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DELIMITING THE CULTURE DEFENSE

James M. Donovan & John Stuart Garth

I. INTRODUCTION

The culture defense—the claim that, when ascertaining guilt or setting penalties, courts should consider relevant features of a defendant’s cultural background—arises inconsistently during both criminal and civil proceedings. Some judges rule the argument extraneous to the issues at bar, while other judges confronting similar facts may find the culture defense relevant to the case.¹ The array of cases in which the culture defense can arise is illustrated in the Appendix below. In trials dealing with subjects ranging from homicide to child abuse, and from marriage to clothing, persons outside the dominant traditions of society are frequently disadvantaged when attempting to secure their rights.² As the example decisions suggest, sometimes such persons are allowed to assert the culture defense and sometimes they are not.³ And while sometimes the denial may be comparatively uncontroversial, at other times it can appall the sense of justice.⁴

An especially influential proponent of the promulgation of a formal right to invoke a culture defense has been Alison Dundes Renteln:⁵

1. *E.g.*, Elaine Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1321 (2006) (“The results for defendants have been spotty and inconsistent as the ability to secure acquittals on the basis of culture or to offer cultural evidence at their trials has varied wildly.”).

2. Although it may be difficult to quantify the injustice experienced domestically by cultural minorities, it is sobering to realize that, worldwide, one in seven persons are members of groups that are disadvantaged or discriminated against due to their cultural identities. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2004: CULTURAL LIBERTY IN TODAY’S DIVERSE WORLD 31 (2004), available at http://hdr.undp.org/en/media/hdr04_complete.pdf.

3. *Compare, e.g.*, *Nguyen v. State*, 520 S.E.2d 907 (Ga. 1999) with *People v. Croy*, 710 P.2d 392 (Cal. 1985); see also *infra* Appendix.

4. *Compare, e.g.*, *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984) with *In re Jertrude O.*, 466 A.2d 885 (Md. Ct. Spec. App. 1983); see also *infra* Appendix.

5. ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* (2004).

[Courts] should consider cultural evidence in all cases. It should not be excluded as irrelevant and should be admissible in the courtroom. Although I contend that defendants should have the right to explain the motivations behind their behavior, I do not think that all defendants should be exonerated.⁶

To the extent that a right to one's own culture is recognized as within a broader principle of basic human privileges (which is, as Renteln concedes, an admittedly contested premise), that right "should mean, at the very least, that individuals have the [opportunity] to present evidence in court concerning traditions that are important for the maintenance of their cultural identity."⁷ Explanations in terms of the party's culture, however, should not be asserted without limit.⁸ In an initial attempt to prevent the trivialization of this strategy, and to set a reasonable minimal threshold for the invocation of the culture defense, Renteln offers the following three-point culture defense test:

1. Is the litigant a member of the ethnic group?
2. Does the group have such a tradition as that claimed by the litigant?
3. Was the litigant influenced by that tradition when he or she acted?⁹

Although departing from Renteln's analysis in some of the details,¹⁰ we agree, for reasons explained below, that evidence of cultural background should be heard as a matter of standard procedure during judicial proceedings. The goal of this essay is to address one obstacle to that outcome: the fear that routine admissibility of cultural information will lead to differing standards of accountability for different groups, thus eroding the common societal expectations underlying the rule of law. We conclude that a reformulated culture defense test is required.

6. *Id.* at 200.

7. *Id.* at 212.

8. Alison Dundes Renteln, *The Use and Abuse of the Cultural Defense*, 20 CAN. J. LAW & SOC'Y 47, 54-56 (2005).

9. RENTELN, *supra* note 5, at 207.

10. For example, although Renteln does not see the variable of successive generations as a relevant variable in weighing the influence of the culture defense, we will argue that lifelong exposure to the normative expectations of the dominant society will diminish the relevancy of a culture defense. Nor are we likely to be as confident as she that the government should remain free to limit cultural traditions "that involve irreparable physical harm," RENTELN, *supra* note 5, at 218, since the perception of "harm" is often the precise attribute charged during the trial and rebutted by the defense. Harm, in other words, should remain a question of fact and not of law.

This revised test should balance the defendant's interest for a fair hearing, specifically a defendant who is a member of a nondominant culture group, with the interests of the dominant society to preserve a legal system in which all parties are treated equally.

Renteln recognizes the need to impose some principled limitations upon invocations of the culture defense.¹¹ Her own suggestions include limiting the defense to "bona fide ethnic minority groups" while denying it to "subcultures" which have more to do with class than with cultural differences.¹² For the most part, however, Renteln asks questions about possible limits rather than offering firm conclusions: should the culture defense be limited to first-generation immigrants only; does it matter "if the defendant is charged with violating a general law like assault or with violating a law that specifically forbids the cultural practice"; and should the culture defense "be allowed in cases where the victim is not from the defendant's culture?"¹³

In contrast, our analysis concludes that more specific limitations can be imposed upon the culture defense without detracting from the justifications for its existence. Specifically, the culture defense is most appropriate to acts that, in the original setting, are understood to advance social rather than personal goals (this represents a limitation on the kinds of actions for which the culture defense should be available), and is best justified by litigants who presumptively cannot have known the antisocial or criminal nature of the act they were committing (this represents a limitation on the types of persons who should be allowed to assert the culture defense). These requirements should be read as additions to Renteln's three-point test described above. The net effect we hope to achieve is a robust recognition of culture's role in individual life, as well as a concession to the sociological fact of multiculturalism. We favor imposing only those limits on the culture defense that are required for an orderly rule of law, without venturing beyond to effect a government-enforced comprehensive and homogeneous way of life determined by the culturally dominant majority.

II. BACKGROUND JURISPRUDENTIAL ISSUES

We begin our discussion with terminological clarifications. The culture defense broadly refers to the mitigation or negation of "criminal

11. *Id.* at 207-10.

12. *Id.* at 207-08.

13. *Id.* at 208-09.

responsibility where acts are committed under a reasonable, good-faith belief in their propriety, based upon the actor's cultural heritage or tradition."¹⁴ Although the culture defense most often arises in this criminal context, the Appendix contains several cases which demonstrate that the culture defense is also applicable in civil contexts, such as family law and disputes over dress codes.¹⁵

As characterized above by Taryn Goldstein,¹⁶ and as required by the third element of Renteln's test,¹⁷ the legitimate introduction of a culture defense requires that the defendant have relied upon a positive, normative rule from his own cultural background, rather than merely having acted in ignorance of the dominant culture's laws (i.e., I must have taken your apples not simply because I did not know they belonged to you, but because in my culture the apples *could not* belong to you, and we have an affirmative tradition of access to any apples we come across). The distinction between behaving in conformity with different cultural postulates, as opposed to acting out of ignorance of those of the dominant society, thus emerges as central to the sustainability of the culture defense as a separate legal concept. As underscored by Levine, it is the *reliance* of the defendant upon his or her cultural background that frames the central question of fact in the culture defense, inquiring into the reasonableness and honesty of that reliance.¹⁸

Although the usual terminology in the literature refers to the "cultural defense," as reflected in the title of Renteln's book, that label is unnecessarily misleading. *All* defenses are intrinsically cultural in that their embedded logic and presuppositions draw upon the shared background of the referent group.¹⁹ That is precisely why there is a need for a "culture defense" which seeks to draw the court's attention to the role of the defendant's nondominant culture in his decision to perform the contested act. Otherwise, the suggestion is that only the distancing

14. Taryn F. Goldstein, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141, 143 (1994).

15. See, e.g., *In re Marriage of Vryonis*, 248 Cal. Rptr. 807 (Cal. Ct. App. 1988); *LOOC, Inc. v. Kohli*, 701 A.2d 92 (Md. 1997); see also *infra* Appendix.

16. Goldstein, *supra* note 14, at 143.

17. RENTELN, *supra* note 5, at 207.

18. Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 LAW & SOC. INQUIRY 39, 72 (2003).

19. See, e.g., Susan S. Kuo, *Culture Clash: Teaching Cultural Defenses in the Criminal Law Classroom*, 48 ST. LOUIS U. L.J. 1297, 1308 (urging students to be "mindful of the cultural assumptions contained in the cases they read").

“they” have culture, immediately casting the argument against the culture defense in a pejorative light.²⁰

In principle, the defense serves as a counterbalance to the cultural presumptions of the majority, presumptions that are already embedded as defaults within the legal system itself. The nuances of this claim are better preserved by the use of the noun “culture” rather than the adjective “cultural” to describe the defense, and, therefore, this essay employs the more instructive phrase “culture defense” over the prevailing but technically misleading “cultural defense.”

As seen in the illustrative cases in the Appendix, culture defense issues arise in both criminal and civil disputes. For didactic purposes, however, our argument for the culture defense (and the principled limitation of its application) emphasizes the role the defense plays in criminal contexts. The injustice arising from its denial, as well as the danger posed by its unchecked use, are both accentuated in the criminal context, allowing easier identification of a principled middle course.²¹

Within the criminal context, the judicial process aims to apportion responsibility for the charged act (an outcome signified by the outcome of the process in a determination of “guilty” or “not guilty”). This need to ascertain “guilt” does not vary based on whether the criminal justice system is rooted in retribution for criminal acts or rehabilitation of those who commit the acts. In the first instance, punishment targets those responsible for the misdeed, whether that responsibility is personal or collective.²² In the second instance, one can only maximize social welfare by changing the behavior of the specific persons who acted antisocially.²³ Diminishing responsibility in either instance results in

20. See, e.g., SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 101-02 (2006) (“For many transnational elites, culture is far away. It is mostly located ‘out there’—in villages, mountains, deserts, deep forests, or among minority communities.”).

