1. Cultural Law: An Introduction

A. The Cultural Dimension of the Legal Process

Legal issues may lead multiple lives. They can be political, economic, social, historical, or cultural. Normally, the particular classification of an issue, in the abstract, is not so important. What is important, however, is to understand how a particular nonlegal dimension may condition the analysis of an issue and the appropriate response to it. Gaining this understanding is a matter not only of viewpoint or specialized information but also of professional skill. It is a skill that is best acquired by gaining a comprehensive understanding of the manifold ways in which a particular dimension of human experience – for our purposes, the cultural dimension – affects the legal process.

The first two chapters in this book address the problem of cultural conflict, the interaction of culture and law, a working definition of cultural law, and the characteristics of both culture and law. The remaining chapters examine the interaction of culture and law in specific contexts of cultural expressions, practices, and activities such as art, traditional knowledge, sports, and religion.

We begin this chapter by considering how the cultural dimension of legal issues in both private sectors and public sectors, including the principle of cultural diversity, may be significant in dispute resolution and ordinary legal discourse. The examples are neither definitive nor comprehensive, but only suggestive. The chapter concludes by broadly defining the discipline of cultural law as a set of relationships.

1. Dispute Resolution amid Cultural Diversity

Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme
169 F. Supp. 2d 1181 (N.D. Cal. 2001),
rev'd on other grounds and remanded, 433 F.3d 1199 (9th Cir. 2006)

Defendants La Ligue Contre Le Racisme Et L'Antisemitisme ("LICRA") and L'Union Des Etudiants Juifs De France, citizens of France, are non-profit organizations dedicated to eliminating anti-Semitism. Plaintiff Yahoo!, Inc. ("Yahoo!") is a corporation organized under the laws of Delaware with its principal place of business in Santa Clara, California. Yahoo! is an Internet[1] service provider that operates various Internet

[1] The Internet and World Wide Web are distinct entities, but for the sake of simplicity, the Court will refer to them collectively as the Internet. In general, the Internet is a decentralized networking system that

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websites and services that any computer user can access at the Uniform Resource Locator ("URL") http://www.yahoo.com. Yahoo! services ending in the suffix, ".com," without an associated country code as a prefix or extension (collectively, "Yahoo!'s U.S. Services") use the English language and target users who are residents of, utilize servers based in, and operate under the laws of the United States. Yahoo! subsidiary corporations operate regional Yahoo! sites and services in twenty other nations, including, for example, Yahoo! France, Yahoo! India, and Yahoo! Spain. Each of these regional web sites contains the host nation's unique two-letter code as either a prefix or a suffix in its URL (e.g., Yahoo! France is found at http://www.yahoo.fr and Yahoo! Korea at http://www.yahoo.kr). Yahoo!'s regional sites use the local region's primary language, target the local citizenry, and operate under local laws.

Yahoo! provides a variety of means by which people from all over the world can communicate and interact with one another over the Internet. Examples include an Internet search engine, e-mail, an automated auction site, personal web page hostings, shopping services, chat rooms, and a listing of clubs that individuals can create or join. Any computer user with Internet access is able to post materials on many of these Yahoo! sites, which in turn are instantly accessible by anyone who logs on to Yahoo!'s Internet sites. As relevant here, Yahoo!'s auction site allows anyone to post an item for sale and solicit bids from any computer user from around the globe. Yahoo! records when a posting is made and after the requisite time period lapses sends an e-mail notification to the highest bidder and seller with their respective contact information. Yahoo! is never a party to a transaction, and the buyer and seller are responsible for arranging privately for payment and shipment of goods. Yahoo! monitors the transaction through limited regulation by prohibiting particular items from being sold (such as stolen goods, body parts, prescription and illegal drugs, weapons, and goods violating U.S. copyright laws or the Iranian and Cuban embargos) and by providing a rating system through which buyers and sellers have their transactional behavior evaluated for the benefit of future consumers. Yahoo! informs auction sellers that they must comply with Yahoo!'s policies and may not offer items to buyers in jurisdictions in which the sale of such item violates the jurisdiction's applicable laws. Yahoo! does not actively regulate the content of each posting, and individuals are able to post, and have in fact posted, highly offensive matter, including Nazi-related propaganda and Third Reich memorabilia, on Yahoo!'s auction sites.

On or about April 5, 2000, LICRA sent a "cease and desist" letter to Yahoo!'s Santa Clara headquarters informing Yahoo! that the sale of Nazi[-] and Third Reich[–]related goods through its auction services violates French law. LICRA threatened to take legal action unless Yahoo! took steps to prevent such sales within eight days. Defendants subsequently utilized the United States Marshal's Office to serve Yahoo! with process

links computers and computer networks around the world. The World Wide Web is a publishing forum consisting of millions of individual Web sites that contain a wide variety of content.

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in California and filed a civil complaint against Yahoo! in the Tribunal de Grande Instance de Paris (the "French Court").

The French Court found that approximately 1,000 Nazi[-] and Third Reich[–]related objects, including Adolf Hitler's *Mein Kampf*, *The Protocol of the Elders of Zion* (an infamous anti-Semitic report produced by the Czarist secret police in the early 1900s), and purported "evidence" that the gas chambers of the Holocaust did not exist were being offered for sale on Yahoo.com's auction site. Because any French citizen is able to access these materials on Yahoo.com directly or through a link on Yahoo.fr, the French Court concluded that the Yahoo.com auction site violates Section R645–1 of the French Criminal Code, which prohibits exhibition of Nazi propaganda and artifacts for sale.[2]

On May 20, 2000, the French Court entered an order requiring Yahoo! to (1) eliminate French citizens' access to any material on the Yahoo.com auction site that offers for sale any Nazi objects, relics, insignia, emblems, and flags; (2) eliminate French citizens' access to web pages on Yahoo.com displaying text, extracts, or quotations from *Mein Kampf* and *Protocol of the Elders of Zion*; (3) post a warning to French citizens on Yahoo.fr that any search through Yahoo.com may lead to sites containing material prohibited by Section R645–1 of the French Criminal Code, and that such viewing of the prohibited material may result in legal action against the Internet user; (4) remove from all browser directories accessible in the French Republic index headings entitled "negationists" and from all hypertext links the equation of "negationists" under the heading "Holocaust." The order subjects Yahoo! to a penalty of 100,000 Euros for each day that it fails to comply with the order. The order concludes:

> We order the Company YAHOO! Inc. to take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes.

Yahoo! asked the French Court to reconsider the terms of the order, claiming that although it easily could post the required warning on Yahoo.fr, compliance with the order's requirements with respect to Yahoo.com was technologically impossible. The French Court sought expert opinion on the matter and on November 20, 2000, "reaffirmed" its order of May 22. The French Court ordered Yahoo! to comply with the May 22 order within three (3) months or face a penalty of 100,000 Francs (approximately US$13,300) for each day of non-compliance. [The confusion of francs and euros in this opinion reflects a transition from the national to the regional currency during the course of the litigation. – *Eds.*] The French Court also provided that penalties assessed against Yahoo! Inc. may not be collected from Yahoo! France. Defendants again utilized the United States Marshal's Office to serve Yahoo! in California with the French Order.

[2] French law also prohibits purchase or possession of such matter within France.

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Yahoo! subsequently posted the required warning and prohibited postings in violation of Section R645–1 of the French Criminal Code from appearing on Yahoo.fr. Yahoo! also amended the auction policy of Yahoo.com to prohibit individuals from auctioning:

> Any item that promotes, glorifies, or is directly associated with groups or individuals known principally for hateful or violent positions or acts, such as Nazis or the Ku Klux Klan. Official government-issue stamps and coins are not prohibited under this policy. Expressive media, such as books and films, may be subject to more permissive standards as determined by Yahoo! in its sole discretion.

Yahoo Auction Guidelines (visited Oct. 23, 2001) <http://user.auctions.Yahoo.com/html/guidelines.html>. Notwithstanding these actions, the Yahoo.com auction site still offers certain items for sale (such as stamps, coins, and a copy of *Mein Kampf*) which appear to violate the French Order. While Yahoo! has removed the *Protocol of the Elders of Zion* from its auction site, it has not prevented access to numerous other sites which reasonably "may be construed as constituting an apology for Nazism or a contesting of Nazi crimes."[3]

Yahoo! claims that because it lacks the technology to block French citizens from accessing the Yahoo.com auction site to view materials which violate the French Order or from accessing other Nazi-based content of websites on Yahoo.com, it cannot comply with the French order without banning Nazi-related material from Yahoo.com altogether. Yahoo! contends that such a ban would infringe impermissibly upon its rights under the First Amendment to the United States Constitution. Accordingly, Yahoo! filed a complaint in this Court seeking a declaratory judgment that the French Court's orders are neither cognizable nor enforceable under the laws of the United States.

Defendants immediately moved to dismiss on the basis that this Court lacks personal jurisdiction over them. That motion was denied.[4] . . .

As this Court and others have observed, the instant case presents novel and important issues arising from the global reach of the Internet. Indeed, the specific facts of this case implicate issues of policy, politics, and culture that are beyond the purview of one nation's judiciary. Thus it is critical that the Court define at the outset what is and is not at stake in the present proceeding.

This case is *not* about the moral acceptability of promoting the symbols or propaganda of Nazism. Most would agree that such acts are profoundly offensive. By any reasonable standard of morality, the Nazis were responsible for one of the worst displays of inhumanity in recorded history. This Court is acutely mindful of the emotional pain reminders of the Nazi era

[3] The Court also takes judicial notice that on October 24, 2001, a search on Yahoo.com of "Jewish conspiracy" produced 3,070 sites, the search "Protocols/10 Zion" produced 3,560 sites, and the search "Holocaust /5 'did not happen,'" produced 821 sites. The search "National Socialist Party" led to a Web site of an organization promoting modern-day Nazism.

[4] *See* Yahoo!, Inc. v. La Ligue Contra Le Racisme et L'Antisemitisme, 145 F. Supp. 2d 1168 (N.D. Cal. 2001).

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cause to Holocaust survivors and deeply respectful of the motivations of the French Republic in enacting the underlying statutes and of the defendant organizations in seeking relief under those statutes. Vigilance is the key to preventing atrocities such as the Holocaust from occurring again.

Nor is this case about the right of France or any other nation to determine its own law and social policies. A basic function of a sovereign state is to determine by law what forms of speech and conduct are acceptable within its borders. In this instance, as a nation whose citizens suffered the effects of Nazism in ways that are incomprehensible to most Americans, France clearly has the right to enact and enforce laws such as those relied upon by the French Court here.[5]

What *is* at issue here is whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation. In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, the implications of this question go far beyond the facts of this case. The modern world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press. If the government or another party in one of these sovereign nations were to seek enforcement of such laws against Yahoo! or another U.S.-based Internet service provider, what principles should guide the court's analysis?

The Court has stated that it must and will decide this case in accordance with the Constitution and laws of the United States. It recognizes that in so doing, it necessarily adopts certain value judgments embedded in those enactments, including the fundamental judgment expressed in the First Amendment that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech. The government and people of France have made a different judgment based upon their own experience. In undertaking its inquiry as to the proper application of the laws of the United States, the Court intends no disrespect for that judgment or for the experience that has informed it.

. . .

No legal judgment has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. 28 U.S.C. § 1738. However, the United States Constitution and implementing legislation require that full faith and credit be given to judgments of sister states, territories, and

[5] In particular, there is no doubt that France may and will continue to ban the purchase and possession within its borders of Nazi[-] and Third Reich[–]related matter and to seek criminal sanctions against those who violate the law.

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possessions of the United States. U.S. Const. art. IV, §§ 1, cl. 1; 28 U.S.C. § 1738. The extent to which the United States, or any state, honors the judicial decrees of foreign nations is a matter of choice, governed by "the comity of nations." *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S. Ct. 139, 40 L. Ed. 95 (1895). Comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Hilton*, 159 U.S. at 163–64, 16 S. Ct. 139 (1895). United States courts generally recognize foreign judgments and decrees unless enforcement would be prejudicial or contrary to the country's interests. *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017, 92 S. Ct. 1294, 31 L. Ed. 2d 479 (1972); *Laker Airways v. Sabena Belgian World Airlines*, 731 F.2d 909, 931 (D.C. Cir. 1984) ("[T]he court is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests."); *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981) ("[R]equirements for enforcement of a foreign judgment expressed in *Hilton* are that . . . the original claim not violate American public policy . . . that it not be repugnant to fundamental notions of what is decent and just in the State where enforcement is sought").

As discussed previously, the French order's content and viewpoint-based regulation of the web pages and auction site on Yahoo.com, while entitled to great deference as an articulation of French law, clearly would be inconsistent with the First Amendment if mandated by a court in the United States. What makes this case uniquely challenging is that the Internet in effect allows one to speak in more than one place at the same time. Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders. *See, e.g.*, *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 4 (D.D.C. 1995) (declining to enforce a British libel judgment because British libel standards "deprive the plaintiff of his constitutional rights"); *Bachchan v. India Abroad Publications, Inc.*, 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup. Ct. 1992) (declining to enforce a British libel judgment because of its "chilling effect" on the First Amendment); *see also Abdullah v. Sheridan Square Press, Inc.*, No. 93 Civ. 2515, 1994 WL 419847 (S.D.N.Y. May 4, 1994) (dismissing a libel claim brought under English law because "establishment of a claim for libel under the British law of defamation would be antithetical to the First Amendment protection accorded to the defendants"). The reason for limiting comity in this area is sound. "The protection to free speech and the press embodied in [the First] amendment would be seriously jeopardized by the entry of foreign [] judgments granted pursuant to standards deemed appropriate in [another country] but considered antithetical to the protections afforded the press by the U.S. Constitution." *Bachchan*, 585 N.Y.S.2d at 665. Absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the

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principle of comity is outweighed by the Court's obligation to uphold the First Amendment.

. . .

In light of the Court's conclusion that enforcement of the French order by a United States court would be inconsistent with the First Amendment, the factual question of whether Yahoo! possesses the technology to comply with the order is immaterial. Even assuming for purposes of the present motion that Yahoo! does not possess such technology, compliance still would involve an impermissible restriction on speech.

Yahoo! seeks a declaration from this Court that the First Amendment precludes enforcement within the United States of a French order intended to regulate the content of its speech over the Internet. Yahoo! has shown that the French order is valid under the laws of France, that it may be enforced with retroactive penalties, and that the ongoing possibility of its enforcement in the United States chills Yahoo!'s First Amendment rights. Yahoo! also has shown that an actual controversy exists and that the threat to its constitutional rights is real and immediate. Defendants have failed to show the existence of a genuine issue of material fact or to identify any such issue the existence of which could be shown through further discovery. Accordingly, the motion for summary judgment will be granted. The Clerk shall enter judgment and close the file.

NOTES AND QUESTIONS

1. By a bare majority (6–5), the Ninth Circuit Court of Appeals reversed on procedural grounds the decision you have just read and remanded the case to the federal court for dismissal without prejudice. In a complicated set of opinions, three of the eleven judges sitting en banc in the case voted to reverse the lower court for a lack of personal jurisdiction and the three others for a lack of ripeness to adjudicate the case. 433 F.3d 1199 (9th Cir. 2006).
2. The case highlights the divergent views on freedom of speech (namely, Internet communications) between France, conditioned by its experience in the 1930s and 1940s, and the United States, under the First Amendment of its U.S. Constitution. As the court observed, "What makes this case uniquely challenging is that the Internet in effect allows one to speak in more than one place at the same time." The carefully written opinion in *Yahoo!, Inc.* confirms the essence of a cultural dimension in what otherwise might be a toss-up on the question of whether one legal system should enforce a judgment of another system that runs contrary to the enforcing system's public policy. Note in particular the court's acknowledgment that "[t]he modern world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press." Note also the court's sensitivity to "the emotional pain reminders of the Nazi era cause to Holocaust survivors" and its deep respect of the motivations

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that underlay the French statutes and the pursuit of relief under them that the defendants sought.

3. The court's discussion of the general principle of comity in international law is instructive, given the lack of international standards to resolve cultural tensions. But in the end, did comity play any role at all, or was it just nice-sounding rhetoric? Ultimately, the court held that "the principle of comity is outweighed by the court's obligation to uphold the First Amendment." Why?
4. During the same period as this litigation, France was vigorously promoting the drafting of what became the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression (2005) (Convention on Cultural Diversity), which we shall examine briefly in the discussion of culture as a human right later in this chapter and again in Chapter 4. Does the French court's decision to apply the statute at issue in *Yahoo!* seem to be an expression of cultural diversity? Indeed, does the statute itself bespeak a tolerance for cultural diversity? Should intolerance of certain behaviors (especially genocide and ethnic cleansing) and symbols (such as Nazi artifacts) be an exception to acceptance of cultural pluralism? To answer that question, the following commentary may be helpful:

> Cultural diversity proves to be an even more elusive concept [than culture], because every culture and interest group has its own unique definition. Constructive ambiguity in this area is at its apex. We must briefly delve into the definitional depths to structure meaning around the concept.
>
> France, original proponent of the *exception culturelle* (cultural exception) to the traditional rules of free trade, interprets diversity as differences between national cultures. . . . The polar opposite view is espoused by the United States, in which diversity refers to the free flow of ideas and expressions – a distinctly nation-neutral (and audiovisual sector liberalizing) approach. Both approaches have intrinsic problems.
>
> UNESCO (United Nations Educational, Scientific, and Cultural Organization) has struggled to reach consensus among its members on this issue and defines cultural diversity as "the manifold ways in which the cultures of groups and societies find expression." This approach creates its own set of problems. Chief among these is its emphasis on the various different means of expressions (a commoditized approach) rather than the differences between cultures (an anthropological/sociological approach).

Johnlee Scelba Curtis, *Culture and the Digital Copyright Chimera: Assessing the International Regulatory System of the Music Industry in Relation to Cultural Diversity*, 13 Int'l J. Cultural Prop. 59, 61 (2006).

Do you understand the diametrically opposed interpretations of cultural diversity between those of France and the United States, that framed the core issue in *Yahoo!, Inc.*? It is the French interpretation that motivates and defines the Convention on Cultural Diversity, thereby ensuring the convention's unacceptability within the cultural tradition of the United States.

5. Cultural differences abound in implementing intellectual property and privacy rights. Again, we find tension between French and American expectations:

> North American copyright law has a clause called "fair use," which allows writers to quote phrases here and there without permission from the copyright

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> holder. It's minimal, but it's something. American copyright law also allows paraphrasing. . . .
>
> The French do not have fair use for unpublished material. Paraphrase has to be extremely loose. (There must be no echo of the original voice; the imagery and even the tone must be changed.) The French also have a law protecting "private life" – "a loi sur la vie privée" – which means that if you do not like what someone says about you, you can sue.

Hazel Rowley, *Point of Departure: Censorship in France*, 78 Am. Scholar, Winter 2009, at 144. Cultural predilections about privacy are profound. Consider, on the one hand, the relaxed attitude of Europeans toward surveillance cameras and national identification cards and, on the other hand, the relaxed, anything-goes attitude of Americans toward Internet and broadcast communications. Are those attitudes shared across the Atlantic Ocean?

6. Taking account of the cultural diversity dilemma, as highlighted by the examples here, is there any point in trying to develop cross-cultural or international standards to promote, let alone govern, anything as ambiguous as cultural diversity?

David J. Przeracki, *"Working It Out": A Japanese Alternative to Fighting It Out*, 37 Clev. St. L. Rev. 149 (1989)

In stark contrast to America's legal and cultural heritage, and essential to an understanding of contemporary Japan, is the recognition of the pervasive influence of Confucian philosophy on Japanese society from the earliest times. Best known for its moral philosophy, Confucianism "gives primary emphasis to the ethical meaning of *human relationships*, finding and grounding the moral in the divine transcendence." The relationships one has with others, if harmonious, lead to achievement of the basic Confucian virtue of *jen* (translated as compassion, human-heartedness, or "man-to-manness"). For the Japanese,

> [t]he spirit of harmony and concord [is] expressed in the virtue of *wa*. If people abided by *wa*, disputes would not arise. It is one's duty to avoid discord. *En* is the principle of social tie. The net effect of these two principles [constitutes the foundation of] . . . the Japanese [perspective]. Maintaining the relationship bound together by these two forces is the paramount concern.
>
> [Watts, *Briefing the American Negotiator in Japan*, 16 Int'l Law. 597, 600 (1982).]

Wa is the principle of harmony which the Japanese feel is a condition of one's being in any relationship, including contractual. Accordingly, *wa* may prevent discord in all activities.

Owing to simple Confucian principles, the Japanese are socialized to avoid interpersonal disputes in every realm, including social and business. The principles of *wa* and *en* are still practiced in contemporary Japan, as

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evidenced in Japanese contract methodology and Japanese dispute resolution techniques, which are characterized by conciliation, less litigation, and very few lawyers.

It is worthy of reiteration that there exists no concept of right in Japanese society. Historically, the emphasis has been on duty, specifically, a duty to maintain harmonious relationships. As a consequence, the Japanese approach to dispute resolution reverses the order of practice in America; the Japanese strongly prefer extra-judicial, informal means as opposed to litigation. "When a dispute arises, the *relationship* functions as the dispute settling mechanism."

. . .

The procedure by which interpersonal settlements are made has been called "reconcilement." Reconcilement is described as "the process by which parties in the dispute confer with each other and reach a point at which they can come to terms and restore or create harmonious relationships." Japanese confidence in reconcilement is perhaps best exemplified in the "We Can Work It Out" clause which invariably appears at the end of Japanese contracts. The clause will typically take one of two forms:

> If in the future a dispute arises between the parties with regard to the [provisions] . . . stipulated in this contract, the parties will confer in good faith [*Sei-o o motte Kyogi Suru*].
>
> or
>
> . . . will settle [the dispute] harmoniously by consultation [*Kyogi Ni Yori emman Ni Kaiketsu Suru*].
>
> [D. Henderson, Conciliation and Japanese Law 194 (1965).]

The notion of reconcilement recalls the traditional idea that both parties are to blame when a conflict arises (*kenka ryoseibei*) because they both failed to maintain harmonious relations. It is, therefore, in the best interest of each party to settle the dispute privately.

A second level of dispute resolution in Japan is conciliation (*chotei*). Also rooted in Confucian philosophy, and first codified during the Tokugawa Shogunate, conciliation is now provided for in the Civil Conciliation Law of 1951. According to Article 1, "[t]he purpose of this law is to devise, by mutual concessions of the parties, solutions for disputes concerning civil matters, which are consistent with reason and befitting actual circumstances." The negotiations are conducted through a third party (a conciliator or a judge) or a committee. When a compromise is reached, the settlement is enforceable as if determined by a court.

Conciliation is very popular in Japan. Surveys conducted over a three-year period indicate that 80% of Japanese would seek settlement through conciliation. Only 20% would prefer settlement in court (after first attempting reconcilement). The Western practice of arbitration, however, is not very popular in Japan. The Japanese dislike arbitration because it

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"*imposes* a decision on the parties rather than allowing [them] to mold the outcome under the [influence] of a social superior."

Litigation, consequently, is considered exclusively a last resort. "To bring a case to court emphasizes a failure of society and individuals to resolve suits through traditional means. Any hope of restoring harmony is thus destroyed."

The non-litigious nature of the Japanese is generally attributed to their desire to maintain social harmony. However, several other reasons have been proffered to explain their non-litigious propensities. The first of these is the dearth of effective legal sanctions. In Japanese civil cases, the ultimate sanction is to attach property. While other sanctions include civil fines, the ability to collect them is heavily reliant upon the party's willingness to pay. Another reason is the relative expense to bring suit in Japan. Filing fees, for example, are prorated to the amount in controversy, and can be very costly. A final reason to explain the scarcity of litigation is the modest supply of lawyers in Japan.

NOTES AND QUESTIONS

1. Are the lack of effective legal sanctions in Japan, the relative expense of a lawsuit there, and the modest supply of lawyers more an explanation of nonlitigious propensities of Japanese culture, as the reading suggests, or a reflection of it?
2. A leading authority on Japanese litigation has lamented a lack of explanatory data on the cultural and social dynamics and implications of the historical predisposition against adversarial processes that is attributed to the Japanese. He also offered the following observations, based on several empirical studies:

   > The current consensus, at least tacitly, . . . challenges the view that Japan is exceptional. Despite Japan's relatively lower per capita litigation rates, few if any scholars today assert that Japan is unique. Rather, most seek to discover universally applicable factors that explain Japan's lower rates of litigation. Consequently, the Japanese experience is critically relevant for any general assessment of litigation, arbitration and the role of courts and legal rules.
   >
   > Finally, the Japanese experience teaches us that arbitration – to the extent perceived to produce less predictable outcomes – is a less-preferred means of dispute resolution than litigation. Almost always more costly and often more time consuming as private adjudication, arbitration is not a transparent process. The outcomes produced are not necessarily consistent or certain. They are unpredictable by definition. Arbitration thus inhibits settlement and thereby produces unnecessary serial costs.

   John O. Haley, *Litigation in Japan: A New Look at Old Problems*, 10 Willamette J. Int'l L. & Disp. Resol. 121 (2002).
3. The description of Japanese predispositions to dispute resolution highlights the importance of legal culture. In higher context societies such as Japan, for example, the role of hard law is abbreviated, whereas in lower context societies such as the

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United States, it is substantial. The two modern, democratic systems share many economic and political values but differ substantially in the strength of their legal cultures. The significance of the concept has been summarized as follows:

> [T]he term *legal culture* may prove helpful in looking for differences in the degree to which given controversies are subject to law, the role allocated to other expertise, and the part played by "alternatives" to law. It also directs attention to the role of religious or ethnic norms and the ambit of other forms of social control and social ordering. Accompanying and concretizing such differences, explaining and attempting to justify them, there are likely to be contrasting attitudes to the tasks law should be asked to play, to the distinctive approaches to formal and substantive ideas of legality and legitimacy, or concerning the appropriateness of public participation.

David Nelken, *Culture, Legal, in* Encyclopedia of Law & Society 370 (David S. Clark ed., 2007).

According to this observation, why is it important professionally to have an understanding of one's own legal culture as well as foreign legal cultures?

2. Legal Discourse

If law can be viewed as a process of communication, an important responsibility of lawyers, and a demand on the legal profession, is to help avoid disputes and contribute to society by informed, effective communication. The drafting of contracts and of wills are two of the most common professional activities that fulfill this responsibility. In a shrinking world, cross-cultural sensitivities and sensibilities are critical. One is reminded of the disastrous results of linguistic and other cultural lapses such as the attempt to market the Chevrolet Nova by that name in Spanish-speaking countries where the model's name means "doesn't go."

The negotiation process is a routine context in which the cultural dimension of lawyering is common. The following readings highlight issues in both private transactions and diplomacy.

a. International Business Transactions

Daniel C.K. Chow & Thomas J. Schoenbaum, International Business Transactions: Problems, Cases, and Materials 11–13 (2005) (reproduced with the permission of Aspen Publishers)

In an age where people, goods, services, capital, and technology now routinely cross national boundaries, issues of differences and clashes in culture that affect [international transactions] have also become more common. By culture, we refer to the values and norms shared by a group and the group's economic, social, political, and religious institutions. Although consideration of cultural issues may not have been traditionally considered part of the work of an international transactions lawyer, a lawyer who ignores cultural issues in a business transaction does so at his or her own peril in this rapid age of globalization.

