BUILDING COMMUNITY TRUST: IMPROVING CROSS-CULTURAL COMMUNICATION IN THE CRIMINAL JUSTICE SYSTEM

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Disclaimer

This is a resource developed by the American Bar Association Criminal Justice Section and cosponsored by the ABA Section of Individual Rights and Responsibilities and the ABA Council on Racial and Ethnic Justice. This resource was funded by the American Bar Association Board of Governors Enterprise Fund. No attempt has been made to treat the topic exhaustively. These materials are intended for education and training only. Every effort is made to ensure the accuracy of the information presented in these materials. We do not assume any liability for the accuracy or completeness of the information contained within. For questions or comments please contact Jack Hanna, Criminal Justice Section Director at hannaj@staff.abanet.org.

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Dear Colleagues:

The Building Community Trust project is a cornerstone of the ABA and its Criminal Justice Section, Section of Individual Rights and Responsibilities and Council on Racial and Ethnic Justice's attempt to shed light upon and equip actors in the criminal justice field to address the disparate racial impact of the system. I want to begin by expressing our gratitude to the ABA Board of Governors for having the foresight to fund this worthy project.

This training manual is the result of months of work in curriculum development, testing through two-day trainings, and refinement based on trainee input. We owe special recognition and thanks to Catherine Beane of Beane Consulting who has completed the primary work of creating, testing and refining this effort.

Our hope is that we have designed a product that can assist criminal justice practitioners in addressing the disparate racial impact of the criminal justice system. Respect for the rule of law depends upon successfully addressing these issues. Hopefully, this can be a step forward for all who choose to utilize it.

Very truly yours,

Charles Joseph Hynes

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CHAPTER 1

INTRODUCTION

> Racial and ethnic prejudice persists in American society today despite the achievements, legal and otherwise, that have been made over the years at both the local and national level to ensure that all citizens are treated fairly and equally. . . . [E]ven the perception of unfairness impacts the public's trust and confidence in the courts and the justice system.
>
> — *White Paper on State Court's Responsibility to Address Issues of Racial and Ethnic Fairness, Conference of State Court Administrators; Government Relations Office (December 2001)*

> If we are to improve our ability to make our communities safe we must deal directly with issues of bias, whether real or perceived. . . . Although change can trigger resistance, if we fail to face this challenge, we will have failed to give meaning to the pledge, "with liberty and justice for all."
>
> — *Robert M.A. Johnson, Anoka County Attorney and Former Chair of the ABA Criminal Justice Council Criminal Justice Magazine (Winter 2007)*

Judicial, prosecutorial, and defense agencies across the country face significant challenges as they strive to effectively serve their increasingly diverse communities. One of the keys to successfully navigating these challenges is cultural competence—the ability to interact effectively with people of different cultures. Psychological research tells us, however, that implicit social bias, independent from one's explicit values and beliefs about equity and fairness, is hard-wired into the human experience in a way that hinders one's ability to interact with others in a culturally competent manner, even in the absence of explicit bias.

The reality of implicit bias has significant implications for participants in the criminal justice system. Growing evidence suggests that subconscious prejudices and implicit bias affect an astonishing range of human interaction. In the criminal justice system, implicit bias can affect important issues, such as policing patterns and practices, decisions to hire and promote employees within criminal justice agencies, and jury deliberations and sentencing decisions in the courtroom.

The good news is that cultural competence can be cultivated to help navigate this complex terrain. Increasing cultural competency skills holds the promise of providing leaders and managers of prosecution, defense, and court agencies with the information, training, and resources they need to create culturally competent work environments. Such environments allow leaders and managers to effectively address personnel, communication, and management issues related to race and culture, and to recruit, retain, and promote a diverse work force. Increasing cultural competency skills has the added benefit of introducing a common language for

addressing the racial disparities inherent in the American criminal justice system and for engaging in the challenging discussion that could lead to more effective solutions. Ultimately, increasing cultural competency skills can help to improve community perceptions of and confidence in the criminal justice system by helping judges, prosecutors, and defenders understand how these perceptions arise. Doing so will also teach those in the justice system how to make decisions that are culturally sensitive and judicially appropriate and that build respect for the rule of law.

This *Model Curriculum & Instructional Manual* is intended to provide leaders of judicial, prosecution, and defense agencies with the information, resources, and training tools they need to support educational efforts in cultural competency. We hope these educational efforts will improve the effectiveness of cross-cultural communication between justice agencies and the communities they serve, and build community trust in the integrity and fairness of the criminal justice system.

The Building Community Trust Initiative

While there are many multi-faceted diversity challenges facing the criminal justice system, the *Building Community Trust* initiative and this publication focus on two challenges that are of particular importance to the legal profession: (1) the rising tide of distrust of the criminal justice system in communities of color, which is closely linked with systemic racial disparities, and (2) management challenges posed by increasing racial, ethnic, and cultural diversity in the workforce.

Internal & External Diversity Challenges Facing the Criminal Justice System

In recent years, policy reports have highlighted the social ills disproportionately impacting communities of color. "Perhaps in no other area, though, have these problems been displayed as prominently as in the realm of crime and the criminal justice system."[1] Decades of statistical research document the racial disparities inherent in the system:

- African-Americans are incarcerated at nearly six times the rate of whites.[2]
- African-American males have a 32% chance of serving time in prison at some point in their lives; Hispanic males have a 17% chance, and Caucasian males have a 6% chance.[3]
- In 2000, African-Americans were 13% of the resident population but represented 44% of all convicted federal offenders.[4]

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[1] Mauer, Mark. "The Crisis of Young African American Males and the Criminal Justice System." The Sentencing Project (April, 1999).

[2] Mauer and King, "Uneven Justice: State Rates of Incarceration By Race and Ethnicity." The Sentencing Project (July 2007). Page 3

[3] "Facts About Prisons and Prisoners." The Sentencing Project.. http://sentencingproject.org/doc/publications/publications/inc_factsAboutPrisons_Mar2010.pdf (no author listed)

[4] "African Americans and the Correctional System," from "Joint Center DataBank," available online at http://www.jointcenter.org/DB/factsheet/correctionalsys.htm.

- In 2008, 10.4% African-American males aged 25–29 were in prison or jail, as were 3.8% Hispanic and1.6% Caucasian males in the same age group.[5]

> "Nationwide, the rate of drug admissions to state prison for black men is thirteen times greater than the rate for white men. In ten states black men are sent to state prison on drug charges at rates that are 26 to 57 times greater than those of white men in the same state. In Illinois, for example, the state with the highest rate of black male drug offender admissions to prison, a black man is 57 times more likely to be sent to prison on drug charges than a white man."
>
> —Malcom Gladwell, *Blink* 275 (Back Bay Books and Little, Brown, and Company 2007) (2005).

It is against this backdrop of racial disparity that America's criminal justice system is viewed and evaluated by the actors in the forum, by the communities it serves, and by the world at large as America seeks to promote the rule of law in emerging democracies.

Each of the major actors in the criminal justice system—officials of the courts, prosecutors, and defenders—interacts with the communities he or she serves in important ways: with victims of crime, with witnesses to crime, with defendants in criminal proceedings, with jurors, and with community resource providers. As the ABA has noted, the legal profession continues to be predominated by Caucasians, while community members often come from different racial, ethnic, and cultural backgrounds, and defendants brought before the courts are overwhelmingly poor, increasingly of color, frequently of varied ethnic and national origin, and may speak a language other than English.

The juxtaposition of an overwhelmingly Caucasian criminal justice infrastructure with the low socio-economic profile and varied cultural backgrounds of those brought before the criminal justice system—whether as victims, witnesses, defendants, or otherwise—has combined with other factors to generate increasing skepticism from many communities about the integrity and reliability of the criminal justice system. Racial disparities in prosecution and incarceration rates, high profile exonerations, and the disproportionate impact of poverty on communities of color with high crime rates combine to fuel community distrust of the criminal justice system and its actors. Community perceptions of judicial and prosecutorial bias contribute to this skepticism and distrust. Significantly under-funded public defense programs in many jurisdictions limit the time, tools, and training available to defenders to provide adequate representation of clients, further exacerbating community perceptions about the integrity and fairness of the criminal justice system.

Moreover, leaders and managers of criminal justice agencies struggle to ensure that those working as public servants within their offices reflect the rich diversity of the communities they serve. Many have begun to discuss the challenges of creating work environments that are welcoming and supportive of the racially, ethnically, and culturally diverse workforce they employ. These leaders also seek to address significant concerns about the lack of racial and cultural diversity in the recruitment, promotion, and retention of lawyers in their offices.

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[5] "Facts About Prisons and Prisoners," *supra* note 4.

However, they need training and informational resources to develop the skills and confidence to respond to these significant management challenges. Leaders from prosecution and defender agencies lag behind judicial leaders in developing the educational and informational resources that are needed to address these issues.

Moving Toward Solutions

Recognizing these significant issues, the Criminal Justice Section of the American Bar Association (ABA) initiated the *Building Community Trust* initiative, in partnership with the ABA Section of Individual Rights and Responsibilities and the ABA Council on Racial and Ethnic Justice. This initiative sought to address both the internal (how we manage personnel and communication issues within justice agencies) and the external (how criminal justice actors interact with the community) dimensions of the diversity and cultural competency issues described above and to provide tools and resources for improving community perceptions of and confidence in the criminal justice system.

More specifically, the *Building Community Trust* initiative sought to develop a cultural competence curriculum for lawyers in the criminal justice system. This publication is the result of those efforts. The development of this *Model Curriculum* was guided by a volunteer Advisory Group, informed by the perspectives expressed by participants in the ABA Criminal Justice Section's Criminal Justice Congress, and improved by the feedback received from judges, prosecutors, and defenders who participated in the *Building Community Trust Faculty Workshop* in October 2009, the *Building Community Trust National Conference* in November 2009, and the *Building Community Trust Cross Cultural Communication Conference* in June 2010.

The Model Curriculum & Instructional Manual

This *Model Curriculum & Instructional Manual* seeks to use core concepts from the field of cultural competence as a lens through which to examine issues of race, culture, and other diversity dimensions in justice agencies. The Model Curriculum also examines the systemic issues and institutional barriers that undermine community confidence in the criminal justice system.

Chapter 2 presents the substantive units of the Model Curriculum. Each substantive unit sets forth a specific cultural competency concept, an estimated time for presentation of the material in that unit, learning objectives for that unit, recommended presentation format, a list of materials needed for that unit, definitions of key concepts and vocabulary in that unit, a summary of key learning points, and detailed presentation instructions. Corresponding PowerPoint slides have been prepared where needed to support presentation of the material and are referenced in the presentation instructions.

Chapter 3 presents recommendations for working with the model curriculum and sample agendas. Recommendations include important considerations related to needs assessment, logistics (time, schedule, space, and seating), faculty, break-out groups, pre-conference assignments, evaluation, and CLE credit. Sample agendas demonstrate how various units of the

model curriculum can be combined to respond to specific needs and achieve certain learning objectives.

Chapter 4 provides important background materials regarding best practices in the design of cultural competency curricula, which have been incorporated into the Model Curriculum. The chapter also provides important reference materials for faculty members to review in advance of any program that utilizes this Model Curriculum.

Finally, Chapter 5 provides additional resources, including a bibliography, links to resource materials, and sample forms that are referenced within the units of the Model Curriculum.

CHAPTER 2

MODEL CURRICULUM

The units in this chapter present core concepts from the field of cultural competence, a lens through which to examine issues of race and culture within justice agencies and the criminal justice system. This curriculum utilizes a problem-solving approach to guide leaders of judicial, defense, and prosecutorial agencies in devising strategies for addressing these issues. The subject matter of cultural competence thus serves as a springboard for problem-solving, for improving cross-cultural communication skills, and, ultimately, for building greater community trust in the criminal justice system.

GOALS & OBJECTIVES

As detailed more fully in Chapter 3, the Model Curriculum presented in this chapter can be organized in a variety of ways to design a workshop, meeting, or conference agenda that addresses the particular needs of your office or jurisdiction. The discussion questions and exercises suggested in each of the following curricular units are intended as a guide. We encourage you to select or modify these discussion questions and exercises so that they align with the needs of your audience.

Similarly, the goals and objectives of any workshop, meeting, or conference that incorporates components of this Model Curriculum will vary by office and jurisdiction. In general, presentation of the units of this Model Curriculum will enable participants to:

1. Describe basic concepts of culture, cultural competency, and implicit bias.
2. Discuss the rationale for the study of cultural competency by criminal justice system stakeholders.
3. Identify issues in your jurisdiction related to race and culture that impact—
    a. An office's overall work environment or its ability to recruit, retain, and promote employees of color;
    b. One's ability to effectively manage and supervise employees in criminal justice agencies;
    c. A community's confidence in the fairness, integrity, and reliability of the criminal justice system; and
    d. Identifying systemic factors, which create racial disparities in the criminal justice system.
4. Demonstrate communication and action-planning skills to address these issues.

We encourage you to modify these general training goals to closely align with the overall purpose of your learning event and with the needs of your audience, office, and jurisdiction.

UNIT 1: WELCOME & INTRODUCTIONS

Overview:

This unit presents an approach for facilitating introductions, orienting participants to the program's learning objectives and agenda, and developing a common understanding of the norms, expectations, and assumptions of the program.

Estimated Time: **30–60 Minutes**

Unit Objectives:

1. Articulate goals, objectives, norms, and expectations of the program.
2. Introduce participants and faculty members.

Recommended Format:

- Plenary session.
- Either as a stand-alone session or as the first segment of an opening plenary session.
- Combination of interactive lecture and small group discussion.

Materials Needed:

- This facilitation guide
- PowerPoint presentation & facilitation notes for "Unit 1: Welcome Session"
- LCD projector & screen
- Copies of the PowerPoint slides
- Flipchart and markers
- Clock/watch
- Confidentiality agreement

Powerpoint Presentation:

To access the PowerPoint Presentation, please refer to the accompanying disc.

Presentation/Facilitation Instructions:

Utilizing the "Unit 1: Welcome Session" PowerPoint slides (either via LCD projector or as a printed handout), the session facilitator should:

1. **Introduce** him/herself and welcome participants to the session. PPT Slide 1

2. **Introduce** any additional faculty members who will assist with the program.

3. **Lead participant introductions** PPT Slide 2 using the following suggested language as a guide:

   "I will call on each person and invite you to introduce yourself by stating your name, the office you represent, and one word or phrase that best describes why we should care about cross cultural communication in the justice system."

   Note: Participants will want to talk at length and give an "opening statement." **Limit participants to only one word or phrase in order to maximize the impact of the introductory exercise and to manage time.** Let participants know that you will do this.

4. **Model an introduction** for the participants:

   For example, "my name is Susan Taylor. I am a supervisor in the juvenile division of the public defender's office. The word or phrase that best describes why we should care about cross cultural communication in the justice system is 'cooperation.'"

5. After modeling the introduction, **call on each participant** in turn to introduce themselves.

6. **Record** the word or phrase each participant chooses on a flip chart in handwriting that is large enough and clear enough for all to see. Try to record all words/phrases on one flipchart page. If the same word or phrase is stated by more than one person, place a star or check mark next to that word.

7. After all participants have introduced themselves, **facilitate** a brief (5–10 minute) discussion to elicit participant opinions about common interests, values, and motivations. **Record** any additional observations that participants make. If possible, **identify** a word or phrase (e.g. *action toward justice)* that can serve as a unifying theme or value for the group. The following questions may be helpful in facilitating this discussion:

   i. What do you see in this list?
   ii. What did you hear in our introductions?
   iii. What words or phrases seem most striking from this list?
   iv. What do we all seem to have in common?
   v. Are there any values that we seem to have in common?
   vi. In what ways do we all seem to have common interests, despite the different roles we play in court?

a. **Reinforce** the following points in facilitating this brief discussion:

Despite the different roles we play in the criminal justice system, we have common motivations, values, and interests in justice, fairness, and the welfare of our community.

These common motivations, values, and interests provide a common ground for us to work together to address systemic issues, even though we play different and often adversarial roles in court.

b. **Display** the flip chart page where it will be visible throughout the program/conference. **Refer back** to any common interests, values, and objectives elicited through this exercise at appropriate times during the conference.

3. **Review learning objectives** PPT Slide 3 using the following as a guide:

"Now that we know who is here and what brought each of us here, we can turn our attention to what we hope to achieve during our time together."

"We have developed specific learning objectives to guide our work over the next [insert length of time of program]. As a result of this program, we will be able to:

i. Describe basic concepts of culture, cultural competency, and implicit bias.
ii. Discuss the rationale for the study of cultural competency by criminal justice system stakeholders.
iii. Identify jurisdiction-specific cultural issues that are undermining community confidence in the fairness, integrity, and reliability of the criminal justice system.
iv. Demonstrate communication and action-planning skills for addressing these issues."

Note: Modify this language to match the specific goals and objectives of your program.

5. **Preview agenda** PPT Slide 4 using the following as a guide:

"In order to achieve these objectives:

First, we will explore the concepts of culture, cultural competency, and cultural collisions; the rationale for applying cultural competency concepts in the criminal justice context; and the characteristics of a culturally competent criminal justice system. This initial discussion will build the framework for our subsequent discussions.

Next, we will turn our attention to the field of social psychology as we explore the concepts of social cognition and implicit bias.

We will then identify the issues related to race and culture that may be undermining community confidence in the fairness, integrity, and reliability of the criminal justice system in our community.

Finally, we will turn our attention to the question of 'what do we do about this?'"

6. **Explain the role of the facilitator and faculty members** PPT Slide 5 using the following suggested language as a guide:

"My role here today is facilitator of learning. This means presenting information and facilitating our discussions to ensure that we achieve each session's objectives and follow the schedule in order to cover the material as planned. We have built in time for small group discussion. Even so, I may sometimes need to re-direct – or move a discussion in a particular direction. Please work with me if this happens."

7. **Articulate norms and expectations** PPT Slide 5 using the following as a guide:

"Issues related to race and culture can bring up strong emotions. It is important for us to come together in a safe environment where everyone can share feelings, experiences, and thoughts. Norms and expectations can help us do that."

Some norms or ground-rules to guide our discussions include the following:

i. Confidentiality: Inform participants that they can review and sign confidentiality agreements if necessary.
ii. Be respectful: Explain that we are at varied stages of our own learning and experience with this subject matter.
iii. Listen to understand: Explain that we listen not only to argue our own viewpoints.
iv. Self-responsibility: Explain that "I-statements" such as "I feel x" and "I think y" are more helpful and less charged than general statements like "Hispanics feel x" or "Asian Americans think y."
v. "Ouch! Then educate": Show that this is a tool used to communicate that something said was hurtful. Literally say, "ouch, that hurt—here's why. . . ."[6]
vi. Comfort: Breaks are scheduled, but use your discretion to take impromptu breaks as needed due to the energy.
vii. Minimal Interruptions: Please place phones on a quiet setting. Step out if you need to handle something back at home or back at the office, and then rejoin the group.

b. **Ask** participants:

"What else would you add to this list?"

