
Defendants of Culture

Alison Dundes Renteln, *The Cultural Defense*. New York:
Oxford University Press, 2004. Pp. 219.

Reviewed by David Howes*

Alison Dundes Renteln's *The Cultural Defense* is a monumental treatise, equally versed in the literature of law and anthropology. The author holds a position in political science at the University of Southern California. Her command of these different fields situates her at the forefront of the growing chorus of scholars who argue—some pro, some con—that it is incumbent on the judiciary to take cultural differences seriously in their adjudication of the legal frictions thrown up by our increasingly multicultural society.

Cultural conflicts can arise in many different cases when the traditions of an immigrant or minority culture clash with those of the dominant society. A partial list would include: homicide and assault cases (e.g., when a defendant commits an “honour killing” in reaction to an adulterous liaison, or abides by a “street fighter standard” in response to a verbal insult); child abuse cases (e.g., when a traditional healing or puberty ritual ostensibly performed to benefit the child results in bodily injuries in the eyes of the medical establishment and child welfare authorities); drug use or smuggling cases (e.g., when substances classified as licit and even essential to social existence or spiritual enlightenment in the culture of origin are classified as dangerous and prohibited in the culture of destination); the treatment of animals (e.g., when dietary codes differ, or there is the appearance of cruelty in the way animals are handled in a ritual or sporting event, such as the cockfight or *charreada*); employment discrimination suits (e.g., when the dress code of a minority culture clashes with the hygiene or safety codes of the dominant society, or the “image” which a given corporation wishes to project); and, the treatment of the dead (e.g., when state-mandated autopsies are performed irrespective of the religious objections of the deceased's next of kin).

In addition to providing a typology of the multiplicity of criminal and civil cases in which cultural defences have been invoked in the United States and other predominantly First-World jurisdictions (most notably, the United Kingdom, France,

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Canada, and Australia), Renteln aims to provide a normative framework for the analysis and resolution of such disputes. Her position is that governments and the courts should cleave to a principle of “maximum accommodation” of cultural differences so that individuals may pursue their own “life plans” (subject to certain provisos, to be discussed presently) in place of the “presumption of assimilation” or “monocultural paradigm” that currently holds sway. The latter paradigm assumes that individuals from “other” cultures should conform to a single national standard, with the result that judges feel no compunction to factor evidence of the cultural background of the litigants into their handling of a case, and simply dismiss such evidence when it is proffered as “irrelevant”.¹ According to Renteln, this attitude has the effect of alienating rather than incorporating minorities into the dominant society, and denies them their “right to culture”,² in addition to interfering with other fundamental rights, such as equal protection, or freedom of religion. She therefore calls for the establishment of a “formal cultural defence” that would obligate the judiciary to at least consider cultural evidence in all cases involving cross-cultural conflict, while leaving the question of how much weight to attach to such evidence, and whether or not it should excuse the conduct at issue (wholly, partially, or not at all), to be decided on a case-by-case basis.

Culture matters for justice, Renteln argues, because “enculturation” (i.e., cultural conditioning) predisposes individuals to act in certain ways, consciously or subconsciously, and “acculturation” (i.e., assimilation to the culture of destination) is far less prevalent or uniform than is commonly thought. What is more, “to ignore the truth of enculturation is to bias the result [of a case] from the beginning.”³ For example, defendants of culture typically find it difficult to avail themselves of existing defences, such as provocation, to a charge of murder or assault because of the operation of the “objective reasonable person” test. As Renteln points out, “the reality is that this ‘objective’ being is simply the persona of the dominant culture,” with reference to which all other viewpoints are adjudged “subjective” (or “unreasonable”); hence, the defence of provocation, “which is theoretically available equally to all defendants, in fact cannot be used by people who come from other

¹ Equally problematic, according to Renteln, is the surreptitious admission of cultural evidence, which is then sometimes upheld and sometimes overturned (as an “abuse of discretion”) on appeal: “There is no uniformity in the way culture is handled by the courts, and this variation leads to dissimilar outcomes, sometimes for similar offenses” (Alison Dundes Renteln, *The Cultural Defense* (New York: Oxford University Press, 2004) at 185 [Renteln, *Cultural Defense*]). Hence the need for “statutory authorization of the admissibility of cultural evidence in the courtroom” (*ibid.* at 206).

