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CULTURE AS JUSTIFICATION, NOT EXCUSE

Elaine M. Chiu*

ABSTRACT

The wide discussion of cultural defenses over the last twenty years has produced very little actual change in the criminal law. This Article urges a reorientation of our approach thus far to cultural defenses and aspires to move the languishing discussion to a more productive place. The new perspective it proposes is justification. The Article asks the criminal law to make doctrinal room for defendants to argue that their allegedly criminal acts are justified acts, and not excused acts, based on the values and norms of their minority cultures.

Currently, the criminal law deals with such acts of minority defendants through the excuse approach. It begins by relying excessively on the individual discretion of judges, prosecutors and law enforcement officials to achieve just results in such cases. When discretion fails, the status quo then employs the legal fiction of ill-fitting excuse defenses like temporary insanity and extreme emotional disturbance. The troubling message of the current approach is that minority defendants commit wrongful acts but are not blameworthy because they suffer from the defect or disability of their culture.

The proposal of the Article is to replace this current excuse approach with a justification approach. In Part II, it explains the theoretical distinctions that separate excuse from justification and offers some elements and limits to a justification defense. It even describes some available doctrinal vehicles through which the criminal law can adopt the justification approach.

In Part III, the Article applies the justification approach to three famous cultural defense cases. It uses the cases to make a powerful comparison of the relative weaknesses and strengths of the excuse approach and the justification approach. Adopting justification will eliminate the use of legal fictions, will force the criminal law to directly confront the difficult moral questions posed by such cases and will advance the cause of cultural pluralism in the criminal law.

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[I]f respect for an individual also requires respect for the culture in which his identity has been formed, and if that respect is demanded in the uncompromising and non-negotiable way in which respect for rights is demanded, then the task may become very difficult indeed, particularly in circumstances where different individuals in the same society have formed their identities in different cultures.

— Jeremy Waldron¹

I. INTRODUCTION

Consider the following true stories:

People v. Kimura

Fumiko Kimura lived with her husband and two young children in the Los Angeles area.² In November 1984, her husband confessed that he had been supporting a mistress for several years of their marriage. The mistress was a waitress at the same restaurant where he worked.³ Extremely upset by the news, Fumiko Kimura tried along with her husband and the mistress to find a resolution for their sticky love triangle. They failed. On January 29, 1985, Fumiko decided to take matters into her own hands and walked into the Pacific Ocean while holding both her children in an attempt to commit parent-child suicide.⁴ Onlookers at the beach managed to pull Fumiko and her two children from the water.⁵ Only Fumiko survived.⁶

People v. Aphaylath

A Laotian refugee, May Aphaylath had been living in the United States for two years when he married his wife.⁷ One month into the marriage, his wife continued to accept phone calls from her former boyfriend and to display affection for this other man.⁸ Her behavior brought shame upon May Aphaylath and his family. When she received yet another phone call from her former boyfriend, May repeatedly stabbed his new bride to death.⁹

State v. Butler

Gary Butler, Dino Butler and Robert Van Pelt were Native Americans who belonged to the Siletz tribe and lived in the Portland, Oregon area.¹⁰ They also belonged to a politically active organization known as the American Indian Movement. They began to hear from fellow tribe members that artifacts buried in

1. JEREMY WALDRON, *Cultural Identity and Civic Responsibility*, in CITIZENSHIP IN DIVERSE SOCIETIES 160 (Will Kymlicka & Wayne Norman eds., Oxford University Press 2000).

2. Deborah Woo, *The People v. Fumiko Kimura: But Which People?*, 17 INT'L J. SOC. L. 403, 404 (1989).

3. *Id.*

4. *Id.* at 403-04. On the term, "parent-child suicide," see *infra* text accompanying notes 152, 162-68.

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

6. *Id.*

7. *People v. Aphaylath*, 502 N.E.2d 998, 999 (N.Y. 1986).

8. *Id.*

9. *People v. Aphaylath*, 499 N.Y.S.2d 823, 824 (N.Y. App. Div. 1986), *rev'd*, 502 N.E.2d 998 (N.Y. 1986).

10. Sherman, *supra* note 5, at 27.

the graves of dead relatives had been appearing for sale at local antique shops.¹¹ For many years one of the names circulated as a graverobber of valuable objects from Siletz burial grounds was Donald Pier.¹² On January 21, 1981, these three men went to Donald Pier's home where they smashed his fingers in order to get him to confess to robbing Siletz graves and then cut his throat.¹³ They believed that killing the grave-robber restored the spirits of their ancestors.¹⁴

Two similarities amongst these stories are obvious. First, they all concerned the use of deadly physical force and second, they all ended in the deaths of human beings. These commonalities are easy to identify because the use of deadly force and the resulting harm of death constitute the physical aspects or the *actus reus*¹⁵ of the homicides.

What about the mental aspects or the *mens rea*¹⁶ of these actors? Are there also similarities there? All of the defendants exhibited an intent to kill in that they each desired the demise of their victims. In common law jurisdictions, such a mental state is known as an express intent to kill.¹⁷ In the Model Penal Code, a conscious objective to cause death is part of the definition of the *mens rea*, "purposely."¹⁸

More interestingly, in addition to their intent to kill, all the defendants also shared one additional mental state. They all had that object to kill because they all believed that their act of killing was right or justified. In other words, all the defendants had righteous motives. Although the criminal law usually regards the presence of motive generally or of any particular motive as unimportant,¹⁹ there are some notable exceptions to the usual disregard. Prominent among these exceptions are the justification defenses that exist to the crimes of murder, manslaughter or assault.²⁰

A deeper examination of this last similarity reveals the factual differences among the stories. Although they all entertained good faith, subjective beliefs in the righteousness of their acts of homicide, they did not share the same exact motive. Each of them had a different substantive reason for doing what they did. For example, May Aphaylath killed his wife to restore his family honor while Fumiko Kimura killed her children to prevent them from being motherless,

11. *Id.*

12. Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437, 453 (1993) [hereinafter Renteln Article].

13. *Id.*

14. See *infra* text accompanying notes 245-257.

15. BLACK'S LAW DICTIONARY 36 (6th ed. 1990) ("The *actus reus* is the physical aspect of a crime . . .").

16. *Id.* ("[T]he *mens rea* (guilty mind) involves the intent factor" of a crime.).

17. WAYNE R. LAFAVE, CRIMINAL LAW §5.2(a), at 245 (4th ed. 2003) ("[T]he traditional view is that a person who acts . . . intends a result of his act . . . when he consciously desires that result, whatever the likelihood of that result happening from his conduct . . .").

18. MODEL PENAL CODE § 2.02(2)(a)(i) (1985) ("A person acts purposely . . . when . . . it is his conscious object . . . to cause such a result.").

19. Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 663 (2005).

20. See *id.* at 667-68 (discussing the defenses of self-defense, necessity, and mistake of fact).

assuming she had been successful in her own suicide attempt. The Siletz Indians vindicated the spirits of their ancestors by killing Donald Pier.

Despite the different substance of their motives, the criminal law responds to their claims of righteousness with a singular reaction. Because their claims reflect the values and norms of minority cultures, and not the dominant Anglo-American culture, the criminal law ignores them. The defendants in all three homicides are silenced from telling their stories of righteousness. Instead, they are left to rely on an ill-fitting excuse defense or the discretion of a prosecutor as defense strategies for escaping criminal liability. This Article explores the puzzle posed to the criminal law by these defendants—those who commit harmful acts believing in their righteousness but whose beliefs are grounded in the norms of minority cultures.

Discussion of this puzzle began in earnest twenty years ago when Fumiko Kimura tragically drowned her two children.²¹ A year after their deaths, the *Harvard Law Review* published an oft-cited note, *The Cultural Defense in the Criminal Law*,²² which passionately urged the adoption of a new cultural defense to achieve the twin goals of cultural pluralism and individualized justice.²³ Since that time, scholars of criminal law as well as the social sciences have engaged in a vigorous debate about the merits and implications of a cultural defense. Several positions have been staked. The main dividing line is between those who support and those who oppose a new cultural defense.²⁴ Within the group of supporters, there is further disagreement over whether the cultural defense should be a new and independent defense or whether cultural evidence should merely be included within already existent defenses.²⁵ In addition, many have suggested a myriad of

21. The passage of time has not quelled the desire of many to recall the factual details of this tragedy and its surprising legal outcome. Indeed, even new writings about cultural defenses continue to focus on the Kimura case as a particularly instructive instance. See, e.g., ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 25 (2004) [hereinafter RENTELN Book]; Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 LAW & SOC. INQUIRY 39, 64-65 (2003); Michele Wen Chen Wu, *Culture is No Defense for Infanticide*, 11 AM. U.J. GENDER SOC. POL'Y & L. 975, 994-997 (2003).

22. Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986) [hereinafter HARV. Note].

23. *Id.* at 1300-08.

24. For supporting articles, see Ann T. Lam, *Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 ASIAN AM. & PAC. ISLANDS L.J. 49 (1993); Renteln Article, *supra* note 12; HARV. Note, *supra* note 22.

For opposing articles, see Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L.J. 57 (1994); Alice J. Gallin, Note, *The Cultural Defense: Undermining the Polices Against Domestic Violence*, 35 B.C. L. REV. 723 (1994); Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141 (1994); John C. Lyman, Note, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 99 (1986); Julia P. Sams, Comment, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L COMP. L. 335 (1986).

25. For arguments in favor of establishing a formal cultural defense see Lam, *supra* note 24, at 49; Renteln Article, *supra* note 12, at 437; HARV. Note, *supra* note 22; cf. Carolyn Choi, *Application of a Cultural Defense in Criminal Proceedings*, 8 UCLA PAC. BASIN L.J. 80, 90 (1990) (limiting defense to sentence mitigation or charge reduction); Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for*

limitations and restrictions on an independent defense or on the admission of cultural evidence.²⁶

Despite all this study and discussion, not much has actually changed in how the criminal law handles these cases in the last twenty years. Although there may be increased awareness about the problem of culture and the criminal law, the treatment of minority cultural norms has largely remained the same since the case of Fumiko Kimura. Minority cultures and their norms have yet to be the foundation of a new and independent defense and are often relegated to being a factor in discretionary plea bargaining or sentencing. Indeed, more often than not minority cultures and their norms are still considered irrelevant to substantive determinations of liability. In the few instances where minority cultures have been formally included, they ironically have served as evidence proving or disproving longstanding, well-established criminal doctrines based on the dominant Anglo-American culture.

The results for defendants have been spotty and inconsistent as the ability to secure acquittals on the basis of culture or to offer cultural evidence at their trials has varied wildly. Indeed, such results have led Professor Cynthia Lee to ask whether there is a rational explanation for why culture seems to work for a few criminal defendants and not for many others.²⁷ The explanation is that culture has succeeded in achieving justice for a few defendants whose moral choices happen to fit well within existing criminal legal doctrine; for the many defendants whose moral choices lie outside existing doctrine, their minority culture has been ignored or masked and sheer luck has determined whether they achieved a fitting result.

This Article aspires to move the discussion of culture and the criminal law beyond its current stagnancy by making two major claims: first, it rejects as unjust the prevailing response of the criminal law to the puzzle of defendants motivated by their minority cultures and second, it proposes a new approach based on the concept of justification.

This Article declares the current approach of discretion and excuse a dismal failure. By and large, when discretion fails to achieve just results, the criminal law has either ignored culture or resorted to squeezing culture into ill-fitting excuse defenses. For example, Fumiko Kimura argued temporary insanity while May

Analysis, 27 N.M. L. REV. 101, 103 (1997) (limiting the defense to establishing state of mind); Malek-Mithra Shebyani, Comment, *Cultural Defense: One Person's Culture Is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751, 783 (1987) (limiting defense to sentence mitigation or charge reduction); Sharon M. Tomao, Note, *The Cultural Defense: Traditional or Formal?*, 10 GEO. IMMIGR. L.J. 241 (1996) (limiting the defense to establishing state of mind).

26. See, e.g., Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1112–20 (1994) [hereinafter Chiu, Comment] (discussing an intermediate approach which would limit the impact of the cultural defense to the mens rea element of the charge, the prosecutor's decision to charge, and the imposition of a sentence by the judge).

27. CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 112–24 (2003) (positing that interest convergence theory can help explain the successful use of culture in the criminal courtroom).

Aphaylath relied on extreme emotional disturbance.

The most obvious weakness of this approach is its reliance on legal fictions that are simply not factually true. Fumiko Kimura, May Aphaylath and the Butler defendants were not temporarily insane nor did they act under duress; instead, at the time of their acts, they believed what they did was the right thing to do. Yet, confined by existing criminal doctrine and the current excuse approach, these defendants, along with their attorneys, the prosecutors and the judges, were forced to resort to defense strategies that are, at best, a stretch and, at worst, frauds committed in courts of law.

Even more troubling is a second shortcoming of the excuse approach. It allows the criminal law to sidestep important moral questions in passing judgment on such defendants. Instead of addressing whether the acts of these defendants are right or wrong, the excuse approach simply assumes the wrongness of their acts while at the same time excusing the defendants who are particularly sympathetic or understandable. Sometimes the excuse approach may manage to achieve a rough justice, but it does so by having the criminal law avoid its most essential function as the moral arbiter of behavior in a community.

A final weakness is the denigration of minority cultures that results from the excuse approach. Such desperate moves reflect the attitudes that culture should be irrelevant to the criminal law or, at best, that culture should only serve as an excuse for wrongdoing. Neither are acceptable views of culture for the criminal laws of a multicultural community.

Interestingly, despite its enormous weaknesses, the excuse approach is so engrained and pervasive that most legal commentators have failed to recognize, much less to question, its use. Only a few have given some attention to the possibility of a different approach.²⁸ This Article endeavors to identify the approach and its weaknesses as its first contribution to the ongoing discussion.

The second major claim of this Article is to propose a new approach to minority cultures and norms within the criminal law: namely, that minority cultures and norms be viewed as justifications and not excuses. The justification approach will empower defendants to express their righteous motives. Minority defendants' defense strategies will focus on explaining how their harmful acts were warranted to protect new values, interests and norms. Not surprisingly, the strengths of justification are the inverse of the weaknesses of excuse. The new justification approach will eliminate legal fiction, engage the difficult moral questions that are the provenance of the criminal law and advance cultural pluralism.

Part II of the Article focuses the discussion by describing with particularity the *true* cultural defense case at the center of the cultural defense puzzle in the criminal law. It then continues with the important theoretical distinctions between justifica-

28. See, e.g., Levine, *supra* note 21, at 67 (arguing that the cultural defense is about "expanding" and "reexamining" flexible legal definitions so they include minority cultural norms).

tion and excuse in the criminal law. These distinctions are the bedrock of the argument in favor of a new approach to this puzzle. They are of significant consequence not only because they take separate legal paths to absolve defendants of criminal liability, but also because they express entirely different statements about how the law of a multicultural community should treat minority cultures.

Part II next summarizes the basic components of the current excuse approach and then sketches the core elements of the proposed justification approach. Subsequently, the Article surveys several doctrinal vehicles by which the criminal law could adopt the justification approach. Some of these vehicles already exist: the general necessity defense, the Model Penal Code's *de minimis* defense and the interest of justice defense. The final vehicle is an entirely new and independent cultural justification defense.

Part II closes by suggesting several principles that could be used to limit the application of the proposed justification approach. These principles function as more legitimate and culturally respectful explanations of why culture may eliminate the liability of some, but not all culturally motivated, defendants. These principles are superior to the current excuse approach and its practice of excusing defendants only when their minority culture happens to coincide with the dominant Anglo-American culture.

In Part III, the Article returns to Fumiko Kimura, May Aphaylath and the Butler trio and uses their true stories to demonstrate two things: first, a compelling comparison of the problems of the current excuse approach and the advantages of the justification approach and second, a realistic look at how judges and juries might use the proposed justification approach in actual cases.

Finally, in Part IV, the Article concludes with some parting words on the contributions it hopes to make. This Article will undoubtedly leave many readers with questions, uncertainty and discomfort. This is largely because of the fundamental shift it proposes in the response of our criminal law to the phenomenon of multiculturalism. I do not pretend that it will immediately inspire actual change in the criminal law. Instead, the goal is more modest. It is to invigorate the languishing discussion of cultural defenses by introducing a new, but necessary, direction.

II. PROPOSING THE JUSTIFICATION APPROACH

A. *Focusing on the True Cultural Defense Cases*

Before comparing excuse and justification, it is necessary to outline clearly the type of case with which this Article is concerned. To describe its concern as all criminal matters involving culture is too imprecise. That imprecision is due to the fact that there are numerous ways in which culture can be involved in a criminal

defense;²⁹ the justification proposal is conceived to apply only to what I call the “true cultural defense case.” Neal Gordon, in his student note, is one of the few authors to recognize the important distinction between a cultural evidence case and a cultural defense.³⁰ As Gordon correctly describes, there are some defendants who properly claim existing defenses. What is cultural about these cases is that the defendants are asking judges or prosecutors to consider evidence about their minority culture in support of their claimed defenses.³¹ These are the cultural evidence cases.

An example of a cultural evidence case is *Regina v. Chimney Evans*. Two Aborigines claimed that they were under duress when they were ordered to kill a man who had stolen some precious stones because they feared “serious consequences” if they refused the order.³² To support this duress defense, the defendants wanted the norms of their Aborigine culture to be considered relevant evidence. *Chimney Evans* is still remarkable because its proffer of cultural evidence challenged the evidentiary standard of relevancy and pressed the extent of the subjectivity of the duress defense. However, the case presented “no philosophical problem as it [the aborigine cultural norm] functions in the same way as any other type of evidence.”³³ In other words, the criminal law was not challenged to consider any new doctrine or concepts in addressing this case, but rather to merely expand an existing standard.

According to Neal Gordon, a true cultural defense case, on the other hand, is found where a defendant wants to state a defense based on the norms of his minority culture, but cannot do so due to the limitations of existing criminal doctrine. Gordon describes such a case as operating “outside of criminal law’s existing mechanisms.”³⁴ Although such a case is similar to the cultural evidence

29. A second reason for the imprecision is that there are many understandings of what culture is. For example, is this Article only concerned with ethnic cultures or does its proposal also apply to political cultures? There is a wealth of definitions for “culture” from other disciplines such as anthropology and sociology. *See, e.g.,* WALDRON, *supra* note 1, at 160-161 (defining culture to be “an enduring array of social practices, subsisting as a way of life for a whole people . . . a distinct set of practices in which [one’s] people . . . have historically addressed and settled upon solutions to the serious problems of human life in society.”); Robert C. Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 490 (2003) (discussing the Devlin model of culture as “‘shared ideas’ that establish an enduring and discrete community identity” and that are “stable, coherent and singular”). Unfortunately, a comprehensive debate of the appropriate definition for culture in the criminal law is beyond the scope and purpose of this Article.

