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## NOTES

### Changing Sexual Assault Law and the Hmong

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*The best way to get married is for the boy to come to your house and ask your mother and father. But I knew that if [my boyfriend] Xao did that, my parents would say, "No." So that was a problem and I had not decided what to do.*

*Every night I had to go outside to get wood and water for the morning. One night I went out to get the wood, and found Xao waiting for me with his two friends. . . .*

*Xao didn't say anything. His friends said, "We want to take you to marry him."*

*"No!" I said. "If he wants to marry me, let him come to my house and ask my father and mother!"*

*"We don't want to ask," they said, and they just grabbed me to pull me away.*

*"No, no," I said. "I don't want to go! You have to ask!"*

*But they didn't stop, they put their hand over my mouth and just pulled me down the street! Yes, they did that!*

*A lot of Hmong girls get married like that. That kind of marriage is called "catch-hand". I was afraid, plus I didn't really want to go. I was only 14, I wasn't ready. But in our country, whether you're ready or not ready, if they pull you away and you go with them for two or three blocks, you cannot go back! . . .*

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1. May Xiong & Nancy Donnelly, *My Life in Laos*, 1 THE HMONG WORLD 201, 217 (1986).

## INTRODUCTION

About 97,000 of the world's three million Hmong people live in the United States today.<sup>2</sup> Vicious Pathet Lao pogroms, in retaliation against those Hmong who fought for the United States in Vietnam,<sup>3</sup> drove one-third of the Laotian Hmong from their mountain homes to cramped refugee camps in neighboring Thailand.<sup>4</sup> Denied resettlement with native Thai Hmong in Thailand, and facing murder, persecution and starvation in Laos, waves of Laotian Hmong resettled in the United States after 1976. Most were ill-acquainted with literate, urban, industrial society.<sup>5</sup>

Hmong clans, organized by male kinship, reconstituted with vigor in the United States.<sup>6</sup> Large Hmong groups concentrated in California, Minnesota, Wisconsin, Texas, and Rhode Island, but clusters of Hmong families can be found in scores of urban and rural areas in many states.<sup>7</sup> Close clan ties reinforce Hmong identity and cultural practice.<sup>8</sup> However, some Hmong people refuse to abandon cultural practices that clash with American legal ideals.<sup>9</sup> This is particularly true of one type of traditional marriage practice, which involves the forced kidnap and rape of an unwilling bride.<sup>10</sup> The rape consent standards of most states might un-

2. Kathleen M. McInnis, *Who Are the Hmong?* in *THE HMONG IN AMERICA: PROVIDING ETHNIC-SENSITIVE HEALTH, EDUCATION, AND HUMAN SERVICES* 1, 1-2 (Kathleen M. McInnis et al. eds., 1990) [hereinafter *THE HMONG IN AMERICA*].

3. KEITH QUINCY, *HMONG: HISTORY OF A PEOPLE* 192-97 (1988).

4. Yang Dao, *Why did the Hmong Leave Laos?* in *THE HMONG IN THE WEST: OBSERVATIONS AND REPORTS* 3, 18 (1982).

5. See QUINCY, *supra* note 3, at 200-03.

6. See John Finck, *Clan Leadership in the Hmong Community of Providence, Rhode Island*, in *THE HMONG IN THE WEST: OBSERVATIONS AND REPORTS* 21-28 (1988). See also Cheu Thao, *Hmong Migration and Leadership in Laos and in the United States*, in *THE HMONG IN THE WEST: OBSERVATIONS AND REPORTS* 99, 117-19 (1988) (explaining the remarkable power that clan loyalty and leadership has over individual decision-making).

7. McInnis, *supra* note 2, at 6. The Hmong National Plan of Action lists representatives from small Hmong communities in cities throughout the United States, including cities in Illinois, Ohio, Pennsylvania, Massachusetts, Connecticut, Washington, Montana, Nebraska, Iowa, Kansas, Oklahoma, Colorado, North Carolina, South Carolina, Georgia, and Tennessee. *HMONG AMERICAN NATIONAL DEVELOPMENT PROJECT, HMONG NATIONAL PLAN OF ACTION* 9 (1991). When Hmong communities are small, government bodies may delay attempts to understand Hmong culture until problems arise. See *Wife-buying case turned over to DA*, *LOUISVILLE TIMES/LAFAYETTE NEWS*, July 10, 1991, at 7 (noting that Lafayette, Colorado city council members, police representatives, and county officials began meeting with the leaders of 35 Hmong families only after a Hmong rape case and after Hmong complaints of cultural misunderstanding to the city council).

8. Kathleen M. McInnis, *The Hmong Family*, in *THE HMONG IN AMERICA*, *supra* note 2, at 25, 27.

9. Some refugees refuse to recognize American law when it conflicts with deeply ingrained cultural practices. Spencer Sherman, *Legal Clash of Cultures*, *NAT'L L.J.*, Aug. 5, 1985.

10. Kathleen M. McInnis, *What Is Ethnic-Sensitive Practice?* in *THE HMONG IN AMERICA*, *supra* note 2, at 11, 14-15.

intentionally decriminalize this type of sexual assault on unmarried Hmong women because the consent standards contain a built-in cultural defense.<sup>11</sup> Reforms in American rape law may undermine the ability of Hmong men to assert this defense.

This Note will attempt to explain the confusing cultural issues encountered by lawyers involved in such cases, and explain how some cultural factors relate to American sexual assault law. Part I of this Note will examine the cultural foundations for the mistaken belief of consent defense in Hmong sexual assault cases. Part II will explain why such cultural defenses may be undesirable in the American legal system. Part III will address the American legal system's involvement in recent Hmong sexual assault cases, and Part IV will examine legal reforms that could change the outcome of these cases. Finally, Part V of the Note will explore other obstacles to the legal resolution of Hmong sexual assault reports.

## I. CULTURAL FOUNDATIONS

Modesty<sup>12</sup> and the lack of a body of Hmong literature<sup>13</sup> make it difficult to determine traditional Hmong attitudes toward sexual relationships. Also, Hmong in America have enculturated at different speeds, making it impossible to refer to a single Hmong view.<sup>14</sup> But generally, in *traditional* Hmong society, even a willing Hmong bride should seem reluctant to be married, protesting that she is too young or otherwise unready.<sup>15</sup> Anecdotal evidence says this mock unwillingness extends to sex itself, and should last throughout a virtuous woman's married life.<sup>16</sup>

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11. See *infra* Part III.

12. "[S]exual issues are not easily discussed in Hmong culture even between spouses." Kimberly Cohen, *Child Abuse in Hmong Culture*, in *THE HMONG IN AMERICA*, *supra* note 2, at 34, 37. Some body parts and functions cannot be spoken of between men and women. See, e.g., Elizabeth Perkins & Pa Foua Yang, *Suggestions for Health Care Professionals Who Interact with the Hmong* (1989) (on file with author).

13. Although there are tales that the Hmong used and lost writing systems in the past, modern Hmong writing systems were not developed until this century. Generally, only members of important families were taught to read or write. See generally WILLIAM A. SMALLEY ET AL., *MOTHER OF WRITING: THE ORIGIN AND DEVELOPMENT OF A HMONG MESSIANIC SCRIPT* (1990).