[6] Descriptions of the "difficult situations" set forth here are from the "Facilitation Skills Inventory" in Nile, Lauren N. "Developing Diversity Training for the Workplace: A Guide for Trainers." 9th ed. at p. 1-9 NMCI Publications (2008)

Additional norms to note depending on what the group generates might include the following:

i. Engage in open thinking—be open to hearing information that's different even if you do not agree. Listen carefully. We are not asking you to accept everything you hear.
ii. Participate at your comfort level.
iii. Take risks—push yourself a little.
iv. Have fun! Help us all learn!

c. **Ask** participants:

"Are these norms we can all abide by?"

d. **Instruct** participants:

"At any time, you can raise your hand and remind the group of the norms, especially if we stray from the agreed upon ground rules."

8. **Review assumptions** PPT Slides 6 & 7 using the following as a guide:

There are a number of assumptions that underlie this workshop and curriculum:

i. There are significant links between issues of race and culture, racial equity, systemic disparities, and community confidence in the fairness, integrity, and reliability of the criminal justice system.
ii. These issues, whether real or perceived, must be addressed to ensure public safety.
iii. Cultural competence offers a lens through which we can better understand issues—and more effectively address them.
iv. Learning events focused on cultural competency can be an effective means of raising awareness and increasing the ability of the criminal justice system and the players in that system to address the issues, especially when they are part of a larger institutional commitment and effort. They are part of the solution but not the entire solution.
v. Cultural competence is not innate; it is something we have to work at, and it can be developed. People can learn and grow with adequate time, commitment, and action. Organizations can do the same.
vi. We must engage the head, the heart, and the hands. Purely intellectual work does not change perceptions or behavior.
vii. This workshop allows us to raise awareness and develop skills.
viii. Perhaps most important, given our different roles in the criminal justice system, is the assumption that we come here today with shared values of fairness, justice, and integrity—values rooted in the Constitution.
ix. We must move from our adversarial roles to find common ground on which we can converse as leaders of the criminal justice system, together, and with mutual respect.

UNIT 2: CULTURE, CULTURAL COMPETENCY & THE CRIMINAL JUSTICE SYSTEM

Overview:

This unit explores the language and concept of cultural competency as well as the rationale for its application in the criminal justice context. It delves into such questions as: What is culture? What are cultural groups? What are cultural collisions? How do these concepts apply in the criminal justice context?

Estimated Time: **120–150 Minutes**

Unit Objectives:

1. Define key terms from the field of cultural competency (culture, cultural group, cultural collision, and cultural competency).
2. Discuss ways in which the cultural group that makes up the criminal justice system collides with cultural groups within the community in which you live and work.
3. Distinguish characteristics of a culturally competent criminal justice system.

Recommended Format:

- Plenary session
- Interactive presentation that uses group exercises and facilitated group discussion.

Materials Needed:

- This facilitation guide
- PowerPoint presentation & facilitation notes for "Unit 2: Culture, Cultural Competency & the Criminal Justice System"
- LCD projector & screen
- Copies of the PowerPoint slides
- Flipchart and markers
- Clock/watch
- Session evaluation form
- Handouts of the recommended readings listed below

Powerpoint Presentation:

For the PowerPoint presentation, please refer to the accompanying disc.

Recommended Readings:

To access the recommended readings, please refer to the accompanying disc.

- Bentsi-Enchill, Jatrine. "The 6 Stages of Cultural Competence in Lawyers." (2005).
- Isaacs-Shockley, Mareasa, PhD. "Cultural Competence and the Juvenile Justice System: Irreconcilable Differences?" *Focal Point* Vol. 8 No. 2 (Summer 1994).
- Johnson, Robert M.A. "Racial Bias in the Criminal Justice System and Why We Should Care." *Criminal Justice* (Winter 2007).
- Stevens, Sylvia. "Cultural Competency: Is There an Ethical Duty." *Oregon State Bar Bulletin* (January 2009).

Key Concepts & Vocabulary:[7]

Culture is a community's shared set of norms, practices, beliefs, values, traditions, customs, history, and means of expression that affects how we analyze, judge, and interpret information, behavior, and perceptions about behavior.

A ***cultural group*** is a group of people who "consciously or unconsciously share identifiable values, norms, symbols, and some ways of living that are repeated and transmitted from one generation to another." [8] Cultural groups can include historically disadvantaged or excluded groups such as native communities; descendants of enslaved persons; women; immigrants; lesbian, gay, bisexual, transgendered or questioning individuals; refugee and asylum seekers; individuals with mental, developmental, or physical disabilities; members of faith-based communities; and people of similar economic status.

Cultural collisions occur when individuals or groups with different traditions, world views, values, or languages encounter a situation in which neither side is able to understand or respect the situation from the other's perspective.

Cultural competence occurs when individuals use awareness, knowledge, and understanding in order to value cultural diversity, and promote fairness, justice, and community confidence. In an ***organizational or systemic context***, cultural competency can be understood as "managing diversity in ways that create a climate in which the potential advantages of diversity for organizational or group performance are maximized while the potential disadvantages are minimized."[9]

[7] Definitions of key concepts and vocabulary and the summary of key learning points in this unit rely on discussions of the participants in the "Building Community Trust Faculty Workshop," and in part on definitions developed by the National MultiCultural Institute (www.nmci.org).
[8] "Technical Assistance Bulletin," SAMHSA Health Information Network (available online at http://ncadi.samhsa.gov/govpubs/ms500/).
[9] Nile, Lauren N. "Developing Diversity Training for the Workplace: A Guide for Trainers." 9th ed. at p. 5-17. NMCI Publications (2008).

Key Learning Points:

The following key learning points should be made and reinforced through the recommended presentation and exercises that follow:

- The concept of culture is broader than race and gender, and includes such things as language, nationality, religion, ethnicity, physical and mental ability, sex, sexual orientation, and profession.

- Individual differences exist within cultures. Shared culture does not equate to identical thinking or identical behavior.

- Culture shapes attitudes about child rearing, sexual roles, care-taking, treatment, dress, spirituality, education, discipline, punctuality, pre-marital sex, drugs/alcohol, homosexuality, employment, politics, the importance of family, authority figures, medications, criminal justice system, protective services, death and dying, living arrangements, marriage, domestic violence, and hospitality.

- Culture also shapes our behavior, communication style, and interactions with others.

- Being aware of cultural differences can help us to communicate and interact with one another more effectively. In the criminal justice context, awareness of cultural differences can improve our ability to communicate with colleagues and the communities that we serve.

- The culture of the criminal justice system and the lawyers within that system are influenced by its adversarial nature; by each attorney's valued mode of communication such as cross-examination, application of legal rules, and precedent to facts; and by varied motivations for doing the work (e.g., upholding the Constitution, enforcing the law, protecting society, or helping people).

- Cultural collisions are abound in the courtroom between prosecutors, defenders, judges, law enforcement, and court personnel; when working with clients, victims, and witnesses; in our offices; and among colleagues.

Presentation Instructions:

Using the "Unit 2: Culture, Cultural Competency & the Criminal Justice System" PowerPoint slides (either via LCD projector or as a printed handout), the session facilitator should:

1. **Introduce the concept of "culture":** PPT Slide #1

    a. **Tell** participants:

"With a common understanding of who is in the room, where we are headed during this program, and the ground rules that will guide our work together, we will now turn our attention to the substantive topics of culture and cultural competency."

b. **Conduct the *What is culture?* Buzz group exercise:** PPT Slide #2
(A buzz group is a "small discussion group formed for a specific task such as generating ideas, solving problems, or reaching a common viewpoint on a topic within a specific period of time.")[10]

i. **Instruct** participants:

"During the next five minutes, please discuss with your table the following question: 'when you think about culture, what comes to mind?'" PPT Slide #2

"After you have had a chance to talk, I will call on each group to share one or two main points from its discussion with the larger group."

"Someone in your group should take notes and be prepared to report back on those main points."

ii. After groups have had five to seven minutes of discussion, **call on** each buzz group in turn, and **instruct**:

"Please share one or two of the main points from your discussion."

iii. **Record** responses on flipchart.

iv. After each group has reported, **ask**:

"Is there anything else that was discussed that we have not yet mentioned or that you think is important to add?"

v. ***Note*:** If you are working with a smaller group (less than fifteen people) you may wish to facilitate a discussion of the question at the large group/plenary level instead of breaking into buzz groups first.

c. **Introduce the definition of culture:** PPT Slide #3

i. **State**:

Culture can be defined as a community's shared set of norms, practices, beliefs, values, traditions, customs, history, and means of expression that affects (among other things) how we, as the community, analyze, judge, and interpret information, behavior, and perceptions about behavior.

[10] Business Definition for Buzz Group, BNet, http://dictionary.bnet.com/definition/buzz+group.html (last visited July 20, 2010).

ii. **Facilitate** a discussion of this definition, choosing from among the following questions:

1. What do you notice about this definition?
2. In what ways does this definition relate to our earlier observations about culture?
3. Is there anything about this definition with which you disagree?
4. Is there anything that seems to be missing from this definition?
5. Is this a definition we can accept and work with during this workshop?

iii. **Record** responses on flipchart.

iv. **Wrap-up** the discussion by making the following points: PPT Slides 4, 5, & 6

PPT Slide #4

- The concept of culture relates to and impacts many different things, including our sense of identity and time.

- The concept of culture is broader than race and gender, and includes such things as language, nationality, religion, ethnicity, physical and mental ability, sex, sexual orientation, and profession.

- Culture is a deep concept, touching on both visible dimensions such as skin tone and religious symbols, and invisible dimensions such as our values and beliefs. Culture can be deeply embedded in us, going to the core of our identity.

PPT Slide #5:

- Culture shapes attitudes about such things as child rearing, gender roles, care-taking, treatment of the elderly, attire, spirituality, education, discipline, punctuality, pre-marital sex, drugs/alcohol, sexual orientation, employment, government, the importance of family, criminal justice system, protective services, death and dying, living arrangements, marriage, domestic violence, and hospitality.

PPT Slide #6:

- Culture also shapes our behavior—our communication style, interactions with others, and decision-making paradigms.

2. **Introduce the definition of "cultural group"** PPT Slide #7 using the following as a guide:

a. **Tell** participants:

"Within cultures, there are **cultural groups**, which are groups of people who consciously or unconsciously share identifiable values, norms, symbols, and some ways of living that are repeated and transmitted from one generation to another."

"Cultural groups can include historically disadvantaged or excluded groups such as native communities; descendants of enslaved persons; women; immigrants; lesbian, gay, bisexual, transgendered, or questioning individuals; refugees and asylum seekers; individuals with mental, developmental or physically disabilities; members of faith-based communities, and people of similar economic status."

b. **Facilitate** the following interactive exercise: **Five Circles Exercise**

   i. **Ask**:

   "To what cultural group(s) do you belong?" PPT Slide #8

   "Over the next twenty minutes, we are going to explore this question."

   ii. **Instruct** participants:

   PPT Slide #9 "Take out a blank sheet of paper and draw five circles."

   When everyone seems to have completed this task, move to the next step:

   PPT Slide #10 "Write one cultural group with which you closely identify in each circle."

   Give participants a minute or two to complete this task. When most of them seem to have finished, give the next instruction:

   PPT Slide #11 "Once you have finished filling in your circles, find two people for each circle with whom you share a cultural connection."

   "When you find someone who has written the same cultural group on his or her paper, write his or her name inside your circle."

   "For example, if I write 'Italian' in one of my five circles, and I find someone in the room who has also written 'Italian' in one of his or her five circles, I am going to write that person's name in my 'Italian' circle."

   "Does anyone have any questions?"

   "You have five minutes to fill in your circles."

   "Please get up and move around the room for this."

iii. **Keep track of time**, and **notify** the group at the half-way point, when one minute remains, and when thirty seconds remain. This is an up-tempo exercise; counting down the time will keep everyone moving.

iv. **Debrief participants:**

When time is up, **ask** people to return to their seats and **facilitate** a ten-to-fifteen-minute discussion of the exercise, choosing from among the following questions to guide the discussion:

"How many of you found two matches in each circle? How did that feel?"

"How many of you found matches in only two or three of your circles? How did that feel?"

"Did any of you share more than one cultural connection with a person? Were you surprised by that? What does that suggest to you?"

"Did you notice anything as you were filling out your circles?"

"Did anyone have a hard time actually filling out all 5 circles? Tell us about that."

"Did anything strike you about the process of finding matches?"

"How many of you put your role within the criminal justice system down as one of your culture groups?"

"How might the cultural groups with which you identify be related to or motivate your work as defenders, prosecutors, and judges?"

"Did anything surprise you? If so, how?"

c. **Conduct** the following group exercise, which invites participants to **describe** the criminal justice system cultural group. PPT Slide #12

i. **Ask** participants:

"Now that we have gained a basic familiarity with the concepts of culture and cultural group, we want to turn our attention to describing the culture of the criminal justice system."

"How would you describe the criminal justice cultural group to which we, as lawyers, judges, and staff members within that system, belong?"

ii. Referencing PPT Slide #12, **instruct** participants as follows:

"In groups at your table, come up with a list of words to describe the visible and invisible dimensions of the criminal justice cultural group."

"As you brainstorm, think about the different aspects of our definition of cultural group such as values, norms, symbols, and ways of living and interacting."

"Think about preferred modes of communication and decision-making paradigms within the legal system."

"Take five to seven minutes to come up with your list. Please take notes, and be prepared to report back on your discussion."

"While groups are engaged in discussion, **draw** an iceberg shape on a flipchart page, with a waterline approximately one-third of the way down from the top of the iceberg."

iii. **Call on** groups to report back. **Record** their responses on the iceberg. Visible dimensions (e.g. attire, jargon) should be recorded above the waterline while invisible dimensions (e.g. values, motivations, preferences) should be recorded below the waterline.

After five to seven minutes of discussion, **call on** the first group:

"Tell me two words or phrases from your list."

With each response, **ask** whether the word/phrase is a visible or an invisible dimension of the cultural group, and record it either above (visible) or below (invisible) the waterline that is drawn through the iceberg.

After the first group reports, **ask** the next group to add two words or phrases to the list, and so on.

After each group has reported back, **ask**:

"Do any groups have a word or phrase that has not yet been mentioned?"

"Are there any aspects of culture PPT Slide #12 that we have not touched on yet in our discussion (values, norms, symbols, ways of living, modes of communication, or decision-making paradigms)?"

Record any additional responses on the flipchart list.

Ensure that the following are covered in the discussion, either by reinforcing these points as participants make them, asking leading questions to elicit the point, or making the point as an observation:

- We are heavily influenced by the adversarial nature of the criminal justice system.

- There are valued modes of communication such as cross-examination, linear story-telling, and fitting facts to rules or precedent.

- There are varied motivations for doing the work (e.g. upholding the Constitution, enforcing the law, protecting society, challenging the government, challenging authority, and helping people).

iv. **Wrap-up** this discussion by noting the following:

PPT Slide #13

"As we can see from our discussion, there are both visible and invisible dimensions to our criminal justice culture."

"Some of those visible dimensions include the structure (judge, prosecutor, defense attorney or defendant), the language we use, our communication styles (especially during cross-examination), the complex procedural rules and precedents that are followed, the adversarial nature of the proceedings, the case process itself, and the clothing we wear. These are things that can be seen and observed."

"The less visible dimensions include our values and motives for doing this work. They are less visible, so it can be easy to forget that we share some of the same values and motivations even though we are adversaries in court. It can also be easy for others to misunderstand our motives and values or to attribute ill-will to our efforts."

"Just like real icebergs, these run deep below the surface. What is below the surface is often unnoticed but important to acknowledge."

PPT Slide #14

"As we think about this, it is important to remember that culture affects how we analyze, judge, and interpret information, behavior, and perceptions about behavior."

"Among lawyers and judges in the criminal justice system, this means a heavy reliance on and a high value for things like logic, analytical thought, and facts."

"If we value qualities such as logic what happens when we interact with others who do not value those qualities so highly? Or those who do not communicate in that way? Or those who do not have the legal training that we have?"

"For example, consider the communities we serve, and the members of the community with whom we regularly interact: victims, witnesses, jurors, and clients."

"Cultural competency experts call this phenomenon 'cultural collisions.'"

3. **Introduce the concept of cultural collisions** PPT Slide #15

   a. **Tell** participants—

   "Cultural collisions occur when individuals or groups with different traditions, world views, values, or languages encounter a situation in which neither side is able to understand or respect the situation from the other's perspective."

   PPT Slide #16

   "Typical cultural collisions occur with regard to sexual roles, attire, punctuality, political views, employment, punishment, and body language."

   b. **Facilitate** a twenty-minute discussion of this concept, choosing from among the following questions. **Record** key discussion points on the flipchart.

   PPT Slide #17 "When thinking back on the Five Circles Exercise, did anyone experience a cultural collision as you went through the process of trying to find someone else with whom you have a cultural connection? Tell us about the collision. Were you surprised by it?"

   "Did anyone expect to have some collisions based on your cultural identity? Tell us about that. Did it play out the way you expected?"

   "Did anyone notice a collision on your own page (e.g. litigious nature of our role in criminal justice system conflicting with 'keeping the peace' or value of harmony aspects of one's ethnic or religious background)?"

   Turning our attention outward—PPT Slide #18

   "What are some of the cultural collisions we expect to see between the different players in the criminal justice system (judges, prosecutors, defenders, victims, witnesses, clients, jurors, and police officers)?"

   "What are some of the cultural groups we see among the community members in the criminal justice system?"

   "What do we know about those cultural groups?"

"How would we describe those cultural groups with regard to the following:

- Their values;
- How they tell stories and relate facts;
- The role of the family in decision-making;
- Preferred modes of communication;
- The meaning of gestures such as eye contact, head nodding, or smiling;
- Sense of time and personal boundaries; and
- Their view of the role of courts, police, or lawyers?"

"How might the culture of the criminal justice system conflict with the cultural groups within our community?"

"What kind of cultural collisions do we expect to see between the criminal justice system's culture and the community?"

"Can you think of any examples of cultural collisions from real-life that have occurred? Tell us about that."

c. **Wrap-up** the discussion:

"Cultural collisions are abound in the criminal justice system. They can happen in the courtroom; between prosecutors, defenders, judges, law enforcement, and court personnel; during interactions with clients, victims, and witnesses; in our offices; and among colleagues."

"How do we navigate all of this effectively without spinning in circles?"

"That is what our focus on cultural competency is all about—navigating differences effectively to achieve our common goals in the justice system."

4. **Introduce the concept of cultural competence** PPT Slide #19 using the following as a guide:

a. **Tell** participants:

"Let's look again at a concept:"

"Cultural competence means awareness, knowledge, and understanding sufficient to value cultural diversity and promote fairness, justice, and community confidence."

"Cultural competence is a means of effectively navigating cultural differences and challenges—a process of continuous learning that enables one to work effectively in a diverse environment."

"There is an inherent duality to the concept because cultural competence can be understood as a process (a vehicle for moving toward the goal of fairness) and as an end-goal (the highest level of functioning in multi-cultural environments)."

PPT Slide #20

"In addition, cultural competence is understood in terms of a progression from cultural destructiveness up through cultural proficiency."