² Renteln points to article 27 of the *International Covenant on Civil and Political Rights* (19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368) as one source of the “right to culture”, but decries its relatively restricted use to date: Renteln, *Cultural Defense*, *supra* note 1 at 213. The same could be said of article 27 of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11), which subjects the interpretation of the *Charter*’s provisions to “the preservation and enhancement of the multicultural heritage of Canadians.”

³ Renteln, *Cultural Defense*, *supra* note 1 at 15.

cultures.”⁴ The “objective reasonable person” standard thus violates the principle of equal protection, which leads Renteln to conclude that the provocation defence should either be abandoned altogether or else modified to a “culturally specific reasonable person” test. That is, when a defendant’s conduct can be shown to have been “culturally motivated”, then this should be considered a mitigating circumstance and constitute a “partial excuse” (which would result in the accused being convicted of a lesser included offence and accorded a proportionately lighter sentence) instead of exposing the defendant to an excess of culpability and punishment. This is but one of the many thought-provoking suggestions for law reform which emerge from what could be called Renteln’s “extrasystemic” perspective on the prevailing legal system of the United States. Formalizing the cultural defence would, she claims, result in the achievement of a higher degree of “individual justice”, which is surely the goal of any legal system that pretends to treat all individuals equally.

In her drive to expose the double standard by which many minority cultural practices are judged, Renteln frequently gives expression to viewpoints that force a double take on the assumed naturalness or “reasonableness” of the practices of the dominant society. For example, in response to the supposition that arranged marriages violate the rule of free and informed consent, it is observed that “you marry the one you love” whereas “we love the one we marry.”⁵ Similarly, while the ritual sacrifice of animals, particularly dogs and eagles, or the tripping of horses in the Mexican *charreada*, are judged to be “cruel and unnecessary”, the wholesale secular slaughter of chickens for food, or the roping of calves in Western rodeos, does not attract the same opprobrium. Renteln sums up the many strands of her argument by stating that

the dominant culture often perceives unfamiliar cultural traditions as ominous. The threat is often illusory, as with kirpans in school [which are religious symbols, not weapons], the use of coining as folk medicine [which may result in temporary bruises at worst], affectionate touching in families [which is not supposed to be sexually motivated in the culture of origin], and the cornrows hairstyle [which is often perceived as a sign of militancy when it may represent no more than a stylistic option]. The beliefs and traditions are not dangerous, and the misperceptions surrounding them stem from cross-cultural misunderstanding and even xenophobia. In general, intellectuals and the wider society seem to overreact to the prospect that cultural pluralism might be allowed.⁶

She traces the tendency to overreact to the anxiety occasioned by the fact that multiculturalism “exposes the fiction of any national identity.”⁷ Such culture shock in no way warrants putting other cultures on trial, or compelling immigrants to “surrender their culture” upon arrival, however, since to allow such majoritarian bias to prevail would be to bring the administration of justice itself into disrepute.

⁴ *Ibid.* at 32 and 36.

⁵ *Ibid.* at 115.

⁶ *Ibid.* at 218. All of the information in square brackets in this quotation is derived from discussions of cases elsewhere in *The Cultural Defense*. The opinions are those of Renteln.