14. The degree to which an individual Hmong person may accept American laws and ideals can depend on his or her level of education, exposure to Western influence in Asia, time spent in this country, employment or schooling here, social interaction with non-Hmong, and the extent to which American values are accepted by his or her elders and leaders within the clan and the community. Elizabeth (Perkins) QuinnOwen, *Obstacles Faced by Hmong Women Considering Divorce or Seeking Custody of Their Children*, in *CUSTODY: THE CHALLENGE CONTINUES. AN INFORMATIONAL MANUAL FOR BATTERED WOMEN AND ADVOCATES* (Wisconsin Coalition Against Domestic Abuse eds., 1992).

15. Eagerness to go with a boy and join his family implies disrespect to one's

This mock resistance has led to the widespread confusion between two forms of Hmong marriage: elopement, which is consensual; and abduction, which is not.<sup>17</sup> It has also led to acceptance of arranged marriages, to which brides may or may not have agreed.

When young Hmong women have accused Hmong men of rape, many of the accused rapists have used this "mock resistance" to assert a mistake of fact defense, which goes like this: "Since consenting Hmong women pretend to resist sex, I believed this woman was consenting to sex, even though she struggled and cried and otherwise resisted."<sup>18</sup> Criminal law allows mistaken belief of consent to negate culpability in sexual assault.<sup>19</sup> At least one Hmong defendant has successfully asserted

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own family, and therefore is improper. Nancy D. Donnelly, *The Changing Lives of Refugee Hmong Women* 163 (1989) (unpublished Ph.D cultural anthropology dissertation, University of Washington).

16. An American refugee advocate who speaks Hmong says that a woman who seems too willing to have sex will be insulted and gossiped about in Hmong as one who has an "itchy pussy." Both men and women have told her that Hmong women give conflicting signals during sex, such as batting a man's hand away, but then lifting her hips to help him remove her clothing. Telephone interview with Ruth Hammond, Journalist, *TWIN CITIES READER* (Oct. 8, 1992). Others feel that sometimes the resistance is real, and that a woman's consent to sex is often irrelevant to her partner. See, e.g., Mary Turnquist et al., *Guidelines for Presenting Family Planning Services to the Hmong* (Sept. 1985) (informally published manuscript prepared by the Refugee Women in Development Project of Lutheran Social Services of Wisconsin and Upper Michigan North Central Area, Wausau, Wisconsin) (on file with author) (asserting that sex meets male needs, is hurried, and shows little concern for female pleasure); Rebecca F. Smith, *Natural Family Planning for the Hmong*, in *THE HMONG IN AMERICA*, *supra* note 2, at 101, 102 (noting that men have complete authority to determine when and how often to have intercourse). *But cf.* HUGO A. BERNATZIK, *AHKA AND MIAO* 134-37 (Alois Nagler trans., 1970) (1947) (describing detailed and loving foreplay by young Hmong couples studied in Thailand, and noting that although girls are publicly chaste, they generally have no objection to premarital sexual intercourse).

17. In Hmong culture, there are four ways to begin marriage negotiations. In Laos, voluntary elopement was the most common. Abduction of the girl by the boy and his cousins was the second most common. Third, and most polite, was the unannounced arrival of a suitor and his marriage negotiators at the home of the girl's family. The least common start to marriage occurred when the girl's parents caught the couple having intercourse and forced them to marry. MYTHS, LEGENDS AND FOLK TALES FROM THE HMONG OF LAOS 207 (Charles Johnson, ed., 1985) (relating twenty-seven folk tales with extensive annotation on Hmong customs and beliefs, gathered to preserve Hmong oral history and provide cultural interpretation for refugee advocates) [hereinafter MYTHS, LEGENDS, AND FOLK TALES].

18. See, e.g., Myrna Oliver, *Cultural Defense, a Legal Tactic*, *L.A. TIMES*, July 15, 1988. See also Donnelly, *supra* note 15, at 163, wherein she notes: "Thus, if the girl's protest is real, the boy has no way to tell."

19. Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 *YALE L.J.* 2687, 2694 (1991).

this defense at a rare jury trial.<sup>20</sup> Using this standard, American courts may deny justice to an unmarried Hmong woman who is sexually assaulted by a Hmong man, simply because she and her attacker belong to the same ethnic group.<sup>21</sup> Her resistance, which American courts would normally view as evidence of her innocence, is rendered meaningless by her attacker's cultural beliefs.<sup>22</sup>

Accused rapists raise this defense whether or not the case goes to trial and whether or not the parties followed traditions.<sup>23</sup> As a result, courts have handed down light sentences in the few cases reaching disposition. Light sentences and little prosecution arguably have led to little deterrence.<sup>24</sup>

A close look at Hmong cultural beliefs reveals that Hmong men who abduct unwilling brides based upon cultural beliefs often are acting recklessly with regard to consent.<sup>25</sup> They are aware that rape is a possibility, but they proceed despite that risk. To understand the problem of sexual assault on unmarried Hmong women and girls in an American legal context, we must focus on two traditional cultural patterns: Hmong views of marriage, and Hmong views of crime.

#### A. *Hmong Views of Marriage*

In elopement, the two young people go through an exchange of personal tokens and a period of courtship, which may last just a couple of days.<sup>26</sup> If one or both families disapprove of the union, the couple can arrange to sneak off to the groom's family house, where they will

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20. See *infra* Part III.A.

21. For example, a prosecutor in one such rape case decided not to go to trial because "it would be almost impossible to convince a jury that the girl really meant no and had been taken away against her will and raped." He opted for a plea bargain. The defendant was fined \$1,000 and spent no time in jail. Oliver, *supra* note 18.

22. B. ANTHONY MOROSCO, *THE PROSECUTION AND DEFENSE OF SEX CRIMES*, § 3.01(3) (1991).

23. None of the cases examined in Part III of this note appear in reporters. The author traced these cases through newspaper articles and through word of mouth from refugee advocates and lawyers. See also *infra* Parts IV and V.

24. For example, a refugee advocate tells of one Hmong family whose twelve-year old daughter was forcibly abducted by a Hmong man from another state. The family called police, who located and returned their daughter. However, the prosecution dropped the charges against the man. Five years later, when negotiators from the same clan demanded the girl as a bride, the girl's mother threatened to call police. The negotiators merely laughed at her, noting that nothing happened to them the first time. Telephone conversation with Elizabeth (Perkins) QuinnOwen, refugee advocate, Oct. 26, 1992.

