Making Room for Culture in the Court

By Alison Dundes Renteln

As more and more cases involving unknown cultural traditions reach the courtroom, judges will have to decide how to take these customs into account, if at all. Should different world views influence the disposition of cases that enter the courtroom? There is a growing jurisprudence, somewhat beneath the radar screen, concerning the cultural rights of ethnic minorities that deserves much greater consideration. For example, in one case, members of a Brazilian sect living in New Mexico sued the U.S. government because the government claimed that hoasca tea, a sacramental beverage containing a mild hallucinogen, violated the Controlled Substances Act. The U.S. Supreme Court held that the law unjustifiably burdened their right to religious freedom[1] and carved out an exemption from the federal narcotics law. In another case, a court had to decide whether Ruth Friedman, a woman who, in a state of hysteria, catapulted herself out of a ski lift chair to avoid being trapped alone with a man after dark in violation of Orthodox Jewish law could receive damages. The judge, after listening to testimony from a rabbi confirming this interpretation of Jewish law, awarded her nearly $40,000.[2] In yet another decision, a babysitter reported seeing a father kissing his two-year-old son's penis. Mr. Kargar, a refugee from Afghanistan, explained that this way of showing affection was accepted in his culture and had no sexual meaning. Many members of the Afghani community supported his claim. Despite this argument, he was convicted of two counts of gross sexual assault. Eventually, the Supreme Court of Maine agreed with the defense and vacated the judgment of the district court.[3]

Some traditions may be unfamiliar to jurists and hence subject to misinterpretation. Given the reality that courts will encounter litigants from an increasingly wide range of backgrounds, judges might want to consider how best to handle cultural arguments. Demonstrating respect for the traditions of ethnic groups within their jurisdictions will improve judges' standing in their own communities.

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Ultimately, public confidence in the judiciary may depend on avoiding ethnocentrism and the appearance of cultural bias. Yet, there are, to be sure, risks associated with the introduction of cultural evidence that must be taken into account. This article focuses on the question of when judges should allow cultural considerations to influence the disposition of the cases that come before them.

Individuals from different cultural backgrounds sometimes ask that courts take into consideration evidence that explains their behavior. The custom may be relevant in the context of a criminal case, in a lawsuit seeking an exemption from a general statute, or in a civil action. Cultural factors figure into legal proceedings in a wide array of cases, including arson, bribery, child abuse, civil rights, employment discrimination, homicide, marriage and divorce, political asylum, religious worship, unauthorized autopsies, and zoning.[4] In all of this litigation, it is necessary to understand the cultural dimensions of the dispute. In the absence of this factual data, judges and juries have difficulty comprehending what happened in a particular case.

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Why Culture Is Relevant for Legal Decision Making: The Theory of Enculturation

There is a tendency to think that cultural evidence is not relevant in legal proceedings. The standard response is "When in Rome, do as the Romans do." However, social science forces us to question this "monocultural paradigm."[5] This is because there are many notions as to what constitutes "reasonable" behavior. What is deemed reasonable depends on one's upbringing.

The reality is that all individuals are subject to the process of enculturation. Culture shapes our perceptions and behavior without our being aware of it. In fact, the process by which individuals acquire the cultural categories of their societies is largely an unconscious one, and yet cultural forces influence our behavior in profound ways. As the famous anthropologist Ruth Benedict once said: "we do not see the lens through which we look."[6] For instance, in some parts of the world, children are socialized to use the left hand only for urination and defecation. When they see someone from another culture put food in his mouth with his left hand, they find it repulsive.

The use of cultural evidence can help judges avoid making ethnocentric judgments.

There are many other manifestations of the effects of culture on human interactions. For example, in some societies kissing in public is considered obscene. A cultural conflict occurred in 2007 when the American actor Richard Gere kissed an Indian actress on Indian television. Much to the surprise of Americans, this led to protests (including the burning of effigies of Gere), death threats, and the issuance of an arrest warrant for Gere. Although the trial court's decision was reversed on appeal, the strength of the public reaction in India demonstrated the seriousness of this cultural faux pas.[7]

Another classic example of cultural relativity concerns food taboos. The idea that some animals can be eaten but not others varies from one society to the next. Horse meat is, for example, popular in France, though not eaten in many other places.[8] Sometimes conflicting notions about food wind up in the legal system, as when two Cambodian immigrants in Long Beach, California, were arrested preparing to eat a dog. Once it became clear that there was actually no California statute prohibiting the consumption of dogs, a campaign was launched to enact one. The violation of a social norm led to the adoption of a law prohibiting the eating of pets but without specifying which animals are to be considered pets.[9]

Americans do not often reflect on their own cultural presuppositions.[10] We take for granted, for example, that we can eat beef but not dogs and that monogamy is the correct form of marriage, not polygamy (though we do allow multiple marriages over time). Enculturation makes us predisposed to act in certain ways, and we are at best only dimly aware of this process. If we are not cognizant of our own cultural biases, then our evaluations are prone to subjectivity. The use of cultural evidence can help judges avoid making ethnocentric judgments in many types of litigation.[11]

Ethnic and religious minorities are sometimes astonished to find that their traditions are considered crimes in their new homeland. Although "ignorance of the law is no excuse," the newly arrived may contend they were not given notice as to what the law requires, as, for instance, in some cases involving the chewing of khat.[12] In some instances, immigrants face a dilemma: If they follow their customary law, they violate the law of the

new country; however, if they adhere to the law of the new country, then they must violate their folk law. Because many individuals are caught in this predicament, the cultural traditions central to these disputes deserve careful consideration.