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[C]ultural and political issues [divide] developing and developed nations as groups and [have] an impact in international policy-making arenas such as the World Trade Organization, the United Nations, and other international organizations. In addition to having an impact in the policy-making arena, cultural differences between countries also have a direct impact on particular [international transactions] in two ways. First, cultural issues should be part of the background "business case" for a private transaction, but unlike economic, legal, and marketing issues, all part of traditional business and legal analysis, cultural issues may be ignored to the detriment of the transaction. For example, when the Walt Disney Company bought a tract of land near Paris to construct Euro Disney, Disney's U.S. management assumed that the promise of jobs and economic development would mean widespread local support for the new theme park. Instead, the local populace valued its traditional agricultural lifestyle over economic development and offered spirited resistance to the Disney project, much to the surprise of Disney's management. In addition, a Disney theme park had been a spectacular success in Japan, but the Japanese were far more receptive to U.S. culture than many of the French, who, if anything, were lukewarm toward American culture. Although these were important considerations, the experienced business and legal officials at Disney never considered the cultural factors. *See* Jeanne M. Brett, Negotiating Globally 8 (2002). One possible explanation for the failure of the Disney officials to fully consider the cultural factors is that these factors are not present in the company's transactions in the United States, the business environment to which Disney officials were accustomed, and so were ignored in the company's initial forays into the international market.

A second way that differences in culture can affect international business transactions is in negotiating styles. Lawyers are often called on by their clients to negotiate across cultures: The same lawyer may negotiate a sales contract with a German buyer and a joint venture with a Brazilian partner for the same client. Understanding differences in negotiating styles can be advantageous to the lawyer or business executive. On the other hand, failure to understand cultural differences might result in "value being left on the table" – that is, in a deal where both parties are not as well off as they could be if barriers in culture and negotiating styles could be overcome. Cross-cultural negotiation skills have become highly-sought-after skills in the modern age as we have acquired a better understanding of cultural differences.

According to one view, there are certain prevalent cultural categories that are reflected in negotiation strategies and styles: Individualism versus collectivism, egalitarianism versus hierarchy, and low-context versus high-context communications. *See* Brett, *supra*, 15–21. Most countries fall into these categories. Individualist cultures place the interests of the individual above those of the collective; hierarchical cultures, unlike egalitarian cultures, emphasize differentiated social status and deference to social superiors and associate social power with social status; negotiators from low-context-communications cultures emphasize direct, explicit

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communications, whereas those from high-context-communication cultures emphasize indirect communications that must be understood against a complex and often unstated background of social values. *See id.* Negotiators from individualist, egalitarian, and low-context-communications cultures such as China prefer to use indirect negotiation styles that avoid confrontation. Where there is a negotiation between persons with clashing negotiation styles, such as from the United States and China, the difference in styles could lead to poor communication and misunderstanding that result in a less-than-optimal result for both parties. Another, perhaps even greater, concern to lawyers and their clients is that they may be disadvantaged and exploited by the other party's skillful negotiators who are used to working in [a] cross-cultural context. From the viewpoint of the lawyer negotiating on behalf of a client, the goal is to avoid both results that can arise from the pitfalls of culture.

Richard W. Downing, Comment, *The Continuing Power of Cultural Tradition and Socialist Ideology: Cross-Cultural Negotiations Involving Chinese, Korean, and American Negotiators*, 1992 J. Disp. Resol. 105, 125–29

[The author first discusses five Chinese and Korean cultural values that define the stereotypical negotiation behavior of those nationalities: harmony, friendship and affiliation, hierarchy and face, historical experience, and patience. – *Eds.*]

It seems intuitively obvious that negotiations between individuals of different cultures will encounter greater difficulties and take longer to reach agreements. An enormous number of factors may inhibit the settlement of a dispute. For example, parties can never easily communicate their needs to each other, even when they have an extensive background of shared values and experience. In fact, studies show that the greater the similarities of perception and behavior between opposing parties, the more readily they can reach agreement. Therefore, differences in nationality and culture can only add to differences found between individuals within a culture.

A cultural dimension may even exist in the way that parties view the negotiation encounter itself. However, cultural differences *per se* do not interfere with negotiation; instead it is how these differences impact on communication between the parties and on the choice of tactics that causes barriers to settlement. This section tries to ascribe specific difficulties encountered to causes found in the negotiators' cultural heritage and ideology.

A. Harmony

The importance placed on harmony and consensus can create communication difficulties and prevent the development of creative solutions. First,

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part of the ideal of harmony concerns preventing emotional displays and open conflict between the parties. Generally, suppression of emotion can prove valuable, allowing negotiators to focus on issues instead of being distracted by outbursts and shifts of emotion. However, if foreigners do not follow the courteous and respectful norm (*keqi*) expected of them, their behavior can become quite disruptive. Chinese negotiators tend to react negatively to overtly aggressive behavior and may not consider impoliteness as a mere oversight, but as an insult. The common Western approach of admitting the differences between the parties' positions so as to promote "honest confrontation" might easily backfire. Thus, a lack of understanding of the Chinese desire for harmony during talks can cause frictions that may prevent a mutually beneficial agreement.

A second pitfall caused by this desire for harmony lies in the modes of communication used by negotiators. Chinese or Korean individuals may use subtle gestures or oblique suggestions to convey meaning rather than openly stating information or feelings that might cause disruption. For instance, American negotiators may not recognize that silence or lack of eye contact in their opponents need not indicate disapproval. If they acted on their usual interpretation of these appearances, negotiations might founder needlessly. In a more subtle example, Premier Zhou Enlai quoted a poem written by Mao concerning the evanescence of life. This act has since been understood to express Zhou's recognition of his own failing health, a subject he would be uncomfortable to raise openly. Zhou died several years later of cancer. Chinese officials have made other such subtle references that may have an impact on the progress of negotiation; if their American counterparts fail to recognize them, once again settlement may be jeopardized.

The desire for harmony within a negotiating group may also have a negative impact on bargaining outcomes. Investing creative options proves extremely valuable to settling many disputes. However, the requirement of consensus within many working groups stifles individual initiative. This lack of consensus may well explain some of the difficulties and slowness experienced by negotiations involving Chinese and Korean negotiators, but its exact impact remains very difficult to calculate or even detect.

B. Friendship and Affiliation

Although the building of strong relationships has many positive side-effects, the stress placed upon such bonds by Chinese and Korean negotiators may cause misunderstandings and inhibit the reaching of agreements. In terms of positive effects, perhaps the best way to solve the problem of the lack of similar experience and values of the negotiators, even within one culture, is to build a strong working relationship between the parties. The Chinese emphasis on such relationships can also help to save a contract. Because of the long-term bond created during negotiation, an American business partner might not feel that it needs to respond to its counterpart's failure live up to a contract provision. The foreigner can trust her Chinese

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"friend" to make up for any minor shortcomings later, and the American has greater inclination to settle disputes so as not to risk the overall relationship. In fact, in 1987 over fifty billion dollars of trade occurred between the PRC and the United States without a single dispute rising to the level of a formal lawsuit. Despite these benefits, differing views of the nature of the relationship itself and of the necessity for written contracts can cause misunderstandings.

First, differing views of the negotiators' relationship may disrupt an otherwise stable agreement. Individuals who value the Confucian model of friendship perceive obligations on the parties that foreigners may not recognize. For example, the American paradigm of a stable relationship seeks strict compliance and predictability after signing a contract. A Chinese partner, however, might regard a relationship as setting up obligations on the part of the American, and would not hesitate to ask small favors. Such requests, in turn, might arouse irritation in the American or even accusations of bad faith. On the other hand, the notion of friendship might create expectations in the Chinese official of deserving such special favors or attention. Ill feelings might arise if the American fails to fulfill these perceived obligations. . . . [T]he concept of friendship can lead to exaggerated expectations of dependency that, if not satisfied, can cause angry reactions and feelings of having been mistreated.

Differing emphasis placed on the relationship and the written expression of it may also create difficulties. Chinese negotiators tend to trust a working relationship more than a contract or treaty that arises from it. This opposite view of the general Western perspective caused misunderstandings when Zhou Enlai entered negotiations with the United States over the 1954 Geneva treaty governing Indochina, a treaty which the U.S. would not sign. Zhou convinced the U.S. government to agree to unilaterally declare that it would not interfere with the treaty's provisions. Although the United States regarded this action as a mere declaration of policy, the PRC then persistently claimed that the U.S. was bound by the 1954 Geneva agreements. The negotiated settlement came to nothing when the United States changed its policy in 1960 and increased its military presence in Vietnam.

Differing views of the importance of contracts and relational bounds also create difficulties in business negotiations. When bargaining over a contract, for example, Chinese negotiators do not like to consider the possibility of the breakup of the relationship, and if they do agree to assigning responsibilities after a breach, they prefer general, uncertain terms. The standard arbitration clause . . . simply states that both parties must try to correct unsatisfactory results and jointly work out the consequences should the contract fail. Obviously, American businesses regard this kind of general statement as completely inadequate. In addition, each side may waste much time trying to educate the other as to the level of specificity and the ultimate form of the contract. American negotiators in particular find this need for explanation frustrating. Thus, different conceptions of the role of

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contracts, as well as differing ideas on levels of specificity in contracts, can cause barriers to successfully concluding negotiations.

C. Hierarchy and Face

Individuals who hold a concept of hierarchy tend to prefer not to associate with others who have lower status levels, and this preference can prevent the formation of the trusting relationship necessary for successful negotiations. Because lawyers traditionally hold a very low status and were persecuted during the Cultural Revolution along with all intellectuals, perceptions of the status levels of many foreign representatives may hinder negotiation. Although changes since Mao's death made the use of lawyers more legitimate, and the recognition that other cultures may assign status to members in different ways has become more widespread, status consciousness may still limit the ease with which negotiation relationships form.

Ideas of status and face may also affect the ways in which negotiators go about building friendships. Just as important as not injuring another's reputation is the idea of *giving* face: small gestures or comments of respect may fulfill a Chinese negotiator's desire for status recognition. Americans in particular have trouble giving face; although flattery exists between Americans, they often regard it as mere pretense or feel guilty about pumping another's ego. However, failing to show the customary signs of respect will cause offense or inhibit the formation of positive relationships.

NOTES AND QUESTIONS

1. Given the cultural traps identified in the foregoing commentary, why wouldn't it be best for cross-cultural negotiators simply to acknowledge their cultural differences and ask each other to be tolerant? From what you have read, would that overcome the risk of unintended offense?
2. The Chow and Schoenbaum article underscores the significance for lawyers of cultural differences in planning transactions and negotiating agreements. The authors summarize certain prevalent cultural categories: individualism versus collectivism, egalitarianism versus hierarchy, and low-context- versus high-context-communications cultures. They cite the following example of negotiations with the Chinese:

   > A U.S. company had a contract from a German buyer to sell bicycles produced in China. When the first shipment was ready, there was a problem. The bikes rattled. The U.S. buyer did not want to accept the shipment, knowing that they would not be acceptable to the German customer, whose high-end market niche was dominated by bikes that were whisper quiet. What to do? In U.S. culture, the normal approach would be to tell the manufacturer that the rattling bikes were unacceptable and that the problem had to be fixed. In China, such a direct confrontation would be extremely rude and cause much loss of face. Knowing this, the U.S. manager went to the Chinese plant,

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> inspected the bicycles, rode a few, and asked about the rattle. "Is this rattle normal? Do all the bikes rattle? Do you think the German buyer will think there is something wrong with the bike if it rattles?" Then he left. The next shipment of bikes had no rattles (citing JEANNE M. BRETT, NEGOTIATING GLOBALLY 8 (2002)).

The authors then ask the following: Under the suggested approach, when does the U.S. manager find out whether the problem has been resolved? Do you see any other issues with this approach? How would you suggest handling this problem without causing loss of face?

3. Professional competence may require not only a grasp of the characteristic cultural values that specifically animate negotiation behavior, as Richard Downing suggests, but also a deeper understanding of foreign culture, as the following observation suggests:

> In order to understand the East Asian negotiating style, Americans who deal with East Asians should explore the history and culture of East Asia. East Asia has a long history that continues to influence the character and style of the inhabitants today. Among East Asian countries, China has the longest continuous history; in fact, the traditional Chinese culture heavily influenced the development of the entire East Asian culture. In modern East Asian business culture, negotiation approaches are rooted in certain Chinese thoughts and studies dating back more than two thousand years. The negotiation styles of the modern East Asians are largely found in *The Art of War*, a book on military strategy and tactics written by Sun Tzu about two thousand five hundred years ago.
>
> As such, before using the typical American negotiation methods when dealing with East Asians, like "problem solving" or "cooperative negotiation," or "adversarial" or "competitive negotiation," Americans should understand the traditional influences behind the East Asian negotiation practices.

John Chu, The Art of War *and East Asian Negotiating Styles*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 161, 162–63 (2002).

4. Well-informed generalizations about foreign cultural values and behavior, if skillfully employed, can be helpful, even essential, in negotiations and other professional activities. But overgeneralizations or mindless, unnuanced stereotyping of foreigners and the influence of their culture can be risky, even damaging; skillful employment of cultural information requires much experience and refinement. See James K. Sebenius, *Caveats for Cross-Border Negotiators*, 18 NEGOTIATION J. 121 (2002); Jeffrey L. Rubin & Frank E.A. Sander, *Culture, Negotiation, and the Eye of the Beholder*, 7 NEGOTIATION J. 249 (1991) (cautioning against stereotyping and the self-fulfilling prophesy of expecting differences even when they do not exist or are ineffectual).

b. Diplomacy

In recent years, empirical studies have documented the role of culture in intergovernmental negotiations and diplomacy. These studies focus on the extent to which

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cultural-based premises can lead to conflicts in negotiation and advocate a more nuanced conceptualization of culture. The scholars not only take care to distinguish culture from national character and stereotypes but also insist that culture is dynamic.

In the thoughtful and practical commentary that follows, Raymond Cohen shows how different assumptions about bargaining affect diplomatic processes. His thesis is that cultural differences not only persist despite the emergence of a global culture but also have an observable effect on diplomatic negotiation. Comparing two styles of negotiation, his emphasis is "not on culture as a single determinant of behavior but on the effect of bilateral negotiation of the cultural gap (often detectable at the linguistic level) between the negotiating parties." The United States is the "baseline culture" against which other cultures are compared and contrasted, though he adds that "this is not meant to imply that American culture is considered superior or normative." The main point is that even subtle cultural differences can affect diplomatic outcomes. As Cohen notes, for example, the concept of saving face is unlikely to cause trouble in Sino-Japanese relations, but it can certainly be problematic in Chinese negotiations with Americans who are unfamiliar with the concept.

Raymond Cohen, Negotiating across Cultures: International Communication in an Interdependent World 215–18, 222–26 (1997) (reproduced with the permission of the United States Institute of Peace)

Culture has been called "the hidden dimension," unseen, yet exerting a pervasive influence on the behavior of individuals, groups, and societies. . . .

Negotiation theorists' dismissal of the effect of culture springs from the assumption that there is a single, universal paradigm of negotiation and that cross-national differences are stylistic and superficial. . . . [T]wo quite different paradigms of negotiation [are, however, apparent]. One is associated with the predominantly verbal and explicit, or *low-context*, communicatory style of the United States. In a nutshell, it is infused with the can-do, problem-solving spirit, assumes a process of give-and-take, and is strongly influenced by Anglo-Saxon legal habits. When theorists posit a universal paradigm of negotiation (usually involving such features as the "joint search for a solution," "isolating the people from the problem," and the "maximization of joint gains"), they are in effect proposing an idealized version of the low-context, problem-solving model. Notice the instrumental assumptions of rationality that underlie the paradigm: people are part of the problem, not the solution; each problem can be solved discretely; goals are defined in terms of material, not psychic, satisfactions.

. . .

There exists another, quite different paradigm of negotiation just as self-consistent and valid in its own terms as that exemplified by [a] low-context, problem-solving approach. This alternative model, associated with a non-verbal, implicit, *high-context* style of communication, predominates in interdependent societies that display a collectivistic, rather than individualistic, ethos. This paradigm was found to mark the negotiating behavior

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of the non-Western states examined. In contrast to the results-oriented American model, it declines to view the immediate issue in isolation; lays particular stress on long-term and affective aspects of the relationship between the parties; is preoccupied with considerations of symbolism, status, and face; and draws on highly developed communication strategies for evading confrontation.

Putting the two paradigms together in the same room in an intercultural or interparadigmatic encounter produces some interesting reactions. American negotiators tend to be surprised by their interlocutors' preoccupation with history and hierarchy, preference for principle over nitty-gritty detail, personalized and repetitive style of argument, lack of enthusiasm for explicit and formal agreement, and willingness to sacrifice substance to form. They are frustrated by their partners' reluctance to put their cards on the table, intransigent bargaining, evasiveness, dilatoriness, and readiness to walk away from the table without agreement. Non-Western negotiators tend to be surprised by their interlocutors' ignorance of history; preoccupation with individual rights, obsession with the immediate problem while neglecting the overall relationship, excessive bluntness, impatience, disinterest in establishing a philosophical basis for agreement, extraordinary willingness to make soft concessions, constant generation of new proposals, and inability to leave a problem pending. They are frustrated by their American partners' occasional obtuseness and insensitivity; tendency to see things and present alternatives in black-or-white, either-or terms; appetite for crisis; habit of springing unpleasant surprises; intimidating readiness for confrontation; tendency to bypass established channels of authority; inability to take no for an answer; and obsession with tidying up loose ends and putting everything down on paper. Obviously, these are oversimplified depictions, but they do serve to highlight the main points of abrasion in the low-context [and] high-context encounter.

Insistence on the dichotomy may seem overstated in the light of contemporary patterns of interdependence and globalization. But its continuing relevance stems from the existence of an international trend to some cultural *convergence* at the same time as deep-seated *divergence* continues to exist.

. . .

If cross-cultural dissonance can harm a relationship, the converse should be equally true: that cross-cultural synchrony, based on careful attention to the other side's psychological needs, should prove beneficial. This has indeed proved to be so [as in] the example of Senator Mike Mansfield, a superb ambassador to Japan (1977–89). Following a 1981 accident at sea, in which a U.S. nuclear submarine, the *George Washington*, collided with a Japanese freighter, killing two Japanese sailors, passions ran high in Japan. A speedy U.S. naval inquiry, acceptance of liability, and agreement to pay compensation helped defuse the incident. However, the critical step in finally disposing of the affair was taken by Senator Mansfield. Delivering the final report to the Japanese foreign minister, he bowed low according to Japanese custom and apologized in full view of press and television.

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"I wanted to let the whole nation know how sorry the U.S. felt by adopting the Japanese manner of apologizing and being sorry," he said. "I deliberately adopted something the Japanese would understand. It was a small price to pay to bring an amicable settlement."

Unless there are shared interests in reaching an accord, however, and a healthy relationship following its conclusion, no amount of cross-cultural sensitivity will help.

. . .

The salience of "personal chemistry" in international affairs may, of course, be overstated. After all, the ongoing conduct of foreign policy is in the hands of a great many agencies and officials. National leaders and high officials are engaged only intermittently. Nevertheless, consultations at the highest level can play a crucial role. Communication between heads of state and foreign ministers brings information authoritatively and promptly to the attention of their respective governments. Commitments are made, directions indicated, agendas set. Where that communication is easy and unencumbered, it may not be possible to brush aside insurmountable differences, but misunderstanding of the other's intentions and gratuitous complications can be avoided. Moreover, without open channels of communication, opportunities to explore common interests may be missed.

A second factor facilitating harmony was the recognition by the United States that there may be certain points of inviolable dogma that are nonnegotiable as far as a high-context interlocutor is concerned. However, once such axioms are conceded in principle, it may be possible, in a pragmatic fashion, to arrive at a satisfactory agreement on concrete issues. This approach involves true cross-cultural accommodation, in that it reconciles the deep-seated needs of both sides.

It was this approach that underlay the 1962 Kennedy-Mateos accord paving the way for a resolution of the Chamizal dispute. Once the United States recognized the justice of the Mexican claim (conceded by international arbitration in 1911), Mexico was prepared to be utterly pragmatic in its practical implementation. An identical strategy was followed in 1973, when President Nixon committed the United States to a "just solution" of the Colorado River problem, thereby acknowledging the responsibility of the United States to ensure that usable *water* reached Mexican farmers. Similarly, in the 1969 Okinawa bases negotiations the United States wisely conceded the principle of "home-level reversion" – the return of the Ryukyu and Bonin islands to Japanese administration – thereby guaranteeing both continued U.S. use of the bases and future military cooperation.

The 1972 Shanghai communiqué was yet another example of a generalized framework beneath the philosophical awnings of which pragmatic cooperation could proceed. [The Shanghai communiqué opened up relations and led to formal diplomatic relations between Beijing and Washington, even in the midst of the Chinese Cultural Revolution.] In this case, remarkably, points of difference were not plastered over. But the two countries' opposition to hegemony (that is, Soviet ambitions) was proclaimed and the yawning gap over the Taiwan issue was bridged with the ingenious

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U.S. acknowledgment "that all Chinese on either side of the Taiwan Straits maintain there is but one China."

A final ingredient in reaching agreement with high-context negotiators was scrupulous regard for their heightened sensitivity in matters of face. Any whiff of humiliation would doom an agreement to perdition. To obtain the substance of accord it was essential to preserve appearances: to maintain – if necessary, contrive – the impression that the accord was an achievement of the other side, concluded on the basis of mutual respect and equal standing. Striking examples of this pattern were found in the 1971 Japanese devaluation and the 1982 Mexican loan. In the first instance, a 17 percent devaluation of the yen was impossible, but 16.9 percent devaluation was acceptable. In the second case, Mexico was ready to receive a lower effective price for its oil than it could otherwise have obtained, because it rested on a face-saving arrangement. The vital importance of face was also observed in the 1971–72 talks with China, for example, in the terms of the invitation to President Nixon; and in the 1973 negotiations for a cease-fire following the Yom Kippur War, when United Nations checkpoints on the Cairo–Suez road obscured the reality of the blockade of the Egyptian Third Army by Israeli forces. Finally, although it was not always feasible, something unacceptable as an explicit agreement might be palatable as an informal understanding. Over the years, many areas of cooperation, especially with Mexico and Egypt, have been assisted by this expedient. The February 1995 peso rescue package is an example. Political concessions were made by Mexico, but not in the main financial agreement.

. . .

[C]ross-cultural insight is not a panacea or substitute for consonant interests. Furthermore, prior to [a] grasp of the cultural context must come the realization that negotiations do not take place in a vacuum. If negotiators are to succeed they must first have a good feel for the personal abilities, requirements, and freedom of maneuver of opposing delegates, as well as the political strengths and weaknesses, needs, and constraints of the government they represent.

Provided these reservations are borne in mind, there are certain obvious lessons to be drawn from this project. I present them here (for the benefit of the low-context individual faced by a high-context adversary) in the form of ten recommendations for the intercultural negotiator[:]

1. Prepare for a negotiation by studying your opponents' culture and history, and not just the issue at hand. Best of all, learn the language. Immerse yourself in the historical relationship between your two nations. It may explain more than you might expect.

2. Try to establish a warm, personal relationship with your interlocutors. If possible, get to know them even before negotiations get under way. Cultivating contacts and acquaintances is time well spent.

3. Do not assume that what you mean by a message – verbal or nonverbal – is what representatives of the other side will understand by it. They will interpret it in the light of their cultural and linguistic background, not

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yours. By the same token, they may be unaware that things look different from your perspective.

4. Be alert to indirect formulations and nonverbal gestures. Traditional societies put a lot of weight on them. You may have to read between the lines to understand what your partners are hinting at. Do not assume that they will come right out with it. Be ultra-careful in your own words and body language. Your partners may read more into them than you intend. Do not express criticism in public. Do not lose your temper. Anything that leads to the loss of face is likely to be counterproductive.

5. Do not overestimate the power of advocacy. Your interlocutors are unlikely to shift their positions simply in response to good arguments. Pressure may bring short-term results, but risks damaging the relationship. Facts and circumstances speak louder than words and are easier to comply with.

6. Adapt your strategy to your opponents' cultural needs. On matters of inviolable principle, attempt to accommodate their instinct for prior agreement with your preference for progress on practical matters. Where haggling is called for, leave yourself plenty of leeway. Start high, bargain doggedly, and hold back a trump card for the final round.

7. Flexibility is not a virtue against intransigent opponents. If they are concerned to discover your real bottom line, repeated concessions will confuse rather than clarify the issue. Nor is there merit in innovation for its own sake. Avoid the temptation to compromise with yourself.

8. Be patient. Haste will almost certainly mean unnecessary concessions. Resist the temptation to labor under artificial time constraints; they will work to your disadvantage. Allow your opponents to decide in their own good time. Their bureaucratic requirements cannot be short-circuited.

9. Be aware of the emphasis placed by your opponents on matters of status and face. Outward forms and appearances may be as important as substance. For face-conscious negotiators, an agreement must be presentable as an honorable outcome. On the other hand, symbolic gains may compensate them for substantive losses.

10. Do not be surprised if negotiation continues beyond the apparent conclusion of an agreement. Implementation is unlikely to be automatic and often requires continuing discussion. To assist compliance, it may help to build a system of graduated, performance-based incentives into the original contract.

NOTES AND QUESTIONS

1. Do American assumptions about negotiation differ markedly from those of diplomats in Asia?
2. In what ways does the concept of saving face affect international diplomacy? How should individuals preparing for meetings ensure that they are aware of sensitivities that exist for the other parties?

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3. Does item 7 in Raymond Cohen's list of diplomatic negotiations spell doom for efforts to bridge major policy differences, such as the effort in the first decade of the twenty-first century to negotiate an end to North Korea and Iranian development of nuclear weapons? Or does item 7 make better sense in the wider context of the entire list of recommendations?
4. Carol Gilligan has written that moral reasoning is gendered. In her influential book, In a Different Voice, she contends that women reason more in terms of harm done to relationships than in terms of abstract principles. Assuming her argument is correct, in what specific ways might gender affect diplomatic relations? Do women throughout the world reason in the same way, as Gilligan suggests, or is reasoning itself culturally conditioned?
5. The economist and diplomat John Kenneth Galbraith famously observed that "there are a few iron-clad rules of diplomacy but to one there is no exception: When an official reports that talks were useful, it can safely be concluded that nothing was accomplished." Does the sugar-coated parlance of diplomacy, with its euphemisms, reinforce or overcome cultural misunderstandings?
6. Successful diplomacy normally involves acts as well as communications, of course. Social hospitality and gift-giving have nearly always been instrumental, from the potlatch ceremonies of the Kwakiutls in Canada to the ritualistic swapping of gifts among heads of state today. Scientific evidence suggests, for example, that the Wari empire, which dominated much of Peru between 600 and 1000 A.D., may have relied on a form of diplomatic party-giving featuring a potent mix of corn beer and hallucinogens. See Andrew Curry, *Trophy Skulls and Beer*, Archaeology, Jan.-Feb. 2010, at 38 ("Mountain-top palaces might have functioned like embassies, and could have played a role in a soft-power effort to impress the neighbors with great parties." *Id.* at 39.).

3. Cultural Identity Paradigms

As the following reading makes clear, cross-cultural sensitivity and experience may not be enough in the face of deep-seated, determinative cultural identities. Such identities often perform a positive function in enriching and stabilizing people's lives, but, as we shall see, they also may constrain legal communications, cheapen cultural values, and inhibit options for constructively resolving cultural issues. For example, cultural identities may lead to expansive definitions of a nation's cultural patrimony over archaeological material. It may also limit collaboration in resolving disputes concerning illegally exported material. Entrenched national identities may also encourage unfairness in the sports area, just as religious identities may discourage ecumenical progress in alleviating poverty, social injustice, and environmental degradation. The following reading undertakes the ambitious project of examining the implications of cultural identities for the world order.