⁷ *Ibid.*

For all that, Renteln does not pretend that cultural difference should provide a *carte blanche* (as should be apparent from our earlier discussion of the cultural defence as a “partial excuse” to a charge of murder or assault). “As a general principle,” she argues, “one can say that when the cultural claim can be shown to be true, then culture should affect the disposition of the case, unless this would result in irreparable harm to others.”⁸ Renteln cites cultural practices leading to death or permanent disfigurement (e.g., tribal scarification, female genital cutting) as instances of traditions that would be disallowed under the “irreparable harm” standard. It will be observed that positing this standard introduces a shift of registers from the cultural to the physical, substituting individual longevity for spiritual “immortality”, and bodily integrity for cultural identity. Renteln acknowledges the difficulties with her “irreparable harm” standard (*viz.* harm is constructed differently in different traditions), but goes on to justify it by reference to the fact that many cultural conflicts involve children, that it cannot be assumed that children will choose to remain members of their culture of origin upon reaching the age of majority, and that this choice should be protected by the state *vis-à-vis* such practices as scarification or female (or male) circumcision. “Although some may object to this analysis because of a cultural bias [in favour of autonomy and choice], at least it does not entirely prevent the practice of traditions, but merely delays them.”⁹

Renteln also takes pains to defend her position against those of the dominant society who argue against the establishment of an autonomous cultural defence on explicitly theoretical grounds, such as: that it interferes with the deterrence function of the criminal law; that it undermines the rights of vulnerable groups such as women; that it is difficult to prove the existence of specific customs; and that it “essentializes” culture and perpetuates stereotypes. She counters these arguments by, for example, claiming that the fundamental justification for punishment is retribution (the individual should only be punished as much as he or she *deserves*), not deterrence or rehabilitation; that the cultural defence is equally available to women; and that it is possible to determine the validity of a cultural claim by using what she calls “the cultural defence test” (Is the litigant a member of the ethnic group? Does the group have such a tradition? Was the litigant influenced by the tradition when he or she acted?).¹⁰ She also makes a strong case for training legal actors to be more culturally open in a passage that is worth quoting at length, given its appositeness to the theme of this special issue:

To promote greater cultural sensitivity on the part of lawyers, judges, and law enforcement officers, some have argued for “cultural competence” training. The desire for greater cross-cultural understanding is admirable but is unlikely to be

⁸ *Ibid.* at 15, 217. Renteln also discusses a variety of civil cases where the actions of state officials and/or professionals expose “persons of culture” to an excess of harm or trauma by their own standards (e.g., a strip search involving female gypsies who felt “polluted” by contact with the officers concerned).

⁹ *Ibid.* at 218.

¹⁰ *Ibid.* at 207.

sufficient to resolve many culture conflicts so long as this training is elective and the course is a matter of hours. To become a police officer, lawyer, or judge should be contingent upon significant knowledge of other folkways. This could be accomplished by required courses, homestays in other countries, or cultural questions on exams like the bar examination. It is only when actors receive a signal that their governments are serious about cultural pluralism that they will have the incentives to overcome their own ethnocentrism.¹¹

Given its “extrasystemic” perspective, Renteln’s treatise represents an important breakthrough in cross-cultural jurisprudence. Not only does she bring to light the ubiquity of culture conflicts in the courtroom,¹² but through her use of the “extended case method” (reviewing transcripts and briefs, researching the anthropological literature, interviewing the lawyers who handled the litigation about how they thought cultural evidence influenced the outcome of a case, and analyzing press clippings as well as actual decisions), she also exposes the complex underpinnings of such cases, and how their effects spill over into everyday life. Sometimes a cultural community rallies around a defendant, as in the case of the Japanese-American community of California appealing for a Japanese mother, who had attempted “parent-child suicide” upon learning of her husband’s infidelity, not to be prosecuted, because her actions were based on “a different worldview.”¹³ Sometimes, a cultural community may contest the tradition that is at the centre of a dispute on account of the unwelcome glare of publicity it attracts, as in the case of the Cambodian Association of California, which protested that the consumption of dog, either as a delicacy or out of necessity, is not a part of traditional Cambodian culinary tradition (despite some evidence to the contrary).

Cases that turn on what could be called “contested traditions” from the minority culture’s own viewpoint highlight one of the principal difficulties with Renteln’s otherwise very compelling defence of the cultural defence.¹⁴ The difficulty lies in the fact that her concern with “individualizing justice” sometimes leads her to de-socialize culture. Thus, while one might agree with her contention that “individual justice demands that the legal system focus on the actor as well as the act, and on motive as well as intent,”¹⁵ such an analysis should not preclude the study of the specific relationships in which the litigants stand to each other, and the ever-changing relationships between the minority culture and the wider society. In place of

¹¹ *Ibid.* at 209-10.