Criminal Law

In many cases, it is nearly impossible to understand a defendant's state of mind without considering the cultural context of the action central to a dispute. Cultural defenses have been raised in homicide cases, such as the highly publicized *Kimura* case. Fumiko Kimura became distraught after learning that her husband had had an affair, and she attempted to commit *oyaku-shinju*, or parent-child suicide, by walking into the ocean with her two young children. Although the children drowned, she was rescued and prosecuted for first-degree murder with special circumstances, which could have brought the death penalty. She sought to raise a cultural defense, emphasizing the culturally motivated aspects of her conduct as part of an insanity argument. According to her world view, it was more cruel for her to leave the children behind with no one to look after them than for her to take them with her to the afterlife. Thousands of members of the Japanese American community signed a petition arguing that Japanese law should be applied in this case. Through a plea negotiation, she received a sentence of time served, counseling, and probation. Although parent-child suicide is illegal in Japan, it occurs there on a regular basis and would certainly be understood in Japan; evidently, the punishment there would have been roughly equivalent to what Mrs. Kimura received in the United States. This case highlights differences in world view, and a court would unquestionably have difficulty grasping the cultural imperative for her action without information about the meaning and significance of *oyaku-shinju*.[13]

Other homicide cases have involved husbands who became enraged upon discovering that their wives had been unfaithful to them. After killing them, they invoked a provocation defense. For instance, Aphaylath bludgeoned his wife to death after she admitted receiving a phone call from a former boyfriend.[14] The public defender tried to introduce evidence showing that Aphaylath had experienced tremendous difficulty adjusting to life in the United States ("culture shock") and that the infidelity of his wife brought great shame sufficient to trigger his rage. Although the trial court judge excluded this evidence because jealousy is universal and therefore not beyond the ken of ordinary jurors, the court of appeal found that disallowing the cultural evidence constituted a reversible error. Even if jealousy is universal, whether one is permitted to act on those feelings may vary from one society to the next.

In some cases, the defendant is provoked by an insult apparently unfamiliar to the average reasonable person. For example, in *Trujillo-Garcia v. Rowland*,[15] two Mexican Americans were playing poker and one man, Padilla, lost $140 to the second man, Trujillo-Garcia. Padilla returned a few days later demanding his money back. When Trujillo-Garcia refused, the other man responded with an extremely offensive phrase in Spanish. At that point, Trujillo-Garcia took out a gun and shot Padilla to death. At the trial, he tried unsuccessfully to raise a provocation defense. Although he could show that he had been provoked, he could not prove that an "objective reasonable person" would have been provoked by a phrase in Spanish (in an English-only state), thereby failing to meet the other requirement of the test. After his appeals in state court failed, he argued unsuccessfully in federal court that the exclusion of cultural evidence constituted a violation of equal protection. Whereas juries could easily comprehend provocation in most instances, without an explanation of the insult in this case, he could not effectively raise the provocation defense.

While some may believe that individuals should exercise self-control even when insulted, the provocation defense is well established in jurisprudence as one of the most ancient defenses in the criminal law. Members of the dominant culture can reduce a charge of murder to manslaughter by demonstrating adequate provocation, but defendants from other cultures fail because they cannot show that a so-called objective reasonable person would have been provoked by what counts as an insult in their culture.[16] If defendants similarly situated can never win a partial excuse by invoking a provocation defense, this arguably constitutes a violation of equal protection.[17]

Not only does the principle of equality support the use of a cultural defense, but so, too, does the constitutional right to effective assistance of counsel. For example, in some cases, defense counsel failed to make clear that the stoic demeanor of the defendant did not signify a lack of remorse. In some cultures, even those under extreme emotional distress are socialized from an early age not to display any emotion. Juries misinterpreting body language have imposed the death penalty instead of life imprisonment.[18] Although there is no way of knowing whether nonverbal communication was the sole or main reason for the jury's decision, it could have played a role in their decision making. Failure to present cultural evidence in circumstances such as these may constitute a violation of the Sixth Amendment right to effective assistance of counsel. If so, attorneys must present adequate information to ensure that the cultural context of a defendant's action is well understood.

