



One Person's Culture is Another's Crime: The Question of the Cultural Defense

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The clash between (some) cultural customs and the Law

- **General:** influence of cultural traditions on behavior.
- **The clash:** heritage, traditions, and customs of immigrants to Western countries often clash with the law and constitute crimes.
- The dilemma in criminal law: The clash with the law raises the question of criminal law and the “cultural defense”.

People v. Kimura (1985).

The facts

- Fumico Kimura was a Japanese-American woman.
- She attempt to drown herself with her children.
- The children drowned.
- She charged with first degree murder.

Mother who killed children trapped in culture conflict

EDITOR'S NOTE — Japanese immigrant Fumiko Kimura goes on trial this month for killing her two children by drowning them in the sea. She claims it was a failed attempt at oyako shinju — parent-child suicide, which occurs almost daily in Japan. Public support for Mrs. Kimura has been overwhelming, with thousands of people urging the prosecutor to take her culture into account.

By TAMARA JONES
Associated Press Writer

SANTA MONICA, Calif. (AP) — The beach was nearly deserted that afternoon. A man stooped to gather seashells along the windy shore, deaf to the laughter of a teen-age couple-mocking the shrieking gulls.

Just north of the pier, a woman dressed in pink walked toward the chill water with two young children.

Fumiko Kimura clutched 6-month-old Yuri to her chest while 4-year-old Kazutaka scampered ahead of his mother, happily scooping up fistfuls of sand and watching it pour through his small fingers.

Mrs. Kimura set her purse and the baby's diaper bag down on the hard, wet sand and took Kazutaka by the hand.

No one saw them enter the surf. The teen-agers spotted the bodies floating about 30 yards from shore when a lone seagull suddenly swooped out over the waves. The mother survived; the children did not.

Her voice raspy from mouthfuls of salt water, Mrs. Kimura told police from her hospital bed that she had attempted parent-child suicide.

In her native Japan, it happens almost daily. They call it oyako shinju.

In California, they call it first-degree murder.

The case has generated international publicity and considerable public support for Mrs. Kimura, 32, who faces a possible death penalty if convicted in a trial scheduled to begin Oct. 21. Thousands of strangers from the United States, Japan and Europe have signed petitions or called the Santa Monica District Attorney's office.

"They want her to be treated as she would be in Japan — a lenient sentence and psychiatric help," said Lauren Weis, the deputy district attorney prosecuting the case.

Mrs. Kimura's attorney, Gerald Klausner, has hinted he will mount an insanity defense, portraying her



TRAPPED IN CULTURAL TIME WARP — Fumiko Kimura, left, 32, is escorted into a Santa Monica, Calif., courthouse in this 1984 file photo. Kimura is charged with the ritualistic slaying of her two children in an ancient Japanese custom called "Oyako Shinju." Kimura's defense portrays her as a doting mother who suffered a traumatic experience after discovering her husband's unfaithfulness. (AP Laserphoto)

she had become pregnant by Itsuroku in 1982 but had an abortion at his insistence. She said Itsuroku told her he didn't want more children.

Then the mistress learned late last year that Itsuroku's wife had borne him a second child.

Interviewed by police after Mrs. Kimura attempted oyako shinju, the mistress said she thought the best way to end the affair was "honestly" — by confronting Itsuroku's wife.

After sitting down with Fumiko and Itsuroku in their home, the mistress announced that she was returning Itsuroku's gifts. She spoke to Fumiko at least twice more by telephone, then, on Jan. 27, she sent

a boy to her door with a note. In it, she apologized and offered "to sacrifice her own life if the problem could be settled," according to the police report.

On the morning of Jan. 29, the mistress got two telephone calls. She could hear children in the background, but the caller hung up without speaking.

Shortly after 2 p.m. that day, Fumiko Kimura, clutching her drowned children, lay face down in the cold water, waiting for death.

"I like the sea. I like the Santa Monica sea...

when I lose my way, it comes to meet me.

And when I have something sad, it

comes to meet me."

Yoji Hirose was growing concerned about her neighbor Fumiko Kimura that January. She looked exhausted and her behavior seemed bizarre to Mrs. Hirose, described by Klausner as Fumiko's only close friend in this country.