"Various models suggest certain skills that we need in order to interact with others in a culturally competent manner, such as:

- Personal awareness of one's own culture and values;
- Respect for others' culture and values;
- Knowledge of a specific culture (e.g. meaning of eye contact or role of family members in decision-making processes);
- Awareness of ways in which personal bias (implicit or explicit) may affect interactions with others;
- Knowledge of institutional barriers that prevent some cultural groups from accessing justice;
- Flexibility and ability to adapt to differences; and
- Ability to communicate and mediate effectively across cultural differences."

b. **Facilitate** a discussion of this concept using the following as a guide, and **record** key discussion points on the flipchart.

PPT Slide #21

"We set out some goals at the start of this program, which were formulated with assumptions about why it is important for us to study and work at building cultural competence."

"Some of these goals were

- To better understand issues of community trust; and
- To more effectively address systemic issues."

"However, one of our assumptions toward these goals was that statistics tell us diversity and tolerance are increasing."

"Do we agree with these assumptions?"

"Why else might it be important for leaders of criminal justice agencies to study cultural competence?"

"Let's look again at the definition of cultural competence:"

PPT Slide #22

"Cultural competence means awareness, knowledge, and understanding in order to value cultural diversity and promote fairness, justice, and community confidence."

"Based on this understanding of cultural competence, how would you define cultural competence?"

- At a systemic level—for the criminal justice system?
- At an office level—for a criminal justice agency?

***Note*:** Depending on the needs of your group and the objectives of your program, you may want to utilize buzz groups or a breakout session to explore this question. This approach would provide a deeper level of discussion among participants, and may be particularly appropriate if team-building is one of your goals or if it is important for participants to have a deep level of understanding regarding this definition. Make sure to debrief participants following any non-plenary discussion using the following as a guide:

1. **Ask** each group to report the definition they developed and/or 1-2 highlights from their discussion

2. **Ask** the larger group:

   "Are there any common elements to the discussion highlights?"

   "Is there a common definition that emerges from our discussion?"

3. **Wrap-up** the discussion by reinforcing the discussion highlights.

Turn the focus to the following question: PPT Slide #23

"What are the characteristics of a criminal justice system that handles diversity well?"

Note: Responses may include policies, practices, communication, use of interpreters, community dialogue, etc.

Note: If your program is focused on intra-agency issues, or on improving supervision and management skills, you may modify this exercise to have participants describe the characteristics of a criminal justice ***agency*** that handles diversity well.

"Do you feel you work in a culturally competent office?"

"What characteristics exist within your office to make it competent?"

"What is lacking? What needs improvement?"

c. **<u>Wrap-up</u>** the discussion, by summarizing key discussion points and any questions that emerged from the discussion with which participants may be grappling. You may wish to frame differing opinions as a question with which people are grappling. (e.g. *we have some differing opinions about point x. Some people think…while others think…; therefore, we are still grappling with what x means.)*

"In many respects, the focus of the remainder of our time will be spent exploring what each of us can do to make our office more reflective of your model."

UNIT 3: SOCIAL COGNITION & IMPLICIT BIAS

Overview:

This unit presents the concepts of social cognition and implicit bias from the field of social psychology. Through the lecture and break out discussions, participants will explore such questions as: What are social cognition and implicit bias? What role do they play in the operation of criminal justice agencies and systems? In what ways are they connected to community perceptions about the fairness, integrity, and reliability of the criminal justice system? How do systemic justice issues impact community perceptions regarding the integrity and reliability of the criminal justice system?

Estimated Time: **90–120 Minutes**

Unit Objectives:

1. Describe concepts of implicit bias and social cognition.
2. Discuss concerns and implications of these concepts for leaders of the criminal justice system and of criminal justice agencies.
3. Analyze the ways in which implicit bias impacts the operation of and perceptions about the criminal justice system or criminal justice agencies.
4. Apply strategies to decrease implicit bias.

Recommended Format:

- Plenary lecture supplemented with breakout sessions.
- When possible, the presentation should be made by a social psychologist or cultural competence expert versed in this field. (See Chapter 4 under *Faculty* for additional recommendations related to using a social psychologist or cultural competence expert for this unit).

Powerpoint Presentation:

To access the PowerPoint Presentation, please refer to the accompanying disc.

Recommended Readings:

To access the recommended readings, please refer to the accompanying disc.

- Kang, Jerry "Implicit Bias - A Primer for Courts." Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts (August 2009).

- Levinson, Justin D. "Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering." Duke Law Journal Vol. 57:345 (2007).
- Marsh, Shawn C. "The Lens of Implicit Bias." *Juvenile and Family Justice Today* (Summer 2009).

Materials Needed:

- This facilitation guide
- PowerPoint presentation & facilitation notes for "Unit 3: Implicit Bias"
- LCD projector & screen
- Copies of the PowerPoint slides
- Copies of case scenario (1 per person)
- Flipchart and markers
- Clock/watch
- Session evaluation form
- Handouts of the recommended readings

Key Concepts & Vocabulary:

In order to make sense of and navigate the incredible volume of data that human beings encounter from day to day, human brains organize and categorize information into ***schemas***—or mental shortcuts.

Implicit social cognitions are the schemas that apply to human interaction and that guide the way a person thinks about social categories. Social cognitions include ***stereotypes*** (traits we associate with a category) and ***attitudes*** (evaluative feelings that are positive or negative).

Implicit bias is a preference (positive or negative) for a group based on a stereotype or attitudes we hold and that tends to develop early in life. Implicit bias operates outside of human awareness and can be understood as a lens through which a person views the world and that automatically filters how a person takes in and acts in regard to information.

Key Learning Points:[11]

The following key learning points should be made and reinforced through the recommended presentation and exercises that follow:

- Not all inequity or disparity is the result of an intentional "-ism."

[11] Key learning points with concepts and vocabulary for this unit are drawn from: Marsh, Shawn C. "The Lens of Implicit Bias." *Juvenile and Family Justice Today* (Summer 2009); Kang, Jerry "Implicit Bias - A Primer for Courts." Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts (August 2009).

- Recent discoveries in the science and psychology of how human beings develop preferences tells us that human beings naturally assign people social categories of various traits such as age, gender, race, and role. This categorization begins shortly after birth and is closely followed by associations of characteristics with social groups, which often are formed based on people who are like you ("in-group") and people who are not like you (out-group). Generalized characteristics come from many sources (parents, friends, or media) and can be either positive or negative. Associations strengthen over time and eventually becoming automatic.

- Implicit and explicit biases are not always aligned. Although related to explicit biases, implicit biases sometimes differ substantially from explicit biases (the stereotypes and attitudes we expressly report).

- While these mental shortcuts can be incredibly helpful in some situations, they can also lead to discriminatory behaviors, inequity, and unfairness.

- There is increasing evidence that implicit bias, as measured by the Implicit Association Test (IAT) predicts behavior in ways that impact our roles and responsibilities within the criminal justice system.[12]

- Implicit bias operates at each and every decision point as a person enters, moves through, and exits the criminal justice system. For example, implicit bias can impact actions resulting from an observation of an act that is ultimately interpreted as shoplifting: a decision of whether to call parents or police, a decision to charge or arrest, a decision about detention or diversion, and other decisions all the way through adjudication and sentencing.

- Implicit bias also influences responses to decision-makers (e.g. judges, prosecutors, police officers, and defenders). In this sense, a reciprocal process between actors sets the stage for a self-fulfilling prophecy that affirms one's implicit beliefs.

- The good news is implicit biases are malleable and can be changed.

    - ***Motivation to be fair matters***. One must first believe there is a potential problem before it can be fixed.
    - ***Environment matters***. Social contact across social groups seems to have a positive effect on explicit and implicit attitudes.
    - ***Exposure to counter-typical exemplars.*** Counter-typical exemplars function as de-biasing agents, seems to decrease our biases (e.g., exposure to positive exemplars such as Martin Luther King or contact with female professors, deans, judges, or lawyers). The conditions of exposure are important: interaction on equal terms, repeated interaction, and non-trivial cooperation. Fleeting exposure

[12] For an explanation of the Implicit Association Test, please see https://implicit.harvard.edu/implicit/.

may be drowned out by repeated exposure to more typical stereotypes from the media.
    - ***Procedural changes*** can disrupt the link between implicit bias and discriminatory behavior. For example, a blind screen in orchestra auditions increased women's success in auditions, and agreeing beforehand to merit criteria-decreased gender discrimination in hiring a police chief increases hiring success as well.

- Methods to decrease implicit bias:

    - ***Education:*** Recognize that race, gender, sexual orientation, and other social categories may influence decision-making. Engage in educational programs to increase one's awareness rather than attempt to be color-blind.
    - ***Cognitive Load:*** Decrease the amount and complexity of information one has to process in any given time frame.
    - ***High-effort processing:*** Engage in thought that confronts information rather than retaining information for peripheral and secondary cognition.
    - ***Mindfulness***: Focus on the task at hand to understand one's thought processes, develop awareness, and challenge one's errors (e.g., is this a fact or am I making an assumption?).
    - ***Organizational review:*** Review the structure of a given organization to determine how effectively it fosters bias-free behavior.
    - ***Checklists:*** Develop checklists to use at key decision points. These will help encourage less-biased decisions by providing an objective framework to assess one's thinking and subsequent decisions.

Presentation Instructions:

Using the "Unit 3: Implicit Bias" PowerPoint slides (either via LCD projector or as a printed handout), the session facilitator should:

1. **Present lecture** on implicit bias. PPT Slides #1—27

    Note: Suggested script for lecture is included in the *notes* field of the Unit 3 PowerPoint slides.

    Note: Because the content of this lecture is likely to be unfamiliar to participants, we strongly recommend providing each participant with a copy of the PowerPoint slides with ample space for notes.

2. **Lead interactive exercise.**

    Choose an interactive exercise from among the following scenarios to increase participants' awareness of the ways in which implicit bias can impact decision-making and to present strategies participants can utilize to minimize potential negative consequences.

You have a number of choices to make for this exercise:

Scenario: You may choose between the two scenarios presented below. The first explores the subject of implicit bias in a case as it moves through the juvenile court system. The second scenario explores implicit bias as it relates to hiring and promotion decisions within a prosecution or defense office. Alternatively, you may develop your own case study.

Setting: You may lead this interactive exercise in buzz groups, or in a breakout session. Breakout sessions are more conducive to interactive role-playing, which would be particularly appropriate.

Grouping: Depending upon your audience and objectives, you may wish to group participants by role (e.g. prosecutors with prosecutors; staff members with staff members). When debriefing the exercise, this approach will allow you to compare and contrast differences/similarities in how different kinds of players in the system approach and analyze issues. Alternatively, you may wish to group participants in cross-sector/cross-function groups to support team-building and to encourage consideration of differing perspectives as the participants analyze the issues.

Handouts: You may want to distribute copies of the case study to participants.

a. ***Scenario #1***

i. **Tell** the participants the following:

"With a basic understanding of what implicit bias is and how to minimize it and its potential negative consequences, we are now going to explore how this plays out in a concrete, real-life way."

"I will present a scenario to you, and then in small groups, we will work through a series of discussion questions."

ii. **Provide instructions** as needed—e.g., groupings.

iii. **Present** the following case study:

Jimmy is a fourteen-year-old boy accused of shoplifting at a local 7-Eleven convenience store. He is a seventh-grader in a junior high school located in a predominantly low-income neighborhood. Beginning in fourth grade, Jimmy was placed in special education classes because of conduct and behavioral disorders. He has repeated a grade in school twice, and is the oldest seventh-grader in his class. He reads on a fourth grade level, is frequently absent from school, and has previously been suspended for disciplinary infractions. Jimmy is

African American and lives in an apartment with his mother and grandmother. Neither his mother nor his grandmother completed high school.

The shoplifting charges arise from an incident that occurred during school hours at a 7-Eleven several blocks from Jimmy's school. A security officer observed Jimmy placing a bag of chips inside his jacket, zipping his jacket up, and then exiting the store without paying. The security officer detained Jimmy and phoned the police. The responding officer was in the middle of a hectic day; he had already responded to an incident near school. The officer was also aware that multiple calls for police assistance had come in as he arrived at the 7-Eleven and was anxious to process this situation quickly. He placed Jimmy under arrest and described Jimmy in reports as disrespectful, non-responsive, and having a hard look on his face.

Jimmy was detained in a group home pending the resolution of his court case, and was ultimately adjudicated delinquent. He was represented by a public defender that carried a caseload of more than twice what the ABA guidelines recommend, and the prosecuting attorney operated under a similarly-heavy caseload. These caseload pressures prevented both the prosecuting attorney and Jimmy's public defender from interviewing Jimmy's mother, grandmother, and teacher until the morning of the delinquency proceeding, and neither reviewed Jimmy's educational records. The judge presiding over Jimmy's case handled ten other matters on the same morning. Jimmy is now under continued court supervision and must report to his probation officer weekly. He frequently waits for over an hour in a crowded waiting room for his weekly meeting, which lasts less than three minutes.

iv. **Lead** participants through the following discussion questions, **recording key discussion** points on a flipchart.

"At what points in this scenario did different individuals exercise discretion?"

- Store security officer's decision to call police;
- Police officer's decision to arrest;
- Jimmy's attitude at time of arrest;
- Court's decision to detain pending outcome of case;
- Public defender and prosecuting attorney's decisions—e.g., interviews/investigation;
- Court's determination of delinquency; or
- Sentence and post-disposition reporting requirements.

"Based on what we have learned so far about culture and implicit bias, in what ways might implicit bias play a role at one or more of these decision-making points?"

"Of the various socio-economic factors described in the scenario, which do you consider to be legitimate factors for the court, prosecution, police, probation office, and public defender to consider in their work on the case?"

"What strategies for decreasing implicit bias might one or more of these decision-makers employ to ensure that Jimmy's case is handled as fairly as possible?"

Participants should consider the following from the lecture:

- Procedural changes
- Education
- Cognitive Load
- High-effort processing
- Mindfulness
- Organizational review
- Checklists

Note: In facilitating this last question, make sure to ask groups to consider strategies they may not have focused on initially. For instance, if all groups report back that they discussed strategies related to procedural changes and cognitive load, **ask:**

> "We have some great ideas about cognitive load and procedural changes. What about checklists? Are there ways in which a checklist could have been used by the public defender or probation officer to help make sure Jimmy's case is handled as fairly as possible? What about high-effort processing? Is there a way in which high-effort processing could assist the judge?"

"To what extent should different actors in this scenario bear responsibility for implicit bias at other decision-making points in the case?"

> "For example, would it be appropriate for a prosecutor to somehow take into account an implicit bias of the responding officer or security guard when prosecuting the case?"
>
> "Would it be appropriate for the judge to take into consideration any of the public defender's implicit biases that may have negatively impacted the amount of time the defender spent investigating the case?"

"In light of what we have learned about implicit bias, if you were the supervisor for either the public defender or prosecuting attorney assigned to this case, how might you counsel them?"

Supplemental Activity:

Consider tasking the small groups with developing an objective checklist, a de-biasing check and balance, or procedural safeguards that might be put in place to guide decision-making at one or more of the discretion points in the case scenario.

Instruct groups to first brainstorm a list and then discuss the options. Ask groups to write their final checklist on flip chart paper and share it with the larger group.

Consider assigning each group a different discretion point so that the group, as a whole, explores and learns about multiple discretion points in the life of a case.

After each group presents, **ask** for feedback or additional items from the larger group.

Once all groups have presented, **debrief** the exercise by asking what similarities and differences exist with regard to steps that can be taken at different points in the life of the case or by different actors in the scenario.

v. **Wrap up** the discussion by noting key learning points that correspond with the group's discussion or by reinforcing key learning points from the lecture that may not have been discussed during the exercises.

b. ***Scenario #2***

i. **Tell** the participants the following:

"With a basic understanding of the steps that can be taken to minimize implicit bias and its potential negative consequences, we are now going to explore how this plays out in a concrete, real-life way."

"I am going to present a scenario to you, and then in small groups, we are going to work through a series of discussion questions."

ii. **Provide** instructions as needed—e.g., groupings.

iii. **Present** the following case study.

Office X is a public defender/prosecution office that serves a predominantly low-income Latino community, many of whom speak only Spanish. The office employs fifteen attorneys, four investigators, two social workers, three interpreters, and twelve administrative support personnel. All but two of the office's attorneys are Caucasian; the remainder of the office personnel are predominantly (75%) people of color. While the office's two social workers have completed college, most (90%) of the office's investigators, interpreters, and administrative support personnel have only a high school degree. While

most of the non-attorney personnel speak Spanish, only four of the office's fifteen attorneys speak Spanish, and the others must rely on the office's interpreters and support personnel for assistance in communicating with clients, witnesses, and other Spanish-speaking members of the public. The lack of Spanish-speaking attorneys has caused staffing issues in the past.

The office has a strong reputation among local criminal justice leaders and in the broader legal community. Many of these leaders supported the office director's recent request for additional funding to hire two new entry-level staff attorneys. The office was inundated with applications for the two positions, and the director ultimately hired two recent law school graduates with similar academic backgrounds to the director and assistant director.

The director is known within the office as caring and conscientious. However, the Spanish-speaking lawyers and staff members in the office have expressed discontent that, just like the director and assistant director, neither new hire speaks Spanish. In addition, the two attorneys of color in the office have expressed dissatisfaction because both new hires are Caucasian, and no person of color has ever held a leadership position within the office.

iv. **Lead** participants through a facilitated discussion, choosing from among the following questions. **Record** key discussion points on a flipchart.

"What issues related to race and culture are suggested in this scenario?"

- Persons of color concentrated in lower-level positions, with Caucasians in attorney and leadership positions.
- New hires continue the concentration of Caucasians in attorney positions.
- New hires are not able to speak Spanish, continuing reliance on other attorneys and staff members for translation services.
- Staff/attorney power conflicts—e.g., prioritization of translation over other administrative responsibilities.
- Underlying tensions with director's decision to hire attorneys who look "just like him/her."

"What are the ways in which implicit bias may have affected the director's hiring choices? How might they have affected decisions regarding promotions?"

"What strategies might the director employ to decrease implicit bias in decisions related to hiring and promotion?"

Participants should consider the following from the lecture:

- Procedural changes
- Education
- Cognitive Load
- High-effort processing
- Mindfulness

- Organizational review
- Checklists

Supplemental Activity:

Consider tasking the small groups with developing an objective checklist, a de-biasing check and balance, or procedural safeguards that might be put in place to guide the director's decision-making with regards to hiring and promotions.

Instruct groups to first brainstorm a list, and then discuss the options. Ask groups to write their final checklist on flipchart paper, and share with the larger group.

After each group presents, **ask** for feedback or additional items from the larger group.

Once all groups have presented, **debrief** the exercise by asking what similarities/differences exist in the lists generated by the different groups.

v. **Wrap-up** the discussion by noting key learning points that correspond with the group's discussion or by reinforcing key learning points from the lecture that may not have been discussed during the exercises.

UNIT 4: UNEARNED PRIVILEGE OR ADVANTAGE

Overview:

This unit presents the concept of ***unearned privilege***. The interactive exercise provides a rich, experiential learning opportunity and sets the stage for a discussion of the links between privilege, personnel dynamics within criminal justice agencies, and interactions between lawyers and judges in the criminal justice system and members of the community they serve.