Cultural arguments also are advanced in child abuse and neglect cases, as differing child-rearing practices exist around the world. In one particularly disturbing case, an Albanian-Muslim father touched his daughter in a public gymnasium during a martial arts tournament in which his son was competing.[19] Even though the incident occurred in public, the police and prosecutor had no qualms about treating the matter as child sexual abuse. Both children were removed from the home and placed in foster care; the family court approved of the action by Child Protective Services, concluding that the parents were unfit parents. After the mother took the children to see their father in violation of the court order,

their parental rights were terminated, a decision later affirmed on appeal. In the subsequent criminal case, an expert witness, an anthropologist who specialized in Albanian culture, testified about the innocuous nature of the touching in Albanian culture. On the basis of her testimony, the jury acquitted the father of all criminal charges. His exoneration had no effect on the termination decision.

Other cases involve the use of folk medicine or religious objections to medical treatment. For instance, children whose families come from Southeast Asia may ask their parents for a folk remedy known as coining, or *cao gio*, when they have the flu, a cold, or some other physical ailment. This technique leaves temporary bruises on the torso that can give cause for alarm. School authorities who observed the bruises have sometimes called the police, resulting in the arrest of parents for child abuse and placing the children in protective custody. Coining may appear to fit the legal definition of child abuse, i.e., the intentional infliction of physical harm, but, in fact, the parents are using an innocuous remedy that they believe cures their children of a malady. If, as some might argue, there is no intent to do harm, a felony child abuse charge is excessive.[20]

In contrast to immigrant parents who use innocuous folk medicine, parents whose children die for lack of medical treatment often face no prosecution because of the existence of statutory exemptions from child neglect laws for faith healing. Christian Scientists, for example, have avoided incarceration because of religious exemptions that are still found in most states.[21]

The main challenge for those attempting to raise a cultural defense is that the ordinary definition of a crime includes only the intent and the act; motive is technically not germane to the question of guilt. It is precisely the question of cultural motivation that parents wish to introduce at the trial to show less culpability, but the strictures of American criminal jurisprudence prevent this from occurring. To ensure the consideration of cultural motives, we must return to the traditional understanding of *mens rea*, which includes both moral guilt (motive) and legal guilt (intent).[22] Jurists would then have to construe the rules of evidence to permit the presentation of cultural evidence relevant to motives.[23]

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Exemptions

There are certain customs that continually bring ethnic minorities into conflict with the standards of the dominant legal system. Members of groups whose traditions clash with the law may anticipate these conflicts and preemptively seek a legislative exemption from a general statute.

Traditions that spark controversy have often concerned food.[24] Sometimes when inspectors have questioned the safety of a particular ethnic cuisine, legislators were lobbied to obtain exemptions for the culinary item. For example, one campaign won an exemption for Peking duck from public health law after inspectors targeted this dish. As no one had ever been known to have become ill from consuming this delicacy, the exemption was appropriate. Likewise, when Korean rice cakes became the center of controversy, the California legislature again authorized an exemption from health code provisions. The success of these efforts may reflect the fact that the items were consumed largely by the cultural community and were not perceived as posing any real threat to the larger community.

Although some minority groups have succeeded in obtaining legislative exemptions, others have not. For instance, a campaign to exempt Sikh *kirpans* (short ceremonial daggers) from knife policies ultimately failed. This effort followed litigation involving Sikh children who were kept out of public school because wearing their religious symbol violated the "no weapons" policy of the school board; they were given the choice of either removing the *kirpan* or not attending public school. They filed suit and lost in federal district court.[25] After being kept out of school for nearly a year while their appeal was pending, the Court of Appeals for the Ninth Circuit ruled in an unpublished decision that they had to be allowed to return to school, but the *kirpan* had to be rendered safe either by gluing it into the sheath or sewing it securely so it could not be removed. This compromise serves as a model of what might be sought in other culture conflicts. Following this litigation, then California Senator Bill Lockyer sponsored a bill to exempt the *kirpan* from relevant laws. Although the bill passed both houses, the governor ultimately vetoed it.

By contrast, other countries allow Sikhs to wear *kirpans*. For instance, the Parliament in the United Kingdom successfully enacted a statutory exemption from relevant laws for carrying a *kirpan*.[26] Elsewhere, the judiciary has ruled in favor of the Sikhs, such as when the Canadian Supreme Court handed down the *Multani* decision,[27] vindicating the right of Sikh students to wear *kirpans*. Despite the fact that there is worldwide understanding that the *kirpan* is a religious symbol that does not pose any danger despite its resemblance to a knife, the California legislators failed to protect the religious liberty of Sikhs. Thus, it may inevitably fall to judges to entertain religious defenses when Sikhs are prosecuted for wearing required religious symbols. Other branches of government cannot always be counted on to enact the necessary exemptions to ensure that minorities can follow traditions central to their way of life.