30. Neal A. Gordon, Note, *The Implications of Memetic for the Cultural Defense*, 50 DUKE L.J. 1809, 1811 (2001) (“The problem is further complicated by the frequent confusion of the cultural defense with the use of cultural evidence within existing defenses.”).

31. *Id.* at 1811-12.

32. *See* RENTELN Book, *supra* note 21, at 30.

33. *See* Gordon, *supra* note 30, at 1812.

34. *Id.* at 1811. Where Neal Gordon and I part ways is that he still regards this new cultural defense as an attempt “to excuse the defendant for admittedly wrong conduct.” *Id.* Gordon goes on to separate those cases properly deemed cultural defenses into cognitive defenses versus volitional defenses. In the end, Gordon opposes the concept of a new cultural defense. *Id.* at 1833.

cases in that there will be proffers of evidence concerning culture, the cultural defense cases use the evidence to create new defenses as opposed to supporting existing doctrine.

An early example of a true cultural defense case can be found in an 1852 English case, *Regina v. Barronet & Allain*.³⁵ In *Regina v. Barronet & Allain*, two French defendants had acted as seconds to their friend, Frederic Courmet, in a duel in Great Britain.³⁶ Unfortunately, Frederic Courmet died in the duel and the defendants were charged with willful murder.³⁷ The defendants argued that they were “natives of France, that they were ignorant of the laws of England, and of the circumstance that acting as seconds in a fair duel was punishable as a crime in this country, it not being punishable as a crime in France.”³⁸ Although the case certainly generated discussion of the defense of ignorance of the law,³⁹ it also hinted at a true cultural defense issue. Allain and Barronet both explained that, in agreeing to be seconds in a duel to the deceased Courmet, they were motivated by “private friendship and in obedience to the rules of honour.”⁴⁰ This statement about their righteous motives can reasonably be interpreted as a plea for an exception or defense to the crime of murder based on French norms of honor and friendship. Such an exception or defense, if granted, would have lain *outside* the existing mechanisms of the criminal law. The English lords rejected this plea.⁴¹

The critical difference between supporting existing doctrine versus creating new doctrine is what divides the cultural evidence cases from the more interesting cultural defense cases. It is this distinction that either eludes many scholars or fails to capture their attention. Often articles and books on the cultural defense discuss cases from both categories without recognizing this difference.⁴² Perhaps they do so because their focus is on the bare fact of the appearance of minority cultures in criminal cases as opposed to the ways in which the minority cultures may engage with the legal doctrine.⁴³

As a result of this oversight and confusion, it is sometimes difficult to identify the true cultural defense cases. The general impression is that these cases are less frequent and therefore less significant than the cultural evidence cases. Very few defendants complain out loud that the criminal law offers no doctrinal home for

35. (1852)169 Eng. Repts. 633, 633 (Q.B.).

36. *Id.*

37. *Id.*

38. *Id.*

39. *See id.* at 634-35.

40. *Id.* at 634.

41. *Id.* at 634-35.

42. For examples of this prevalent failure to recognize the distinction, see the sources listed in *supra* notes 21-26.

43. The appearance of culture in a case, criminal or civil, is the unifying commonality of all cases discussed by Professor Renteln in her book. *See RENTELN Book, supra* note 21.

their culturally-based justification defense.⁴⁴ Many may resort to existing excuse defenses for lack of a better choice, but if there had been the choice of a culturally based justification defense, perhaps they would not have done so.⁴⁵ Thus, in some sense, the identification of true cultural defense cases is an exercise in speculation based on the belief that many cultural evidence cases are actually true cultural defense cases.

Despite the speculative nature of its examination, this Article undertakes its study from the perspective of true cultural defense cases. It does not discuss the merits of evidentiary issues. The evidentiary perspective may be interesting because it is a subset of the longstanding discussion of the subjectivity of the criminal law. However, a more difficult and novel challenge lies in those cultural defense cases that do not ask the criminal law to recognize new evidence of old defenses, but rather ask the law to recognize entirely new defenses. It is only in allowing new doctrine and not merely new evidence that the criminal law is truly confronting the challenge of minority cultures in a multicultural community.

B. The Theory Behind Excuse and Justification

Having now described with precision the type of case that is at the center of this puzzle for the criminal law, Part II now turns to the theoretical distinctions between justification and excuse. Justification and excuse have traditionally been understood as distinctive approaches to relieving a defendant of criminal liability. Both are affirmative defenses in that they are only discussed after there is sufficient evidence of the mens rea and actus reus of a crime. In 1984, Paul Robinson undertook the monumental effort of systematically categorizing and analyzing the myriad of defenses in the criminal law. In his encyclopedic two-volume work entitled *Criminal Law Defenses*,⁴⁶ he provides standard definitions of justification and excuse and also engages in a lively examination of what separates justification from excuse. Relying in part on his work and the work of others, this Part will briefly survey the concepts of justification and excuse and then address the critical differences between them.

1. What Is Excuse?

Excuse defenses begin the path to non-liability with an admission. "Excuses admit that the deed may be wrong, but excuse the actor because conditions suggest that he is not responsible for his deed."⁴⁷ Embedded in the concept of excuse is the

44. See, e.g., *infra* text accompanying notes 259-60.

45. See *infra* text accompanying notes 261-62.

46. PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* (1984). Thanks to the tremendous work of Paul Robinson in his authoritative two volume treatise, criminal defenses can be systematically categorized and analyzed in several large categories. These categories are failure of proof, offense modification, justifications, excuses and nonexculpatory defenses. *Id.* at § 21, at 70.

47. *Id.* at § 25(a), at 91.

separation between the designation of an act as wrong (and therefore criminal) and the casting of blame and punishment. The result of excuse defenses is that blame and punishment are shifted away from the actor to another object.⁴⁸

The object that is blamed is the actor's disability that causes some kind of excusing condition that renders him blameless.⁴⁹ Disabilities include intoxication, insanity, duress, automatism and somnambulism.⁵⁰ Excusing conditions include conditions that lead to involuntary acts, inaccurate perceptions of risks and consequences of acts, the inability to know the moral status of certain acts, or the inability to control conduct.⁵¹ Both disabilities and excusing conditions are characteristics of the actor that distinguish the actor from the general law-abiding population. Both are necessary elements to an excuse defense, as well as the causal relationships between (1) the disability and the excusing condition; and (2) the excusing condition and the wrongful conduct.⁵²

The type of excusing condition and the type of disability involved are what determines the applicable excuse defense in a case. When a defendant "knows the nature of his act, but does not know that it is wrong or criminal," this is regarded as a case of cognitive disability.⁵³ In the *Kimura* case, culture and emotion were used to support a cognitive disability defense of temporary insanity.⁵⁴ When a defendant lacks the capacity to control his conduct, despite his awareness that it is criminal, this is known as a case of volitional disability.⁵⁵ In the *Aphaylath* case, culture and emotion were used to support a volitional disability claim of extreme emotional disturbance.⁵⁶

2. What is Justification?

The theoretical foundation of justification in the criminal law is the subject of much greater debate and disagreement than is the premise of excuse.⁵⁷ Perhaps that is because unlike excuse, justification does not admit any wrongdoing and therefore, the underlying theories must answer a much more difficult question. How is it that conduct that fulfills all the mens rea and actus reus requirements of a criminal statute is not wrong, but justified? Numerous theories have been offered to explain the rationale of justification defenses. To name five common ones, there

48. *Id.* at § 161(a)(4), at 225.

49. *Id.* at § 161(a)(1) – (4), at 222-28.

50. *Id.* at § 161(a)(1), at 222.

51. *Id.* at § 161(a)(2), at 224.

52. *Id.* at § 161(a)(1) – (4), at 222-28.

53. *Id.* at § 25(b), at 95-96. This is the third category of excuse defenses under Paul Robinson's schema.

54. See *infra* Part III.A.1.

55. Robinson, *supra* note 46, at § 25(b), at 95-96. Volitional disability is the fourth category of excuse defenses under Paul Robinson's schema.

56. *People v. Aphaylath*, 502 N.E.2d 998, 999 (N.Y. 1986).

57. See Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 19 (1999) (explaining that exactly why a killing is justified is still up for debate).

is the theory of (1) choice of evils or lesser harms, (2) moral forfeiture, (3) the right to resist aggression, (4) double effect, and (5) personal autonomy.⁵⁸ Some of these theories build on the concept of justification in philosophy and ethics.⁵⁹ Others are based upon the school of law and economics. If there is any one commonality in these theories, it “is the idea that to be justified is to have sound, good reasons for what one does or believes.”⁶⁰

Today the dominant theory is the lesser harms model. This model is also known by several other monikers including the “‘choice of evils,’ ‘public good’ or ‘balance of utilities theory.’”⁶¹ As Robinson explains, the criminal law pinpoints certain harms and criminalizes those harms. A justification defense does not change the fact that “[t]he harm caused by the justified behavior remains a legally recognized harm that is to be avoided whenever possible.”⁶² Instead, a justification defense expands the relevant scope of the analysis. It introduces a comparative analysis of a particular harm against other harms. The premise of a justification defense is that “[u]nder the special justifying circumstances . . . that harm is outweighed by the need to avoid an even greater harm or to further a greater societal interest.”⁶³ Every justification defense is a statement that the defendant’s act in question was actually the least harmful act the defendant could have done, given the options in front of him or her as defined by the particular circumstances.

The classic justification defense is self-defense. Under the lesser harms model, self-defense claims that the injury avoided by the defendant outweighs the injury caused by their effective act of self-defense.⁶⁴ Self-defense belongs to a subcategory of justification defenses known as “defensive force” justifications.⁶⁵ In addition, there is defense of property, defense of habitation, and defense against forcible rape or kidnapping. All of them make similar claims about how certain defensive acts may cause some harm but ultimately are justified because they avoid some greater harm. What differs among them is the nature of the interest being protected and the different rules that legislatures may fashion for each

58. The first theory is described in detail in the next several paragraphs in the Article. Moral forfeiture refers to the forfeiture of rights by an aggressor due to his violation of the rights of the victim. The right to resist aggression is based on the notion that everyone enjoys a right to self-preservation that is independent of any aggressor’s culpability. Under the principle of double effect an agent is permitted to cause an otherwise forbidden result such as death only as a by-product of achieving some good end. Finally, the fifth theory of personal autonomy is based on the rationale that those in the right should never yield to wrongdoers. *See id.* at 19-24.

59. *See* Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1903 (1984) [hereinafter Greenawalt, *Perplexing Borders*] (“‘[J]ustified’ is most definitely not a special legal term. In discussions of ethics, justified action is morally proper action.”).

60. *Id.*

61. Green, *supra* note 57, at 19.

62. ROBINSON, *supra* note 46, at § 24(a), at 83.

63. *Id.*

64. ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS 56 (1998).

65. ROBINSON, *supra* note 46, at § 24(a), at 84.

defense to reflect the varying interests.⁶⁶

In the case of deadly self-defense, there is the odd comparison between the life of the victim being taken against the life of the defendant being saved. How can taking the life of one person to save the life of another person be justified? The harm distribution principle explains how deadly self-defense can still constitute a justification under the criminal law. “[W]hen the harm is inevitable and will be of equal severity regardless of who suffers it, then distribute it to the party who culpably caused the harm to be inevitable.”⁶⁷

How the criminal law defines what it means by the terms “justified” and “justification” has tremendous implication for deterrence and encouragement of future behavior. The lesser harms model and the harm distribution principle define a justified act as a less harmful act. In a utilitarian world, the implication of this definition is that the criminal law should encourage the commission of these less harmful acts given the right circumstances. In other words, every person who finds himself in the future in the specific circumstances of a justification defense should do the act that may cause a harm, albeit a lesser harm.

Interestingly, although this is the logical extension of the lesser harms model, many pause at the view that a justified act is therefore the act that everyone in like circumstances *should* do. The discomfort and controversy is with the normative obligation. Does the fact that an act is the less harmful act necessitate the prescription that it is the act that should always be done? Even further, does the determination that an act should always be done amount to the judgment that the act is *the morally righteous act*? These questions lie at the heart of the prescriptive tension in justification theory. Should the criminal law equate a justified act with a righteous act?

Robert Schopp provides an example of how justified action can sometimes fall short of “right” action, especially when right is defined to mean “morally ideal” or “morally obligatory.”⁶⁸

[P]olice officer *X* enters a house to investigate reported gunfire; *X* encounters a six-year-old *Y* who has found a loaded gun and killed his sister, apparently unaware that they are not playing a game. When *X* enters the room, *Y* laughs, points the gun at *X*, and begins to pull the trigger. *X* may justifiably shoot *Y* in self-defense, but if *X* refrains from shooting, choosing instead to risk lethal injury to himself rather than harming the dangerous but innocent *Y*, most observers would praise *X* for heroically rising above the standard set by the law.⁶⁹

Acknowledging that shooting innocent *Y* would be a justified act under the

66. Elaine M. Chiu, *Culture in Our Midst*, 17 U. FLA. J.L. & PUB. POL’Y 231, 239 (2006).

67. *Id.* at 60.

68. SCHOPP, *supra* note 64, at 60.

69. *Id.*

lesser harms model, Schopp rejects the notion that justified conduct is righteous conduct and instead, adopts an understanding of justified conduct as permissible conduct.⁷⁰ Kent Greenawalt agrees; he writes that “[b]ecause the law permits much behavior that is regarded as morally less preferable than its possible alternatives, the ‘permissible decision’ idea is probably the justification notion that is best suited for the law.”⁷¹

Most criminal law theorists agree with Schopp and Greenawalt. Justification merely identifies acts which are “legally permissible”, and not acts that are “right.”⁷² This stance is based upon a particular understanding of the overall role of criminal law in society. If the criminal law is regarded as merely a proscription of certain harms and not as a prescription for ideal conduct, then this conservative regard of justification makes sense.⁷³

3. *Excuse v. Justification*

The line between excuse and justification⁷⁴ has been visited many times. Most recently, there has been an ongoing conversation among Paul Robinson, Kent Greenawalt, George Fletcher and others. Each espouses theories as to what the critical differences are that constitute this line.⁷⁵ This Article builds on their work and adopts a much broader lens in analyzing the differences between justification and excuse. In particular, I emphasize how justification and excuse impact the greater social messages that emanate from the criminal law. There are two important differences that separate justification from excuse: the object of their social message and the substance of their message.

The first difference is the difference between the acts of defendants and the defendants themselves. While justification defenses focus on the conduct of defendants, excuse defenses stress the individual defendants themselves.

Justified conduct is correct behavior that is encouraged or at least tolerated. In determining whether conduct is justified, the focus is on the *act*, not the actor.

70. *Id.* at 20-21.

71. Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS. 89, 105 (1986) [hereinafter Greenawalt, *Distinguishing*].

72. SCHOPP, *supra* note 64, at 21.

73. *Id.* at 17.

74. Some scholars have created third or alternative categories of defenses that bridge the gap between excuse and justification. See, e.g., Claire O. Finkelstein, *Excuses and Dispositions in Criminal Law*, 6 BUFF. CRIM. L. REV. 317 (2002) (arguing for a “disposition-based” theory to explain “rational excuse” defenses); Michelle R. Conde, Comment, *Necessity Defined: A New Role in the Criminal Defense System*, 29 U.C.L.A. L. REV. 409 (1981) (arguing that the necessity defense should have its own category).

75. Interestingly, Professor Greenawalt discusses the fine boundaries between justification and excuse to conclude that such discussions are fruitless and misguided. He urges judges and legislators to deemphasize the distinctions between them. Greenawalt, *Perplexing Borders*, *supra* note 59, at 1906-1907. He cites to the imprecision of general verdicts and acquittals in his recommendation that legislators and judges not waste their time on the distinction between justification and excuse. Such discussion, he argues, should be reserved for scholars only. See Greenawalt, *Distinguishing*, *supra* note 71, at 105.

An excuse represents a legal conclusion that the conduct is wrong, undesirable, but that criminal liability is inappropriate because some characteristic vitiates society's desire to punish him. Excuses do not destroy blame . . . rather they shift it from the actor to the excusing conditions. The focus in excuses is on the actor. Acts are justified; actors are excused.⁷⁶

Although the excused actor escapes criminal liability, this outcome is achieved at a cost. The excuse is built upon a disability of the defendant that produces excusing conditions.⁷⁷ The cost is public portrayal as an individual who is flawed by some disability that provides escape from the universal standards of the criminal law. The excused defendant is not marked by a criminal conviction with its pronouncement of moral culpability. Nonetheless, he is still brandished by his excuse defense as an individual who is defective and weak and therefore, lesser in some serious way.

This social message stands in stark contrast to justified defendants. As Professor Greenawalt recognizes,

[i]f [the defendant] is fully justified, she will not be subject to blame or to classification as a weak or defective person. If [the defendant] is excused, she may be regarded as wholly or partly free of blame, but she will have demonstrated weakness or some defect.⁷⁸

Thus, the justified defendant emerges from the resolution of his criminal prosecution with his reputation and character intact. The first difference, then, between justification and excuse is the differential impact on the social reputations and public characters of defendants.

One suggestion to address this difference is to reconceptualize excuse defenses. After all, if moral blame is being shifted away from the actor onto his disability, then perhaps what is being judged and labeled is solely the disability and not the actor. This suggestion is appealing because it takes the theory of excuses to its logical end. However, in reality disabilities do not exist independently but instead are conditions borne, either temporarily or permanently, by the individual defendants. While it is possible for the legal doctrine to separate the defendant from disability for moral judgment purposes, it is not possible to achieve the same separation in social reality. Even if it were possible, this reconceptualization is not an improvement for defendants with cultural defenses. Because their disabilities are their minority cultures, the social message would be that the cultures are the flaw or weakness that is to blame. This too is a problematic message.⁷⁹

The second difference between justification and excuse is the difference in the substance of the social messages that emanate from each. On a basic level, this is

76. ROBINSON, *supra* note 46, § 25(d), at 100-01.

77. See *supra* text accompanying notes 49-56.

78. Greenawalt, *Distinguishing*, *supra* note 71, at 89.

79. See *infra* text accompanying notes 284-89.

the difference between right and wrong. Justified conduct is regarded as right while excused conduct is regarded as wrong. However, this binary depiction of right and wrong is oversimplified because the criminal law is not reducible to absolute judgments of right and wrong.