Estimated Time: **60–90 Minutes**

Unit Objectives:

1. Graphically demonstrate that the playing field is not yet and has never been level.
2. Discuss how differential treatment flows from society's ranking of social identification.
3. Analyze ways in which unearned privilege impacts the operation of and perceptions about the criminal justice system or criminal justice agencies.

Recommended Format:

- Conduct the interactive exercise and debrief all together.
- Utilize breakout groups for follow-up reflection and discussion.

Recommended Readings:

To access the recommended readings, please refer to the accompanying disc.

- Jones, Steven. "The Right Hand of Privilege." Available online at http://www.multiculturaladvantage.com/recruit/diversity/white-men-diversity/Right-Hand-of-Privilege.asp.
- McIntosh, Peggy. "White Privilege: Unpacking the Invisible Knapsack." Available online at http://www.nymbp.org/reference/WhitePrivilege.pdf.

Materials Needed:

- This facilitation guide
- "Privilege and Cultural Competence Exercise" personal reflection form (See sample in Chapter 5)
- Flipchart and markers
- Clock/watch
- Session evaluation form

Key Concepts & Vocabulary:

Unearned privilege relates to "the idea that some individuals receive certain advantages in life solely based on being a member of certain social identity groups."[13] While success in life depends on our hard work and personal merit, it also depends on society's system of power and privilege, which favors some groups over others. Such privileges or advantages are unearned in the sense that a person is born into a certain status, or that a certain status is valued by the dominant culture and gives a person certain advantages.

Key Learning Points:[14]

The following key learning points should be made and reinforced through the recommended presentation and exercises that follow:

1. Different aspects of privilege go hand-in-hand with different dimensions of diversity: race, sexual orientation, gender, skin color, body size, socio-economic status, age, religious affiliation. Notable aspects that have been identified and discussed in literature include "white" privilege, "heterosexual" privilege, and "male" privilege.

2. The concept of unearned privilege is intended to raise awareness that life can be very different depending on where you start. Moreover, relative privilege in certain areas shapes and impacts our experiences and our perceptions about reality.

    - This concept does NOT mean that you have not worked hard or earned what you have achieved in life. It is also NOT meant to undervalue what a person has accomplished or cause guilt.

3. One of the ways unearned privilege occurs is when one group's culture, values, and ways of interpreting the world are built into the fabric of institutions within a society and then made invisible—referred to as the "standard" or "norm."

    - Institutionalized support for the culture allows members of that culture to see themselves as individuals only, without need to define or identify with a group, because it is the standard. They are not different; they are normal.

4. Unearned privileges are often very subtle, and people who have them may be totally unaware that they have unearned privilege. When people are unaware, it may be hard to convince them that they have these privileges.

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[13] Jones, Steven. "The Right Hand of Privilege." Available online at http://www.multiculturaladvantage.com/recruit/diversity/white-men-diversity/Right-Hand-of-Privilege.asp,

[14] Key concepts and learning points are drawn from Jones, Steven. "The Right Hand of Privilege." Available online at http://www.multiculturaladvantage.com/recruit/diversity/white-men-diversity/Right-Hand-of-Privilege.asp. *See also* Nile, Lauren N. "Developing Diversity Training for the Workplace: A Guide for Trainers." 9th ed. NCMI Publications (2008) at p. 3-85 to 3-90.

5. Those who do not have privilege are very aware. This lack of privilege creates tension, stress, and frustration in diverse environments.

6. Privilege impacts our perceptions of reality. We perceive reality based on our own experiences. We tend to see truth based only on our perceived reality. If our reality is right, then we assume that someone else's must be wrong.

    - Some groups are more likely to have their reality reinterpreted for them. For example, members of dominant groups reinterpret reality of others more often (e.g., men reinterpreting women's reality or Caucasians reinterpreting reality of people of color by saying they are over-reacting or being too sensitive).

    - Certain groups also experience daily indignities (e.g., being followed in a store, being served last, receiving impolite services) more frequently. The tendency is for privileged groups to reinterpret others' reality because it is not part of their experience—and for the affected groups to perceive a pattern, sometimes accurately and sometimes not.

    - ***Key***: groups that experience these kinds of daily indignity want their experiences validated, not reinterpreted.

Presentation/Facilitation Instructions:

1. **Lead** "The Level Playing Field" exercise,[15] using the following instructions as a guide**:**

- Have participants form a single line side-by-side facing forward. There should be approximately equal space in front and behind the line. You should be standing in front of the group, facing them, with a wall, line, or sidewalk (some end point) behind you.

- Make sure everyone has their hands free. Make whatever accommodations are necessary for people using wheelchairs, crutches, or canes. (For example, it may be helpful to have those people find a place at either end of the line.)

[15] Provided by Joseph Sawyer, Distance Learning & Technology Manager at the National Judicial College. This activity was originally developed by Martin Cano, Valerie Tulier and Ruth Katz of "World of Difference", the Diversity program sponsored by the Anti-Defamation League. It was subsequently adapted by Ellen Bettman and re-titled the "Horatio Alger" exercise. Subsequent modifications/improvements, particularly to the instructions, goals, processing questions and take home messages were developed by Joan Olsson of Cultural Bridges and Betty Powell of Betty Powell Associates. Additional changes were made by Betty Powell and Mitchell Karp of Karp Consulting Group, Inc. Whenever this exercise is used, credit should be acknowledged.

- Instruct everyone to respect one another and the process by remaining silent during the exercise. (You may have to repeat this instruction.)

- Tell the group you are going to read a series of statements about life experiences. After each one you will instruct them to move either backward or forward depending on their experience.
  - Since stepping is something only people who walk do, try saying move one space forward rather than take one step forward. This less-ablest phrasing is more affirming to people who use wheelchairs.
  - At this point you should illustrate the size of the step participants should take each time. Determine this by the size of the room and the number of statements you are going to read.

- Let the group know that they can ask you to repeat the statement if it is not heard clearly. Remind people that they should not move again if the statement is being repeated.

- Ask the group to hold hands to the people next to them and to keep holding hands as long as they can. If someone in the group uses a wheelchair, crutches or a walker, be sure the people on either side figure out how to keep physical contact. Tell participants that at some point they may have to let go and that they should not hold on if it means one or both people will fall down.

- Read the statements. Use the statements on the following pages or write your own that focus on the forms of oppression for the particular group (e.g., race and class, gender and race, gender and sexual orientation, etc.)

- When you finish all the statements, pause. Ask the group to remain where they are, drop hands, and look around. Ask them to note where <u>they</u> are and where <u>others</u> are.

- Tell the group, "Behind me is the wall (wall, sidewalk, line, etc.). This wall contains the resources, opportunities, and benefits that society can offer and are desirable to you. [In an employment setting, you may want to reference a promotion, pay increase, upward mobility, challenging work, etc.] On the count of three, race to this wall."

- You can begin to count immediately, leaving no time to really think about what you asked. Alternatively, you may want to wait a few seconds before you start the count and note how some people prepare for the race.

Statements:

1. ____ If your parents speak English as a first language, move one space forward.

2. ____ If as a child, you did not have a room of your own (with a door), move one space backward.
3. ____ If one or both of your parents completed college, move one space forward.
4. ____ If one of your parents never completed high school, move one space back.
5. ____ If you went to a private elementary or secondary school, move one space forward.
6. ____ If your home as a child had more than 10 children's books and 30 adult books, move one space forward.
7. ____ If you have spent one year or more without health insurance, move one space back.
8. ____ If you have NEVER believed you were harassed or disrespected by police because of your race or ethnicity, move one space forward.
9. ____ If you were discouraged from pursuing activities, careers, or schools of your choice by teachers or guidance counselors, move one space back.
10. ____ If your racial or ethnic group has ever been considered by scientists as "inferior," move one space back.
11. ____ If you were raised in a community where the vast majority of police, politicians, and government workers were NOT of your racial group, move one space back.
12. ____ If you were taken to art galleries or museums by your parent(s) or those who raised you (does not include school trips), move one space forward.
13. ____ If you have ever had to worry about the disclosure of a disability or the consequences of such a disclosure, move one space backward.
14. ____ If you have ever entered a store and had sales clerks or security guards follow you, move one space back.
15. ____ If, at a meeting, you have ever felt you were asked to make copies or coffee because of your gender (or age), move one space back.
16. ____ If you went to an elementary and secondary school where the majority of the teachers were of your same race, move one space forward.
17. ____ If you felt you were ever denied a job or promotion because of your race, gender, or ethnicity, move one space back.
18. ____ If you have even been stopped or questioned by the police or other persons about your presence in a particular neighborhood, move one space back.
19. ____ If you never had to hand a grocery store cashier food stamps for your food, move one space forward.
20. ____ If your parents were able to provide significant financial support for your college costs, move one space forward.
21. ____ If your relatives of any generation had their land forcibly taken by the US government, move one space back.

22. ____ If you have had a relative, of any generation, lynched or murdered because of their race or ethnicity, move one space back.

23. ____ If you have ever been told that your religion or spiritual belief was strange, primitive, heathen or just plain wrong, move one space back.

24. ____ If you have ever been treated as if you were the maid, housekeeper or some other subordinate job when you were the boss, supervisor, or homeowner, move one space back.

25.____ If you never had to wonder if you were hired to meet a racial or gender affirmative action goal, move one space forward.

26.____ If you, as a child, were ever told you were dirty, should not touch someone's food, or should not drink from the same glass because of your skin color, move one space back.

27. ____ If you needed braces, dental or medical care as a child but did not get them then, move one space back.

28.____ If you, as a child, were regularly told such things as "only one glass of milk" or one helping of fruit at a meal because there was not enough, move one space back.

29.____ If you commonly see people of your race in positions of leadership in business, the courts and government, move one space forward.

30.____ If the safety or well-being of any child in your life has ever been questioned because of your sexual orientation, move one space back.

31.____ If as a child, you were rewarded in school for being assertive and speaking your mind, move one space forward.

32.____ If you have ever been sexually harassed or sexually assaulted, move one space back.

33.____ If you were ever told by a doctor or health care provider that your illness was "all in your head," move one space backward.

34.____ If your parents, grandparents or great grandparents were either killed in the German Holocaust or were Holocaust survivors, move one space backward.

35.____ If you never had to consider if a workplace, restaurant, bank or friend's home was physically accessible to you, move one space forward.

36.____ If as a child, you vacationed outside of the U.S. (or outside of your native country), move one space forward.

37. ____ If you have ever been prohibited from observing or shamed by teachers or colleagues into not observing a religious holiday, move one space backward.

38. ____ If you or a member of your immediate family was ever imprisoned for more than one week, move one space backward.

39. ____ If as a child, you were taught **in-depth** about the history of your race in school classes and textbooks, throughout most of K-12, move one space forward.

40. ____ If you, as a child, were ever told you must dress or act in a proper

way because it reflected on your whole race or ethnic group, move one space back.

41. ____ If you or your parents were prevented from buying or renting property in certain neighborhoods, move one space back.

42. ____ If you have ever been told by a bank, car dealership, or insurance company that the approval or signature of your male partner was required to complete a transaction and that transaction would not have required your male partner's signature had he gone alone, move one space back.

43. ____ If you have ever been challenged, assaulted or ostracized because of the religion, sexual orientation or race of the person you chose to love, move one space back.

Additional Statements:

44. ____ If you never had to wait in the rain or snow for a specially built van or bus, move one space forward.

45. ____ If, as a child, you were discouraged from being physically active in sports, outdoor activities and competition, move one space backward.

46. ____ If you have an immediate family member (other than yourself) who is a doctor, lawyer, or professor, move one space forward.

47. ____ If you were raised in a home where the newspaper was read daily, move one space forward.

48. ____ If you regularly cash checks without being asked to show additional identification, move one space forward.

49. ____ If your ancestors were ever forced onto reservations or detention camps within the United States, move one space backward.

50. ____ If your religious holidays are regularly recognized by a calendar, move one space forward.

51. ____ If you do not have to find a TTY (text communication device for the hearing impaired) to make an emergency telephone call, move one space forward.

52. ____ If you were given a car to drive as a teenager, move one space forward.

53. ____ If as a child, your family owned a second home or a vacation home, move one space forward.

PROCESS QUESTIONS:

- What was the exercise like for you?
- What was it like to have to let go of a colleague's hand?
- What did you see when you looked around the room near the end of the exercise? Was there anything that surprised you about people's positions? About your position?
- What did you notice about your reactions as the exercise progressed?

- How many cheated or adjusted their step size (e.g. took larger steps backward than forward or vice versa) or did not move when they could have? Why? What feelings or thoughts prompted you to do that?
- What was your first reaction when I instructed you to race for the wall?
- What does this exercise show us?
- What is the point of this activity?
- Do we all start off equal in life?
- Were any of the statements that were read, things over which you had any control or influence?
- What does this have to do with prejudice, discrimination, and oppression?
- Is it possible to be the fastest runner and still lose the race?
- What is level about a level playing field? Was it ever level? (No, even our pre-natal care and early nutrition dictate what kind of life we may have.)

TAKE HOME MESSAGES:

- None of the exercise statements was about any individual's choice or decision. Each was dependent on parents, other people or social circumstances. While recognizing the feelings of guilt and blame that can arise, reinforce this "no choices" point.

- None of the statements or any person's position at the end of the exercise had anything to do with how hard the person worked, how smart they were, or how well-intended or determined they were.

- Many of the statements related to the multi-generational impact of oppression and privilege. While there is no denying that substantial social change has occurred, it is still true that at least some of the effects of oppression from one generation impact subsequent generations.

- The statements in the exercise (and the life experiences they represent) have a cumulative effect. People of color do not have just one opportunity denied, women do not experience just one incident of harassment, etc.

- In the exercise, no matter how fast or hard everyone near the back run, they will not beat the front everyone to the wall. Relate to perceptions and reality in the comments: "women have to work twice as hard as men" or "people of color have to be twice as qualified as Caucasians," etc.

- What emotional responses might logically be evoked by these common, repeated, and expected (by adulthood) experiences? By both the target and privilege groups?
    - You can begin to talk about internalized oppression and internalized privilege (e.g., the feelings, particularly of young people, of "Why bother? I cannot get there" or "I cannot do that.")
    - Talk about the assumptions by people in privilege groups of "I accomplished that simply on my own merit and determination."

- The playing field is NOT level. Race, class, gender, etc. continue to have significant influence on people's access to the opportunities in this society.

- There remains a need for programs like affirmative action.

- There also is a compelling need to devote time, energy, and resources to actively dismantle these systems of oppression. Eliminating individual prejudice and bias are important and valuable but, by themselves, will not level the playing field.

Supplemental Break-out Session Exercise:

The following small-group discussion questions provide an opportunity for participants to link what they learned in the plenary exercise with the issues they are exploring in their local criminal justice system, within their criminal justice agencies, or in their management and supervision of their employees.

Processing and Taking Meaning:

1. **Instruct** each participant to fill out the "Privilege and Cultural Competence Exercise" worksheet (see sample in Chapter 5). Provide ten minutes for participants to record their reflections.

2. **Facilitate** a discussion about participants' responses to questions five through seven, using the following questions as a guide:

   What was the single most important thing you learned from the "Level Playing Field" exercise?

   What observation or revelation from the exercise surprised you most?

   If your program is focused on intra-agency issues or supervision and management challenges, **consider** one or more of the following questions:

   - What are the implications of what you have learned for your office or agency?

   - What are some of the privileges or advantages that may be "at play" in interactions between employees within our offices? (e.g., attorneys and "non-attorney" staff such as investigators, social workers, administrative staff, support staff, interpreters, etc.)

   - How might "reinterpretation of reality" contribute to these dynamics? (This is described more fully under "key learning points.")

- How can you use what you have learned about the concept of privilege to better relate to others in your office?

Looking back at Scenario #2 from Unit 3 (at p. 34):

- What are the ways in which the concept of unearned privilege may be impacting hiring and promotion decisions within the office?

- How might the concept of unearned privilege relate to the expressed perceptions and concerns of the Spanish-speaking employees within the office? The two attorneys of color in the office?

If your program is focused on cross-sector, inter-agency issues or community perceptions about the fairness, integrity and reliability of the criminal justice system, **consider** one or more of the following questions:

- What are the implications of what you have learned for your local criminal justice system?

- How can you use what you have learned about the concept of privilege to better serve your clients and community? What about to better relate to colleagues in other criminal justice agencies?

- What are some of the privileges or advantages that may be "at play" in interactions between judges, prosecutors, defense attorneys (especially lawyers within those agencies), defendants, victims, witnesses, communities we serve, or each other?

Note: Responses might include:
  - Academic accomplishment or success;
  - Membership in the legal profession;
  - Socio-economic status;
  - Language and accent; or
  - Definitions of "law-abiding" vs. "law-breaking" behavior—one reinforced as normal or standard and the other as "deviant"

- How might these privileges or advantages contribute to or reinforce negative community perceptions about the fairness, integrity, and reliability of the criminal justice system?

- How might those privileges or advantages impact our assessment of community perceptions?

- Are we reinterpreting or discrediting the community perception?

3. **Wrap-up** discussion, incorporating key learning points for the unit (See p. 38).

UNIT 5: MICRO-INEQUITIES

Overview:

This unit presents the concept of micro-inequities and explores several questions: How do micro-messages impact personnel dynamics within criminal justice agencies? Are there micro-messages that lawyers and judges in the criminal justice system send to each other, defendants, victims, witnesses, or other community members that reinforce negative perceptions about the fairness, integrity, and reliability of the criminal justice system?

Estimated Time: **30–60 Minutes**

Unit Objectives:

1. Define and identify micro-inequities regarding inter-office personnel issues and community relations.
2. Demonstrate techniques for converting micro-inequities into micro-affirmations.
3. Analyze the impact of micro-inequities on office culture or community perceptions regarding the fairness, integrity, and reliability of the criminal justice system.

Recommended Format:

- Ideal for breakout groups, but may also be presented in plenary session.

Powerpoint Presentation:

To access the PowerPoint Presentation, please refer to the accompanying disc.

Recommended Readings:

To access the recommended reading, please refer to the accompanying disc.

- Rowe, Mary. "Micro-affirmations and Micro-Inequities." Journal of the International Ombudsman Association. Vol. 1(1) (2008). Available online at: http://web.mit.edu/ombud/publications/micro-affirm-ineq.pdf.

Materials Needed:

- This facilitation guide
- PowerPoint presentation & facilitation notes for Unit 5
- LCD projector & screen

- Copies of the PowerPoint slides
- Flipchart and markers
- Clock/watch
- Session evaluation form

Key Concepts & Vocabulary:[16]

Micro-messages are small, "sometimes unspoken, and often unconscious messages that are constantly sent and received that can have a powerful impact on our interactions with others."

Micro-affirmations "convey inclusion, respect, trust, and genuine willingness to see others succeed." They may lead to a more productive and efficient work environment where all members feel valued and enjoy work.