Although seeking exception through the legislature seems like a prudent strategy, there is no guarantee that legislators will see fit to authorize statutory exemptions for ethnic minority groups. To the extent that the customs seem bizarre or controversial, legislatures may

decide to ban rather than permit them. Furthermore, individuals seeking exemptions are often members of discrete and insular minorities, which means they are by definition those who lack access to the political process. They are unlikely to have the political clout necessary to win legislative exemptions.

Inevitably, therefore, culture conflicts will find their way into court. In some instances, they will involve religious claims, as when the Amish effectively requested a judicial exemption from Wisconsin's compulsory education law on the grounds that having their teenage children exposed to the worldly values prevalent in public high schools would undermine their way of life.[28]

Even if legislative exemptions are in theory preferable, it is inevitable that courts will have to grapple with the question of whether minorities should be granted exemptions from general statutes. In many instances, the cross-cultural matter will come to court because the legislature failed to resolve the conflict so as to protect the cultural rights of minorities.

Civil Litigation

Although commentators focus mostly on the use of cultural evidence in criminal proceedings, it is important to consider the role of culture in civil litigation as well.[29] Cultural differences figure into a wide array of cases: family law matters, civil rights lawsuits, employment discrimination cases, and tort actions in which cultural issues are implicated. A few examples should demonstrate the significance of culture in civil litigation.

Customary law was important in a civil rights lawsuit centering on the effects of an illegal police search.[30] In Spokane, Washington, police suspected that a Gypsy household was in possession of stolen property. The officers mistakenly executed the search earlier than was authorized by the search warrant. They entered the home looking for silverware, jewelry, and cash, and in the process also conducted a body search of several young Roma women. According to Gypsy folk law, the search rendered the women *marime*, or polluted. In response, the Gypsies filed a civil rights lawsuit for $40 million. As this was technically an illegal search, the only issue at trial was what the amount of the damages should be. Expert witnesses testified as to whether the women were indeed unmarriageable. The case settled out of court.[31]

Cultural factors are also influential in tort cases. Some plaintiffs allege that, because of their cultural or religious background, the negligent act caused them more trauma than the ordinary person would experience.[32] For instance, in 2006, the relatives of a young man (originally from Egypt) killed in a plane crash filed a lawsuit against EgyptAir. The plaintiffs argued that because the deceased was the eldest son, in Egyptian culture there was a strong expectation that he would support his parents in their old age.[33] The judge agreed and awarded the family $3.6 million in damages.[34]

In another case, a Hindu man who ordered a bean burrito from Taco Bell was mistakenly given a beef burrito, part of which he consumed. This violated a serious food taboo, and he experienced psychological trauma and felt compelled to travel to India to purify himself in the Ganges. He filed suit seeking damages for the trauma he experienced.[35] The case settled out of court before trial for an undisclosed sum. Public opinion, at least as reflected in published letters to the editor, did not indicate much sympathy for the plaintiff's plight. Some thought he should have unrolled the burrito to check the contents if so much was at stake.

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A surprising number of lawsuits dealing with the negligent preparation of the dead are brought against mortuaries and medical examiners. According to the world view of some cultural communities, the dead go to the afterlife in the condition they are at time of death. Hence, if they have been mutilated, they will remain in this state for eternity. As Anglo American law treats the dead as quasi-property who are therefore unable to sue in their own right, the relatives must sue on their behalf for the indignity of an unauthorized autopsy.[36]

Arguments For and Against Considering Culture

One of the main arguments against the cultural defense is that the introduction of this type of information results in oversimplifying or "essentializing" the culture. If a court admits evidence showing bruises were the result of coining, for example, this may give the false impression that all Southeast Asians rely on this folk remedy.

Although there is a risk that the use of the cultural defense may reinforce stereotypes, this can easily be addressed. Courts and journalists must be careful to emphasize that it is only one person advancing a cultural claim in one particular case; if the presentation of the case is handled with sensitivity, then others will be less inclined to generalize from one specific incident. It also may turn out to be the case that the custom is widely practiced (as with coining), so that it would not be a misrepresentation to claim that the technique is commonly found among some groups. The existence of a pattern of behavior is not the same

thing as a stereotype, and one must note that there are always individuals within a cultural community who deviate from the pattern.

Another related argument is that individuals may masquerade as members of groups in order to carry a knife, use a drug, marry multiple women, and so on. Although it is conceivable that someone might pretend to belong to a religious or cultural group, courts can determine whether or not individuals are truly Sikhs, Rastafarians, Mormons, or members of other distinct cultural groups. There is also the argument that individuals may manufacture false claims. Someone might say that he belongs to a church that requires the use of machine guns. Again, while this is theoretically possible, courts should be able to ascertain whether such a religion with these tenets actually exists.

To help courts evaluate cultural claims, I have proposed the use of a cultural defense test:[37]

1. Is the litigant a member of the ethnic group?
2. Does the group have such a tradition?
3. Was the litigant influenced by the tradition when he or she acted?