25. However, in most American jurisdictions, this does not make them criminally liable. See *infra* Part III.

26. Yaj Txooj Tsawb, *Excerpt from Outline of Marriage Rites*, in 99 *THE HMONG WORLD* 105 (David Strecker trans., 1986).

live.<sup>27</sup> The families immediately will give in, and marriage negotiations will take place about three days later.<sup>28</sup> Even in elopement, the girl may protest her unwillingness in an effort to avoid conflict with her family and to preserve her virtue.<sup>29</sup> The elopement, like all other forms of Hmong marriage, is followed by negotiation between the two clans to determine the "bride price," dowry, and wedding meal arrangement.<sup>30</sup>

In abduction, the girl may not even know the boy, or she may have refused him as a marriage partner. However, he can succeed in marrying her if he abducts her, takes her away from her family, and has sex with her.<sup>31</sup> A groom's reasons for abducting a bride include fear that the girl or her parents will reject him, fear that other, more desirable suitors will win the girl's hand, knowledge that the girl has already been committed to marry another man, or a desire to lower the bride price.<sup>32</sup> In addition, a girl may ask the boy to pretend to abduct her in an effort to avoid an open conflict of will with her parents.<sup>33</sup>

If the girl resists within her family's sight, they will fight off her attackers and she does not have to marry the boy.<sup>34</sup> Traditionally, the boy will bring two kinsmen with him to help subdue the girl.<sup>35</sup> If the boy manages to carry her away, she is considered married, whether she consents or not.

[S]uppose they have pulled her far away, so that her parents do not know where she is and cannot hear her cries, and cannot

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27. *Id.* at 105.

28. *Id.*

29. See Donnelly, *supra* note 15, at 90 (noting that: "Even if she wants to marry, she has to say she doesn't want to marry."); and 99-100 (reporting that if parents ask a Hmong girl whether she likes a particular youth, instead of saying "Yes," she should "just cry."). See also MYTHS, LEGENDS, AND FOLK TALES, *supra* note 17, at 241-42 (reporting that a willing Hmong girl may cry with fear of her unknown future, and push the responsibility for the decision onto her parents, but a truly unwilling Hmong girl will refuse more forcefully).

30. The bride price, literally translated as milk price, is said to compensate the girl's parents for the cost and pain of raising her. However, culturally it serves as a symbol showing the subordination of the bride and groom to their elders in each clan. Donnelly, *supra* note 15, at 100-03. Prices are generally quite high, and serve such social ends as displaying the status of the groom's family, which can raise it, and the bride's family, which can command it. W.R. GEDDES, *MIGRANTS OF THE MOUNTAINS* 58 (1976). Therefore, anthropologists warn against seeing this as a mere sale of a woman. *Id.* at 58-59. However, some bride's families recently have used the American criminal justice system to force payment of higher bride prices, lending more credence to the theory of women as chattel. See *infra* notes 169-75 and accompanying text.

31. See Tsawb, *supra* note 26, at 105.

32. MYTHS, LEGENDS AND FOLK TALES, *supra* note 17, at 225-26.

33. *Id.* at 226.

34. *Id.*

35. Xiong & Donnelly, *supra* note 1, at 217.

reach her. Then, when they have brought her to their house, they let someone bring a message to the girl's parents so that they will not worry. The boy's family has taken her away. If she is carried a distance of one armspan she is considered a member of [the boy's] family; if she is carried a distance of two armspans she is considered a member of their family. If she lives, she is considered a member of their family; if she dies, she is counted among their ancestral spirits. Therefore, let her parents accept the situation; let their hearts remain at peace.<sup>36</sup>

Forcible abduction and rape are risks clearly known to Hmong people. A formal marriage negotiation for a bride price follows both a successful abduction and an elopement.<sup>37</sup>

Confusion about the two forms occurs because both forms of marriage traditionally are valid, because even consensual relations can *appear* violent, and because both are followed by acquiescence and negotiation by the families. Confusion also occurs because the Hmong legal system did not penalize the rape of a young, unmarried girl, even if a marriage did not result.<sup>38</sup> A Hmong woman could be married completely against her wishes if her family agreed to the union.<sup>39</sup>

### B. *Hmong Views of Crime*

In traditional Hmong society, custom and ideology serve as law.<sup>40</sup> Even in the United States, local or regional clan leaders arbitrate solutions, enforce fines, and mandate apologies.<sup>41</sup> All clan leaders are male.<sup>42</sup> There are no written laws that dictate these settlements: "Clan leaders contend the decisions are made based on concerns for fairness and in consideration of all parties' viewpoints."<sup>43</sup> However, decisions may show gender bias, reflecting Hmong perceptions of women's roles.<sup>44</sup>

Clan leaders punish most often with public humiliation and fines, paid by the offender's family to the victim's family.<sup>45</sup> They levy fines for theft, property damage, adultery, fathering an illegitimate child and

36. Tsawb, *supra* note 26, at 107.

37. *Id.*

38. MYTHS, LEGENDS, AND FOLK TALES, *supra* note 17, at 94-95. In the United States, if a Hmong girl becomes publicly known as a non-virgin because of rape, clan resolution apparently involves an apology and compensation of bride price to the girl's family by the boy's family. See, e.g., Beth L. Goldstein, *Resolving Sexual Assault: Hmong and the American Legal System*, in THE HMONG IN TRANSITION 135, 137 (1986).

39. MYTHS, LEGENDS, AND FOLK TALES, *supra* note 17, at 242 (noting that in a traditional setting, a girl can tell her parents she disagrees with their choice, but her parents' decision is the final one).

40. Donnelly, *supra* note 15, at 93.

41. See MYTHS, LEGENDS, AND FOLK TALES, *supra* note 17, at 315.

42. McInnis, *supra* note 8, at 28-29.

43. *Id.* at 28.

44. One refugee advocate notes that since the clan leaders are all male elders, their

refusing to marry the mother, and even for manslaughter and murder.<sup>46</sup> They do not use physical punishment or jail, except occasionally in Laos when the offender had to be bound and detained before trial.<sup>47</sup>

In this system, the Hmong punish the rape of a married woman because they consider such an act adultery.<sup>48</sup> The woman's consent is irrelevant because it is really her husband whom the rapist has wronged.<sup>49</sup> Clan leaders would order a guilty man to pay a fine and to be exposed to scorn and reproach, and sometimes to physical blows from the victim's husband.<sup>50</sup> However, the rape of a young, unmarried girl "would be taken much less seriously, and tolerated as part of the overall pattern of courtship by a man in search of a prospective marriage partner."<sup>51</sup> The blame would be laid on the girl for being lured into privacy with the boy because "if the female dog doesn't wag her tail, the male dog doesn't follow."<sup>52</sup> Clan leaders could find that a rape-induced marriage was valid even if the victim or her family disputed it.<sup>53</sup>

## II. CULTURAL DEFENSES

The definition of rape as an affront to another man's property interest in his female chattel sounds an uncomfortable echo from our

edicts are often gender-biased. For example, in a domestic abuse case, a man would be told to beat his wife less often, and the woman would be told she would just have to put up with being beaten from time to time. See QuinnOwen, *supra* note 14 at 3.

45. See MYTHS, LEGENDS, AND FOLK TALES, *supra* note 17, at 310.

46. *Id.*

47. *Id.* at 315-16. Jails did not exist as part of the Hmong justice system in Laos. This conflicts with one prosecutor's attempt to resolve a Hmong rape case by accepting the assertion of the victim's aunt that in "the old country," justice could be satisfied by a short jail sentence. See Oliver, *supra* note 18.