For instance, the concept of being justified is quite complex and multifarious. Professor Greenawalt best captures the complexity of the message of justification when he describes the varying reactions to the use of deadly self-defense:

Because people hold varying moral perspectives, they judge particular acts differently. For instance, people who value highly the defense of right believe the use of deadly force is morally better or at least the moral equivalent of retreating. Others prefer retreating but regard standing one's ground as morally permissible. Still others think that standing one's ground is wrong, but that a failure to retreat is excusable, considering human pride, the general emotional response to attack, and the short time for response. Finally, there are those who would not punish the actor who stands his ground even though they are uncertain how to regard his use of deadly force.⁸⁰

Earlier I discussed how criminal law theorists have struggled with whether justified action is morally mandated conduct or whether it is merely legally acceptable behavior.⁸¹ As a result, it is misleading to think of justified conduct as *right*.

Similarly, the social message of excuse may be more varying than a universal pronouncement of being wrong. Some acts may not be morally wrong, but instead unacceptable given general deterrence concerns for future offenders and law-abiding citizens. As a result, it is misguided to think of excused conduct as wrongful.

For our purposes, the distinction in the substantive meaning of justification and excuse is still worrisome. Despite the multiple meanings that may be attributed to justification and excuse, there is still undeniably a significant divide between the two; the substantive message of justification is a positive one, while the substantive message of excuse produces negative overtones. This gap produced by the contrast of justification and excuse has tremendous implications for the communities governed by the criminal law. These critical differences between justification and excuse are what inspires this Article's call for an approach to the true cultural defense case based on justification rather than excuse.

C. The Current Approach Based on Excuse

Despite its name, there are actually two components to the current excuse approach to the true cultural defense cases: discretion and excuse defenses. This section discusses in detail the weaknesses of the first component and reserves its

80. Greenawalt, *Distinguishing*, *supra* note 71, at 107.

81. *See supra* text accompany notes 68-73.

critique of the second component for Part III.⁸²

The first component is the discretionary power of various authorities within the criminal justice system. When confronted with the facts of a true cultural defense matter, a police officer can use her discretion to avoid an arrest, to proceed with non-criminal charges in a non-criminal forum or to arrest for more lenient criminal charges. Likewise, the assigned prosecutor can use his discretion to reduce the criminal charges, to offer a generous plea bargain or to recommend a non-jail or light jail sentence. Finally, the judge can use her discretion to order a favorable penalty for the defendant.

The second component of the current approach is the reliance on existing excuse defenses. Although the overwhelming majority of cases in the criminal justice do not involve a trial,⁸³ almost all arguments made by defense attorneys on behalf of their accused clients involve doctrinal defenses.⁸⁴ Defense attorneys, whether purposely or not, advocate in their private conversations with prosecutors, in their appearances before judges and in their presentations to trial juries, actual defenses such as lack of mens rea, a reasonable mistaken belief, entrapment, etc. Interestingly, when representing defendants in true cultural defense cases, attorneys overwhelmingly confine their arguments to established excuse defenses, such as insanity or diminished capacity.⁸⁵ If the norms and values of minority cultures are discussed at all, they are relegated to being evidence to support classic existing excuse defenses.⁸⁶

In any one case, discretion and excuse, the two components of the current excuse approach, can operate in tandem. For example, a defense attorney can threaten to plead insanity to induce a prosecutor to offer a non-jail plea bargain to avoid a lengthy, difficult hearing with mental health experts and to risk civil commitment, as opposed to a criminal confinement. The two components can also operate independently or only one of the two may be implicated in any single case.

Regardless of how discretion and excuse may be invoked, both components of the current excuse approach are flawed. Discretion is problematic and has been criticized in many other contexts in the criminal justice system and in other areas

82. See *infra* Part III.A.–C.

83. See, e.g., Cait Clarke & James Neuhard, "From Day One": Who's in Control as Problem-Solving and Client-Centered Sentencing Take Center Stage?, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 13 n.5, 14 (2004) (stating that "plea rates in most states are at 70% or higher" and concluding that "an overwhelming majority of criminal cases are resolved through negotiated pleas or diversion programs").

84. See Neil P. Cohen et al., *The Prevalence and Use of Criminal Defenses: A Preliminary Study*, 60 TENN. L. REV. 957, 960-963 (1993) (summarizing data regarding criminal cases in Tennessee); Stephen G. Valdes, Comment, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709 (2005) (summarizing survey data given to judges and lawyers in six states).

85. This is to be expected because the defendant's mental state usually rules out other defenses such as lack of mens rea or justification. See, e.g., *infra* text accompanying notes 153-158.

86. See *infra* Part III.A.

of law.⁸⁷ Most commonly, critics describe the arbitrary randomness and lack of justice and fairness in outcomes when there is too much reliance on discretion.⁸⁸ In the context of cultural defenses, discretion is particularly troubling because of the large stakes involved. For defendants who have true cultural defense claims, the range of possible dispositions at the discretion of various law enforcement officials is wide. On the one hand, there may never even be a criminal case if there is a decision not to arrest. On the other hand, there may be a conviction after trial for a serious felony along with a stiff jail sentence. Officials are not simply choosing among possible criminal offenses to pursue or sentences to recommend. In some cases, they are contemplating the option of never formally involving the criminal justice system at all. With that option in the range of possibility, reliance on discretion as a response to true cultural defense cases is particularly worrisome.

Admittedly, even under the alternative justification being proposed in the remaining parts of the Article, key law enforcement officials will retain and exercise discretionary power over outcomes. Realistically, discretion is unavoidable since the criminal justice system is a human enterprise used to govern communities of humans.⁸⁹ However, because the justification approach offers a better doctrinal fit for cultural defense cases, there will be less reliance on discretion as a corrective measure. Instead, there will be greater application of legal doctrine and adherence to the rule of law. The effects of discretion under the proposed justification approach will be ameliorated due to the relative advantages of justification over excuse as the second component.

D. The Proposed Approach Based on Justification

In the opening stories, the current excuse approach, along with its flaws, was accepted rather matter-of-factly by all the defendants and their attorneys with little protest. None of the attorneys attempted to seriously advocate for a new culturally based justification defense. Even the Kimura petition, with its twenty-five thousand signatures, introduced the Japanese conception of *oya-ko shinju*, or parent-child suicide, but did not evolve into a basis for a doctrinal challenge to the law.⁹⁰

87. See, e.g., Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 933 (2000) (discussing the problem of discretion in the context of the federalization of crimes traditionally prosecuted in state courts; stating that "[b]ecause the prosecutors in the field who make charging decisions often lack sufficient incentives to apply the principles of federalization, prosecutorial discretion can exacerbate the political, institutional, and fairness problems inherent in federalization") (footnote omitted).

88. See, e.g., Michael A. Simons, *Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921, 944-45 (2002) (highlighting criticisms of the exercise of discretion in cooperating with defendants).

89. See Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 Nw. U. L. REV. 857, 857 (1994) (stating that the first function of criminal law is to "define and announce the conduct that is prohibited (or required) by the criminal law . . . [thus] provid[ing] ex ante direction to members of the community as to the conduct that must be avoided (or that must be performed) upon pain of criminal sanction").

90. See *infra* Part III.A.1.

Instead, it remained as a plea to the prosecutors to use their wide discretion mercifully. Perhaps the lack of protest and challenge is due to the fact that attorneys are trained to accept the law as it is, and only rarely do they regard their cases as opportunities to change the law. After all, challenging the law is not without risks and, given the paramount ethical obligations to individual clients, attorneys may logically reject riskier options.

Remarkably, even scholars in the debate over culture and crime have largely failed to recognize the confines of the current excuse approach and the absence of a defense that speaks to the righteousness of defendants' motives. Many of them presume, in their discussions of a cultural defense, that they are being asked to consider excusing the defendant for a wrongful act. This presumption is clear from their choice of language and statements. For example, Nancy Kim writes that "[a] substantive criminal defense would *excuse* the defendant's otherwise criminal behavior because cultural attributes of the defendant induced the defendant to act as he or she did."⁹¹ Similarly, Taryn Goldstein writes that "[t]he cultural defense, if formally adopted, would operate as an *excuse* for an otherwise criminal act. Under the present justice system, the act would be considered wrongful; however, the actor would be excused because he lacked the requisite mental culpability."⁹² Even the oft-cited Harvard Law Review note that began this debate proposed its radical idea of an independent cultural defense as an excuse. "An argument that might be raised against the cultural defense is that it would have a counter-deterrent effect, thus encouraging crime by its implicit guarantee of an *excuse*."⁹³

In the most recent comprehensive treatment on cultural defenses, Professor Alison Renteln accomplishes the unprecedented task of compiling numerous instances where the norms of a minority culture intersected with the law.⁹⁴ She concludes in her book that the best way to incorporate culture into crime is the creation of a partial excuse.⁹⁵ She assumes that such defendants are, on some level, culpable and that a partial excuse allows increased flexibility in determining the relative level of culpability.⁹⁶ In her analysis, Professor Renteln considers a complete excuse defense as an alternative.⁹⁷ However, she never acknowledges or

91. Kim, *supra* note 25, at 109 (footnote omitted) (emphasis added).

92. Goldstein, *supra* note 24, at 155 (emphasis added).

93. HARV. Note, *supra* note 22, at 1304 (emphasis added).

94. See RENTELN Book, *supra* note 21, *passim*.

95. See *id.*; see also Renteln Article, *supra* note 12, at 489.

96. See Renteln Article, *supra* note 12, at 489:

The advantages of partial excuses are clear. They allow the law to accommodate the motivation of the defendant without requiring inappropriate conviction or complete acquittal By providing alternatives, partial excuses would allow more flexibility. More importantly, they would allow the jury, after hearing all the evidence, to determine the appropriate degree of culpability.

97. "If cultural motives are admissible in court, then this would allow for the creation of a formal cultural defense. A decision must be made whether the cultural defense should exonerate the defendant entirely or only partially." *Id.* at 490.

explores the alternative of a justification claim, partial or complete.

Despite their divergent roles and purposes, attorneys in the courtroom and academics in the classrooms have approached the intersection of culture and the criminal law similarly. They have assumed a cultural defense would and could only operate as an excuse. What is notably missing is a challenge to the status quo that steps outside the box of excuse. The time is now to undertake the challenge of conceiving a cultural defense not as an excuse, but rather as a justification.

1. Three Essential Elements of the New Justification-Based Approach

There are several possible forms a justification approach can take and there are certainly outer limits to this approach. This Article discusses both these topics momentarily.⁹⁸ First, there are several essential elements important to the proposed justification approach, regardless of which form or device is used. They are (1) that the precise form or device is a formal defense; (2) that it operates as a complete defense; and (3) that it be based upon a mixed subjective/objective standard.

The first element is formality and doctrine. The new approach proposed by this Article is to create a formal defense in the criminal law to reflect the righteous motives of culturally-influenced defendants. The formal doctrine would replace the current entreaties to sympathy and discretion that occur in informal contexts, such as plea bargaining, discretionary charging decisions by police officers and prosecutors and in sentencing.⁹⁹

Some commentators believe that discretion and informal contexts are sufficient and even appropriate accommodation of minority cultures and thus reject the proposal of greater formalism.¹⁰⁰ However, Professor Renteln's survey of instances where defendants have tried to use their minority cultures in their defense reveals a startling range of successes and failures.¹⁰¹ According to the survey, frequently the individual proclivities of a judge or a prosecutor or a defense attorney had profound implications for the inclusion or exclusion of culture in a defendant's defense.¹⁰² Individual proclivities are bound to be more determinative

This raises the question as to whether a cultural defense should at times serve as a complete excuse. If the court determines that the defendant is not blameworthy, then it stands to reason that it may conclude that punishment is inapt. But the concept of a partial excuse includes the range of punishment from none to complete.

Id. at 500.

98. See *infra* Part II.D.2.–3.

99. See *supra* text accompanying notes 83–88.

100. See, e.g., Damian W. Sikora, *Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695, 1714–24 (2001) (arguing cultural issues should be looked at in sentencing only).

101. See RENTELN Book, *supra* note 21, *passim*.

102. Professor Renteln reports a wide disparity in how judges view the relevancy of cultural evidence.

We have seen that sometimes judges exclude the evidence about culture as irrelevant. In others they take it into account, sometimes even imposing virtually no punishment Because it is

in informal contexts.

Under a justification approach, where the norms and values of a minority culture constitute the bedrock of the defense strategy, it is not acceptable to have only informal contexts. There must also be opportunities for defendants to present claims of justification formally before trial juries and appellate courts. The addition of formalism will ensure that such claims are fairly heard and meritoriously decided.¹⁰³ It will ameliorate the discretion and fortuity that otherwise dominates in a system that considers minority cultures only in informal contexts.

The second essential element of a justification approach is that the defense is as a complete defense, meaning that defendants should wholly escape criminal liability and criminal penalties for the particular acts. The charges should not simply be reduced to some lesser degree. Perhaps the completeness of the defense is self-evident in the terms, justification and justified. After all, to be justified is broadly to be right and narrowly to be permitted or tolerated.¹⁰⁴

Being a complete defense also mandates that successful invocations of a justification defense protect the defendant from any form of punishment, even collateral consequences. Under the current excuse approach, successfully excused defendants are deemed to have or have had some disability, and thus are vulnerable to the imposition of civil restrictions on their freedom. For instance, a finding of not guilty by reason of insanity gives rise to the risk of civil commitment in a state mental institution for an indeterminate period. Paul Robinson and others have identified these consequences as "collateral consequences" that are imposed even when there is no criminal conviction.¹⁰⁵ He lists "civil commitment, civil restraint or injunction, forfeiture, civil liability and expulsion from the country" as substantial examples.¹⁰⁶ More importantly, Paul Robinson points out that the nature of the defense dictates whether such collateral consequences should be imposed.¹⁰⁷ Because justified acts mean that there has been no "harm or evil" that has occurred while excused acts do occasion "harm or evil," escape from collateral consequences is more readily achieved with justification.¹⁰⁸

The third and final element vital to the justification approach is that it be based

unacceptable for a legal system to have such disparate results, this is one reason why some formal policy on the cultural defense should be adopted.

Id. at 47.

103. See Richard Delgado, et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1400-04 (1985) (criticizing the lack of formalism in ADR because it leads to greater racial and ethnic prejudice).

104. See *supra* text accompanying notes 68-73.

105. See e.g., ROBINSON, *supra* note 46, § 38, at 179-87.

106. *Id.*, § 38(a), at 180.

107. *Id.* at 180-181. "Depending on the nature of the defense, however, it may be appropriate to reconsider whether such exemption from collateral effects is always appropriate. Failure of proof defense, offense modifications, and justifications present little problem." *Id.* at 181.

108. *Id.*

upon a mixed subjective/objective standard. This means that whatever form the justification defense takes, it should operate as a standard that is based on the reasonable person. Under the new approach, the reasonable person will be imbued with a particular cultural background. For instance, the perspective for a jury in the Kimura case in evaluating whether the act of drowning her children in an attempted parent-child suicide was justified should be the perspective of a Japanese mother. The standard could even be more specific as to be a Japanese immigrant mother living in a predominantly Japanese community. However, the inclusion of a cultural background or community is not at all meant to eliminate reasonability in the standard.

Reasonability is an important feature of the proposed justification approach because it avoids complete subjectivity. Admittedly, the consequence of a culturally-based justification is the injection of greater subjectivity into the criminal law. However, the proposal is not suggesting that the only question for the jury is whether Fumiko Kimura herself believed her act was justified.¹⁰⁹ Of course, a good faith subjective belief is essential but it is only the beginning of the inquiry. Objectivity is necessary for the criminal law to function as the moral voice of the community.¹¹⁰

An objective cultural defense goes on to evaluate the reasonability of a defendant's act from the perspective of a reasonable person who shares the same cultural background and community as the defendant. It eliminates as grounds for acquittal the defendant whose decision to kill may be the product of their minority culture but is nevertheless unreasonable, even by the norms and values of that culture. In other words, extreme Japanese mothers or outrageous Laotian spouses whose decisions and actions are judged by their cultural standards as unreasonable would fail the mixed subjective/objective standard.

In summary, the Article's proposed justification approach is to introduce a formal doctrine that allows defendants whose values are based on their cultural backgrounds to argue that they are not criminally liable because their acts were justified from the perspective of a reasonable person who shares their cultural attributes. If successful, such defendants should be free from criminal liability and any collateral consequences.

2. Possible Doctrinal Vehicles

The three essential elements of a justification approach can become legal doctrine in the form of several possible devices. They are (a) the necessity defense;

109. This avoidance of complete subjectivity is a familiar point that is often made in other debates in the criminal law. For example, England struggled with the questions of whether to retain objectivity and how much in the context of provocation defense in *Director of Public Prosecutions v. Camplin*, (1978) 2 Eng. Rep. 168, and in *Regina v. Smith*, (2001) 1 A.C. 146 (H.L.).

110. Even the drafters of the Model Penal Code have endorsed the value of objectivity in the standards of the criminal law. MODEL PENAL CODE AND COMMENTARIES § 210.3 cmt. at 62-63 (1980) (explaining the mixed subjective-objective inquiry of the extreme emotional disturbance defense).