21. The criminal context heightens the possibility of gross injustice not only because of the liability for incarceration or worse, but also because the due process issues raised make these controversies of constitutional significance. See James J. Sing, Note, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845, 1883 (1999).

22. Elaborations on collective responsibility appear in Joel Feinberg, *Collective Responsibility*, in RESPONSIBILITY 222 (Ellen Frankel Paul, Fred D. Miller, Jr., & Jeffrey Paul eds., 1999) and J.R. LUCAS, RESPONSIBILITY 233 (1995). A theory of collective responsibility can arguably render an entire polity liable for punishment for actions taken by the state in its name. See KARL JASPERS, THE QUESTION OF GERMAN GUILT 31-32, 61-73 (1947).

23. This “rehabilitative ideal” was responsible, in part, for the creation of our separate juvenile court system, which sought to “address the individual needs of delinquent children, provide care and rehabilitation, and ensure that they could go on to live lawful, productive

reduced response by the state, albeit by different rationales.²⁴ Justice systems, then, however conceived, contain as an elemental task the identification and allocation of responsibility for the offending acts.

The culture defense is useful in assigning responsibility for a charged act. As one example, the American legal system typically requires proof of a criminal defendant's culpable state of mind, or "mens rea," in committing the charged deed.

Mens rea, or "guilty mind," marks a central distinguishing feature of criminal law. An injury caused without mens rea might be grounds for civil liability but typically not for criminal. Criminal liability requires not only causing a prohibited harm or evil—the actus reus of an offense—but also a particular state of mind with regard to causing that harm or evil.²⁵

In its most general sense, this term of art refers to the mindset of the accused at the time he or she was allegedly committing the crime.²⁶ Determining whether the accused possessed the requisite mens rea usually involves the question of whether the act was committed "purposely" or "knowingly."²⁷

Although the exact contours of the required cognitive state can be imprecise, the main thrust of the problem can be seen in examples of mistaken beliefs and accidents. If I knowingly and purposely burn down my neighbor's home, the act would be deemed arson and I would be liable for the accompanying criminal penalties. Should that outcome be any different if (a) I knowingly and purposely burn down my neighbor's home, in the belief that it is my *own*, or (b) I burn down my neighbor's home, but accidentally—perhaps I lit a match near a gas main?

As Paul Robinson explains, modern charging (1) tends to speak in terms of culpability rather than mens rea; (2) has identified four specific levels of culpability: purposely, knowingly, recklessly, and negligently;

lives." Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951, 956 (2006).

24. See, e.g., *Solem v. Helm*, 463 U.S. 277, 284, 286 (1983) (holding that the Eighth Amendment's ban on cruel and unusual punishments "prohibits . . . sentences that are disproportionate to the crime committed," and that the "constitutional principle of proportionality has been recognized explicitly in this Court for almost a century").

25. Paul Robinson, *Mens Rea*, in *ENCYCLOPEDIA OF CRIME & JUSTICE* 995, 995 (Joshua Dressler ed., 2d ed. 2002).

26. *Id.*

27. A compendium of common adverbial expansions of the "guilty mind" component is available at WAYNE L. LAFAVE, *CRIMINAL LAW* 240 (4th ed. 2003).

and (3) tends to assign to each element of a charged crime its own level of required culpability.²⁸ Thus,

[if] the objective elements of an offense require that a person take the property of another, the culpability elements might require, for example, that the person *know* that she is taking property and that she is at least *reckless* as to it being someone else's property. In each instance, and for each element of an offense, the legislature may set the culpability level at the minimum they think appropriate either to establish liability or to set off one grade of an offense from another.²⁹

As the concept of the guilty mind is elaborated, we begin to see how problems of cultural background emerge as a relevant variable for consideration. For example, if the crime of theft requires some degree of culpability as to the knowing taking of someone else's *property*, then it becomes pertinent to ask what types of property are considered eligible for private ownership within a given set of cultural precepts. If, due to my cultural background, it never occurs to me that a specific individual can own natural resources, then my eating apples from your tree might fail to rise to an act of theft. The ubiquitous obviousness in American culture of the opposite view matters not at all; it is what is in *my* mind that becomes the relevant variable on such questions.

A common retort to this argument relies on some version of the dictum that ignorance of the law is no excuse.³⁰ If the law is to function as an effective means of social regulation, according to the argument, there must be a general presumption of acquaintance with its requirements.³¹ Otherwise, the criminal justice system would be placed in the absurd predicament of being able to punish only those who made a good faith effort to learn and obey the law. The subjective knowledge of a defendant, therefore, must be irrelevant to the determination of responsibility and guilt within any system modeled upon the "rule of law."³²

28. Robinson, *supra* note 25, at 999.

29. *Id.* (emphasis in original).

30. This phrase is the modern version of Roman law's "ignorantia juris non excusat." BLACK'S LAW DICTIONARY 762-63 (8th ed. 2004).

31. Thus classic philosophers from Aquinas, *see* THOMAS AQUINAS, SUMMA THEOLOGICA, at Q.91, art.4 (1265), to Hegel, *see* GEORG W. F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 215 (Allen W. Wood ed., 1991), point out the need for law to be publicly promulgated before it can be binding on the citizens.

32. Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 9 (1998) ("Subjective standards

In place of a subjective analysis, one might apply an “objective test” that takes the point of view of an external observer of the defendant. A prominent example of such an objective standard is the “reasonable man.”³³ This touchstone is particularly appropriate given that at least one legal anthropologist, Max Gluckman, offered the strong (and contested) conclusion that the “reasonable man is recognized as the central figure in all developed systems of law,”³⁴ raising hopes that its use would be culturally neutral.

Within this analysis, the defendant’s state of mind and personal beliefs are irrelevant.³⁵ Instead, it becomes the idealized *observer’s* state of mind and personal beliefs that determine the outcome, with the subjective opinions of the actor himself deemed inconsequential. What would the generic society member have done, known, and felt under circumstances similar to those that confronted the defendant? The further the defendant has deviated from this stereotyped expectation, the greater the perceived fault: he acted unreasonably.

One can easily see why Renteln would conclude that the “‘objective reasonable person’ standard is culturally biased because it is simply the persona of the dominant legal culture, namely the Anglo-American.”³⁶ The test is not “objective” at all, but merely the unreflective presumptions of the cultural majority raised to the level of a legal duty. The legal analysis differs little, if at all, from a mere culture-conformity test: did the defendant behave in a way that an idealized, stereotypical *American* would have behaved under like circumstances?

Unsurprisingly, the “reasonable man” standard has received an onslaught of criticism.³⁷ Women in particular have argued that the “reasonable man” is precisely that, a *man*, and therefore prejudices the claims of females about reasonable behavior from their perspective.³⁸

of reasonableness are irreconcilable with the Rule of Law, in this view, because such standards necessarily take into account ‘the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men.’” (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* 108 (1938)).

33. *Id.* at 8 (“The concept of the ‘reasonable person’ is at the heart of the objective standard”).

34. MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* 83 (2d ed. 1967).

35. Heller, *supra* note 32, at 9.

36. RENTELN, *supra* note 5, at 36.

37. *E.g.*, V.F. Nourse, *Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person*, 2 OHIO ST. J. CRIM. LAW 361, 371 (“Would we really lose so much if we were to eliminate the reasonable person?”).

38. See FIONA E. RAITT & M. SUZANNE ZEEDYK, *THE IMPLICIT RELATION OF*

Although touted as a generic standard, the “reasonable man” is intrinsically sexist, and not by accident.³⁹ The cognitive ability to reason has historically been withheld, erroneously, from the list of common feminine attributes, earning women a significant amount of paternalistic protection from the law “for their own good.”⁴⁰

The above example demonstrates how legal systems have a perhaps inevitable tendency to reify their own cultural assumptions, and to objectify such concepts as being “normal,” even “natural,” thus requiring adherence by all to such assumptions, regardless of a person’s background. For full members of the majority group, this heuristic may even be roughly valid because it is those members, if anyone, who will tend to hold the beliefs and understandings that the law projects onto them. The difficulty here is not necessarily with the process of legal rationalization, but its collision with other demands of a functioning system of law.

The “reasonable man” is problematic not simply because the standard disadvantages women, but also because it does so in violation of its own internal logic. A fundamental component of the “rule of law” is that it treats all similarly situated persons equally.⁴¹ The feature of the rule of law of particular relevance to the present point is due process, which affords individuals “a hearing before a neutral magistrate who applies rules that in principle dispose of other, similar disputes.”⁴² By that standard, if the law affords males the privilege of being judged according to typical male behavior, then females deserve the right to be evaluated according to a measure that reflects their own modal tendencies.⁴³ Thus, if members of the majority are judged by their own

PSYCHOLOGY AND LAW: WOMEN AND SYNDROME EVIDENCE 53 (2000) (“Male-normative expectations permeate psychology and law. Yet they are well concealed, having acquired a ‘point-of-viewlessness’ that is masterly in its simplicity and efficiency.”).

39. See, e.g., Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the “Reasonable Man,”* 8 RUTGERS-CAM. L.J. 311 (1977).

40. For this reason, for example, women for Aristotle were “‘necessary deformities,’ not quite human.” Stephen R. Clark, *Is Humanity a Natural Kind*, in WHAT IS AN ANIMAL? 17, 26 (Tim Ingold ed., Routledge 1994) (1988).