48. A married Hmong woman's consent to sex is immaterial because she has no independent right to consent. Hmong people see the cuckolded husband as the primary victim of rape or adultery. Ruth Hammond, *Call it Rape*, TWIN CITIES READER, Mar. 27-Apr. 2, 1991, at 8-9. Attacking a *married* woman was a serious offense under Hmong law, and resulted in a fine in silver bars paid to the husband. The Hmong phrase for such an attack translates as knocking over someone else's wife. MYTHS, LEGENDS, AND FOLK TALES, *supra* note 17, at 94.

49. MYTHS, LEGENDS, AND FOLK TALES, *supra* note 17, at 94.

50. *Id.*

51. *Id.* at 94-95. See also Letter from Lisa Capps, anthropologist, to the author (Nov. 28, 1992) (on file with author).

52. Donnelly, *supra* note 15, at 163.

53. See QuinnOwen, *supra* note 14, at 2. For example, during the Vietnam War, soldiers from some Hmong divisions forced personal tokens on young Hmong women and used that as a justification for rape. Clan leaders ruled these "marriages" valid. Telephone Interview with Nancy D. Donnelly, Ph.D. (Sept. 19, 1992). One could view this as a distortion caused by some clans' excessive consolidation of power during the war years. See Cheu Thao, *supra* note 6, at 118.

own legal past.<sup>54</sup> In one possible outcome of rape at ancient English law, the victim consented to marry the rapist, who then paid a fine to her father for the damage to her virginity.<sup>55</sup> Some of the world's people may still adhere to these beliefs.<sup>56</sup> Nonetheless, ancient English rape law hinged on the victim's non-consent, and the ancient English killed and mutilated rapists.<sup>57</sup>

American common law defines rape as a defendant's sexual intercourse with a woman not his wife, by force, and without consent.<sup>58</sup> Even those modern statutes that deliberately avoid mentioning consent seek to prevent and avenge non-consensual sexual contact.<sup>59</sup> Only murder is thought worse.<sup>60</sup> Ideally, current American rape law promotes and protects the physical autonomy of all human beings, recognizing the right of each individual to choose when to have sex and with whom.<sup>61</sup>

In comparison, traditional Hmong custom made the female's consent almost irrelevant. Pragmatically, a willing partner would be more desirable (and less trouble) as a potential wife. This would serve as a deterrent to rape aimed at marriage. There was a real possibility that a mistreated woman would commit suicide.<sup>62</sup> However, raping a non-consenting unmarried woman was not individually punished. Little deterrence meant little meaningful incentive for Hmong men to ensure their partner's consent. Rapes are inevitable in a social system that posits that all women resist, but not that all women consent.

American law generally does not accept a formal cultural defense as a justification for crime.<sup>63</sup> Some critics have argued that American respect for individual justice and cultural diversity should result in a formal cultural defense.<sup>64</sup> Some argue that American judges do not

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54. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 7-8 (1975).

55. *Id.* at 16.

56. *Id.* at 7.

57. *Id.* at 15-17.

58. MOROSCO, *supra* note 22, § 3.01(3).

59. *Id.*

60. "From earliest times the unique nature of the psychological as well as physical harm caused to the victim was recognized. . . . [T]he general attitude of society . . . is that no more horrible or wrongful act can be committed against a human being, short of intentional murder, than the act of forcible rape." *Id.* § 1.02(1)(a) (Aug. 1992).

61. Robin D. Wiener, Note, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 *HARV. WOMEN'S L.J.* 143, 159-60 n.104 (1983).

62. See Donnelly, *supra* note 15, at 102. In Laos, one committed suicide by overdosing on opium, which some Hmong raise as a cash crop. GEDDES, *supra* note 30, at 216-18.

63. Note, *The Cultural Defense in the Criminal Law*, 99 *HARV. L. REV.* 1293, 1293-94 (1986).

64. *Id.* at 1296-1307.

*understand* other cultures.<sup>65</sup> However, others point out that adopting the values of a defendant's culture abandons the human rights declared and protected by American law.<sup>66</sup> The idea that a woman's "no" really means "yes" and requires a man to exercise aggressive persuasion isn't much different from our own legal and cultural viewpoint of not long ago.<sup>67</sup> We are discarding laws that decriminalize some rapes as an unfortunate byproduct of male aggression and female coyness.<sup>68</sup> Americans may respect the survival of the Hmong family in the face of overwhelming odds. They may realize that survival came at a price: the sacrifice and obedience of the individual for the welfare of the group.<sup>69</sup> A woman's acceptance of family and clan resolution of sexual assault may display subservience of her injury to the needs of the group.<sup>70</sup> But relativist appreciation of the values of other cultures does not dictate abandonment of American values.<sup>71</sup> America attracts immigrants partly by championing the rights of the individual. Denying these rights to victims in any cultural group, by failing to punish and deter crimes acceptable within that culture, corrupts the American promise of human rights for all.

However, the legal system considers cultural factors informally.<sup>72</sup> These "ghost" cultural defenses affect prosecutors' charging decisions

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65. See Matthew G. Davis, *Hmong Clan Celebrates 6 College Graduations*, ST. PAUL PIONEER PRESS-DISPATCH, July 19, 1992, at 1A.

66. See Allison Dundes Renteln, *Culture and Culpability: A Study of Contrasts*, 22 BEVERLY HILLS B. ASS'N. J. 17, 26-27 (1987-88). Renteln notes that: "[W]omen's rights and children's rights will never be protected if their traditions follow them everywhere they go." *Id.* at 26. See also Allison Dundes Renteln, *Relativism and the Search for Human Rights*, 90 AM. ANTHROPOLOGIST 56, 63 (1988) (arguing that if moral categories are accepted uncritically, conflicts involving absolutes like human rights are difficult to resolve).

67. See, e.g., Roger B. Dworkin, Note, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680, 682 (1966) (arguing that it is customary for a woman to say "no" but mean "yes" and therefore invite male aggression).

68. See, e.g., Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1127 (1986).

69. For traditional Hmong, family needs and concerns outweigh individual needs, and Hmong-American children are torn between this value system and the American system, which stresses competition and individual development. McInnis, *supra* note 8, at 29. *But cf.* GEDDES, *supra* note 30, at 59 (asserting that individual rights are strongly embedded in Hmong culture).

70. When a Hmong woman decides her needs are best served through clan settlement, her wishes should be respected by police and prosecutors. However, the deterrent and the educational functions of punishment necessary to preserve the rights of other Hmong women will not be upheld. See Goldstein, *supra* note 38, at 137-42 (observing that a Hmong sexual assault victim mainly wanted her family satisfied with the court's decision, and her family mainly wanted to minimize the disruption of clan and kinship ties).

71. See Renteln, *Culture and Culpability: A Study of Contrasts*, *supra* note 66, at 25.

72. Note, *supra* note 63, at 1293-95.

and plea agreements, as well as judges' sentencing.<sup>73</sup> When the legal system informally accepts such cultural factors, it may cripple the individual rights of immigrant women in this country.<sup>74</sup> Beating, raping, or murdering women under certain conditions may not be considered a crime, or may be criminal, but excused, in other cultures.<sup>75</sup> When American prosecutors and judges, perhaps eager to appear culturally sensitive, drop charges and sweeten sentences to accommodate other cultures, they inform other potential perpetrators that such criminal conduct is understandable, perhaps even acceptable, within that ethnic group. Courts reinforce the message if they allow culturally-influenced formal defenses to excuse the crimes.