Micro-inequities[17] are the ways in which individuals are either singled out, overlooked, ignored, or otherwise discounted based on an unchangeable characteristic such as race or gender. A micro-inequity usually takes the form in slight difference of language, gesture, treatment, or even tone of voice. They are often subconsciously given but can have a huge impact on a work environment or social structure.[18]

Key Learning Points:

The following key learning points should be made and reinforced through the recommended presentation and exercises that follow:

- Micro-inequities occur when people perceive they are receiving differential treatment based on some aspect of their diversity. Examples include:
    - People roll their eyes or sigh when someone considered "different" is speaking.
    - Manager walks down the hall and does not acknowledge co-workers or subordinates.
    - Staff member (usually "of difference") shares an idea, and no one responds. Same idea is repeated by someone else, and everyone acknowledges it.
    - Many attendees do not pay attention in meetings when a certain person is sharing an idea.
    - Office excludes environmental factors that represent a certain group (e.g., decorations, literature, or artwork).

[16] Key concepts, vocabulary, and learning points are drawn or quoted from Nile, Lauren N. "Developing Diversity Training for the Workplace: A Guide for Trainers." 9th Ed. NMCI Publications (2008) at p. 3-48.
[17] Sandler, Bernice. "The Campus Climate Revisited: Chilly for Women Faculty, Administrators, and Graduate Students." Association of American Colleges. 1986.
[18] http://www.magazine.org/content/files/Microinequities.pdf Microinequities: When Small Slights Lead to Huge Problems in the Workplace

- Some individuals receive micro-affirmations, and others do not. Third person observes and draws conclusions.
- Colleague expresses a gesture of affection or praise for one colleague but not another.
- Supervisor chats frequently with one employee but not another.
- Colleague invites some office mates to lunch but not others.

- Micro-messages are small but powerful.

  - Affirmations can boost morale and can create a supportive, productive atmosphere, especially if consistent.
  - Inequities can be especially harmful when they become daily inequities, which can erode self-esteem and ability to perform. They create feelings of exclusion for a person of difference, especially if there are many slights over time.

- For example:

	Micro-message	Response by Receiver(s)	Impact
+	Manager greets every member of team in the morning by name	Employees respond positively and, in turn, greet manager	Employees have higher morale and feel that manager values them
-	Manager walks by employees and does not greet them or make eye contact	Employees feel devalued and "unseen"	Employees have low morale and harbor negative feelings toward manager

- It is possible to become intentional with one's actions.
  - Make conscious effort to infuse micro-affirmations into daily workplace behavior.
  - Model respectful behavior through intentional micro-affirmations.

- Practicing micro-affirmations can lead to changed attitudes.

Presentation Instructions:

Using the "Unit 5: Micro-Messages" PowerPoint slides (either via LCD projector or printed handout), the session facilitator should:

1. **Present** lecture on micro-messages. PPT Slides #1—13

   Note: Suggested script for lecture is included in the *notes* field of the Unit 5 PowerPoint slides.

2. **Lead** the following exercise:

   a. **Divide** participants into breakout groups or buzz groups at tables.

   b. **Instruct** each person to write down one *micro-inequity* she or he has observed or experienced in the workplace, noting:

      i. The behavior that he or she observed;
      ii. The response of the receiver; and
      iii. The perceived impact that the behavior had on the recipient.

      Note: Depending on the goals and objectives of your training, you may want to be more specific with this exercise. For instance, if your program is focused on intra-office culture or management and supervision issues, instruct participants to write down one micro-inequity she or he has observed or experienced within his or her agency. If your program is focused instead on cross-sector issues within the criminal justice system, instruct participants to write down one micro-inequity he or she has observed or experienced in the courtroom, in interaction between different players in the system (e.g., between a prosecutor and a defender), or in interaction with a community member (e.g., between a defender and his or her client, a prosecutor and a witness, or a judge and a defendant).

   c. After participants have had time to complete this task, **instruct** participants to share their reflections with others in their group. **Ask** one person in each group to record the three key points (behavior, response, and impact) for each participant's story.

   d. **Instruct** participants to discuss the following questions:

      What do these different situations seem to have in common?

      What is the larger or cumulative impact that these situations could have on office dynamics; relationships between prosecution, defense, and judicial functions; or community perceptions about the fairness, integrity, and reliability of the criminal justice system?

   e. **Instruct** each person to write down one *micro-affirmation* he or she has observed or experienced in the workplace, noting:

      i. A description of the behavior that was observed;
      ii. The response of the receiver; and
      iii. The perceived impact that the behavior had on the recipient.

Note: As with the first part of this exercise, be specific when giving these instructions. Doing so will help to ensure that the exercise is consistent with the overall objectives and context of your program.

f. After participants have had time to complete this task, **instruct** participants to share their reflections with others in their group. **Ask** one person in each group to record the 3 key points (behavior, response, and impact) for each participant's story.

g. **Instruct** participants to discuss the following questions:

   1. What do these different situations seem to have in common?
   2. What is the larger or cumulative impact that these situations could have on office culture and dynamics; relationships between prosecution, defense, and judicial functions; or community perceptions about the fairness, integrity, and reliability of the criminal justice system?

h. **Instruct** participants to consider ways in which micro-inequities might be turned into micro-affirmations:

   Thinking back on each of the micro-inequities we discussed earlier, how might we transform negative micro-messages into a positive micro-affirmation?

   What steps could we take to send a more positive micro-message and develop a positive and broad impact on the culture of office or working relationships between prosecution, defense, and judicial functions or community perceptions about the fairness, integrity, and reliability of the criminal justice system?

i. ***If your program is focused on community perceptions***, **instruct** participants to consider the following discussion questions:

   What micro-messages might criminal justice stakeholders participating in this conference send that contribute to or reinforce negative community perceptions about the criminal justice system?

   What steps could we take to turn these micro-inequities into micro-affirmations?

j. **Ask** groups to **report back** key points from their discussions and **record** their responses on flipcharts.

   Note: If you are conducting this exercise in a plenary setting using buzz groups, ask for a report at whatever intervals best fit the available time for this session and the objectives of your program. (e.g., between steps "d" and "e" and again between steps "g" and "h"). If you are conducting this exercise in a breakout session, build in time for a report at the start of the next plenary session.

3. **Wrap-up** discussion, incorporating key learning points from the lecture.

UNIT 6: SYSTEMIC DISPARITIES & COMMUNITY PERCEPTIONS

Overview:

This unit explores the ways in which systemic disparities may undermine community confidence in the criminal justice system. Through an interactive plenary discussion, participants will explore several questions: What are the potentially conflicting narratives and perceptions within my jurisdiction, and what causes them? Do the policies, laws, and practices within the legal system contribute to systemic disparities for racial and ethnic minorities? Are there barriers that inhibit fair access to the courts for cultural groups? How do these systemic disparities impact perceptions about the criminal justice system? Is this always a matter of bad intent or can otherwise-neutral laws or practices contribute to the situation?

Estimated Time: **90 Minutes**

Unit Objectives:

1. Identify laws and practices within the legal system that may contribute to systemic disparities for racial and ethnic minorities or may pose institutional barriers to fair access to the courts.
2. Identify ways in which implicit bias may contribute to the existence of systemic disparities.
3. Discuss the impact of systemic disparities and institutional barriers on community perceptions regarding the criminal justice system.

Recommended Format:

- Give the presentation and incorporate interactive discussion questions.
- Supplement information from the presentation with any locally available data representing systemic disparities or community perceptions.

PowerPoint Presentation:

To access the PowerPoint Presentation, please refer to the accompanying disc.

Recommended Readings:

To access the Recommended Readings, please refer to the accompanying disc.

- Kennedy, David. "Drugs, Race and Common Ground: Reflections on the High Point Intervention." *NIJ Journal* No. 262 at p. 12 (2009) (available online at http://www.ojp.usdoj.gov/nij/journals/262/high-point-intervention.htm).

- Neeley, Elizabeth. "Racial and Ethnic Fairness in the Courts: Impressions from Public Hearings." (available online at http://ppc.nebraska.edu/publication/RacialandEthnicBiasCourtsPerceptionsPublicHearings).
- McKenzie, Wayne. "Racial Disparities in the Criminal Justice System." Testimony Before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security (October 29, 2009) (available online at judiciary.house.gov/hearings/pdf/McKenzie091029.pdf).
- Beane, Catherine. *Moving Toward a More Integrative Approach to Justice Reform*, at Chapter 2. Open Society Institute (2008). (available online at http://www.soros.org/initiatives/washington/articles_publications/publications/moving_20080228/justice_reform_20080228.pdf).
- "Reducing Racial Disparity in the Criminal Justice System: A Manual for Policymakers and Practitioners." The Sentencing Project. (available online at http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf).

You can also incorporate any studies, public opinion polls, reports, media stories, etc. from your own jurisdiction that relate to community perceptions of the criminal justice system.

Materials Needed:

- This facilitation guide
- PowerPoint presentation & facilitation notes for Chapter 6
- LCD projector & screen
- Copies of the PowerPoint slides
- Flipchart and markers
- Clock/watch
- Session evaluation form

Key Concepts & Vocabulary:

Disproportionality

Disproportionality in the criminal justice system exists when the proportion of a racial or ethnic group within the control of the system is greater than the proportion of such groups in the general population. For example, African-Americans make up 12% of the U.S. population, but account for approximately 40% of all arrests, 50% of the prison population, and 50% of the inmates on death row. [19] Racial disparity also occurs when there is a significantly larger percentage of members of a minority group involved in a part of the criminal justice system than Caucasians. For example, more than 4.6% of all African-American adult males are in jail or in prison,

[19] *See generally,* http://www.cliffsnotes.com/study_guide/Racial-Disparities.topicArticleId-10065,articleId-9915.html.

compared with .07% of all Caucasian adult males[20]; African-Americans are 13.4 times as likely as Caucasians to be arrested on drug charges, even though Caucasians use drugs at five times the rate.[21]

Racial Disparity
Racial disparity in the criminal justice system refers to the dissimilar treatment of similarly situated people based on race. The causes of such disparity are varied and can include law enforcement emphasis on particular communities, legislative policies, and/or decision-making by criminal justice practitioners who exercise broad discretion in the justice process at one or more stages in the system. In some instances this may involve overt racial bias; while in others, it may reflect the influence of factors that are only indirectly associated with race. Moreover, in some cases disparity results from unguarded, individual- or institution-level decisions that are race-based.

Community perception
Community perception is used generally in this section to refer to perceptions about the fairness, integrity, and reliability of the criminal justice system that may be held by a particular community or group. There may be more than one affected group within a jurisdiction, and perceptions of particular criminal justice policies, laws, and cases may vary by group within the same jurisdiction. Community perceptions may be identified through such instruments as polls, surveys, interviews, questionnaires, town hall meetings, etc.

Key Learning Points:

The following learning points will be made and reinforced through the recommended presentation and exercises that follow:

> There is no singular community perception. In this unit, we will focus on the perceptions of different cultural groups within the jurisdictions we serve. Sometimes these perceptions will vary by group, and sometimes they will vary significantly from those who work within the criminal justice system (e.g., law enforcement officers, prosecutors, defense attorneys, judges, etc.). In order to meaningfully engage issues of race and culture, we must identify the different perceptions, perspectives, and competing narratives.
>
> For example, in *Drugs, Race and Common Ground: Reflections on the High Point Intervention* (see recommended reading list), the author describes law enforcement officers and community members' conflicting narratives that inaccurately assessed the

[20] Sabol, William J., PhD, and Couture, Heather, Bureau of Justice Statistics, Prison Inmates at Midyear 2007 (Washington, DC: US Department of Justice, June 2008), NCJ221944, p. 7. http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf
21 Human Rights Watch, "Racial Disparities in the War on Drugs" (Washington, DC: Human Rights Watch, 2000). http://www.hrw.org/legacy/reports/2000/usa/Rcedrg00.htm#P54_1086

perspective and viewpoint of the other group. Kennedy notes that "these dynamics have created a brick wall that precludes meaningful conversations."

There are a variety of potential avenues to discern community perspectives including surveys, public opinion polls, public hearings, and town hall-style meetings.

It is important to remember that the national numbers, statistics, and stories matter. People in our communities hear about these on the news and in the media. Local numbers, statistics, and stories impact community perceptions as well. We have to pay attention to both national and local information even if they differ.

Community perceptions can impact such things as willingness to participate in the judicial system (e.g., as a juror, as a testifying witness, etc.) and willingness to report crime.

Data-driven decision-making is an essential tool in identifying and resolving issues of racial disparity.

Presentation/Facilitation Instructions:

Using the "Unit 6: Systemic Disparities and Community Perceptions" PowerPoint slides (either via LCD projector or as a printed handout), the session facilitator should:

1. **Present lecture** on systemic disparities and community perceptions. PPT Slides #1 – 19

   Note: Suggested script for lecture is included in the "notes" field of the Unit 6 PowerPoint slides. As with other units of the Model Curriculum, you may pick and choose from among the discussion questions and exercises (particularly slides 17–19 and the interactive exercise below) to meet the needs of your audience and the time available for your program. We strongly recommend providing each participant with a copy of the PowerPoint slides with room for note-taking.

2. **Lead interactive exercise.**
   Note: the suggested times are for a breakout group of five to seven people and will need to be modified for larger groups.

   a. **Ask** participants to break into pairs.

   b. **Invite** participants to share with their interview partner something about their racial, ethnic, or cultural background, and something about the commonly held values and beliefs of people who share that background. You may wish to narrow the discussion to values related to justice or fairness. (3 minutes)

c. **Ask** participants to write down a statement that answers the following question: How do you assess the fairness, integrity and reliability of the criminal justice system in which you work? (2 minutes)

d. **Invite** participants to share their statement with their partner. (3 minutes)

e. **Invite** participants to imagine being drawn into the criminal justice system as a victim, witness, or defendant, and to write down the two things that would help the criminal justice system deliver effective services to members of his or her identified cultural group. (2 minutes)

f. **Ask** participants to share their responses. (5 minutes)

   i. Chart responses.
   ii. Note any similarities/differences in response.

g. **Ask** participants: *Are the needs you have just expressed being effectively met in your jurisdiction?*

h. **Facilitate** a brief discussion that compares answers to question g with answers to question c.

3. **Wrap up** the discussion by noting key learning points that correspond with the group's discussion or by reinforcing key learning points from the lecture that may not have been discussed during the exercises.

UNIT 7: CROSS-CULTURAL COMMUNICATION

Overview:

Effective communication skills are a critical asset for leaders of criminal justice system agencies, both in and out of the courtroom. Communication styles and preferences, however, are heavily influenced by one's culture. The effectiveness of our communication with colleagues, clients, victims, witnesses, jurors, and other community members can fall apart when cultures collide. This unit explores how cultural differences can impact communication, strategies, and techniques for improving the effectiveness of one's cross-cultural communication skills.

Estimated Time: **60–90 Minutes**

Unit Objectives:

1. Identify ways in which cultural differences can impact effective communication.
2. List barriers to effective cross-cultural communication, particularly in the criminal justice context.
3. Identify personal hot button communication challenges and their nexus with cultural differences.
4. Practice skills and strategies for increasing the effectiveness of one's cross-cultural communication skills.

Recommended Format:

- Plenary lecture
- Combination of interactive lecture and small group exercises

Powerpoint Presentation:

To access the PowerPoint Presentation, please refer to the accompanying disc.

Recommended Reading:

To access the Recommended Readings, please refer to the accompanying disc.

- Miller, Nelson P. "Beyond Bias: Cultural Competence as a Lawyer Skill." *Michigan Bar Journal* (June 2008).

Materials Needed:

- This facilitation guide
- PowerPoint presentation & facilitation notes for Unit 7
- LCD projector & screen
- Copies of the PowerPoint slides
- Flipchart and markers
- Clock/watch
- Session evaluation form

Key Learning Points:[22]

The following learning points will be made and reinforced through the recommended presentation and exercises that follow:

- Culture shapes a range of behaviors, including communication style.

- Differing communication styles can be a source of cultural collisions.

- Accurate interpretation of non-verbal cues (facial or postural cues such as eye contact, facial expression, posture, gestures, proximity, and vocal cues such as tone, volume, pitch, voice quality, or rate of speaking) is critical for effective cross-cultural communication.

- Awareness of our own nonverbal language and comfort level with different nonverbal communication patterns are critical aspects of successful cross-cultural communication.

- Other keys to effective cross-cultural communication include skills like clarifying meaning and intent; listening with respect; increasing one's culture-specific awareness; being aware of non-verbal cues; avoiding the use of slang, idioms, or double-entendre; and cultivating patience.

- Criminal justice systems value certain modes of communication (e.g., cross-examination or adversarial) which may be in conflict with the modes of communication valued by members of the communities we serve.

Presentation Instructions:

Using the "Unit 7: Cross-Cultural Communication" PowerPoint slides (either via LCD projector or as a printed handout), the session facilitator should:

1. **Present lecture** on cross-cultural communication. PPT Slides #1 – 22

[22] Key learning points for this unit and the corresponding PowerPoint slides are drawn from Anand, Rohini. "Teaching Skills and Cultural Competency: A Guide for Trainers." 5th ed. NMCI Publications at p. 4-41 to 4-49 (2006).

Note: A suggested script for lecture is included in the "notes" field of the Unit 7 PowerPoint slides. You should pick and choose from among the various discussion questions to highlight the issues of greatest concern and to meet time parameters under which you may be operating.

2. **Lead interactive exercise.**

Note: This exercise is suggested for use in a group session with room for participants to move around but could also be modified for a breakout group of five to seven people. This is intended to be a high-energy, quick-paced exercise that provides an opportunity for self-reflection and a little fun.

a. Room set-up: **Write** each behavior listed into the inventory on a small sign (8.5x11) and post these signs around the room (taped to the wall).

b. **Provide** each participant with a copy of the "Cultural Influences on Communication Worksheet"[23] provided in Chapter 5 under additional resources.

c. **Provide** participants with five minutes to take this inventory.

d. **Ask** participants to rank the three items in the inventory that annoy them the most or make them the most uncomfortable.

e. **Invite** participants to stand under the sign for the behavior that they ranked number one. Once participants have placed themselves in the appropriate position in the room, choose from among the following questions and ask participants to discuss as a group:

i. Why and how does this behavior bother you?
ii. How does this behavior impede effective communication?
iii. How do you typically respond?
iv. How might your typical response either impede or enhance communication?
v. In what ways might culture be involved in the behavior that bothers you or in your response? What is it about your culture that may impact your intolerance for this behavior?
vi. How might this behavior and your response be linked to the legal culture?

f. **Debrief** the smaller group discussions using the following as a guide:

i. What are some of the words or phrases people used to describe the behavior that bothers them? (Note the responses on the chart.)
ii. How did the behavior impede communication? (Note the responses on the chart.)

[23] From Anand, Rohini. "Teaching Skills and Cultural Competency: A Guide for Trainers." 5th ed NMCI Publications at p. 4-123.

iii. What responses were found to have enhanced communication instead of further impeding communication? (Note the responses on the chart.)

g. **Repeat** "e" and "f" for the behaviors ranked second and third.

h. **Ask** participants to compare the responses to question (f)(iii): Are there any common themes to the responses that were found to enhance rather than impede communication?

i. **State** the following:

i. "Part of the challenge of cultural competency and building more effective cross-cultural communication skills is becoming self-aware. In this case, we may have become aware of the verbal and non-verbal behaviors that are hot buttons for us and the potential impact that these buttons may have on both the behavior and our responses".

ii. "The common themes we have just noted are, in many respects, a set of strategies and techniques for responding to hot button issues when they arise. These strategies and techniques can help us to avoid privileging our culture and mode of communication over others and from making negative assumptions about others because of differences in communication that may be rooted in culture".

j. **Ask** the following: what is the impact of this discussion;

i. In our roles in the court system?
ii. As leaders and managers of criminal justice agencies?

