-61 (1980).
181. *Id.*
182. *See supra* text accompanying notes 143-44.
183. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 210.3, at 54-55 (1980).

"[o]ne who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence."[184] Hence, the Model Penal Code concedes that some personal characteristics of the defendant must be considered.[185]

Unlike California Penal Code section 192, the Model Penal Code permits the jury to inquire into the defendant's "situation" and thereby intelligently determine whether her actions were reasonable.[186] Consequently, it is preferable to apply a more flexible test such as Model Penal Code section 210.3(1)(b) instead of mitigating Kimura's offense to manslaughter by claiming she was insane.[187]

As previously discussed, California has abolished the diminished capacity defense.[188] While the Model Penal Code might seem to incorporate the diminished capacity defense, it has not done so.[189] There may be certain situations where the defendant's mental condition may have no just bearing on his or her intentional homicide.[190] Nonetheless, there are other situations, such as Mrs. Kimura's culture, which are relevant to the moral assessment or "reasonableness"[191] of a defendant's conduct.

It is a given fact that there are certain minimal standards of conduct to which every member of the society must conform. Conformance with these standards is achieved by penalizing the wrongdoer for disregarding the law. However, in Kimura's case the loss of her children was her greatest punishment.[192] Mrs. Kimura is certainly not a threat to society.[193] Moreover, a sentence of voluntary manslaughter pursuant to Model Penal Code section 210.3(l)(b) may provide a sufficient deterrent to dissuade other persons of Japanese ancestry living in the United States from committing the same offense. Therefore, due to the unusual nature of this case, the court should have either

184. *Id.* at 55.

185. *Id.* at 54-55.

186. *See supra* text accompanying notes 88-93.

187. *See supra* text accompanying note 177.

188. *See supra* text accompanying notes 62-64.

189. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 210.3, at 72 (1980).

190. *Id.* Under Model Penal Code section 210.3, although the defendant's mental condition may be abnormal, the jury still has to determine the "reasonableness" of the defendant's conduct. *Id.* Thus, unlike the defense of diminished capacity, "the Model Code does not authorize mitigation on the basis of individual abnormality without any measure of the defendant against an objective measure." *Id.*

191. *Id.*

192. L.A. Times, Feb. 24, 1985, pt. I, at 31, col. 6.

193. *Id.*

allowed Mrs. Kimura's cultural background to be introduced as a separate mitigating factor, or permitted the defense to introduce to the jury the cultural implications of her act in order to properly assess Mrs. Kimura's situation.[194]

C. *California Law and the Model Penal Code: Marriage by Capture*

1. The rape statutes

California Penal Code section 261 defines rape as an act of sexual intercourse accomplished with a person not the spouse of the perpetrator under any of the following circumstances:

> (2) where [the act is] accomplished against a person's will by means of force or fear of immediate and unlawful bodily injury on the person or another . . . (5) where [the victim] submits under the [erroneous] belief that the person committing the act is the victim's spouse, and this belief is induced by . . . the accused . . . (6) where the act is accomplished against the victim's will by threatening to retaliate in the future [for example, by kidnapping, false imprisonment or infliction of extreme pain, serious bodily injury or death] against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat.[195]

Rape, as defined in California Penal Code section 261, is punishable by imprisonment in a state prison for up to eight years.[196]

The lack of consent is a determinative factor in the statute. In California, consent is defined as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."[197] However, the statute does not require an affirmative exercise of the woman's will in opposition to the act if she is

194. *See supra* text accompanying notes 88-93.

195. CAL. PENAL CODE § 261 (West Supp. 1987). The other circumstances which amount to rape under § 261 are: (1) the accused knows or reasonably should have known that the person is incapable of giving legal consent because of a mental disorder or developmental or physical disability, *id.* § 261(1); (2) the victim is prevented from resisting due to anesthetic, intoxication, or any controlled substance, administered by the accused, *id.* § 261(3); (3) the accused knows that the person is at the time unconscious of the nature of the act, *id.* § 261(4); (4) the act is accomplished against the victim's will by threatening to use a public authority to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official, *id.* § 261(7).

196. *Id.* § 264.