41. According to Miguel Schor, the “rule of law” has two primary elements, due process and constitutional judicial review. Miguel Schor, *Rule of Law*, in 3 ENCYCLOPEDIA OF LAW AND SOCIETY 1329, 1329-30 (David S. Clark ed., 2007).

42. *Id.* at 1330

43. Women are placed in an intolerable double bind, according to Fiona Raitt and Suzanne Zeedyk. When considering the Premenstrual Syndrome defense, women “can either be guilty or they can be crazy. They can be wicked or they can be controlled. But they cannot be reasonable and autonomous, and they cannot engage in criminal or violent activity for rational reasons, as men can.” RAITT & ZEEDYK, *supra* note 38, at 125. Would social chaos

cultural standards, members of the minority should be entitled to have their cultural standards considered as well. For the “litigants to be treated equally under the law [they must be] treated differently.”⁴⁴ A refusal to at least consider such factors violates the minority’s right to culture as articulated, for example, in the International Covenant of Civil and Political Rights.⁴⁵ Moreover, such refusal undermines the majority’s justification for its social order as the fair rule of law based upon due process for all, rather than a self-serving rule (quite literally) of men.

Assigning responsibility and culpability in light of a more nuanced consideration of relevant background assumptions, such as race and gender, has been gaining acceptance.⁴⁶ This trend, however, does not necessarily assure that courts will similarly entertain other potential influences, such as cultural background. Still, the existence of those other allowances makes that possibility less extraordinary. Allowing that the general feasibility of a meaningful cultural defense can be achieved through analogy with such precedents, the remaining objections to its invocation would reduce to policy concerns specific to its special details. The remainder of this essay attempts to address some of these issues.

III. THE CULTURE DEFENSE

Renteln’s rationale for the culture defense builds upon the presumption “that culture shapes the identity of individuals, influencing their reasoning, perceptions, and behavior.”⁴⁷ Because culturally embedded predispositions run deep within a person’s psyche, judicial systems should take them into account either when apportioning responsibility or determining punishment.⁴⁸ The alternative, she argues,

truly ensue “if psychology characterized a woman’s reaction to long-term battering or rape or sexual abuse as *normal*?” *Id.* at 178.

44. RENTELN, *supra* note 5, at 16.

45. “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171.

46. *See generally, e.g.*, CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (2003).

47. RENTELN, *supra* note 5, at 10.

48. In her analysis Renteln includes cases that we suspect are more apt to cloud the present conceptual issues concerning the culture defense than to illumine them. Specifically, she includes as instances involving the culture defense those raising issues relating to the

is the enforcement of an ideology of complete assimilation of all who come within U.S. borders.⁴⁹

A few examples of actual cases should illustrate the potential injustices to which Renteln is drawing our attention.

A. State v. Kargar

In *State v. Kargar*, a man originally from Afghanistan was charged with “gross sexual assault” after he kissed the penis of his nine-month-old son.⁵⁰ Kargar admitted the action, but denied that this was a crime within the meaning of the criminal statute under which he was charged. Witnesses testified that such demonstrations were “considered neither wrong nor sexual under Islamic law and that Kargar did not know his action was illegal under Maine law.”⁵¹ Based on Maine’s *de minimis* statute, which allows the court to dismiss a case if “it finds the defendant’s conduct . . . [presents] such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in defining the crime,”⁵² the Maine Supreme Court accepted Kargar’s argument and held that he was not guilty.⁵³ In this instance, the court accepted the culture defense because, in part, Maine’s legal scheme had a preexisting category into which such arguments would fall.

B. People v. Moua

Renteln and Deirdre Evans-Prichard discuss an unreported 1985 case, *People v. Moua*, in which “Kong Moua, then twenty-three years old, believed he was following Hmong customary marriage practices when he engaged in sexual intercourse with Seng Xiong. But Seng Xiong, then nineteen years old, apparently rejected this tradition” and

exercise of religion. While religion is indisputably a powerful cultural force, within our own legal system disputes concerning religious beliefs (and to a much lesser extent, actions) relate to a well-elaborated First Amendment jurisprudence far beyond any that would inform litigation arising from other cultural practices. Because it may not be instructive to discuss religious free exercise cases as ones illustrating culture defense problems, we have not followed Renteln in that direction.

49. *Id.* at 6.

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

51. Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 838 (1999).

52. *Id.* at 837; see also ME. REV. STAT. ANN. tit. 17-A, § 12 (2006).

53. *Id.* at 837.

alleged that she had been raped.⁵⁴ Both parties were born and raised in Laos, and immigrated to the United States after reaching their teens.⁵⁵

Moua's rape charge was complicated by the Hmong practice of "marriage by capture," whereby "the man is required to take the woman to his family home and keep her there for three days in order to consummate the marriage. The woman is supposed to protest, 'No, no, no, I'm not ready,' to prove her virtue."⁵⁶ To the external observer, the marriage ritual would be indiscernible from an actual sexual assault.⁵⁷

The criminal justice problem grows more complex with the realization that Hmong rape, to the extent the Hmong have an equivalent concept, refers to sex with a classificatory inappropriate woman rather than sex with a woman who withholds her consent.⁵⁸ This raises the question whether, had Moua believed Xiong's protests to be sincere, he would have realized he was doing something wrong. That ethnographic datum certainly brings into doubt that he knew he was committing the act of rape as defined by American law.

In this case, Moua was sentenced to three months in jail and fined one thousand dollars, nine hundred of which were given to Xiong as "reparation."⁵⁹ Underscoring the apparent reasonableness of this plea-bargained result were the additional details that Xiong "did not report the incident to the police right away, and later, when she did, told them that she had not been sexually molested," only later changing her story.⁶⁰ Although the culture defense did not completely negate the allegation against Moua, it did lead to a plea bargain that mitigated his punishment.⁶¹

54. Deirdre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1, 9 (1994).

55. *Id.*

56. *Id.* at 8.

57. Goldstein, *supra* note 14, at 150 n.97 ("In the *Moua* case, the tribesman could have made an honest mistake concerning the woman's consent, and it would have been reasonable for him to believe that her resistance was a mere pretense," referring to the possibility of a mistake of fact defense to the charge of rape).

58. Evans-Pritchard & Renteln, *supra* note 54, at 31.

59. Goldstein, *supra* note 14, at 150.

60. Cynthia Lee, *Interest Convergence Theory and the Cultural Defense*, 49 ARIZONA LAW REVIEW (forthcoming Winter 2007), available at <http://ssrn.com/abstract=968754>.

61. Evans-Pritchard & Renteln, *supra* note 54, at 26-28.

C. *People v. Chen*

Homicide offers the most difficult context for the culture defense. While some would accept the outcomes for Kargar and Moua, it is difficult to justify a killer evading punishment, either completely or even with diminished sanctions.

Goldstein relates the circumstances of *People v. Chen*,⁶² a 1989 case in which Dong Lu Chen, after learning that his wife had had an affair, “left the room, returned with a claw hammer, knocked her onto the bed, and hit her on the head eight times until she was dead.”⁶³ Again, the culture defense was successfully invoked to reduce Chen’s punishment. Instead of a conviction for second-degree murder, he received five years probation, the lightest sentence possible for second-degree manslaughter.⁶⁴

The court accepted evidence, offered by an anthropologist serving as an expert witness, concerning the cultural appropriateness of Chen’s reaction after becoming aware of his wife’s infidelity.⁶⁵ The episode resulted in a death because, unlike what typically occurs in China, the community failed to intervene to prevent the tragic outcome.⁶⁶ The dysfunctional element, therefore, was not Chen’s outburst—which in fact conformed to the cultural “script”—but rather the dissociation of the Chens from a culture in which other Chinese would have played their own parts in this tragic drama.

These three examples map the range of beneficial outcomes that can occur from the use of the culture defense, from complete acquittal to punishment mitigation. They also provide some sense of the contexts in which an appeal to this kind of evidence would be prototypically meaningful: new immigrants committing acts that reflect identification with their former culture group. These litigated cases form the core of the issues meant to be redressed by the standard availability of a culture defense.

62. *People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989).

63. Goldstein, *supra* note 14, at 151.

64. *Id.* at 151-52.

65. *Id.* at 151.

66. *Id.*

IV. ADDRESSING THE OBJECTIONS

The proposal to recognize formally a culture defense has not been universally welcomed.⁶⁷ One constitutional concern is that “the admission of cultural evidence violates the principle of equal protection and favors immigrant and minority defendants over American defendants.”⁶⁸

Legal anthropologists can assist the debate by demonstrating that many legal standards are not self-evident, but culturally specific, as Renteln suggests, and by addressing some of the most pointed objections to this rule of evidence. Damian Sikora conveniently describes some of the objections preventing recognition of the culture defense: “cultural defenses may promote stereotypes; immigrant women and children’s rights are undermined by the defense; it would be impossible to draft legislation that defines when, where, and how the defense can be used; and the defense would cause a balkanization of the criminal justice system.”⁶⁹ Our discussion limits itself to the question of whether the boundaries of the defense could be rationally identified and applied, and whether its acceptance would indeed lead to a “balkanization of the criminal justice system.”

The predominant fear underlying these concerns is that chaos will result if criminal law were to recognize a defendant’s individual cultural imperatives when assigning guilt or meting punishment.⁷⁰ Social order requires certain behavioral standards that generally apply equally to all.⁷¹ Deviation from that expectation creates unending difficulty for law enforcement. If the basis for a punishable act becomes not the nature of the act itself, but instead the personal history of the actor, then it cannot

67. See, e.g., Leti Volpp, *(Mis)Identifying Culture: Asian Women and the Cultural Defense*, 17 HARV. WOMEN’S L.J. 57 (1994); Martin P. Golding, *The Cultural Defense*, 15 RATIO JURIS 146 (2002).