4. **Wrap up** the discussion by noting key learning points that correspond with the group's discussion or by reinforcing key learning points from the lecture that may not have been discussed during the exercises.

UNIT 8: ADDRESSING THE INEQUITIES: MODELS & STRATEGIES FOR LEADING ORGANIZATIONAL CHANGE AND BUILDING COMMUNITY TRUST

Overview:

Organizational, cultural, and systemic changes needed to fully realize the vision of a culturally competent criminal justice system are long-term, continual processes. Drawing on established models for leading diversity and organizational change initiatives, this plenary session will introduce an analytical framework for addressing the issues related to race and culture that impact community perceptions and undermine community trust. Examples of how criminal justice stakeholders have addressed these issues will be presented.

Estimated Time: **90 Minutes**

Unit Objectives:

1. Describe an organizational change framework for addressing cultural competency issues.
2. Explore examples of how other jurisdictions have addressed issues.
3. Plan for action.

Recommended Format:

- Plenary lecture
- Combination of interactive lecture and small group exercises

Powerpoint Presentation:

To access the PowerPoint Presentation, please refer to the accompanying disc.

Recommended Reading:

To access the Recommended Readings, please refer to the accompanying disc.

- Pratt, Anna. "Striving for Inclusion in the Halls of Justice" (Parts 1 & 2). *Minnesota Spokesman-Recorder* (August 2007).
- Martin, John A., et al. "Becoming a Culturally Competent Court." *The Court Manager*, Vol. 2 Issue 4 at p. 6-24.

Materials Needed:

- This facilitation guide
- PowerPoint presentation & facilitation notes for Unit 8
- LCD projector & screen
- Copies of the PowerPoint slides
- Flipchart and markers
- Clock/watch
- Session evaluation form

Key Learning Points:

The following key learning points will be made and reinforced through the recommended presentation and exercises that follow:

- Experts from the fields of cultural competency and organizational development have studied the keys to leading successful organizational change efforts. Their work provides a framework that can guide the efforts of criminal justice system leaders to address cultural competency issues and build community trust.

- In addition, colleagues from different jurisdictions have endeavored to address cultural competency in a variety of ways that can serve as models for jurisdictions just beginning this process.

- Utilizing a formal, structured approach to organizational change can improve both the process and the outcomes of your efforts.

- As suggested in previous units, collaboration, data-driven decisions, and soliciting community input are critical factors which should be incorporated into the efforts of criminal justice stakeholders.

Presentation/Facilitation Instructions:

Utilizing the "Unit 8: Models & Strategies for Leading Organizational Change" PowerPoint slides (either via LCD projector or as a printed handout), the session facilitator should:

1. **Present lecture**. PPT Slides #1 – 19

   Note: Suggested script for lecture is included in the "notes" field of the Unit 8 PowerPoint slides. We strongly encourage you to provide the slides as handouts because the content is likely to be unfamiliar to your participants.

2. **Lead interactive exercise.**

Note: Before presenting this unit, you will need to review and choose one article on which to focus this exercise (see either *Becoming a Culturally Competent Court* or *Striving for Inclusion in the Halls of Justice* articles in the recommended reading section for this unit). If possible, assign this article as a pre-event reading assignment.

a. **Invite** participants to briefly review the selected article.

b. **Invite** participants to break into small groups and discuss the following questions:

   i. What was the issue that criminal justice stakeholders tried to address?
   ii. What did they know about the community's perceptions regarding this issue? How did they find out more?
   iii. What strategy/process did they use to address the issue?
   iv. Did data analysis play any role in the effort? Could it have?
   v. What challenges did they have to overcome?

c. **Provide** ten to fifteen minutes for discussion, and then **invite** the groups to share highlights from their discussions with the larger group.

3. **Lead action-planning exercise.**

   a. **Provide** each participant with an action planning form. (See sample in Chapter 5 in the additional resources section).

   b. **Provide** participants with forty-five minutes or more for brainstorming and discussion using the action planning form as a guide.

      Note: For this exercise, divide participants into small groups of three to five, and encourage active brainstorming and participation in the action planning process. If participants have attended this training session as a team, allow them to engage in the action planning exercise as a team

   c. After the designated time is up, **invite** each small group to present the highlights of their discussion regarding each item on the action planning form.

   d. **Emphasize** that this action planning exercise is intended as a first step to jump-start their continuing efforts to address the issues they have identified. Completing each question on the form in the designated time period is not nearly as important as beginning the conversation and the planning process. Encourage them to continue their discussions after the program.

4. **Wrap up** the discussion by noting key learning points that correspond with the group's discussion or by reinforcing key learning points from the lecture that may not have been discussed during the exercises.

UNIT 9: STRANGER IN A STRANGE LAND: CROSS-CULTURAL ISSUES IN THE COURTS[24]

***Overview*:**

Through vignettes distilled from actual cases, this unit demonstrates the many ways in which the customs, traditions, values, mores, languages, and laws of other countries are arising in the United States' criminal justice system through immigration cases. This unit will explore such questions as: (1) Should immigrants be bound by the same laws as everyone else based on the theory of "When in Rome…"? (2) Do the age-old adages that "all men [and women] are presumed to know the law" and "ignorance of the law is no excuse" apply even to recent immigrants? (3) Should the criminal justice system formally recognize a "cultural defense" and, if so, under what circumstances?

***Estimated Time*:** **90—120 Minutes (depending on number of cases presented); 4–6 cases/hour (depending on extent of audience discussion allowed following each case)**

***Unit Objectives*:**

1. Demonstrate the extent to which U.S. culture pervades its substantive criminal laws.
2. Illustrate the many ways in which the cultures, customs, traditions, values, mores, languages; how laws of other countries are arising in criminal cases involving immigrants; and how the U.S. criminal justice system is handling "cultural evidence" and the so-called "cultural defense" using U.S. court cases.
3. Highlight the extraordinary diversity of customs, traditions, values, mores, languages, and laws from one culture to another.
4. Sensitize participants to the need to recognize the impact of culture in any criminal case involving an immigrant.
5. Consider how a country that takes great pride in its diverse, multi-cultural heritage should reflect that value in its criminal justice system.
6. Explore how the U.S. criminal justice system is dealing with the customs, traditions, values, mores, languages, and law of other countries, and think about what changes, if any, might be appropriate.

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[24] "Stranger in a Strange Land: Cross-Cultural Issues in the Courts" was developed for the National Conference of Federal Trial Judges ("NCFTJ") of the ABA Judicial Division by Professor Alison Dundes Renteln of the University of Southern California, Rene L. Valladares of the Office of the Federal Public Defender-Las Vegas, Mark J. Mills, J.D., M.D., Hon. Bernice B. Donald of the U.S. District Court for the Western District of Tennessee, Professor Jonathan Turley of George Washington University School of Law, and Hon. Delissa A. Ridgway of the U.S. Court of International Trade, each solely in their individual capacities. They have presented the program for lawyers and judges in a wide range of fora both in the U.S. and abroad. For further information or to discuss a potential speaking engagement, please contact Judge Ridgway at 212.264.5482, or delissa_ridgway@cit.uscourts.gov.

7. Evaluate the extent of the criminal justice system's success in providing "justice for all" – immigrants and non-immigrants alike.

***Recommended Format*:**

- Plenary session
- Fast-paced, engaging, highly-interactive presentation, in which a single presenter (or one of a panel of presenters) gives audience members the stripped-down facts of a actual case that presented one or more cultural issues. Audience members are then asked to cast their votes (either by raising their hands, or through use of electronic Audience Response System (hand-held voting technology) to indicate how they would decide the case if they were the judge or jury. After the vote, the presenter summarizes the decision of the judge or jury in the actual case. The presenter (and other panelists, if applicable) and audience may follow up with comments and questions (*e.g.*, identifying significant factors that influenced the outcome of the case, and what, if anything, could or should have been done differently, highlighting points or phenomena illustrated by the case; noting other similar cases; etc.) Alternatively, the presenter or panel may immediately move on to the next case to be presented.

***Recommended Readings*:**

To access most of the Recommended Readings listed below, please refer to the accompanying disc.

- Alison Dundes Renteln, *The Cultural Defense* (Oxford University Press 2004).
- Linda Friedman Ramirez (Ed.), *Cultural Issues in Criminal Defense* (Juris Publishing 3d Ed. 2010) (including chapter co-authored by Rene L. Valladares).
- *Judicature* (March-April 2009) (symposium issue on cross-cultural justice, including 10 articles on the topic) (available from the American Judicature Society, www.ajs.org).
- Alison Dundes Renteln, "Making Room for Culture in the Court," 49 *Judges' Journal* 7 (American Bar Association Spring 2010).
- Richard Willing, "Courts Asked to Consider Culture," *USA Today* 3A (May 25, 2004) (available at http://www.usatoday.com/educate/college/casestudies/Multicultural.pdf).
- Doriane Lambelet Coleman, "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma," 96 *Columbia Law Review* 1093 (1996).
- Amir Efrati, "Cultural Background Gains Traction As A Legal Defense," *Wall Street Journal* A9 (July 2, 2009).
- Miles Corwin, "Cultural Sensitivity on The Beat: As Police Work in Increasingly Diverse Communities, Their Academies Are Emphasizing Recognition of Ethnic Customs," *Los Angeles Times* (Jan. 10, 2000).
- Dick Polman, "When Is Cultural Defense a Legal Defense? Immigrants' Native Traditions Clash With U.S. Law," *Seattle Times* A1 (July 12, 1989).
- Myrna Oliver, "Immigrant Crimes: Cultural Defense – A Legal Tactic," *Los Angeles Times* (July 15, 1988).

- Richard Lacayo, "The 'Cultural' Defense," *Time* 61 (Dec. 13, 1993)
- Margaret Talbot, "Baghdad on the Plains," *The New Republic* (Aug. 11, 1997) (available at http://jummahcrew.tripod.com/baghdad.htm).
- Anne Fadiman, *The Spirit Catches You and You Fall Down – A Hmong Child*, *Her American Doctors*, *and The Collision of Two Cultures* (Farrar, Straus, and Giroux 1998).

***Materials Needed*:**

- This facilitation guide
- Session evaluation form
- Printed handout of questions for audience on cases to be presented (including the four answer options for each question)
- ***Optional***: Electronic Audience Response System including someone to program the system in advance and operate it during the presentation
    - ***Note:*** Use of electronic Audience Response System may be donated by a local litigation consulting, audio-visual consulting, marketing research, political consulting, or polling firms
- ***Optional***: Copies of Richard Willing, "Courts Asked to Consider Culture," *USA Today* 3A (May 25, 2004) (*see* "Recommended Reading" *above*), as handouts to be distributed to audience members at the end of the presentation
- ***Optional***: Copies of the list of cases presented as handouts to be distributed to audience members at end of presentation
- ***Optional****:* For additional case materials see the appendix.

***Key Concepts & Vocabulary*:**

Enculturation is the largely subconscious process by which an individual learns and internalizes the values and culture of his or her society. This "cultural conditioning" shapes the identity of individuals and influences their cognition, reasoning, perception, and behavior.

Acculturation is the various phenomena that result from an individual's exposure to a culture other than his or her own.

Assimilation refers to the process by which an individual adopts the values of a different culture.

Cultural hegemony refers to the imposition of the dominant culture on all individuals within the borders of the jurisdiction. One example is the legal fiction of an assertively "objective" standard, which is actually defined as the standard of the cultural majority.

Legal centrism is the tendency to view only one's own state law as valid law.

Cultural Defense is the use of evidence of culture, custom, or tradition to explain "foreign" or immigrant conduct, which would ordinarily be considered criminal under U.S. law. Although the

term is generally accepted in legal and anthropological circles, no jurisdiction has formally recognized a "cultural defense."

Cultural Evidence is evidence of culture, custom, or tradition, which may be used to explain "foreign" or immigrant conduct that would ordinarily be considered criminal under U.S. law.

***Key Learning Points*:**

The following key learning points should be made and reinforced through the recommended presentation and case studies that follow:

- Law is not "culture-neutral." The laws of any country are reflections of that country's history, culture, customs, traditions, values, and mores. The laws of the United States are largely based on Western European (principally Anglo-Saxon) customs, traditions, values, mores, and laws.

- U.S. criminal law (like the criminal law of all other countries) assumes that the judge and the jury share the same social and cultural framework as the defendant.

- U.S. criminal law (like the criminal law of all other countries) contains cultural biases that are invisible to those who belong to the dominant cultural group – *i.e.*, those born and raised in the U.S.

- The culture, customs, traditions, values, mores, and laws of a country are not static. Instead, they change and evolve.

- Culture is not monolithic. Just as not all native-born U.S. citizens think and act alike, not all individuals born and raised in Morocco or Brazil think and act alike.

- Culture shapes the identity of individuals and influences their reasoning, perception, and behavior.

- In a growing number of cases in state and federal courts all across the country, immigrants are proffering "cultural evidence" and/or seeking to assert a "cultural defense" to justify or explain their actions by invoking the culture, customs, traditions, values, and mores of their homelands.

- Many different customs, traditions, and beliefs are being raised by individuals from a very wide range of cultures and a very diverse group of countries in cases involving charges ranging from child abuse and neglect to narcotics violations, kidnapping, assault, rape, and homicide.

- Many laws in the U.S. are not readily discernible to immigrants of whom the vast majority receives no orientation to U.S. laws and customs.

- A so-called "cultural defense" may claim, in essence, "ignorance of the law." The "cultural defense" may claim "cultural compulsion" (*i.e.*, "I knew what I was doing was not legal, but my culture compels me to do it").

- The "cultural defense" has been raised in virtually every conceivable type of criminal prosecution, for example, homicides, assaults, rape and other sex crimes, bribery, arson, narcotics offenses, child abuse, animal cruelty, etc. Moreover, culture is raised at virtually every stage of the legal process, including pretrial decisions to arrest, prosecute, or negotiate a plea. Defendants seek to introduce "cultural evidence" in the guilt phase of a trial, to negate an element of a crime, or to support an established defense (such as insanity or provocation), and in an effort to secure leniency at the sentencing phase. Even prosecutors introduce "cultural evidence" (e.g., to show that the crime with which a defendant is charged is consistent with the practice in the defendant's culture, to challenge a witness's credibility, or to help explain the behavior of a victim after an incident.) Courts of appeals must grapple with cultural issues as well, addressing arguments that "cultural evidence" was either improperly admitted or improperly excluded, that jury instructions on the issue of culture were improper, or that challenges to the competence of defense counsel at trial for failure to pursue and present "cultural evidence."

- One leading scholar, Alison Renteln, advocates the formal recognition of a "cultural defense" which, if proved, would operate as a "partial excuse" by allowing the jury to "decide whether cultural factors were determinative in a defendant's behavior, and, if so, whether that is sufficient to warrant a lesser charge."[25] In addition, Renteln has formulated a three-part "cultural defense test": (1) is the individual a member of the ethnic group; (2) does the ethnic group, in fact, have such a tradition; and (3) was the individual influenced by the tradition when he or she acted?[26] She would limit or not permit the "cultural defense" where the custom or tradition at issue involves irreparable harm to another or violates fundamental human rights.[27] However, even the concepts of "physical harm" and "human rights" are themselves culturally subjective.

- Critics raise a number of philosophical and practical objections to the "cultural defense." For example, according to the critics, recognizing a "cultural defense" will discourage immigrants from assimilating (i.e., "When in Rome, do as the Romans do.") Critics further argue that it would be unfair to allow immigrants to avail themselves of a defense that is not equally available to non-immigrants. Critics also paint the "cultural defense" as a "slippery slope" – in other words, if immigrant cultures could invoke the norms of their cultures as a defense, why could not U.S. "sub-cultures" do so too? Similarly, critics of the "cultural defense" express concern that if an immigrant's culpability for his actions is reduced via a "cultural defense," the immigrant may continue to act in the same way in the future, and other members of the ethnic community may assume that they too can adhere to the custom or

[25] *See* Alison Renteln, *The Cultural Defense* at 188.
[26] *See id.* at 207.
[27] *See id.* at 203.

tradition with impunity. Critics argue that the absence of uniform legal standards applicable to all would be too confusing, "balkanize" criminal laws, effectively undermine the rule of law, and result in anarchy. Critics also contend that the "cultural defense" would perpetuate negative cultural stereotypes. They further assert that the "cultural defense" would be most frequently invoked to the detriment of vulnerable groups, such as women and children. In addition, critics claim that there is no need for a special, formal "cultural defense" because – they maintain – cultural issues can be adequately addressed through existing defenses such as provocation and insanity. In addition, they argue that, as a practical matter, it would be difficult to determine whether a defendant was a member of the claimed group, to ascertain the existence or prevalence of specific customs and traditions, and to determine whether the defendant adhered to the customs and traditions of the group.[28]

- In many cross-cultural cases, as a practical matter, it is impossible for the judge and/or jury to understand what actually happened absent "cultural evidence" to place the relevant events in context.

- "Cultural evidence" has been admitted in many cases, but the treatment of such evidence remains inconsistent. In many cases, it has been rejected as "not relevant."

- A number of courts have expressly recognized that "[c]ompetent counsel undertaking to represent defendants with unique cultural backgrounds have an obligation at least to consider the effect of that background on their clients' conduct."[29]

- Language interpretation is one of the "dirty little secrets" of the criminal justice system in the United States. Misinterpretation of non-verbal communication (*i.e.*, "body language") presents similar challenges.

- Proper handling of cross-cultural cases requires inter-disciplinary approaches and partnerships (*e.g.*, with language interpreters, cultural anthropologists, psychologists and psychiatrists with cross-cultural expertise, and representatives of immigrant communities, among others).

- Cultural competence is necessary throughout the justice system – including "gate-keepers" (such as teachers, social workers, and health care professionals), law enforcement officers, prosecutors, defense counsel, language interpreters, judges (both trial and appellate), jurors, court staff, corrections personnel, and others.

- Cultural competence throughout the justice system is necessary to ensure *justice for all* – immigrants and non-immigrants alike.

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[28] For a detailed survey of the objections to the "cultural defense," and a response thereto, *see* Alison Renteln, *The Cultural Defense* at 185-201; *see also* Linda F. Ramirez, "The Virtues of The Cultural Defense," *Judicature* (March-April 2009).

[29] *See*, *e.g.*, Siripongs v. Calderon, 35 F.3d 1308, 1315 (9th Cir. 1994) (*citing* Mak v. Blodgett, 970 F.2d 614, 617-619 (9th Cir. 1992)).