197. *Id.* § 261.6.

incapable of using force at the time.[198] Frequently, courts today state that the lack of consent can be established by the woman's age, strength, the surrounding facts and other attending circumstances.[199]

Similar to California Penal Code section 261, Model Penal Code section 213.1(1) limits the offense of rape to cases where the man has had sexual intercourse with a female who is not his wife.[200] However, the Model Code is distinguishable from California Penal Code section 261. The Model Code introduces a grading scheme by dividing rape into three felony levels.[201] The most serious offense is aggression resulting in serious bodily injury or when no voluntary social and sexual relationship exists between the parties.[202] The man is guilty of second degree rape when he compels the victim to submit by force or by certain specific serious threats.[203]

Gross sexual offense, the third degree felony under the Model Penal Code, was punishable as rape under the common law.[204] Model Penal Code section 213.1(2)(a) limits third degree felony rape to instances where the threat is presumably not serious and force is not used.[205] For example, gross sexual offense is found where the accused compels the woman to submit by any threat that would prevent resistance by a woman of ordinary resolution, or the woman mistakenly believes the existence of a marital relationship between them.[206]

Model Penal Code section 213.1 thus departs from the single-category approach to the punishment of rape by creating grading distinctions among the different forms of the offense.[207] The Model Code focuses on the culpability of the perpetrator, the coercive conduct and the degree of harm inflicted on the victim.[208] The Model

198. *See* R. PERKINS & R. BOYCE, *supra* note 17, at 211-12.

199. *Id.*

200. MODEL PENAL CODE § 213.1 (1962).

201. *Id.*

202. *Id.*

203. *Id.* Furthermore, the defendant is guilty of second degree rape if (1) he has compelled the woman to submit by substantially impairing her capacity to appraise or control her conduct by administering without her knowledge drugs or other intoxicants; or (2) the woman is unconscious; or (3) the woman is less than 10 years old. *Id.*

204. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 213, at 271 (1980).

205. MODEL PENAL CODE § 213.1(2)(a) (1962).

206. *Id.* 213.1(2)(a),(c). Other instances of gross sexual offense include where the man knows the woman suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct or where the man knows that the woman is unconscious of the act. *Id.* 213.1(2)(b)-(c).

207. *Id.* § 213.1.

208. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 213.1, at 280 (1980).

Code reasons that rape "is the only form of violent criminal assault in which the physical act accomplished by the offender is an act which may, under other circumstances, be desirable to the victim."[209] "This unique feature of the offense necessitates the drawing of a line between forcible rape on the one hand and reluctant submission on the other, between true aggression and desired intimacy."[210]

2. Marriage by capture (*zij poj niam*)

Another cultural conflict confronting American courts is the traditional marriage ritual of the Hmongs, labeled "marriage by capture" by anthropologists and "rape" by the American criminal judiciary. Prior to the Hmongs arrival in the United States, the Hmongs were nomadic farmers from the isolated hills of Laos.[211] Due to the strategic location of their homeland, which was between Laos and Vietnam, the United States Central Intelligence Agency obtained the assistance of the Hmongs to fight the North Vietnamese and Laotian communists and to rescue downed American flyers in North Vietnam.[212] When the United States' military involvement in Vietnam ended, approximately 70,000 Hmongs in Laos were killed by revenge-seeking communists.[213] Consequently, since 1980, an estimated 30,000 Hmongs have migrated to the San Joaquin Valley near Fresno, California.[214]

---

209. Shapo, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1503 (1975), *quoted in* 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 213.1, at 279 (1980).

210. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 213.1 at 279-80 (1980).

211. Sherman, *When Cultures Collide*, CAL. LAW., Jan. 1986, at 33, 34.

212. *Id.*

213. Wall St. J., Feb. 16, 1983, at 1, col. 1. "[The Hmongs] were perhaps America's most tenacious and loyal ally in Southeast Asia, losing 50,000 people, or 10% of their population, by the time the United States' 'secret war' in Laos ended in 1975." *Id.*

214. Sherman, *supra* note 211, at 33. In the last three decades, more than 60,000 Hmong refugees have come to live in the United States. L.A. Times, Apr. 7, 1985, pt. I, at 1, col. 2. Of all the Asians that have immigrated to the United States, the Hmongs have had the most difficulty assimilating into the American culture. *Id.* at 30. The Hmongs had no written language of their own until thirty years ago. Sherman, *supra* note 211, at 34. Furthermore, their language has no past tense and they have no conception of distance. Christian Science Monitor, Mar. 30, 1981, at B13, col. 2.