(b) the de minimis or the interest of justice defense; and (c) a new cultural justification defense. The first two already exist in numerous jurisdictions in the United States and have developed their own jurisprudence, replete with exceptions and limitations. The last suggestion has not been enacted by any jurisdiction and would need to be refined to a greater degree than can be done in this Article. The following brief descriptions of each device is intended only to begin the discussion of how best to implement the proposed justification approach.

a. The Necessity Doctrine

The necessity defense is “also known as the choice of evils doctrine.”¹¹¹ It allows a defendant to escape from criminal liability for a harmful act if that act was necessary to prevent a greater harm from occurring.¹¹² The rationale of the doctrine is the lesser harms analysis described earlier in Part II.B.2.¹¹³ Most states have this defense in their statutes¹¹⁴ and follow the Model Penal Code’s version.¹¹⁵ Generally a defendant must satisfy four elements: (1) the act must have been an emergency measure to avoid an imminent injury; (2) the defendant must not have had a role in creating the emergency situation; (3) the act must have been necessary to prevent the imminent injury from occurring; and (4) the harm caused by the defendant’s act must be less than the injury prevented.¹¹⁶

Early common law versions of the necessity defense limited the defense to circumstances where the cause of the impending harm is nature, as opposed to human beings.¹¹⁷ However, modern criminal law permits the defense even when the source of the impending harm is human.¹¹⁸ Thus, the necessity defense could be adapted to the context of the true cultural defense case.

Successful adaptation contemplates that the cultural background of the individual defendant will be considered in evaluating the claims of the defense. Recall that this is the third essential element of the justification approach described

111. *E.g.*, Adav Noti, *The Uplifted Knife: Morality, Justification and the Choice-of-Evils Doctrine*, 78 N.Y.U. L. Rev. 1859, 1860 (2003).

112. *Id.*

113. *See supra* text accompanying notes 61-67.

114. Noti, *supra* note 111, at 1861.

115. *Id.*; *see* MODEL PENAL CODE AND COMMENTARIES § 3.02 (1980).

116. MODEL PENAL CODE AND COMMENTARIES § 3.02 (1980); *see e.g.*, N.Y. PENAL LAW § 35.05(2), at 513 (McKinney 2005).

117. *See* LAFAYE, *supra* note 17, at § 10.1(a), at 523 (stating that duress was the defense for human pressures to commit harmful acts); *see also id.* (stating that duress is traditionally and essentially an excuse defense that treats such pressures as disabilities that force or compel a defendant to commit a harmful act and that because it does not speak of the moral agency and free will of the defendant). This Article does not consider duress as an option for enacting the proposed justification approach. For a worthwhile discussion of how culture affects the free will of individuals and how the law should consider this effect, *see* Levine, *supra* note 21, *passim*.

118. *See* LAFAYE, *supra* note 17 at 523 (explaining that modern criminal law “blur[s] the distinction between duress and necessity”) (quoting *United States v. Bailey*, 444 U.S. 394 (1980)).

above.¹¹⁹ The cultural subjectivity is necessary because the weighing of harms explicit in the necessity defense relies upon more subtle judgments of what harms are recognized at all and what scale of values is used to weigh the harms. These subtle judgments are what John Parry believed many judges and commentators sadly fail to appreciate about the defense of necessity.

Although the debate is framed as one over the relative magnitudes of the competing harms, the crucial but often buried question is whether to recognize the purportedly greater harm as a harm at all [T]he normative question of what counts as a harm . . . suggests an even more fundamental moral inquiry into the general desirability and appropriateness of the defendant's conduct. . . . [There is] a debate about defining harm that is unresolvable without an appeal to some trumping scale of values. In sum, while harm is important, it always exists in reference to a scale of values, and those values are just as much at issue in necessity cases. The narrow, mechanical version of the balance of harms test conceals and fails to resolve this conflict of values.¹²⁰

Thus, the proposed justification approach could only be successfully expressed as a cultural version of the necessity defense if the scale of values used to recognize and to measure harms was the scale of the minority culture of the defendants.

Some may protest that this renders the necessity defense overly subjective and nullifies any objectivity in the criminal law. There are two responses to this criticism. First, there will still be some objectivity in the application of the cultural necessity defense because the defendant's act would still have to be the lesser harm to a *reasonable* person sharing the same cultural background and not just any person. Second, justification defenses are already quite subjective in current criminal doctrine.

There are at least two instances where current justifications are arguably subjective. For example, in the legendary case of *People v. Bernard Goetz*,¹²¹ the New York State Court of Appeals held that in order to assess the objective reasonability of a defensive homicide, there must be consideration for the "'circumstances' facing a defendant or his 'situation.'"¹²² Such circumstances or situation include the subjective factors of

any relevant knowledge the defendant had about [the victim,] . . . the physical attributes of all persons involved, . . . [and] any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions

119. See *supra* text accompanying notes 109-11.

120. John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 Hous. L. Rev. 397, 420 (1999) (discussing civil disobedience cases which are strikingly similar to cultural defense cases in this regard).

121. 497 N.E.2d 41 (N.Y. 1986).

122. *Id.* at 52.

were to injure or rob him or that the use of deadly force was necessary under the circumstances.¹²³

Thus, assessing the objective reasonableness of a self-defense claim requires considering subjective terms. Indeed, this subjectivity is so well-established that several defendants have been able to inject culture as evidence supporting their perception of the threats to their lives that justify their acts of homicide.¹²⁴

A second example of where current justification defenses are already subjective in nature is the mistaken defendant who makes a justification claim in conjunction with a mistake of fact claim. A defendant thought that he was justified under his perception of the circumstances; however, it turns out that his perceptions were factually wrong. In such cases, the classification of such mistaken self-defense claims is still justification and not excuse, even though a disability may be responsible for their faulty perception of the facts.¹²⁵ Clearly, current justification doctrine in the criminal law is no longer purely objective; indeed, it is strongly subjective while retaining some objectivity. Using the existing necessity defense to articulate the values of a minority culture does not change this fact.

b. The De Minimis Defense

The de minimis defense is a second vehicle through which the proposed justification approach can be implemented. It is one of the defenses in the Model Penal Code that only a few states have adopted.¹²⁶ This defense allows a judge to dismiss a prosecution if he finds that

the defendant's conduct (1) was within a customary license or tolerance; . . . or (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to a [trivial extent]; . . . or (3) present[ed] such other extenuations that it cannot reasonably be regarded as envisioned by the legislature in forbidding the offense.¹²⁷

Famously, this defense was used in a unique cultural defense case where an Afghani immigrant was observed and was photographed kissing the penis of his

123. *Id.*

124. *People v. Croy* is a celebrated case in which the California Supreme Court supported the inclusion of the culture of the defendant in a subjective interpretation of the reasonable person in self-defense. See JAMES G. CONNELL, III & RENE L. VALLADRES, *CULTURAL ISSUES IN CRIMINAL DEFENSE* § 7.2(a) (2003) (citing *People v. Croy* where the defense attorney successfully argued for a culturally relative reasonable person test of self-defense).

125. This is true in the Model Penal Code and in New York. See Robinson, *supra* note 46, § 27(f), at 115-16 (protesting such classification as problematic because the claim of the defendant is now so subjective that it is based on the personal factual perceptions of one individual, the mistaken defendant).

126. MODEL PENAL CODE § 2.12 (2002). There are five jurisdictions that have the de minimis defense: Guam, Hawaii, Maine, New Jersey and Pennsylvania. Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 837 n.23 (1999).

127. MODEL PENAL CODE § 2.12 (2002).

toddler son and charged with sex abuse in Maine.¹²⁸ The defendant claimed that this was an Afghani custom and that it was done as an act of love when a parent takes the unsanitary body part of their young child into their mouth.¹²⁹ The statute for sex abuse in Maine did not have any specific intent element and, as a result, it did not matter what the defendant's motive was for the act.¹³⁰ Thus, the legal issue in the case centered on the second prong of the de minimis defense: whether any harm occurred.¹³¹ The Maine Supreme Judicial Court reversed the defendant's conviction on the grounds that no harm occurred of the sort that the legislature sought to prevent and that the trial court should have dismissed the charges on the basis of the de minimis defense.¹³² The Kargar case is a model of how the proposed justification approach can be enacted through the second prong of the de minimis defense.

The first prong of the de minimis defense could also be a doctrinal vehicle for the proposed justification approach. Rejecting the view that customary license referred to consent and instead accepting the newer view that customary license refers to societal and communal customs,¹³³ the first prong of the de minimis defense could function as a strong cultural justification defense. Stanislaw Pomorski suggests this in his article on the de minimis defense:

[Under the customary license defense], the defendant is not trying to excuse his violation of the statutory norm, but claims that his conduct should be evaluated under customary norms prevailing in his community, rather than under a written rule of the state [T]he customary license defense is a species of justification rather than a species of excuse.¹³⁴

A parallel doctrine to the de minimis defense that could also serve as a vehicle for a cultural justification defense is the interest of justice statute. There are at least eleven states that have such statutes.¹³⁵ These statutes allow defendants to petition courts to dismiss criminal charges in the interest of justice and even enable judges to do so on their own.

Interest of justice statutes are arguably better suited for the justification approach than the de minimis defense because they are worded extremely vaguely and broadly. For example, New York Penal Law § 210.40 states that

128. *State v. Kargar*, 679 A.2d 81, 82 (Me. 1996).

129. *Id.* at 83.

130. *Id.* at 84-85.

131. *Id.* at 83-84.

132. *Id.* at 85-86.

133. This new view is offered in an article by Stanislaw Pomorski. See Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the 'De Minimis' Defense*, 1997 B.Y.U. L. REV. 51, 54-55 (1997) (arguing that customary license is behavior that is either approved of or tolerated by the dominating culture).

134. *Id.* at 66.

135. See Wanderer & Connors, *supra* note 126, at 844 n.67 (citing codes in Alaska, California, Idaho, Iowa, Minnesota, Montana, New York, Oklahoma, Oregon, Utah and Washington).

[a]n indictment or any count thereof may be dismissed in furtherance of justice . . . when . . . such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice.¹³⁶

Factors to consider in making such a decision include the

seriousness and circumstances of the charged offense, [the defendant's background,] the purpose and effect of imposing a sentence authorized by the offense, the impact of the dismissal on public confidence in the judicial system . . . on the safety and welfare of the community [and] any other relevant information that would indicate that the conviction would serve no useful purpose.¹³⁷

Clearly, the norms and values of the minority culture of a defendant would fit easily into this expansive list of factors. Additionally, courts could weigh the effects, both positive and negative, of imposing liability on the public confidence and welfare of minority communities. This concern is discussed in detail as a comparative advantage of the proposed justification approach over the current excuse approach.¹³⁸

c. A New Defense

A final vehicle for bringing the proposed justification approach to life in the criminal law would be a completely brand new cultural justification defense. I offer this last suggestion only to inspire discussion of what such a defense could be and not as a definitive exercise in statutory drafting. There are many important choices to be made, such as whether to rest the power of such a defense within the discretion of a judge or whether to expand the power also to lay jurors at a criminal trial. Furthermore, there is the decision whether to define the term, culture, broadly or narrowly or at all. Again, this is simply a first effort and nothing more. A new cultural justification defense could read as follows:

A defendant is not guilty of an offense if a reasonable person of a similar cultural background to the defendant believes that the harm caused by the conduct of the defendant was outweighed by some other imminent harm prevented by the same conduct. A defendant cannot claim this defense if there was a way, other than their conduct, to prevent the harm sought to be avoided.

Built into this cultural justification are the usual suspects in justification defenses: necessity, imminence and reasonability. Also notable is the absence of

136. N.Y. CRIM. PROC. LAW § 210.40 (2006); *see also* Wanderer & Connors, *supra* note 126, at 844 (explaining that interest of justice statutes call for dismissal when there are "compelling circumstances").

137. *E.g.*, N.Y. CRIM. PROC. LAW § 210.40 (2006).

138. *See infra* Part III.C.

another traditional concept in criminal justification and that is proportionality. Its conspicuous absence makes a lot of sense since proportionality is the relative assessment of harms. The point of a new cultural justification is to allow the minority culture of each individual defendant to shape this assessment, as opposed to the dominant Anglo-American culture of the current criminal law. In a way, then, proportionality is not stated explicitly but instead implied within the requirement of reasonableness from the perspective of the minority culture.

3. The Outer Limits of the Justification Approach

In this final section of Part II, I suggest several outer limits that could be used to contain the scope of the justification approach to true cultural defense cases. In addition to the limits that are included in the elements of the necessity, the de minimis, the interest of justice and the cultural justification defenses, the criminal law could also impose restrictions of a general nature. Such restrictions, or "outer limits," can be wholly detached from the underlying concepts of lesser harm to avoid greater harm, of the triviality of the harm, justice or cultural equality. Instead, these outer limits represent other societal values that lie in tension with the underlying concepts of the defenses.

I borrow the first three suggestions from existing outer limits already imposed on other existing defenses in the criminal law. For example, a common requirement of the self-defense, duress, and necessity defenses is that the defendant must not have caused, or significantly contributed in causing, the situation in which he finds himself. This outer limit is often referred to as the doctrine of clean hands. It expresses the judgment that while a defendant may otherwise have a valid claim of duress or necessity, it is unjust to accept that claim if the defendant brought the situation upon himself. The doctrine of clean hands reflects both retributivist concerns with the decisions of the defendant in bringing about bad circumstances and the utilitarian desire to deter the future occurrence of such circumstances.

A second borrowed outer limit is to disallow the defense if the victim of the harmful conduct was innocent. Innocence in this context is used to refer to two distinct concepts, one or both of which can be invoked. The first concept of innocence is defined as the lack of responsibility in causing the situation in which the defendant finds himself. In this sense, the innocence restriction is a logical supplement to the doctrine of clean hands. It is inherent in the nature of existing defenses classified as defensive force justifications, as a defendant is justified in killing or injuring a victim who is threatening to take his life, to burglarize his home or to forcibly rape him because the victim is not innocent, but instead, through threatening conduct, has morally forfeited his right to live. Thus, if a victim has not brought about the situation through some morally condemnable conduct, his death or injury is not deemed justified; instead, it constitutes a crime. Some have highlighted the innocence of potential victims as the rationale for not extending the defense of duress to those who suffer from battered women's

syndrome, even though the criminal law has extended the right of deadly self-defense to the same group.¹³⁹

An alternative or additional understanding of innocence is the concept of consent. For instance, it could be argued that a victim is innocent where the victim is not a member of the minority culture to which the defendant belongs. This notion expresses the judgment that a defense should not be afforded when a victim, although part of the causal chain for the circumstances in which defendant finds himself, has not consented to the particular culturally-motivated reaction of the defendant because the victim is not a member of that same culture. Indeed, the victim is a member of some other culture. It assumes that victims who share the same culture as the defendant have consented to the culturally motivated reaction of the defendant and, therefore, are not innocent.

This second definition of innocence based on the concept of consent is different from the lack of causal liability described earlier. While I use membership in a particular culture as an example of a possible definition of consent, I recognize that it is obviously controversial and is only one of several ways to define consent in this context. One legitimate criticism is that a fair and workable definition of membership within a culture may prove to be elusive, given that individuals who are born in one ethnic culture may no longer live their lives according to the norms and values of that culture due to assimilation and the influence of other cultures, including the dominant culture.¹⁴⁰

The point of my inclusion of this second sense of innocence is not to advocate for membership in a culture as the best way to define consent or lack of innocence; rather, the goal is to describe consent as a possible outer limit, however it is defined. It already exists in several areas of the criminal law. For example, consider Model Penal Code § 2.11(1) where “[t]he consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent . . . precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.”¹⁴¹

A third outer limit borrowed from existing doctrine is to prohibit any defendant from using the justification approach to answer to charges of homicide. This prohibition is long established in the necessity and duress defenses. It articulates the judgments that the societal harm of loss of life can never be justified by a lesser harms analysis, even where one life is taken to save multiple lives, and can never

139. See Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormentors: Reflections on Maintaining Respect for Human Life While Killing Moral Monsters*, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 259 (Stephen Shute & A.P. Simester eds., 2002) (arguing that Battered Women's Syndrome should be used limitedly in self-defense cases and never when a woman has killed her husband in a non-confrontational setting).

140. See Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1192-94 (2001) (observing that “minority cultures . . . undergo constant transformation and reshaping”).

141. MODEL PENAL CODE AND COMMENTARIES § 2.11(1) (1985). Also, Stanislaw Pomorski reinterprets the first prong of the Model Penal Code's de minimis defense as a societal consent defense. See Pomorski, *supra* note 133, at 54-55 (comparing Pomorski's view with those of other scholars).

be excused by a disability argument. It protects the sanctity of life from such defenses. Although this outer limit certainly has an appeal, its judgments are still subject to the criticism of the current excuse approach that inspires this Article. Preventing the use of justification in homicide cases by culturally motivated defendants is a general declaration that the values of minority cultures never justify the harm of death. Yet, at the same time, death is outweighed by the values of the dominant culture in existing doctrine such as the deadly defense of habitation and the deadly defense against forcible rape. While the application of this outer limit may increase the likelihood of the criminal law adopting the justification approach to minority cultures, this inequality among cultures remains problematic.

A final suggestion for an outer limit to impose on the justification approach is to ban its use when it would contradict some other important societal principle. This final suggestion is deliberately worded vaguely to be broad enough to include future cultural defense cases that cannot be anticipated. However, some contradictory societal principles include: gender equality, a no-tolerance principle towards the torture of others and the protection of children. In advocating for a broader understanding of the *de minimis* defense, Stanley Pomorski describes the need for this final outer limit in the following excerpt:

[A]n additional qualifying criterion of the scope of customary license is necessary – a general formula drawing a line separating those customs that are acceptable from those that are not. Respect for local autonomy and diverse cultural traditions would dictate tolerance, but the outer limits of tolerance should be defined with an eye on basic decencies expected in a modern democratic society. Minority cultures, while afforded all the respect they deserve, must not be idolized. Courts as well as legislatures should not be shy to recognize that some customary practices are oppressive and must not be tolerated.¹⁴²

Now that we have described the underlying theory and the essential elements of the proposed justification approach and several possible ways to bring that approach to true cultural defense cases, let us now turn to Part III and the serious task of understanding why we should adopt this new approach.

III. JUSTIFYING THE JUSTIFICATION APPROACH

Recall that there are two components to the current excuse approach: the over-reliance on discretion and the use of existing excuse defenses. While this Article briefly observed the vulnerability of relying excessively on discretion in Part II.C., it is here that I now turn to the significant shortcomings of using the excuse defenses. There are three shortcomings: (1) the use of legal fictions; (2) the avoidance of moral claims; and (3) the denigration of minority cultures. In perfect

142. Pomorski, *supra* note 133, at 60.

symmetry, the opposites of these very weaknesses of the excuse approach are the comparative strengths of the proposed justification approach: (1) the elimination of legal fictions; (2) the direct confrontation with difficult moral questions; and (3) the promotion of cultural pluralism.