***Presentation/Facilitation Instructions*:**

Before the day of the presentation:

1. Decide on the approximate number of cases to be presented (based on time available for presentation and extent of discussion, if any, desired after each case is presented). Then select specific cases to be presented (*see* "Possible Cases for Presentation," below), ensuring that a range of cultures is represented (*i.e.*, not all cases involve Hmong defendants, or Muslim defendants, etc.), that a range of alleged crimes is represented (*i.e.*, not all cases involve alleged child abuse or homicide, etc.), and that a range of customs is represented (*i.e.*, not all cases involve child-rearing practices or marriage customs, etc.). Depending on the expected audience, the presenter may also want to ensure that cases selected are from state courts, federal courts, or both. For national audience, you may also want to ensure that the selected cases are from a range of jurisdictions across the country. Finally, decide on the logical order in which to present cases selected for presentation.

2. If using an electronic Audience Response System, have an appropriate number of hand-held devices programmed with the questions and the four answer options for each of the cases selected for presentation, and have the questions and answer options (which should also be programmed to display results of the vote on each case).

4. Consider preparing a handout of the questions and the four answer options for each of the cases selected for presentation. Audience members will understand questions and answer options more readily if they can see them rather than just having the presenter read them aloud.

5. Prepare and make copies of handouts, if handouts will be distributed to audience at end of presentation. (See the "Materials Needed" section above).

For the presentation:

1. **Introduce** the substantive topic by stating the following:

   a. "The topic of cross-cultural justice has never been timelier – or more important – than it is today. The United States has always been a nation of immigrants; and, as a nation, we have always taken great pride in our justice system. However, with immigration at an all-time record high, we are failing some of the most vulnerable individuals in our society; and, often, we do not even realize it."

   b. "The challenges that we face are largely due to changing patterns of immigration. Today, there are at least 173 different nationalities represented in the population of New York City alone. As of 2005, there were 35.2 million

foreign-born people living in the U.S. – approximately 12% of the population."

c. "Not only is the immigrant population at record levels, but – in addition – those immigrants are from *more* countries and from a *much more diverse group* of countries than ever before. Historically, the vast majority of U.S. immigrants have come from Europe (and many of our customs and mores in this country are derived from those of Europe). But, now, immigrants from elsewhere in the world dominate – and many of those countries have customs, traditions, mores, values, and laws that are very different from those of the U.S. (indeed, differences that are often significantly greater than the differences between the culture of the U.S. and that of Europe)."

d. "As the ratio of immigrants to residents born in the U.S. increases, immigrants are no longer quickly assimilated into U.S. society. With their growing numbers, immigrants increasingly have the option of living in enclaves. What exactly does the growing size – and occasional isolation – of immigrant communities mean for us in the criminal justice system? It means that new immigrants (in general) will be less exposed to (and thus less familiar with) U.S. cultural norms and values and U.S. laws."

e. "Geography is another major factor. Due to factors such as federal refugee resettlement policies and economic opportunity, immigrants are no longer clustered in large cities on the two Coasts (like New York, Miami, Los Angeles, and San Francisco). Immigrants and their cultures are now finding their way into state and federal courtrooms, in both large cities and small towns, all across the country – literally, 'from sea to shining sea.'"

f. "The types of cross-cultural cases that the justice system is seeing are every bit as diverse as the parties – everything from personal injury cases, civil rights cases, and commercial litigation, to divorce and child support, allegations of child abuse and neglect, and criminal matters such as narcotics violations, kidnapping, assault, rape, and homicide."

g. "The cases that we will discuss today are generally either so-called 'cultural defense' cases or cases in which 'cultural evidence' was presented to support a party's position. However, culture makes its way into the justice system in other ways too – ways that are much more common, including language interpretation (which is increasing in demand in both the state and federal systems) as well as non-verbal communication (also known as 'body language')."

h. "What we want to do today is to open a dialogue on the importance of promoting 'cultural competence' throughout the criminal justice system – including 'gate-keepers' (such as teachers, social workers, and health care professionals), as well as law enforcement officers, prosecutors, defense

counsel, language interpreters, judges and jurors, court staff, corrections personnel, and others."

i. "Our goal is to ensure that our system truly dispenses *justice for all* – immigrants and non-immigrants alike."

j. "Because our time is limited, we will not be able to delve very deeply into the fascinating philosophical and public policy issues that lie at the heart of the cases that we will be discussing. But we very much hope that today is just the beginning, and that – after our presentation – you will want to do further reading and study on the subject."

2. **Explain** the format of the presentation by stating the following:

a. "We are going to give you the "bare bones" facts of an actual – "ripped from the headlines" – case raising cross-cultural issues. Then, after you have heard the basic facts of each case, we are going to ask you to vote, indicating how you would decide that case if you were the judge or the jury."

b. "After everyone has "voted," we will tell you the outcome in the actual, "real-life" case. We may have a few minutes of discussion about the case, what affected the outcome, and some of the points that the case illustrates."

c. **Explain** how audience members will vote –the question and the four answer options will be read aloud by the presenter (and, if so, whether a handout of all the questions, together with the four answer options, has been distributed to the audience). If audience members will be using an electronic Audience Response System, explain how to vote using that system.

d. If using an electronic Audience Response System, **emphasize** that the hand-held devices are expensive, and that they will not work as TV remote controls or garage door openers.

- **Tell** people what they should do with the devices when they leave the presentation – i.e., whether the devices should be left on their chairs, returned to event organizers at the door, etc.
- **Tell** the audience that – in the unfortunate event that they inadvertently take the hand-held device with them when they leave – they should contact the bar association (or some other authority that they will readily recall) promptly for instructions about how to return the device.

e. **Forewarn** the participants: "We are going to move at a pretty fast pace. We could easily spend hours debating any one of the cases that is going to be presented. Instead of spending a lot of time on just a couple of cases, we are going to take a cursory look at a larger number of cases, to help get a 'feel' for

the many different cultures and customs that have come up in cases, and the many different contexts and charges."

f. "We realize that it may be frustrating not to be able to explore some points in detail. But please understand that our goal here is to try to 'survey' this emerging area of the law, and to pique your interest in doing additional reading and study after the presentation. And, of course, we hope that you will approach us to talk after the presentation adjourns."

g. "Before we begin, we want to emphasize once again that – given our time constraints, and to facilitate the educational purposes of the program – we are taking the "Law & Order" TV show approach, by simplifying the facts of the cases that we are presenting and distilling them to their essence. If you want the full context of a case that we are presenting, we hope that you will read it after the presentation."

3. **Present** the cases.

a. **State** the name and jurisdiction (name of the state and whether the case was in state or federal court) for the first case selected for presentation, and summarize the facts of the case as they are distilled below in "Possible Cases for Presentation." (Presenters must be attentive to the details as outlined and to the order in which the facts are presented, to ensure that the case is properly "set up" for the audience question that follows).

b. **Read** the question associated with the case (see "Question for Audience" listed with the case below) out loud followed by the four answer options. (If the question and the four answer options are in a handout, which has been distributed to the audience, refer the audience members to the handout as the presenter reads the question).

c. **Ask** the audience to vote, indicating how they would decide the question presented if they were the judge or jury in the case. (If the voting is by a show of hands, the presenter reads each answer and then asks the audience members who have selected that answer to raise their hands, etc. If the voting is by use of an electronic Audience Response System, the presenter reminds the audience members how to use the hand-held technology to cast their votes).

d. After "voting" is complete, **summarize** the results of the vote for the audience (saying, for example, "roughly a third of you voted for answer number '1' – 'Definitely guilty,'" etc.) (If an electronic Audience Response System is used, the system will electronically tally the votes and display the results on the screen, either as raw numbers or as a percentage).

e. **Explain** the outcome in the actual case (as summarized in "Result in the Case" below).

f. After summarizing the outcome of the actual case, **offer** comments and observations and/or pose questions to the audience (or other presenters), as suggested in "Additional Points/Questions for Discussion" below.

g. **Repeat** the process with the remaining cases selected for presentation.

4. **Close** the presentation.

a. **Take questions** from the audience (if you wish, and if time permits).

b. **Sum up** the "take away" from the presentation, drawing on (for example) the "Unit Objectives" and "Key Learning Points" outlined above.

c. **Distribute** handouts (USA Today article, together with list of cases presented and bibliography of sources suggested for further reading). (See "Materials Needed," above.)

d. **Encourage** members of the audience to approach presenter(s) with questions and comments after the presentation.

e. If using an electronic Audience Response System, **remind** audience members of what they should do with the devices as they leave – i.e., whether the devices should be left on their chairs, returned to event organizers at the door, etc. Also **tell** the audience that – in the unfortunate event that they inadvertently take the hand-held device with them when they leave – they should contact the bar association (or some other authority that they will readily recall) promptly for instructions about how to return the device.

f. **Thank** the audience members for their attention and for their interest in the topic of cross-cultural justice.

***Possible Cases for Presentation*:**

***Note*:** Several sample cases are set forth below. "Additional Points/Questions for Discussion" to accompany those cases are included in the appendix, for your convenience. Also included in the appendix are numerous additional possible cases for presentation, covering a wide range of customs, alleged crimes, and immigrant nationalities.

1. New York v. Singh, 516 N.Y.S.d 412 (N.Y. Civ. Ct. 1987); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 152-53, 200, 293, 316.

Mr. Singh – a Sikh priest who was wearing a *kirpan* (ritual/ceremonial dagger) – was arrested on a New York City subway platform and charged with violating a city

ordinance which prohibits any person from wearing a knife outside his or her clothing in a public place, or carrying a knife in plain view in a public place, unless the knife is actually being used at the time for a lawful purpose.

Mr. Singh argued that the kirpan was not a weapon, but a religious symbol, which his faith required him to wear at all times.

Question for Audience:

How would you find on the charge of violating the city ordinance?

1. Definitely guilty
2. Probably guilty
4. Probably not guilty
5. Definitely not guilty

Result in the Case:

The court acknowledged that Sikhs vow to observe the "5 Ks": (1) To wear long hair ("Kesh"); (2) To keep a comb in their hair ("Kangha"); (3) To wear a steel bracelet on the right wrist ("Kalha"); (4) To wear an undergarment ("Kasha"); and (5) To wear a sword ("Kirpan").

The court further stated that it did not question "the good faith and religious intentions of Sikhs in general or of the defendant . . . who is a Sikh by religion and a priest by profession, requiring . . . the strict observance of the five 'K's.' But the rational connection between the prohibited act and the public safety justifies the lack of a scienter requirement in the enforcement of [the city ordinance]. . . . Furthermore, granting an exemption in this particular case would place an intolerable burden on law enforcement officials where someone dressed in the religious and ceremonial garb of a Sikh, carrying a "Kirpan" in full view in a public place, required an official intrusion and searching inquiry on the part of the said official as to whether in fact said person was actually a 'Sikh' in custom, practice and religion."

The court proposed its own "solution to the problem" of balancing the interests of the state as reflected in the ordinance with the rights of the Sikhs to practice their religion – "A 'symbolic kirpan' encased in a solid protective element such as plastic or lucite [which] would remove it from the category of knife or weapon."

Notwithstanding the court's determination that it was reasonable not to require scienter as an element of the crime, and notwithstanding the court's finding that it would be unduly burdensome to expect law enforcement officials to attempt to discern whether an individual carrying a dagger is actually Sikh, the court ultimately dismissed the case. The court concluded that, although "there is no basis for dismissal as a matter of law" – "the continuance of this prosecution would not be in the furtherance of justice and that dismissal is required as a matter of judicial discretion."

2. **<u>New York v. Chen</u>, No. 87-7774 (Kings Co. Super. Ct. Dec. 2, 1988); *see also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 34, 47, 232; Dick Polman, "When Is Cultural Difference A Legal Defense? Immigrants' Native Traditions Clash With U.S. Law," *Seattle Times* A1 (July 12, 1989); Richard Willing, "Courts Asked To Consider Culture," *USA Today* 3A (May 25, 2004); Nina Schuyler, "When in Rome," *In These Times* 27 (Feb. 17-March 2, 1997); Doriane Lambelet Coleman, "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma," 96 *Columbia Law Review* 1093, 1093, 1095-96, 1102-03, 1108-09, 1124, 1138, 1141, 1146-47, 1159 (1996).**

   Several weeks after his wife admitted to him that she had been unfaithful, a Chinese man in his late 40's used a claw hammer to bludgeon his wife in the head eight times, then left her to die in their bed in their Brooklyn apartment. Afterward, the man did not flee the scene or even change his bloody shirt. When his teenage son arrived home, the man met the boy at the door and told him, "I killed your mother."

   The Defendant was charged with second degree murder. In a bench trial, the Defendant mounted (in essence) a "cultural defense." The defense emphasized that the Defendant had left China for the U.S. only two years before the killing. The defense's cultural expert witness testified that, in traditional Chinese culture, a woman's adultery would be conceived as an "enormous stain" on her husband, his ancestors, and his children; that the man would find it difficult to remarry if he divorced his wife because of her adultery; and that violence against adulterous spouses was quite common in China. The defense further argued that, as a recent immigrant, the Defendant lacked ties to a close-knit community of fellow Chinese men who – if the events had transpired in China – might have prevented the Defendant from acting on his impulses. On cross-examination, however, the defense's cultural expert could not identify even a single case where a woman in China had been killed by her husband for being unfaithful.

   The prosecution did not present a cultural expert.

<u>Question for Audience</u>:

How would you find?

1. Definitely guilty of second degree murder
2. Probably guilty of second degree murder
3. Probably guilty of first degree manslaughter
4. Definitely guilty of first degree manslaughter

<u>Result in the Case</u>:

The judge found the Defendant guilty of *second degree* manslaughter and ruled: "were this crime committed by the defendant as someone who was born and raised in America . . . the Court would have been constrained to find the defendant guilty of *manslaughter in the first degree.* . . . But based on the cultural aspects, the effect of the wife's behavior on someone who is essentially born in China, raised in China, and took all of his Chinese culture with him except the community which would moderate his behavior, the Court . . . based on the peculiar facts and circumstances of this case . . . and the expert testimony . . . finds the defendant guilty of *manslaughter in the second degree*." (Emphases added.)

The court then invoked culture again to reduce the Defendant's sentence from prison to five years' probation. The judge justified the grant of probation by speculating that incarceration of the Defendant might harm the marriage prospects of his daughters. Moreover, in imposing the sentence, the judge sought a promise from the Defendant "on his honor and the honor of his family" to abide by the terms and conditions of probation; he reminded the Defendant that failure to comply could result in not only a jail term, but also "a total loss of face."

The Asian community was up in arms, criticizing prosecutors for not challenging the defense's expert testimony; and feminists were outraged. The prosecutors apparently were caught "off guard" by the judge's decision, and later said they were shocked that the judge was swayed by the defense expert's testimony, which the prosecutors found incredible.

3. **Omaha "Coining" Incident – *See* Joseph Morton, "Second Coining Case is Dropped; Asian Dad Hopes Case Helps Others," *Omaha World-Herald* 1B (May 14, 2002); Alison Dundes Renteln, "Making Room for Culture in the Court," 49 *Judges' Journal* 7, 10 (American Bar Association Spring 2010).**

   Elementary school teachers in Omaha spotted "extensive" long red welts on the backs and chests of two Vietnamese children, ages 8 and 7. Suspecting child abuse, the school called police. When the children were questioned, they explained that their parents had treated them for the flu by massaging them with "Tiger Balm" using the edge of a coin. At least one of the children also indicated that the welts were painful. The children were removed from their family home, together with their four younger siblings (ages 4, 23 months, 14 months, and 4 months), and placed in foster homes. Police cited the mother on suspicion of "misdemeanor child abuse," which carries possible penalties of up one year in jail and a $1000 fine. The prosecutor told the media that criminal child neglect charges might be filed against the mother even if she did not intend to harm her children.

<u>Question for Audience</u>:

How would you find on the charge of "misdemeanor child abuse"?

1. Definitely guilty
2. Probably guilty
3. Probably not guilty

4. Definitely not guilty

Result in the Case:

The immigrant community took to the streets of Omaha, demonstrating against school and government authorities, protesting the removal of the children from their home. School officials, police, child welfare authorities, and prosecutors vigorously defended their actions, insisting that they were adhering to the legally-mandated protocol for handling cases of potential child abuse. Four days after the children were removed from their parents, the children were returned to their family home, based on prosecutors' consultations with social services caseworkers, medical experts, and guardians *ad litem*, but only on condition that the parents agree not to use "coining" on their children until a final decision was reached in the case, and on condition that the parents consent to unannounced home visits by child welfare authorities. Moreover, the state retained legal custodial rights for a total of about 10 days, and prosecutors publicly weighed the possibility of filing more serious child neglect charges against the parents.

Eventually, the charges were dismissed. At the hearing, the children's father asked whether the parents could continue to use "coining" on the children. The judge told the father to discuss the matter with his lawyer. The lawyer, in turn, advised the father that he could continue the practice. Within a couple of months, the family had moved back to Lincoln, Nebraska, which has a larger, more organized Vietnamese community, and where public officials were already very familiar with Vietnamese customs and traditions such as "coining."

At the exact same time the elementary school teachers called police about the Vietnamese children, they also reported the same type of welts/bruising on two young Hmong students at the same school. The two Hmong children (ages 8 and 6) were also removed from their family home. Although their two siblings, ages 4 and 2, did not have welts/bruising, they too were removed from the family home because authorities deemed them "at risk for similar injuries." Like the mother of the Vietnamese children, the 23-year-old mother of the Hmong children was cited on suspicion of "misdemeanor child abuse," which carries possible penalties of up to one year in jail and a $1000 fine. The two families' cases proceeded through the juvenile courts and the criminal justice system largely in parallel.

See generally Tom Shaw, Joe Dejka, and Karyn Spencer, "Children's Safety or Culture Clash? Parents: Bruises Part of Remedy," *Omaha World-Herald* 1A (May 2, 2002); Joe Dejka, "Asian Couples Work to Get Children Back," *Omaha World-Herald* 1B (May 3, 2002); Erin Grace and Joseph Morton, "Parents Take Plea to Streets; Police Defend the Removal of Two Families' Children As the Asian Community Protests Authorities' Investigation of Possible Child Abuse," *Omaha World-Herald* 1A (May 3, 2002); Jeremy Olson, "Asian Remedy Raises Few Alarms Elsewhere; People in Cities With Closer Ties to Hmong Culture Say the Issue No Longer Is A Concern," *Omaha World-Herald* 1A (May 3, 2002); Joseph Morton and Erin Grace, "Children Back With Parents," *Omaha World-Herald* 1B (May 4, 2002); Cindy Gonzalez and Michael O'Connor, "Families

Reunited, But Issue Lingers; Dialogue Key in Blending Cultures; Balancing Immigrant Traditions with Local Societal Standards Is Difficult for Newcomers and Agencies Alike," *Omaha World-Herald* 1A (May 5, 2002); Joseph Morton, "Vietnamese Family's 'Coining' Case Closed," *Omaha World-Herald* 1A (May 10, 2002); Joseph Morton, "Second Coining Case is Dropped; Asian Dad Hopes Case Helps Others," *Omaha World-Herald* 1B (May 14, 2002); Chris Burbach, "Hmong Use Fourth to Reflect on Ordeal," *Omaha World-Herald* 1A (July 5, 2002).