Jacinta O'Hagan, *Conflict, Convergence, or Coexistence? The Relevance of Culture in Reframing World Order*, *in* Reframing the International: Law, Culture, Politics 187–88, 198–210 (Richard Falk, Lester Edwin J. Ruiz & R.B. Walker eds., 2002)

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Having now moved into the twenty-first century[,] the calendar turns on a thousand years of human history, a period that has seen technological and social changes that have transformed the social and physical world in which humanity lives. What is the relevance of culture to the world order that is emerging from these processes of transformation? "Culture," it seems, is prevalent in contemporary political commentary and analysis. In many contexts, cultural identity is perceived as defining the parties to conflict. For instance, in the late 1990s, conflict in Indonesia revealed for some the cultural "faultlines" between that state's ethnically and religiously diverse peoples. There were similar concerns with regard to ongoing cultural tension between Muslim and Hindu communities in India and Pakistan. In the Balkans, Kosovo presented a harrowing image of a seemingly ancient and irreconcilable conflict between the region's Albanian Muslim population and the Orthodox Serbs. The disintegration of the former Soviet Empire into ethnic and religiously diverse states produced tension in the Caucasus, in Central Asia, and in Russia itself. In Africa, violence between Hutu and Tutsi people led to the deaths of tens of thousands of people in 1994. Rivalry between Islam and the West appears to pervade the politics of the latter decades of the twentieth and early twenty-first century. There has also been wide debate about "Asian values" as a system that both empowered the dynamic states of the East Asian region and distinguished them from the West. There is, then, a prevalent image of culture as a force that distinguishes and divides ethnic and religious communities, of culture as a source of conflict. This is the pessimistic message underlying Samuel Huntington's "clash of civilizations" image of the post–Cold War world order. But is this the only way to view the influence of culture on contemporary world politics?

. . . The nature of culture and its relevance to contemporary world order is deeply contested. This is not surprising; culture is a broad and complex term that can be interpreted in many ways.

. . .

. . . Perhaps the most prominent and contentious example of the recent revival of interest in culture's role in world order is Samuel Huntington's work on the "clash of civilizations." In this thesis, Huntington suggests that civilizational identity is becoming the organizing principle in the post–Cold War world order. Although Huntington's argument is a controversial one that has been widely contested, it provided something of a centrifugal point around which the arguments relating to culture and civilizations spun in the 1990s. The imagery and language employed in his discussion of "cultural clashes," fault lines, and tectonic plates have powerfully entered into the vocabulary of contemporary academic and political commentary.

Huntington has argued that the end of the Cold War signaled the collapse of ideological identification as a central feature of international relations. However, he also saw modernization and technology as forces that are weakening the role of the nation-state as a political community and enhancing the role of cultural and religious identity in politics. These

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processes enhance the sense of identity between culturally similar groups and heighten the sense of difference from others. For Huntington, these developments are expressed in economic and political cohesion within civilization groups and increased tension between civilizational groups. In essence, Huntington's thesis is premised on the belief that differences accentuated by proximity accentuates conflict. Culture, as expressed through civilizational communities and alliances, structures relations between the smaller political units or communities. This perspective shifts the focus away from states as the foundation of the international and world order toward broader, culturally based communities. It does not argue that states are no longer significant actors in world politics, but it does suggest that they are becoming the agents of civilizational identity, with their interests increasingly defined along cultural lines.

This perspective projects an image of world order based on the interaction of a number of largely incommensurable civilizations. These are seen as dynamic, in that they rise and fall and are subject to redefinition. However, while Huntington acknowledges that civilizations blend and overlap, he sees the differences between them as real, if not always sharply defined. Most significantly, civilizations are seen as largely incommensurable; their capacity to understand each other is limited. Huntington rejects any suggestion that humanity forms, or is converging toward, a single, universal civilization. Instead, world order comprises a number of coexisting but antagonistic civilizations. . . .

The "clash of civilizations" provides one *reading* of the impact of globalization and modernization of the modern world. However, this perspective suggests that increased interaction raises awareness of the differences between civilizations and invigorates animosities rather than enhancing understanding and cultural convergence. Furthermore, this perspective suggests that modernization does not homogenize societies; modern societies share commonalities but remain culturally distinct. In particular, modernization does not necessarily mean Westernization for Huntington. He firmly rejects the idea that the end of the Cold War will produce the universalization of Western liberal democracy. For Huntington, the norms and values that define the West also distinguish it from other civilizations, making it unique rather than universal. Huntington argues that the spread of Western values and institutions, such as democracy, has been a superficial process, predicated on the strength of the West as a military and economic power, not the innate relevance of these values to all other societies. Huntington's analysis led him to conclude in 1996 that the promotion of Western norms and values as universal is false, immoral, and dangerous. It is false because Western values are not universal. It is immoral because values could only be effectively spread through the projection of force, suggesting some form of imperialism. It is dangerous because it posed the risk of counterreaction. In contrast, the "clash of civilizations" thesis suggests civilizations should pursue policies of consolidation at home and noninterference with other civilizations abroad.

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. . . Huntington's analysis of cultural world order has been widely debated and contested. A central criticism is that it overemphasizes conflict between peoples of different civilizations. The thesis allows very little consideration of the constructive and cooperative engagements between civilizations that can be a source of growth and development. In addition, there is little space for exploring the points of commonality and shared experience that link groups and societies across civilizational boundaries and concerns for issues such as management of the global commons or the rights of indigenous peoples.

The "clash of civilizations" image of the cultural world order has also been criticized for its tendency to underplay tensions and conflicts between people from the same civilization. For instance, Huntington's treatment of Islam has been widely criticized as underrating the tension between Muslim societies and exaggerating the influence of radical Islamic elements in these societies. In part, this derives from the tendency of this approach to accentuate the homogeneity of civilizations, portraying them as rather rigid, hermetically sealed entities. This is despite Huntington's definition of civilizations as dynamic. The essentializations of civilizations facilitates viewing tensions in relations between them as primordial and inevitable. This can convey the sense that culture is itself the source of conflict, rather than one factor in the interpretation of a variety of issues in relations between different civilizations.

Cultural World Order as Convergent

. . . The "clash of civilizations," however, presents only one set of assumptions in contemporary political commentary about the nature of cultural world order. This model of world order as a plurality of incommensurable civilizations is particularly contested by liberal critics who convey a much stronger sense of the convergence of societies toward the universal, modern civilization. For them, the increased interaction generated by modernization and globalization is producing powerful forces that encourage the integration of the world along a Western, liberal model. One of the best-known contemporary liberal proponents of this alternative model of world order, one often cited in contrast to Huntington, is Francis Fukuyama. In his "end of History" thesis, Fukuyama projects an image of world order comprising different cultures, but in which humanity as a whole is engaged in a single, civilizing process of development and modernization. Human society is perceived to be on a journey of ideological revelation, the process of History. This journey is toward the most satisfying and efficient political and economic system, a journey that has culminated in the concepts underlying the system of liberal democracy, the "end of History." The West is presented by Fukuyama as at the vanguard of this process, defeating competing models of modernization, such as Marxist-Leninism. Through this victory, the West is perceived as establishing the norm, presenting the standard toward which other societies are moving.

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Fukuyama's understanding of this process of human development is premised on a belief that economic modernization and technical change are integrative and homogenizing forces: "all countries undergoing economic modernization must increasingly resemble one another." Over time, these changes tend to "blur the boundaries between civilizations and promote a homogenous set of political and economic institutions among the world's most advanced countries." Furthermore, he argues, economic development encourages "a certain degree of value change in a Western direction."

. . . Fukuyama then acknowledges the persistence of culture, even recognizing some resistance to homogenization at the level of cultural identity. However, unlike Huntington, he does not assume cultural difference necessarily leads to conflict. Furthermore, his discussion focuses on national rather than broad civilizational cultures. In fact, he attempts to eradicate such notions as a single Asian culture as too simplistic. However, he continues to assume that the institutional models of Western liberal democracy define the parameters within which all societies will evolve. Therefore, he continues to assume a broad process of convergence toward Western institutions and values.

The liberal confidence in modernization as a process that leads to convergence with the Western model was further enhanced by the crisis that befell Asian economies in 1997–1998. The crisis demonstrated for scholars such as Fukuyama that the Asian model of development did not provide a durable and universal model. Cultural differentiation might obstruct but ultimately will not inhibit institutional and, presumably, ideological convergence toward a liberal political and economic system. Consequently, the impression remains of a single civilizing process with "the West" at its forefront.

Cultural World Order as Coexistence

. . . A more pluralist cultural world order can be found in the "international society" perspective. The vision of world order drawn from the work of authors such as Martin Wight, Hedley Bull, and Adam Watson is pluralist in that it sees the current world order as characterized by a global international society that encompasses a variety of civilizational identities. However, while it is multicivilizational in membership, they conceptualize this modern international society as an outgrowth of Western civilization, and its emergence is interwoven with the political development of the European states system. The West has provided the normative and institutional framework of modern world politics. Through the structures of international society, it has created a single, global political system and the context within which all civilizations function and interact.

These scholars, however, do not argue that international society has created civilizational homogeneity. Within the context of international society, the identity of various civilizations, and particularly the West, remains distinct. The West occupies a privileged position within this society

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that was constructed around the assumptions, interests, and experiences of Western civilization. The West set the standards, first of race, then [of] religion, and subsequently of governance, which other societies were required to meet to obtain entry into international society. The image of cultural world order that emerges from this analysis is a pluralist but also a hierarchical one, with Western civilization occupying the apex of this hierarchy as the hegemonic or dominant force.

A sense of civilizational hierarchy is even more evident in the perception of cultural world order that we find in the work of Edward Said. In Said, we find a world order that has been structured by the imperialism of the West, used here primarily to represent the imperial powers of Europe and the United States. Said perceives the empires of the nineteenth and early twentieth century [as] establishing a sense of civilizational hierarchy that was constituted, reinforced, and legitimated through the deployment of images of the non-Western societies as less rational, less advanced, and less capable than the West. This hierarchy is perceived as ongoing, perpetuated through a system of cultural hegemony in the postcolonial period in which the projection of law and the maintenance of order and stability provided the basis for a different form of civilizing mission. This continued to legitimate the West's intervention in, and control of, the political and economic affairs of the non-West.

For Said, then, the projection of Western norms and institutions as universal masks the cultural hegemony of the West. However, Said's cultural world order is not one that assumes a convergence with the dominant culture. Instead, it suggests that a gap has been maintained between the dominant and the dominated. Therefore, Said's cultural world order, like Huntington's, is pluralist and critical of Western universalism as a mask of hegemony. However, Said's pluralist world order does not assume that civilizational identities are necessarily segregated and hostile. Difference does not inevitably mean hostility for Said. Rather, he portrays cultures as dynamic, hybrid, heterogeneous, constantly changing in interaction with one another. Said seeks to escape the hegemonic structure of the current world order to achieve one based on mutual respect between cultures, while maintaining an underlying respect for broad human goals.

The Implications of Differing Conceptions of World Order

. . . Identifying differing conceptions of cultural world order is not just an intellectual exercise. How we view the cultural world order is one of the perspectives that frames the way in which we read political interaction. This is not to argue that the cultural perspective is the only or even necessarily the dominant factor that shapes political perceptions and assumptions. However, assumptions about cultural interaction have significant and differing implications for how the possibilities for political interaction are perceived. This can be illustrated by considering how the three broad models of cultural world order identified in the preceding discussion – the

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models of conflict, convergence, and coexistence – could provide different readings, analysis, and prescriptions for issues in world politics. We will briefly consider three significant issues in current political debates[:] the issues of ethnic nationalism, globalization, and human rights.

Conceptions of Cultural World Order and Ethnic Nationalism

At the outset, we noted that cultural identity is often associated in contemporary world politics with issues of ethnic nationalism and religious revivalism. In cases such as the emergence of ethnic nationalism during the 1990s in locations such as Kosovo, Bosnia, and in Chechnya and Dagestan, local cultural identities not only became important political identities but [also] were significantly articulated in the context of broader civilizational identities – Islamic and Slavic or Orthodox. . . . This can produce the perception of cultural identity itself being the source of conflict between such communities. This can have serious consequences for the ways in which we might negotiate conflicts in such contexts. Focusing on culture as the essential source of conflict can inhibit dispute resolution and even exacerbate tensions further. It can distract attention from other sources of dispute, based perhaps on issues relating to resources or the distribution of political power that may be interwoven with identity politics. If conflicts over economic or political issues are interpreted as essentially collisions of civilizations based on primordial differences, they are transferred from the realm of the negotiable and the solvable into that of perpetual unsolvable conflict. Furthermore, focusing on the irreconcilability of civilizations, rather than on their techniques for coexistence, can become a self-fulfilling prophecy. The rhetoric of the inability of peoples who see themselves as culturally distinct to peacefully coexist can generate and legitimate policies such as "ethnic cleansing," which can decimate previously heterogeneous communities.

An alternative reading of ethnic nationalism, such as in the Balkans or the Caucasus, can be found in the more liberal convergence perspective. From this perspective, these forces may be treated as temporary and transitional phenomen[a] that do not seriously challenge the broader long-term processes of development. This may inhibit consideration of the importance attached by local communities to local values and beliefs, which can in themselves provide powerful and immediate forces that can shape political interaction, as was the case in Rwanda in 1994. A lack of sensitivity to the cultural context in which policies or institutions have evolved, or to which they will be applied, can produce friction, misunderstanding, resentment, or even the failure of such policies and institutions. Furthermore, the processes of development that the liberal perspective identifies with progress are not universally accepted as positive and desirable. For some, they are associated with the continuing projection of Western control over the non-West. Voices from the developing world have argued that liberal standards are a form of cultural imperialism imposing Western standards under the guise of universal standards.

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What of those who conceptualize cultural world order as pluralist and potentially cooperative, how would this perspective view the issue of ethnic nationalism and religious revival? In Edward Said's work there is an effort to find a path between cultural relativism and cultural hegemony. For Said, while nationalism has played a significant role in achieving human emancipation from absolutism and imperialism, there is a danger that these liberating energies could be strangled by narrow, essentialized, or chauvinist forms of nationalism, or "nativism," which continue to reinforce divisions. For Said, while the development of national consciousness is the necessary first stage of anti-imperialism, true liberation requires movement onward from national to "social consciousness." Without such a transformation, national consciousness can produce fundamentalism and despotism rather than liberation. It can produce an essentialized sense of homogeneous and authentic traditions that can be as oppressive as the essentialized images of weakness and inferiority that were projected during imperial control. Said rejects nationalist separatism and triumphalism in favor of seeking a community among cultures and peoples. A key question here is how one attains the conditions of trust and dialogue such a community requires. How can these conditions be achieved in relationships such as between Palestinians and Israelis or ethnic Albanians and Serbs in Kosovo, where the communities have become scarred by fear and insecurity through experiences of violence?

Conceptions of Cultural World Order and Globalization

A second central debate in world politics at this point in time is whether world order is converging or diverging as a result of globalization. How might perceptions of cultural world order frame positions in this debate? An image of world order that assumes the "convergence" of different civilizational identities perceives globalization as enhancing communication and interdependency between different civilizational groups, facilitating institutional and normative homogenization toward the dominant model of modernization. Societies become more similar. While basic cultural differences may remain, these do not impede political, economic, and some measure of normative homogenization. In contrast, an image that perceives the cultural world order as innately conflictual would view the processes of globalization as raising the level of intercivilizational contact, exacerbating tensions between societies from different civilizational identities and enhancing the cohesion within. From the perspective of the pluralist who seeks to encourage coexistence rather than conflict, globalization may be seen as a series of processes that increase contacts and interdependencies but generate a significant resurgence of identity politics, an arena in which civilizational identity becomes increasingly important, but also one in which these identities increasingly intermingle. For Robert Cox, as the material boundaries of civilizations become increasingly mingled in the contemporary world, conceptualizing civilizations as analogous to territorial communities becomes less relevant. Rather than seeking to contain

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this intermingling through policies that encourage civilizational homogenization and enhanced cohesion, which Cox views as less and less feasible, he accentuates the need for mutual comprehension and dialogue between civilizational identities as paramount for world order. The establishment of a nonhegemonic pluralist world order in this context requires dialogue and mutual respect among different civilizational identities.

Each of these perspectives might provide a slightly different understanding of the processes of regionalism that forms one facet of the globalization debate. For the convergence theorists, the growth of regional arrangements such as the European Union (EU), the North American Free Trade Agreement (NAFTA), [the] Association of South East Asian Nations (ASEAN), and [the] Asia Pacific Economic Cooperation (APEC) is a function of the growing interdependence of societies and their tendency toward integration on an economic and, to some degree in the case of the EU, a political level. Regionalism is a stepping stone for globalization. For Fukuyama, the EU demonstrates the feasibility of moves toward economic integration and the evolution of a pacific union in states prepared to dismantle national boundaries in the pursuit of peace and prosperity. However, for the perspective that emphasizes conflict, regionalism does not signal convergence, but fragmentation. It is a reaction to globalizing trends, with societies resisting universalizing tendencies by strengthening their cultural identity within larger blocks. Huntington, for instance, argues that cooperation is most likely to succeed within, rather than across, civilizational communities. Therefore, the prospects for the EU, based on a homogenous Western civilizational community, are anticipated to be much stronger than those of ASEAN, a regional organization that includes members from a number of different civilizations.

From a more positive pluralist perspective, Richard Falk has reflected on the potential for regionalism to act as a site of resistance to the negative impacts of globalism, which include the relaxation of controls and codes of conduct on multinational corporations and transnational financial institutions, as well as increasing pressure of welfare and labor standards. Regionalism might act as a site for the promotion of positive globalism, in the form of world governance structures that promote sustainability, human rights, development, and demilitarization, while preserving a measure of cultural diversity. Falk acknowledges, however, that to date, regionalism has not necessarily fulfilled this potential, acting in a number of cases to affirm some of the negative dimensions of globalization.

Conceptions of Cultural World Order, Human Rights, and Intervention

A third set of significant issues in contemporary debates on world politics is that of human rights and the efficacy of humanitarian intervention. While there is now widespread commitment among states to the UN conventions on human rights, there is a lack of consensus on how the concepts of human rights should be interpreted and applied. For some, human rights represent the basic, universal principles that protect and

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respect the dignity and welfare of all humans, regardless of their culture. For others, the human rights regime as it is currently structured reflects the priorities and norms of a dominant culture, the West. It has been argued, particularly, by commentators such as Malaysia's President Mahathir, that the current human rights regime is not sufficiently sensitive to the diversity of social, economic, cultural, and political realities that prevail in different countries. Instead, human rights are often seen to represent Western values, pursued at times to further Western economic and political goals. This is particularly with respect to the emphasis that the West places on the rights of the individual over the rights of the community and on political and civil rights over social and economic. The UN Conference on Human Rights in Vienna in 1993 addressed this issue when the representatives of Asian governments such as Indonesia and China took a strong stand in articulating the need for the human rights regime to respect a variety of cultural perspectives. The position of regional governments in this respect was outlined in the Bangkok Declaration issued just prior to the Vienna Conference.

The human rights debate is a broad and multidimensional one. It was of central importance to politics of 1999, particularly with reference to the crises in Kosovo and in East Timor. In both cases, elements of the international community, led by Western states, justified intervention into Yugoslavia and Indonesia on the grounds of gross violations of human rights. How might different perspectives on the nature of cultural world order influence analysis of these issues? An analysis based on the "clash of civilizations" might argue that intervention in both disputes was premised on a misguided belief in Western "universalism" that projects Western interpretations of norms and values, such as human rights, as universal. Such a perspective would suggest that norms and values are culturally relative. Furthermore, this perspective might suggest that the conflicts in the Balkans and in East Timor were themselves a product of conflictual relations between civilizational identities. In this context, intervention could be read as the interference by the West in the affairs of another civilizational community in an effort to project Western norms and values.

From the perspective of those who see the cultural world order as a convergent one, these interventions could be viewed as marking the progressive emergence of universal norms and values. For instance, the liberal internationalist perspective articulated by British Prime Minister Tony Blair during the early stages of the NATO intervention in Kosovo presented the international community led by the West as having both an interest and a duty in promoting new norms of sovereignty and intervention to promote a more united peaceful and ethical world order. One element of this new norm of sovereignty is that the principles of noninterference must be qualified by considerations of the way in which states treat their citizens regardless of their particular civilizational identity. In this context, it is noteworthy that intervention in both Kosovo and East Timor was undertaken by Western or Western-led forces in order to protect non-Western

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populations. This could suggest that "civilizational rallying" was not the chief motivation behind the measures taken. Rather, these "human rights" interventions could be perceived as signaling the convergence of different civilizational identities toward the upholding of common norms and values.

However, those who seek to cultivate a more cooperative and egalitarian cultural world order might read these instances of humanitarian intervention with some skepticism. As noted above, while there is a large measure of agreement on the principle of the existence of human rights, there is less consensus on the interpretation and application of these principles. For instance, as noted above, there is a sense that while Western norms and values have an important contribution to make to the universal principles of human rights, the West's interpretations privilege some values over others. Furthermore, the West itself has been selective and inconsistent in its application of these principles, thus undermining the sense of a genuine evaluation of common norms and values. In particular, there is a concern that humanitarian intervention tends to be pursued when it serves the best interests of the most powerful.

In the case of Kosovo, intervention could be interpreted not only as seeking to protect human rights, but also as a means of asserting Western hegemony over a smaller and non-Western state. In East Timor, some disquiet has been voiced in Indonesia and Malaysia with regard to the perceived aggression of the Australian troops, with Australia perceived as acting as an agent for Western hegemony, a "regional deputy sheriff" to the U.S. global policeman. Advocates of a pluralist but nonconflictual cultural world order highlight the necessity for an order that is nondiscriminatory and operates on the basis of equal respect for all participants. This perspective, while valuing the establishment of universal principles to be protected by concerted action from the international community, would advocate that humanitarian interventions be pursued on a consistent, nonselective basis. . . .

Conclusion

Examining assumptions about culture therefore does form an important aspect of the broader project of reframing world order. Important questions surround the issue of how we think about culture. For instance, assumptions about the relevance and role of culture and of cultural identity are ever more prevalent in the politics of states today. However, culture is not something that should or can be examined simply at the level of states. Assumptions about culture and cultural identity can also shape politics within states and at transnational levels. Recognition of a significant relationship between conceptions of civilizational identities and broader assumptions about the nature of the cultural world order is important for studies of world politics as we enter a new millennium. It suggests we need further consideration and investigation of how these assumptions may frame perceptions of the possibilities for global political interaction.

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Assumptions of incommensurability in relations between civilizations, as found in Huntington's analysis, could lead to policies of consolidation and homogenization within broad cultural communities, and the pursuit of self-regarding rather than cosmopolitan policies and behavior without. Conversely, assumptions of strong universalist tendencies in civilizational interaction, as found in Fukuyama's work, could lead to policies that accentuate and promote perceived commonalities or potential for these, but perhaps disregard important areas of cultural, social, and political difference.

To assume that it is feasible, and desirable, to establish a cultural world order that is pluralist but not hierarchical challenges policymakers to seek genuine, cross-cultural global dialogue. This in itself is a daunting task. It demands that cultural communities are seen as being distinct but not necessarily immutable, and seen as social constructions rather than essentialized as fixed and given. It encourages policies and strategies that recognize the salient cultural differences, but also strive to identify points of commonality between cultures. Is this an unrealistic approach? It certainly presents a goal that will be challenging and difficult to meet. However, it is perhaps no less a realistic perspective than those that accentuate conflict to the neglect of cooperation and commonality, or convergence to the neglect of significant and meaningful differences. As we move toward a new millennium in which assumptions about culture will continue to powerfully influence our understanding of world order, we might do well to keep in mind Edward Said's observation:

> No one can deny the persisting continuities of long traditions, sustained habitations, national languages and cultural geographies, but there seems no reason except fear and prejudice to keep insisting on their separation and distinctiveness, as if that was all human life was all about. Survival in fact is about the connections between things.

NOTES

1. Samuel Huntington summarized his clash-of-civilizations theory in *The Clash of Civilizations*, 72 Foreign Aff., Summer 1993, at 22 ("It is my hypothesis that the fundamental source of conflict in this new world will not be primarily ideological or primarily economic. The great divisions among humankind and the dominating source of conflict will be cultural. Nation states will remain the most powerful actors in world affairs, but the principal conflicts of global politics will occur between nations and groups of different civilizations. The clash of civilizations will dominate global politics. The fault lines between civilizations will be the battle lines of the future."). But Daniel Chirot, in *A Clash of Civilizations or of Paradigms?* 16 Int'l Soc. 341 (2001), argues that the so-called clash of civilizations is actually the product of uneven modernization. He describes the resistance to modernization as "the hallmark of the most intense cultural clashes in the contemporary world." *Id.* at 356. He concludes on the following sobering note:

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> [T]he most bitter clashes of competing cultures will not be mostly between cultures at different evolutionary stages of development, because existing gaps can be closed, as they have been in many cases in the past. Rather, we can predict that both the Huntingtonians and postmodernists are wrong, and that the most severe, irreconcilable cultural clashes will be within societies, between different ideas about how to continue modernization, what to reject and what to accept. We also know that within any society, when the wrong side wins, tragedy will ensue.

Id.

2. When we consider cultural issues, we must be careful to distinguish theory, particularly grand theory, from belief and practice. For example, the global public seems to be skeptical about Samuel Huntington's sweeping clash of civilizations. In an extensive poll of more than twenty-eight thousand people in twenty-seven countries, a BBC poll found that some 56% of all respondents rejected an inevitable conflict between the Islamic world and the West. Perhaps most significantly, 52% attributed ongoing tensions to political powers and interests rather than to religion or culture. On average, three-quarters of the public rejected the clash of civilizations thesis in Canada, Italy, and the United Kingdom. BBC News, BBC World Service POLL (Feb. 19, 2007).

B. Cultural-Legal Interaction

The *Yahoo!* case at the beginning of this chapter introduced the cultural dimension of legal disputes, dramatizing the challenge to legal systems and the transnational principle of comity when cultural values collide. The readings that followed further examined the cultural dimension of dispute resolution, through Japanese cultural predispositions and through legal discourse, with its own risks of conflict between cultural values, in the contexts of diplomatic and business negotiations. Compounding the challenges we face in a world that is both multicultural and globalizing is, as we have seen, the lack of agreement on a definitive interpretation of cultural diversity and on the implications of cultural identity for world order.

This section shifts our focus away from the cultural dimension of both private and public transactions, and away from the overarching process of world ordering, which often involve conflicts between fundamental cultural values. Although we have already observed generally the interaction of law and culture, we will now focus more sharply on the intersection of cultural values and legal prescriptions.

1. Legal Protection of Cultural Values

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)

Justice O'Connor delivered the opinion of the Court.

This case requires us to consider whether the First Amendment's Free Exercise Clause prohibits the Government from permitting timber harvesting in, or constructing a road through, a portion of National Forest that has traditionally been used for religious purposes by members of three

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American Indian tribes in northwestern California. We conclude that it does not.

I

As part of a project to create a paved 75-mile road linking two California towns, Gasquet and Orleans, the United States Forest Service has upgraded 49 miles of previously unpaved roads on federal land. In order to complete this project (the G-O road), the Forest Service must build a 6-mile paved segment through the Chimney Rock section of the Six Rivers National Forest. That section of the forest is situated between two other portions of the road that are already complete.

In 1977, the Forest Service issued a draft environmental impact statement that discussed proposals for upgrading an existing unpaved road that runs through the Chimney Rock area. In response to comments on the draft statement, the Forest Service commissioned a study of American Indian cultural and religious sites in the area. The Hoopa Valley Indian Reservation adjoins the Six Rivers National Forest, and the Chimney Rock area has historically been used for religious purposes by Yurok, Karok, and Tolowa Indians. The commissioned study, which was completed in 1979, found that the entire area "is significant as an integral and indispensible part of Indian religious conceptualization and practice." Specific sites are used for certain rituals, and "successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting." . . . The study concluded that constructing a road along any of the available routes "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief system and lifeway of Northwest California Indian peoples." Accordingly, the report recommended that the G-O road not be completed.