Part III of the Article begins by returning to the three opening narratives to discuss how legal fictions were employed as defense strategies and to describe how the fictions would be replaced by more honest claims under the proposed justification approach. The cases of *People v. Kimura*, *People v. Aphaylath* and *State v. Butler* are useful prototypes because they were all actual cases where defendants were hampered by the criminal law's current excuse approach to the norms of minority cultures. In addition, because they were all homicides, they were covered by the mass media and were litigated to fairly late stages in the criminal justice process. The mass media coverage provides greater insight into how the cases resolved themselves.

Part III then continues with a discussion of the remaining pairs of weakness and strength. It compares the avoidance of moral claims under the current excuse approach with the direct confrontation of such claims under the proposed approach. It juxtaposes the denigration of minority cultures in the status quo with the advancement of cultural pluralism under justification. Finally, Part III ends with a look at how judges or juries working under the proposed approach could apply the concept of justification to the three opening narratives. This section goes back to the essential elements and outer limits laid out in Part II and demonstrates how the proposed approach can be part of a fair and just criminal law.

A. *Replacing Fiction with Honesty*

Before we begin our review of the three opening narratives, it is important to warn that the fact that they all concern homicides can be a distraction. As discussed earlier, some would even support an outer limit that cultural defenses can never be used to answer to charges of homicide.¹⁴³ This is because many people understandably fixate on the fact of death in assessing these cases.

However, it is important to keep in mind that not all cultural defense cases are homicides.¹⁴⁴ The intention of this Article is to critically examine *all* cultural defense cases (homicide as well as non-homicide) and the merits of a new approach to minority cultures in the criminal law. To truly appreciate the conflict-

143. See *supra* Part II.D.3.

144. See *U.S. v. Tomono*, 143 F.3d 1401, 1404 (11th Cir. 1998) (holding that the trial court erred in considering "cultural differences" in sentencing the defendant, a Japanese national charged with the illegal importation of reptiles); *Regina v. Robert Ferguson Derriviere*, (1969) 53 Crim. App. 637, 637 (reviewing the case of an English immigrant from the West Indies who disciplined his thirteen-year son by striking him in the face; the court affirmed his sentence and charge of assault, holding that "[i]mmigrant parents must conform to English standards in the correction of their children, although some regard may be had initially to their different background"). See generally, RENTELN Book, *supra* note 21, at 48–113 (discussing other cultural practices, including scarification, female circumcision, and folk medication).

ing tensions in the culture puzzle then requires a suspension of the visceral response to the fact of death. Attention should be focused on the larger question of whether minority culture should inspire new doctrine and not on the factual specifics of any one case.

The first advantage of the justification approach is the elimination of legal fiction from the criminal justice system.¹⁴⁵ Some may point out that the criminal law, like many other areas of law, is full of legal fictions. According to this viewpoint, legal fictions serve a particular function in the law and should not be discarded simply because they are false. While that may be true of certain fictions, the proposal for a new culturally-based justification eliminates legal fictions that are little more than obvious manipulation of existing excuse defenses. Unlike legal fictions that are independent from any existing doctrine, the use of ill-fitting excuse defenses impacts the coherence of the excuse defenses themselves. Ends-driven jurisprudence is always harmful to the integrity of the law.

Moreover, the obviousness of the ploys significantly undermines respect for the law. The *Kimura* case is a startling lesson that a defendant can be deemed temporarily insane, even though she had complete control, and fully understood the nature of her acts and the difference between right and wrong.¹⁴⁶ When such falsehoods are fashioned by a judge, the prosecutor and the defense attorney in a case, the message is that the law is nothing more than a pliable tool that can be used to achieve substantively just outcomes, even when the accompanying legal determination is not true. Eliminating such fictions and their messages through a new justification approach is a substantial improvement over the current status quo.

For defendants in true cultural defense cases, the absence of any doctrine that captures their claims of justification has forced them to use legal fictions. They have had little choice but to become cultural evidence cases by employing evidence of their cultures in support of ill-fitting existing excuse defenses.¹⁴⁷ In contrast, a cultural justification defense will allow these defendants to represent that they were not crippled by the disability of their cultures but rather that they made reasoned choices that are based on different value systems due to their backgrounds. Instead of ignoring or disguising the affirmative choices of such defendants, a justification defense accepts the nature of these choices and analyzes whether such acts were justified under the circumstances. The concept of choice and free will is fundamental to the American criminal justice system and should be

145. Earlier works of mine have also identified other legal fictions in the criminal justice system and advocated for their removal. See Chiu, *supra* note 19, at 657-61 (explaining why the agency defense in drug cases is a legal fiction that "disguises the actual underlying empathy for the [defendant]"); Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. Cal. L. Rev. 1223, 1246-56 (2001) (characterizing battered women syndrome as an unrealistic, inadequately descriptive legal fiction).

146. Rashmi Goel, *Can I Call Kimura Crazy? Ethical Tensions in the Cultural Defense*, 3 SEATTLE J. FOR SOC. JUST. 443, 445-49 (2004).

147. See *infra* Parts III.A.1.-3.

extended to culturally-motivated defendants.¹⁴⁸ The Article now returns to our three narratives to observe how legal fictions were employed and to ponder how their defense strategies could be transformed into honest claims of justification.

1. *People v. Kimura*

In the first case, Fumiko Kimura faced two counts of first degree murder. In light of the grievous harm, the prosecutor believed she had little choice but to criminally charge Fumiko Kimura for the deaths of her two young children.¹⁴⁹ Remarkably, the Japanese community in Los Angeles and around the world responded to the prosecution with a protest petition signed by more than twenty-five thousand people. This petition proclaimed that the acts of Fumiko Kimura would not be prosecuted under “modern Japanese Law” as murder, but at most, would be charged as involuntary manslaughter.¹⁵⁰ In addition, the petition described the most probable sentence in Japan, as “a light, suspended sentence with probation and supervised rehabilitation.”¹⁵¹ Perhaps the most startling information was the petition’s statement that this act of Fumiko Kimura was recognized and even ascribed a particular name in Japanese culture, *oya-ko shinju*, or parent-child suicide.¹⁵²

Unfortunately for the defendant, there was no parallel recognition of or deference to *oya-ko shinju* in American criminal law. Indeed, as the prosecutor correctly pointed out, evidence of this cultural norm and practice amongst the Japanese supported her case that the defendant had intent to kill her children—the very *mens rea* that she would need to prove for first degree murder.

If, in fact, she [Fumiko Kimura] was doing everything according to her cultural precepts, it would have supplied elements of the prosecution case, because then it would have shown she *intended* to kill her kids—intent to kill . . . I could have shown premeditation, deliberation, and intent to kill—all of those things which are necessary for first-degree murder.¹⁵³

The discussion of the norms of her minority culture would have been incriminating as an admission of an intent to kill.¹⁵⁴ Moreover, there was no doctrine in American criminal law that justified an intentional killing under such circum-

148. See, e.g., Levine, *supra* note 21, at 46 (“The U.S. criminal justice system is premised on the notions of free will and individual responsibility for one’s actions.”).

149. Woo, *supra* note 2, at 405 (quoting remarks of the deputy district attorney, “But what can I do? Two children were killed—and it doesn’t matter what her reasons were, it’s against the law”). These remarks are simplistic and misleading. As described earlier, the criminal law does indeed accept certain reasons as justifications for causing death, even when the deaths are of young children. See *supra* text accompanying note 69.

150. Woo, *supra* note 2, at 404.

151. *Id.*

152. *Id.*

153. *Id.* at 405 (quoting district attorney Lauren Weis).

154. *Id.* at 418.

stances. Without a failure of proof defense or a justification defense, the defense counsel turned to excuse because “[t]he only plausible defense had to be one that proved the defendant mentally incapable of the rational planning of such actions.”¹⁵⁵ Thus, instead of defending his client on the basis of this cultural norm, the defense attorney, Gerald Klausner, put forth a psychiatric defense. On behalf of the defendant, six psychiatrists examined Fumiko Kimura and testified at a pre-trial hearing,¹⁵⁶ concluding that she suffered from temporary insanity¹⁵⁷ at the time of the drowning.¹⁵⁸

As a result of their conclusions, the prosecutor agreed to reduce the first degree murder charges to voluntary manslaughter and Fumiko Kimura was sentenced to one year in county jail and five years’ probation.¹⁵⁹ Coincidentally or not, this penalty was similar to what the protest petition had predicted would have been the defendant’s fate in Japan. To achieve this result in the United States, though, Fumiko Kimura had to resort to a claim of temporary insanity.

Legally speaking, this is an odd and striking result. To be insane under the criminal law, it is generally required that there be either cognitive and/or volitional impairment. Cognitive impairment refers to the inability to distinguish between right and wrong while volitional impairment refers to the ability to resist impulses to engage in criminal behavior. Despite the testimony of the psychiatrists, Fumiko Kimura suffered from neither of these impairments at the time of her homicidal act. Although there is certainly evidence that her actions may have been “impulsive, spontaneous, and unplanned,”¹⁶⁰ there is no evidence that she lacked control over her own behavior or the capacity to tell the difference between right and wrong.

The day before the drowning, Fumiko Kimura had acted strangely according to a neighbor. She had been rude on the telephone and seemed exhausted and rambled during a visit from the neighbor. She even abruptly laid down on the floor in a spread-eagle position during their conversation. On the day of the drowning, Fumiko Kimura left a pediatrician’s office when she was told she had to wait to see the doctor and then went to a travel agency to buy three tickets to go to Japan with her children but did not have enough money. From there, she took a bus to Santa

155. *Id.*

156. *Id.* at 406. Her diagnosis was “brief reactive psychosis,” including major depression. *Id.*

157. *Id.* There is no formal legal definition of temporary insanity. However, some authors have outlined a working definition based on existing case law. See ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 48, 117 (1967) (suggesting a definition of temporary insanity as a state of mind where the defendant suffered from mental disease of a fixed, prolonged or chronic nature marked by lucid intervals such that he lacked the requisite mental state at the time of the crime); see also HENRY WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 87-88 (1933) (discussing voluntary intoxication, which although not acceptable as a defense in most states, does leave the defendant with a mental disorder so pronounced that it renders him for the time unconscious of his acts or incapable of distinguishing right from wrong).

158. See Woo, *supra* note 2, at 406.

159. *Id.* She had already spent this amount of time in jail by the time the plea bargain was struck. *Id.*

160. *Id.* at 416.

Monica beach, got off the bus, left her stroller at the bus stop and walked slowly into the ocean with her two children.¹⁶¹

This evidence is not consistent with a claim of insanity. Her behavior on these two days may be fairly characterized as abnormal and out of the ordinary for Fumiko Kimura. Certainly, she was anxious and upset and became more and more desperate as she struggled with her marital woes. Nonetheless, her conduct did not show a loss of control over her own bodily movements or a deprivation of a sense of right and wrong. For instance, she kept a medical appointment for her child and was distracted by her marital problems only when she was told to wait to see the doctor. Fumiko Kimura then attempted to return immediately to Japan with her two children but was stymied by a lack of funds. Only then did she turn to *oya-ko shinju*. She displayed thoughtfulness, awareness and control.

What may be true is that she did not know that her act of *oya-ko shinju* was unlawful under California's penal code. In other words, she may have been ignorant as to the legal status of her act. However, such ignorance is irrelevant to a determination of insanity.¹⁶² Cognitive insanity concerns whether the accused understands the distinction between *morally* right and *morally* wrong behavior. There is woefully little evidence that she lacked a moral compass at the time of the drowning. Instead, it was abundantly clear that Fumiko Kimura believed strongly in the moral rightfulness of her actions.¹⁶³ More plainly, Fumiko Kimura and the California Penal Code simply differed as to whether her particular act of *oya-ko shinju* was morally right or wrong. Moral disagreement is not and should not be masked as temporary insanity. Such circumstances should not lead to the use of an excuse defense. To do so is the manipulation of legal doctrine into legal fiction.

Fumiko Kimura believed that her act of drowning her two children was the right thing to do. In order to understand the reasons for her belief, it is necessary to understand Japanese culture. There are three aspects to Japanese culture that support the righteousness of her deadly act: the merged identity of parent and child, the social condoning of suicide and the negative stigma associated with motherless children. These three aspects of Japanese culture combine to explain the Japanese phenomenon of *oya-ko shinju*. Its greater acceptance in Japan is supported by its frequency. Surveys report that during the 1950s and 1960s, parent-child suicides occurred at a rate of about two cases every three days in Japan; in the 1970s, economic prosperity led to a decline, but they still occurred to a much greater degree than in Western countries.¹⁶⁴

161. *Id.* All of these factual details about the day before and the day of the killing are from the same source.

162. Such ignorance is instead the basis for another defense in criminal law and that is ignorance of the law. This defense has long been disfavored by courts and legislatures alike. See Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641 (1941) (tracing the common law's refusal to consider mistake of law as a defense in criminal cases).

163. See *infra* text accompanying notes 164-81.

164. Woo, *supra* note 2, at 410.

The first aspect is apparent in the Japanese language. The petition of more than twenty-five thousand signatures identified her act as *oya-ko shinju*. A literal translation into English of the Japanese terms, *oya-ko* and *shinju*, means “parent-child” and “center of the heart.”¹⁶⁵ Also telling is the fact that the Japanese language has a separate word for infanticide - *kogoroshi*, which literally translates into “child-kill.”¹⁶⁶ As Michele Wen Chen Wu explains, these translations are helpful in understanding the Japanese practice of *oya-ko shinju*. “In *oya-ko shinju*, the death of the child and the parent is conceptualized as one act – one death, in which the parent and the child are one and the same victim. Unlike infanticide, the child in *oya-ko shinju* is not considered to be victimized by the parents.”¹⁶⁷ The merging of the identities of parent and child is pivotal to the Japanese understanding of the act of *oya-ko shinju*. When confronted with an instance of *oya-ko shinju*, the Japanese do not categorically denounce the parent as a killer. Instead, the immediate question for the Japanese is “whether the parent was a victim of tragedy that justified the taking of his/her life (and incidentally, that of the child) or whether the parent’s action was not sufficiently justified.”¹⁶⁸ In other words, there is an assessment as to whether a justification exists. This contrasts starkly to the immediate dismissal of such an act as crazy or criminal.

Inherent in the Japanese assessment is the second aspect of Japanese culture that contributes to the phenomenon of *oya-ko shinju*: Japan’s distinctive norms about suicide. As opposed to the general American taboo against suicide, the Japanese conceive of some suicides as justifiable.¹⁶⁹ This should not be construed to mean that the Japanese encourage suicide. Suicide is still considered an action only for those who have failed in some way in life.¹⁷⁰ However, in Japan, suicide is an acceptable option for those whose lives suffer from certain insurmountable obstacles.¹⁷¹ There are several examples of this acceptance of suicide even within the story of Fumiko Kimura. For instance, at some point in their efforts to resolve the love triangle, the mistress offered to kill both the husband and herself as a solution.¹⁷² This friendlier posture towards suicide in Japan leads to greater acceptance of *oya-ko shinju*.

Finally, in addition to the merged identity of parents and offspring and the increased acceptance of suicide, *oya-ko shinju* is further supported by one last

165. Taimie L. Bryan, *Oya-ko Shinju: Death at the Center of the Heart*, 8 U.C.L.A. PAC. BASIN L.J. 1, 4 (1990).

166. *Id.*

167. Wu, *supra* note 21, at 981.

168. *Id.*

169. See Goel, *supra* note 146, at 446-48 (discussing the various times when suicide may be appropriate).

170. See Woo, *supra* note 2, at 413 (explaining further that the fact that Fumiko Kimura failed to complete her suicide attempt was yet another shameful failure that added to a long string of failures in her life including her marriage).

171. *Id.* at 412.

172. *Id.* at 411 (describing conversations between Fumiko Kimura and her husband’s mistress from January 1985).

aspect of Japanese culture. If Fumiko Kimura had been successful in taking not just her children's lives but also her own life, her act of *oya-ko shinju* would have constituted one final act of good parenting. In other words, "it is more merciful to kill children than to leave them in the cruel world without parental protection. The mother who commits suicide without taking her child with her is blamed as an *oni no yō ha hito* (demonlike person)."¹⁷³

The interpretation of *oya-ko shinju* as an act of parental love is explained by a longstanding social stigma in Japan. There, a child or an adult who as a child lacked the supervision, protection and disciplining of a natural mother suffers from a strong, negative stigma.¹⁷⁴ Even being raised by a natural father is not enough to overcome this stigma.

This stigma is key to understanding Fumiko Kimura's act in terms of the least harmful analysis of justification defenses. Imbued in the Japanese culture, Fumiko Kimura was not insane at the time of her act and did not lack an appreciation of the rightness or wrongness of her act. Instead, she clearly understood the nature of her act when she drowned her children and believed that her act was justified. Once she had decided to kill herself, she had a choice. She could either kill only herself or kill her children too. Her motive was to do what was best for her children. Faced with this choice, Fumiko Kimura had to decide which was a greater harm to her children: leaving them behind or taking their lives along with her own? In Japanese communities, the powerful negative stigma attached to children without their natural mothers continues into their adult lives.¹⁷⁵ Fumiko Kimura feared that her motherless children would be shunned and would suffer from the shame of their mother's suicide. By drowning them, she believed that she would be committing a lesser harm to avoid this greater harm. For Fumiko Kimura, drowning her children was therefore the less harmful, justified thing to do.

The Japanese claim of lesser harms at first seems incredible and ludicrous. In the United States, there are vastly different attitudes about parents and children and about suicide and death. For example, children are regarded by almost all Americans as their own individuals, separate from their parents, from the moment of birth.¹⁷⁶ Pro-life Americans regard children as distinct beings even before birth. Also American culture is exceptional in its vigorous denial and avoidance of death and all related variations including suicide.¹⁷⁷ Accordingly, acts of *oya-ko shinju* are described in the West as "murder-suicides" and not as parent-child suicides. The difference is not merely semantic, but rather reflective of the deep divide in

173. MAMORU IGA, *THE THORN IN THE CHRYSANTHEMUM: SUICIDE AND ECONOMIC SUCCESS IN JAPAN* 18 (1986).

174. See Woo, *supra* note 2, at 411 (explaining that these orphans are regarded as "unreliable").

175. See *id.* (explaining that because of that stigma banks will not hire orphans).

176. Cf. *id.* (explaining that in Japanese culture a child is the parents' possession, which is why a suicidal parent must also kill his/her child; this is "incongruous with American expectations").