68. Lee, *supra* note 60, at 2.

69. Damian W. Sikora, *Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695, 1708 (2001).

70. This concern was expressed nicely, although in another context, by *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969) (“To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos.”).

71. Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1302 (1986) (“To maintain [social] order, it has been argued, societies must lay down a body of positive law that compels the obedience of all regardless of individual notions of morality: if each person were required to adhere to the law only to the extent that it was consistent with her own values, societies would tend toward anarchy.”).

be easily discerned when state intervention is appropriate. Even more troubling is the likelihood that individuals will perceive unfair differences in treatment by state power. Why should I be severely punished for attacking my wife, but someone else not, when the principal difference between our two cases is that I acted out of personal delinquency while the second defendant modeled a cultural norm? Is not spousal abuse just as bad, and worth preventing and punishing, whatever the circumstances? Surely migrating from another culture should not be a sufficient excuse for acts criminalized in the new setting:

Look, *everyone* must modify their culture in this regard. *Everyone* is having to develop new forms of self-control, which are at odds with the way they have been socialized. Why should society give the members of this culture a special exemption from a painful process that *every* culture in this society should undergo?⁷²

Few argue that persistent, unwarranted, disparate treatment of defendants charged with identical crimes would be healthy for any system purported to be grounded in a respect for fundamental fairness and justice within the rule of law. The challenge, then, is to recognize the stubborn social fact that culture is a powerful motivator of human action for which no one should be needlessly disadvantaged, while also preventing any consequences of such considerations from undermining the bonds of social cohesion and respect for the legal process. The problem is determining *to whom* the culture defense should be available and *in which contexts* the consideration of nonmajority cultural influences advances both the quest for criminal justice and the respect for an individual's right to culture and a preferred way of life. The key to striking the proper balance between these competing interests lies in the implications of the culture concept embedded in the justification for the defense itself.

V. THE CULTURE CONCEPT

As its name suggests, the culture defense relies heavily upon the basic anthropological idea of co-existing distinctive cultures. While the content of the term "culture defense" has varied over the years,⁷³ with

72. Jeremy Waldron, *One Law for All? The Logic of Accommodation*, 59 WASH. & LEE L. REV. 3, 29 (2002) (emphasis in original).

73. Even a half century ago the term had acquired a plethora of distinct usages. For a compilation of these usages, see ALFRED KROEBER & CLYDE KLUCKHOHN, *CULTURE: A*

some anthropologists even having called for the abandonment of the concept,⁷⁴ the core sense required here is that of a patterned and deep relationship between the beliefs and ideas of the individual and the milieu in which he has lived. This tight relationship can be illustrated by the following passage from Robert Levy's *Tahitians: Mind and Experience in the Society Islands*:

In part, being a Tahitian is having a "Tahitian mind," operating with assumptions and motives which have been shaped by various aspects of growing up and of everyday life in Tahitian communities. People act in a Tahitian way and "conform" to Tahitian culture because it is the natural thing for them to do.⁷⁵

Culture provides a template of default ways for one's behavior to be within a wide assortment of social and existential contexts. Culture is not wholly determinative, but it does provide ready-made solutions to the most commonly encountered problems of living, and especially of group living.⁷⁶ To deviate from such assumptions requires "work" of a personal and anxiety-provoking sort, mainly due to the gap between rejection of the group model and the convinced formulation of the idiosyncratic solution (or, alternatively, the adoption of the prefabricated cultural set of a new society).⁷⁷ Few people are likely to reject more than a small slice of the cultural traits they have acquired during early childhood. While all humans live in a culture, it is the culture in which a person was born and nurtured that has the most powerful formative influence, in both breadth of areas of life impacted and the depth of personality structures involved.⁷⁸

CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS (1952). The situation since has only grown still more confused.

74. See, e.g., VICTOR DE MUNCK, *CULTURE, SELF, AND MEANING* 29 (2000).

75. ROBERT I. LEVY, *TAHITIANS: MIND AND EXPERIENCE IN THE SOCIETY ISLANDS* 326 (1973).

76. See, e.g., Michelle Z. Rosaldo, *Toward an Anthropology of Self and Feeling*, in *CULTURE THEORY: ESSAYS ON MIND, SELF, AND EMOTION* 137, 140 (Richard A. Shweder & Robert A. LeVine eds., 1984) ("[Culture provides] a basis for the organization of activities, responses, perceptions, and experiences by the conscious self.").

77. A common mode of this experience takes the form of "culture shock" when the "sojourner" enters a new cultural setting and undergoes a "removal or distortion of many of the familiar cues one encounters at home and the substitution for them of other cues that are strange." EDWARD T. HALL, *THE SILENT LANGUAGE* 156 (1959).

78. The consequence of the processes of socialization is that children come to view these traits as "supremely 'natural.'" Uichol Kim & Soo-Hyang Choi, *Individualism, Collectivism, and Child Development: A Korean Perspective*, in *CROSS-CULTURAL ROOTS OF MINORITY CHILD DEVELOPMENT* 227, 228 (Patricia M. Greenfield & Rodney R. Cocking

The difficult theoretical question concerns the details of how this person-culture bond is forged. This process, known as *enculturation*, has been characterized by Melford Spiro: "To learn a culture is to acquire its propositions; to become enculturated is, in addition, to 'internalize' them as personal beliefs, that is, as propositions that are thought to be true, proper, or right."⁷⁹ This internalization is so pervasive that even "the most deliberately unconventional person is unable to escape his culture to any significant degree."⁸⁰ Even an act of rebellion can only be seen as such against the particular background to which the behavior is responding. Within this perspective, cultural psychologists argue that culture emerges as the core of the individual's identity to such an extent that it is inextricable from that identity and sense of self. According to Richard Shweder, for example, culture and psyche are mutually constituting.⁸¹ Neither exists independently of the other. Culture is inseparable from the individual, providing "the media for 'how to be' and for how to participate as a member in good standing of particular social contexts."⁸²

De Munck and others have suggested that the "self 'exists' as a mental representation or construct, a language game, a constellation of narratives that humans tell themselves . . . [and that] the ontology of the self (the 'realness' that we attribute to the self) is grounded in language rather than in spirit-stuff or flesh and blood."⁸³ In an important sense, then, culture creates language and language creates self, with reciprocal influences at every level. This chain of relationships suggests that while newcomers to a society are fully capable of adapting to the social and legal milieu, adopting interpretations of their selves that incorporate the in situ behavioral norms, this task will be especially difficult for monolingual immigrants.⁸⁴ Because they do not participate in the

eds., 1994).

79. Melford E. Spiro, *Some Reflections on Cultural Determinism and Relativism with Special Reference to Emotion and Reason*, in *CULTURE THEORY: ESSAYS ON MIND, SELF, AND EMOTION* 323, 326 (Richard A. Shweder & Robert A. LeVine, eds., 1984).

80. RALPH LINTON, *THE TREE OF CULTURE* 39 (1961).

81. Richard A. Shweder, *Cultural Psychology: What is It?*, in *CULTURAL PSYCHOLOGY: ESSAYS ON COMPARATIVE HUMAN DEVELOPMENT* 1, 22 (James W. Stigler, Richard A. Shweder, & Gilbert Herdt eds., 1990) ("[T]he central theme of cultural psychology [is that] you can't take the stuff out of the psyche *and* you can't take the psyche out of the stuff.").

82. URS FUHRER, *CULTIVATING MINDS: IDENTITY AS MEANING-MAKING PRACTICE* 82 (2003).

83. DE MUNCK, *supra* note 74, at 39-40.

84. The convergence theory of intercultural communication holds that "if two or more

“language game” of the new environment, monolingual immigrants face additional obstacles in reconstructing a sense of self that contains the new expectations and cultural assumptions built into the legal system.⁸⁵ The behaviors they will seek to observe will be those intended to preserve the self-constructed, out-of-cultural rules from the previous environment. “The worlds in which different societies live are distinct worlds, not merely the same world with different labels attached.”⁸⁶

Bridging the divide becomes even more onerous if postmodern views of culture are applied. While agreeing that constructions of the self can be approached as “language games,” students of postmodernism disagree with the assumption that these build upon a recognizable set of human universals that both effectively limit the range of variation that might develop in any context, and simultaneously ensure at least a rudimentary consistency between human social groups.⁸⁷ The postmodern strains within cultural anthropology emphasize the particular over the general—arguing, for example, that the basic emotions which we assume are shared by all peoples (e.g., anger, love, sadness) are in reality cultural constructs not available to all.⁸⁸ The extent to which postmodern ideologies have left a permanent mark on culture theories in anthropology remains to be seen,⁸⁹ but any tendency

individuals share information with one another, then over time they will tend to converge toward one another, leading to a state of greater uniformity.” D. Lawrence Kincaid, *The Convergence Theory and Intercultural Communication*, in THEORIES IN INTERCULTURAL COMMUNICATION 280, 282 (Young Yun Kim & William B. Gudykunst eds., 1988).

85. *Id.* at 290 (“If communication between members of an immigrant cultural group and the host culture is unrestricted, then over time, the values of the immigrant group and the host culture will converge toward a state of greater uniformity.”). In contexts of linguistic divergence between immigrants and the host country, those members of the immigrant group who do not speak the language of the host culture (i.e., monolinguals), experience obstacles to cultural convergence and thereby the incorporation of the new normative rules into their sense of selves.