Law enforcement officials believe that the Hmongs are generally law-abiding citizens and are far more often victims, rather than perpetrators, of crime. L.A. Times, Apr. 7, 1985, pt. I, at 3, col. 1. Providence police say they do not recall a single Hmong being arrested for a crime. Wall St. J., Feb. 16, 1983, at 25, col. 3. Instead, "[d]ozens of Hmong have had their apartments burglarized and cars stolen, and some Hmong children have been beaten walking home from school. They seldom complain to the police because they still feel like 'guests' in America." *Id.*

In *People v. Moua*,[215] a Hmong woman's family filed rape and kidnapping charges against Kong Moua, a Hmong man, for performing marriage by capture.[216] This marriage ritual is a legitimate form of matrimony practiced by Hmong tribesmen and begins with the man engaging in ritualized flirtation.[217] The woman responds by giving the man a token signifying acceptance of the courtship.[218] The man is then required to take the woman to his family's house in order to consummate the union.[219] According to Hmong tradition, the woman is required to protest: "No, no, no, I'm not ready."[220] If she doesn't make overt protestations, such as weeping and moaning, she is regarded as insufficiently virtuous and undesirable.[221] The Hmong man is required to ignore her mock objections, and firmly lead her into the bedroom and consummate the marriage.[222] If the suitor is not assertive enough to take the initiative, he is regarded as too weak to be her husband.[223]

This Hmong marriage ritual was performed by Moua and led to his arrest on rape and kidnapping charges.[224] However, Moua claimed that he had received all the proper cultural signals from the victim, and thus, he believed that she would not object to the marriage ritual.[225] For example, during the New Year's celebration, a traditional time for courting, they had exchanged letters and tokens of affection which led him to believe that she wanted to marry him.[226]

The court in *Moua* had to determine if the victim's protests were real and were not merely culturally oriented.[227] The prosecutor and judge believed both the defendant, who genuinely thought the woman wanted to have the union consummated, and the woman, who really did not consent.[228] The defendant was allowed to plea bargain to the

215. People v. Moua, No. 315972-0 (Fresno Super. Ct.); *see* Sherman, *supra* note 7, at 27, col. 1.

216. *Id.*

217. Dershowitz, *'Marriage by Capture' Runs into The Law of Rape*, Wall St. J., June 14, 1985, at 5, col. 1.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Sherman, *supra* note 7, at 27, col. 1.

225. *Id.* at 36.

226. *Id.*

227. Dershowitz, *supra* note 217, at 5, col. 2.

228. *Id.* at cols. 1-2. The plaintiff's attorney insisted that the plaintiff was Americanized

misdemeanor of false imprisonment and the rape and kidnapping charges were dropped.[229] The judge sentenced Moua to ninety days in prison.[230] After the judge's ruling, the prosecutor conceded that the court had considered the cultural defense to a certain extent.[231]

In contrast with the court in *Kimura*, the court in *Moua* was apparently more candid in its consideration of the Hmong marriage rituals and the cultural difficulties that subject Hmong men to the American rape laws. In fact, the judge, who presided over the *Moua* case, was quoted as saying that the reduction of charges to misdemeanor false imprisonment gave him "leeway to get into all these cultural issues and to try to tailor a sentence that would fulfill both . . . [American] needs and the Hmong needs."[232] However, as both *Kimura* and *Moua* illustrate, the recurring problem of reconciling what is socially accepted and ingrained in one culture, and a criminal act in another, continues to face the American courts.

3. Application of the California rape statute

Protecting society, punishing and deterring the defendant and other Hmong men from such criminal conduct (marriage by capture) are the major objectives of sentencing.[233] Under California Penal Code section 261(2),[234] Moua's matrimonial ritual could constitute rape. The victim in *Moua* satisfied the first essential requirement of California Penal Code section 261; she was not married to the perpetrator, Moua.[235] Moreover, the consummation was apparently against her will because she repeatedly and sincerely stated that she was not consenting to his actions.[236] Additionally, Moua's traditional forceful behavior may be sufficient to trigger section 261(2) which requires the use of force or coercion.[237]

Alternatively, Moua may be prosecuted for rape pursuant to Cal-

---

and had rejected the Hmong tradition. Thompson, *supra* note 6, at 26, col. 4. He further pointed out that the plaintiff had the right not to be kidnapped and raped against her will. *Id.*

229. Sherman, *supra* note 7, at 27, col. 1.

230. *Id.*

231. Thompson, *supra* note 6, at 26, col. 6.

232. Sherman, *supra* note 211, at 36.

233. *See* CAL. R. CT. § 410.