At least twice recently, Mrs. Hirose had picked up her phone to hear Kazutaka Kimura crying.

"When I asked him what happened, the line was cut off either by him or by Fumiko," Mrs. Hirose told investigators.

Mrs. Hirose was busy getting ready to move to Detroit, but on the evening of Jan. 28, she took time to visit Fumiko. Fumiko told Mrs. Hirose she hadn't slept or eaten for a week. Toys were strewn across the normally tidy apartment and Kazutaka was running wild, Mrs. Hirose recalled.

Suddenly, Fumiko sprawled on the floor spread-eagle, face up, and began to ramble.

Fumiko told Mrs. Hirose she was losing interest in caring for her children. She babbled on about death and feeling "not qualified as a mother." Mrs. Hirose testified at the preliminary hearing.

The coroner's report described both children as well-nourished. There was no evidence of abuse or neglect.

Lying there on the floor, Fumiko repeatedly asked Mrs. Hirose what time it was — an odd query, Mrs. Hirose thought, since Fumiko was wearing a watch. Fumiko complained that she had no concept of time and was losing her memory.

She told Mrs. Hirose she thought she was going crazy.

Mrs. Hirose called to check on Fumiko after she got home. Kazutaka answered and said his mother was crying. Mrs. Hirose got Fumiko on the line and they made plans to go for a drive the next day.

Itsuroku came home late that night and Fumiko bathed his feet.

Kimura, a 40-year-old co-owner of a Japanese restaurant, told investigators the only unusual thing he had noticed about his wife's behavior were her recent demands that he paint her portrait.

Fumiko called her family in Japan about four hours before she walked into the surf. It was 3 a.m. there. Fumiko was incoherent and told her sleepy sister she would check into a nearby hotel and then fly home to Japan.

Fumiko's worried family immediately called Itsuroku at work, and he set off to find Fumiko and the children. He searched until dark, checking the doctor's office, neighborhood stores and the hotel. He came across Yuri's stroller abandoned beneath a freeway overpass a few blocks from home.

When Itsuroku got home, the police called and told him to come to the hospital.

There, Itsuroku learned that his only son had died. His baby daughter was fighting for life. His wife was under intensive care.

He became so distraught that chief homicide investigator Detective Ray Cooper had him committed to a psychiatric ward for 72 hours. "He threatened to kill his wife and to kill himself," Cooper explained.

The day Itsuroku returned home, another officer came to the door to tell him Yuri had died.

On Jan. 31, Cooper and a Japanese-speaking officer visited Mrs. Kimura in her hospital room and asked if she knew that killing her children was against the law. Mrs. Kimura said no.

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People v. Kimura (1985)

The Japanese culture that played a role in the case

- *Oya-ko shinju* (parent-child suicide).
- perceptions of motherhood in the Japanese tradition.
- Japanese attitudes toward suicide.

People v. Kimura (1985)

Trial and Result

- Community support and petition to the district attorney.
- Charges reduced to involuntary manslaughter.
- the court expressly considered the punishment she would have received in Japan.
- Final sentencing: five years of probation and one year in the county jail.

International support growing for woman who killed children

By Tamara Jones
The Associated Press

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"They want her to be treated as she would be in Japan — a lenient sentence and psychiatric help," said Lauren Weis, the deputy district attorney prosecuting the case.

Kimura's attorney, Gerald Klausner, has hinted he will mount an insanity defense, portraying her as a doting mother who apparently suffered a psychotic episode after learning her husband had been unfaithful.

In hearings scheduled for Oct. 18 and 21, Klausner said, "We're asking the court to exclude alleged statements made to police officers (by Kimura) and made in her intensive care room while she was on life support. . . This was within 48 hours of being pulled out of the surf."

Awaiting trial, Kimura sits alone in the prison cell where she has been held on \$100,000 bail since February. She fills legal pads with bleak, penciled prose. She writes of womanhood and weakness. Sometimes she writes about music.

Failure had shadowed her since childhood. On the dismal afternoon of Jan. 29, Fumiko Kimura failed at her own suicide.

"Living is hard and dying is hard," she told The Los Angeles Times in a brief interview within days of her arrest. Her attorney no longer permits her to speak with reporters. Her story is pieced together through police and court documents and interviews with attorneys for both sides.