If courts use the test, they should be able to identify false claims in criminal and civil cases. The failure to meet any one part is sufficient to call the claim into question.

Assuming we can overcome the practical difficulties with evaluating particular cultural claims once evidence to support them is admitted, one must still ask when the claim should prevail. What if there is evidence that a culture allows honor killings when girls ostensibly behave in ways that families consider unacceptable? If a specific cultural tradition endangers women, children, or members of other vulnerable groups, should it be permitted? I take the position that customs causing irreparable harm should not be allowed. Therefore, while I would always allow the presentation of cultural evidence, the cultural arguments ought to be rejected in cases in which the traditions result in irreparable harm.

Some may fear that adopting a cultural defense as an official policy would undermine the integrity of the legal system. However, individualized justice requires that the punishment should fit the crime. The cultural argument is designed to tailor the punishment so it is appropriate for the magnitude of the offense committed. A parent who tries to heal a child is less culpable than one who disciplines a child in anger. Insofar as the law permits the consideration of personal attributes, such as whether a person is sane or insane, or an adult or a juvenile, adding cultural identity is merely adding another characteristic for consideration; it is not a radical departure from existing policy to insist upon proportional justice. The introduction of cultural evidence helps judges tailor the sentence appropriately so that the punishment is not disproportionately harsh.

It is worth emphasizing that the mere possibility of invoking a cultural defense in no way commits a judge or jury to accepting the evidence. As when defendants raise an insanity defense, the defense may be rejected. The fact that some may attempt to misuse a defense is not grounds for disallowing it in cases where its use would be legitimate.

There have been arguments in federal cases that the federal sentencing guidelines may preclude the consideration of ethnicity or national origin. As this sentencing policy was designed to prevent racism and xenophobia from influencing sentencing, it would be improper to use it to block all consideration of cultural evidence. Here, the cultural factors are being introduced in order to benefit defendants, so it would make no sense to rely on the policy to exclude the evidence.

Several constitutional grounds for taking cultural evidence into account have been suggested. In addition to the equal protection, due process, and right to effective counsel arguments, there are others based on the First Amendment and international human rights obligations. Cultural evidence may be necessary to guarantee religious freedom, as in the case of the Sikh children kept out of school because of a misperception that the *kirpan* is a weapon and not a religious symbol. The right to culture is a fundamental right found in Article 27 of the International Covenant on Civil and Political Rights, a treaty ratified by virtually all countries, including the United States. Signatories have an affirmative duty to enforce the right to culture, an obligation that may be interpreted to guarantee litigants the opportunity to explain their cultural motivations in a court of law.[38]

At the same time, the right to culture must be weighed against other important human rights, such as women's rights, children's rights, and the rights of persons with disabilities. When a custom involves irreparable harm, then cultural evidence should not mitigate a criminal offense, individuals should not win an exemption, and damage awards should not be adjusted. However, when a tradition involves no serious threat of harm, I believe that individuals should have the right to follow their own life plans without interference from the government.

Practical Steps to Manage Cultural Evidence Effectively

The admission of evidence about different cultures and the evaluation of it in the context of specific legal disputes may seem daunting for judges.[39] But there are numerous strategies available for coping with the apparent challenges, so the cultural diversity increasingly found in our courtrooms need not be viewed as a problem.

Judges can demonstrate concern for individuals from other cultures in many ways. In the administration of oaths, courts can accommodate witnesses by permitting them to use symbols that are meaningful in their belief systems, such as their holy books, e.g., the Gita (Hindu), the Sunder Gutka (Sikh), and the Koran (Muslim). This practice of substitution, which has been allowed in the United Kingdom for quite some time,[40] has multiple benefits: It shows respect for cultural differences and it makes it much more likely that the person will feel obligated to tell the truth. Some small accommodations also may be necessary, as for members of religious minorities who may need to wash before taking an oath, or for those

obligated to wear religious headgear; this may entail relaxing the traditional rule that forbids hats in the courtroom.

The use and proper pronunciation of nomenclature also can be beneficial, not to mention the availability of qualified interpreters and listings of expert witnesses on cultural matters.[41] Academics who have devoted their careers to studying the folkways of specific groups are well positioned to advise judges about the validity of cultural claims. Courts might consider appointing their own experts to evaluate the competing claims of experts hired by both sides or in lieu of them.[42]

The United Kingdom has long relied on the *Judicial Handbook on Ethnic Minority Traditions*, which has chapters outlining different ways of administering oaths, different systems of naming, body language and cross-cultural communication, religions, and family patterns; it also provides a reading list. The American Bar Association (ABA), the American Judicature Society, and other organizations could collaborate to compile a similar manual for judges in the United States.

