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Cultural Defense

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In pluralistic societies, individuals belonging to ethnic minority groups sometimes find that their traditions [p. 356 ↓] clash with the law of the state. When individuals involved in legal proceedings are asked to explain their conduct, they raise what jurists and scholars call the *cultural defense*. Immigrants, for example, attempt to persuade the court that it should understand their behavior in the proper cultural context; the premise of their argument is that their enculturation shaped their perceptions and predisposed them to act in particular ways that conflicted with the law. Such a defense, if recognized, allows the consideration of cultural evidence in the courtroom in both civil and criminal matters. The basic question is whether legal systems should take into account evidence concerning a litigant's cultural or religious background.

A cultural defense can influence legal proceedings in many ways. Cultural factors can affect a police officer's decision whether to arrest a person; a prosecutor's decision whether to charge a defendant, and if so, for what offense; and the decisions of the judge or jury during the guilt and sentencing phases of a criminal trial. If one uses the cultural defense in the guilt phase of a trial, various outcomes are possible: a defendant can be acquitted, receive a lesser sentence, or be found guilty of the crime charged; a cultural defense does not necessarily lead to the exoneration of a defendant. In civil proceedings, one can introduce cultural evidence to increase the size of a damage award if the individual succeeds in showing he or she was more traumatized than an ordinary person from the majority culture would be by a negligent act (for instance, the performance of an unauthorized autopsy). Sometimes litigants also contend that because of their cultural backgrounds, they should be exempt from certain laws. Although some may assume incorrectly that the cultural defense is applicable only in criminal trials, litigants can invoke the defense in many other areas of law, including constitutional cases, death penalty appeals, and employment discrimination, juvenile, family, and tort cases.

Another misconception is that adopting a cultural defense as a matter of public policy necessarily means that the evidence will affect the outcome in a case. In reality, having a formal cultural defense would simply ensure that the courtroom door is open to cultural evidence. It is a separate question how much weight such evidence should be given. Permitting courts to evaluate cultural data does not guarantee that it will influence the disposition of the case.

Range of Cultural Conflicts

While defendants use the cultural defense in many types of criminal cases, the most notorious are those involving the use of violence. Jealous husbands kill their wives, claiming they were provoked to do so by cultural imperatives. In *People v. Aphaylath*, 502 N.E.2d 998 (N.Y. 1986), a Laotian immigrant stabbed his wife to death after she received a phone call from a former boyfriend. The public defender tried unsuccessfully to introduce evidence that Aphaylath was suffering from culture shock and that in Laos, the infidelity of a man's wife brings great shame on the family. The court of last resort in New York held that it was a reversible error to exclude evidence concerning the defendant's cultural background. Subsequently, as the prosecutor allowed the defendant to plead guilty to manslaughter and receive a lower sentence, the cultural defense effectively served as a partial excuse.

In homicide cases, a defendant may claim that something unusual provoked him. For example, in one case, *Trujillo-Garcia v. Rowland*, 9 F.3d 1553 (1993), Trujillo-Garcia, a Mexican, responded to an extraordinarily offensive phrase in Spanish by killing the man who had uttered it. Although Trujillo-Garcia could show that he had been provoked, he was unable to prove that the objective reasonable person would have been provoked. While a jury could understand common insults, without an interpretation of the cultural significance of the insult, it would not appreciate how serious it was. Hence, the refusal of the trial court to allow the jury to consider cultural evidence violated equal protection of the laws.

Introducing cultural information into an existing criminal defense such as provocation can be difficult since it relates to the motivation for the act. As a technical matter, a defendant who has the *mens rea*, or requisite intent, and commits the *actus reus*, or act, is guilty; motive is not germane to the question of guilt but can be considered during sentencing. Consequently, except for cases in which motive is part of the definition of the [p. 357 ↓] crime (for example, self-defense and child sexual abuse), it can be virtually impossible to persuade judges to allow the introduction of cultural evidence.

Even when cultural evidence is admissible in criminal cases, it may not prevent an ethnocentric judgment from having devastating consequences. In the *Krasniqi* case, an

Albanian Muslim was acquitted of sexually molesting his four-year-old daughter, largely based on the testimony of an anthropologist. The expert explained that in Albanian culture, the touching of a child in the genital area was innocent and not for sexual gratification, a necessary component of child sexual abuse, a specific-intent crime. Despite the acquittal in the criminal case, this did not reverse the earlier family court decision terminating the parental rights of both parents to their daughter and son. As this case shows, the same set of facts can give rise to a civil and criminal matter, both involving the interpretation of a cultural practice.