Fumiko was one of six children from a broken home. She earned decent grades in high school but flunked entrance exams to Japan's National Music University, where she had hoped to turn 10 years of piano lessons into a classical music career.

Pursuing an interest in language, Fumiko journeyed to California and enrolled in a community college but did not graduate. After 14 years in the United States, she still has not mastered English, according to Klausner.



Fumiko Kimura is charged with the murder of her two children.

She sold hot dogs in Dodger Stadium and worked as a waitress to make ends meet. She married a Japanese-American, but after eight years, that, too, ended in failure. He lacked ambition and didn't want children.

Then Fumiko met Itsuroku Kimura at the restaurant where they both worked. They married six years ago, and Fumiko fulfilled her dream of motherhood.

Friends and relatives described the Kimuras as loving, over-protective parents who clung to Japanese traditions such as sleeping on mats and leaving their shoes at the door. Fumiko bathed Itsuroku's feet each night before he went to bed.

Fearing the children might hurt themselves, the Kimuras removed all furniture from the living room of their suburban Tarzana apartment. They even got rid of Fumiko's beloved piano.

Kimura's life was said to revolve around her children. When her mother once saw Fumiko cleaning house with Yuri in a pouch strapped to her chest, she suggested Fumiko put the baby on her back so her arms would be free.

"No," Fumiko replied, "then I can't see if she needs me."

The trouble began when the phone rang nine days before she walked into the sea.

A Japanese waitress on the other end announced she had been Itsuroku's lover for more than three years. She asked to talk with Fumiko the following day. Fumiko agreed.

Facing the prospect of a second divorce, Fumiko was again filled with a sense of failure.

"Fumiko never had a lot of confidence in herself as a good mother or wife," said Gail Klausner, the wife and assistant of Kimura's attorney.

"She has no sense of identity, no self-esteem," added Klausner, who visits Fumiko often in jail.

People v. Kimura (1985).

- Scholars differ on the extent to which Kimura's cultural background played a role in the court and influenced the outcome of the trial.
- Kimura's case sparked off the long debate about cultural defense.
- The first article that drew attention to the claim, using the term "cultural defense" for the first time, was the following: Note, *The Cultural Defense in the Criminal Law*, 99 **Harvard Law Review** 1293 (1986).

What is Cultural Defense?

Definition by Norgren and Nanda:

“A Cultural defense holds that persons socialized in a minority or foreign culture who regularly conduct themselves in accordance with their own culture’s norms, should not be held fully accountable for conduct that violates official [...] law, if these individuals’ conduct conforms to the prescription of their own culture.

The intention of a cultural defense in a criminal case is to negate or mitigate criminal responsibility where acts are committed under a reasonable, good-faith belief in their propriety based upon the actor’s heritage or tradition.”

Arguments for and against cultural defense

Culpability and moral responsibility

- It may be justified not to punish an accused if the offense committed was permissible under the entrenched social concepts of the perpetrator, which reduces the degree of culpability.
- The low level of culpability stems from the fact that the accused committed the acts believing that the actions were desirable, even necessary under a given religious or traditional imperative.

Arguments for and against cultural defense

Criminal law is the last defense of minimum liberal values

- criminal law reflects the level of tolerance in society, therefore consideration of non-liberal cultures or anti-social acts is undesirable and may harm the social fabric and protected values.

Arguments for and against cultural defense

Criminal law is the last defense of minimum liberal values

Israeli Supreme Court Justice, Salim Joubran:

“Before recognizing the accused's right to culture, the victim's right to life and bodily integrity must be protected. Tolerance in a multicultural society has limits. These limits are determined by balancing the principles of multiculturalism with that of liberalism [...] It is understood that in this balance, violent customs, such as blood revenge, honor killing, etc., fall outside the multicultural arena. There is no possibility of accepting a cultural custom that follows a path of severe violence. We must fight a bitter war against violent customs of this type. We are committed to maintaining basic moral standards, first and foremost, the sanctity of life and the integrity of the body. A cultural custom that violates these fundamental values is not acceptable in a liberal, multicultural society.”