In 1982, the Forest Service decided not to adopt this recommendation, and it prepared a final environmental impact statement for construction of the road. The Regional Forester selected a route that avoided archeological sites and was removed as far as possible from the sites used by contemporary Indians for specific spiritual activities. Alternative routes that would have avoided the Chimney Rock area altogether were rejected because they would have required the acquisition of private land, had serious soil stability problems, and would in any event have traversed areas having ritualistic value to American Indians. At about the same time, the Forest Service adopted a management plan allowing for the harvesting of significant amounts of timber in this area of the forest. The management plan provided for one-half[-]mile protective zones around all the religious sites identified in the report that had been commissioned in connection with the G-O road.

. . .

After a trial, the District Court issued a permanent injunction prohibiting the Government from constructing the Chimney Rock section of the G-O road or putting the timber-harvesting management plan into

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effect. The court found that both actions would violate the Free Exercise Clause because they "would seriously damage the salient visual, aural, and environmental qualities of the high country." Finally, the court concluded that both projects would breach the Government's trust responsibilities to protect water and fishing rights reserved to the Hoopa Valley Indians. . . .

[A summary of the litigation in the federal district and appellate courts is omitted. –*Eds.*]

A

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." It is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion. Those respondents contend that the burden on their religious practices is heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the G-O road or to engage in timber harvesting in the Chimney Rock area. We disagree.

. . .

The crucial word in the constitutional test is "prohibit." "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."

Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a government action on a religious objector's spiritual development. The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices. Those practices are intimately and inextricably bound up with the unique features of the Chimney Rock area, which is known to the Indians as the "high country." Individual practitioners use this area for personal spiritual development; some of their activities are believed to be critically important in advancing the welfare of the Tribe, and indeed, of mankind itself. The Indians use this area, as they have used it for a very long time, to conduct a wide variety of specific rituals that aim to accomplish their religious goals. According to their beliefs, the rituals would not be efficacious if conducted at other sites than the ones traditionally used, and too much disturbance of the area's natural state would clearly render any meaningful continuation of traditional practices impossible. To be sure, the Indians themselves were far from unanimous in opposing the G-O road, and it seems less than certain that construction of the road will be so disruptive that it will doom their religion. Nevertheless, we can assume that the threat to the efficacy of at least some religious practices is extremely grave.

Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will "virtually destroy the . . . Indians'

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ability to practice their religion," the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities – from social welfare programs to foreign aid to conservation projects – will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.

Respondents attempt to stress the limits of the religious servitude that they are now seeking to impose on the Chimney Rock area of the Six Rivers National Forest. While defending an injunction against logging operations and the construction of a road, they apparently do not *at present* object to the area's being used by recreational visitors, other Indians, or forest rangers. Nothing in the principle for which they contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands. The Indian respondents insist that "*[p]rivacy* during the power quests is required for the practitioners to maintain the purity needed for a successful journey." . . . No disrespect for these practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property. Even without anticipating future cases, the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion[] would this case be far from trivial: the District Court's order permanently forbade commercial timber harvesting, or the construction of a two-lane road, anywhere within an area covering a full 27 sections (*i.e.*, more than 17,000 acres) of public land.

The Constitution does not permit government to discriminate against religious that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. Whatever rights the Indians may have to the use of the area, however, those rights to not divest the Government of its right to use what is, after all, *its* land.

B

Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to

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the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.

. . .

Perceiving a "stress point on the longstanding conflict between two disparate cultures," the dissent attacks us for declining to "balance[e] these competing and potentially irreconcilable interests, choosing instead to turn this difficult task over to the Federal Legislature." Seeing the Court as the arbiter, the dissent proposes a legal test under which it would decide which public lands are "central" or "indispensable" to which religious, and by implication which are "dispensable" or "peripheral" and would then decide which government programs are "compelling" enough to justify "infringement of those practices." We would accordingly be required to weigh the value of every religious belief and practice that is said to be threatened by any government program. Unless a "showing of 'centrality'" is nothing but an assertion of centrality, the dissent thus offers us the prospect of this Court's holding that some sincerely held religious beliefs and practices are not "central" to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play. . . .

IV

The decision of the court below, according to which the First Amendment precludes the Government from completing the G-O road or from permitting timber harvesting in the Chimney Rock area, is reversed. In order that the District Court's injunction may be reconsidered in light of this holding, and in the light of any other relevant events that may have intervened since the injunction issued, the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Kennedy took no part in the consideration or decision of this case.

Justice Brennan, with whom Justice Marshall and Justice Blackmun join, dissenting.

. . .

I

For at least 200 years and probably much longer, the Yurok, Karok, and Tolowa Indians have held sacred an approximately 25-square-mile area of land situated in what is today the Blue Creek Unit of Six Rivers National Forest in northwest California. As the Government readily concedes, regular visits to this area, known to respondent Indians as the "high country," have played and continue to play a "critical" role in the religious practices

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and rituals of these Tribes. Those beliefs, only briefly described in the Court's opinion, are crucial to a proper understanding of respondents' claims.

As the Forest Service's commissioned study, the Theodoratus Report, explains, for Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life "is in reality an exercise which forces Indian concepts into non-Indian categories." Thus, for most Native Americans, "[t]he area of worship cannot be delineated from social, political, cultur[al], and other areas o[f] Indian lifestyle." A pervasive feature of this lifestyle is the individual's relationship with the natural world; this relationship, which can accurately though somewhat completely be characterized as one of stewardship, forms the core of what might be called, for want of a better nomenclature, the Indian religious experience. While traditional Western religions view creation as the work of a deity "who institutes natural laws which then govern the operation of physical nature," tribal religions regard creation as an on-going process in which they are morally and religiously obligated to participate. Native Americans fulfill this duty through ceremonies and rituals designed to preserve and stabilize the earth and to protect humankind from disease and other catastrophes. Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends upon it.

In marked contrast to traditional Western religions, the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas. Established or universal truths – the mainstay of Western religions – play no part in Indian faith. Ceremonies are communal efforts undertaken for specific purposes in accordance with instructions handed from generation to generation. Commentaries on or interpretations of the rituals themselves are deemed absolute violations of the ceremonies, whose value lies not in their ability to explain the natural world or to enlighten individual believers but in their efficacy as protectors and enhancers of tribal existence. Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. Rituals are performed in prescribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites possess different spiritual properties and significance. Within this belief system, therefore, land is not fungible; indeed, at the time of the Spanish colonization of the American Southwest, "all . . . Indians held in some form a belief in a sacred and indissoluble bond between themselves and the land in which their settlements were located."

For respondent Indians, the most sacred of lands is the high country where, they believe, prehuman spirits moved with the coming of humans to the Earth. Because these spirits are seen as the source of religious power, "medicine," many of the tribes' ritual and practices require

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frequent journeys to the area. Thus, for example, religious leaders preparing for the complex of ceremonies that underlie the Tribes' World Renewal efforts must travel to specific sites in the high country in order to attain the medicine necessary for successful renewal. Similarly, individual tribe members may seek curative powers for the healing of the sick, or personal medicine for particular purposes such as good luck in singing, hunting, or love. A period of preparation generally precedes such visits, and individuals must select trails in the sacred area according to the medicine they seek and their abilities, generally moving to increasingly more powerful sites, which are typically located at higher altitudes. Among the most powerful of sites are Chimney Rock, Doctor Rock, and Peak 8, all of which are elevated rock outcroppings.

According to the Theodoratus Report, the qualities "of silence, the aesthetic perspective, and the physical attributes are an extension of the sacredness of [each] particular site." The act of medicine making is akin to meditation: the individual must integrate physical, mental, and vocal actions in order to communicate with the prehuman spirits. As a result, "successful use of the high country is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting. Although few Tribe members actually make medicine at the most powerful sites, the entire Tribe's welfare hinges on the success of the individual practitioners.

. . .

In the final analysis, the Court's refusal to recognize the constitutional dimension of respondents' injuries stems from its concern that acceptance of respondents' claim could potentially strip the Government of its ability to manage and use vast tracts of federal property. In addition, the nature of respondents' site-specific religious practices raises the specter of future suits in which Native Americans seek to exclude all human activity from such areas. These concededly legitimate concerns lie at the very heart of this case, which represents yet another stress point in the longstanding conflict between two disparate cultures – the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred. Rather than address this conflict in any meaningful fashion, however, the Court disclaims all responsibility for balancing these competing and potentially irreconcilable interests, choosing instead to turn this difficult task over to the Federal Legislature. Such an abdication is more than merely indefensible as an institutional matter: by defining respondents' injury as "nonconstitutional," the Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor, subject only to the Court's toothless exhortation to be "sensitive" to affected religions. In my view, however, Native Americans deserve – and the Constitution demands – more than this.

Prior to today's decision, several Courts of Appeals had attempted to fashion a test that accommodates the competing "demands" placed on

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federal property by the two cultures. Recognizing that the Government normally enjoys plenary authority over federal lands, the Courts of Appeals required Native Americans to demonstrate that any land-use decisions they challenged involved lands that were "central" or "indispensable" to their religions practice. Although this requirement limits the potential number of free exercise claims that might be brought to federal land management decisions, and thus forestalls the possibility that the Government will find itself ensnared in a host of Lilliputian lawsuits, it has been criticized as inherently ethnocentric, for it incorrectly assumes that Native American belief systems ascribe religions significance to land in a traditionally Western hierarchical manner. . . .

III

Today, the Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause. Having thus stripped respondents and all other Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life, the Court assures us that nothing in its decision "should be read to encourage governmental insensitivity to the religious needs of any citizen." I find it difficult, however, to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of respondents' religion impossible. Nor do I believe that respondents will derive any solace from the knowledge that although the practice of their religion will become "more difficult" as a result of the Government's actions, they remain free to maintain their religions beliefs. Given today's ruling, that freedom amounts to nothing more than the right to believe that their religion will be destroyed. The safeguarding of such a hollow freedom not only makes a mockery of the "'policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions,'" it fails utterly to accord with the dictates of the First Amendment.

I dissent.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)

Justice Kennedy delivered the opinion of the Court. . . .

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Concerned that this fundamental nonpersecution principle of the First Amendment was implicated here, however, we granted certiorari.

Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact

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that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs. We invalidate the challenged enactments and reverse the judgment of the Court of Appeals.

I

A

This case involves practices of the Santeria religion, which originated in the 19th century. When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called *orishas*, through the iconography of Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments.

The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the *orishas*. The basis of the Santeria religion is the nurture of a personal relation with the *orishas*, and one of the principal forms of devotion is an animal sacrifice. The sacrifice of animals as part of religious rituals has ancient roots. Animal sacrifice is mentioned throughout the Old Testament, and it played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son.

According to Santeria teaching, the *orishas* are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals.

Santeria adherents faced widespread persecution in Cuba, so the religion and its rituals were practiced in secret. The open practice of Santeria and its rites remains infrequent. The religion was brought to this Nation most often by exiles from the Cuban [R]evolution. The District Court estimated that there are at least 50,000 practitioners in South Florida today.

B

Petitioner Church of the Lukumi Babalu Aye, Inc. (Church) is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion. The president of the Church is petitioner Ernesto Pichardo, who is also the Church's priest and holds the religious title of *Italero*, the second highest in the Santeria faith. In

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April 1987, the Church leased land in the City of Hialeah, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum. Pichardo indicated that the Church's goal was to bring the practice of the Santeria faith, including its ritual of animal sacrifice, into the open. The Church began the process of obtaining utility service and receiving the necessary licensing, inspection, and zoning approvals. Although the Church's efforts at obtaining the necessary licenses and permits were far from smooth, it appears that it received all needed approvals by early August 1987.

The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and the announcement of the plans to open a Santeria church in Hialeah prompted the city council to hold an emergency public session on June 9, 1987.

. . .

In September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. Ordinance 87–52 defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption," and prohibited owning or possessing an animal "intending to use such animal for food purposes." It restricted application of this prohibition, however, to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." The ordinance contained an exemption for slaughtering by "licensed establishment[s]" of animals "specifically raised for food purposes." Declaring, moreover, that the city council "has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community," the city council adopted Ordinance 87–71. That ordinance defined sacrifice as had Ordinance 87–52, and then provided that "[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." The final Ordinance, 87–72, defined "slaughter" as "the killing of animals for food" and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption, however, for the slaughter or processing for sale of "small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." All ordinances and resolutions passed the city council by unanimous vote. Violations of each of the four ordinances were punishable by fines not exceeding $500 or imprisonment not exceeding 60 days, or both.

Following enactment of these ordinances, the Church and Pichardo filed this action . . . in the United States District Court for the Southern District of Florida. Named as defendants were the city of Hialeah and its mayor and members of its city council in their individual capacities. Alleging violations of petitioners' rights under, *inter alia*, the Free Exercise Clause, the complaint sought a declaratory judgment and injunctive and monetary relief. The District Court granted summary judgment to the individual

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defendants, finding that they had absolute immunity for their legislative acts and that the ordinances and resolutions adopted by the council did not constitute an official policy of harassment, as alleged by petitioners.

. . .

It is a necessary conclusion that almost the only conduct subject to Ordinances 87–40, 87–52, and 87–71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. We begin with Ordinance 87–71. It prohibits the sacrifice of animals, but defines sacrifice as "to unnecessarily kill . . . an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter. We need not discuss whether this differential treatment of two religions is itself an independent constitutional violation. It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern. The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the *orishas*, not food consumption. Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.

Operating in similar fashion is Ordinance 87–52, which prohibits the "possess[ion], sacrifice, or slaughter" of an animal with the "inten[t] to use such animal for food purposes." This prohibition, extending to the keeping of an animal as well as the killing itself, applies if the animal is killed in "any type of ritual" and there is an intent to use the animal for food, whether or not it is in fact consumed for food. The ordinance exempts, however, "any licensed [food] establishment" with regard to "any animals which are specifically raised for food purposes," if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover kosher slaughter. Again, the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others: If the killing is – unlike most Santeria sacrifices – unaccompanied by the intent to use the animal for food, then it is not prohibited by Ordinance 87–52; if the killing is specifically for food but does not occur during the course of "any type of ritual," it again falls outside the prohibition; and if the killing is for food and occurs during the course of a ritual, it is still exempted if it occurs in a properly zoned and licensed establishment and involves animals "specifically raised for food purposes."

. . .

The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice. If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. It

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did not do so. Indeed, counsel for the city conceded at oral argument that, under the ordinances, Santeria sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses. Thus, these broad ordinances prohibit Santeria sacrifice even when it does not threaten the city's interest in the public health. . . .

Under similar analysis, narrower regulation would achieve the city's interest in preventing cruelty to animals. With regard to the city's interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. The same is true for the city's interest in prohibiting cruel methods of killing. Under federal and Florida law and Ordinance 87–40, which incorporates Florida law in this regard, killing an animal by the "simultaneous and instantaneous severance of the carotid arteries with a sharp instrument" – the method used in kosher slaughter – is approved as humane. The District Court found that, though Santeria sacrifice also results in severance of the carotid arteries, the method used during sacrifice is less reliable and therefore not humane. If the city has a real concern that other methods are less humane, however, the subject of the regulation should be the method of slaughter itself, not a religious classification that is said to bear some general relation to it.

. . .

The city concedes that "neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals." It asserts, however, that animal sacrifice is "different" from the animal killings that are permitted by law. According to the city, it is "self-evident" that killing animals for food is "important"; the eradication of insects and pests is "obviously justified"; and the euthanasia of excess animals "makes sense." These *ipse dixits* do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel treatment of animals.

The ordinances are also underinclusive with regard to the city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat. Neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it. The city does not, however, prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity. Despite substantial testimony at trial that the same public health hazards result from improper disposal of garbage by restaurants, restaurants are outside the scope of the ordinances. Improper disposal is a general problem that causes substantial health risks, but which respondent addresses only when it results from religious exercise.

The ordinances are underinclusive as well with regard to the health risk posed by consumption of uninspected meat. Under the city's ordinances,

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hunters may eat their kill and fishermen may eat their catch without undergoing governmental inspection. Likewise, state law requires inspection of meat that is sold but exempts meat from animals raised for the use of the owner and "members of his household and nonpaying guests and employees." The asserted interest in inspected meat is not pursued in contexts similar to that of religious animal sacrifice.

Ordinance 87–72, which prohibits the slaughter of animals outside of areas zoned for slaughterhouses, is underinclusive on its face. The ordinance includes an exemption for "any person, group, or organization" that "slaughters or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." Respondent has not explained why commercial operations that slaughter "small numbers" of hogs and cattle do not implicate its professed desire to prevent cruelty to animals and preserve the public health. Although the city has classified Santeria sacrifice as slaughter, subjecting it to this ordinance, it does not regulate other killings for food in like manner.

We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself." This precise evil is what the requirement of general applicability is designed to prevent.

. . .

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

Reversed.

NOTES AND QUESTIONS

1. After the Supreme Court's decision in *Lyng*, "the political process responded to interests the judiciary had not protected, and the Bureau of Land Management relocated the road." Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245 (1994). Does this suggest the efficacy of a separation of powers (legislative and judicial) in ultimately resolving a sensitive cultural issue?
2. How can you reconcile the opposite results on the issue of religious freedom in *Lyng* and *Church of the Lukumi Babalu Aye*? In the absence of the First Amendment – in other words, if neither of the two cases had involved a constitutional

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question – can you construct an argument based on the protection of a religious minority's cultural values that would adequately address the respective issues in the two cases, or is the argumentation and the justiciability of the issues dependent on the supremacy of constitutional protection? Does Justice Brennan's strong dissent in *Lyng* offer any arguments for a nonconstitutional resolution of the dispute?

3. In 2009 *Forbes* magazine named Hialeah, Florida, the site of the dispute in *Church of the Lukumi Babalu Aye*, as one of the "ten most boring cities" in the United States. Evidently, Santeria practices have had little effect on the city's equanimity, even after the Supreme Court decision.
4. In Chapter 2, we return to the theme of a tribe's cultural attachment to land as an example of indigenous cultural law.

2. Cultural Relativism and Universalism in the Legal Process

Jacqueline Nolan-Haley, Harold Abramson, & Pat K. Chew, International Conflict Resolution: Consensual ADR Processes 78–82 (2005) (reprinted with the permission of Thomson Reuters)

Dilemma One

A delegation of American feminists attends a United Nations World Conference on Women in China, where delegations from countries all over the world meet. A critical issue arises: Given profound cultural differences among women from different countries, how can feminists maintain a global political movement while avoiding charges of cultural imperialism?

Dilemma Two

You are a judge in a criminal case where the defendant is a recent immigrant to the United States. What if the defense presents cultural evidence as an excuse for her otherwise criminal conduct? Should the immigrant defendant be judged according to her own cultural standards rather than those of the relevant jurisdiction?

Dilemma Three

A company is considering doing business in a foreign country where there are discriminatory employment practices and lax environmental protection laws. Should the company go along with the practices of the host country? Should the company reject the practices even though that decision would put them at a competitive disadvantage? Should the company simply refuse to do business in that country altogether?

Dilemma Four

You are asked to resolve the case of an employee who has worked for your company for sixteen years. Though her work has been excellent for

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fifteen years, it has been unsatisfactory for the past year. If there is no reason to expect that performance will improve, should the employee be (a) dismissed on the grounds that job performance should remain the grounds for dismissal, regardless of the age of the person and his previous record; or (b) is it wrong to disregard the fifteen years the employee has been working for the company?

Two models, those of cultural relativism and of universalism, offer very useful conceptual tools for trying to reconcile these dilemmas. The *cultural relativist model* essentially advocates a deference to each culture and their cultural practices: "When in Beijing, do as the Chinese do!" The *universalist model*, in contrast, argues that there should be uniform global standards [to which] all countries should adhere.

Each approach presents its own challenges. Under the cultural relativist model, the presumption is that cultural practices are clearly identifiable. . . . [D]efining the "culture" and its attributes is seldom easy. Among other nuances, cultures are always changing, and there are often competing political, religious, or social authorities for defining cultural practices.

The universalist model also has definitional challenges. How and who decide what constitutes the universal norm? To what extent are these standards determined by global consensus versus the decision of a dominating and domineering group of countries, individuals, or interests?

Let's revisit the dilemmas posed above. Consider the varied perspective[s] on how to reconcile these differences and on what roles the cultural relativist and universalist models play.

Dilemma One

Feminist responses to this charge [of cultural imperialism] are complicated and sometimes conflicting. On the one hand, feminists note that culture and religion are often cited as justifications for denying women a range of basic rights, including the right to travel, rights in marriage and divorce, the right to own property, even the right to be protected by the criminal law on an equal basis with men. Women have much to lose, therefore, in any movement away from a universal standard of human rights in favor of deference to culture. On the other hand, feminists acknowledge that feminism itself is grounded in the importance of participation, of listening to and accounting for the particular experiences of women, especially those on the margins of power. Indeed, much feminist criticism of traditional human rights approaches has focused on the tendency of international policymakers to exclude women's experiences and women's voices. Thus, the claim that Western concepts of women's equality are exclusionary or imperialist strikes at the heart of one of feminism's central commitments – respect for difference.

In short, both the move to expand universal human rights to include those rights central to women's condition and the move toward a relativist view of human rights are consistent with and informed by feminist theory. Indeed, the tension between them reflects a tension within feminism itself,

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between describing women's experience collectively as a basis for political action and respecting differences among women.

(From Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 Harv. Women's L.J. 89–105, 111–15 [1996].)

Dilemma Two

Allowing sensitivity to a defendant's culture to inform the application of laws to that individual is good multiculturalism. It also is good progressive criminal defense philosophy, which has as a central tenet the idea that the defendant should get as much individualized (subjective) justice as possible.

For legal scholars and practitioners who believe in a progressive civil and human rights agenda, these illustrations also raise an important question: What happens to the victims – almost always minority women and children – when multiculturalism and individualized justice are advanced by dispositive cultural evidence? The answer, both in theory and in practice, is stark: They are denied the protection of the criminal laws because their assailants generally go free, either immediately or within a relatively brief period of time. More importantly, victims and potential victims in such circumstances have no hope of relief in the future, either individually or as a group, because when cultural evidence is permitted to excuse otherwise criminal conduct, the system effectively is choosing to adopt a different, discriminatory standard of criminality for immigrant defendants, and hence, a different and discriminatory level of protection for victims who are members of the culture in question. This different standard may defeat the deterrent effect of the law, and it may become precedent, both for future cases with similar facts, and for the broader position that race – or national origin-based applications of the criminal law are appropriate. Thus, the use of cultural defenses is anathema to another fundamental goal of the progressive agenda, namely the expansion of legal protections for some of the least powerful members of American society: women and children.

(From Doriane Lambelet Coleman, *Individualizing Justice through Multiculturalism*, 96 Colum. L. Rev. 1093, 1099, 1156–65 [1996].)

Dilemma Three

There are some hard truths that might guide managers' actions, a set of what I call core human values, which define minimum ethical standards for all companies. The right to good health and the right to economic advancement and an improved standard of living are two core human values. Another is what Westerners call the Golden Rule, which is recognizable in every major religious and ethical tradition around the world. In Book 15 of his *Analects*, for instance, Confucius counsels people to maintain reciprocity, or not to do to others what they do not want done to themselves.

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Although no single list would satisfy every scholar, I believe it is possible to articulate three core values that incorporate the work of scores of theologians and philosophers around the world. To be broadly relevant, these values must include elements found in both Western and non-Western cultural and religious traditions. . . .

In the spirit of what philosopher John Rawls calls *overlapping consensus*, one can see that the seemingly divergent values converge at key points. Despite important differences between Western and non-Western cultural and religions traditions, both express shared attitudes about what it means to be human. First, individuals must not treat others simply as tools; in other words, they must recognize a person's value as a human being. Next, individuals and communities must treat people in ways that respect people's basic rights. Finally, members of a community must work together to support and improve the institutions on which the community depends. I call those three values *respect for human dignity*, *respect for basic rights*, and *good citizenship*.

(From Thomas Donaldson, *Values in Tension: Ethics Away from Home*, Harv. Bus. Rev. Sept.–Oct. 1996, 3, 12.)

Dilemma Four

There is great potential for conflict when people from cultures having different orientations must deal with one another. This is particularly true when people who value universal rules deal with people who think each particular situation should be examined on its merits and that different rules might be appropriate for different people. Westerners prefer to live by abstract principles and like to believe these principles are applicable to everyone. To set aside universal rules in order to accommodate particular cases seems immoral to the Westerner. To insist on the same rules for every case can seem at best obtuse and rigid to the Easterner and at worst cruel.

[In a study by Hampden-Turner and Trompenaar on this case], more than 75 percent of Americans and Canadians felt the employee should be let go. About 20 percent of Koreans and Singaporeans agreed with that view. . . . As these results show, Westerners' commitment to universally applied rules influences their understanding of the nature of agreements between individuals and between corporations. By extension, in the Western view, once a contract has been agreed to, it is binding – regardless of circumstances that might make the arrangement must less attractive to one of the parties than it had been initially. But to people from interdependent, high-context cultures, changing circumstances dictate alterations of the agreement.

(From Richard E. Nisbett, The Geography of Thought: How Asians and Westerners Think Differently . . . and Why 64–66 [2003].)

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NOTES

1. On the debate between cultural relativism and universalism in human rights law, see Ida L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12 ILSA J. Int'l & Comp. L. 1 (2005) (detailing the need to "strike a balance" between cultural relativism and universalism "that will recognize legitimate cultural differences – particularly when those differences may make it more difficult to uncover the truth about what occurred – but without ignoring the danger of using cultural relativism as a shield behind which to hide atrocities. A mild cultural relativism is the best way to accomplish these goals . . . by establishing hybrid tribunals and/or by international tribunals exercising jurisdiction only where the domestic courts are unable or unwilling to do so.").
2. When rules of law and cultural predispositions or expressions collide, as they often do, the resulting upheavals may alter the law, conflicting cultural values, or both. This dynamic process is continuous and important, as the following commentary suggests:

   > [L]aw and culture cannot fully answer the normative law reform question. This is because law and culture operate in a reflexive loop, each influencing the other. Accordingly, a change in law may actually change culture over time. Thus, a legal reform or transplant from another system may be rejected because of a lack of cultural fit, but alternatively it may be adopted and ultimately come to seem natural, thereby effectuating broader cultural shifts.

   [As an example, the author notes the unexpected enthusiasm for alternative dispute resolution in the traditionally adversarial culture of the United States. – *Eds.*].

   > As communication technologies, trade, and migration blur cultural boundaries and even begin to undermine relatively stable ideas about the majority religious, racial, and ethnic groupings that comprise a state, law will face greater pressure to incorporate foreign cultural practices. Yet, at the same time, there are bound to be backlashes, as cultures fight fiercely to retain their dispute resolution mechanisms and legal cosmology just as surely as they resist other perceived encroachments.
   >
   > Negotiating this complex interplay between cultural bricolage and cultural essentialism is bound to be the crucial question for comparative law in this new era. We will need to develop a jurisprudence for an increasingly hybrid world where cultural conceptions remain crucial, but are in flux.

   Paul Schiff Berman, *The Enduring Connections between Law and Culture*, 57 Am. J. Comp. L. 249, 256, 257 (2009) (reviewing Lawrence Rosen, Law as Culture: An Invitation (2006) and Oscar G. Chase, Law, Culture, and Ritual: Disputing Systems in Cross-Cultural Context (2005)).

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3. The Cultural Defense

Dilemma 2 in the last reading involves the cultural defense, which litigants invoke to justify a modification of applicable law and due process.[6] When individuals follow their time-honored traditions, usually doing so occurs without any sort of incident or governmental interference. On those occasions, however, when authorities ban customs, individuals may claim that the policy impinges on their right to culture. If they are prosecuted for violating state law, they sometimes use the legal strategy of a cultural defense. Even though no national legal system has officially adopted the cultural defense as an official policy, judges have made reference to cultural considerations in numerous cases. In some of the cases, the defendant may have difficulty persuading the court that the cultural practice is "genuine" or "authentic." As we shall see in Chapter 2.B, the invocation of a recognized body of traditional customary law may strengthen this defense, but in general, it has not led to its successful application. Consider a few examples that illustrate how the law treats cultural arguments regarding different worldviews.