The next section will examine how defendants have used the formal defense of mistake of fact as to consent as a cultural defense in Hmong sexual assault cases.

### III. THE MISTAKE OF FACT DEFENSE IN HMONG RAPE CASES

In rape cases, when the defendant and the complaining witness know each other, the accused often raises the affirmative defense that he honestly and reasonably believed the woman consented to sexual activity.<sup>76</sup> Non-consent is the line separating legal and illegal sexual acts.<sup>77</sup> At common law, the actual presence of consent or non-consent in the victim's mind is not at issue.<sup>78</sup> The victim must unambiguously manifest her non-consent to the rapist and, vicariously, to the court that will eventually judge her actions.<sup>79</sup>

In rape cases where Hmong men have been accused of sexually assaulting unmarried Hmong women, the men have raised the defense of reasonable belief of consent.<sup>80</sup> When defendants insert the cultural information that Hmong women "always resist sex," non-consent becomes difficult for the prosecution to prove.<sup>81</sup> Under the common law, American women have been forced to prove their own innocence through

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73. *Id.* at 1295.

74. See Kathleen Hendrix, *World's Women Speak as One Against Abuse*, L.A. TIMES, May 17, 1991, at 1E (reporting that refugee advocates decry the use of cultural evidence as a legal defense for violence against women); Dick Polman, *After a Killer Eludes Jail, A 'Cultural Defense' is on Trial*, PHILADELPHIA INQUIRER, July 2, 1989, at A1 (reporting feminist uproar after a Chinese man murdered his unfaithful wife, used cultural evidence at his sentencing hearing, and received five years probation with no jail time).

75. See Hendrix, *supra* note 74, at 1E.

76. Berliner, *supra* note 19, at 2688.

77. Estrich, *supra* note 68, at 1094.

78. Berliner, *supra* note 19, at 2689.

79. *Id.* (noting that the prosecution "must prove actual refusal; mere absence of consent or silence will usually be insufficient for conviction.").

80. See *infra* Part IV.

81. *Id.*

resistance.<sup>82</sup> Because of the cultural evidence presented by Hmong defendants, this avenue is barely open to Hmong women.

### A. *Formal Use of the Defense*

For example, in a rare case brought before a jury in 1989, a Hmong man was acquitted of attempted rape, using the mistake of consent defense.<sup>83</sup> According to the complaining witness, the defendant, a relative, came to her home to negotiate for her hand in marriage. She declined because he was "too pushy."<sup>84</sup> She said that although he threatened to abduct her, she laughed it off. When they were alone in the house, she said he grabbed her, pulled her onto his lap, and stuck his hand under her shirt and squeezed her breast as she struggled, kicked, and hit.<sup>85</sup> She said they fell to the floor and he ripped off her pants and underwear, damaging the zipper on her pants.<sup>86</sup> As she screamed and cried, she said he told her in Hmong that he was going to rape her.<sup>87</sup> She said when he removed his shorts, she thought she kicked him in the groin, which made him stop and allowed her to flee the house.

The defendant first told police investigators that the events were part of a Hmong courtship ritual. He said Hmong women never really say "yes" to sex, but say "no" when they mean "yes."<sup>88</sup> While testifying, the defendant said he did not see the woman cry, nor was it obvious that she was upset. He said he "notice[d] that when her pants were off, that she became sad,"<sup>89</sup> and she said "[S]top it. You cannot do this to me."<sup>90</sup> He said he stopped his attack when he realized she was serious, not because she kicked him.<sup>91</sup>

The deputy district attorney who prosecuted the case felt the jury found the defendant credible, believing he perceived the initial struggle as "a little Hmong game."<sup>92</sup> They acquitted him because he abandoned

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82. Estrich, *supra* note 67, at 1098-1100.

83. *People v. Kue*, No. CR24956 (Ventura County [Cal.] Mun. Ct. filed July 11, 1989).

84. Memo from Michael R. McKendry, Investigator in the *Kue* case (July 7, 1989) (on file with author).

85. *Kue* (R. at 11-12) (filed Nov. 17, 1989) (on file with author).

86. *Id.* (R. at 19-20).

87. *Id.*

88. *People v. Kue*, Application for Extradition, No. FE54036, p.3, 11.10-11 (Mar. 20, 1989).

89. *People v. Kue*, No. CR24956 (R. at 2).

90. *Id.* (R. at 2-3).

91. *Id.* (R. at 3).

92. Telephone Interview with Patrice Koenig, Deputy District Attorney, Ventura County, Cal. (Jan. 5, 1993).

his attempt when the woman made her non-consent clear.<sup>93</sup> If the purpose of the resistance requirement is to give attackers "full and fair warning that their (forceful) advances constitute an unwelcome rape," rather than seduction, then clearly a Hmong woman must submit to at least some sexual attack before convincing her Hmong assailant that her "no" means "no."<sup>94</sup>

In extreme circumstances, a jury may reject a mistake of fact defense asserted by a Hmong defendant. In another 1989 case, a jury convicted a 33-year-old man who paid a \$10,000 bride price for a 10-year-old girl.<sup>95</sup> The defendant testified they were boyfriend and girlfriend, and the 10-year-old recanted her rape accusation on the witness stand.<sup>96</sup> However, the girl's adult brother had taken her to a doctor after her "wedding night."<sup>97</sup> The doctor testified that the girl, upset, crying, and bleeding from her vagina, said she had been raped.<sup>98</sup> Apparently, the girl's extreme youth, coupled with medical evidence of injury, convinced the jury that her initial rape accusation was not merely culturally proper Hmong coyness.

### B. *Informal Use of the Mistake of Fact Defense*

Because Hmong rape trials are scarce, the legal system frequently weighs the mistake of consent defense informally. It influences how seriously the police will take a rape report.<sup>99</sup> Prosecutors, using their discretionary estimates of justice and case strength, will reduce or drop charges, or bargain in exchange of a plea.<sup>100</sup> Judges also consider cultural factors in mitigating a defendant's sentence.<sup>101</sup>

These informal considerations are evident in several recent cases involving sexual assaults of unmarried Hmong women. In a 1991 Colorado case, the family of a 21-year-old man paid an \$8,300 bride price

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93. *Id.* Voluntary withdrawal from a criminal act, or failure to go beyond mere preparation, is a defense to a charge of attempt. The withdrawal is not voluntary if motivated by a change in circumstances that makes the criminal conduct more difficult to accomplish. WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., *CRIMINAL LAW* § 6.3 (2d ed. 1986).

94. Estrich, *supra* note 68, at 1131.

95. *Clerk Seized in Child Sale*, SAN JOSE MERCURY NEWS, Apr. 21, 1989, at 2F. See also Telephone interview with Holly Van Der Meer, former detective for the city of Long Beach, Cal. (Nov. 25, 1992).