Diversity on the bench and in the jury box also would be immensely helpful. If the jury in a case involving a cultural tradition included someone from that cultural community, this would probably help ensure understanding and fairness; certainly the use of peremptory challenges to exclude jurors from the same cultural background would be detrimental to the process. In addition, the creation of patterned jury instructions dealing with the evaluation of customs would benefit all involved in litigation.

Judges whose jurisdictions include substantial numbers of ethnic minorities could learn their languages, read about their folklore, and interact with the ethnic community centers that exist in their communities. Expanding this type of community outreach effort would increase public trust in the judiciary.

Judicial education programs could familiarize judges with customs that are likely to be misinterpreted. This type of curriculum could be incorporated in orientation programs for new judges as well as in continuing judicial studies programs. For example, research attorney Kathleen Sikora and Judge Robert Timlin established an annual course, "Jurisprudence and Culture," for the California Center for Judicial Education and Research. More recently, Judge Delissa Ridgway, a champion of cross-cultural justice, has organized panels on cross-cultural justice for the ABA, the National Association of Women Judges, and other professional groups. Increasingly, legal and judicial organizations ranging from the ABA to the North American South Asian Bar Association (NASABA) have been raising awareness about this subject. In addition to domestic courses on culture, funding also might be allocated to permit judges to take immersion trips to other countries so they can experience diverse cultures directly and enjoy the folklore of other societies. Initiatives such as these would afford greater cross-cultural insight, and the judiciary would reap many benefits.

Conclusion

Cultural issues have come to the courts, in both urban and rural areas, and judges everywhere are faced with startling questions. It is evident that to guarantee the right to a fair trial, equal justice for all, adequate protection of the free exercise of religion for members of all faiths, and key international human rights, courts should develop appropriate ways to take cultural differences into account. I have suggested that cultural evidence to explain cognition and conduct always be treated as admissible and then evaluated according to the cultural defense test I proposed. Unless the conduct in question involves irreparable harm to others, it should be entitled to appropriate weight in the disposition of the case.

Judges have many conflicting responsibilities, and one of these is to protect the rights of minorities. When litigants from minority groups ask that they be permitted to present cultural evidence, courts may grant this request, as there is no rule preventing its consideration. Furthermore, by showing that the legal system is sufficiently flexible to take into account varying explanations as to what constitutes "reasonable" conduct, courts render cultural acts comprehensible and ensure that the interests of justice are served. ■

Endnotes

1. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal et al., 546 U.S. 418 (2006). Of great interest is the Court's conclusion that exceptions do not necessarily undermine the efficacy of a general law. The decision, even if limited in scope, is significant because it acknowledges that it is legitimate to grant exceptions to protect rituals important for the maintenance of group identity, when appropriately evaluated on a case-by-case basis.

2. Friedman v. State, 282 N.Y.S.2d 858 (1967); Alison Dundes Renteln, The Cultural Defense 119–20 (2004).

3. State v. Kargar, 679 A.2d 81 (Me. 1996). For more background, see Renteln, *supra* note 2, at 58–61; Alison Dundes Renteln, *Raising Cultural Defense*, in Cultural Issues in Criminal Defense (L. F. Ramirez ed., 3rd ed. 2010), at 453–55. *See also* State v. Ramirez, 2005 WL 367032 (Me. Super. 2005).

4. *See* Renteln, *supra* note 2.

5. Alison Dundes Renteln, *The Cultural Defense: Challenging the Monocultural Paradigm*, in Cultural Diversity and the Law: State Approaches from Around the World (Marie-Claire Foblets, Alison Dundes Renteln & Jean-Francois Gaudreault-Desbiens eds., 2010).

6. Ruth Benedict, *The Science of Custom*, The Century Mag. 117, 641–49 (1929). This is important in the United States, where we tend to assume that what we see with our own eyes must be true. *See* Alan Dundes, *Seeing Is Believing*, in Alan Dundes, Interpreting Folklore (1980) [hereinafter Interpreting Folklore].

7. Alison Dundes Renteln, *When Westerners Run Afoul of the Law in Other Countries*, 92 Judicature 238–42 (Mar.–Apr. 2009).

8. For a challenge to an Illinois regulation prohibiting the slaughter of horses for exporting the meat to Belgium, France, and Japan based on the Commerce Clause, see *Cavel International, Inc. v Madigan*, 500 F.3d 551 (7th Cir. 2007). The court held the statute violated neither the interstate nor foreign commerce clauses.

9. Renteln, *supra* note 5, 104–06.

10. For discussion of distinctive aspects of American culture, see the analytic essays by Alan Dundes: *The Number Three in American Culture* and *Thinking Ahead: A Folkloristic Reflection of the Future Orientation in American Worldview*, both in Interpreting Folklore, *supra* note 6; *see also* Alan Dundes, *A Straightforward Study of Lineal Worldview in American Folk Speech*, in What Goes Around Comes Around: the Circulation of Proverbs in Contemporary Life (Kimberly J. Lau, Peter Tokofsky & Stephen D. Winick eds., 2004), at 171–87.