86. Edward Sapir, *The Status of Linguistics as a Science*, 5 LANGUAGE 207, 209 (1929); see also James M. Donovan & Brian A. Rundle, *Psychic Unity Constraints upon Successful Cross-Cultural Communication*, 17 LANGUAGE & COMMUNICATION 219, 233 (1997) (“The very quality which makes any communication at all possible, psychic unity, guarantees that successful communication will vary on a continuum from the universally understandable to the solipsistically incommunicable.”).

87. Representative of this position is Richard Shweder’s pronouncement of a “cultural psychology” that “does not presume the premise of psychic unity [or] that the fundamentals of the mental life are by nature fixed, universal, abstract, and interior,” but is instead *sui generis* to the “intentional world” of each individual. Shweder, *supra* note 81, at 22.

88. DE MUNCK, *supra* note 74, at 46. The example of romantic love is developed at length in James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521 (2002).

89. *But see* ADAM KUPER, CULTURE: THE ANTHROPOLOGISTS’ ACCOUNT 223 (1999).

in that direction can only serve to underscore further the difficulty of relocating from one cultural context to another. Within more traditional approaches to the culture concept, the challenge of such transpositions is serious; under recent attempts at reformulation, it is Herculean. By any reading, a need for sensitivity to the cultural assumptions of the defendant in a criminal proceeding can be justified.

This intimate relationship between culture and personal identity notwithstanding, it would be a mistake to attribute every act of a person to her “culture.” As described above, enculturation refers to the internalization of the normative values of the *group*. Culture, while arguably the most influential, is not the only constituent of individual identity. Spiro names experience as another crucial element.⁹⁰ Some motivations, consequently, are grounded in idiosyncratic histories rather than inherited cultural values. The culture defense would look to the latter while excluding the former. It would be the task of the anthropologist as expert witness to help the court draw that line in a principled manner.

This concept of culture, while obviously incomplete, serves as the foundation of our argument for allowing introduction of the culture defense in court proceedings.

VI. TWO LIMITATIONS UPON THE CULTURE DEFENSE

In a multicultural society, cultural difference must be respected, even fostered All this is, of course, part of a certain liberal European tradition, but it inevitably raises a problem for another liberal political tradition, dominant in America, that is based on the principle that all citizens are equal—and the same—before the law. [Scholars have] attempted to find some basis for reconciling these two liberal traditions, but it is an intractable task.⁹¹

Here, Kuper identifies a tension between the twin liberal beliefs that all persons are equivalent before the law, and that personal differences should be respected by the state. The first belief supports an expectation that all defendants will be treated equally by the judicial system, while the second belief justifies treating defendants individually relative to their backgrounds, in order to achieve a uniform respect for each one’s dignity and rights. Both beliefs implicate the value of equality, but different kinds of equality. Equality before the law seeks to

90. Spiro, *supra* note 79, at 324.

91. KUPER, *supra* note 89, at 236.

respect the worthiness of the generic person, with no special allowances made for any acquired attributes, such as wealth, status, or fame.⁹² Every person is subject to the same rules and standards that have been promulgated beforehand. The consistency of procedural justice is the guarantor of this kind of equality.⁹³

The second tenet of equality, however, responds to a different concern, and is in many ways the converse of the first kind. Instead of ignoring personal attributes in order to apply a uniform procedure, here the goal is to recognize those individual differences in order to ensure the fundamental fairness of proceedings. Legal proceedings would otherwise be marred by any insensitively strict adherence to a preordained set of rules. For example, the financially impoverished are often assigned representation that would not otherwise be available to them; and speakers of foreign languages may be given access to interpreters.⁹⁴ The American society has an established history of granting exemptions from general rules and laws to minority convictions of conscience, whenever doing so does not threaten the public interests (e.g., exempting the Amish from compulsory education laws,⁹⁵ exempting Jehovah's Witnesses from mandatory recitations of the Pledge of Allegiance,⁹⁶ and allowing Jews in the military to wear yarmulkes).⁹⁷ The legal system, therefore, does not require conformity merely for conformity's own sake. The system traditionally allows

92. See Schor, *supra* note 41, at 1330.

93. "Procedural justice has been defined as 'the right to treatment as an equal. That is the right, not to an equal distribution of some good or opportunity, but to equal concern and respect in the political decisions about how these goods and opportunities are to be distributed.'" Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 287 (2004) (quoting Jeffrey Rachlinski, *Perceptions of Fairness in Environmental Regulation*, in STRATEGIES FOR ENVIRONMENTAL ENFORCEMENT 339, 347 (Barton H. Thompson Jr. ed., 1995)).

94. Franklyn P. Salimbene, *Court Interpreters: Standards of Practice and Standards for Training*, 6 CORNELL J. L. & PUB. POL'Y 645, 647 (1997) ("To protect the constitutional rights at trial of this increasing number of non-English speakers, one common recommendation of the various state court bias reports has been to require the appointment of language interpreters in judicial proceedings."); see, e.g., *State v. Teshome*, 94 P.3d 1004, 1006 (Wash. Ct. App. 2004) ("In Washington, a defendant's right to an interpreter is based on the Sixth Amendment constitutional right to confront witnesses and the right inherent in a fair trial to be present at one's own trial." (internal quotation marks omitted)).

95. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

96. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

97. 10 U.S.C. § 774 (2000) (superseding *Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding that the First Amendment did not prohibit application of air force regulation proscribing plaintiff's wearing of yarmulke while on duty and in uniform)).

deviations that are meaningful to small groups, so long as such deviations are not overly costly to the interests of social order.

The three illustrative cases recounted earlier suggest that consideration of culture during criminal proceedings is another example of the exemption that the legal system sometimes will allow.⁹⁸ To preserve the balance of social order against the tension of the two competing interests for equality, however, some limits on the culture defense must be imposed. Even the permission granted by Congress to Jews for the innocuous practice of wearing a cap is bounded by limitations: it may be prohibited whenever “the Secretary determines that the wearing of the item would interfere with the performance of the member’s military duties; or (2) if the Secretary determines . . . that the item of apparel is not neat and conservative.”⁹⁹ In the context of military apparel, the goal is to strike a balance between respecting the important cultural backgrounds of military personnel, versus the need to maintain sufficient discipline and conformity required for the unit to perform its intended function. No less can be expected of an allowed culture defense, in which case the task is to articulate principled limitations that recognize the embedded values of respect for an individual person’s cultural background and equality before the law.

Our suggestion finds reasonable limitations in each of two major dimensions of the culture defense: the people who can invoke it, and the contexts in which it can be invoked. The goal is to construct a principled understanding of the culture defense that prevents defendants from minority cultures from being unjustly disadvantaged in their interactions with the judicial system, while allaying a fear that allowing such defenses would lead to an outbreak of every man becoming his own standard of law, and thus to the disintegration of social order and a return to a Hobbesian state of nature.

98. The fact that all three of these examples are religious exercise cases complicates their immediate translation into precedents for culture defense arguments. *See supra* note 48. Their role here in our argument, therefore, is merely to indicate that our legal practices have proven tolerant of exceptions that have been specific, targeted, and limited, without chaos ensuing. We have no reason to believe that similarly narrow allowances would cause any greater harm to the rule of law than these have proven to be.

99. 10 U.S.C. § 774(b) (2000).

A. *To what crimes should a defendant be allowed to apply the culture defense?*

The problem that the culture defense aims to address is not new; it has confronted all heterogeneous political societies. Whenever one group expands to incorporate significantly different peoples, the question of how the disparate populations should be governed becomes central. One obvious solution—enforced conformity by all people via the legal institutions of the controlling group—is not always available for several reasons, especially the apparent injustice of the strategy. First, the dominant culture may not believe the subordinated people are sufficiently “elevated” or “civilized” to learn and comply with the subtle intricacies of its law. Even more likely, the groups to be governed are simply too many, too diverse, too dispersed, and ruled by too few to make imposition of a radically different set of legal expectations an effective option. In such circumstances, a more efficient solution may be to let the conquered conduct their daily affairs according to their traditional practices, and only apply foreign law to matters that directly impact the interests of the alien governors. Yet, even if the dominant power allows subordinate groups to maintain their local practices for most matters, the difficult issue remains over when the parties—whether two individuals in a private dispute, or one person in conflict with the civil authorities—do not share the same legal background. What law applies?

Romans—members of the original Western multicultural society—recognized that each jurisdiction had its own *ius civile*, or civil laws, with specific requirements that might have been unfamiliar to a visiting foreigner.¹⁰⁰ Because Roman citizenship was as much a status symbol as a status, their own “civil law [i.e., the law of citizens] was the proud possession of Roman citizens and could not be extended indiscriminately to peregrines [foreigners].”¹⁰¹ The *ius civile* thus formally applied only to Roman citizens,¹⁰² and that citizenship would not be extended to all free members of the Roman Empire until 212.¹⁰³ This history underscores the extended period for which problems arising

100. Dante Scala, *Introduction* to HENRY SUMNER MAINE, *ANCIENT LAW*, at vii, xxvi (2001) (“All nations who are ruled by laws and customs, are governed partly by their own particular laws, and partly by those laws which are common to all mankind. The law which a people enacts is called the Civil Law of that people.”).

101. PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 12 (1999).

102. See OLGA TELLEGEN-COUPERUS, *A SHORT HISTORY OF ROMAN LAW* 48 (1993).

103. *Id.* at 67.

from the intersection of legal systems and multiculturalism would vex the Empire.