234. *See supra* text accompanying note 195.

235. *See* Sherman, *supra* note 211, at 33.

236. Dershowitz, *supra* note 217, at 5, cols. 1-2.

237. *See supra* text accompanying note 195.

ifornia Penal Code section 261(6)[238] if the women submitted to Moua due to fear of future retaliation such as kidnapping or false imprisonment.

Furthermore, it can be contended that Moua's act may constitute rape under California Penal Code section 261(5).[239] The assertion would be that Moua induced the Hmong woman to consummate the union by deceiving her into believing that according to the Hmong culture, since they were sharing the same bed, they were presently married. She thereby submitted under the mistaken belief that Moua was her husband. Such inducement, which results in her passive submission, is rape under California Penal Code section 261(5). Similarly, Model Penal Code section 213.1(2)[240] penalizes the defendant for seducing a woman by deceiving her as to their marital status. However, under the Model Penal Code, the defendant is charged with gross sexual imposition instead of first degree rape as in California Penal Code section 261(5).[241]

Nevertheless, this is a weak argument because both California Penal Code section 261(5) and Model Penal Code section 213.1(2) were drafted to cover different situations. For example, they were intended to cover instances where the defendant impersonates the victim's husband, or when the defendant induces the woman to enter a void marriage by deceiving her as to his eligibility to marry, or when the man stages a sham marriage to create the false supposition that they were legally married.[242]

4. Application of the Model Penal Code

Under California Penal Code section 261, Moua's action could be construed as first degree rape since the various types of rape are lumped into a single category. Conversely, under the three-tier scheme of Model Penal Code section 213.1, Moua's action would not amount to first degree rape. First, Moua's matrimonial ritual would not constitute first degree rape under Model Penal Code section 213.1 because there was an existing social relationship between them.[243] When determining the degree of rape, the Model Penal Code consid-

238. *Id.* It is not clear from the facts of the case whether the woman feared that Moua would retaliate in the future.

239. *Id.*

240. *See supra* text accompanying notes 205-06.

241. *Id.*

242. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 213.1, at 332 (1980).

243. *See supra* text accompanying notes 225-26.

ers whether the perpetrator was a total stranger to the victim.[244] "The law of rape protects against unwanted sexual intimacy, and it is reasonable to believe that such conduct is especially shocking and injurious when the actor is a stranger."[245]

Secondly, according to Model Penal Code section 213.1, the " 'no prior relationship' provision for escalating the penalty of rape is also responsive to . . . the magnitude of harm involved."[246] Moua did not inflict *serious* bodily injury on anyone. Thus, under Model Penal Code section 213.1, Moua would not be guilty of first degree rape because he had a prior social relationship with the victim and because he failed to inflict *serious* bodily injury on her.

Nonetheless, Moua could be prosecuted under Model Penal Code section 213.1 for second or third degree rape. The focus of the inquiry for second degree rape is on the defendant's degree of force and the seriousness of the defendant's accused threats.[247] If Moua threatened the victim with imminent death, kidnapping or serious bodily injury, he could be penalized for second degree rape.[248] However, if he threatened the victim with a less serious harm, Moua could be found guilty of third degree rape (also known as gross sexual imposition) pursuant to Model Penal Code section 213.2.[249]

5. A comparative assessment of the codes

One perceived problem with California Penal Code section 261 is that different forms of rape involving varying degrees of culpability are lumped into a single category.[250] "The effect of such laws . . . [is] to authorize grave sanctions for a range of conduct that includes offense[s] plainly less serious than the most aggravated forms of rape."[251] Thus, because section 261 is overinclusive, Moua, who had no intent to commit a crime, could be found guilty of first degree rape.