177. See JAMES M. HOFER WITH BRIAN E. KAMOIE, *DEATHRIGHT, CULTURE, MEDICINE, POLITICS AND THE RIGHT TO DIE* 26-42 (1994) (identifying five traits of American culture that encourage the denial of death: individualism, liberty, scientism, the entitlement syndrome, and religious taboo).

social meanings that such acts have in different cultures.¹⁷⁸ Finally there is no stigma associated with being raised without your natural mother in the United States.¹⁷⁹

However, consider that Fumiko Kimura and her children lived in an insular Southern California community that was dominated by the practices, norms and values of the Japanese culture. This strong presence of Japanese culture and norms in her life lends the necessary credibility and reasonability to her fears and to her ultimate decision. Evidence of the influence of the Japanese culture in her life was plentiful. For instance, Fumiko Kimura is described to have washed her husband's feet every night when he came home from work and never learned to drive, despite living in Southern California for many years.¹⁸⁰ Fumiko's Japanese ways were never supplanted by American culture. Even Fumiko Kimura herself recognized that her belief in the righteousness of *oya-ko shinju* was grounded in her Japanese culture. Her initial reaction to the bystanders who saved her from the ocean were: "[t]hey must have been Caucasians. Otherwise they would have let me die."¹⁸¹ Her words speak to the power of Japanese culture in shaping her affirmative choice to act.

Fumiko Kimura's act of drowning her children was not an act that needed to be excused, but rather an act that needed to be explained. Under a justification approach to the norms of minority cultures, Fumiko Kimura would be able to tell the truth and to provide that explanation as a justification defense. She could contend that what she was attempting to do was the less harmful act for a Japanese mother. In her close knit community, had she taken only her own life and left her two young children behind, they would have suffered for the rest of their lives. This honest explanation could be the basis of a defense of justification.

2. *People v. Aphaylath*

In *People v. Aphaylath*, the defendant also faced the charge of intentional murder.¹⁸² In this case, however, the defense was not temporary insanity, but rather an affirmative defense in New York known as extreme emotional disturbance.¹⁸³ Through this partial defense, the charge of murder is mitigated to manslaughter.¹⁸⁴ There are two principal elements in this defense:

178. See *id.* (explaining how different Western minority cultures accept forms of suicide).

179. In the past, there has been harsh discrimination against orphans and illegitimate children and adoptees in the United States, but this discrimination has long since declined. They are useful to recall because they are perhaps the closest in kind to the Japanese stigma against motherless children.

180. Woo, *supra* note 2, at 404.

181. *Id.* at 411.

182. 502 N.E.2d 998, 998 (N.Y. 1986).

183. N.Y. PENAL LAW § 125.25(1)(a) (McKinney 2005).

184. § 125.20(2).

(1) the particular defendant must have 'acted under the influence of extreme emotional disturbance,' and (2) there must have been 'a reasonable explanation or excuse' for such . . . disturbance, 'the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.'¹⁸⁵

The extreme emotional disturbance defense in New York is modeled after a defense in the Model Penal Code.¹⁸⁶ Both versions are very similar and are conceived as excuse defenses. As explained by the New York Court of Appeals in another case, "[W]hat the Legislature intended in enacting the statute was to allow the finder of fact the discretionary power to mitigate the penalty when presented with a situation which, under the circumstances, appears to them to have caused an understandable weakness in one of the fellows."¹⁸⁷

May Aphaylath's attorney argued that May was emotionally disturbed and that his emotional disturbance was due to the mental and emotional stresses and trauma of being a Laotian refugee in the United States.¹⁸⁸ He lost control at the particular moment that he discovered his wife on the phone with her former boyfriend because in Laotian culture, a wife's display of affection for another man by accepting his phone calls brought shame and humiliation upon her husband and his family.¹⁸⁹ It was "the combination of the disgrace of Aphaylath's wife's conduct and the stress of resettlement" that "triggered his disproportionate rage."¹⁹⁰

To support his defense, May Aphaylath proffered two expert witnesses to the court who could testify about Laotian culture and about the stressful life of a Laotian refugee.¹⁹¹ The trial court refused to allow their testimony on the grounds that "neither one . . . was going to be able to testify as to anything specifically relating to this defendant."¹⁹² The trial court objected to the lack of a personal examination of the defendant himself by these experts. Not surprisingly, without these two experts, the extreme emotional defense failed and the trial ended in a conviction for murder.¹⁹³

However, the New York State Court of Appeals declared that this evidentiary ruling was erroneous as a matter of law on the grounds that such expert testimony would still have been probative of a fact at issue, even if the experts had not conducted a personal examination of the defendant himself.¹⁹⁴ They ordered a new

185. *People v. Casassa*, 404 N.E.2d 1310, 1316 (N.Y. 1980) (quoting § 125.25(1)(a)).

186. MODEL PENAL CODE § 210.3(1)(b) (2002).

187. *Cassasa*, 404 N.E.2d at 1317 (noting the key phrase here as "understandable weakness").

188. *People v. Aphaylath*, 502 N.E.2d 998, 999 (N.Y. 1986).

189. *Id.*

190. RENTELN Book, *supra* note 21, at 33.

191. *Aphaylath*, 502 N.E.2d at 999.

192. *Id.*

193. *Id.* at 998.

194. *Id.* at 999-1000.

trial.¹⁹⁵ Instead of undertaking a second trial with expert testimony on Laotian culture, the prosecutor offered a plea bargain to manslaughter. Since this charge was precisely the mitigation sought by his extreme emotional disturbance defense in the first place, May Aphaylath readily agreed.¹⁹⁶ He was sentenced to eight and a third years to twenty-five years in jail as opposed to fifteen years to life in jail for a murder conviction.¹⁹⁷

Perhaps by some accounts, May Aphaylath was wonderfully successful in using cultural evidence, or actually the threat of cultural evidence, to achieve a conviction for a lower offense and a lighter jail sentence. In terms of the bottom line for the individual defendant, there does not seem to be any serious harm stemming from the use of an existing excuse defense. It is probably the truth that May Aphaylath was very upset and angry when he heard his wife speaking on the telephone with a former paramour. Thus, legal fiction does not immediately appear to be a problem in this case.

Yet, in delving deeper into the extreme emotional disturbance doctrine and in reviewing the substance of the claims about Laotian culture, it becomes apparent that like Fumiko Kimura, May Aphaylath may actually have been resorting to the best available defense that existed as opposed to a more intellectually honest defense based on justification. Consider the following two points. First, the defense of extreme emotional disturbance is meant to apply only to extreme cases.¹⁹⁸ It mitigates those few intentional homicides that are committed as a result of extremely intense emotional states. It is not designed to apply to *all* intentional homicides.¹⁹⁹ Given the violence of the offense, it is the case that the overwhelming majority of intentional homicides are committed by defendants who are in the throes of some strong emotion such as fear or anger or desperation. Cold-blooded killers who kill in utter calm are quite rare. Nonetheless, the extreme emotional disturbance defense excuses the exceptions rather than the rule.

Against this understanding of the defense, it is not at all clear that May Aphaylath killed out of some excessively intense emotional state. He may have

195. *Id.* at 1000.

196. RENTELN Book, *supra* note 21, at 33-34.

197. *Id.* at 34.

198. See *People v. Harris*, 740 N.E.2d 227, 231 (N.Y. 2000) (holding that the defendant was entitled to a jury charge of extreme emotional disturbance where evidence showed that he completely lost control over his actions and psychiatric testimony opined that he was acting under extreme stress); *People v. Moye*, 489 N.E.2d 736, 738 (N.Y. 1985) (holding that extreme emotional disturbance was appropriate where the defendant savagely mutilated and decapitated his victim, recounted the victim's continued ridicule and taunting about his impotence, and made statements to the police and District Attorney that "something snapped" when the victim mocked him and that he went "bananas" and needed help); see also Stuart M. Kirschner et al., *The Defense of Extreme Emotional Disturbance: A Qualitative Analysis of Cases in New York County*, 10 PSYCHOL. PUB. POL'Y & L. 102, 127 (2004) (surveying New York cases and finding that anger or rage alone may be insufficient to warrant a jury charge of extreme emotional disturbance in New York).

199. See, e.g., *People v. Watson*, 548 N.Y.S.2d 356, 357 (N.Y. App. Div. 1989) (holding that the defense is inapplicable to depraved-indifference murder).

been angry and upset but he may not have been *excessively* angry and upset to warrant the excuse defense. Distracted by the seemingly just substantive outcome of the case, an analysis could easily miss the fiction of claiming extreme emotional disturbance for an average emotionally charged murder.

Second, consider again the defendant's claims about Laotian culture. If it is true in Laotian communities that spousal infidelity is a grave violation that brings shame and dishonor to one's spouse and greater family, then perhaps May Aphaylath killed his wife, not because he was out of control, but rather because he was in control and wanted to defend his family honor. In other words, he may have intentionally and purposely killed his wife because he was motivated by the values of his minority culture. Furthermore, he probably believed that such a defense of family honor was the morally right thing to do. At a minimum, he most likely believed that such a defense of family honor was a justified thing to do. Thus, once again, by using a conveniently existing excuse defense, the criminal justice system was able to avoid difficult moral questions by relying on legal fiction.

Similarly, the justification approach would allow May Aphaylath to make a more honest defense. Instead of hiding behind a fictitious claim about the loss of control and the extremity of his emotional state,²⁰⁰ May Aphaylath could reveal that he maintained control over his actions and his emotions and that he willfully stabbed his wife to death. He did so because he believed it was the right thing to do. Recall that May Aphaylath had been living in the United States for only two years before the fatal stabbing.²⁰¹ He had immigrated to the United States from the Southeast Asia country of Laos where he had lived in a farming village.²⁰² In fact, more than ten percent of the Laotian population—more than 360,000 Laotians—left their country between 1975 and 1992 due to economic hardship and political repression measures.²⁰³ In order to comprehend his act of killing as a justified act, it is necessary to gain a deeper understanding of Laotian life, culture, history, and society around the time of May Aphaylath's homicide act.

Laos is a landlocked country that shares borders with five other nations: Burma, Cambodia, China, Thailand, and Vietnam.²⁰⁴ It had been a protectorate of France for many decades from 1893 to 1949.²⁰⁵ Due to its geographic location, Laos was a critical battleground during the Cold War.²⁰⁶ In 1975, a socialist government assumed power and Laos fell into a period of self-imposed isolation from the rest

200. See *supra* text accompanying note 197.

201. *People v. Aphaylath*, 502 N.E.2d 998, 999 (N.Y. 1986).

202. Telephone Interview with Richard Friedfertig, Trial Counsel for May Aphaylath (Nov. 6, 2006).

203. W. Randall Ireson, *The Society and Its Environment*, in *LAOS: A COUNTRY STUDY* 92 (Andrea Matles Savada ed., 3d ed. 1995).

204. Central Intelligence Agency, *The World Factbook* (2006), available at <https://www.cia.gov/cia/publications/factbook/geos/la.html#Geo>.

205. *LAOS: ITS PEOPLE, ITS SOCIETY, ITS CULTURE* 1 (Frank M. LeBar & Adrienne Suddard eds., 1960) [hereinafter *LAOS: ITS PEOPLE*].

206. *Id.*

of the world until 1986.²⁰⁷ The result of this isolation was significant economic and political weakness in the global community. A frequently repeated jest even today is that Laos is the "Land of a million elephants (referring to the fourteenth-century Buddhist kingdom), Land of four million irrelevants."²⁰⁸

Despite some efforts to bring modernity to Laos by its socialist leaders, the social structures of the country were slow to change.²⁰⁹ This was particularly true in the rural areas of Laos.²¹⁰ By and large, Laos was an agrarian village society in which many peasant farmers practiced subsistence agriculture.²¹¹ Through the middle of the twentieth century, many of the farmers were illiterate.²¹² May Aphaylath was also illiterate.²¹³ Villagers lived in relatively small nuclear households and were typically related to each other by blood or by marriage.²¹⁴ As a result, nearly all the villages were ethnically homogenous.²¹⁵

In addition, the villages were highly independent and autonomous communities and had very little interaction and commerce with neighboring villages.²¹⁶ Villagers seldom interacted with outsiders and instead relied on one another through direct and personal relationships for their social, economic and political needs.²¹⁷ As a result, at the time of May Aphaylath's upbringing the village was the dominant source of social identity for Laotians.²¹⁸ "Kinship ties of the villagers . . . [were] reinforced by reciprocal labor exchanges, a sense of participation in village political councils, vested interest in the local pagoda, and village ceremonies in honor of common ancestral spirits."²¹⁹ Given the strong sense of community,

207. LOUISE WILLIAMS, *WIVES, MISTRESSES AND MATRIARCHS: ASIAN WOMEN TODAY* 247-48 (Rowan & Littlefield Publishers, Inc. 1999) (1998).

208. *Id.* at 246-47.

209. MARTIN STUART-FOX, *LAOS: POLITICS, ECONOMICS AND SOCIETY* 49 (1986) ("Traditional social relationships which played an important role in structuring lowland Lao society during the period from 1949 to 1975 have proved remarkably resistant to change during the early period of socialist government.").

210. *Id.*

211. Indeed, that continued to be true. See Ireson, *supra* note 203, at 79. "Laotian society is above all else characterized by semi-independent rural villages engaged in subsistence agricultural production." *Id.* at 94.

212. See LAOS: ITS PEOPLE, *supra* note 205, at 2. While many boys learned to read and write either while working as house-boys or during their premarital initiation in the temple, women had to learn to read from the legends read aloud during a woman's confinement or next to a dead person. See Banyen Phimmasone Levy, *Yesterday and Today in Laos: A Girl's Autobiographical Notes*, in *WOMEN IN THE NEW ASIA* 247-48 (Barbara E. Ward ed., 1963).

213. See Telephone Interview with Richard Friedfertig, *supra* note 202.

214. See LAOS: ITS PEOPLE, *supra* note 205, at 68-69.

215. See Ireson, *supra* note 203, at 94.

216. "The village, usually founded on a matrix of families related to one another by blood or marriage, forms a self-conscious and strongly self-sustaining unit." LAOS: ITS PEOPLE, *supra* note 205, at 68-69; see also STUART-FOX, *supra* note 209, at 51; Ireson, *supra* note 203, at 79.

217. See NOELEEN HEYZER, *WORKING WOMEN IN SOUTH-EAST ASIA: DEVELOPMENT, SUBORDINATION AND EMANCIPATION* 15 (1986).

218. Indeed, this too continued to be true. See Ireson, *supra* note 203, at 79. "[T]he common threads of village self-reliance, limited regional trade and communications, and identification with one's village and ethnic group persist regardless of the settings." *Id.* at 94.

219. LAOS: ITS PEOPLE, *supra* note 205, at 69.

governance of the village was achieved by consensus and through social pressures to conform behavior.²²⁰

Against this backdrop of an interdependent and vibrant village community, the relationships between men and women and in particular, the status of Laotian women, were interesting. Since at least the 1960s, there had been a trend away from parental arrangements to self-selection in the choosing of one's spouse.²²¹ However, the traditional practice of grooms and their families paying a fee for their brides—the bride price—remained strong.²²² When couples experienced marital difficulties, their problems were discussed and handled first by their two extended families.²²³ If their efforts to help did not succeed, domestic disputes were then turned over to village elders.²²⁴ Divorce was an option for failed marriages.²²⁵

In intact marriages, anthropologists and sociologists observed some gender differentiation in household and farming tasks in Laotian families²²⁶ but also concluded that such definitions were relatively less rigid than seen in China, Vietnam and India.²²⁷ Less rigidity usually meant that wives had greater roles in making household decisions and enjoyed more equality within their individual families. Some scholars have attributed this to the absence of clans and extended family lineages in the agrarian Laotian society²²⁸ and to the necessity for women to be equal contributors and partners in an impoverished subsistence economy.²²⁹

Although the relative equality in household management bears emphasis, other rules of behavior are more revealing about the actual status of Laotian women at that moment in history. In Laos in the 1960s and 1970s, strict codes of conduct governed the physical interactions between men and women and between husbands and wives. As one Laotian woman explained,

Laotian women have to treat their husbands with great respect. A wife must never touch her husband's head, or the head of any other adult man. She must never lie on a bed higher than that of her husband or than that of any other man

220. See Ireson, *supra* note 203, at 101.

221. See LAOS: ITS PEOPLE, *supra* note 205, at 65.

222. See *id.*

223. See Ireson, *supra* note 203, at 98.

224. See *id.*

225. See *id.* Interestingly the right to request a divorce and the rights to inherit and own property were significant legal rights enjoyed by Laotian women. See Barbara E. Ward, *Men, Women and Change: An Essay in Understanding Social Roles in South and South-East Asia*, in *WOMEN IN THE NEW ASIA* 80-82 (Barbara E. Ward ed., 1963). But see *infra* text accompanying notes 230-232.

226. See LEVY, *supra* note 212, at 248 ("There was a precise division of labour according to sex. Men ploughed or harrowed the rice-fields, while women or children, following behind the men, fished with the *kheung* for the eels and smalls fishes which abounded in the furrows. Men usually sowed the seed, as well as harvesting and threshing the crop, but thinning and pricking out the seedlings were generally done by women.")

227. See STUART-FOX, *supra* note 209, at 51; BARBARA N. RAMUSACK & SHARON SIEVERS, *WOMEN IN ASIA: RESTORING WOMEN TO HISTORY* 79 (1999); Richard S. D. Hawkins, *Contours, Cultures, and Conflict, in LAOS: WAR AND REVOLUTION* 13 (Nina S. Adams & Alfred W. McCoy eds., 1970).