¹² It bears underlining that Renteln breaks out of the mould of only considering the cultural defence in relation to the criminal law by citing and analyzing a multitude of civil cases in which the consideration of cultural evidence is essential to the proper resolution of a dispute (e.g., child custody, employment discrimination, assessment of damages).

¹³ *Ibid.* at 25.

¹⁴ On contested traditions in the Canadian context, see also Pascale Fournier, “The Ghettoisation of Difference in Canada: ‘Rape by Culture’ and the Dangers of a ‘Cultural Defence’ in Criminal Law Trials” (2002) 29 *Man. L.J.* 81; Sherene Razack, “What Is to Be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence” (1994) 19 *Signs* 894.

¹⁵ Renteln, *Cultural Defense*, *supra* note 1 at 187.

constructing a kind of modal personality for each culture in an effort to elucidate the motives that guided a particular individual's conduct (and ought therefore to mitigate culpability) in any given case, as Renteln does, I would advocate a more dynamic, relational approach to the appreciation of the circumstances which influence persons to conform to some cultural practices and not others.¹⁶ Such an approach would be in line with the growing recognition that cultures are conjunctural (not essential), distributive (not simply shared), constitutive of a panoply of subject positions (not just one persona per culture), and always partial, as anthropologist James Boon brings out well in the following quotation from *Other Tribes, Other Scribes*:

[S]ocial facts [or traditions] represent selections from larger sets of possibilities of which societies keep symbolic track, whether consciously or unconsciously, explicitly or covertly. Societies conceptualize themselves as select (in both senses) arrangements, valued against contrary arrangements that are in some way "objectified".¹⁷

I do not pretend that a relational approach—focusing on the interface and internal diversity of cultures—would make the court's task in assessing the admissibility and weight of cultural evidence any easier. However, it would help guard against cultural arguments being rejected as reductive or "frozen" stereotypes, as is all too often the case. Consider the affair of *State of Minnesota v. Vue*, which is a highly instructive example of what could be called the abuse of cultural evidence. In this sexual assault case, the prosecution sought to introduce cultural evidence to account for why the victim, a Hmong woman referred to as M.V., had delayed reporting that the defendant raped her four times over a period of several months. This delay undermined her credibility as a witness. A white police officer was called to give expert testimony. He observed on the basis of his casual contacts with the Hmong community that it was considered inappropriate to seek help from outside for "clan-related problems", and that Hmong culture is "a male-dominated culture" in which "women are to suffer rather than to tell." On appeal, it was observed that this testimony did nothing to enhance the victim's credibility, for it only pertained to "older Hmong" for whom language was a barrier, whereas the victim was bilingual and educated (rendering the cultural testimony "irrelevant"); that the police officer's credentials to give expert testimony were suspect (absent academic training); and that the prejudicial effect of the officer's generic statements about "male dominance" in Hmong culture (which painted the defendant as part of a "'guilty class' of spouse-abusers") far outweighed any probative value. The appellate court concluded that the district court had improperly allowed the expert testimony to be heard on the ground that "[o]ur

¹⁶ Renteln herself provides some very insightful analyses of the significance of relationships (master-apprentice, gift, etc.) in a section entitled "Relationships: Pressures on Individuals Induce Them to Participate in Drug Operations" (*ibid.* at pp. 85-90), but she does not go on to explore the implications of relational factors for the other cases she considers; she only examines motivational factors.