C.A. 10358/08 *Azbarga v. State of Israel* (March 16, 2010)

Arguments for and against cultural defense

Ignorance of the law does not exempt from punishment

- “ignorance of the law is no excuse.”
- The applicability of criminal law is not subjective and does not reflect the defendant's worldview.
- The adoption of the cultural defense may lead to unjustified inequality between defendants.

Arguments for and against cultural defense

Feminist theories

- Attempt to justify harming women and children.
- Normalization of harmful practices
- Undermining legal protections.

Arguments for and against cultural defense

Feminist theories

Doriane Colman:

“What happens to the victims – almost always minority women and children – when multiculturalism and individualized justice are advanced by dispositive cultural evidence? The answer, both in theory and in practice, is stark: they are denied the protection of the criminal laws because their attackers generally go free, either immediately or within a relatively brief period of time.”

Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 **Columbia Law Review** 1093 (1996).

Models of Cultural Defense

The three models:

- Independent criminal defense.
- Integration of cultural arguments within existing defenses.
- Cultural background as a mitigating factor in sentencing.

Model I: Independent Cultural Defense

- Full acquittal.
- Culture can reduce the degree of the culpability.
- But... it does not fully exculpate the defendant.

Model II: Integration of cultural arguments within existing defenses

- Moderate model: Integration of cultural arguments within existing defenses.
- Example: *Kargar* case
 - Facts
 - The cultural arguments
 - The court in Maine
 - Supreme Judicial Court of Maine

that difficulty should not result in a felony conviction in this case."
— Maine Supreme Judicial Court



Afghanistan immigrant Mohammad Kargar of Portland confers with his son, Rahmon, 5, during a news conference in Portland Thursday. AP photo

Court reverses sex assault conviction of Afghan man

PORTLAND (AP) — Kissing a child's genitals would be considered sex abuse in most cases, but not in the case of an Afghan immigrant who kissed his 18-month-old son's penis as part of a cultural tradition, Maine's highest court ruled Thursday.

The court threw out the gross sexual assault conviction against Mohammad Kargar, citing a Maine law that requires courts to look at extenuating circumstances.

The Maine Supreme Judicial Court said a lower court did not take into account culture, lack of harm and Kargar's innocent state of mind when he kissed his son.

"Although it may be difficult for us as a society to separate Kargar's conduct from our notions of sexual abuse, that difficulty should not result in a felony conviction in this case," the court said in a unanimous decision.

"I feel much better now. I'm happy. My family is happy," Kargar said at a news conference, flanked by his wife and now 5-year-old son in his lawyer's office.

"Today is the best day in my life," said Kargar's wife, Shamayel.

Charges were brought against Kargar three years ago after a neighbor told police that her two children saw him kissing his child's penis. Police later found a snapshot in the man's family photo album showing his mouth on the boy's genitals.

Afghanistan, testified that kissing a son's penis is common in that country, and done to show love for the child. Kargar testified that the practice is common until the child is 3- to 5-years-old. No sexual feelings are involved, witnesses said.

Kargar's lawyer, Catherine Connors, said the conviction was the result of a "cultural misunderstanding."

When asked if the court's ruling allows Afghan immigrants to continue the practice, Kargar's other lawyer Jim Erwin said, "Generally, no. The publicity of this case will help serve to inform people that it is not an acceptable practice in this country."

Cumberland County Superior Court Justice Robert Crowley last year handed down an 18-month suspended sentence, placed Kargar on probation and allowed him to rejoin his wife and four children, who he had been barred from seeing unsupervised since mid-1993.

Members of Portland's small Afghan community were troubled by the criminal charge, viewing it as an attack on their Islamic culture.

"In virtually every case, the assumption that a physical touching of the mouth of an adult with the genitals of a child under the age of 14 is inherently harmful is correct," the court said. "This case however, is the exception that proves the rule."

Cumberland County District Attorney Stephanie

Model III: Cultural background as a mitigating factor in sentencing

- Sentencing considerations.
- Degree of culpability.

Conclusion

- Recognizing an independent cultural defense in criminal law is not justified.
- When successfully raised, the defense can use cultural evidence to either establish an affirmative criminal defense or support a more lenient sentence.

Thank you !