228. See HAWKINS, *supra* note 227, at 13; STUART-FOX, *supra* note 209, at 51.

229. See WARD, *supra* note 225, at 77.

who is older or of superior status. She must not walk in front of a man who is seated, and if she wants to reach something above a man's head she must ask permission This is part of the rules of behaviour in Laos. A Laotian woman may never come too near to a priest, or touch his body or his gown. A Laotian woman is, by definition, inferior to a man and must therefore always take a lower place in any circumstances. A man always goes before a woman.²³⁰

The inferiority of Laotian women was also apparent in the fact that only men served as the official heads of households for all public purposes.²³¹ Moreover, the village elder was usually a man.²³²

When May Aphaylath killed his wife, he was no longer living in a village in Laos. However, he had only left the village two years earlier. His beliefs as to what is proper behavior for a wife and his commitment to the importance of a collective village community still strongly reflected his Laotian culture. For May Aphaylath, the insult of his wife displaying affection for a former paramour was more than a personal affront. It was an assault on his superior male status and even worse, it was a stain on his reputation and the reputation of his family in his Laotian refugee community in the United States.

The adoption of a justification approach to minority cultures in the criminal law would enable a defendant to make an honest claim of justification based on the norms and values of his culture. May Aphaylath would not have to rely solely on a theory about the loss of control to fit within an existing excuse defense. Instead, he could explain the meaning of his wife's actions to him, to his family honor and to his culture, and provide a jury a better understanding of his assessment of harms.

3. *State v. Butler*

Finally, in the last case of *State v. Butler*, the three Siletz tribesmen, Gary Butler, Dino Butler and Robert Van Pelt, were also charged with murder.²³³ The theory of the prosecution's case was that the three defendants intentionally killed Donald Pier to avenge his robbing of Indian burial grounds.²³⁴ There was evidence showing that prior to the killing, an informant from the Siletz community had reported a rash of grave robberies to the police. More importantly, that informant stated that "many people were irate and someone would be killed in the traditional manner [and] [t]hey were going to cut their necks and let them bleed on the graves

230. LEVY, *supra* note 212, at 257 n.1; *see also id.* at 262; DONALD P. WHITAKER, ET AL., *LAOS: A COUNTRY STUDY* 49 (2d ed. 1979).

231. *See* WHITAKER, *supra* note 230, at 48.

232. *See id.* at 46.

233. Sherman, *supra* note 5, at 27.

234. *Id.*

to appease the spirits.”²³⁵ Subsequently, the policy confirmed that some graves had indeed been disturbed, but for the next seven months, there were no arrests.²³⁶

On January 21, 1981, the decedent’s son, Paul Pier, was at home along with his father and his father’s girlfriend, Leslie Oakland.²³⁷ He saw three men enter the house and heard them announce to his father, “[W]e’re holding court here in this living room, and we find you guilty of digging up graves.”²³⁸ Then, one of the three men stabbed his father, Donald Pier, to death.²³⁹ The three men escaped.

The police recovered some Indian artifacts from the victim’s house²⁴⁰ and also worked with the two witnesses, Paul Pier and Leslie Oakland,²⁴¹ to try to identify the killers. In order to assist their recollection of events, the police had both witnesses undergo hypnosis.²⁴² Through hypnosis, Paul Pier was able to positively identify Darrell Dino Butler and Gary Butler as two of the three murderers.²⁴³ In March 1981, a grand jury in Oregon returned indictments for murder for the death of Donald Pier, attempted murder for the injuries to Paul Pier and first degree burglary.²⁴⁴

The trial was held in the fall of 1985.²⁴⁵ At trial, the prosecution offered as motivation the defendant’s quest for vengeance for the victim’s acts of grave robbing and their frustration at the lack of an arrest.²⁴⁶ The defense argued that the state lacked sufficient evidence to prove that Gary and Darrell Dino Butler were ever at the home of Donald Pier.²⁴⁷ Ultimately, they were acquitted of all charges by a jury.²⁴⁸

As a claim of justification, *State v. Butler* is a bit different from the first two stories. Unlike the first two narratives, this defense strategy did not depend on an existing excuse defense. Also unlike the previous two narratives, the Butler

235. Carmel Finley, *Trial Told of Warning by Indian*, THE OREGONIAN, Oct. 1, 1985, at B5 (quoting Senior Trooper Gary E. Shearer’s recollection of his conversation with the Siletz informant).

236. *Id.*

237. Carmel Finley, *Indians’ Murder Trial May Air Legal Issues*, THE OREGONIAN, Sept. 1, 1985, at D9 [hereinafter Finley, *Legal Issues*].

238. *Id.* (quoting Paul Pier).

239. *Id.*

240. *Id.*

241. Leslie Oakland did not witness the actual slaying because one of the three intruders detained her in a separate room. *Judge to Decide if Witnesses ‘Tainted,’* THE OREGONIAN, Sept. 5, 1985, at B1.

242. *Judge Refuses to Dismiss Murder Charges Against 3 Indians*, THE OREGONIAN, Sept. 4, 1985, at B2.

243. Finley, *Legal Issues*, *supra* note 232, at D9 (noting that Leslie Oakland was never able to make a definitive positive identification).

244. Dave Peden, *Two Indicted in Murder*, THE OREGONIAN, March 14, 1981, at D2.

245. The long delay between the indictment and the trial was due to the fact that at the time of the indictment, the Butlers had fled to Canada. However, they were in custody there because they had shot at the Canadian police during a chase. They ended up spending more than three years in prison for that shooting before being extradited back to Oregon. *See* Finley, *Legal Issues*, *supra* note 232, at D9.

246. *See* Carmel Finley, *Jury Acquits Butler Cousins of Murder*, THE OREGONIAN, Oct. 20, 1985, at A1 [hereinafter Finley, *Jury Acquits Butler Cousins*].

247. *See id.*

248. *See id.*

cousins were acquitted at trial and hence there was never a finding or an admission of guilt for the killing of Donald Pier. At trial, the central defense was misidentification; in other words, the defendants claimed that the State's evidence was insufficient to prove that they were the ones who killed Donald Pier.²⁴⁹ In addition, there was also a vague claim of justification.²⁵⁰ Because trial juries are not required to describe the basis for their decisions, it is not clear if they were persuaded by either of these two defenses. Thus, in a sense, there is no clear cut case of legal fiction in this third narrative.

However, *State v. Butler* should be considered alongside the first two narratives because the defense strategy was similarly restricted by the current excuse approach to true cultural defense cases. This Article includes their story because the proposed approach would still allow a stronger, more definite claim of justification. For instance, suppose that the defendants had admitted to the killings, but still sought to escape from criminal liability. Under the proposed justification approach, they could explain how killing Donald Pier was the socially desirable, less harmful choice from their cultural perspective.

Native Americans believe that upon burial into the ground, their dead become part of the sacred Earth and have an important spiritual connection to the Earth. This is "their journey after life."²⁵¹ The sacrosanct nature of burial sites is a belief almost universally held by Native American tribes.²⁵² In addition, it is the responsibility of each generation of the living, especially chiefs and tribal elders and faithkeepers, to protect the human remains and sacred objects at burial sites.²⁵³ Disturbance of a burial site interrupts the journey of the interred.²⁵⁴ It is further believed that failure to protect the sacred grave sites, in turn, brought harm to the living.

Of course throughout history, countless Native American burial sites have been ransacked and plundered. Can the graves and spirits who are disturbed be restored to a state of peace? Not every Native American tribe offers a way.²⁵⁵ However, the Siletz tribe of the Butler cousins did believe in two methods of restoration: either the reburial of stolen artifacts or the killing of the grave robber.²⁵⁶ In fact, certain Siletz burial items that were found at the Pier home by the police were eventually returned to the Siletz Indians who in turn reburied them in a restoration cer-

249. *See id.*

250. *See infra* text accompanying notes 252-53.

251. Christopher A. Amato, *Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage*, 27 COLUM. J. ENVTL. L. 1, 7 (2002) (quoting the Haudenosaunee Statement on Human Remains).

252. *Id.* at 6-7 ("Most Native American religious beliefs dictate that burial sites once completed are not to be disturbed or displaced, except by natural occurrence.").

253. *Id.* at 7 (citing the Haudenosaunee Statement on Human Remains).

254. *Id.* at 6.

255. *Id.* at 7 (citing as evidence of the sanctity of burial sites in Haudenosaunee religion the fact that this tribe has no rituals or ceremonies for reburial of disturbed remains).

256. *See infra* text accompanying notes 252-53.

emony.²⁵⁷

Even though misidentification was their primary defense, at the sidelines of the trial and even during the trial itself, there was discussion of the sacred importance of Indian burial grounds. For a long time, there had been robbing reported of the graves of Siletz Indians in Oregon. These graves were not necessarily older graves as several Siletz Indians reported seeing the same objects that they had recently buried with the bodies of their relatives for sale in Indian artifact markets. Supporters of the defendants used the publicity surrounding the trial as an opportunity to advocate for the passage of state law that would elevate the punishment of the desecration of grave sites from a misdemeanor to a felony.²⁵⁸

At the trial itself, the jury learned about these beliefs of the Siletz Indians when the trial judge allowed a member of the Siletz tribe to testify about the meaning of grave desecration in the Siletz culture.²⁵⁹ "Integral to their religious value system was the sacred quality of the burial ground, and the tranquility of their relatives' spirits as well. The only way to restore the harmony would require the re-burial of the stolen artifacts, or the spilling of the marauder's blood."²⁶⁰

The message to the jury from this witness was that the defendants had spilled the blood of Donald Pier because they had sought to restore the spirits of their ancestors.

It was important for the defendants to achieve spiritual restoration not only because their culture taught them to believe that it was their obligation to do so, but also because they believed that they would otherwise come into harm's way themselves. In other words, if they failed to kill Donald Pier, the result would be both harm to the spirits of their ancestors and to living members of the Siletz tribe. Dino Butler wrote a passage in a lobbying pamphlet to the Oregon legislature that expressed the strength of his cultural beliefs:

Our spirits are as strong as our respect toward the land that contains the bodies of our Red People. If we don't respect the land, we have no respect for ourselves. We will not survive as 'The People,' we will vanish and our spirits will wander throughout the endless universe, never to unite with our ancestors. That is genocide.²⁶¹

These cultural beliefs about the sacrosanct nature of grave sites, the restoration of ancestral spirits and the obligation of the living worked together to create a powerful motivation to kill Donald Pier. After all, if the defendants had believed that Donald Pier sold the items he stole into the black market for Native American

257. Finley, *Legal Issues*, *supra* note 232, at D9.

258. *See id.* (quoting Kathy Gorospe from the Oregon Commission on Indian Services as stating that grave robbing might not be "considered a serious crime by traditional police, but it's a serious crime to Indian people").

259. Renteln Article, *supra* note 12, at 453.

260. *Id.*

261. Carmel Finley, *Long Beset by Grave Robbers, Indians Find Irony in Omsberg Case Outrage*, OREGONIAN, Oct. 13, 1985, at C1.

antiquities,²⁶² there was no other method of spiritual restoration available other than to kill Donald Pier.

The prosecutors in the case of *State v. Butler* were also interested in the evidence of these cultural beliefs. As in the Fumiko Kimura case, these cultural beliefs constituted proof of the mens rea element for the crime of intentional murder.²⁶³ Under the current excuse approach, these cultural beliefs would simply be regarded as such and nothing more. However, to hold them in such limited regard is misleading because it overlooks the much more important claim of justification that is buried within. The ultimate conclusion of the testimony concerning Siletz beliefs is that the killing of Donald Pier was a justified act because the good of restoring the spirits of the Siletz ancestors and preventing any further harm from being imposed on the living Siletz Indians outweighed the taking of Donald Pier's life. Under the proposed justification approach to minority cultures, such a conclusion could be argued to the jury.

The current excuse approach to such cases though prevented the defendants from fully pursuing a defense of justification. Patrick Birmingham, a defense attorney in the case, understood that robbing and desecrating graves in Native American cultures are regarded as very serious offenses. As he explained, some members of the Indian community viewed the murder of Donald Pier as an "act of violence . . . akin to an act of war or self-defense,' striking out at a grave robber and protecting burial grounds."²⁶⁴ Despite the cultural norm and the sentiment in the Indian community, Patrick Birmingham chose not to pursue a justification defense. In his accurate assessment of the current posture towards minority cultures in the criminal law, he stated, "I don't think that idea would get anywhere."²⁶⁵

All three narratives exemplify defendants whose defenses were confined by the current excuse approach. By relying on discretion and excuse defenses, the status quo disallows the recognition of any justification defense based on a minority culture. The lack of an option to create new justification doctrine was palpable in all three cases. All the defendants here had particular motives for their acts of homicide, and they all believed in the righteousness of their motives. However, the existing justification defenses in the criminal law did not contemplate their particular righteous motives.²⁶⁶ The legal problem for Fumiko Kimura, May

262. See Sherman, *supra* note 5, at 1.

263. See *supra* text accompanying notes 153-54.

264. Sherman, *supra* note 5, at 1.

265. *Id.*

266. A survey of current justification defenses reveals relatively few. There is the classic defense of self-defense that allows a defendant to protect her own life and/or bodily integrity. See *supra* text accompanying notes 64-66. There is also the defense of habitation which permits the protection of a defendant's home. Less frequently invoked are the justification defenses of defense against rape or kidnapping, defense of others and defense of property. For a general discussion of the cultural origins of these existing justification defenses, see Chiu, *supra* note 66, at 249-59 (discussing the defense of habitation and self-defense against rape).

Aphaylath and the Butler cousins was that none of these justification defenses spoke to the value or interest that they were seeking to defend or protect and they were not welcome to create a new one.²⁶⁷

As a result, the defendants were left to choose among existing excuse defenses. Fumiko Kimura and May Aphaylath overemphasized the emotional aspect of their acts. Their claims of being emotional at the time of their killings are undoubtedly true, but then, this claim is true of most killings. What separates their cases from others is that these defendants had little choice but to use their emotions as the centers of their criminal defenses. Thus, even if their emotional states did not rise to the level of temporary insanity or extreme emotional disturbance, they put forth these defenses because they were the only options under the excuse approach. Fortunately, for the Butler cousins, there were also issues of mistaken identification and lack of sufficient proof. Because they could argue that the prosecution did not prove that they had even committed the act, they did not have to avail themselves of an excuse defense. Had there not been an issue with the identification, the Butlers would assuredly have been in the same predicament as Fumiko Kimura and May Aphaylath.

This lengthy exploration of how these cases employed legal fictions and yet are more honestly considered claims of justification makes a powerful case for the first advantage of the proposed approach over the current excuse approach. The desperate invocation of an excuse defense not because it is doctrinally accurate but rather because it is the best available option is destructive. In the worst cases, it results in absurd legal fictions and in the best cases, it represents strategic legal manipulation. In all cases, it undermines respect for the rule of law. We now turn to the remaining flaws of the excuse approach and corresponding assets of the justification approach.

B. Confronting the Hard Moral Questions

In all three narratives, the defendants made particular assessments of the harms that were inflicted and were avoided by their ultimate actions. These assessments were all determined in large degree by the particular minority culture of each defendant. The proposed justification approach does not guarantee or require that a prosecutor, judge or jury necessarily agree with the assessments of culturally motivated defendants; however, the approach does allow them to explain their assessments and behaviors in the context of their cultures' beliefs and values so that such decision makers have the opportunity to absolve them. By giving the decision makers this opportunity, the justification approach achieves a second

267. In her survey of homicide cases that intersected with culture, Alison Renteln observed that "[t]he real difficulty defendants have faced in Western legal systems has been how to link culture to the legal categories of crimes, each of which has its own particular elements." RENTELN Book, *supra* note 21, at 23. This Article adds that defendants have also been hampered by the difficulty in linking culture to the existing categories of defenses.

important advantage over the current excuse approach: the engagement of the difficult moral questions posed by the defendants' acts.

The criminal law has the extremely important function of serving as the moral arbiter in a community. Arguably there are other institutions that also serve a similar role. However, the criminal law is unique because it is the most public of these arbiters and even more critically, it has jurisdiction over all. Ironically, it is this traditional role of the criminal law that also underlies the need for the criminal law to distinguish between justification and excuse defenses.²⁶⁸

If the exclusive purpose of criminal law were to allocate an appropriate amount of punishment to those accused of doing wrong, the law would not need to distinguish between justifications and excuses. But because it reflects and reinforces moral judgments, criminal law should illuminate the moral status of various courses of action, and the community should be concerned with the reason a particular individual goes unpunished.²⁶⁹

In true cultural defense cases, the defendants are making claims of moral righteousness. Under the current excuse approach that does not accommodate the values of minority cultures, their claims are regarded as appeals to personal moral obligations. These obligations are viewed as "extra-legal."²⁷⁰ As a helpful non-cultural example of such crimes, Robert Schopp describes a husband who

might conclude . . . that an obligation of loyalty to his wife requires that he fulfill her request that he disconnect the medical life support equipment from which she is unable to free herself, and . . . that this relationship-based obligation is so strong as to outweigh any obligation he might have to conform to law in general or to the homicide statute specifically.²⁷¹

The stories of Fumiko Kimura and the Butler defendants are simply cultural versions of crimes of personal moral obligation. Like the husband in Schopp's example, they committed their acts because "they conscientiously believ[ed] that important moral considerations justify their conduct."²⁷² Like the husband, their acts "fulfill the offense elements of certain crimes and no specific defense clearly

268. See Greenawalt, *Distinguishing*, *supra* note 71, at 90.

269. *Id.*

270. SCHOPP, *supra* note 64, at 155. In his book *Justification Defenses and Just Convictions*, Robert Schopp describes how civil disobedience and conscientious resistance crimes differ from what he calls "crimes of personal moral obligation."

Crimes of personal moral obligation involve conscientious violations of law Individuals perform crimes of personal moral obligation when they commit criminal offenses in order to fulfill some extralegal source of obligation that they understand as overriding any obligation they have to obey the law in question.

Id.

271. *Id.* at 155-56.

272. *Id.* at 156.

applies.”²⁷³ Because these personal moral obligations do not reflect the values and norms of existing criminal doctrine, the current excuse approach categorically sweeps them as evidence under the carpet of existing excuse defenses.²⁷⁴ By relegating these extra-legal obligations to ill-fitting excuse defenses without any analysis of the morality of the claims of righteousness, the current excuse approach dodges the original function of the criminal law to pass moral judgment upon the actions of the accused.

The current reliance on existing excuses admittedly secures for some defendants decent substantive outcomes. Some find it acceptable to avoid the difficult moral questions so long as the result of an excuse defense allows the achievement of some rough substantive justice. They are content to label an act of personal moral obligation as criminal and wrong. However, consider the symbolism of a criminal law that decries particular acts as immoral on the sole basis that the values underlying those acts are foreign to current doctrine. Consider the implications of a criminal law that does not go further and answer whether such acts are truly immoral and instead relies on inaccurate labels of disability or defect to achieve rough justice. The current excuse approach reduces the criminal law to a stagnant, incoherent, manipulable body of rules that fails to command the rule of law.