Some cases reflect differing beliefs about the significance of animals. *United States v. Tomono* is an example of judicial treatment of cultural factors in sentencing a defendant convicted of reptile smuggling. Kei Tomono was accused of violating U.S. laws concerning wildlife and smuggling. A twenty-six-year-old, college-educated Japanese national, Tomono ran an import-export business known as Amazon International based in Chiba, Japan.

On one trip to the United States in April 1996, he had 60 pig-nosed, or Fly River, turtles and 113 Irian Jaya snake-necked turtles in his luggage, which he intended to sell. Later, in August 1997, he made another trip from Japan to San Francisco to attend a reptile breeders' conference, this time carrying with him six red mountain racer snakes and two Mandarin rat snakes in his luggage. On both occasions, he filled out the standard customs declaration form denying that he was carrying any "fruits, plants, food, soil, birds, snails, other live animals, wildlife products, farm products." Government agents had searched his luggage in San Francisco, without his knowledge. Although he was permitted to fly on from San Francisco to Orlando, once he reached Florida, a U.S. Fish and Wildlife Service agent asked to search his luggage. He consented, the snakes were found, and he and his traveling companion were taken into custody. The creatures were said to be worth approximately $70,000.[7]

A grand jury indicted him for violations of the federal antismuggling act and the Lacey Act, which forbids the import, export, sale, and possession of fish or wildlife taken in violation of federal, state, or foreign law. The violations dealt not only with the possession and intended sale of the creatures but also with the failure to declare them to customs.

Charged with violations of the Lacey Act and the federal antismuggling act, Tomono decided to plead guilty. Tomono argued for a downward departure under the sentencing guidelines. His position was that, because of cultural differences between Japan and the United States, he "was unaware of the serious consequences of his actions, and that these actions constituted a factor not considered by the Sentencing Commission that should be taken into account in calculating his sentence."[8]

[6] *See generally* Cultural Issues in Criminal Defense (Linda Friedman Ramirez ed., 3d ed. 2010); Alison Dundes Renteln, The Cultural Defense 110–12 (2004), from which the examples in the text are taken.

[7] Jim Leusner & Susan Jacobson, *2 Dealers of Reptiles Go to Jail*, Orlando Sentinel, Aug. 17, 1997.

[8] United States v. Tomono, 143 F.3d 1401 (11th Cir. 1998).

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Taking his cultural background into consideration, the district court reduced his sentence.[9] At the sentencing hearing, Judge Ann Conway stated:

> Basically, the court agrees with the defense that the cultural differences in this case give the court a basis to depart downward that is not otherwise available or covered by the Sentencing Guidelines. . . . The court finds that Mr. Tomono's not declaring [the animals] to the U.S. Customs could be well the result of the cultural differences and his misunderstanding of the laws and the forms. The court is departing three levels downward because the cultural difference would be demonstrated by the difference in the market value in Japan versus the difference in the market value in the [United States].

The judge explicitly distinguished between cultural differences and national origin: "Even though culture might be related to a person's origin, not every person who has the same national origin has the same culture and background. Culture extends beyond just national origin and includes factors such as beliefs, religion, laws, morals, and practices."

The court made it clear that it was basing the sentence not on national origin but on cultural differences. In particular, the court noted that the turtles in question were not endangered species in Japan and that Tomono would not have been arrested there. The court also made a special point of the "unique" place of reptiles in Japanese culture, and of the fact that Tomono is widely respected for his work in the field of herpetology. Furthermore, the court was influenced by Tomono's apparent ignorance of American law. Because Tomono had been to the United States on only two or three occasions and ostensibly was unfamiliar with the laws, the court was sympathetic to his argument. On the basis of the specific facts in this case, the court sentenced Tomono to five years' probation (unsupervised, provided he leave the United States), a $5,000 fine, and another "assessment" of $200.

The government appealed the downward departure of his sentence, presenting arguments that provided the basis for the court of appeals' decision. The government argued that downward departures for factors not adequately considered by the sentencing guidelines should be an uncommon occurrence. The offense at the center of this case, namely foreign nationals' smuggling of wildlife into the United States, is routine. Because defendants generally come from different cultures, a downward departure in a case such as this would lead to rampant misuse of the guidelines. Downward departures based on culture would be a common occurrence, something not anticipated by the policy.

Another part of the prosecution's argument was that the motivation for smuggling was economic and not cultural. This motivation applies also to smugglers of drugs, contraband, and so on. The basic point the government wished to make was that the sentencing guidelines are to permit departures only for rare or unique circumstances. The prosecution emphasized what it regarded as a contradiction. Tomono claimed ignorance of the law but admitted knowledge of U.S. policy during the plea negotiation.

[9] United States v. Tomono, 97 CR-127-ORL-22, Dec. 4, 1997. The Court of Appeals for the Eleventh Circuit explained the lower court's behavior as follows: "the district court granted a three-level downward departure for what it termed cultural differences." 143 F.3d at 1403. Before making the downward departure, the court had reduced his level of culpability because of his acceptance of responsibility. In American culture, showing remorse and accepting responsibility are considered extremely desirable.

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He also was aware of U.S. regulations on trade in wildlife and federal health regulations prohibiting the importation of turtles of less than four inches in carapace (shell) length.

The government argued that following the logic of the district court's decision would result in two different sets of sentencing guidelines, one for U.S. citizens and one for foreign nationals. The government's brief rejects, in principle, the notion that the norms in other legal systems should influence the disposition of cases in the United States, arguing that such circumstances are so common as to result in routine downward departures not contemplated by the Sentencing Commission.

On appeal, the court rejected all strands of the cultural differences argument. The court found as follows: that the guidelines also took into account the endangered status of turtles,[10] that there was no evidence in the record supporting the unique place reptiles occupy, that counsels' arguments alone were usually not enough to justify departures from the sentencing guidelines, and that Tomono showed familiarity with U.S. policies during the plea negotiation. The government had to show that the defendant knew the wildlife was illegal, not that the defendant was specifically aware of the existence of the Lacey Act.

The court of appeals concluded that there were insufficient grounds for a downward departure. The district court therefore had abused its discretion when it took the case "out of the heartland of the guidelines.... [C]onsidering 'cultural differences' attributable solely to a defendant's country of origin comes uncomfortably close to considering the defendant's national origin itself, in contravention of the guidelines.... We need not decide whether 'cultural differences' may ever be an appropriate ground upon which to depart from the guidelines."[11] The court vacated the sentence and remanded it for resentencing. Tomono was deported to Japan.

Judge Roney, writing in dissent, began with the proposition that the Sentencing Commission had not prohibited the consideration of culture. Because it is permissible to base a downward departure on cultural differences, according to Judge Roney, the crucial question is whether the sentencing court abused its discretion. Emphasizing that the trial court is in a "preferred position" to understand what justice requires in particular circumstances, he eloquently defended the use of discretion by the district court. After explaining that "discretion" means that a decision either way is not wrong, he concluded that the district court judge in *United States v. Tomono* did not abuse her discretion.

In the United States, it remains unclear whether cultural differences can legitimately be referred to in sentencing. The decisions thus far are from the circuit courts and, as a consequence, are binding only on the states within the court's region. The appellate decisions, in any event, have not resolved the question of whether the prohibition against considering national origin encompasses cultural differences.

In another case, *Siripongs v. Calderon*,[12] the issue was whether the failure to consider cultural factors during the death penalty phase was a serious constitutional error. Jaturun ("Jay") Siripongs, a Thai national, participated in a robbery of a convenience store, the

[10] "The fact that the turtles may or may not be endangered is already considered in the applicable guideline, which mandates a four-level enhancement if the wildlife in question is listed in the Endangered Species Act of the Convention on International Trade in Endangered Species. See U.S. Sentencing Guidelines Manual S 2Q2.1(b)(3)(B)."

[11] *Tomono*, 143 F.3d at 1404.

[12] Siripongs v. Calderon, 133 F.3d 732 (9th Cir. 1998).

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Pantai market, during which two clerks were killed.[13] Convicted of two murders with special circumstances, he received a death sentence in 1983. Though he admitted to being present at the robbery, he professed that he was innocent of the murders and that his accomplices were responsible for the killings. He was, however, unwilling to name the accomplices.[14] Because he would not furnish information about them, the court did not find his account credible. His lawyer, a public defender, did not present psychological or cultural evidence that might serve as mitigating factors during the finding of guilt or during sentencing phase of the trial.[15]

After the California Supreme Court affirmed the judgment,[16] Siripongs filed a petition for writ of habeas corpus in the federal district court, alleging, among other things, that his lawyer's failure to present mitigating evidence constituted a violation of his Sixth Amendment right to effective assistance of counsel. The district court declined to allow Siripongs to present evidence and ruled on summary judgment for Calderon. The first time the court of appeals heard the case it concluded that Siripongs should have the opportunity to argue that his legal counsel was ineffective, on the basis of a complete factual record. The court therefore remanded the case for an evidentiary hearing on the question of whether Siripongs's attorney had failed to provide adequate legal representation during both the guilt-finding and penalty phases of the trial.[17] After hearing evidence for eight days, the district court ruled against Siripongs. The Ninth Circuit, the second time it heard the case,[18] did not decide whether the lawyer's failure to develop the expert testimony constituted deficient performance but simply concluded that the lawyer made a reasonable choice to forgo the testimony of Siripongs's mother because of a fear her testimony would be impeached.[19]

The cultural argument central to this case was whether the refusal to name the accomplices was culturally motivated. An expert in Thai culture, Herbert Phillips, professor of anthropology at the University of California, Berkeley, explained that the reluctance to snitch was "consistent with deeply embedded Thai cultural values, including cultural concepts of shame and dishonor, and with Thai religious beliefs." Siripongs did not "snitch" because it would interfere with duty to made amends for his wrongdoing in the next life. Ostensibly saving face, Siripongs avoided bringing even greater shame on his family by refusing to implicate others in the wrongdoing.[20] There was also the possibility that his family might experience retaliation had he divulged his accomplices.

[13] Afterward, Siripongs used the victims' credit cards. This may suggest that – subconsciously, at least – he wanted to be caught. Affidavit of Herbert Phillips, professor of anthropology, University of California, Berkeley, Nov. 14, 1991.

[14] One especially puzzling aspect of the case is the accomplice defense. Much of the cultural evidence pertained to the question of whether another person had committed the murders. Even if that were true, Siripongs could still receive the death penalty. Pulling the trigger is not a prerequisite to the imposition of capital punishment.

[15] "Siripongs'[s] counsel put on no witnesses during the guilt phase and called none of Siripongs'[s] personal friends or family members during the penalty phase." *Siripongs*, 133 F.3d 732 at 734.

[16] People v. Siripongs, 754 P.2d 1306 (Cal. 1988), *cert. denied*, 488 U.S. 1019 (1989).

[17] Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), *cert. denied*, 512 U.S. 1183 (1995).

[18] The Ninth Circuit Court had to evaluate a record consisting of thirty volumes of transcripts!

[19] *Siripongs*, 133 F.3d 732 at 735.

[20] Siripongs never told his family about his arrest; they learned from the local Thai-language paper. Phillips notes that this is consistent with "the cultural expectation that an individual endeavor not to cause his family shame. By so doing, Mr. Siripongs can get on with his own death, begin to compensate for the evil, the 'baap,' with more good, the 'boon,' if not in this life, then in future lives."

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In his affidavit, Professor Phillips explained the multifaceted cultural argument, emphasizing particularly the important Thai concept of shame:

> The Thai concept of merit and de-merit arises from a strong belief that if a Thai commits a bad or evil act, he must work extremely hard in doing good things to compensate for what he has done. The Thai notion is not to be punished for the evil act, because it is done and cannot be reversed. Rather, the Thai notion is that you have to make up for the evil act by compensating for it with merit. There is a cash register notion of merit and de-merit known as "boon" and "baap." "Boon" means goodness and "baap" means sin. There is a constant dialectic between boon and baap throughout life for all Thais, as they struggle continually to compensate for the baap they have made with more and more boon. . . .
>
> I understand that Mr. Siripongs has refused to identify his accomplices. Such behavior makes sense from a cultural perspective even if ultimately it leads to Mr. Siripongs' death. From a Thai perspective, it would have been a useless act for Mr. Siripongs to identify the actual murderer. Making known his accomplices' identities would not reverse what had happened. The two people who had been killed would remain dead. From a cultural perspective, therefore, identifying his accomplices would have served no purpose for Mr. Siripongs. Thus, Mr. Siripongs' refusal to identify the accomplices does not necessarily mean that Mr. Siripongs killed either victim or intended death to result. Such behavior in fact is culturally appropriate under these circumstances.
>
> The cultural notion at work here is that assignment of blame is not the critical issue. The critical issue, from the perspective of Thai culture, is that the robbery got out of control. In Thai culture, "khwaan" refers to an individual's soul, which is the source of an individual's identity in the most profound sense of the term. In periods of extreme emotional stress, a Thai's "khwaan" leaves his body, causing him to be out of control. In this case, Mr. Siripongs' behavior appears to demonstrate that he believed he had lost his "khwaan" when the robbery got out of control and his accomplice committed the homicides. With the two victims already dead, from Mr. Siripong[s]'s perspective, it made no sense to assign blame for the homicides to the actual murderer. Importantly, even if he had done so he could not have regained his "khwaan." This could only be done by regaining a state of personal and social equilibrium and by compensating for the evil or "baap" that he had committed. . . . [T]his is exactly what he did by creating a trail that resulted in his quick arrest and punishment.

Professor Phillips pointed out another cultural factor, namely the Thai concept of supernatural moral justice. According to the Thai worldview, a Thai person, if not punished in this life, will receive his or her due in future lives. Phillips also speculated that if the accomplices were relatives, Siripongs might have declined to identify them. Because of the Thai notions of deference to authority and of reciprocal obligations, from the Thai perspective, Siripongs's actions made some sense.

Another important cultural difference pointed out by Phillips concerns the display of emotions. In Thai culture, it is considered inappropriate to express emotion. Phillips suggested that those during the trial who observed Siripongs's "stoical demeanor" might have misconstrued this body language: "To be 'ning,' or free of emotional demonstration,

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in the context of a criminal trial in which a Thai is accused of committing two murders is completely appropriate behavior. In fact, any outward expression of emotion would be culturally highly improper."

The appellate court was skeptical of the cultural arguments because Siripongs seemed too Americanized. The court noted that he had cooperated with law enforcement, that he was no longer a practicing Buddhist, and that he preferred the American value system.

Another basis for the Sixth Amendment challenge was that Siripongs's lawyer had not pursued his client's interests energetically, to say the least. Not only was this his first capital case, but also he was simultaneously running for Congress. Arguably, the political campaign had distracted him from preparing properly for the trial.[21] He never gathered any evidence about Siripongs's background from Thailand; his investigators had planned a trip to Thailand but later canceled it. No explanation for this was ever provided. Some aspects of Siripongs's background might have influenced the jury – for example, he apparently had been raised by an uncle who ran a prostitution business, he may have been sexually abused as a child, and he was an ex–Buddhist priest. His lawyer even allowed the prosecution to present evidence he knew to be false.[22] During the penalty phase of the trial, the jury never heard any mitigating evidence concerning Siripongs's life in Thailand.[23] His lawyer also never called Siripongs's mother to testify on his behalf, even though she sat in the courtroom on a daily basis.

In 1995 Siripongs's new lawyers presented evidence showing that his trial attorney's performance fell below constitutional standards. They argued that the failure to develop "potentially meritorious defenses" constituted deficient representation. Because this was a capital case, the attorney's duty to investigate was particularly crucial. Because death is final and irreversible, it is always imperative that defense counsel search for any potentially mitigating evidence.

Ultimately, however, the appellate court did not find the lawyer's performance deficient. It concluded that the system had operated correctly: "Our decision is made with the confidence that must accompany a decision that upholds a sentence of death."[24] The court concluded not only that Siripongs was responsible for the killing but also that his crime must have been premeditated. Because he knew the store clerks and realized that, if left alive, they would be able to identify him, he must have planned to rob the store and murder the clerks. The defense's response was that, because that the owner of the store was apparently involved in selling stolen jewelry, this would have deterred the owner from reporting the robbery for fear of being arrested.

Siripongs's new lawyers filed a petition for the writ of certiorari, whose main argument was that Siripongs should have had an opportunity to resolve the Sixth Amendment

[21] Although the Ninth Circuit found this matter "troublesome" the first time it heard the case, the second time it concluded that his campaign had not interfered with his trial preparations. *Siripongs*, 133 F.3d 732 at 737.

[22] Evidently a rap sheet from Thailand showed Siripongs had been convicted of one crime, a nonviolent burglary. It was translated improperly in the California court, but despite having a corrected copy, his lawyer did not rectify the error in the court record.

[23] The lawyer failed to notice that the court interpreter was a friend of victim's husband, something that at the very least created the appearance of bias.

[24] *Siripongs*, 133 F.3d 732 at 737.

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argument and that the district court had failed to conduct adequate investigation to made this determination. The lawyers also argued that the appellate court had misinterpreted Supreme Court precedent, putting its ruling in conflict with other circuits on the duty that counsel have to investigate mitigation evidence.[25] Despite these arguments, Siripongs was executed in 1998.[26]

It is impossible to know whether the evidence relating to a defendant's cultural background would have influenced the jury's decision about whether to impose the death penalty. There is, of course, a chance that it might have. Even those who support the death penalty will be troubled by the possibility that a defendant could be sentenced to death merely because of his body language. Given that there is nothing in the legal system that formally prohibits the consideration of cultural factors, this information should be presented to prevent any potential miscarriage of justice.

Failure to consider cultural evidence can be challenged on various grounds. Such failure can lead to the imposition of excessive punishment – that is, a disproportionately harsh penalty. Another possible line of argument is that a court's refusal to consider cultural evidence violates a defendant's right to freedom of expression. The defense counsel's failure to present the evidence could be considered malfeasance, a violation of the defendant's right to effective assistance of counsel. The emerging norm seems to be that lawyers should go to some lengths to discover the background of their clients, to the extent that it might mitigate their sentences. Ignorance of other cultures is no longer acceptable.

Some commentators might object to cultural evidence even at sentencing as a matter of principle, because it offends notions of equal justice. Defendants should be treated equally under the law. The problem with this argument is that the motivations and demeanor of the average defendant from the dominant culture will be understood and therefore generally not be subject to misinterpretation. To avoid misunderstandings, justice requires the consideration of the cultural background of defendants at all stages of legal process, most certainly during the sentencing phase of the trial.

In some cases, the question is not one of appropriate sentencing but rather of whether the act itself constitutes a crime. For example, a Nigerian national, Dr. Gregory Ezeonu, was prosecuted in New York for statutory rape of his second, or junior, wife, Chiweta,

[25] Motion for Leave to Proceed in forma pauperis and Petition for Writ of Certiorari. October Term, 1997. If this petition failed, his lawyers planned to advance an argument along the lines of the *Breard* case. Daniel Breard, a national of Paraguay, was convicted of murder in Virginia. While on death row, he filed a lawsuit in which he alleged that the failure of the Virginia authorities to permit him to speak with his embassy was a serious error, a violation of the Vienna Convention on Consular Relations, to which the United States is a party. When a national of another country is accused of a crime, according to public international law, he or she is supposed to have access to his consulate. The U.S. Supreme Court declined to intervene, despite an international outcry including a plea from the World Court. Siripongs, like Breard, was tried for a capital crime without ever having the opportunity to consult his embassy. Robert F. Brooks & William H. Wright Jr., *States Deny Treaty Rights to Foreign Defendants*, Nat'l L.J., Nov. 4, 1996, at B8.

[26] Many pleaded for Siripongs's life, including relatives of victims, two jurors who had recommended the death penalty, Pope John Paul II, and even the warden of San Quentin Prison and a death-row prison guard. Richard Marcosi & Daniel Yi, *Friends and Foes Offer Conflicting Pictures of Killer*, L.A. Times, Nov. 15, 1998, at A34. Neither Republican Governor Pete Wilson nor Democratic Governor Gray Davis granted his plea for clemency. Richard Marcosi, *Siripongs Gets New Execution Date; Will Take Appeal to Davis*, L.A. Times, Dec. 15, 1998, at A3; Richard Marcosi & Greg Hernandez, *Convicted Killer Siripongs Put to Death*, L.A. Times, Feb. 9, 1999, at A1, A18; Richard Marcosi, *Attorney Has Case of a Lifetime*, L.A. Times, Dec. 3, 1998, at B1, B6.

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who was thirteen years old.[27] (The record does not reveal from which of hundreds of ethnic groups in Nigeria Ezeonu came; polygamy is practiced among only some groups.) Dr. Ezeonu was a psychiatrist affiliated with Harlem Hospital. His children were removed from the household by the Child Welfare Administration. When detectives went to his apartment to discuss his children, he evidently invited them in and volunteered that he was interested in "giving Chiweta sex education." His defense was that he had been married concurrently under both New York and Nigerian law. The court therefore had to evaluate the status of the second marriage and the second wife in New York. Although generally a marriage is recognized if valid where consummated, the court concluded that where recognition would be "repugnant to public policy," the general rule does not apply. The court thought it was obvious that polygamy was against public policy.

In what was apparently a case of first instance for New York, the court held that bigamy was no defense to the charge of statutory rape. Furthermore, the court explicitly expressed disinterest in hearing witnesses from Nigeria who allegedly had observed the marriage ceremony or were prepared to discuss marriage customs. Although Nigerian law and custom may permit a junior wife, New York does not recognize such status. Because at the time of his "marriage" to the complainant, Dr. Ezeonu was already married, his second marriage was void even were it to have been legally consummated in Nigeria. Consequently, Dr. Ezeonu was not married to Chiweta, the thirteen-year-old, for purposes of prosecution for statutory rape.

NOTES AND QUESTIONS

1. In a lower-context legal culture such as that of the United States, is there a greater or lesser need for the cultural defense than in a higher-context legal culture where cultural considerations already are more determinative of outcomes in transactions and dispute resolution?
2. What criticisms might anthropologists likely make of the use of culture in the summarized cases?
3. Does the consideration of culture in the foregoing cases violate equal protection of the law? From the point of view of the victims, is it fair to mitigate the defendants' punishment simply by virtue of having come from another country?
4. What are the arguments for and against allowing cultural factors during the guilt-finding phase or the penalty phase of trials?
5. In your view, should the prohibition against the consideration of national origin preclude the possibility of admitting cultural evidence?
6. In Chapter 2.B, we return to issues related to the cultural defense in the context of a discussion about customary law.

4. Separate Legal Systems

Another way to adjudicate culture issues besides considering a cultural defense to the normal legal process is for the dominant legal system to delegate decision making to special tribunals within the ethnic minority or indigenous community. Although this approach might seem surprising, there is precedent for allowing religious minorities to

[27] People v. Ezeonu, 155 Misc. 2d 344, 588 N.Y.S.2d 116 (1992).

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settle their conflicts within religious tribunals. For example, Orthodox Jews settle disputes in the *bet din*. The main argument for doing so is its consistency with the principle of religious freedom that is often if not normally guaranteed by national constitutions. One major objection to such tribunals is that the state, by allowing religious institutions to settle their own disputes, violates the principles of equal protection and the separation of church and state. Another worry is that religious judges may misinterpret secular law. Another serious concern is that the male elites of the minority community may render decisions that do not afford adequate protection to women's rights. We shall return to these issues in the context of religious values in Chapter 9.

NOTE

> For an example of issues related to separate legal systems, see, e.g., Mark Landler, *German Judge Cites Koran, Stirring Up Cultural Storm*, N.Y. Times, Mar. 23, 2007, at A10. "Under Israeli law, the religious courts have exclusive jurisdiction in matters of divorce between spouses who are both Jewish, Muslim, or Christian belonging to one of the recognized religious communities or who are both Druze." Talia Einhorn, Private International Law in Israel 212 (2009).

5. Globalization of Mass Culture

"Jamaica called. They want their culture back."

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The globalization of cultural values, artifacts, and practices – for good or bad – is a characteristic of our times. As in the cartoon, cultural globalization may be viewed as a threat to local, national, or regional identities and control. The improper appropriation of culture may be particularly offensive. Even more threateningly, the McDonaldization of mass culture may result in an unwanted displacement of cherished traditions. On the other hand, the process of globalization helps spread otherwise remote and inaccessible culture for the enjoyment and benefit of all humanity. The process also universalizes fundamental benefits such as standards and expectations of human rights.

The widespread use of computers in a universe of cyberspace has, of course, facilitated globalization. A particularly interesting development at the intersection of culture and law has been the rapid growth of open sourcing of knowledge. This development,

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with its profoundly participatory and democratic implications, has engaged the entire world in cultural projects such as Wikipedia. If the culture defense and separate legal systems represent centrifugal tendencies in global society, open sourcing in cyberspace is a markedly centripetal tendency.

As the following reading suggests, the rhetoric and very idea of open sourcing bear similarities to the collective process of creativity and innovation in traditional societies. Moreover, open sourcing has profound implications for an important artifact of modern economies: copyright protection. The effect of open sourcing on copyright law is thus a significant example of the effect of mass culture on law.

Siva Vaidhyanathan, *Open Source as Culture – Culture as Open Source, in* Open Source Annual 346 (2007)

Copyright is a limited monopoly, granted by the state, meant to foster creativity by generating a system of presumed incentives. The copyright holder must have enough faith in the system to justify her investment. The copyright holder's rights to exclude are limited by some public values such as education and criticism. This is the standard understanding of copyright law's role and scope. But while acknowledging the interests of the public, it omits the voice of the public itself. In other words, the system cannot thrive if the public considers it to be captured, corrupted, irrelevant, or absurd.

The rise and success of Open Source models foster a general understanding that copyright is not a single right bestowed upon one brilliant individual author, but is instead a "bundle" of rights that a copyright holder (individual, corporation, organization, or foundation) may license. Most importantly, these experiments and project[s] show that "all rights reserved" need not be the default state of copyright protection. For many, "some rights reserved" serves the interests of creators better than the absolutist proprietary model.

As the rhetoric of Open Source and the politics of traditional knowledge and culture emerge in starker relief within the topography of copyright and cultural policy debates, their themes tend to converge. As anthropologist Valdimar Hafstein describes the tension between copyright systems as dictated by the industrialized world and modes of communal cultural production that are best (albeit not exclusively) demonstrated in developing nations, he uses terms that could just as easily be applied to technological peer production. "Creativity as a social process is the common denominator of these concepts and approaches," Hafstein writes. "From each of these perspectives, the act of creation is a social act. From the point of view of intertextuality, for example, works of literature are just as much a product of society or of discourse as they are of an individual author or, for that matter, reader." Traditional cultural knowledge, communally composed and lacking distinct marks of individual authorship, is "a node in a network of relations: not an isolated original, but a reproduction, a copy," Hafstein explains. Nothing about Hafstein's descriptions of the politics of traditional

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knowledge offers a resolution to that particular source of friction in global intellectual property battles. The converging rhetorics, however, reveal the extent to which innovation and creativity often (perhaps most often) lie outside the assumptions of incentives and protectionism upon which high levels of corporate copyright protection rest.

The Open Source model of peer production, sharing, revision, and peer review has distilled and labeled the most successful human creative habits into a political movement. This distillation has had costs and benefits. It has been difficult to court mainstream acceptance for such a tangle of seemingly technical ideas when its chief advocates have been hackers and academics. Neither class has much power or influence in the modern global economy or among centers of policy decision-making. On the other hand, the brilliant success of overtly labeled Open Source experiments, coupled with the horror stories of attempts to protect the proprietary model, have added common sense to the toolbox of these advocates.