Exclusion from the civil law, however, did not mean that aliens were permitted free license in their actions. While not “indiscriminately” subject to the *ius civile*, all persons were answerable to the *ius gentium*, or the law of nations.¹⁰⁴ This body of rules included those that Romans believed were not locale-specific, but could instead be discerned by rational beings, regardless of where such persons had established societies.¹⁰⁵ In a certain light, then, when faced with the growing multiculturalism of their expanding empire, the Romans allowed a kind of culture defense for matters that were solely the concern of the civil law, but not for those that fell within the universal law of nations.

Could we adopt a similar approach to the conflicts arising from our own multicultural society, a solution that identifies one coherent body of law in which the culture defense is available and another in which it is not? We are skeptical that the Roman solution would prove transferable in any of its specifics. One difficulty in attempting to identify a principled divide between two bodies of law corresponding to the Roman *ius civile* and *ius gentium* is the sheer quantity of law that now exists as compared to that with which the Romans were acquainted. Justinian’s compilation of Roman law, the *Corpus Iuris Civilis* from the Sixth Century, was contained in a few volumes; all three parts—the *Institutes*, the *Codex*, and the *Digest*—in modern editions consume approximately 2800 pages. By contrast, the base set of the unannotated official U.S. Code—last published in 2000—without accounting for supplements, federal regulations, or state and local laws, requires thirty-five volumes. Excusing foreigners from the details of civil law seemed more feasible when that law regulated comparatively little of everyday life. With the steadily pervasive insertion of governmental oversight into more and more of ordinary living, the practical consequences of nonconformity become more serious, reducing the possibility of anything approaching a blanket culture exemption.

Beyond sheer volume, a more pertinent limitation of any direct appeal to the Roman example of the culture defense follows from the kinds of laws at issue. U.S. law is not merely more voluminous, it also

104. STEIN, *supra* note 101, at 13 (“The *ius gentium* was available to citizens and non-citizens alike.”).

105. *Id.* (“[The rules of the *ius gentium*] were based not on traditional practice but on the common sense or ‘natural reason,’ which all men shared as part of their human nature.”).

concerns significantly more public law than did Roman law.¹⁰⁶ As a broad generalization, Romans viewed most disputes as arising between individuals, and only rarely as involving the state's police action against a person.¹⁰⁷ In general the "administration of justice was not organized by the state," whose function was limited primarily to the compilation of "an official list of Roman citizens who could in specific cases be appointed by the praetor as judges."¹⁰⁸ The *ius civile* thus "became synonymous with private law."¹⁰⁹ Romans originally understood the private/public distinction as abstractly demarking "those civil law rules which could not be altered by private agreement, by contrast with those that could be altered by parties." This distinction was first drawn by the jurist Ulpian¹¹⁰ to refer to "law that was primarily of public concern, such as the powers of magistrates and the state religion, by contrast with the law that concerned the interests of private individuals."¹¹¹ It appears the Romans felt that exempting foreigners from the full requirements of private civil law was tolerable, but the social consequences of a similar freedom from the regulatory influence of public law would be much more disruptive.

Although the Roman solution cannot serve as a model for our adoption, the example is still instructive in its demonstration of the persistent problems legal authorities face from multiculturalism. The Romans found the tension important enough to craft an enduring solution that suited their overall approach to jurisprudence (out of their construction of the pragmatic *ius gentium* would come the philosophical category of the *ius naturale*, or natural law, an intellectual legacy we still carry). The challenge of governing a multicultural society should demand similar attention and respect from modern jurists.

106. The *Twelve Tables*, the original source of Roman law, included no public law at all, thus creating "the fundamental distinction between public law and private law." ALAN WATSON, *THE SPIRIT OF THE ROMAN LAW* 37-38 (1995). Even within the realm of private law there was a marked lack of a public dimension. *Id.* at 46.

107. *Id.* at 46 ("Public law is that which regards the state of Rome." (quoting JUSTINIAN'S DIGEST 1.1.4)). On public law the *Justinian's Digest* "says nothing beyond mentioning public property and again the detail on the ownership of treasure found on state land." *Id.*

108. TELLEGEN-COUPERU, *supra* note 102, at 58.

109. STEIN, *supra* note 101, at 13.

110. Domitius Ulpianus, anglicized as Ulpian, was a Roman jurist of Tyrian ancestry. The time and place of his birth are unknown, but the period of his literary activity was between 211 and 222 AD; he died 228 AD. TONY HONORÉ, *ULPIAN* 8-15 (1982).

111. *Id.* at 21.

If we cannot adopt Roman law's restriction of the culture defense to civil law issues alone, is there another way to draw a principled line as to the kinds of laws that should recognize it? The critics' concerns are not unwarranted: Renteln's exhaustive survey documents the assortment of cases in which cultural evidence has been invoked, including homicide, sexual abuse of varying degrees, drug use, animal cruelty, death, and marriage.¹¹² If the objection to the culture defense is to be met, a standard is required that will control the opportunities for its invocation and thus allay fears that permitting the defense would be tantamount to inviting social disintegration.

A plausible solution would seek not to impose arbitrary limitations, but would better identify limitations within the rationale for the defense itself. One approach to this challenge, therefore, draws upon the concept of culture that is assumed by the defense. In the description of the culture concept that we offered earlier, cultural norms generally further group living.¹¹³ Purely idiosyncratic notions, such as personal experience, would have their roots elsewhere. The culture defense seeks to provide a mechanism for the court to consider the former, not the latter: Chen murdered his wife not solely because of his personal anger, but because his wife's adultery was viewed as a shame to his ancestors, as well as himself and his children.¹¹⁴ This shame was so harrowing that it became his duty to his ancestry, self, and progeny to remove the tarnish by attempting to kill the adulteress.

Within this framework, the culture defense should be limited to acts that have embedded within them the interests of the social group rather than those of the individual person. A sustainable dividing line could conceivably be drawn not between private and public law, or the *ius civile* and *ius gentium*, but between those acts performed for the purpose of cultivating and preserving socially valued relationships, versus those which are merely attempts at self-enrichment and personal advantage. Accordingly, crimes involving theft, armed or unarmed robbery, and other presumptively self-beneficial economic crimes would fall outside the scope of a properly delimited culture defense, as compared to crimes involving domestic relations. Fear of our police due to past experiences in a natal culture wherein police forces were viewed not as protectors of the citizens but as agents of oppression, such as the Gestapo, would not

112. See, e.g., *infra* Appendix.

113. See *supra* Part V.

114. See *supra* Part III.C.

trigger the culture defense,¹¹⁵ while facts involving family arrangements may deserve consideration of a defendant's culture.

This simple limitation would prevent the culture defense from becoming the *carte blanche* for criminality feared by some skeptics, and would recast several elements of Renteln's culture defense test. Perhaps tightening the terms of the first prong in Renteln's test, we argue that the defendant should come from the cultural background argued to impose the claimed duty, rather than be merely associated with a more diffuse ethnicity. Our version of the second prong in Renteln's test is also more limited: the relevant society must not only have a "tradition" related to the act, but that tradition must be a positive one ordinarily functioning to regulate affirmative and desirable social cohesion. Under this analysis, for example, Cynthia Lee's inclusion of "Black Rage" within her instances of the culture defense inappropriately expands the category.¹¹⁶

Defendants should lose access to the culture defense if they cannot demonstrate that they relied upon the normative practices of their specific culture, rather than upon personal or non-normative interpretations of those standards.¹¹⁷ Addressing these issues would require an anthropologist or other culture expert to serve as an expert witness, and to articulate which norms are demanded of the defendant's home culture versus norms that are merely preferred but rarely observed (or perhaps formerly required but today obsolete). In any situation but the first, the culture defense should be insupportable.

B. To whom should the culture defense be available?

In addition to restricting invocations of the culture defense to those acts that have a foundation in the original cultural background of the defendant, and in the positive group orientation of its normative systems, an independent dimension of limitation should be found in the intentions of the actor. As reviewed earlier, conviction of criminal charges in the

115. See *United States v. Zapata*, 997 F.2d 751 (10th Cir. 1993).

116. Lee, *supra* note 60, at 52-55.

117. The requirement that the invoked cultural tradition rely upon shared, normative practices within the referent group distinguishes the culture defense from another species of legal exceptionalism, religion. Religious beliefs can be wholly idiosyncratic, deviating from the understandings of other members of the same congregation, without weakening the force of the claimed religious exemption. See *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."). Private beliefs about social duties find no place in the culture defense.