After describing what he means by crimes of personal moral obligation, Robert Schopp asks, “Are these the types of people and conduct we had in mind when we built the prisons?”²⁷⁵ To add to his question, this Article asks, “Were their acts morally reprehensible?” Unlike the current excuse approach, the proposed justification approach demands that decision makers answer these questions head-on. Defendants in true cultural defense cases could advocate that their acts were not crimes of personal moral obligation, but rather justified acts based on righteous assessments of harm. Importantly, such claims would no longer be regarded as extra-legal but instead would be treated as legal claims. Again, decision makers may not agree with the assessments of defendants, but at least there would no longer be the avoidance of deep moral questions. They could no longer pretend that a defendant from a minority culture was merely insane or extremely emotionally disturbed. Instead, the criminal law would have to wrestle with the morality of their acts and issue either disapprobation or approval of their acts.

273. *Id.*

274. One may argue that inherent in the excuse approach is a sincere assessment that all such acts are morally wrong. In other words, the current excuse approach finds that these acts are crimes because there is evidence of the elements of these crimes and there is no justification defense that applies. This analysis though is wholly unconvincing because the absence of an applicable justification defense is a product of the history of the development of American criminal law in the Anglo-American tradition. There is an appalling lack of consideration of other cultures and their values in the criminal law. *See* Chiu, *supra* note 66, at 234 (arguing that culture is already part of our criminal law and our criminal law should now reflect minority culture as well).

275. SCHOPP, *supra* note 64, at 156.

C. The Promotion of Cultural Pluralism

A third and final improvement of the justification approach is the advancement of cultural pluralism in the criminal law. In his book entitled *Constitutional Domains*, Robert Post lays out the three options for the law of a society composed of heterogeneous groups.

The law can place the authority of legal sanctions behind the cultural perspectives of a dominant group; or it can foster a regime in which diverse groups can escape from such domination and maintain their distinctive values; or it can ignore group values and perspectives altogether and recognize only the claims of individuals . . . [He calls] these three options, respectively, assimilationism, pluralism, and individualism.²⁷⁶

All three of these options have deep roots in American history and can be seen at work in numerous settings in the law, including the criminal law.²⁷⁷

Current criminal law is assimilationist. It expresses the values and norms of the dominant Anglo-American culture to the exclusion of other minority cultures.²⁷⁸ Some protest this characterization and insist that no culture, dominant or otherwise, has had influence over the criminal law. Their failure to appreciate the presence of culture in our penal codes is the result of their moral absolutism and legal centralism.²⁷⁹ One need only look to the category of justification defenses to discover that the doctrines reflect Anglo-American values.²⁸⁰ For example, there is the use of deadly force to protect a home, the gradual elimination of the need to retreat in deadly self-defense, and the use of deadly force to prevent a forcible rape.²⁸¹

Being assimilationist implies not only the expression of certain values, but also the imposition of these values upon all. It insists upon conformity with the formal legal code because conformity ensures that "the dominant culture is imposed on all who reside within its borders."²⁸² This tradition of achieving assimilation with the criminal law is not new. Consider Lord Campbell's opinion in the case of *Regina v. Barronet & Allain* from 1852.

276. ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 90 (1995).

277. *See id.* at 90-92.

278. Chiu, *supra* note 66, at 234.

279. Moral absolutism refers to the philosophical belief that one's own moral categories are the only correct ones. When faced with individuals with other values, absolutists dismiss these other values as "misguided." For them, the lines of criminal and non-criminal behavior are "unambiguously defined" according to their moral code. *See Renteln Article, supra* note 12, at 488. Extending this moral philosophy to the legal arena is "legal centralism or the tendency to view only state law as valid law." RENTELN Book, *supra* note 21, at 18.

280. *See* Chiu, *supra* note 66, at 238, 260 (discussing both the dominant culture's impact on criminal law rejecting the concept of motive, and how that concept is part of the justification defense).

281. *Id.* at 234.

282. RENTELN Book, *supra* note 21, at 18.

These two persons are placed in exactly the same situation as if they were native born subjects of this kingdom, and will have the same justice administered to them as would be administered to native born subjects . . . Persons 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.²⁸³

Failure to assimilate by obeying the laws is viewed as a failure to fulfill civic responsibility and in the case of penal laws, a criminal offense.²⁸⁴

This Article seeks to supplant the assimilationism in the criminal law with pluralism. Given the particular functions of the criminal law, it is essential that the criminal law adopt the option of pluralism. This Article discusses several reasons for this: the need to protect against majoritarian rule; the need to avoid contempt and tension in group relations; the need to achieve individualized justice in the criminal system; and the use of culture to support the rule of law.

Amy Gutmann argues for a pluralistic approach to multiculturalism from the perspective of political science. She posits that one of the primary goods that liberal democracies are obligated to achieve is a secure cultural context, along with health care and education for their citizens. This context is necessary to give meaning and guidance to the choices of citizens in life. Pluralism is required as protection of the efforts of disadvantaged groups to "preserve their culture against intrusions by majoritarian or 'mass' cultures."²⁸⁵ It is necessary as a matter of liberty and equality.²⁸⁶ In the case of the United States, this obligation as a liberal democracy is particularly warranted to deflect its history as an oppressive colonizing power in the world.²⁸⁷

A second reason is the very real need in heterogeneous societies to promote harmony and peace amongst groups. Such harmony and peace is necessary for success as a heterogeneous society. Assimilationism generally invites tension and contempt amongst groups because the dominant culture refuses any respectful consideration of minority cultures. To simply state "that is how we do things here" is awkward and unsustainable for increasingly multicultural societies.²⁸⁸

The current excuse approach in the criminal law is especially harmful in this regard. Treating minority cultures as disabilities that warrant excusing defendants

283. *Regina v. Barronet & Allain*, (1852) 169 Eng. Rep. 633, 635 (Q.B.).

284. Jeremy Waldron describes the real world predicaments of cultural minorities: "[O]ften . . . dominant majorities make no attempt whatsoever to *debate* the merits of (say) monogamy versus polygamy with the members of groups which hold contrary views. They simply *impose a view*, and then disingenuously accuse the dissident minority of failing to live up to its civil responsibility." WALDRON, *supra* note 1, at 172.

285. AMY GUTMANN, *Introduction*, in CHARLES TAYLOR, *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 5 (Amy Gutmann ed., 1994).

286. See HARV. Note, *supra* note 22, at 1301 (arguing the United States should promote pluralism because of the dedication to liberty and equality).

287. See TAYLOR, *supra* note 280, at 63 (arguing that our history of colonization requires us to be more accepting of minority cultures).

288. *Id.*

denigrates these cultures and their values. In 1985, the *Harvard Law Review* voiced its concern that a system was "likely to convince a person that the majority regards her culture as inferior . . . [when it] punishes her for following the dictates of her culture."²⁸⁹ Although the current excuse approach may manage to excuse and not punish some defendants, the message of inferiority persists because there is a need to excuse only that conduct which the law deems harmful and wrong. Aggravating this message of inferiority is the "broader message that an ethnic group must trade in its cultural values for that of the mainstream if it is to be accepted as an equal by the majority."²⁹⁰ Defendants have success under the current excuse approach "where the jury finds common ground with the defendant, [and] its deliberation and verdict become an exercise in recognizing cultural sameness, not difference."²⁹¹

There is yet one more layer to the message of inferiority emanating from the current excuse approach. Leti Volpp, in a thought-provoking essay in the *Columbia Law Review*, warns that the depiction of feminism and multiculturalism as mutually exclusive or in conflict was erroneous and superficial.²⁹² Such depictions grow out of troubling assumptions about the contrast between minority cultures and Western civilization.²⁹³ For example, she points to how incidents of domestic violence homicides by mainstream defendants are regarded as individual acts of deviants while the same incidents by minority defendants immediately lead to conclusions that the minority culture is to blame.²⁹⁴ In actuality, neither, one or both of these explanations may be true whether a defendant is mainstream or a minority.

The current excuse approach is part of this problem in that it automatically blames minority cultures while excusing the defendants themselves. The blame is indicative of the underlying belief that a minority defendant is compelled by the disability of his culture to commit a harmful act. This belief does not imagine any will or choice involved on the part of the defendant. Again, this is part of the denigration of minority defendants and their cultures in the criminal law.

The alternative to these disturbing messages is the justification approach which includes minority cultures in the larger societal discussions about what behaviors should be regarded as criminal, what actions are justified, and what acts are moral or immoral. Such inclusion where the category of justification defenses is open to the possibility of new doctrines inspired by the values and norms of other cultures sends a message of respect. It will inspire peaceful participation of minorities and

289. HARV. Note, *supra* note 22, at 1302.

290. *Id.*

291. Chiu, Comment, *supra* note 26, at 1114.

292. See Volpp, *supra* note 140, at 1187 (explaining that our own majority culture in addition to minority cultures perpetuates violence against women).

293. See *id.* at 1186-87.

294. See *id.* at 1187-89.

is an important first step towards pluralism in the criminal law. Additionally, the justification approach considers culture as an explanation for the affirmative choice of minority defendants. Thus, it manages to include culture while also respecting defendants as moral agents and not cultural automatons.²⁹⁵

Pluralism in the criminal law is also demanded by a third reason, the criminal law's overarching concern with individualized justice. Where freedom, liberties and public moral condemnation are at stake, the United States has made countless commitments to safeguarding the rights of the accused to ward off the undue encroachment of the state upon the individual. The principle of individualized justice mandates such safeguards in order to ensure that punishments fit the culpability of individual defendants. Pluralism simply continues this commitment. It allows for individuals who are inculcated in different sets of norms to explain those norms to the legal system. These cultural norms are not separable from the defendant.²⁹⁶ Thus, such explanations are necessary to assess which acts should be punished and to what degree.

One final reason why pluralism makes sense for heterogeneous societies, and for the criminal law in particular, is the ability of culture to service the rule of law. Like the law, culture issues rewards and punishments for certain behaviors.²⁹⁷ If a law goes against the culture, it will be hard to enforce and will most likely be ineffective.²⁹⁸ Lawrence Friedman offers the example of prohibition and its failure.²⁹⁹ On the other hand, if a law "make[s] use of the culture and draw[s] on its strength[, it] can be tremendously effective . . . [I]t multiplies its strength."³⁰⁰ Reinforcement of certain norms by both law and culture further effectuates the rule of law.

The proposed justification approach aspires to bring pluralism to the criminal law by adopting a strategy described by Jeremy Waldron as a "desperate attempt [by minorities] to simply *get a hearing* for their side of the case."³⁰¹ In this strategy, the desire of members of minority cultures is to demonstrate that they "are deadly serious in [their] cultural commitments—that it is not just a game [they] are playing or a costume [they] are wearing" and that the majority's refusal to even

295. Many scholars in the debate about cultural defenses lose sight of the fact that many defendants are indeed moral agents. Their description of the defendants often feature words such as "compelled," "obligated," "required," etc. See, e.g., Levine, *supra* note 21 *passim*.

296. Anthony Amsterdam and Jerome Bruner explore in detail how "the construction of Self typically entails internalizing maxims about how to interact with others, maxims we refine by a process of figuring out what we can expect from others and what they can expect from us." ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 232-233 (2000). These maxims are provided by culture. See *id.*

297. LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 107 (1975).

298. See *id.* at 109 (discussing an experiment evaluating what people are more likely to agree with: the law or the attitudes of their peer groups).

299. *Id.* at 108.

300. *Id.*

301. WALDRON, *supra* note 1, at 172.

consider minority practices as an alternative is "intolerable."³⁰²

What is the strategy? In Jeremy Waldron's words, it is to equate respect for one's culture with respect for oneself.³⁰³ As he eloquently states in the opening quote of this Article, it is to demand "respect for the culture in which [one's] identity has been formed . . . in the uncompromising and non-negotiable way in which respect for rights are usually demanded."³⁰⁴ The proposed justification approach is exactly this. It is a demand that the criminal laws and the criminal justice system treat the individual defendant in a true cultural defense case with respect for their culture. It demands this respect as a matter of individualized justice for the individual. It asks for respect in the form of consideration of alternatives to the values and norms of the dominant Anglo-Saxon culture.

A justification defense will allow defendants to explain their cultural norms and the values behind those norms. These norms and values will be different from and indeed contrary to mainstream culture. As opposed to serving as evidence of an excuse defense, the justification approach uses these norms and values to demonstrate how the choice to follow these norms and to protect such values was a choice of lesser harms for the defendant and for a law-abiding, reasonable person sharing their cultural background. This respectful treatment of culture gives jurors and judges an opportunity to affirm the choices of defendants to commit their acts and the legitimacy of their different values. The advancement of cultural pluralism is the third and final advantage justifying the justification approach.

D. Consideration as Justified Acts

Having explained how Fumiko Kimura, May Aphaylath and the *Butler* trio could have been empowered to make more honest claims of justification under the proposed approach, I want to take a moment here to explain how the proposal does not advocate that all of them be absolved of criminal liability. To be perfectly clear, the proposal is to allow defendants motivated by the norms and values of their minority cultures to commit certain acts the opportunity to claim justification, but not to mandate their avoidance of criminal liability. Instead, having learned about the traditions and beliefs of the minority culture of the defendant, judges and juries should be free to pass their ultimate judgment on a case-by-case basis. Their judgment can include considerations of the essential elements and the outer limits

302. *Id.*

303. *Id.* at 164.

304. *Id.* at 160. Interestingly, after providing this incisive description of the strategy, Jeremy Waldron disparages it as the "greatest difficulty for the liberal enterprise and . . . the greatest abuse of civic responsibility." *Id.* at 164. But as the Article explains, Professor Waldron is not approaching the problem of the heterogeneous society from the perspective of criminal law. See *supra* text accompanying notes 285-86. As many others have noted, the goal of criminal justice necessarily intertwines the individual defendant with his formative culture. See, e.g., Levine, *supra* note 21, at 46 (arguing that the defendant must show the court with his defense how culture has shaped his decision); HARV. Note, *supra* note 22, at 1298-1300 (arguing that the notion of individualized justice, our system's model, should favor the cultural defense).

discussed earlier in Part II of the Article. Such considerations should result in a future where some culturally motivated defendants are absolved on the basis of justification while others are not.

For example, in all three opening narratives, it may be fair and just for juries to reject their claims of justification. In the case of Fumiko Kimura, her act of killing may still be problematic and hence, criminal, for several reasons. First, the victims of the killing were innocent in the sense that her children were not at all causally responsible for the sticky love triangle in which their parents were embedded. In addition, they are arguably innocent in the second sense too in that they were too young to be ascribed as victims who affirmatively consented to the Japanese ritual of *oya-ko shinju*. Second, the deaths of the children run afoul of a broader societal goal of child protection.

Similarly and perhaps more obviously, the case of May Aphaylath may be heard as a claim of justification but ultimately rejected. Even though arguably the wife's flirtatious behavior with a former boyfriend was causally linked to the situation in which her husband found himself, the killing of his wife over family honor is in direct tension with the American commitment to gender equality. There may be particular concern where Laotian men marry outside of their culture and still kill their cheating spouses to avenge their family honor.

In the third case of the *Butler* trio, there too remains the possibility that the justification approach allows the defendants to make an honest defense based on their Siletz culture but does not guarantee their acquittal. For example, perhaps the Butlers should have given their victim a chance to voluntarily return the stolen artifacts and thus, may have been acting unreasonably, even as Siletz Indians, when they decided to avenge the spirits of their ancestors by killing the grave robber. Moreover, in all three narratives, the cultural defense may be restricted from applying to homicide cases.

It bears emphasis that the proposal of the Article is to introduce greater empowerment and accommodation of minority cultures through the justification approach without mandating complete absolution. The attainment of all three advantages is made simply with more honest consideration by juries of the claims of culturally motivated defendant. It does not require total accommodation of minority cultures to the exclusion of other important societal principles in the criminal law.

IV. CONCLUSION

The criminal law's current approach towards defendants whose values originate from their minority cultures and differ from those of the dominant culture is unacceptable. By relying on discretion and resorting to fictional excuse defenses, the status quo is applying insufficient band-aids to patch the holes presented by the challenge of multicultural society to the criminal law. The negative consequences are the manipulation of existing excuse defenses, the avoidance of the difficult

moral questions posed to the criminal justice system, and the denial of fair and equal respect towards other cultures by the law.

This Article draws on the important theoretical and practical distinctions between justification and excuse defenses and proposes a novel and controversial justification approach to true cultural defense cases. The distinction between justification and excuse is not minor. Indeed, it is quite meaningful and warrants the attention of scholars as well as jurists and legislators as they struggle with finding a place for culture in the criminal law. Presenting in detail the values of three other cultures, the Article makes a powerful claim that has not yet been made in the debate around cultural defenses in the criminal law: namely, that these values should be considered legitimate bases for justification defenses in the criminal law.

The proposal of this Article is to shift the current orientation of thinking about culturally motivated defendants in the criminal law from excuse to justification. Instead of entrusting their fate to the discretion of individual law enforcement officers or straining the truth into ill-fitting excuse defenses,³⁰⁵ such defendants should be able to advocate that their acts were justified acts. They should be able to contend that given their cultural background, their community, their beliefs and values, they committed an act of lesser harm to avoid even greater harm. Defendants should have a doctrinal space in which to present a conception of harm that reflects the norms and priorities of their minority cultures and justifies their acts.

The three case studies demonstrate that there can be easily imagined defendants who could plausibly and more honestly utilize a cultural justification defense. The adoption of this new approach does not guarantee to each of these defendants the outcome of an acquittal but it does achieve distinct systemic advantages. Indeed, these advantages are the very inverse of the weakness of the current excuse approach. They are the elimination of legal fiction, the undertaking of the hard moral questions posed by the different values of other cultures and the advancement of cultural pluralism by the criminal law.

With the changing faces of our population and the ever-evolving national identity, the United States is at an important juncture in its history. It has the opportunity to address its woefully lacking current response to multicultural defendants and to find a more honest and effective way of achieving justice for individuals as well as for all.

305. See *supra* Part II.C.