Furthermore, due to the fact that rape is not a specific intent crime, ignorance of the law is no excuse.[252] The court could therefore ignore the anthropological evidence which demonstrates that Moua

244. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 213.1 at 355 (1980).
245. *Id.*
246. *Id.*
247. *See supra* text accompanying note 203.
248. *See* MODEL PENAL CODE § 213.1(1)(a) (1967).
249. *See supra* text accompanying notes 204-06.
250. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 213.1, at 278 (1980).
251. *Id.*
252. *See* People v. Bishop, 132 Cal. App. 3d 717, 722, 183 Cal. Rptr. 414, 417 (1982); People v. Guthreau, 102 Cal. App. 3d 436, 443, 162 Cal. Rptr. 376 (1980).

had no intent to rape the plaintiff.[253] Hence, since section 261 lumps the various types of rape into a single category and intent is irrelevant, Moua could be exposed to the same punishment that a first degree, cold-hearted rapist would receive. It is difficult to believe that the Legislature in adopting section 261 intended to penalize a refugee for statutory rape if the accused was merely conforming to his cultural ritual and had no intent to commit a crime.

Since Moua may be found guilty of first degree rape pursuant to California Penal Code section 261, the defense that he entertained a reasonable and good faith belief that the woman voluntarily consented to engage in sexual intercourse should be considered.[254] While it may be difficult for the court to accept such a defense when the woman expressly manifests her disapproval, the underlying fact the court should consider is that in the Hmong culture, the woman's vehement refusal is construed as consent to the consummation of union.[255] Thus, in the interest of justice, the court should consider the culture of the accused. After all, it is reasonable for a Hmong man to believe that a Hmong woman is consenting to his actions, because the Hmong culture requires her to protest the consummation in order to prove that she is virtuous.[256]

Unlike California Penal Code section 261, Model Penal Code section 213.1 provides more flexibility in tailoring a sentence that would best serve the defendant, as well as society. Under Model Penal Code section 213.1, Moua would probably be convicted for gross sexual imposition, a third degree rape.[257] The Model Penal Code more strongly emphasizes the defendant's culpability and intent than does the California Penal Code.[258] In weighing the defendant's culpability, the court would likely consider his culture and his intent. The court could then use its discretion in reducing the sentence. Furthermore, due to the ambiguities relating to the issue of whether the woman has consented, the Model Penal Code does not emphasize the consent of the woman.[259] Hence, Moua, under Model Penal Code section 213.1, would not be subject to the same punishment as some-

253. Sherman, *supra* note 211, at 36.

254. *See* People v. Acevedo, 166 Cal. App. 3d 196, 202, 212 Cal. Rptr. 328, 332 (1985).

255. *See supra* text accompanying notes 217-23.

256. *Id.*

257. *See supra* text accompanying notes 204-06.

258. *See supra* text accompanying notes 208-10.

259. 1 MODEL PENAL CODE AND COMMENTARIES, pt. II, § 213.1, at 303-06 (1980).

one who intentionally and maliciously raped the victim.[260]

In *Moua*, the judge considered Moua's cultural beliefs and concluded that Moua did not intend to harm the victim.[261] The judge used his discretion by allowing Moua to plea bargain to misdemeanor false imprisonment.[262] However, the court's approach does not provide a clear guideline or precedent of how courts should confront a similar cultural conflict in the future.

An appropriate sentence in *Moua* would have been third degree rape pursuant to Model Penal Code section 213.1; a harsher sentence than false imprisonment but milder than first degree rape under California Penal Code section 261. Such a sentence would provide a clearer guideline for future judicial action. Thus, if the court in *Moua* adopted Model Penal Code section 213.1, there would be some assurance that in a future similar case, a court would demonstrate similar latitude by reducing the penalty to third degree rape rather than false imprisonment.

III. Conflicting Viewpoints and Analysis of Cultural Defense

There are two conflicting viewpoints which frame the "cultural defense" issue.

A. Traditional View

The traditional view is that everyone must conform to the law, and that ignorance of the law is no excuse for non-compliance.[263] This viewpoint shall be referred to as the "traditional view". In a famous English case, *Regina v. Barronet*,[264] one justice stated " '[p]ersons who fly to this country as an asylum must obey the laws of the country and be content to place themselves in the same situation as native born subjects.' "[265] Similarly, another justice in *Barronet* stated that foreigners must be dealt with in the same way as natives,[266] and that a native's ignorance of the law cannot be an ex-

260. *See supra* text accompanying note 196.