American legal system often requires proof of the defendant's mens rea when committing the deed.¹¹⁸ In its most general sense, this term of art refers to the state of mind of the person committing the crime: he had to intend "purposely" or "knowingly" the consequences of the act, which extends to recognition of the act's criminal aspect.¹¹⁹

While a culture defense pleader might have intended the charged act, the defendant may not necessarily have also intended the *crime*, and thus may lack the element of culpability often required. This does not constitute a mere "ignorance of the law" scenario, however, because the defendant will have acted not merely in ignorance of the criminality of the act in this jurisdiction, *but also* in the reasonable belief of its normativity in the culture of upbringing. Kargar, for example, surely intended to kiss the penis of his infant son, but he did not thereby intend to break the law; on the contrary, he saw himself as acting in accord with the established customs of showing respect to an infant son.¹²⁰ A useful distinction can therefore be drawn between someone who inadvertently commits a "crime" by observing a normative standard that he has been taught is expected of "a member in good standing" of his reference group, and someone who performs the same deed, but does so maliciously and in full knowledge of the act's criminal status within the local culture's legal system. While this latter person satisfies the mens rea requirement, the former arguably does not—this was the conclusion of the court in *Moua*.¹²¹

In practice, this framework allows the construction of a graded series of rebuttable presumptions about the defendant's probable mindset. At one extreme, a newly arrived immigrant from a markedly different culture who has been charged with performing a deed that is normative and valued in the home context, but criminal in the new one, may be presumed to have acted without the requisite guilty mind. The culture defense works best in this scenario. A recent immigrant could probably put forth a better rationale for asserting the culture defense than, for example, a third-generation descendant.¹²² Barring the most

118. See *supra* Part II.

119. See *supra* Part II.

120. See *supra* Part III.A.

121. See *supra* Part III.B.

122. The presiding judge in Chen's trial reasoned similarly: "Were this crime committed by the defendant as someone who was born and raised in America, or born elsewhere but primarily raised in America, even in the Chinese American community, the [c]ourt would have been constrained to find the defendant guilty of manslaughter in the first degree" rather than in the second degree. See Volpp, *supra* note 67, at 73 (quoting Transcript of Record at

unusual conditions of social deprivation, a person whose family has lived in the United States for a generation or two would have been heavily steeped in the normative and legal expectations of the dominant society, and thus could be presumed to be aware of how his actions will appear to persons outside his cultural milieu, even if he felt justified, for cultural reasons, to ignore those rules. This person, in contrast to the first, would possess the state of mind required of the charge, and thus should be allowed a comparatively restricted use of the culture defense. In addition to revising the first two of Renteln's culture test elements, therefore, we would also add another: the litigant must have been presumptively ignorant of the normative conventions his acts transgressed.

VII. CONCLUSION

The culture defense appears sporadically in reported cases, invoked as an erratic, uncertain line of argument that can be pivotal in one case yet deemed irrelevant in the next.¹²³ We support Renteln's position that culture-based claims should be formally recognized as a legitimate defense, making the culture defense available to all defendants as a matter of standard practice rather than an uncertain option found in some courts but not others. Renteln does not insist that these defenses should always prevail, as other considerations (such as public policy) might have higher priority in the court's decision-making process.¹²⁴ Still, the

301-02, *People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989)).

123. Cynthia Lee argues that this seeming inconsistency of the judiciary's acceptance of the culture defense masks a pattern. "[I]mmigrant and minority defendants who introduce cultural evidence in their defense are more likely to succeed in mitigating a charge or sentence when their interests are either similar to or coalesce with those of the dominant majority." Lee, *supra* note 60, at 4-5. Chen's use of the defense in his provocation claim succeeded, she reasons, less because of his immigrant status than "because his claim [wa]s familiar and resonat[e]d with the judge and jury." *Id.* at 37. Similarly, while it might have appeared that the prosecutor gave undue weight to Moua's marriage-by-capture explanation, Lee suggests that upwards of 96% of all criminal cases are resolved by such plea bargaining, and, therefore, no special explanation is required. In both cases, she found the defendants were helped by the fact that their cultural stories reinforced negative stereotypes about Asian men as "barbaric" and "misogynistic" foreigners. Lee admits, however, that interest convergence does not explain all successful assertions of the culture defense. *Id.* at 59.

124. For example, she would put beyond reach of the culture defense "traditions that involve irreparable harm" as well as "forced marriages." RENTELN, *supra* note 5, at 218. Renteln acknowledges that "no one analytic framework . . . is capable of solving all rights conflicts [and, therefore, that] the resolution of culture conflicts can only take place on a case-by-case basis." *Id.*

routine openness of the court to hearing these arguments could be expected to effect cumulative changes that favor cultural diversity among persons appearing before the bench, rendering greater fairness to all.

A significant obstacle to this salutary result is the concern that no principled boundaries could be imposed on such a defense, effectively rendering each person sovereign over his or her own actions. The goal of this essay has been to show that limits on the use of the defense can be imposed, based not upon arbitrary rules, but upon the arguments supporting the defense itself.

We offered the “reasonable man” standard as a relevant analogy to begin our analysis. If this traditional tool of legal analysis is as freighted with the presumptions of the majority culture as some commentators suggest, the culture defense represents neither a “special” defense nor the sort of legal exceptionalism feared by critics, but rather makes available to cultural minorities the same presumption enjoyed by the dominant population: to be judged by the standard of reasonableness expected of a person in his or her situation, extending even to the cultural presuppositions. On its face, then, the culture defense introduces nothing alien or incompatible with the legal system as it currently operates. A desire to preserve the inherent fairness of our judicial system, therefore, requires some version of the culture defense.

In its barest terms, the culture defense argues that it is neither criminal nor an illness to be a conscientious member of a different cultural system. Maintaining social order requires neither pathologizing nor criminalizing the motives behind the act; a legal system can remain fair and stable while still providing for justification or mitigation under pertinent facts relating to cultural influences. We proposed two limitations to check this greater sensitivity to cultural backgrounds: 1) the culture defense is best applied to acts that, in the original setting, are understood to advance social rather than personal goals (a limitation on the kinds of crimes to which the culture defense should be available); and, 2) the defense addresses the mens rea element of the charge, and thus is best justified with defendants who presumptively cannot have known the criminal nature of the act they were committing (a limitation on the types of persons to whom the culture defense would apply).

Incorporating these suggestions into Renteln’s original culture defense test, the following revised version would result:

1. Is the litigant an enculturated member of the referenced group?
2. Does the group recognize the acknowledged tradition claimed by the litigant?
3. Is that tradition expected to contribute to the fostering of positive social bonds within the culture group?
4. Was the litigant influenced by that tradition when he or she acted?
5. Were the circumstances of the litigant such that he or she could be reasonably presumed to be unaware of the contrary normative standards of the dominant society?

A principled use of the culture defense in any formulation will require an increased reliance upon the kinds of specialized knowledge available from cultural and legal anthropologists, among others. These experts could offer the court helpful information concerning both the issues of culture norms in other societies, as well as identifying embedded assumptions within our own legal system that can present an unintended disadvantage to the cultural minority. By “studying up,”¹²⁵ a term of art encouraging anthropologists to study their own cultures in addition to traditional or “primitive” societies, legal anthropologists can uncover hidden presuppositions within ostensibly unproblematic legal claims, defenses, and rules within the American legal system. Wherever the judicial process advertises itself as being fair to all, any “stacking of the legal deck” that legal anthropologists uncover should provoke remedial responses. That project necessitates the formal recognition of a reasonable culture defense.

125. Laura Nader, *Up the Anthropologist—Perspectives Gained from Studying Up*, in *REINVENTING ANTHROPOLOGY* 282, 284 (Dell Hymes ed., 1972).

APPENDIX

CULTURE CONFLICTS IN THE COURTROOM

A synopsis of representative cases collected in ALISON DUNDES
RENTELN, *THE CULTURAL DEFENSE* (2004)

Homicide – Excuse Defenses*Insanity*

People v. Kimura, No. A-091133 (Los Angeles Super. Ct. 1985). Defendant had attempted *oyako-shinju* (parent-child suicide), but only children drowned. This practice is illegal but not unknown in Japan. The homicide charge was reduced to voluntary manslaughter; the defendant was found guilty and sentenced to one year in prison.

Automatism

People v. Wu, 286 Cal. Rptr. 868 (Cal. Ct. App. 1991). A Chinese woman had strangled her son and then attempted suicide. The defense argued that she had a cultural motivation to save her son and herself from shame and abuse, and to be reunited in the afterlife. She was convicted of voluntary manslaughter.

Battered Woman Defense

Nguyen v. State, 520 S.E.2d 907 (Ga. 1999). A woman from Vietnam had shot her disrespectful husband and stepdaughter after she was informed of his wish to divorce her. The Georgia Supreme Court held that evidence regarding her cultural background was properly excluded as it had no effect on her perception of imminent harm.

Culture-Bound Syndromes

State v. Ganai, 917 P.2d 370 (Haw. 1996). A Filipino man had shot his relatives after “running amok” (a condition of great emotional disturbance recognized in Southeast Asia and the Philippines), brought on by humiliation over his failing marriage. His conviction of first-degree murder was affirmed.

Diminished Capacity

People v. Poddar, 518 P.2d 342 (Cal. 1972). A member of the Harijan caste had killed a woman after she rejected his romantic advances. The court excluded testimony about cultural stress of Indian students in his caste (who are used to arranged marriages) attending American universities. The conviction for second-degree murder was overturned on unrelated grounds.

Provocation

See *People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989), in discussion *supra* Part III.C.

People v. Aphaylath, 502 N.E.2d 998 (N.Y. App. 1986). A Laotian refugee had stabbed his wife in a jealous rage. The court did not allow a culture-based defense regarding culture shock and shame-related infidelity. The defendant's conviction of second-degree murder was overturned due to exclusion of culture shock testimony.

Homicide – Justification

Self-Defense

People v. Croy, 710 P.2d 392 (Cal. 1985). A Native American had killed a police officer during a chase over a dispute in a liquor store. The cultural argument was that defendant Croy, as a result of past discriminations, had been conditioned not to trust white authorities. The jury acquitted of all charges.

Homicide – Sentencing Mitigation

Death Penalty

Siripongs v. Calderon, 133 F.3d 732 (9th Cir. 1998). A Thai national admitted to being present at the robbery of a store, but denied killing two clerks. After his conviction and death sentence was upheld, he argued that his refusal to name accomplices was culturally motivated. The court was skeptical because, according to the court, defendant Siripongs seemed too Americanized. The defendant was executed in 1998.