¹⁷ James A. Boon, *Other Tribes, Other Scribes: Symbolic Anthropology in the Comparative Study of Cultures, Histories, Religion, and Texts* (Cambridge: Cambridge University Press, 1982) at 52.

criminal code is supposed to be blind to the array of cultures in the State of Minnesota.”¹⁸

If anything, this case points to the fact that the court should have been more discerning, not less, as regards the array of cultural differences, including differences internal to the cultures present in the State of Minnesota. A relational approach, such as an anthropological expert would have brought to bear upon this case, would have problematized the gender stereotypes,¹⁹ disclosed the panoply of subject positions, highlighted the full range of recourses (and sanctions) available from within Hmong culture, and forced the court to do a double take instead of perpetuating the illusion of equal (“culturally neutral”) treatment of the parties concerned by turning a blind eye to the defendant’s culture of origin.

I first came across *The Cultural Defense* after sending out a call for papers for a special issue of the *Canadian Journal of Law and Society* on the topic of “Culture in the Domain of Law”. The call for papers was worded as follows:

Culturally-reflexive legal reasoning is increasingly necessary to the meaningful adjudication of disputes in today’s increasingly multicultural society. It involves recognizing the interdependence of culture and law (i.e., law is not above culture but part of it). Judges ought to acknowledge and give effect to cultural difference, rather than override it. Deciding cases solely on the basis of some abstract conception of individuals as interchangeable rights-bearing units would have the effect of undermining our humanity. It is our cultural differences from each other that actually make us human. However, in extending judicial recognition to such difference, judges must be careful to take cognizance of their personal culture, and not just that of “the other.” Reflexivity, not mere sensitivity, is the essence of cross-cultural jurisprudence.²⁰

Alison Dundes Renteln responded to this call with a paper that summarizes the policy considerations articulated in her book that support statutory authorization of a formal cultural defence, and then goes on to set out a series of guidelines for distinguishing those cases which would, in her estimation, result in a misuse of this defence. “If recognizing a cultural tradition would undermine the human rights of vulnerable

¹⁸ *State v. Vue*, 606 N.W.2d 719 (Minn. App. 2000) at 723.

¹⁹ Outside observers often see evidence of male dominance and female subservience in the practices of Oriental and African cultures, whereas anthropological analyses of even such blatantly “patriarchal” cultural symbols as “the veil” or “female genital cutting” may reveal the indigenous experience to be one of female empowerment within a larger framework of gender complementarity. See Sajida Alvi, Homa Hoodfar & Sheila McDonough, eds., *The Muslim Veil in North America: Issues and Debates* (Toronto: Women’s Press, 2003); Janice Boddy, “Womb as Oasis: The Symbolic Context of Pharaonic Circumcision in Northern Sudan” (1982) 9 *American Ethnologist* 682. The decision of whether or not to “defer”, as Jeremy Webber would say, to “minority cultural practices” can only command respect to the extent that it is rooted in cross-cultural understanding as opposed to prejudice. See Jeremy Webber, “Multiculturalism and the Limits to Toleration” in André Lapierre, Patricia Smart & Pierre Savard, eds., *Language, Culture and Values in Canada at the Dawn of the 21st Century* (Ottawa: International Council for Canadian Studies, 1996).

²⁰ David Howes, “Introduction: Culture in the Domains of Law” (2005) 20 *C.J.L.S.* 9 at 10.

groups, it should be rejected ... The right to culture is a fundamental human right, but it should be protected only so long as it does not undermine other human rights.”²¹ This formulation goes a considerable way toward establishing a normative framework for the conduct of cross-cultural jurisprudence, although its recourse to “rights language” might be considered regrettable from the standpoint of those legal traditions which entertain a less formal, more relational conception of the constitution of the subject.²² That said, Renteln’s theorization of just how culture matters to the administration of justice opens up a vital new domain for academic inquiry and judicial notice.

²¹ Alison Dundes Renteln, “The Use and Abuse of the Cultural Defense” (2005) 20 C.J.L.S. 47 at 63, 66.

²² See e.g. H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (New York: Oxford University Press, 2000) at 193-6, 297-98; Edward LiPuma, “Modernity and Forms of Personhood in Melanesia” in Michael Lambek & Andrew Strathern, eds., *Bodies and Persons: Comparative Perspectives from Africa and Melanesia* (Cambridge: Cambridge University Press, 1998) 53.