261. *See supra* text accompanying notes 227-32.

262. *Id.*

263. Samuels, *Legal Recognition and Protection of Minority Customs in a Plural Society in England*, 10 Anglo-Am. L. Rev. 241 (1981).

264. Regina v. Barronet, 169 Eng. Rep. 633 (Q.B. 1852).

265. *Id., quoted in* Samuels, *supra* note 263, at 242.

266. *Id.*

cuse for a crime and cannot be urged in favor of a foreigner.[267] Additionally, a third justice stated

> To make a difference in the case of foreigners would be a most dangerous practice. It is of great importance that the administration of the law should be uniform. It must be administered without respect to persons and it would be dangerous and unjust to introduce into a general rule an exception in favour of foreigners.[268]

Though *Barronet* was decided in 1852, prosecutors today, such as the prosecutor in *Kimura*, adhere to this traditional view. In *Kimura*, the prosecution stated that "[m]urder must be considered murder in the United States and not mitigated by legal or cultural standards from other countries."[269] The court rejected the application of Japanese law and Kimura's culture.[270] The prosecution further claimed that "[y]ou're treading on . . . shaky ground when you decide something based on a cultural thing because our society is made up of so many different cultures. It is very hard to draw the line somewhere, but they are living in our country and people have to abide by our laws or else you have anarchy."[271] Law enforcement officials also share the view expressed in *Kimura*.[272] For example, one official succinctly rebutted the cultural defense raised in *Kimura* by stating that "[t]he problem is we're not in Japan . . . . We're here."[273]

1. Public policy advantages of the traditional view

Penalizing a criminal under American law has been shown to have a deterrent effect.[274] For example, due to the stigma that results from an arrest and prosecution for rape and kidnapping, the Hmong recognize that they can no longer follow their customary way of claiming a bride.[275] The Hmong, no matter how endeared to their

267. *Id.*

268. *Id.*, *quoted in* Samuels, *supra* note 263, at 243.

269. Sherman, *supra* note 7, at 26, col. 1.

270. *See supra* text accompanying note 110.

271. Sherman, *supra* note 7, at 26, col. 1.

272. *Id.*

273. Thompson, *supra* note 6, at 26, col. 4 (quoting Lieutenant Glenn Ackerman, head of the Los Angeles Police Department's sixteen officer Asian Task Force).

274. *Id.* at 26, col. 6.

275. *Id.* The Fresno Deputy Public Defender claimed that the Hmongs in Fresno followed the rape trial very closely. *Id.* Consequently, they are trying to adjust their traditions. *Id.* Similarly, another criminal defense attorney who represents Asian immigrants stated that as the Asians get arrested and imprisoned, the word gets out to the rest of the Asian community. *Id.*

traditional cultural views, must adapt their old cultural patterns to the developing American concepts of sexual equality.[276] By penalizing the Hmong, we are indirectly informing them that they have to conform to American concepts of sexual equality.[277] In effect, the American criminal justice system is instructing the foreigner that his acts are an unacceptable social behavior, and contrary to public policy in the United States.

2. Disadvantages of the traditional view

The traditional view, which requires foreigners to conform to the majority's standards and values, results in the demise of foreign cultural values.[278] For example, the Hmong children are being quickly Americanized and are losing their culture.[279] Consequently, the older generation of the Hmong are somber and wish they could return to their homeland.[280] Cultural problems have even led to mysterious sleeping deaths of middle-aged Hmong males.[281] However, many aspects of foreign cultures can greatly enrich and contribute to American life.[282] For instance, the Hmong are a unique people due to their strong sense of social bonding.[283] "The Hmong people still love each other and worry about each other," stated one member of the Hmong community.[284]

Furthermore, respect for the individual and his personal customs is an integral part of human rights.[285] "[F]or newcomers to deny their original culture means to deny their self-esteem and identity."[286] The Hmong try hard to assimilate into the American culture and gladly abide by American law.

Consequently, support of community outreach programs to educate refugees and immigrants about American laws and customs is essential. A "less coercive approach in educating immigrants is both

276. Dershowitz, *supra* note 217, at 5, col. 3.

277. *Id.*

278. *See* L.A. Times, Apr. 7, 1985, pt. I, at 31, cols. 4-5.