C. Cultural Law

1. A Working Definition

What exactly do we mean by "cultural law"? In general, the term embraces a panoramic range of human behavior, expressions, and activities pertaining to family and social norms, rules of etiquette, folklore, folk art, religion, art, architecture, media, sports, recreation, music, language, literature, drama, dance, other performing arts, and significant relations among these phenomena. Cultural law may be best defined in terms of several distinct functions related to this broad range of subject matter. Accordingly, we can establish that the term "cultural law" refers to a set of relationships between law and culture. The two social constructs are inseparable. These relationships can be summarized as follows:

1. Law embodies culture and formalizes its norms.
2. Law promotes, protects, conditions, and limits cultural attributes and expressions.
3. Law harmonizes cross-cultural differences, confirms cultural rights, and establishes international standards.
4. Culture reinforces legal rules.
5. Culture conditions and constrains the adoption, interpretation, and vitality of legal rules.
6. Cultural expressions and symbols promote legal relationships.

2. Culture-Related Terminology

The term "culture" is notoriously ambiguous. In fact, it has been described as one of the two or three most complicated words in the English language. It has at least three different meanings: a set of desirable characteristics and goals of the civilized world; the norms and other characteristics of particular groups or societies; and specific works of art, literature, music, and other expressions. We can speak therefore of "high culture," "a cultural experience," "low culture," "cultural life," "multiculturalism," "corporate

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culture," "political culture," "military culture," "culture of corruption," "cultural diversity," "culture wars," "cultural bias," "counterculture," the "drug culture," and "debt culture." When the baseball superstar Alex Rodriguez was compelled to admit his use of performance-enhancing drugs, including steroids, during at least three seasons several years earlier, he blamed it on "a different culture" of baseball then.[28]

The range of meanings is mind boggling, and the resulting confusion is rampant. For example, in early reports about pleas for the 2012 Olympic Games in London, the British excitedly urged its readers and audiences not to be carried away by the thoughts of pole-vaulters, swimmers, and gymnasts alone but to carry a torch for "culture" as well as if sports were somehow distinct from culture. The news accounts then trumpeted the usual Olympic plans to feature art exhibits, musical events, and poetry at the games, without ever recognizing that sport itself is culture. Chapter 2.A offers a variety of perspectives on the concept of culture.

Terms derived from "culture" are also important to lawyers, businesspeople, diplomats, and professionals, not to mention national interests. For example, the framework of the antiprotectionist North American Free Trade Agreement (NAFTA),[29] which is thoroughly hostile to national trade barriers, includes an exception for cultural industries. This exception removes from the scope of NAFTA any measure adopted or maintained with respect to cultural industries.[30] Such measures include, for example, "the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing." The parties included the "cultural industries exception" to the national treatment obligation in NAFTA to ensure that they (mostly Canada) could protect and provide support to industries preserving and producing works significant to national culture that otherwise might be jeopardized by the freer import of alternative goods and services from other parties. The cultural industries exception operationalizes the core value of cultural identity that was discussed earlier in this chapter.

In 2007 a NAFTA arbitration under the rules of the UN Commission on International Trade Law (UNCITRAL), and administered through the International Centre for Settlement of Investment Disputes (ICSID), delivered an award and opinion resolving a long-standing dispute between United Parcel Services of America, Inc. (UPS) and the Government of Canada (Canada).[31] The dispute involved conflicting interpretations of NAFTA, in particular, provisions in chapter 11 (investments), chapter 15 (monopolies

[28] *See generally* Selena Roberts, A-Rod (2009); Selena Roberts & David Epstein, *Confronting A-Rod*, Sports Illustrated, Feb. 16, 2009, at 28.

[29] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

[30] Article 2106 of NAFTA, *id.*, provides as follows:

> Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access – Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the *Canada-United States Free Trade Agreement*. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States.

[31] United Parcel Serv. of Am. v. Canada, Merits (NAFTA Ch. 11 Arb. Trib. June 11, 2007), 46 I.L.M. 922 (2007).

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and state enterprises), as well as the relationship between the two chapters. Put simply, UPS claimed that Canada, directly and through its agent Canada Post, a Crown corporation, had harmed UPS and UPS subsidiaries in Canada by breaching its obligations under NAFTA to ensure that UPS and its investments received the requisite treatment to which foreign investors are entitled.

Among the issues in *United Parcel Service v. Canada* was whether Canada could premise its discriminatory treatment by Canada Post against UPS in the cultural industries exception. In a controversial decision, the tribunal, in a 2–1 decision, ruled that the nationwide distribution of mail was a "cultural industry" falling within the exception. (The tribunal also ruled in favor of Canada's other defenses to discriminatory treatment.)

As we shall see in Chapters 3 and 5, another term, "cultural heritage," is normally limited to the tangible or material objects and intangible ideas related to such objects in the sense of the traditional but problematic term "cultural property." Cultural heritage law, like cultural law as a whole, is best defined in terms of its functions. Essentially, cultural heritage law helps protect the physical integrity of cultural material; facilitates cooperation in its protection, transfer, and return; rectifies wrongful activity; imposes penal sanctions in response to criminal activity; and provides formal and informal mechanisms and rules for resolving related disputes.

3. Culture as a Human Right

a. Applicable Law

Culture as an internationally protected human right has two modern sources: the peace movements of the late nineteenth century and the several peace treaties that addressed the territorial renovation of Europe after the First World War. The two Hague Conferences of 1899 and 1907 produced consecutive conventions and regulations that first codified the protection of cultural heritage in humanitarian law. Concurrently, a related concept of cultural internationalism emerged from the same nineteenth-century peace movements, offering an ambitious antidote to mounting political tensions in Europe. Unfortunately the guns of August 1914 tolled the progress of cultural internationalism. After the war, however, such intellectuals as Romain Rolland, Paul Valéry, Marie Curie, Henri Bergson, and Albert Einstein sought to restore the concept to a position of centrality in diplomatic discourse. The postwar peace treaties, informed by Wilsonian self-determinism, established a foundation for modern human rights law in their provisions for protection of cultural minorities within the emerging boundaries of Eastern Europe.

The gathering storm of the Second World War again demolished the fragile structure of cultural internationalism. In the war's aftermath, however, a blend of cultural internationalism and nationalism – not unlike today's cosmopolitanism – inspired an emphasis on cultural diplomacy. The idea was for governments to rely on a form of public diplomacy that emphasized culture in a broad sense. It was to equip governments with what we now call soft power, in Joseph Nye's famous phrase. More recently, the UN Covenants on Civil and Political Rights and on Social, Economic and Cultural Rights and other human rights instruments have provided a new vocabulary and legal framework for culture-based claims. The essay by Jacinta O'Hagan earlier in this chapter introduced the role of human rights in the world order. In this section, we focus on cultural rights specifically.

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"Culture" has multiple meanings in international human rights law. International instruments often refer to culture in terms of a right to culture or to the protection of one or another forum of cultural diversity. The most important conceptualization is in article 27 of the International Covenant on Civil and Political Rights (ICCPR):

> In those states in which ethnic, religious, and 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 their own religions, or to use their own language.

Although this is generally known as the minority rights provision, it has been broadly construed to afford protection of cultural matters for many different types of groups, including indigenous peoples (who may form a majority in some countries) and immigrants. Not only do many individuals and groups avail themselves of these rights, according to the Human Rights Committee, which monitors compliance with the ICCPR and interprets its provisions in the reporting and review process, but also cultural rights themselves are broad in scope. The Committee's general comment on article 27 offered an interpretation of the scope of cultural rights, as follows:

> [C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of [minority] communities in the decisions that affect them.

According to article 15(1) of the International Covenant on Economic, Social, and Cultural Rights, states parties are obligated to protect the right of everyone to take part in cultural life. Culture, in this context, is associated with creative activities in which individuals cooperate. It is linked to the acquisition of knowledge, rituals associated with a way of life, and forms of communication. The international community has used the definition of culture in this article as a basis for developing provisions in the instruments of the UN Educational, Scientific, and Cultural Organization (UNESCO). The notion of culture was subsequently defined in the Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It (1976). In the preamble to the Recommendation, the concept was set forth as follows:

> [C]ulture is not merely an accumulation of works and knowledge which an elite produces, collects and conserves in order to place it within reach of all; or that a people rich in its past and its heritage offers to others as a model which their own history has failed to provide for them; and that culture is not limited to works of art and the humanities.

Despite the idea expressed that culture should be broadly construed, the standard view is that this article deals with science and technology, the protection of intellectual property, and general elite forms of culture (i.e., culture with a capital *C*).

UNESCO adopted, first, a Universal Declaration and, subsequently, a Convention on the Protection and Promotion of Diversity of Cultural Expression, as we saw earlier in this chapter. The Convention's preamble mentions language and intellectual property rights as well as the rights of minorities and indigenous peoples:

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"Cultural content" refers to the symbolic meaning, artistic dimensions and cultural values that originate from or express cultural identities.

"Cultural expressions" are those expressions that result from the creativity of individuals, groups and societies and that have cultural content.

In those states with ethnic, religious, or linguistic minorities or persons of indigenous origin, International Labor Organization Convention No. 169 on Indigenous and Tribal Peoples provides a collective right – a so-called third-generational right – to cultural integrity. Also, article 30 of the Convention on the Rights of the Child guarantees a child of such persons the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, and to use his or her own language. This provision is an important formulation, as the integrity of cultural groups depends ultimately on the cultural identities of their children.

The Convention on the Rights of Persons with Disabilities contains by far the most elaborate provision for cultural rights. The Convention was opened for signature in 2007, with the highest number of signatories on its opening day (eighty-two) in the history of the UN Conventions. It is intended to promote a paradigm shift in attitudes and approaches of states parties toward persons with disabilities so that they no longer are viewed as objects of charity, medical treatment, and social protection but rather as subjects of law capable of exercising human rights on their own. Article 30, on participation in cultural life, leisure, and sport, reads as follows:

1. States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:
   a. Enjoy access to cultural materials in accessible formats;
   b. Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;
   c. Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.
2. States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.
3. States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.
4. Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.
5. With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:
   a. To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels.

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b. To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;
c. To ensure that persons with disabilities have access to sporting, recreational and tourism venues;
d. To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system.

Although these cultural rights are sometimes regarded as the least developed category of human rights, they are unquestionably a part of international human rights law. Cultural rights have been highly controversial because their protection sometimes requires that other human rights be limited. Also, there is substantial debate about the proper interpretation of cultural rights, about which individuals are entitled to invoke them, and about what obligations governments have to enforce these rights.

A crucial question is often how to balance the legal protection of particular cultural rights, such as that of religious expression or family integrity, against other human rights, such as women's rights and children's rights. The interrelationships and tensions among different types of human rights will be especially apparent in Chapter 9, which covers religion.

Many feminist theorists reject the proposition that cultural rights deserve legal protection because of their concern that protecting these rights will undermine gender equality. Although their work is often framed as a critique of multiculturalist relativity, these analysts are essentially denying the validity of cultural rights or are limiting the scope of certain cultural rights. However, such feminist objections do not appear to apply to the numerous traditions that have no connection to gender. Moreover, feminist theorists raise fewer objections to the protection of cultural rights when cultures do not imprison those who seek to exit, particularly women wishing to flee from oppressive customs. Sometimes, too, the respective rights are mutually reinforcing, for example, when women wear the veil in countries that prohibit this type of religious garb.

In practice, the international recognition of cultural rights implies that governments must honor them. Because this obligation is not absolute, however, cultural rights must sometimes yield to countervailing considerations. The challenge, naturally, is to distinguish between valid and invalid reasons for overriding cultural traditions and practices insofar as they may threaten public health, safety, or morals.

b. Claims

(i) Food. The most common examples of cultural relativity in civil society are food taboos, given that foodways are a significant part of a community's way of life. Many cultural conflicts have centered on meat. In India, beef is not eaten because the cow is sacred, and dogs are not eaten in the United States because the dog is a pet, typically regarded as a full-fledged member of the family. In a celebrated case, two Cambodians were arrested in Long Beach, California, after they had butchered a German Shepherd dog for dinner.

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David Haldane, *Culture Clash or Animal Cruelty? Two Cambodian Refugees Face Trial after Killing Dog for Food*, L.A. Times, Mar. 13, 1989, at 1 (reprinted with permission)

These are the facts on which everyone agrees: Late last June, Sokheng Chea, 32, and Seng Ou, 33, both Cambodian refugees, decided to eat a 4-month-old German Shepherd puppy that a co-worker had given them as a pet. Holding the dog down on the kitchen floor of Ou's Long Beach apartment, they hit it over the head with a blunt instrument, slashed its throat and began skinning it. That is when the police arrived. Alerted by a neighbor who had heard the dog's yelps, they arrested the two men. And last week, Chea and Ou went on trial at Long Beach Municipal Court for misdemeanor cruelty to animals, an offense that carries a maximum penalty of a year in jail and a $2,000 fine.

The only disagreement is over whether what they did is illegal. The prosecution contends that the killing was a crime because it was carried out in an unnecessarily cruel way. The defense counters that the dog was killed humanely in a manner consistent with contemporary slaughterhouse practices, and that the two recent immigrants were following their own national customs with no idea that they were offending American sensibilities.

Underlying everything, the lawyers agree, is a resounding clash of cultural values and a basic question: Just how much is America willing to bend to accommodate the new wave of immigrants who are daily arriving on its shores? "If the dog had been some other kind of animal – like a chicken or a duck or a pig – these people wouldn't be in court," said Joe Beason, an attorney representing Chea. "While [Americans] consider it completely acceptable to go out and shoot a deer, those same hunters would disapprove of killing a dog for food." Countered Sarah Lazarus, the prosecutor in the case: "We intend to prove that this was cruelty. It's cultural to the extent that each segment of our society has its own cultural customs, but some of [those customs] can be woven into the fabric of our society and others cannot."

The court proceedings have been closely monitored by animal-rights activists. "We do not accept these things in our society, and we would hope that the court will deal with [these men] with the appropriate severity," said Jerye Mooney, coordinator of the Fund for Animals, a national organization based in Torrance that is pushing for legislation to specifically prohibit the killing of dogs and cats for human consumption. Similar legislation, inspired by reports that Southeast Asian refugees had been foraging for stray dogs and other animals in San Francisco's Golden Gate Park, was defeated by [a California] Assembly committee in 1981.

"I would like to see these other cultures contained," said Sabina Hubbard, chairwoman of the Orange County chapter of the Pet Assistance Foundation. "We don't want these [practices] to spread."

. . .

According to local Asian leaders, dogs and cats are considered delicacies in some Southeast Asian countries. Two years ago, officials of the Society

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for the Prevention of Cruelty to Animals reported an increase in the number of dogs and cats being killed for food in Los Angeles County, a trend they attributed to the influx of Southeast Asian refugees. But Lazarus said that, to her knowledge, this is the first incident in which enough evidence existed to bring the matter to court.

The trial – which has already resulted in at least one death threat against the defendants – has raised the hackles of some local Southeast Asian leaders who fear that the publicity may result in anti-Asian bias. "I am very concerned," said Vora H. Kanthoul, associate executive director of the United Cambodian Community, a social service agency based in Long Beach. While the eating of dogs is not uncommon in such countries as Korea, the Philippines and Vietnam, he said, it was highly unusual in Cambodia until the 1970s, when people there were near starvation during the regime of Pol Pot, a brutal Communist dictator. "During the war, a lot of things happened and they ate anything to survive," Kanthoul said. "It's unfortunate that [these men] were caught because it's blown everything out of proportion."

Responding to a pretrial motion last week, Judge Bradford L. Andrews ruled that killing a dog for food is not in itself a violation of the law. To win its case, therefore, he said, the prosecution must prove that the dog was "maimed, wounded, tortured, mutilated or tormented" in a manner beyond that required to prepare it as food. Lazarus said that as the trial progresses, she intends to produce an eyewitness and a veterinarian who will testify that the dog was killed with unnecessary cruelty. Beason says he has an autopsy report indicating that the killing was done in a manner consistent with livestock slaughter techniques and that there is no direct evidence of inhumane treatment.

As for the cultural issue, both say it will ultimately have to be resolved out of court. "When you bring someone into this country, you take the whole person," Beason said. "You don't just extract them from their culture, you bring the culture with them."

When the prosecutors realized there was no state law prohibiting the consumption of dogs, they decided to prosecute the men under the general animal cruelty law. What is construed as cruelty to animals varies over time and across cultures, however. Eventually, the special legislation was enacted that prohibited the consumption of pets but did not specify which animals constitute pets.

The following federal court opinion involved the related issue of whether the state of Illinois could prohibit the slaughter of horses for import of their meat to France, where horsemeat is considered a delicacy. The case reflects a clash between American and European cultural values that was ultimately resolved on constitutional grounds.

Cavel International, Inc. v. Madigan,
500 F.3d 551 (7th Cir. 2007) *cert. denied*, 128 S. Ct. 2950 (2008)

Posner, *Circuit Judge.* Horse meat was until recently an accepted part of the American diet – the Harvard Faculty Club served horse-meat steaks until

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the 1970s. No longer is horse meat eaten by Americans, though it is eaten by people in a number of other countries, including countries in Europe; in some countries it is a delicacy. Meat from American horses is especially prized because our ample grazing land enables them to eat natural grasses, which enhances the flavor of their meat.

Cavel International, the plaintiff in this case, owns and operates the only facility in the United States for slaughtering horses. Until recently it was one of three such facilities, but the other two, both in Texas, stopped slaughtering horses after the Fifth Circuit upheld a Texas law similar to the Illinois law challenged in this case. *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 336–37 (5th Cir. 2007).

. . .

The Act is fully applicable to Cavel, even though, because there is no U.S. domestic market for horse meat as a human food, Cavel's entire output is exported to such countries as Belgium, France, and Japan. Indeed, Cavel is the subsidiary of a Belgian company.

On May 24 of this year, the Illinois Horse Meat Act, 225 ILCS 635, was amended to make it unlawful for any person in the state either "to slaughter a horse if that person knows or should know that any of the horse meat will be used for human consumption," or "to import into or export from this State, or to sell, buy, give away, hold, or accept any horse meat if that person knows or should know that the horse meat will be used for human consumption." (Prior to the amendment, the statute merely required a license to slaughter horses and imposed various inspection, labeling, and other regulatory restrictions on licensees. The prohibition has made these provisions academic). Cavel claims that the amendment violates both the federal Meat Inspection Act and the commerce clause – the provision in Article I, section 8, of the federal Constitution that in terms merely empowers Congress to regulate interstate and foreign commerce but that has been interpreted to limit the power of states to regulate interstate and foreign commerce even in the absence of federal legislation inconsistent with the state regulation.

[A] state is permitted, within reason, to express disgust at what people do with the dead, whether dead human beings or dead animals. There would be an uproar if restaurants in Chicago started serving cat and dog steaks, even though millions of stray cats and dogs are euthanized in animal shelters. A follower of John Stuart Mill would disapprove of a law that restricted the activities of other people (in this case not only Cavel's owners and employees but also its foreign consumers) on the basis merely of distaste, but American governments are not constrained by Mill's doctrine.

The fact that [Governor Rod Blagojevich's] signing statement acknowledges the role of the Hollywood actress Bo Derek, author of the book *Riding Lessons: Everything That Matters in Life I Learned from Horses* (2002), in outlawing the slaughtering of horses could be thought to inject a frivolous note into a law that forces the closing of a business that has very little to do with the people of Illinois. But this is not a basis for invalidating

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a nondiscriminatory statute that interferes minimally with the nation's foreign commerce and cannot be said to have no rational basis.

NOTES AND QUESTIONS

1. Ultimately there will be cultural clashes over what individuals eat. Perhaps the French adage "chacun à son gôut" – "each to his or her own taste" – may best capture the essence of cultural relativity in taste. In a democratic political system, however, what is the state interest in regulating the consumption of particular animals? Why is the consumption of dogs and horses more repugnant than the consumption of cows? Could the state mandate vegetarianism?
2. In these kinds of food fights, public law and policy blocked people's access to nutrition. Another issue involves the protection of ethnic minorities from food that offends their dietary practices. Some of the controversies hinge on the improper preparation of food. In other instances, the plaintiffs claim damages for injury from which majority populations are spared. For example, a Hindu man ordered a bean burrito at Taco Bell but was given a beef burrito instead. When he took a bite of it, he claimed to have been severely traumatized, and he sued for damages.

   In another case, Hindus discovered that McDonald's was surreptitiously seasoning french fries with beef flavoring without disclosing this information, a practice that obviously violated the Hindu dietary prohibition against the consumption of beef. One of the plaintiffs was said to be horrified when he found out: "I feel sick in the morning every day, like I want to vomit.... Now it is there in my mind that I have done this sin."[32]

   Although the effect of this practice was especially problematic for Hindus, it was also repulsive to vegetarians whose diet is often simply a matter of nonreligious choice. The question of food preparation is also important to vegetarians, who at times have joined forces with Hindus. When vegetarian law students joined forces with the Hindus, they first filed a lawsuit in Seattle. Following this, additional suits were filed in other states. Eventually, McDonald's, although denying it had ever claimed that the French fries were "vegetarian," settled the lawsuit by paying each of the eleven named plaintiffs $4,000 each, by donating $10 million to Hindu and other groups, by creating a dietary advisory board, and by posting an apology on the McDonald's Web site.[33]
3. Some courts have concluded that laws specifically governing Jewish kosher food are unconstitutional, as they cause excessive entanglement with religion in violation of the First Amendment to the U.S. Constitution.[34] In Quebec in the mid-1990s, there was controversy about whether kosher products could be sold if the labels were in English only.[35] Although Jewish communities have developed certification

[32] Laura Goodstein, *For Hindus and Vegetarians, Surprise in McDonald's Fries*, N.Y. Times, May 20, 2001, at 1, 18.

[33] Herbert G. McGann, *McDonald's Settles Beef over Fries*, CBS News, June 5, 2002.

[34] *See, e.g.*, Commack v. Self-Service Kosher Meats v. Weiss, 294 F.3d 415 (2d Cir. 2002), *cert. denied*, 537 U.S. 1187 (2003); Ran-Dav's County Kosher, Inc. v. New Jersey, 608 A.2d 1353 (N.J. 1992).

[35] *Quebec to Convene Kosher Label Panel*, L.A. Times, Apr. 13, 1996, at A5.

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programs, Muslims in the United States have encountered fraud in the sale of halal food despite efforts by the U.S. Department of Agriculture to combat it.

(ii) The Environment. In many disputes, environmental rights and the right to culture are mutually reinforcing. The cultural argument reinforces the demand for environmental protection. Litigation in which indigenous peoples have challenged the desecration of sacred sites has included a claim that harm to the environment also undermines their way of life. In the *Yanomami* case (1985), the Inter-American Commission on Human Rights held that failure of the Brazilian government to prevent development that destroyed the Yanomami way of life constituted "ethnicide." In cases such as these, environmental rights and cultural rights coincide, revealing a confluence of rights claims, whereas in many other contexts, environmental rights claims conflict with cultural rights claims.

At the crux of many cases are cultural differences concerning the use of various types of endangered species. Despite the existence of international conventions such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), designed to prevent the killing of animals thought to be near the brink of extinction, in some Asian countries, these animals are considered necessary for cultural or religious practices among some segments of the population. Animal parts may be needed for medicinal purposes, they may be used as aphrodisiacs, or they are regarded as having supernatural powers.

On the one hand, animal rights activists and environmentalists contend that some creatures deserve protection for their own sake and to preserve biodiversity, a human value deemed intrinsically valuable. On the other hand, representatives of some cultures and some indigenous leaders maintain that they are entitled to use animals for legitimate reasons such as medicinal purposes, despite international criticism. In these disputes, they invoke the right to culture and the right to religious freedom to justify their policy position. (As we saw earlier, these rights are also invoked to support a cultural defense in courts of law.)

For the most part, the international community has not recognized cultural rights arguments when they have clashed with environmental rights in the context of endangered species policy. For example, when the international community concluded that Taiwan had failed to enforce CITES adequately because it allowed the sale of tiger and rhinoceros parts, the Clinton administration in 1994 imposed economic sanctions that prohibited the American import of Taiwanese products made from wild species. This represented more than $20 million in trade.

Within the United States, there have also been domestic prosecutions of individuals engaged in the sale of endangered species parts contrary to endangered species law and the Lacey Act. The federal government has sponsored raids of Asian medicine shops in Chinatown in San Francisco and elsewhere and has conducted sting operations such as Operation Chameleon, in which the Justice Department and U.S. Fish and Wildlife Service in 1998 arrested "Anson" Keng Liang Wong, allegedly the largest illegal reptile dealer in the world.

In one U.S. case, *Kei Tomono v. United States*, a Japanese man who ran an import-export business was caught with turtles and snakes in his suitcase as he was entering the United States. Although he agreed to plead guilty, he argued that the court should take his cultural background into account to mitigate his sentence. His contention was that reptiles occupy a unique place in Japanese culture, that the creatures are not regarded

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as endangered in Japan, and that he was unaware that exporting the animals was illegal. The appellate court ultimately rejected the request for a downward departure from the sentence specified in the federal sentencing guidelines, thus declining to mitigate his sentence. To be sure, the validity of Tomono's arguments may not be convincing, as he was college educated and had been involved in the reptile business for several years, but it is conceivable that such claims have merit in other cases. For the most part, however, cultural defenses of this sort have generally not succeeded.

In some circumstances, both national governments and international organizations have tried to accommodate communities by issuing permits to allow hunting. The question is, What sorts of policies are most likely to achieve the goal of protecting cultural rights as well as environmental rights, such as the right to biodiversity? One noteworthy attempt to balance both concerns was a memorandum from President Clinton.

Memorandum on Distribution of Eagle Feathers for Native American Religious Purposes, Weekly Comp. Pres. Doc. 30 (17) (Apr. 29, 1994), at 935–37

Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes

Memorandum for the Heads of Executive Departments and Agencies

Eagle feathers hold a sacred place in Native American culture and religious practices. Because of the feathers' significance to Native American heritage and consistent with due respect for the government-to-government relationship between the Federal and Native American tribal governments, this Administration has undertaken policy and procedural changes to facilitate the collection and distribution of scarce eagle bodies and parts for this purpose. This memorandum affirms and formalizes executive branch policy to ensure that progress begun on this important matter continues across the executive branch.

Today, as part of an historic meeting with all federally recognized tribal governments, I am directing executive departments and agencies (hereafter collectively "agency" or "agencies") to work cooperatively with tribal governments and to reexamine broadly their practices and procedures to seek opportunities to accommodate Native American religious practices to the fullest extent under the law.

As part of these efforts, agencies shall take steps to improve their collection and transfer of eagle carcasses and eagle body parts ("eagles") for Native American religious purposes. The success of this initiative requires the participation, and is therefore the responsibility, of all Federal land managing agencies, not just those within the Department of the Interior. I therefore direct each agency responsible for managing Federal lands to diligently and expeditiously recover salvageable eagles found on lands under their jurisdiction and ensure that the eagles are promptly shipped to the National Eagle Repository ("Repository"). To assist agencies in this expanded effort, the Secretary of the Interior shall issue guidelines to all relevant agencies for the proper shipment of eagles to the Repository.

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After receiving these guidelines, agencies shall immediately adopt policies, practices, and procedures necessary in accordance with these guidelines to recover and transfer eagles to the Repository promptly.

I support and encourage the initial steps taken by the Department of the Interior to improve the distribution of eagles for Native American religious purposes. In particular, the Department of the Interior shall continue to adopt policies and procedures and take those actions necessary to:

(a) ensure the priority of distribution of eagles, upon permit application, first for traditional Native American religious purposes, to the extent permitted by law, and then to other uses;
(b) simplify the eagle permit application process quickly and to the greatest extent possible to help achieve the objectives of this memorandum;
(c) minimize the delay and ensure respect and dignity in the process of distributing eagles for Native American religious purposes to the greatest extent possible;
(d) expand efforts to involve Native American tribes, organizations, and individuals in the distribution process, both at the Repository and on tribal lands, consistent with applicable laws;
(e) review means to ensure that adequate refrigerated storage space is available to process the eagles; and
(f) continue efforts to improve the Repository's ability to facilitate the objectives of this memorandum.