11. There is growing recognition that cul-

tural issues are important to the judiciary. Amir Efrati, *Cultural Background Gains Traction as a Legal Defense*, Wall St. J., July 2, 2009, at 1. See the special issue of *Judicature*, edited by Judge Delissa A. Ridgway: *Cross-cultural Justice*, 92:5 Judicature (Mar.–Apr. 2009). Even the way furniture is arranged in courtrooms varies from one society to the next. *See* John N. Hazard, *Furniture Arrangement as a Symbol of Judicial Roles*, in Folk Law: Essays in the Theory and Practice of *Lex Non Scripta* (Alison Dundes Renteln & Alan Dundes eds., 1995).

12. Renteln, *supra* note 5, at 74–76. *See also* U.S. v. Caseer, 399 F.3d 828 (6th Cir. 2005); U.S. v. Hassan, 542 F.3d 968 (2d Cir. 2008); Sam Howe Verhovek, (Aug. 22, 2006). *DEA's Khat Sting Stirs Up Somali "Cultural Clash,"* L.A. Times, Aug. 22, 2006, at A9.

13. Another example is the case of Helen Wu. Here a mother tragically killed her son as part of an attempted parent-child suicide. Although the court of appeal reversed her conviction for murder and ordered on remand that the trial court allow the consideration of cultural evidence, the California Supreme Court, in a terse opinion, reversed again and unfortunately depublished the courageous decision. The use of depublication, a power not statutorily authorized, removed what might have proved to be a helpful precedent. *See* Renteln, *supra* note 5, at 27.

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

15. 1992 U.S. Dist. LEXIS 6199 (N.D. Cal. 1992).

16. Sometimes courts have rejected specific provocation arguments that relied on cultural evidence but left the door open to future uses of cultural arguments. *See* Nguyen v. State, 505 S.E. 846, 847–48 (Ga. App. 1998), *rev'd*, 505 S.E.2d 907 (Ga. 1999); Nguyen v. State, 520 S.E.2d 907 (Ga. 1999).

17. If it were up to me, I would abolish the provocation defense because it mitigates punishment when there has been loss of life, clearly an irreparable harm. If the defense exists, however, it is unfair to limit its use to members of the dominant culture.

18. Kwai Fan Mak v. Blodgett, 754 F. Supp. 1490 (W.D. Wash. 1991), 970 F.2d 614 (9th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993); People v. Siripongs, 754 P.2d 1306 (1988), *cert. denied*, 488 U.S. 1019 (1993).

19. See the discussion of the *Krasniqi* case in Renteln, *supra* note 5, at 59, 244.

20. *See, e.g.*, Joseph Morton, (May 14, 2002). *Second Coining Case Is Dropped; Asian Dad Hopes Case Helps Others*, Omaha World Herald, May 14, 2002, at 1B.

21. CHILD, or Children's Health is a Legal Duty, documents the existence of religious exemptions and their impact. *See* http://www.childrenshealthcare.org/.

22. Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. Cal. Rev. L. & Women's Stud. 437 (1993).

23. Despite protestation to the contrary, there is no question that cultural information is relevant to the cases at hand.

24. Renteln, *supra* note 5, ch. 6, *Animals*. For the Peking duck example, *see id.* at 105–06. For more detail about the Korean rice cakes, *see* Alison Dundes Renteln & Rene Valladares, *The Importance of Culture for the Justice System*, 92:4 Judicature 198–99 (Mar.–Apr. 2009). *See also* Ching-Ching Ni, *Food Fight Waged Over Asian Noodles*, L.A. Times, Oct. 2, 2009, at A3.

25. Cheema v. Thompson, No. 94-16097, 1994 U.S. App. LEXIS 24160 (9th Cir. Sept. 2, 1994) (unpublished decision), 67 F.3d 883 (9th Cir. 1995); Alison Dundes Renteln (2004). *Visual Religious Symbols and the Law*, 47 Am. Behav. Scientist 1573.

When litigants from minority groups ask to present cultural evidence, courts may grant this request.

26. One commentator remarks: "England's experiences prove that a country concerned with public safety and the use of dangerous weapons can make a narrowly tailored exception to accommodate those who wear *kirpans*. Indeed, England is more safety-conscious than the United States, yet has been able to carve out an exception, without fretting over non-sensical concerns such as whether someone dressed up as a Sikh really is a Sikh." Amarjeet S. Bhachu, *A Shield for Swords*, 34 Am. Crim. L. Rev. 197, 218 (1996).

27. Multani v. Commission Scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256.

28. Wisconsin v. Yoder, 406 U.S. 205 (1972). Some attribute the Amish success in this case to their romanticized public image.