279. *Id.*

280. *Id.* at 31, cols. 3-6.

281. *Id.* at 31, col. 1. It is speculated that the mysterious deaths were caused by severe cultural shock and stress. Wall St. J., Feb. 16, 1983, at 1, col. 1.

282. Samuels, *supra* note 263, at 255.

283. San Francisco Chron., Jan. 29, 1984, Cal. Living Magazine, at 11.

284. *Id.*

285. Samuels, *supra* note 263, at 255.

286. Hayashi, *supra* note 4, at 5, col. 3.

less traumatic for them and easier on the criminal justice system."[287] For example, a basic problem for the Hmong is that they do not know what to change and what to preserve from their old life style. Hence, community projects should discourage the Hmong, as well as other foreigners, from practicing cultural habits that may pose legal problems and encourage those other habits which will enrich American society as a whole.

B. Modern View

Contrary to the traditional view, there is considerable support for recognizing the defendant's foreign culture and applying the law of the defendant's country in a criminal proceeding.[288] For example, in *Kimura*, the Japanese community in Los Angeles sympathized with Mrs. Kimura because she was to be punished under American, rather than Japanese law.[289] According to a Japanese woman, Mrs. Kimura's actions were the result of her Japanese custom and upbringing.[290] The Japanese believe that custom is ingrained in a person's mind.[291]

The general consensus of this modern view is that when analyzing the defendant's *mens rea* or "state of mind," the courts must consider that person's cultural beliefs.[292] Proponents of this view argue that the defendant's culture is entwined with his or her mental state at the time of the crime.[293] As recited by a local leader of the Hmong, "being Hmong is more than a shared culture or a collective memory of mountaintop villages, but rather a state of mind: a feeling of support, a graciousness in living and a love of one another."[294] Therefore, to support the public policy consideration of fairness to the defendant, it is believed that the courts should consider cultural defenses.

IV. CONCLUSION

We would be living in a state of anarchy if each foreigner's cul-

287. Thompson, *supra* note 6, at 26, col. 7.

288. *See infra* text accompanying notes 289-94.

289. Sherman, *supra* note 7, at 26, col. 1. The 4,000 members of the Japanese community, in their petition, asked the prosecutor to apply "modern Japanese law." *Id.* at 1, col. 3.

290. *See* Hayashi, *supra* note 4, at 5, col. 3.

291. *Id.*

292. Sherman, *supra* note 7, at 27, col. 3.

293. *See supra* text accompanying notes 292-94.

294. San Francisco Chron., Jan. 29, 1984, Cal. Living Magazine, at 11.

ture and law was the determinant factor of what is right and wrong. There is a need for uniformity in the law. A defendant should be penalized for the wrong or harm which he or she has inflicted. However, in reconciling the different public policy concerns and viewpoints, the cultural beliefs of the defendant should mitigate the punishment, especially in the case of a first offender. The defendant's state of mind is certainly an important component of his or her culpability.

In *Kimura*, the provocation-heat of passion defense was not used and seemed inapplicable. Consequently, the court mitigated Mrs. Kimura's offense, from murder to voluntary manslaughter by finding that she was legally insane at the time of the suicide attempt. However, if the court had applied the Model Penal Code, the jury could have considered Mrs. Kimura's cultural background when assessing the reasonableness of her actions. They could then have found her guilty of manslaughter. The court would have reached the same result under both the Model Penal Code and California Penal Code. However, the Model Penal Code provides a preferable approach since the court does not need to create the legal fiction that the defendant was legally insane when she was merely adhering to her cultural values.

Unlike *Kimura*, the judge in *Moua* did consider the defendant's culture. Since the California rape statute lumps the various types of rape into a single category, first degree rape, the judge simply disregarded the rape statute and found the defendant, Moua, guilty of false imprisonment. The judge did not believe that Moua was as culpable as a cold-hearted rapist. However, under the Model Penal Code's three-tier grading system, Moua's action would be considered third degree rape. Thus, the Model Penal Code provides an appropriate compromise: a harsher sentence than merely ninety days imprisonment, but a milder sentence than first degree rape. Therefore, in unique cases such as those discussed in this Comment, the Model Penal Code's flexible approach will lead to clearer precedents and more just results since factors such as the cultural background will be considered.

Malek-Mithra Sheybani