When religious minorities wear symbols that religious law requires, but that the dominant legal system prohibits, some members of ethnic minority groups maintain that they ought not to be held responsible for violating the law. For instance, a Sikh priest was prosecuted for wearing his *kirpan*, a religious dagger that baptized Sikhs are required to don. Although the judge said he lost as a matter of law, the judge nevertheless dismissed the case, saying it would be against the interests of justice to proceed with the prosecution. Sikh children wearing *kirpans* in public schools have also encountered difficulties, but courts have sometimes ruled in their favor, as in *Cheema v. Thompson*, 67 F.3d 888 (9th Cir. 1995) and *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.R. 6. To avoid this type of conflict, some governments (for instance, Canada and the United Kingdom) have enacted statutory exemptions authorizing Sikhs to wear their kirpans. Legislatures have created comparable exemptions for animal welfare laws to permit the slaughter of animals in accordance with Jewish and Muslim law. Sometimes an act is a crime in most but not all jurisdictions within a country, such as with cockfighting in the United States.

In civil litigation, plaintiffs sometimes contend that a negligent act had a more devastating impact on them because of their cultural background. In one case, a group of Gypsies filed a \$40 million civil rights lawsuit against the city of Spokane, Washington, after police conducted an illegal raid of their homes, during which they searched young, unmarried girls. As a result, the girls were said to be *marimé*, or unmarriageable, according to Gypsy folk law. In lawsuits for the unauthorized performance of autopsies, some groups argue that the damage award should be increased because of their belief that the deceased will be forever mutilated in the afterlife. The extent to which these arguments prevail hinges on the ability of courts to assess the veracity of the cultural claims.

Objections to the Defense

The most common objection to the cultural defense is the idea that those who move to a new country should abide by the new law, or “When in Rome, do as the Romans do.” A related idea is the common law principle that ignorance of the law is no excuse. One counterargument is that immigrants should not be required to give up their traditions if they do not involve harm to others. With respect to the notion of ignorance, if the newly arrived are truly unaware of the law, it may violate the fair notice requirement of due process to hold them responsible, at least in cases of first instance.

Another criticism of the cultural defense is that its use will undermine the rights of vulnerable groups such as women and children. To condone violence against these groups violates their right to equal protection if those who harm women and children in the mainstream culture receive full punishment. Yet defendants who commit ordinary crimes receive varying sentences for similar offenses, and their victims do not claim that this violates equal protection, nor would courts be likely to embrace their argument. More important, just because defendants can raise a cultural defense to ensure that judges understand the context for their actions, this does not necessarily affect the disposition of those cases. Finally, some women may benefit from the existence of the cultural defense, for example, as when Fumiko Kimura, a Japanese woman in California, tried to commit parent-child suicide, or *oyaku-shinju*. After learning her husband had had an [p. 358 ↓] affair, Kimura drowned her two children but was rescued when she tried to kill herself. *Oyako-shinju*, while illegal in Japan, is not unheard of as a means by which a family can avoid an otherwise unacceptable social predicament. The Japanese-American community gathered a petition with over 25,000 signatures appealing to the Los Angeles County district attorney not to prosecute her, arguing that her actions were based on a different worldview. According to this worldview, it is more cruel to leave the children behind with no one to look after them than it is for the mother to take them with her to the afterlife. Through a plea bargain, her homicide charge was reduced to voluntary manslaughter and she was sentenced to one year in county jail (which she had already served), five years probation, and psychiatric counseling. The fundamental question is whether mitigation is appropriate in light of a cultural imperative to ensure condign punishment.

Some worry that defendants will manufacture fraudulent claims and that courts will not be able to perceive their falsity. While this concern has merit, ascertaining the validity of claims is not overly difficult. Those involved in litigation must take practical steps to check the veracity of cultural claims. One proposal is the use of a cultural defense test that would pose three questions: Is the litigant part of an ethnic group? Does that group have a relevant tradition? Did that tradition influence the litigant?

Law and society scholars who serve as expert witnesses about particular groups are in a position to contribute much to legal proceedings. Their involvement can help guard against “essentializing” or misrepresentation of the folkways of ethnic communities. Social scientists can offer assessments of the degree of support for traditions with a group when internal disagreement exists over the continuation of the customs.

The overriding concern is that allowing diverse ethnic groups to follow their own ways of life will undermine national unity, perhaps leading to anarchy. While this is conceivable, it is also possible that tyrannical efforts to force minorities to conform to a single national standard risks alienating them entirely. Those who feel that their traditions are not valued may be inclined to use violence to challenge states that deny them the right to make their own life plans.

Rationale for the Defense

Legal systems in democracies protect constitutional rights such as religious liberty, equal protection of the laws, freedom of association, and the right to a fair trial. Failure to allow the consideration of cultural evidence is inconsistent with these principles. International law, in the International Covenant on Civil and Political Rights (art. 27), also affords protection of the right to culture. The right to culture, at the very least, should include the right to introduce evidence explaining what motivated one's actions in a court. To ensure that the law treats everyone fairly, legal systems should examine the context of litigants' actions, including their cultural backgrounds. Justice requires the formal adoption of the cultural defense.

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See also

- [Cultural Identities](#)
- [Essentialism](#)
- [Evidence and Proof, Sociology and Psychology of](#)
- [Forensic Experts](#)
- [Gypsies and Travelers](#)
- [Human Rights, International](#)
- [Race and Ethnicity](#)
- [Relativism, Cultural](#)
- [Religious Minorities](#)

Further Readings

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