The Department of the Interior shall be responsible for coordinating any interagency efforts to address continuing executive branch actions necessary to achieve the objectives of this memorandum.

We must continue to be committed to greater intergovernmental communication and cooperation. In addition to working more closely with tribal governments, we must enlist the assistance of, and cooperate with, State and local governments to achieve the objectives of this memorandum. I therefore request that the Department of the Interior work with State fish and game agencies and other relevant State and local authorities to facilitate the objectives of this memorandum.

With commitment and cooperation by all of the agencies in the executive branch and with tribal governments, I am confident that we will be able to accomplish meaningful progress in the distribution of eagles for Native American religious purposes.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

There were, unfortunately, several difficulties associated with the implementation of this effort. First, there was an insufficient number of eagle feathers. Second, the National Eagle Repository was unable to respond quickly enough to requests. Requiring Native Americans to submit a request by FedEx and then wait for it to come in the mail was

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compared to waiting in line to enter a church days after a death occurred. Third, it was ethnocentric to assume that the use of feathers was by itself important. Instead, it was just as important – culturally – to hunt the eagles for their feathers. In other words, the hunt was itself a crucial aspect of the ritual.

The International Whaling Commission has granted exemptions from the policy against the killing of bowhead and other whales by indigenous communities. This cultural accommodation represents a compromise that accommodates both environmental rights and cultural rights. If indigenous groups agree to take only a few creatures, the resulting depletion of whale stocks will not risk endangering the species.

One major difficulty has been that other groups have objected to the exemption, asserting that it violates equal protection to make an exception for indigenous peoples but not for them. Japanese and Norwegian whaling communities, whose way of life also depends on the taking of whales, have advanced this argument. They hold that policies intended to stop whaling are a form of cultural imperialism. Some members of indigenous groups also criticize the policy as ethnocentric, in part because the need to request exemptions is seen as paternalistic. The "authenticity" of the cultural traditions of hunting is also controversial. As culture is not static, this objection seems to lack force, as groups may prefer to use electric harpoon guns rather than spears. Cultural rights arguments ought not to depend on the method of killing, however.

The real question is how to reconcile competing rights claims. Which should take precedence, environmental rights or cultural rights? In this context, cultural communities find insulting the assumption that they would hunt or fish any species to the point of extinction. They claim that it was, after all, colonial powers that depleted natural resources to such an extent. In the final analysis, minority groups and indigenous peoples will have only the benefit of diverse species for whatever purpose, if they are not extinct. This logic would seem to suggest that environmental rights, despite being recognized later in time, trump cultural rights claims. Whether or not one agrees with this argument, it is clear that greater attention to the hierarchy of human rights claims is needed.

(iii) Disabilities. As we have seen, the first human rights treaty of the twenty-first century, the Convention on the Rights of Persons with Disabilities, provides comprehensive legal protection for individuals with disabilities. Protected persons find that their representations in folklore, popular culture, and other media perpetuate negative stereotypes. It has been a standard plot device to have villains portrayed as persons with disabilities, as in comic strips. Actors with disabilities often face dilemmas when their chance to be in television programs and films requires playing a role that reinforces stereotypes about persons with disabilities.

Another difficulty is that sometimes persons with disabilities may defend a custom that perpetuates stereotypes that are detrimental to the image of the group as a whole. This occurred in a controversy that involved the so-called sport of dwarf throwing that the UN Human Rights Committee ultimately addressed.[36] France claimed that the ban on the sport was consistent with public order, but a man whose livelihood depended on this activity challenged the ban saying that it violated his human rights under the ICCPR.

[36] Manuel Wackenheim v. France, Comm. No. 854/1999: France 20/07/2002, CCPR/C/75/D/854 1999 (Jurisprudence).

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One might wonder whether dwarfs constitute a cultural group for legal purposes. To the extent that a disabled community has a strong sense of social solidarity, speaks a distinct language, and experiences differential treatment from members of the majority, that group is arguably a cultural minority. Although there is little question that the Deaf represent a cultural group, it is less clear whether other disability communities do. There is also a debate about whether there is such a thing as disability culture.

QUESTIONS

> The Convention on the Rights of Person with Disabilities obligates states parties to equalize opportunities for persons with disabilities. If you were an attorney representing an individual whose employment was terminated because of deafness, how would you invoke the new treaty? A deaf woman who worked as a lifeguard with the YMCA was dismissed after a year because of her condition. When she was informed that her disability made her ineligible, she sued. Leaving aside the specific requirements of such legislation as the Americans with Disabilities Act, should hearing facility be a bona fide occupational qualification to be a lifeguard?

(iv) Family Life and Marriage. An important part of life is the opportunity to marry and have a family. As there are vastly different systems of marriage around the world, conflicts may arise over the proper age of marriage, whether individuals should have the right to choose their spouses, whether the spouse must be of the opposite sex, whether a husband may take more than one wife, and so on. Fascinating jurisprudential issues arise when state legal systems are faced with marriages that are considered valid in the countries where they were celebrated but are not in accordance with the law where a husband and wife may have relocated. The following case received considerable attention. It involved Bangladeshi parents who decided that their son, a man aged twenty-six with intellectual disabilities including autism who had the skills expected of an average three-year-old, would marry an older woman. According to English law, the son lacked capacity to consent to marriage. According to Bangladeshi law, however, it was a valid marriage. The matter was further complicated insofar as the marriage ceremony took place over the phone, thereby raising a question about the appropriate *lex loci celebrationis* (the law of the place of the marriage).

City of Westminster Social & Community Services Department v. IC, [2008] EWCA Civ. 198

Expert evidence was given by Professor Menski, professor of South Asian laws at the School of Oriental and African Studies at the University of London. His evidence and conclusions were unchallenged. As to the marriage this was his evidence:

> The "marriage" needs to be contracted in an "Islamically accepted form," which in this case he finds it to have been, even though the bride, the Khazi officiating, many of her relatives as well as IC's relatives, in particular the father, were in Bangladesh, and IC was with his siblings and an Imam from a local mosque in London, there being

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> speaker-phone communication between the two parties. This form of celebration of marriage (at the telephone) is increasingly common and accepted as entirely valid.

As to the communication between those in this jurisdiction and those in Bangladesh, these were the judge's findings:

> Irrespective of IC's ability or inability to consent, the father of IC (his marriage guardian) "may legitimately act in the best interests of his Ward to arrange, solemnize and contract a marriage for that individual which binds that individual and the spouse in all respects. . . .
>
> It is said that in the course of the marriage ceremony IC said the word "yes" in ostensible consent to his marriage, although his overall mental capacity should not be ignored, included within which is the possibility of coaching, or, more probably than not, echolalia from which he suffers, leading, depending on the phrasing of the question put to him, to such an answer. Irrespective of the status of that "yes" it is, in this case, the father's agreement to the marriage as the lawful marriage of an incapacitated son which is sufficient under the provisions of traditional Islamic law to constitute an appropriate consent.

Aleem v. Aleem
947 A.2d 489 (Md. 2008)

Cathell, J.

Farah Aleem filed suit for a limited divorce from her husband, Irfan Aleem, in the Circuit Court for Montgomery County. The husband thereafter filed an Answer and Counterclaim. He raised no jurisdictional objections. Without, however, any advance notification to the wife, and while the Montgomery County action was pending (between the filing of the action for a limited divorce and the filing of the amended complaint for an absolute divorce), the husband, a Muslim and a national of Pakistan, went to the Pakistan Embassy in Washington, D.C., and performed *talaq*[37] by executing a written document that stated:

> Now this deed witnesses that I the said Irfan Aleem, do hereby divorce Farah Aleem, daughter of Mahmood Mirza, by pronouncing upon her Divorce/Talaq three times irrevocably and by severing all connections of husband and wife with her forever and for good.
>
> 1. I Divorce thee Farah Aleem
> 2. I Divorce thee Farah Aleem
> 3. I Divorce thee Farah Aleem. . . .

[37] Apparently, under Islamic law, where that Islamic law has been adopted as the secular law of a jurisdiction, such as Pakistan, a husband has a virtual automatic right to *talaq* (i.e., to divorce his wife by acknowledging "I divorce thee" three times), but the wife only has a right to *talaq* if it is in the written marriage agreement or if he otherwise delegates that right to her. In the present case the husband did not grant the wife the right to *talaq*. While the nature of *talaq* is relevant to the issues here presented, the wife does not claim that the husband "granted" her that right and accordingly that is not a factual issue in this case.

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Petitioner posits that the performance by him of *talaq* under Islamic religious and secular Pakistan law, and the existence of a "marriage contract," deprived the Circuit Court for Montgomery County of jurisdiction to litigate the division of the parties' marital property situated in this country.[38] The trial court found that the marriage contract entered into on the day of the parties' marriage in Pakistan specifically did not provide for the division of marital property and thus, for that reason alone, the agreement did not prohibit the Circuit Court for Montgomery County from dividing the parties' marital property under Maryland law. The Court of Special Appeals agreed and stated "[t]hus, the Pakistani marriage contract in the instant matter is not to be equated with a premarital or post-marital agreement that validly relinquished, under Maryland law, rights in marital property." *Aleem v. Aleem*, 175 Md.App. 663, 681, 931 A.2d 1123, 1134 (2007). The Court of Special Appeals further stated:

> If the Pakistani marriage contract is silent, Pakistani law does not recognize marital property. If a premarital or post-marital agreement in Maryland is silent with respect to marital property, those rights are recognized by Maryland law. . . . In other words, the 'default' under Pakistani law is that Wife has no rights to property titled in Husband's name, while the 'default' under Maryland law is that the wife has marital property rights in property titled in the husband's name. We hold that this conflict is so substantial that applying Pakistani law in the instant matter would be contrary to Maryland public policy.
>
> Our holding in this case only relates to instances where Islamic law, or parts thereof such as *talaq*, is also the secular (civil) law of a country whose judgments we are urged to accept under the doctrine of comity. In other words, we address Islamic law only to the extent it is also the civil law of a country. The viability of Islamic law as a religious canon is not intended to be affected.

Petitioner presents two questions for our review:

1. [Did] the Court of Special Appeals disregard[] fundamental principles of international comity and conflicts of laws in refusing to recognize a Pakistani divorce because Pakistan and Maryland employ different 'default rules' for the division of property between spouses[?]
2. [Did] the Court of Special Appeals disregard[] fundamental principles of international comity and conflicts of laws in concluding that Pakistan lacked jurisdiction to dissolve the parties' marriage because the parties resided in Maryland on diplomatic visas[?]

The Relevant Facts

The parties, both citizens of Pakistan, were married in Pakistan in 1980. The marriage was arranged by the families of the parties. In accordance

[38] The "marital property" as it would be defined under Maryland law included the husband's pension from World Bank valued at approximately one million dollars, real property valued at $850,000, personal property valued at approximately $80,000, and two or more vehicles.

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with Pakistani custom there was a written agreement presented to the wife on the day of the wedding for her to sign. At that time she was 18 years old and her husband was 29 years old. She had just graduated from high school and he was a doctoral candidate at Oxford University in England. . . .

T[he] agreement provided for a "dower" of 51,000 rupees[39] the payment of which was "deferred." There was no other express or implied waiver of any property rights of either party. During the presentation of the agreement, the wife was advised by her uncle who was acting as a "vakil." There is no evidence in this case, however, that the wife's uncle was a lawyer.[40] Under Pakistani law, unless the agreement provides otherwise, upon divorce all property owned by the husband on the date of the divorce remains his property and "the wife has [no] claim thereto." The opposite is also applicable. The husband has no claim on the property of the wife. In other words, upon the dissolution of the marriage, the property follows the possessor of its title.

Shortly after their marriage, the husband moved to England. The wife joined him later and they resided there for four years while he completed his studies. They then moved to the United States and began to reside in Maryland while the husband worked at the World Bank. They maintained a residence in this State for 20 years and resided here at the time the wife filed for divorce and the husband went to the Pakistan Embassy and performed *talaq*. The parties have two children, both of whom were born in this country, are United States citizens, and reside in this country. The wife is now a resident of Maryland, and holds a green card status.

The central issue in the present case concerns the wife's attempt to have the husband's pension from the World Bank, which relates primarily to his work performed while he was a resident of this country, declared to be "marital property" and to have other property declared marital property and thus be entitled to half of that pension and property under Maryland law.

[39] While the dower was deferred at the time of the contract, it appears that when Irfan Aleem attempted to divorce Farah Aleem, that a sum of $2,500 was mentioned as a "full and final" settlement. Under Islamic law as it is in the civil law of Pakistan, a man, upon marriage, can defer the payment of the "dower" (*mahr* in Urdu) but he cannot divorce the wife by *talaq* unless he then pays the *mahr* to the wife. In a pleading filed in the Circuit Court for Montgomery County by the husband, *mahr*, is explained as follows:

> . . . Dower can be used as a means of controlling the husband's power of divorce, since upon dissolution of the marriage he is requi[r]ed to pay the total amount of the dower at once. . . . [T]he wife's claim for any unpaid portion of her dower is an unsecured debt which is due from her husband. . . . Dower is a major part of the husband' financial commitment to his wife.

In the present case, the sum of $2,500 represents payment of the *mahr* to the wife. It is the husband's position that payment of *mahr* of $2,500 is all that is due the wife, as opposed to the one half of almost two million dollars that she might be entitled to under Maryland law (It is unclear how the *mahr* would affect the position of the Pakistani courts in respect to properties titled in both names. The primary property focus in the present case is the petitioner's pension – which is titled only in the husband's name.). This stark discrepancy highlights the difference in the public policies of this State and the public policies of Islamic law, in the form adopted as the civil, secular law of countries such as Pakistan.

[40] Apparently, under Pakistani law a "vakil" performs the function of a legal advisor and often is a lawyer.

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Discussion

More than a hundred years ago, the Supreme Court of the United States, in an extensive discussion relating to the judgments of foreign countries, discussed the comity due judgments of foreign countries and full faith and credit issues. [The Court provides an historical overview from that opinion.] . . . "As to judgments of courts of foreign countries, there is no constitutional requirement of recognition. It is a matter of comity." *Telnikoff v. Matusevitch*, 347 Md. 561, 702 A.2d 230 (1997) (a "certified question" case), is perhaps the most modern and seminal of our cases on comity between Maryland and foreign countries. It did not involve issues of marital property or other domestic law issues, but involved primarily the law of defamation and the constitutional guarantees of freedom of speech. *Telnikoff*, however, did restate with clarity the issues that relate to comity and their application generally. As stated above, the case involved the difference between the laws of libel of England and of Maryland. An English citizen had obtained a judgment in the courts of England based upon a libel occurring in England. He sought to have the judgment enforced in this country and Matusevitch brought an action to preclude the enforcement. We stated as follows:

> Telnikoff argues that the English libel judgment is entitled to recognition under principles of "comity." Matusevitch, on the other hand, asserts that the English judgment is repugnant to the public policy of the United States and Maryland and, therefore, should be denied recognition.
>
> The recognition of foreign judgments is governed by principles of comity. . . . "Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to the international duty and convenience and to the rights of persons protected by its own laws"). . . .
>
> Although foreign judgments are entitled to a degree of deference and respect under the doctrine of comity, courts will nonetheless deny recognition and enforcement to those foreign judgments which are inconsistent with the public policies of the forum state. . . .

The justification for the public policy exception to the recognition of foreign judgments as articulated by the United States Court of Appeals for the District of Columbia Circuit in *Laker Airways v. Sabena, Belgian World Airlines*, 235 U.S. App. D.C. 207, 731 F.2d 909, 937 (D.C.Cir.1984), is as follows:

> There are limitations to the application of comity. When the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the

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> domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.' . . .

In determining non-constitutional principles of law, courts often rely upon the policies and requirements reflected in constitutional provisions. . . . ("Although [Article 46 of the Maryland Declaration of Rights] may not directly apply to private employers, it nonetheless establishes a public policy in Maryland that an individual should not be subjected to sex-based discrimination.")

The Court of Special Appeals, in *Wolff v. Wolff*, 40 Md. App. 168, 389 A.2d 413 (1978), noted as follows:

> "The full faith and credit clause . . . does not apply to a divorce obtained in a foreign country. Courts of the United States are not required by federal law to give full force and effect to a judgment granted in a foreign nation. On the other hand, judgments of courts of foreign countries are recognized in the United States because of comity. . . . This principle is frequently applied in divorce cases. . . . The principle of comity, however, has several important exceptions and qualifications. A decree of divorce will not be recognized by comity where it was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy of the state in which recognition is sought. . . . " (Citations omitted.)

The Maryland Legislature declared Maryland's public policy in regard to property acquired during a marriage, stating in the preamble to Chapter 794 of the Acts of 1978, that "the property interests of the spouses should be adjusted fairly and equitably." And furthermore, from the record in the present case, it appears that under Islamic law, which, albeit with certain modifications, has been adopted as the law in Pakistan, only the husband has an independent right to *talaq*, i.e., to use *talaq* to divorce his wife.[41] The wife may only utilize *talaq* if the husband has given her that right in the contract of marriage. In the case at bar, the wife was not granted the right of *talaq* by her husband. It appears, also from the record, that the husband may utilize *talaq* with no prior notice to the wife. It is clear as well, as we point out above, that, under Pakistani law, upon a divorce there is no equitable division of marital property, i.e., property acquired by the parties during the marriage, unless the marriage "contract" so provides . . .

[41] Here the Court refers to a synopsis of the Pakistani law of divorce in a House of Lords decision. The rules require the husband who exercises his unilateral right to notify the chairman of the local council immediately. "Although [the chairman] is required to convene an arbitration council to attempt the reconciliation of the parties, their attendance is not obligatory and the divorce will become effective, unless the wife is pregnant, once 90 days have elapsed from the date on which the chairman received notice of the *talaq*."

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On November 7, 1972, the people of Maryland ratified the Equal Rights Amendment, now found as Article 46 of the Maryland Declaration of Rights. It provides: "Equality of rights under the law shall not be abridged or denied because of sex." Accordingly, in the first instance, the enforceability of a foreign *talaq* divorce provision, such as that presented here, in the courts of Maryland, where only the male, i.e., husband, has an independent right to utilize *talaq* and the wife may utilize it only with the husband's permission, is contrary to Maryland's constitutional provisions and thus is contrary to the "public policy" of Maryland. Moreover, if we were to recognize the use of *talaq*, controlled as it is by the husband, a wife, a resident of this State, would never be able to consummate a divorce action filed by her in which she seeks a division of marital property, because a husband who is a citizen of any country in which Islamic law, *adopted as the civil law*, prevails could go to the embassy of that country and perform *talaq*, and divorce her (without prior notice to her) long before she would have any opportunity to fully litigate, under Maryland law, the circumstances of the parties' dissolution of their marriage.[42]

Talaq lacks any significant "due process" for the wife, and its use moreover, directly deprives the wife of the "due process" she is entitled to when she initiates divorce litigation in this State. The lack and deprivation of due process is itself contrary to this State's public policy.

Petitioner directs the Court's attention to the practice in Pakistan of having a Council of Arbitration available to the wife. That practice, however, only applies if the parties want to reconcile and it addresses only that possibility. In a situation where both parties seek divorce, as here, it has virtually no application. Its function was explained at the trial level by a letter from Muhammad Najeeb, Chairman of the Arbitration Council in the Clifton Cantonment, Karachi, Pakistan, to the attorney for the wife, as follows:

> Please refer to your letter dated 15th Dec., 2003, on behalf of your client, Mst. Farah Aleem, I may inform you that the marriage was solemnized in Pakistan within the jurisdiction of this Union Council and that both your client and Mr. Aleem are Pakistani citizens and therefore this Union Council has jurisdiction in the matter. We had sent notices to your client as provided under Section 7 of the Muslim Family Laws Ordinance 1961. The purpose of notices is to ascertain whether both parties want to reconcile in which case the divorce shal[l] not become final. In case both parties or any one of them does not want reconciliation, the divorce shall become final after 90 days of such notice. . . . Mr. Aleem had responded in writing that he does not want to reconcile but there is no intimation from your client [in] [ ]spite of

[42] In a letter from respondent's counsel to the Arbitration Council, respondent points out that the husband's performance of *talaq* was designed to circumvent Maryland law. She stated in relevant part as follows:

> Mr. Aleem is obligated to provide Ms. Aleem with both child support and alimony pursuant to Order of Court. Mr. Aleem, by seeking a divorce in Pakistan, is attempting to circumvent the laws of the state of Maryland, and the Order of our Court, notwithstanding that he has submitted to the Court's jurisdiction, to this day has counsel here in Maryland, and has regularly sought our Court's relief.

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> the fact that your client has received the notice which will be presumed that she does not want any reconciliation. *It may also be mentioned that [the] function of the Arbitration Council is* ***only*** *to see whether both husband and wife want to reconcile and live again as husband and wife.* (Emphasis added.)

Additionally, as indicated above, Maryland has enacted a comprehensive statutory scheme designed to effectuate a fair division of property acquired by the parties during the time of their marriage, just as the pension at issue in this case was acquired.[43] To accept *talaq* and to accept the silence of the "contract" signed by the wife on the day of her marriage in Pakistan, as a waiver of her rights to marital property acquired during the marriage, is, in direct conflict with our public policy. Additionally, the Pakistani statutes proffered by petitioner as establishing that all of the property titled in his name, however and whenever acquired, is his property free of any claim by the wife arising out of the marriage, are also in direct conflict with the Maryland statute governing those same issues.

...

The *talaq* divorce of countries applying Islamic law, unless substantially modified, is contrary to the public policy of this state and we decline to give *talaq*, as it is presented in this case, any comity. The Pakistani statutes providing that property owned by the parties to a marriage, follows title upon the dissolution of the marriage unless there are agreements otherwise, conflicts with the laws of this State where, in the absence of valid agreements otherwise or in the absence of waiver, marital property is subject to fair and equitable division. Thus the Pakistani statutes are wholly in conflict with the public policy of this State as expressed in our statutes and we shall afford no comity to those Pakistani statutes.

Additionally, a procedure that permits a man (and him only unless he agrees otherwise) to evade a divorce action begun in this State by rushing to the embassy of a country recognizing *talaq* and, without prior notice to the wife, perform "I divorce thee . . . " three times and thus summarily terminate the marriage and deprive his wife of marital property, confers insufficient due process to his wife. Accordingly, for this additional reason the courts of Maryland shall not recognize the *talaq* divorce performed here.

We answer no to each of petitioner's questions.

Judgment affirmed; costs to be paid by Petitioner.

NOTES AND QUESTIONS

1. How would the Convention on the Rights of Persons with Disabilities have applied in *City of Westminster*? Explain how the judge might have ruled, had the treaty been incorporated into the reasoning.

[43] The *mahr*, deferred in the marriage certificate, would not normally be classified under Maryland law as marital property in any event, as it may not have been "acquired" during the marriage.

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2. As a matter of public policy concerning individuals with intellectual disabilities, should the presumption be in favor or against authorizing marriage?
3. Tacit assumptions underlie marriage law judgments. In North America and Western Europe child marriage not only is presumptively invalid but also may constitute statutory rape. It is also noteworthy that at the same time that same-sex marriage is becoming increasingly accepted worldwide, polygamy is increasingly condemned. Plural marriage may result in both criminal prosecution and exclusion of immigration applicants. In 2008 the Spanish Supreme Court upheld a lower court ruling that had denied a Senegalese man's naturalization because he had two wives. The court concluded that polygamy, unlike same-sex marriage, was not merely illegal in Spain but contrary to the Spanish public order. Sentencia de la Audiencia Nacional, sec. 3, March 11, 2008 (JUR 2008\164675).
4. As *Aleem v. Aleem* demonstrates, divorce practices also reveal important cultural differences such as whether a religious form of divorce – for example, by unilateral repudiation (as by *talaq*) – can be legally recognized. The *Aleem* opinion raises broader legal questions of recognition and enforcement of foreign law that are very common and important in the international legal system. First, what is comity? Does it have limits? How does comity compare with full faith and credit in U.S. constitutional law? Second (and related to the first question), how far should public policy extend to bar the normal recognition and enforcement of foreign law? How, specifically, were comity and public policy applied or not in *Aleem*?
5. Do you agree with the court's analysis of *talaq* in *Aleem*? For an argument that the dispute could have been resolved by focusing on jurisdiction rather than comity, see Rajni K. Sekhri, Aleem v. Aleem: *A Divorce from the Proper Comity Standard – Lowering the Bar that Courts Must Reach to Deny Recognizing Foreign Judgments*, 68 U. Md. L. Rev. 662 (2009). If men and women both had the right to divorce via *talaq*, would this method be more acceptable and not against public policy? Should legal systems facilitate the dissolution of unhappy unions in a more cost-effective manner? Other courts take the view that they should not recognize the *talaq* or "triple divorce" because it is inconsistent with due process and violates public policy. See the per curiam decision *Tarjkonda v. Pinjari*, 2009 LEXIS 733 (Mich. App.) (unpublished).
6. To what extent does it or should it matter where the *talaq* is pronounced and whether it is in the context of a polygamous marriage? Consider, for example, the case of *Radwan v. Radwan*, 3 All E. R. 967 (1972), (Fam. Div. London). An Egyptian husband married an English woman in the Egyptian consulate in Paris; she was his second wife. After living together for several years, the husband pronounced the *talaq* in the Egyptian embassy in London, a procedure that was considered valid in Egypt but not in England. The wife filed for divorce in court, claiming that English law did not recognize this unilateral form of divorce performed in a consulate. The husband argued that he had already secured a valid *talaq* divorce. The judge identified the central issue:

   > The question for my decision is whether by English law the Consulate General of the United Arab Republic is part of a country outside the British Isles within the meaning of the Recognition of Divorces and Legal Separations Act of 1971. By that Act the relevant sections providing for recognition will have effect in

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> respect of overseas divorces if they have been obtained by means of judicial or other proceedings in any country outside the British Isles, and it is necessary for the efficacy of the *talaq* divorce that it should have been obtained outside the British Isles by reason of the fact that at the material time the husband had acquired English domicile.
>
> Curiously, the question has not arisen for decision in England before, that is, the question whether the premises of an embassy or consulate are part of the territory of the sending state as compared to the territory of the receiving state.

The judge considered case law on whether diplomatic premises should be considered the territory of the sending or receiving state and found that relevant treaties were silent on the question of extraterritoriality. He concluded that the husband had not divorced his English wife "outside of England" when he performed the *talaq* in the Egyptian consulate because the embassy could not be considered to be on Egyptian territory outside of England. The law (the Recognition of Divorces and Legal Separations Act of 1972) required that the *talaq* be performed outside of England because the husband had acquired English domicile. Subsequently, in his consideration of the wife's claim, the same judge ruled against her. Because the marriage was performed in France (albeit in the Egyptian consulate), it was controlled by French law, and France, like England, did not accept the extraterritorial fiction that the consulate was Egyptian territory: Under French law, the marriage was not valid in the first place. *Radwan v. Radwan* II, 3 All E. R. 1026 (1972). Do you agree with the court's reasoning in the two *Radwan* decisions? Or should marriages and divorces in consulates and embassies be treated as though they occurred in the homeland?