29. *See* Alison Dundes Renteln, *The Influence of Culture on the Determination of Damages: How Cultural Relativism Affects the Analysis of Trauma*, in Legal Practice and Cultural Diversity (Ralph Grillo et al. eds., 2009), at 199–218.

30. Renteln, *supra* note 5, at 119–21. The thought-provoking film *American Gypsy* provides an overview, background, and narrative account of the case. Marks v. Clarke, 103 F.3d 1012 (9th Cir. 1996); B. Morlin, *Expert Says Raids Were 'Catastrophic' to Gypsy Families*, Spokesman-Review, Sept. 17, 1992, at 2.

31. In another case, an English court awarded damages to an Iranian girl whose fingers were bitten off by a chimpanzee because this would affect her marriage prospects. Bakhitiari v. The Zoological Society of London, 141 New L.J. 55 (1991); *see also* S. Poulter, Ethnicity, Law, and Human Rights: The English Experience 64 (1998). Poulter notes the sexist nature of the decision; the disability would affect her marriage prospects. For an analysis of cultural relativity as it relates to disability, see Alison Dundes Renteln, *Cross-Cultural Perceptions of Disability: Policy Implications of Divergent Views*, in Different but Equal: The Rights of People with Intellectual Disabilities (S. Herr, L. Gostin & H. Koh eds., 2003).

32. There are other cases in which cultural factors were introduced. *See, e.g.*, *In re* Air Crash Disaster Near New Orleans, 789 F.2d 1092 (5th Cir. 1986); Saavedra v. Korean Air Lines, 93 F.3d 547 (9th Cir. 1996). In Canada, judges have considered filial piety in assessing damage awards in lawsuits concerning the death of a son or daughter in families of Chinese and Vietnamese ancestry. *See, e.g.*, To v. Toronto (City) Bd. of Educ., [2001], 55 O.R. (3d) 641 (C.A.); Lian v. Money, [1994] 8 W.W.R. 463 (B.C.S.C.), *rev'd*, [1996] 4 W.W.R. 263 (B.C.C.A.); Lai v. Gill, [1980] 1 S.C.R. 431, [1868] B.C.J. No. 1988, [1978] B.C.J. No. 300. I am indebted to Professor Jennifer A. Chandler, Law Faculty, University of Ottawa, for bringing these cases to my attention.

33. *In re* Air Crash near Nantucket Island, Massachusetts v. EgyptAir, 462 F. Supp. 2d 350 (E.D.N.Y. 2006). As EgyptAir did not contest liability, the only issue was the amount of the damages. *Id.* at 362.

34. John Marzulli, (2006, December 8). *Air Crash Victim's Kin Win $3.6M Award*, N.Y. Daily News, Dec. 8, 2006, http://www.nydailynews.com. The attorney commented on the influence of the cultural argument: "The judge very sensitively appreciated the role of the firstborn son in an Egyptian family."

35. Renteln, *supra* note 5, at 107.

36. *Id.* ch. 9, *The Dead*. *See also* Alison Dundes Renteln, *The Rights of the Dead: Autopsies and Corpse Mismanagement in Multicultural Societies*, 100:4 S. Atl. Q. 1005–27 (2001).

37. Renteln, *supra* note 5, at 207. *See also* Alison Dundes Renteln, *The Use and Abuse of the Cultural Defense*, 20:1 Can. J. L. & Soc'y 47–67 (2005), reprinted in Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense (Marie Claire Foblets & Alison Dundes Renteln eds., 2009).

38. Renteln, *supra* note 5. *See also* Alison Dundes Renteln, *Cultural Rights*, in International Encyclopedia of Social and Behavioral Sciences (Paul Baltes & Neil Smelser eds., 2002); Alison Dundes Renteln, *In Defense of Culture in the Courtroom*, in Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies (Richard Shweder, Martha Minow & Hazel Rose-Markus

eds., 2002), at 194–215.

39. Those who have studied anthropology, folklore, comparative religion, political culture, and related fields are likely to feel more comfortable analyzing cultural traditions central to other ways of life.

40. The Judicial Studies Board produced the Handbook on Ethnic Minority Issues (1994) that delineates in chapter 2 various types of oaths and how courts can accommodate special requests for them. "Whilst the Act prescribes the procedure for a Christian or a Jew, it merely states that the oath shall be administered 'in any lawful manner' for a person who is neither a Christian nor a Jew." *Id.* at 2.4. For more current information, see Judicial Studies Board, Equal Treatment Bench Book (2004), at ch. 3, http://www.jsboard.co.uk/etac/etbb/index.htm. California law also permits this.

41. The ABA could establish a website listing expert witnesses on various ethnic groups and specific customs. Information for the database could be obtained by consulting various professional associations.

42. Some fear that expert witnesses who are "hired guns" may be pressured to misrepresent aspects of the cultural groups whose members are on trial. While that is certainly possible, codes of professional ethics guide experts when providing forensic testimony in these circumstances.