96. Telephone interview with Holly Van Der Meer, *supra* note 95.

97. *Id.*

98. *Id.*

99. See *infra* Part IV.B.

100. See Note, *supra* note 63, at 1295.

101. *Id.*

for his unwilling fifteen year-old cousin.<sup>102</sup> She was held in their home and not allowed to use the telephone or leave the house unchaperoned.<sup>103</sup> During that time, she said the man attempted to rape her.<sup>104</sup> Police arrived after the girl slipped a note to a neighbor that said "I'm not his wife. They force me here and I want to go back to Fresno."<sup>105</sup>

However, because cultural factors made the case "confusing," police didn't arrest anyone.<sup>106</sup> They chose to turn the case over to the district attorney.<sup>107</sup> The prosecutor initially charged the twenty-one-year old man with second degree kidnapping, conspiracy, attempted rape, and third-degree sexual assault.<sup>108</sup> Prosecutors also charged his parents with kidnapping and conspiracy.<sup>109</sup> In the plea agreement, the man and his father pleaded no contest to the charge of conspiracy to commit second-degree kidnapping.<sup>110</sup> The state dropped all other charges.<sup>111</sup> In return for the plea, the prosecutor recommended the defendant serve no jail time, pay no fine, and perform no community service.<sup>112</sup> The judge deferred sentencing.<sup>113</sup>

The prosecutor noted that his recommendations were prompted by "cultural diversity."<sup>114</sup> The defense attorney emphasized that his clients did not admit any guilt with their no contest plea. They were convinced they had done nothing wrong. Later, the defendants sued unsuccessfully to recover the bride price from the girl's family.<sup>115</sup>

In a 1987 Minnesota case in which a man abducted and raped a thirteen-year-old Hmong girl, a prosecutor decided that cultural evidence of resistance by consenting women would make it too difficult to prove non-consent to a jury.<sup>116</sup> As the result of a plea bargain, the court fined the defendant \$1,000 and refused to give a jail sentence.<sup>117</sup>

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102. *Hmong Pair Won't Contest Kidnap Charge*, THE FRESNO BEE, Nov. 7, 1991.

103. Kevin McCullen, *Coloradan Charged With Buying Bride*, 15, ROCKY MOUNTAIN NEWS, July 16, 1991, at 6.

104. *Id.*

105. *Id.*

106. *Wife-buying case turned over to DA*, *supra* note 7, at 7.

107. *Id.*

108. McCullen, *supra* note 103, at 6.

109. *Id.*

110. George White, *Hmong Case to be Settled with Pleas This Afternoon*, LOUISVILLE TIMES/LAFAYETTE NEWS, Nov. 13, 1991 at 1.

111. *Id.*

112. *Id.*

113. *Id.* at 1, 16.

114. *Id.* at 16.

115. *Bride-For-Money Agreement Not Enforceable, Court Rules*, THE FRESNO BEE, Jan. 12, 1992 (copy of article on file with author).

116. Oliver, *supra* note 18.

117. *Id.*

Finally, in a 1985 California case, the prosecution charged a Hmong man who abducted and raped a woman with kidnapping and rape.<sup>118</sup> In a plea agreement, the prosecutor dropped both felony charges, and the man pleaded guilty to the misdemeanor offense of false imprisonment.<sup>119</sup> After reading literature documenting Hmong marriage customs, the judge sentenced the defendant to 120 days in jail and a \$1,000 fine.<sup>120</sup>

Light sentencing in these cases springs from sensitivity to the idea that neither a Hmong defendant nor a jury can distinguish resistance that means "yes" from resistance that means "no." So far, the legal system has refused to impose a *duty* on Hmong men to distinguish between them. As a result, Hmong men remain free to impose their will on resisting Hmong women without making an effort to ensure consent. Modern reform of rape law could change the outcome of similar cases.

#### IV. REFORM

In the past two decades, feminists have spearheaded reform of rape law.<sup>121</sup> Traditional rape law was considered sexist and unresponsive to women's need for physical and sexual autonomy.<sup>122</sup> Many reforms target the requirement that women vigorously resist as a demonstration of non-consent. Feminists argue that this requirement puts rape victim's actions on trial and forces women to risk personal injury during the crime to prove their innocence in the courtroom.<sup>123</sup> Little or no physical struggle by a woman has been insufficient to give the man fair warning that he is raping, even if the woman demonstrates non-consent in other ways.<sup>124</sup>

The difficulty a Hmong woman experiences is different. Traditional American law normally would vindicate her physical struggle as proof of non-consent. However, a Hmong woman's actions fail to give "fair warning" to her attacker because of his cultural belief that her "no" means "yes." This is why rape law reforms that address the resistance requirement can change the outcome of Hmong rape cases. Two such reforms are: (1) the addition of a mens rea requirement to the crime

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118. Julia P. Sams, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335, 336-37 (1986).

119. *Id.*

120. Oliver, *supra* note 18.

121. Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 569 (1980).

122. *Id.* at 570.

123. Estrich, *supra* note 68, at 1100-01.

124. *Id.* at 1111-15.

of rape, and (2) the statutory redefinition of "consent." Both of these reforms work by shifting the burden of communicating non-consent from the woman to the man.

### A. *Addition of Mens Rea*

Unlike most serious crimes, traditionally defined rape contains no mens rea requirement.<sup>125</sup> Instead, courts developed requirements that men use force, and women resist, before justice cried rape.<sup>126</sup> Judges believed the force/resistance requirement would make it obvious which women were truly not consenting. The requirements became the functional equivalent of mens rea in rape.<sup>127</sup> Removing the burden of proving mens rea seems like a blessing to the prosecution, which has one less element to prove. However, some commentators believe it shifts focus from the defendant's behavior to the woman's.<sup>128</sup>

Most American jurisdictions still refuse to add a mens rea requirement to the crime of rape.<sup>129</sup> England, however, has required a showing of reckless mistake of fact to sustain a rape conviction.<sup>130</sup> Recklessness exists in at least four situations: (1) where the rapist realizes the woman may not be consenting, but hopes she is; (2) where he realizes she does not consent but is determined to have intercourse with her anyway; (3) where he is so intent on having intercourse that he closes his mind to the risk of non-consent; and (4) where he does not bother to think about consent at all.<sup>131</sup> In general, a criminal defendant is reckless when he is aware of, but consciously disregards a substantial and unjustifiable risk.<sup>132</sup>

It is likely that Hmong men who force themselves on apparently unwilling women possess a reckless state of mind. The rape of at least *some* unwilling women is the foregone, culturally-accepted risk of their actions.<sup>133</sup> If culture informs a Hmong man that "all" Hmong women seem to resist, culture also informs him that some women mean it. His

125. MOROSCO, *supra* note 22, § 3.01(3)(a). Usually, bad conduct is not criminalized unless accompanied by a bad state of mind, or mens rea. LAFAVE & SCOTT, *supra* note 93, at § 3.1.

126. MOROSCO, *supra* note 22, § 3.01(3).

127. *Id.*

128. *Id.* See also Estrich, *supra* note 68, at 1098.