7. When Muslim couples travel abroad, courts sometimes grapple with the question of how best to evaluate the custom of *mahr*. For insightful commentary on this challenge, see Ann Lazueuer Estin, *Toward a Multicultural Family Law*, 38 Fam. L. Q. 501–27 (2004); Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 Am. U. L. Rev. 949 (1995). For an argument in favor of recognition, see M. Jindani, *The Concept of Mahr in Islamic Law: The Need of Statutory Recognition by English Law*, Y.B. Islamic & Middle Eastern L. 219–27 (2004–5). See also Azizah Al-Ilibri, *Islam, Culture, and Religion*, 12 Am. U. J. Int'l & Pol. 1 (1997).
8. In Israel:

> Jewish divorce is effected by the civil law husband delivering to his wife a *get* (bill of divorce). Personal attendance is not required. The spouses may appoint agents to give and accept the *get*. The rabbinical court only ensures that Jewish law is observed. The spouses do not [profess] any faith. No reference is made to God, either in the *get* or during its delivery. For Reform Jews, a civil divorce is sufficient. However, if the divorced spouse would later on wish to marry an Orthodox or Conservative Jew, he or she would still need a religious divorce. The husband may not divorce his wife against her will. Consent has always been a proper ground for divorce. Each spouse may also demand divorce upon justified grounds. Yet, even when justified grounds exist for

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> demanding divorce, the rabbinical court's judgment does not by itself dissolve the marriage. The court's role is to help enforce rights that already exist. The spouses remain married until a *get* is delivered, an act to which they must both agree.

Talia Einhorn, Private International Law in Israel 213 (2009).

If the husband refuses to deliver the *get*, his wife is trapped indefinitely in a limbo state, unable to move on and establish a new life. The question of whether civil courts can intervene to order the husband to grant the *get* is problematic. From the religious point of view, the *get* must be of the husband's own free will in order to be valid. From the secular perspective, it violates the principle of the separation of church and state for civil courts to interfere in religious affairs. Interestingly, this has been a worldwide concern. For a comprehensive overview, see Esther Tager, *The Chained Wife*, Neth. Q. Human Rights 4, 425–57 (1999).

In *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607, 2007 SCC 54, the Supreme Court of Canada ruled that a secular court could address and then reject a husband's refusal to grant a *get* to his wife, as they had formally agreed, even though the question was rooted in religious practice. In other words, the husband was not shielded from the wife's legal claim for a divorce despite a Canadian constitutional guarantee of freedom of religion. For commentary on this case, see Kevin L. Boonstra, *How to Get a Get*, Liberty, May/June 2009, at 17.

4. Coda: Examples of Cultural Law from the World of Music

Throughout this chapter we have seen examples of the diverse relationships between culture and law that form the framework of cultural law. Subsection 1 defined cultural law in terms of six functional relationships between culture and law. Examples of each of these relationships, as follows, are all drawn from a neglected aspect of cultural law: music.

a. Law Embodies Culture and Formalizes Its Norms

It has been said that "[c]ulture is like a map,"[44] providing "an abstract description of trends toward uniformity in the words, deeds, and artifacts of a human group."[45] If so, it follows that a primary function of law, whether formal or informal, state-centered or not, is to embody culture and formalize its norms in a society.

Music, often accompanied by dance, sometimes establishes "trends toward uniformity" that symbolize or even constitute a kind of legal order, particularly in traditional, often tribal societies. In such highly contextual societies, where legal texts are apt to be only incidental, music-driven ritual may itself serve to define important social expectations. One example involves ritual singing and the use of sacred flutes among the Mehinaku people of Brazil to confirm gender roles, related taboos, and authorization of otherwise prohibited violence.[46] Although modern, more textual societies seldom rely on music itself to define legal rules, their laws do express normative support of music.

[44] Clyde Kluckhohn, Mirror for Man 26 (1949).
[45] *Id.*
[46] Thomas Gregor, Anxious Pleasures 98 (1985).

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Tax deductions for contributions to music (and other cultural) organizations are one example. In the following chapters we shall observe how other cultural artifacts shape the law as well.

b. Law Promotes, Protects, Conditions, and Limits Cultural Attributes and Expressions

Johnlee Scelba Curtis, *Culture and the Digital Copyright Chimera: Assessing the International Regulatory System of the Music Industry in Relation to Cultural Diversity*, 13 Int'l J. Cultural Prop. 59–60, 63–64, 66–69, 77, 80, 81, 84–85 (2006)

As the digital revolution sweeps the globe, the world's cultural property is rapidly being translated into ones and zeros. Simultaneously, the technologies of the Internet, advanced electronics, telephony, and personal computers are constantly converging – often in completely unexpected ways. Technological growth is first spawned, it seems, through the venue of entertainment (where commercially profitable applications have been most readily discovered). Historically, the initial form of entertainment to be widely digitalized was music – through the delivery technology of the compact dis[c]. As both a form of cultural property and a form of entertainment, music has played a central role in the ongoing debate over digital rights in the new era of digital networked environments. Almost constantly, the news has showcased the series of recent law suits that the Recording Industry Association of America (RIAA) has brought before judges, hoping to gain substantial protection against the increased piracy threats the digital revolution has incurred as well as test the limits of the current content regulation regimes.

Views of the present regulatory means of reducing online music piracy and copyright infringement seem polarized. On one side of the ideological spectrum, the "cultural conglomerates" posit that their copyrights are property rights that must be afforded the same protection, as are owners of other types of property. This means supporting extended copyright terms, expanded content usage controls, and fighting Internet downloads or *thefts* of their contents. On the other side, *free culturists* believe that cultural property belongs to the *commons* (to everyone in society). This means that they see copyrights as protectionist instruments that distribute monopoly rights to a handful of cultural enterprises; and they believe that this only serves to afford those corporations monopoly rents, thereby causing market failures within the sector of cultural commodities.

An objective view presents a more subtle explanation. Borrowing the parlance of Lawrence Lessig, this debate is a chimera, because both sides are, at the same time, right *and* wrong. One side wants *all rights reserved* to be the copyright norm in the digital networked environment, which would stifle creativity, innovation, and diversity of production. The other side wants *no rights reserved* to remain the norm within the digital[,] which would undermine the investments of the cultural industries and,

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ironically, the existing cultural habitat of the media market. Between the reactive responses of cultural industries to the digital revolution and the outraged responses by content-hungry consumers, perhaps it is possible [to] divine the impact of the copyright system on cultural diversity.

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The definition of *cultural products* has also been subject to considerable debate (especially as the digital environment blurs definitional boundaries) largely because specific linguistic subtleties can drastically alter legal meaning. Industry leaders interpret their goods and services as mere *entertainment*. This language enables cultural goods and services to be subject to the international trade liberalization rules of the World Trade Organization (WTO). Others have interpreted cultural goods and services as *societal achievements*. This language would justify special treatment for cultural goods and services. The absence of a consensual definition of cultural goods and services has enabled the current *status quo* of stagnant international legal protections of cultural diversity.

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Cultural content of the musical form has existed before recorded history. The concept, however, that such content is property in a proprietary sense is relatively modern. Current copyright law protects a composer's proprietary claims over a wide variety of uses of music, including: written representations in notation form, as part of a dramatic or audiovisual work, and when embodied in a recording. This section adopts a historical approach. Examining several historical periods can help identify how, when, and why music evolved into property.

. . .

In ancient Greece and Rome, the concept of proprietary claims to music did not yet exist. Although little notated Greek music has survived ([as a result of] the papyrus medium), scholars have written enough for us to ascertain the philosophies and practices of music in ancient Greece. Musical notation on various primitive surfaces was developed after the fourth century BC, but music consisted of intangible and communal expressions. The Greeks believe music was different [from] spoken language – one was to be written down (Greek) and the other was not (music). Music was considered an art form bestowed to man by the gods through the intercession of the Muses – specifically, Euterpe, the musical muse. As part of the *quadrivium* of mathematical liberal arts, music was a force of nature to be studied but incapable of being owned by a mortal. In our modern world, we use music's ability to stimulate emotional responses and sell it as a commodity.

The ancient Greeks viewed music as a reflection of balance and harmony, as well as a power that could be disruptive to the social order if not controlled. Both Plato and Aristotle believed that compulsory music education was necessary to enable free citizens to control their own emotions. Plato felt that music was so powerful a force that all aspects of music should be under strict government control. Aristotle agreed that musical education was vital [to] society but disagreed with Plato's idea of state-paid and

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chosen musicians (because that would prevent musicians from being *free men*). The idea that a composer would have proprietary rights to a melody was a concept foreign to the Greeks, because their perception of music was linked to a divine system – one that ordered their world. Although authors (poets, playwrights, philosophers, etc.) were attributed their works, the melodies they often wrote to accompany their texts remained unattributed. When political power shifted from Greece to Rome, the Romans looked to the Greeks for ideological inspiration. Despite the impressive innovations of Roman law, however, there is no evidence that Roman law supported proprietary claims of musical expression and composition, even though some have posited that their tenets of contract and intangible property are the *philosophical roots* of those contemporary laws.

In medieval Europe several elements fused to form the foundations of property rights in music. First, the notation of music in physical form was again attempted – now on less-ephemeral media. This made music a physical embodiment of an intellectual endeavor (instead of a momentary, *otherworldly* phenomenon). Second, the profession of music composition emerged, and the demand for musical compositions grew. Third, urbanization and increased trade made music more of a commodity. Because the Catholic Church was the most influential political and social institution in medieval European life, music was dominated by liturgy and the chant style of composition. The Church directly regulated chants. Secular music, however, was controlled by the feudal system. Only fragments of the secular tradition were embodied in written form. During that period, the concept of property did not attach to the discipline of either music performance or composition. Although, as the job of musical production evolved from slave labor to the labor of the Church, the evolution of music from the property of nature to the property of individuals took root. When the Church developed a system of written notation to preserve the *divinely inspired* chants, the necessity for musical literacy and technical proficiency soon followed. The tool of notation sparked new innovation and forms of expression. Secular music began the tradition of love songs (sung by troubadours). Musical guilds were then established to make the first proprietary claims to music.

The legal protection of guilds greatly evolved the notion of musical performance but had no effect on written music itself, because guilds were granted official monopolies on public performance by towns. Further, membership in a guild became a professional requisite for a musician in the era. The fourteenth century produced even higher levels of achievement in the musical arts. Books of compositions were printed, notation had become ubiquitous, and the commoditization of music had started, but that commodity was not consistently attributed to the composer/artist. Clearly, however, the foundations of property rights were laid during the Middle Ages largely because of innovation-based commoditization.

During the Renaissance, the philosophy of humanism, the further development of composition, and the rise in the number of famous composers caused music to emerge as a form of property. This had legal ramifications.

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For the first time, proprietary claims were made by publishers of music they sold. The increasing status of the composer culminated in Flemish composer Orlando Lassus'[s] attempt to control the printing of his music. Control at this time was different from today's copyright protections. In the Renaissance control meant the publisher's right to publish and vend copies of musical scores. In 1440 Johan Gutenberg's revolutionary invention, the printing press, helped spur this conceptual evolution. The conceptual evolution sparked a legal revolution, but one that took 200 years to occur. When it did, the commoditization of music was complete, and property rights in compositions were first recognized. The Renaissance laws regulating printed books also applied to publications of music notation. The main musical customers during the period were wealthy aristocrats and the Church (but with advances in printing techniques, publications were increasingly available to the public at large). The law granted limited monopolies in expressive and technological innovation and included controls on the content itself through licensing and guild rules of publishing. Legal protection over musical works was granted to encourage increased expressive productivity, as well as increased technological innovation in the printing of music. Exclusive rights were granted to publish and sell copies of music for limited times in limited geographical areas.

Thus, in ancient Greece and Rome, music was viewed as separate from words, and treated very differently. Music was given no property rights, and composers were not acknowledged as the source of inspiration. In the Middle Ages, notation was redeveloped; musical composition was considered a viable activity; and music guilds were formed to give exclusive performance rights legal force. The Renaissance brought the innovation of efficient publishing to musical composition. This caused the evolution of the concept of property rights to include published music. The rights granted to publishers helped them compete against other publishers and other geographical market entrants. The common logical theme that runs through the history is that material conditions determining the commoditization of music directly impacted the concept of private property in each era. The legal concept of property was malleable to changes in the material conditions existing at the particular time. This brief historical journey has hardly been without purpose. We should observe a pattern: conceptual changes in the law brought about by the conversion of technological and philosophical stimuli. In the current battle over the future of music in the digital networked environment, it is wise to refer to the battles of the past and recognize that changes in material conditions and circumstances often can make existing legislation and market strategies obsolete.

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Permission is increasingly required for the most mundane and innocent of endeavors. Campers have, for generations, been able to tell stories and sing tunes like "Row, Row, Row Your Boat" around a campfire without asking for permission. [The] American Society of Composers, Authors and Publishers (ASCAP), the performance rights body that licenses copyrighted works for nondramatic public performances, believes it is entitled to determine the terms for such *performances*. ASCAP reasoned that because

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hotels, restaurants, and resorts must pay for the right to perform recorded music, summer camps should be required to pay for licenses, too. Under copyright law a public performance occurs "where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." Thus ASCAP was technically correct. ASCAP initially demanded that the American Camping Association purchase a license fee of $1,200 per season per camp.

...

The current copyright regime has enumerated benefits that should be retained, but it exhibits more banes than blessings in the context of promoting and sustaining cultural diversity in musical commodities.

While *discovering* rural musicians may help small numbers of them become recognized internationally, musical diversity is destroyed when the world's cornucopia of music is *mixed* and *edited* by a handful of media interests. Although it may be beneficial for the world to have access to American cultural goods, it is not beneficial, in cultural diversity terms, for the world to be awash in the culture of only one nation. Further, although a harmonization of national intellectual property laws into negotiated instruments-in-progress like TRIPS [part of the international trade regime related to cultural law, to be discussed in Chapter 6 – *Eds.*] may eventually serve the public good, such a system is ineffective without strict international enforcement. The current legal regime of copyright (both regionally in the United States and as implemented internationally in negotiated agreements) is unable to provide a predictable, enforceable, harmonized, and balanced international market for cultural commodities amid the wide proliferation of digital and network technologies. The historical analysis we have explored has shown that, in new eras, new legal philosophies are born. [The authors refer to an analysis of current issues such as the copyright on all group singing of "Row, Row, Row Your Boat" – *Eds.*] [That] shows how the current copyright regime can hurt innovation, creativity, and diversity – the very fundamentals that it was ostensibly created to service.

Clearly we have entered a new era – the era of the *digital music revolution*. There are new material circumstances that simply were not present in former eras. Digital reproduction has rendered copies of music distortion free; the World Wide Web has connected music fans (and their collections); physical music media [have] been relegated to secondary importance in light of customizable playlists and digital music players with ever-doubling storage capacities; and affordable digital music studios have democratized musical production. Just as past technological breakthroughs have spawned new regulatory policies, the international regulatory schemes governing digital music must reflect this paradigm shift.

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It is clear that not only do copyright rules need to adjust to balance both consumer and artist interests with the interests of the producers, but copyright also must broadly reform its communication policy and reflect the needs of both digital and cultural ecosystems.

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The chimerical debate over copyright in the digital networked environment yields many rationales and challenges for adjusting the current system. In the adjustment process, only if the goal of promoting cultural diversity takes a heightened role can a true balancing of interests be reached. The debate over the preferable legislative tools for that balancing continues. With rapid convergence and technological growth as the two-dimensional reality of the digital age, smart legislators will seek measures that not only meet the needs of corporate interests (necessary for ongoing technological innovation and cultural development), but also strive to promote cultural diversity among cultural industry goods (necessary for long-term sustainability of cultural markets and human rights). What a sweet sound that would be for citizens and consumers of all cultures!

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c. Law Harmonizes Cross-Cultural Differences, Establishes International Standards, and Confirms Cultural Rights

Jerry L. Weinstein, *Musical Pitch and International Agreement*, 46 Am. J. Int'l L. 341 (1952)

To what extent may it be said that a standard musical pitch has been established by international agreement? This question was recently raised before UNESCO by the Austrian Delegation. The matter has an interesting history of international agreement and practice and is one of much importance to the international musical world. Specifically, the question is one of the establishment of a standard pitch for the note A above middle C; or how many times, measured in cycles per second, should the note A vibrate?

The musical performer, especially the singer, whose voice and ear are trained to a given pitch and cannot readily be altered, is faced with substantive technical difficulties owing to the contemporary international musical cleavage. In certain European countries and in the United States the standard pitch is A = 440 cps (cycles per second), whereas in the other European countries the standard pitch is A = 435 cps.

In the eighteenth century and onwards, the standard pitch in use was the so-called "classical" pitch of A = 422 cps, to which Bach, Mozart, and Beethoven wrote, but by the middle of the nineteenth century the number of vibrations had increased in practice to 435. In an early effort to obtain wide recognition of this pitch, the French Government in 1859 deposited at the Paris Conservatory of Music a standard tuning fork which was to be the standard pitch or "diapason." The frequencies generated by vibrations of this fork were stated to be 435 cps for A above middle C. It was no doubt in view of the establishment of this standard pitch that on January 12, 1885, it was officially announced in London that Queen Victoria had sanctioned the adoption of this "*diapason normal*," as the French standard was called, for her private band, and that it would in [the] future be used at state concerts.

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In the same year 1885, at the instigation of the Austrian Minister of Culture and Instruction, a conference was held in Vienna for the purpose of establishing a "standard diapason." The governments of Italy, Austria, Hungary, Prussia, Russia, Saxony, Sweden, and Württemberg were represented. The conference was held from November 16 to 19, and the principal resolution unanimously adopted called for the establishment of "one international '*diapason normal*' to be set at A = 435 cps." The conference recommended governments to take steps for the adoption of this standard pitch for all musical purposes, and in all musical institutions, public and private.

It would seem[,] therefore[,] that A = 435 cps as the standard pitch was widely accepted at the end of the last century, for Great Britain had followed the standard pitch set up by France, the Vienna Conference did likewise, while musical groups and instrument makers in the United States also conformed to this pitch.

In accordance with this internationally accepted practice of using A = 435 cps as the standard musical pitch, the resolutions of the 1885 Vienna Conference, though mistakenly termed "Convention," and with a minor error as regards dates, were incorporated into the Treaty of Versailles in 1919. By Article 282 of that treaty, certain multilateral treaties, conventions and agreements of an economic or technological character, subsequently enumerated, were to be regarded as being in effect as between Germany and those Allied and Associated Powers who were parties to them. No. 22 of the conventions listed was: "Convention of November 16 and 19, 1885, regarding the establishment of a concert pitch." Similar provisions were included in Article 234 of the Treaty of Peace of St. Germain with Austria in 1919, and in Article 217 of the Treaty of Peace of Trianon with Hungary in 1920.

After the Peace Treaties, however, due to the progressive development in laboratory technique and the manufacture of musical instruments, a move was made to further increase the number of vibrations from 435 to 440 cps. This change gained wide recognition in the United States and was adopted as the standard pitch by the Musical Industries Chamber of Commerce in 1925, and by the American Standards Association in 1936, thus acquiring the status of an industrial standard.

The change also took effect in Europe, and under the auspices of the International Standards Association, an international conference was held in London in May 1939, in order to accord international recognition to A = 440 cps as the new pitch. The governments of France, Germany, Great Britain, Holland and Italy were represented, while the governments of the United States and Switzerland sent official messages. Six of the seven countries represented independently proposed the adoption of A = 440 cps as the standard musical pitch, and this was unanimously accepted by the conference.

The advent of the [S]econd World War temporarily jeopardized the chance of a wider international acceptance of this standard pitch by use, and today many European countries still adhere to the older standard pitch

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of A = 435 cps. A further minor complexity is that in the United States the standard pitch A = 440 cps is the minimum in use, since, for example, the Boston Symphony Orchestra, probably the highest-pitched orchestra in the world, is tuned to a pitch of A = 444 cps.

This, then, is the nature of the present international musical divergence: Should A vibrate 435 or 440 cycles per second? There is much hope inspired by the experience of past international agreement and practice on the matter that the time is not far distant when UNESCO or a third international conference will settle what is, at least culturally, a vexed question.

NOTES AND QUESTIONS

1. In 1995 the International Organization for Standardization settled the "vexed question" by confirming 440 cps (or "Hz" for hertz), a decision that it later reiterated. Today A = 440 Hz is the most common, though not universal, standard. For example, baroque music ensembles have generally agreed on a standard of A = 415 Hz.
2. Much ado about nothing? Although the debate about a universal proper pitch standard may seem rather distant from the mainstream of lawyering, if not trivial, the role of both intergovernmental and nongovernmental standardization of weights, measures, practices, and so on, is of growing significance in practice. In some contexts, such as trade usage, cultural differences would seem to be tangential. In reality, however, cultural differences readily explain the need for international standardization and engage the work of lawyers who have to deal with divergent usages.

d. Culture Reinforces Legal Rules

Culture is not value-free. It may even reinforce grossly unjust legal rules, practices, and regimes. For example, Nazi Germany's aggressive employment of "high culture" (as opposed to "degenerate art") to enhance the regime's image led to massive plundering of cultural resources, principally fine art, throughout Europe. Herbert Gerigk, a music expert, led a relentless search in occupied France for rare instruments, manuscripts, and other musical treasures. His zeal in doing so earned him steady employment by Alfred Rosenberg as well as Joseph Goebbels' approval and extension of funds to him.[47] Gerigk's musical treasure hunt reinforced the authority of the administrative orders and rules in an otherwise dicey, bureaucratically complicated system of plunder and the Nazi regime as a whole.

e. Culture Conditions and Constrains the Adoption, Interpretation, and Vitality of Legal Rules

Steve Jones, *Music That Moves: Popular Music, Distribution and Network Technologies*, 16 Cultural Stud., no. 2, at 213, 221–22 (2002) (reprinted with permission of Taylor and Francis Group)

[47] *See* Jonathan Petropoulos, Art as Politics in the Third Reich 152–53 (1996).

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Processes employed in the past by the music industry to exert control over the flow of music (and, in the case of immigration laws, of musicians themselves) are rendered useless when the medium of distribution undergoes a paradigmatic change from analogue to entirely digital, from physical good to digital code. The legal controls the music industry could exert relied on an infrastructure of transportation that provided gate-keeping opportunities. Customs checkpoints, warehouses, retail outlets and even radio stations were subject to legal authority due to their [situatedness] in space (they could be found, discovered) and in time (they would stay put in space sufficiently long to be found). The lesson of movement has not escaped pirate radio operators who would frequently change locations and frequencies to avoid arrest.

It is likely that in the future the locus of control of online music will reside in the Internet's infrastructure, in the routers, or perhaps the Internet protocol itself. Such points are the ones most clearly available for gate-keeping, and are the ones at which movement is controlled. They form the only locus at which one might monitor and act upon exchange at Internet speed and at great volume. They also, however, create serious issues of loss of privacy and surveillance. It is noteworthy that those loci of exchange are prone to greatest corporate control after industrial consolidations like that of America Online and Time-Warner.

The focus on copyright has also overshadowed the wider implications of digital distribution. The disruption of the loci of exchange also disrupts a connection between the social and financial. High-speed distribution makes it impossible, for all practical purposes, for humans to negotiate an exchange, unless the exchange is forced to a slower rate by artificially interrupting the process. Downloading music using [MP3] software like Napster, Gnutella, and so on, is on the one hand a human-machine interaction that obliterates traditional place – and point-of-purchase interaction. However, on the other hand, such software incorporates opportunities for messaging and chat that allow reconfiguration to new forms of connection between consumers (and purveyors) of music.

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f. Cultural Expressions and Symbols Promote Legal Relationships

Daniel J. Wakin, *North Koreans Welcome Symphonic Diplomacy*, N.Y. Times, Feb. 27, 2008, at A10 (reprinted with the permission of the *New York Times.* All rights reserved)

PYONGYANG, North Korea – As the New York Philharmonic played the opening notes of "Arirang," a beloved Korean folk song, a murmur rippled through the audience. Many in the audience perched forward in their seats.

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It was the first time an American cultural organization had appeared here, and the largest contingent of United States citizens to appear since the Korean War. The trip had been suffused with political importance since North Korea's invitation came to light last year. It was seen by some as an

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opening for warmer relations with the United States, which North Korea has long reviled.

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The concert evoked other orchestra missions to repressive states, like the Boston Symphony Orchestra's visit to the Soviet Union in 1956, followed soon after by a Philharmonic visit, and the Philadelphia Orchestra's trip to China in 1973.

Elisabetta Povoledo, *China Orchestra Plays for Pope for First Time, Hinting at Thaw*, N.Y. Times, May 8, 2008, at A6 (reprinted with the permission of the *New York Times.* All rights reserved)

The China Philharmonic Orchestra performed Mozart's Requiem with the Shanghai Opera House Chorus for Pope Benedict XVI on Wednesday, an unprecedented concert that could signal a thaw in the historically chilly relations between the Vatican and the Chinese government.

The event evoked memories of Ping-Pong diplomacy, which helped lead to the restoration of relations between the United States and China in the 1970s, with music instead of sports as the bonding agent.

"Music, and art in general, can serve as a privileged instrument for encounter and reciprocal knowledge and esteem between different populations and cultures," Benedict said after the concert, which was held in the Paul VI Audience Hall at the Vatican. "A means attainable by all for valuing the universal language of art."

China and the Vatican have not had diplomatic relations since the 1950s, though each side has made conciliatory signs in recent years.

NOTES

1. Perhaps the best-known examples of the use of cultural expressions and symbols to promote legal relationships has been in the sports arena. The "ping-pong diplomacy" between the United States and China in the 1970s and "tennis diplomacy" between South Korea and China in the 1980s are prime examples. In 2008 and 2009 Armenia and Turkey engaged in several phases of "soccer diplomacy" involving attendance of the presidents of the two countries at World Cup qualifying football/soccer games between their respective national teams. The diplomacy served as the principal symbol of a rapprochement between the two countries that may lead eventually to the first diplomatic relations between the traditionally hostile neighbors and the opening of their border for the first time since 1993. See Mark Landler & Sebnem Arsu, *Long-Bitter Turkey and Armenia Struggle to Normalize Ties*, N.Y. Times, Oct. 11, 2009, at A5; Sebnem Arsu, *Armenians and Turks Agree on Ties*, N.Y. Times, Sept. 1, 2009, at A4.
2. In addition to "ping pong" and other sports-related diplomacy, joint archaeological and historic preservations projects have also helped foster better relationships between divided countries. See, e.g., Michael Theodoulou, *Ancient Walls Unite Divided Cypriots*, Christian Sci. Monitor, Apr. 3, 2008 (The restoration

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of a medieval and Renaissance quarter of Famugusta, within the internationally unrecognized northern half of Cyprus, has united estranged Greek and Turkish communities.). See also James Brooke, *Rebuilding Temple, Narrowing a Gap*, N.Y. Times, Oct. 2, 2005, at 6 (describing a joint North Korean-South Korean project to rebuild the Holy Valley Temple in Singye, North Korea, and concluding with the following observation:

> Culture is the way to find common ground for both Koreas, [the head monk said,] after walking barefoot over the polished pine floor boards of the new temple. "As for culture and sentiment, we have a lot in common. But when it comes to politics, economy, and defense, it is a long process."
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> The central link between music and law is interpretation. Both fields depend on textual interpretation. In music, scores provide the texts. In law, the texts are constitutions, statutes, ordinances, regulations, and cases. In each field, interpretation of texts is of immense importance.
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> The similarities between music and law are suggestive. They say something significant about the process of interpretation, something that goes beyond the boundaries of any particular discipline. There is, of course, no single orthodox interpretation of Mozart's Symphony in G Minor, any more than there is one authoritative reading of the Due Process Clause of the Fourteenth Amendment. Everything turns on the outlook of the interpreter, his background, his intellect, his hopes and his aspirations.
>
> Music and law are both functions of their creators, and reflections of their minds and their reactions to the world in which they live. Just as we experience the world through the ears and mind of a Beethoven, Brahms, or Stravinsky when we hear their music, so we understand the world through the minds of the Framers, a particular legislature, or a judge, when we read their work product. We are in contact with minds and we must attempt identification with those minds. The closer the identification, the closer it is possible to come to an understanding of the creator's work.

Daniel Kornstein, The Music of the Laws 107, 110 (1982).

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