Children – Abuse Cases

Folk Medicine

In re Jertrude O., 466 A.2d 885 (Md. Ct. Spec. App. 1983). Children of Central African Republic parents were removed after “cupping”; the appeals court reversed the finding that the oldest child should have been taken from the parents.

Touching

See *State v. Kargar*, 679 A.2d 81 (Me. 1996), in discussion *supra* Part III.A.

Krasniqi v. Dallas Cty. Child Protective Servs., 809 S.W.2d 927 (Tex. App. 1991). An Albanian Muslim man had lost his parental rights after accusations of sexual molestation of his four-year-old daughter. While cultural testimony won acquittal in the criminal case, it proved irrelevant to the custody battle: the two children were legally adopted by their foster parents and forced to convert from Islam to Christianity.

Drugs – Illegal Substances

Khat

State v. Gurreh, 758 A.2d 877 (Conn. App. 2000). The court affirmed the conviction for sale and possession of khat, after arguments that defendant was not put on sufficient notice that law (which mentioned active compounds only, and not khat) was interpreted as applying to the chewed plant.

Medical Exemptions

United States v. Khang, 36 F.3d 77 (9th Cir 1994). Hmong brothers were convicted of importing opium for medicinal use by their aged father. Introducing false arguments that they did not know importation for this use was a crime not only failed to benefit them, but provoked the district court to raise their sentences for obstruction of justice.

Relationships

Social Pressures

United States v. Vongsay, 988 F.2d 126 (9th Cir. 1993). A Thai woman had been convicted of bringing 2200 grams of opium into the United States that she had been asked to bring as gifts. The courts did not allow her to introduce expert testimony about Mien culture explaining that a request to deliver gifts for others is considered obligatory.

Fear of Police

United States v. Zapata, 997 F.2d 751 (10th Cir. 1993). A Mexican man, due to his experiences of police in his homeland, did not feel free to refuse a DEA officer's request to search him. The officer found drugs. Although the lower court granted the motion to suppress the physical evidence, the appeals court disagreed, saying that the objective reasonable person test was to be applied, and that Zapata's subjective attitudes were irrelevant.

Animals

Exotic Pets

United States v. Tomono, 143 F.3d 1401 (11th Cir. 1998). A Japanese man was indicted for bringing prohibited species into the country. He pleaded guilty and won a reduced sentence based upon "cultural differences" regarding awareness of consequences of his actions. This departure from sentencing guideless upon appeal was ruled an abuse of discretion.

Marital Relations

Child Marriage

People v. Benu, 385 N.Y.S.2d 222 (N.Y. Crim. Ct. 1976). A father was convicted of child endangerment for arranging the marriage of his thirteen-year-old daughter, with her consent, to the seventeen-year-old father of her unborn child. "Regardless of conformity or lack of conformity to Moslem ritual, the fact is that Fatima was thirteen years old at the time of marriage, and thus, the marriage was voidable." *Id.* at 142.

Marriageability

Marks v. Clarke, 102 F.3d 1012 (9th Cir 1996). During an illegal search, Spokane police officers had conducted body searches of unmarried Rom girls, leaving them “polluted” or *marime* in the eyes of the community. Initially the plaintiffs had sued for \$19 million, but after eleven years the family agreed to a \$1.43 million settlement.

Capture

See *Moua* case in discussion *supra* Part III.B.

Polygamy

People v. Ezeonu, 588 N.Y.S.2d 116 (N.Y. Sup. Ct. 1992). A Nigerian national was prosecuted for rape in the second degree of his second wife, who was thirteen years old. The charge was defined as, “when, being eighteen years old or more, he or she engages in sexual intercourse with another person to whom the actor is not married less than fourteen years old.” *Id.* at 345. The defendant argued that because he was legally married to the girl, he was innocent of the crime. Although the marriage was valid in Nigeria, the court ruled that bigamy was no defense to the charge of rape.

Temporary

In re Marriage of Vryonis, 248 Cal. Rptr. 807 (Cal. Ct. App. 1988). An Iranian woman, after entering into a temporary marriage (*mut’a*), filed for spousal support after the marriage failed. The man denied a marriage existed. Although the trial court ruled that she had a good faith belief in the validity of the marriage, the appeals court held that such belief was not grounded on an objectively reasonable basis because the ceremony lacked the usual indicia of marriage.

Divorce

In re Marriage of Weiss, 49 Cal. Rptr. 2d 339 (Cal. Ct. App. 1996). A baptist former wife had written a commitment pledging to rear children of the marriage in her former husband’s Jewish faith. After the lower court denied husband’s request that wife be enjoined from engaging in certain religious activity with the child, the appeals court held that the wife’s antenuptial promise to raise children in her husband’s religion was unenforceable.

Attire

Restaurants

LOOC, Inc. v. Kohli, 701 A.2d 92 (Md. 1997). A Sikh man had been denied a managerial position with Domino's Pizza because he refused to shave his beard, an act that can lead to excommunication from his community. The controversy began in 1987 with wins on both sides as Domino's, known for the fundamentalist Christian beliefs of its founder, refused reasonable accommodation.

Industry

Bhatia v. Chevron U.S.A, Inc., 734 F.2d 1382 (9th Cir. 1984). A Sikh employee who was unable to wear an OSHA-required respirator due to his beard had been suspended from his job and offered lower-paying employment as a clerk and janitor. The court found that the employer had made good-faith efforts to accommodate the plaintiff.

Courtroom

Close-it Enterprises, Inc. v. Weinberger, 407 N.Y.S.2d 587 (N.Y. App. Div. 1978). In an action over sales commissions, the appellate court overturned an earlier judgment for the plaintiff employer because the judge had required defendant to remove his yarmulke. Rather than comply, the defendant waited outside the courtroom for the duration of the trial.

Schools

Menora v. Illinois High School Ass'n, 683 F.2d 1030 (7th Cir. 1982). Jewish basketball players brought an action challenging a rule forbidding players to wear headwear while playing. The appeals court vacated the holding that the rule, as applied to prohibiting pinning on with bobby pins of yarmulkes while playing basketball, violated the free exercise clause of the First Amendment, and remanded the case to allow the parties to come to a compromise.

Police

Marshall v. District of Columbia, 392 F. Supp. 1012 (D. D.C. 1975). An officer who had been terminated for failure to comply with police department grooming regulations brought suit. The D.C. District Court

ruled that the regulations promoted the substantial governmental interest of projecting an image facilitating effective functioning of the police department, and was necessary to ensure the safety and security of citizens. This interest outweighed the plaintiff's interest in maintaining his hair and beard as his religious beliefs dictated.

Military

Goldman v. Weinberger, 472 U.S. 1016 (1985). An Air Force captain who was an Orthodox Jew and rabbi was told not to wear his yarmulke while in uniform. The U.S. Supreme Court deferred to the military under the doctrine of military necessity after the appeals court reversed the judgment enjoining enforcement of the Air Force regulation.

Prison

Robinson v. Foti, 527 F. Supp. 1111 (E.D. La. 1981). A Rastafari inmate sued to prevent enforcement of prison haircut regulations. The Louisiana District Court held that the inmate was not entitled to the requested relief since the practice of wearing his hair in dreadlocks, rather than cutting it, was not mandatory upon members of his sect.

The Deceased – Autopsies

Public Health

Yang v. Sturner, 750 F. Supp. 558 (D. R.I. 1990). A Hmong couple sued Rhode Island's chief medical examiner due to the autopsy conducted on their son's body without consent. After initially finding for the plaintiffs, the judge withdrew the first opinion and entered another holding that that application of a Rhode Island law governing autopsies did not profoundly impair the religious freedom of the Hmongs.

Violent Accidental Death

Smialek v. Begay, 721 P.2d 1306 (N.M. 1986). A mother and siblings of a decedent sued the state medical investigator under federal civil rights statutes for damages resulting from an alleged wrongful autopsy. The New Mexico Supreme Court, applying a Western understanding of which individuals constitute "family," held that brothers and sisters lack standing to assert an alleged violation of the free exercise of their religious beliefs.

The Deceased – Preparation of Bodies

Embalming

Doersching v. State Funeral Directors Board, 405 N.W.2d 781 (Wis. Ct. App. 1987). The Funeral Directors Examining Board had revoked a funeral director's license for failure to properly embalm a car accident victim for an open casket funeral in Mexico. Although the court upheld the revocation, the dissent disagreed with "[t]he board's conclusion that Doersching's action exhibited a willful disrespect for the feelings and welfare of the Rocha family." *Id.* 791 (Sundby, J., dissenting). Such a finding imputes to Doersching a knowledge of Mexican culture, which some would argue exceeds the responsibilities of the reasonable professional.

Transportation

Onyeanusu v. Pan Am, 952 F.2d 788 (3d Cir. 1992). An action was brought against the airline for mishandling human remains, including initial confusion with another body, and eventual delivery in a burlap bag, which has negative cultural meanings. The legal argument concerned whether the body was a "person, goods, or baggage" under the Warsaw Convention. The court determined that human remains are "goods" and thus barred the plaintiff's complaint.

Burial

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). The parties contested the Forest Service's plans to permit timber harvesting and road construction in an area of national forest traditionally used for religious purposes by members of three American Indian tribes in northwestern California. The Supreme Court held that the free exercise clause did not prohibit the government from permitting timber harvesting and road construction in this area.