129. MOROSCO, *supra* note 22, § 3.01(3). Cf. *Laseter v. State*, 684 P.2d 139 (Alaska Ct. App. 1984) (criminalizing reckless mistake of fact as to consent); *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975) (criminalizing negligent mistake of fact as to consent).

130. See Jennifer Temkin, *The Limits of Reckless Rape*, CRIM. L. R. 5.

131. *Id.* at 5-6.

132. MODEL PENAL CODE § 2.02(c) (1985).

133. See Tswab, *supra* note 26; Xiong, *supra* note 1 and accompanying text.

appreciation of, but disregard for, this risk would make him culpable under a mens rea of recklessness or negligence.<sup>134</sup>

Another way to describe the mens rea requirement involves the reasonableness of the defendant's belief.<sup>135</sup> California penalizes those who are negligent in forming a mistaken belief of consent: that is, those whose belief was unreasonable.<sup>136</sup> Prosecutors attacking this defense emphasize that a reasonable man would not believe that a struggling, crying woman is consenting to sex.<sup>137</sup> In Hmong cases, this has led to a debate about whether courts should judge Hmong defendants as generic reasonable men (an objective standard) or as reasonable Hmong men (a standard that takes subjective characteristics into account).<sup>138</sup> If the court tells a jury that people raised in Hmong culture can appreciate the risk that a struggling woman might not be consenting, the standard of the reasonable man or the reasonable Hmong man theoretically should not yield a different outcome.<sup>139</sup>

The police reports of an unprosecuted 1989 case contain a male and female perspective of one such alleged rape.<sup>140</sup> A sixteen-year-old girl told police she was lured into a car by a young man she knew and his friend, who told her they were taking her to a store to buy a tape. Instead, they began driving her to a city two hours to the north. The girl realized that the two men were abducting her. They told her that they were taking her to marry. Furious, she attempted to jump out of the moving car, but her assailants pulled her hair and forced her to stay inside. She threw her coat out the window and grabbed the steering wheel to try to make them stop, but they would not. When they arrived, the girl said she was forcibly carried into an apartment and raped. She said her assailant told her that if she were "nice" he would take her home. During the next two days, she was moved from house to house to avoid the police, who had been alerted by a witness to the struggle. Her assailant raped her twice more.

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134. A reckless state of mind also encompasses negligence. MODEL PENAL CODE, *supra* note 132, § 2.02(5).

135. For a review of American courts' application of the defense, see generally Berliner, *supra* note 19.

136. See, e.g., *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975).

137. Telephone interview with Patrice Koenig, *supra* note 92.

138. In *People v. Kue*, No. CR24956, the court allowed the prosecution and the defense to argue both standards to the jury.

139. The prosecution did not use an expert in *Kue*.

140. Because clan arbitration resolved the rape allegation, the complaining witness and the accused became unavailable to police investigators. See Eau Claire (Wis.) Police Dept., Case no. 89-38218 (case reports on file with author); La Crosse (Wis.) Police Dept., Incident no. 89-40634. See also Part V, discussing clan arbitration as an obstacle to legal resolution of Hmong rape complaints.

Police never interviewed the boys involved in the abduction because clan members, afraid the youths would be arrested, refused to tell police where they were. However, a young male relative offered their side of the story. He said the accused and the girl had actually been "boyfriend" and "girlfriend," although they lived in separate towns. A month earlier, the girl's mother visited the boy's parents and said she would like the boy as a son-in-law. Therefore, the boy thought it would be "fine" to abduct the girl, but she decided not to marry him during the "wedding ceremony." The accused boys refused to talk to police, saying the matter had been resolved through the clan.

The young man believed the marriage was "fine" because the girl's mother thought the marriage was a good idea. He believed this despite every manifestation (struggling, coat-throwing, wheel-grabbing) that his "bride" felt differently. Her resistance showed that she might not have consented, but he hoped she had: thus exhibiting his reckless state of mind.<sup>141</sup> American law should impose upon him a duty of ensuring consent. By traditional Hmong standards, the family's consent may override the feelings of the girl herself.<sup>142</sup> But that does not mean that a Hmong following traditional standards is somehow incapable of appreciating the real risk that the woman does not consent. It is merely that Hmong culture downplays the seriousness of the resulting injury.<sup>143</sup> American law does not.<sup>144</sup>

On the other hand, a Hmong man obeying traditional standards might honestly, reasonably, and mistakenly believe in the girl's consent. Factors contributing to an honest belief include an exchange of personal tokens,<sup>145</sup> a courtship, however brief,<sup>146</sup> or the successful conclusion of wedding negotiations. The relative youth of a Hmong girl generally would not reveal non-consent. Compared to American standards, Hmong people usually marry at an extremely young age.<sup>147</sup>

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141. See *supra* note 134 and accompanying text.

142. See *supra* note 39 and accompanying text.

143. Hmong culture views the rape of an unmarried girl less seriously because it is tolerated as part of the overall pattern of courtship by a man in search of a prospective marriage partner." MYTHS, LEGENDS, AND FOLK TALES, *supra* note 17, at 94.

144. See *supra* note 60 and accompanying text.

145. The exchange of personal tokens is *prima facie* evidence of consent. An eloping girl can display her boyfriend's token to her alarmed parents as a way of acknowledging her consent without admitting it. Telephone interview with Nancy D. Donnelly, Ph.D. (Sept. 19, 1992).

146. Direct courtship often lasts only a few days. Donnelly, *supra* note 15, at 161.

147. Hmong people see adolescence as the period between puberty and marriage. Lisa L. Capps, Hmong Adolescents' Perception of Gender Roles and Marriage 8 (Nov. 18, 1988) (unpublished manuscript, on file with author). Most Hmong girls in America are married by age 16. Donnelly, *supra* note 15, at 163. Hmong teenagers have been

These factors indicate a willingness to marry, and indirectly, a willingness to consent to sexual intercourse. They solidify an honest and reasonable, even if mistaken, belief. However, neither desire for eventual marriage, or even marriage itself, proves that partners are always willing participants in sex.<sup>148</sup> A defendant could also have formed a reasonable belief through a more direct expression of consent.<sup>149</sup>

### B. Redefining Consent

Another approach to shifting the burden of communicating non-consent is to redefine the consent element in rape statutes. States designed such statutes to focus on the offender's forceful conduct, rather than whether the victim's resistance was convincing enough.<sup>150</sup> The statutes define consent in terms of words or overt actions that indicate a freely given agreement to sexual intercourse.<sup>151</sup> Using this standard, the fact finder can cease its point-of-view struggle: male or female, Hmong or non-Hmong.<sup>152</sup> Its attention is focused on whether the defendant, by word or conduct, ensured that his partner was a willing one.

The disadvantage of this type of analysis is that it might not reflect people's behavior. Actions indicating consent might not be obvious or unambiguous.<sup>153</sup> Also, expecting a traditional Hmong man to stop and ask permission to act aggressively, or expecting a traditional Hmong woman to abandon coyness, might be expecting them to abandon the culturally prescribed sex roles that make them attractive to one another.<sup>154</sup> The proponents of statutory redefinition recognize that the rules might not reflect typical behavior, but argue that our legal system should set standards of behavior and require people to comply with them.<sup>155</sup> Because violent consensual sex has no countervailing social utility, reform proponents argue that we should not err in favor of those who wish to practice it.

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known to pressure their parents to allow early marriage. QuinnOwen, *supra* note 14, at 2.

148. Although a man's rape of his wife was not criminal at common law, recent reform in many states has abolished the marital rape exemption. MOROSCO, note 22, § 3.01(2).

149. See *infra* Part III.B.

150. See Wiener, *supra* note 61, at 144-45.

151. See, e.g., WIS. STAT. ANN. § 940.225(4) (West 1982) (Supp. 1992); ILL. COMPILED STAT. ANN. S/12-17(a) (Smith-Hurd 1993).

152. Wiener, *supra* note 61, at 158.

153. See Telephone interview with Ruth Hammond, *supra* note 16.

154. However, Hmong youth apparently do not mention these traits when reporting what they look for in a mate. Donnelly, *supra* note 15, at 97-100.

155. Our system should criminalize forcible, non-consensual sex to announce to society that these actions are prohibited, and to deter them. Estrich, *supra* note 68, at 1183.

## V. OBSTACLES TO LEGAL RESOLUTION

As Hmong people assimilate, the type of rape discussed here may become less frequent, but rape reporting may increase.<sup>156</sup> Clan leaders are losing power to enforce dispute resolution over assimilated Hmong, so disputants turn to American law.<sup>157</sup> Two obstacles impede the American criminal justice system's resolution of Hmong rape cases: (1) lack of access to the courts; and (2) the manipulation of the legal system by people seeking leverage in clan fine and bride price disputes.

### A. *Lack of Access to American Courts*

Hmong immigrants are barred from American courts by more than simple language problems. Distrust of police and courts, reporting delays, and interpretation tainted by clan ties and touchy sexual topics cripple criminal justice investigations.

Some Hmong people avoid American justice because they think they will be punished for not understanding American ways, or for practicing traditional ways.<sup>158</sup> Many traditional Hmong practices conflict with American law, including polygamy, marriage of minors, ritual slaughter of animals, and possession and barter of opium.<sup>159</sup> Choosing American justice and American gender roles may be seen as a rejection of Hmong culture and individual cultural identity.<sup>160</sup> Also, convictions and sentences that seem unjust to Hmong people cause them to lose confidence in American courts.<sup>161</sup>

Because of the abduction form of some marriages, rape reporting may be delayed for as long as it takes for the girl to return home. Her parents, thinking the girl eloped, or hoping for clan resolution, will not report the girl missing. In the meantime, vital physical evidence disappears.

Finally, police and courts have been unable to ensure quality Hmong interpretation.<sup>162</sup> This is partly due to the recency of the Hmong writing,

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156. Donnelly, *supra* note 15, at 165 (noting that the American legal system is diminishing parents' and husband's absolute power over Hmong women); Sherman, *supra* note 9, at 26-27 (noting that Hmong women are growing bolder and turning to the legal system as they become aware of their rights).

157. See *Police Stuck in Wedding Deals*, THE FRESNO BEE, July 19, 1989.

158. Sherman, *supra* note 9, at 27.

159. Katherine Bishop, *Asian Tradition at War with American Laws*, N.Y. TIMES, Feb. 10, 1988, at A18.

160. Donnelly, *supra* note 15, at 155-56.

161. Hammond, *supra* note 48, at 11 (quoting a Hmong woman, upset by a rape conviction, saying innocence doesn't matter in American courts).

162. See Ruth Hammond, *Lost in Translation*, TWIN CITIES READER, Mar. 11-17, 1992; Ruth Hammond, *Lost in Translation, Part 2*, TWIN CITIES READER, Mar. 18-24, 1992, at 8-11.

as well as a lack of Hmong words to translate American legal terminology.<sup>163</sup> But Hmong interpretation is plagued with special cultural problems. Some sexual conversations are inappropriate for Hmong men and women. Therefore, when the translator is of a different sex, verbatim translation is difficult.<sup>164</sup> Often, the only available interpreters are relatives of those who are testifying or being questioned.<sup>165</sup> This can taint the interpretation, if the interpreter feels compelled to help the witness.<sup>166</sup> Although Hmong people generally value truthfulness, lying to further family or clan interests is acceptable.<sup>167</sup> Police in areas with large Hmong populations go to great lengths to find unrelated interpreters—a difficult task because Hmong family loyalty extends beyond the nuclear family to everyone within a clan kinship group.<sup>168</sup>

### B. *Manipulation of the Legal System*

Some observers believe that participants in traditional clan arbitration use the American legal system to force compliance with the clan system. For example, some observers believe a Minnesota Hmong man was accused and convicted of the rape of two married Hmong women in 1990 merely because he refused to pay a fine levied by Hmong elders for adultery.<sup>169</sup> They believe that the women's husbands and their clan elders used the American legal system to avenge his disrespect for the traditional system.<sup>170</sup>

Similarly, police in California complained to newspapers and clan elders about the hundreds of rape reports they received from unmarried women.<sup>171</sup> These cases collapsed after little investigation.<sup>172</sup> Police discovered that when the girl's families were upset with the bride price offered or received after an abduction, they would call police and report the rape.<sup>173</sup> Then, when the clans resolved the payment problem, the girl's story would change.<sup>174</sup> The manipulation of the legal system has

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163. See generally Hammond, *Lost in Translation*, *supra* note 162.

164. Goldstein, *supra* note 38, at 140.

165. *Id.*

166. Donnelly, *supra* note 15, at 57; Hammond, *Lost in Translation, Part 2*, *supra* note 162, at 11 (reporting one translator who altered testimony to make it more consistent with previous versions of a story).

167. *Id.*

168. Telephone interview with Joel Popejoy, Fresno police detective (Nov. 1992).

169. Hammond, *Call It Rape*, *supra* note 48, at 9.

170. *Id.*

171. *Police Stuck in Wedding Deals*, *supra* note 157.

172. Telephone interview with Joel Popejoy, *supra* note 161.

173. *Police Stuck in Wedding Deals*, *supra* note 157.

174. Telephone interview with Joel Popejoy, *supra* note 161.

made it difficult for police to take Hmong rape complainants seriously.<sup>175</sup>

## VI. CONCLUSION

Rape law's mistake of consent defense allows Hmong immigrants to impart their ideas of gender roles and sexual assault into American law. Because the American legal system does not penalize some Hmong men's reckless mistakes with regard to consent, it administers trivial or no punishment for the rape of unmarried Hmong women. Rape law reform could result in more convictions and punishment where men do not ensure their partner's consent. However, interpretation and manipulation problems remain a bar to the American system, and the clan justice system will likely remain the court of first resort for most Hmong people.

As Hmong people assimilate through education and employment, Hmong women might report rape more often. Eventually, refugee camps will close, new immigration will end, and the Hmong-American population may discard gender roles that prescribe resistance for Hmong women and aggression for Hmong men. However, the future will bring new waves of immigrants, and many will have gender ideals that justify some rapes. American rape law should deter these men and protect these women, no matter where they are from.

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175. *Id.*