4. **Ohio v. Ramirez, 732 N.E.2d 1065 (Ohio Ct. App. 1999); s*ee also* L. Taylor, "Reversal Points Up Pitfalls in Bad Translation; New Trial Starts After Judge Faults Interpreting," *Lexington Herald-Leader* A1 (April 9, 2002).**

   The Defendant – a 20-year-old male who had lived his entire life in Mexico until the events at issue in this case – could not speak, read, or understand a word of English. When the Defendant and some of his 11 housemates were "partying" one night, the Defendant passed out and was carried upstairs to his bed by his housemates. At some point during the night, a male intruder entered the house. One of the Defendant's housemates physically ejected the intruder, who appeared to be on drugs. But, once the intruder was on the driveway, the Defendant shot him in the chest. The intruder collapsed on the lawn of a nearby house, and later died.

   When police investigating the shooting came to the Defendant's house, one of the Defendant's housemates identified the Defendant as the shooter. At the police station, the Defendant was interviewed by a detective, assisted by a woman who served as an interpreter. The woman was employed as an administrative assistant by the local Chamber of Commerce, and had been used by the police as a Spanish-English interpreter on five or six prior occasions. The woman's knowledge of Spanish was limited to less than two years of college Spanish, and living in Mexico for approximately six months at some unspecified time in her life. (One news report stated that the woman's time in Mexico was limited to "spring break" one year.) Moreover, the woman had no familiarity with legal terminology. The detective gave the Miranda warnings in English, and the woman serving as interpreter repeated them to the Defendant in Spanish. The Defendant then gave oral and written statements admitting that he had fired the gun. (At the time, the Defendant did not yet know that the victim had died.) The entire interview was recorded on audio tape. The Defendant was subsequently indicted for and convicted of murder.

   The Defendant appealed his conviction on various grounds, asserting (among other things) that he had not made a knowing, voluntary, and intelligent waiver of his Miranda rights, and that the trial court, therefore, erred in refusing to suppress his oral and written confessions. For example, "You have the right to the advice of an attorney" had been interpreted as "You have a right-hand turn to give a visa to a lawyer."

Question for Audience:

Would you affirm the Defendant's murder conviction, or overturn it?

1. Definitely affirm
2. Probably affirm
3. Probably reverse
4. Definitely reverse

Result in the Case:

The appellate court reversed the conviction, and remanded the case to the trial court. Competing expert witnesses gave different versions of the Miranda warnings given in Spanish by the woman who served as an interpreter when the Defendant was interviewed by and confessed to police. However, the appellate court concluded that – even accepting *arguendo* the interpretation given by the prosecution's expert witness – the prosecution still could not prevail.

Among other things, the appellate court criticized the woman who served as interpreter for summarizing in English the Defendant's statements, rather than giving a *verbatim* interpretation of what he said. The appellate court stated: "[A]n interpreter should not be permitted to give his own conclusions with respect to the answers of the witness but, instead, should give a literal translation of the witness' words."

5. **California v. Moua, No. 315972-0 (Fresno Co. Super. Ct. Feb. 7, 1985); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 126-28, 185, 282; Myrna Oliver, "Cultural Defense – A Legal Tactic," *Los Angeles Times* 1 (July 15, 1988); Doriane Lambelet Coleman, "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma," 96 *Columbia Law Review* 1093, 1093, 1106, 1123, 1125, 11137, 1150, 1155, 1159 (1996).**

With the help of two friends, a 21-year-old Hmong man took an 18-year-old Hmong woman from the Fresno City College campus, throwing her into a station wagon and taking her to his home as part of a tradition Hmong ritual, "marriage by capture" ("*zij poj nam.*") Both the man and the woman were born and raised in Laos, and had immigrated to the United States in their teens. Friends of the woman who observed the apparent abduction immediately contacted police. When the police showed up at the home of the man's family several days later, the woman identified the man as her husband and declined to leave with the police. Shortly thereafter, however, the woman decided to file kidnapping and rape charges against the man.

The man defended his behavior, explaining that – under the Hmong tradition of "marriage by capture" – Hmong men are supposed to abduct Hmong women. As part of the ritual, the woman is supposed to feign vigorous resistance and protest, both physically and verbally, to signal that she is virtuous and chaste. The ritual requires that the man, in turn, overcome the woman's "resistance," to demonstrate that he is virile and strong, and that he will be able to protect and provide for the woman during their life together. Thus, under the Hmong "marriage by capture" tradition, a woman's verbal and physical resistance is simply part of the ritual. By protesting and resisting, the woman is playing her part in the traditional Hmong marriage ritual, and – by overcoming the woman and

"forcing" himself on her – the man is similarly playing out his culturally-assigned role in the ritual marriage.

The defense contended that – under the circumstances – the man did not understand that the woman was truly resisting and that he did not understand that she actually did not consent. According to the defense, the man believed that the woman was just playing her expected role in the traditional Hmong ritual, "marriage by capture." During pretrial proceedings, the defense filed a 22-page pamphlet on Hmong marriage rituals, which included a brief description of "marriage by capture." The prosecution proffered no evidence to rebut the claims made in the pamphlet or to challenge the Defendant's claims that he honestly did not know that the woman did not consent to his actions and that he sincerely believed that the woman was simply playing out her role in the Hmong "marriage by capture" ritual.

Question for Audience:

Based on what you have heard so far, how would you find on the charges of kidnapping and rape?

1. Definitely guilty
2. Probably guilty
3. Probably not guilty
4. Definitely not guilty

Result in the Case:

The case did not go to trial. After the judge ruled that the Defendant could present evidence of the "marriage by capture" ritual at trial, the prosecutor decided *not* to pursue kidnapping and rape charges. The prosecutor was disinclined to take the case to trial because he would have had difficulty explaining to a jury why the woman did not leave with police when police showed up at the man's door. In addition, the woman's testimony included some other inconsistencies, which would have undermined her credibility. The public defender was also reluctant to go to trial because he was concerned about the man's actions in ignoring the woman's protests being judged against the standard of a "reasonable [U.S.] man." The man, therefore, pled guilty to false imprisonment and was sentenced by the judge to 90 days [some sources say 120 days] in jail and fined $1,000 ($900 of which was paid to the woman as "reparations.")

In a later statement to the media, the judge said, "In a special intent crime like murder, I think the cultural defense could go all the way to acquittal, although as a practical matter, I do not think that would happen." The Defendant had faced eight to ten years in prison on the kidnapping and rape charges. According to the judge, the plea bargain gave him "leeway to get into all these cultural issues and to try to tailor a sentence that would fulfill both his needs and the Hmong needs."

CHAPTER 3

WORKING WITH THE MODEL CURRICULUM: RECOMMENDATIONS & SAMPLE AGENDAS

RECOMMENDATIONS: PREPARING FOR YOUR PROGRAM

Needs Assessment

Use of these curricular materials will ideally be part of a larger organizational or systemic effort by leaders in the criminal justice system to engage in issues of race and culture. A needs assessment is a critical way of defining the independent needs of a particular group to be trained, often using a broad battery of tests to determine the awareness, attitude, knowledge, and skills members in the group have with regards to cultural competency. With this kind of needs assessment, individuals in the group can learn to combat subconscious biases that may affect their day-to-day decisions in their professional life.

Recommended Readings:

The following resources are available to assist you in designing and conducting an appropriate needs assessment that will help to place this publication in context:

- Mercedes Martin & Billy E. Vaughn (2007). Strategic Diversity & Inclusion Management magazine, pp. 31-36. DTUI Publications Division: San Francisco, CA.
- National Center for Cultural Competence: http://www11.georgetown.edu/research/gucchd/nccc/.

We strongly encourage you to modify the curriculum presented here to meet your needs – adjusting program and session goals, modifying discussion questions, substituting learning exercises as needed.

Time & Schedule:

The curricular units in this chapter may be presented:

- As a two-to-three-day conference;
- In shorter segments as an executive series that presents each unit over a period of weeks or months (each unit builds on the preceding unit, so attendance should remain consistent throughout the series); or
- In isolated units, as a presentation of a specific topic during existing CLE programs and conferences (e.g., state bar association meetings).

An estimated length of time has been noted for each unit set forth in Chapters 3, 4, and 5. The amount of time any one unit will take will depend, in part, on the number of participants in your program or workshop. The amount of time allocated for a particular topic can be shortened or lengthened by carefully selecting from among the discussion questions suggested in each unit of the curriculum. If one topic in a particular unit is more important than another (based on an assessment of your program's specific needs or goals), you may shorten the time spent lecturing on less important topics to maximize the time available for suggested discussion questions or exercises.

It is imperative that adequate breaks be provided as different segments of the curriculum are presented—both to give participants time to absorb the material and to maintain focus. We recommend scheduling a ten minute break after fifty minutes of instruction or a fifteen minute break after seventy-five to ninety minutes of instruction. We also recommend giving brief, one-minute stand-and-stretch-at-your-seat breaks or regrouping in dyads as needed if the energy in the room is low, or if you, as the presenter, otherwise notice that participants need one.

Space & Seating:

You will need space to accommodate both plenary presentations and small group discussions. We recommend using facilities with enough rooms to accommodate each breakout group. We also recommend seating seven to ten participants in round tables to facilitate the use of buzz groups during plenary sessions.

Faculty:

We recommend that faculty members for your program reflect the audience who will be participating. Thus, if defenders, prosecutors, and judges will be participating in the program, we recommend that your faculty members represent all three sectors.

In addition, we recommend that you invite a diverse faculty with respect to race, ethnicity, gender, and other areas.

We encourage you to consider bringing in a social psychologist or cultural competency trainer from your area to assist in presenting these materials. If you elect to partner with a psychologist or cultural competency expert, we encourage you to spend sufficient time talking with your expert prior to the training, so as to bridge any potential gaps in knowledge about the criminal justice system and the anticipated audience.

The ABA Criminal Justice Section can provide the names of potential faculty members from each sector of the criminal justice system who are familiar with this Model Curriculum. Please contact Salma Safiedine at (202) 662-1590 or safiedis@staff.abanet.org for a list of faculty who may be available to assist in the program you are planning.

Break-Out Groups:

As you review the model curriculum and plan your program agenda, you will have choices to make regarding what content is covered in plenary session and what is covered in break-out groups. Although we have already made some recommendations for this, you may make adjustments to fit the available facilities, time, and faculty, or to meet the needs of your system and your programmatic objectives. In the absence of a specific recommendation for covering a topic or conducting an exercise in a break-out group, you may assume that the model curriculum as presented in this publication is intended for presentation in a plenary setting.

We recommend that break-out groups and buzz groups be limited between five to seven participants in order to maximize the impact of the small group activities. Larger discussion groups of eight to twelve are less than ideal, but may be necessary depending on circumstances.

We also recommend that faculty members co-facilitate break-out group discussions when possible. One small group facilitator may be sufficient for smaller groups (five to seven people); however for larger-sized discussion groups, we strongly urge you to increase the time allocated for the breakout sessions, and ensure that these groups have two facilitators.

Where break-out groups are utilized, make sure to incorporate a brief report of discussion highlights at the start of the next plenary session. This will help to ensure that all participants learn from one another and stay on the same page with regard to the content and direction of the program.

Pre-Conference Assignments:

In advance of the conference, we recommend that you:

1. Circulate a ***pre-conference survey*** to assess participants' familiarity with the cultural competency concepts that will be presented. (See sample pre-conference survey included in Chapter 5).
   a. The survey should be circulated and completed four weeks in advance of the scheduled program.
   b. The survey also provides the opportunity to elicit participant perspectives regarding the issues related to race and culture that are impacting community perceptions of the criminal justice system's fairness, integrity, and reliability.

2. Assign one or more of the articles from each chapter's list of recommended readings as a ***pre-conference reading assignment.***

3. Request that each participant complete the ***"Implicit Association Test,"*** available on-line at https://implicit.harvard.edu/implicit/.

Post-Conference Evaluation:

We recommend that you use a written evaluation form to elicit participant feedback regarding both curricular content and the effectiveness of presenters. A sample evaluation is included in the Chapter 5 Resource Materials.

Please share your evaluation results with the ABA Criminal Justice Section to help in improving the Model Curriculum. Results can be emailed to Salma Safiedine at safiedis@staff.abanet.org.

CLE Credit

We also strongly encourage you to apply for continuing education credits if you conduct training sessions using this curriculum. It has been acknowledged that "a great amount of racial disparity exists in how the law treats individuals. [Continuing Legal Education] has great potential to educate legal practitioners of this disparity and the wide array of ways it is manifested in their profession."[30] However, the article goes on to show that "among the forty states that require [Continuing Legal Education], only five require coursework addressing bias and discrimination in the profession."[31] This gap in training can be filled by providing training that complies with state requirements for those who may not otherwise be motivated to learn more. For information on obtaining CLE credit, visit https://www.clereg.org/.

Additional Recommendations:

- The sample agenda employs a format of presentation followed by related small group work. We recommend that you maintain this format to ensure that your training participants are exposed to the concept of cultural competency and that the learning is anchored by immediate application through interactive exercises that aims to connect this concept to the criminal justice context with which participants are more familiar.

- The specific training topics incorporated into the sample agenda below are not more important than other topics in this manual; rather, they are intended to serve as examples of how the curricular modules and training exercises can be pulled together. This sample agenda can be expanded to incorporate exercises from each of the training modules in a comprehensive five-day training institute or an in-house workshop series. Any topic in the sample schedule can also be taken out or shortened in the event that you encounter time constraints or determine that the need for you audience is greater in a different topic.

- We encourage you to avoid the fire hose approach to training. We have included in this manual a huge volume of very important material—much more than can be effectively absorbed by your audience in a single training event. If you are afraid of cutting out anything

[30] Lorenzo Bowman et al., *The Exclusion of Race from Mandated Legal Education Requirements: A Critical Race Theory Analysis*, 8 Seattle J. for Soc. Just. 229, 229 (2009).
[31] *Id.* (citing Suzanne E. Graber & Lawrence R. Baca, *Report to the House of Delegates: Recommendation*, A.B.A. Standing Comm. for Continuing Legal Educ. 4 (Feb., 2004)).

important and instead cut the experiential learning that occurs in small group discussion and breakout sessions, you will quickly hit a point of diminishing returns. Err on the side of covering fewer topics to afford participants the opportunity to truly absorb the material.

- Consider opportunities for blended learning—having the participants review a substantive lecture on-line or a substantive outline from this manual one week in advance of a training event, thereby reserving the valuable resource of time in the same room for a brief review of the substantive material and active engagement in one or more small group exercises. In this day and age of shrinking budgets and decreasing training dollars, having participants preview lectures online has the potential to leverage your resources and to maximize the impact of the training.

SAMPLE CONFERENCE AGENDA
Using the Lens of Cultural Competence to Address
Systemic Disparities, Institutional Barriers, & Community Perceptions

Target Audience:

Leaders of judicial, prosecution, and defense agencies

Learning Objectives:

As a result of this conference, participants will be able to

1. Describe basic concepts of cultural competency;
2. Discuss the rationale for the study of cultural competency by criminal justice system stakeholders;
3. Identify cultural issues, systemic disparities, and institutional barriers that are undermining community confidence in the fairness, integrity, and reliability of the criminal justice system; and
4. Demonstrate communication and action-planning skills for addressing these issues.

Day One:

9:00 – 12:00 "Cultural Competency: The Framework"

Presentation Instructions:

This session should cover the curricular materials set forth in "Unit 1: Welcome & Introductions" and "Unit 2: Culture, Cultural Competency & the Criminal Justice System."

Schedule a fifteen-minute break mid-morning (10:30–10:45).

Session Description:

The field of cultural competency provides a framework for increasing our awareness of the issues related to race and culture that impact community perceptions about the criminal justice system and for engaging in the challenging discussions that could lead to more effective solutions. In this opening session, we will explore the language and concept of cultural competency and the rationale for its application in the criminal justice context. This discussion will serve as a springboard for our subsequent exploration of the systemic issues related to race and culture that undermine community confidence in the criminal justice system.

Session Objectives:

1. Explain goals, objectives, and methodology of the conference.
2. Articulate norms and expectations.
3. Define key terms from the field of cultural competency, and the rationale for applying a cultural competency lens to systemic criminal justice issues.
4. Describe characteristics of a culturally competent criminal justice system.

Related Materials:

Bentsi-Enchill, Jatrine. "The 6 Stages of Cultural Competence in Lawyers." (2005).

Isaacs-Shockley, Mareasa, PhD. "Cultural Competence and the Juvenile Justice System: Irreconcilable Differences?" *Focal Point* Vol. 8 No. 2 (Summer 1994).

Johnson, Robert M.A. "Racial Bias in the Criminal Justice System and Why We Should Care." *Criminal Justice* (Winter 2007).

Stevens, Sylvia. "Cultural Competency: Is There an Ethical Duty." *Oregon State Bar Bulletin* (January 2009).

12:00 – 1:00 LUNCH BREAK

1:00 – 3:00 "The Role Implicit Bias Plays in the Criminal Justice System"

Presentation Instructions:

This session should cover the material set forth in "Unit 3: Implicit Bias."

A fifteen-minute break should be incorporated into the presentation.

Session Description:

In this session, participants will explore several questions: What are the ways in which issues of race and culture undermine community confidence in the criminal justice system? How do systemic justice issues impact community perceptions regarding the integrity and reliability of the criminal justice system? Is this always a matter of bad intent, or is something else going on? Concepts from the field of cultural competency (social cognition, implicit bias, micro-inequities, and

unearned privilege) will be utilized to increase our collective awareness of the potential sources of both positive and negative community perceptions.

Session Objectives:

1. Describe concepts of implicit bias, social cognition, micro-inequities, and unearned privilege.
2. Identify systemic issues related to race and culture that undermine community confidence in the integrity and fairness of the criminal justice system.
3. Examine impact of implicit bias, micro-inequities, and unearned privilege on community perceptions of the criminal justice system.

Related Materials:

Kang, Jerry. "Implicit Bias: A Primer for Courts." National Center for State Courts, Race & Ethnic Fairness in the Courts (August 2009).

Marsh, Shawn C., PhD. "The Lens of Implicit Bias." *Juvenile and Family Justice Today* (Summer 2009).

3:00 – 4:30 "What are the Issues of Race and Culture in Our Jurisdiction?"

Presentation Instructions:

This session should cover the material set forth in "Unit 6: Systemic Disparities & Community Perceptions."

Session Description:

In this breakout session, participants will continue the discussion by analyzing the issues relating to race and culture that may affect community perceptions in their own jurisdictions. Each jurisdictional team will brainstorm the issues and evaluate the extent to which implicit bias, micro-inequities, and unearned privilege may be impacting those perceptions.

Session Objectives:

1. Identify jurisdiction-specific issues related to race and culture that undermine community perceptions.

2. Analyze impact of implicit bias, micro-inequities, and unearned privilege on the jurisdiction-specific issues.

Day Two:

9:00 – 12:00 "Improving Cross-Cultural Communication Skills"

Presentation Instructions:

This session should cover the material set forth in "Unit 7: Cross-Cultural Communication." The material should be divided into a seventy-five minute presentation, and a ninety minute break-out group

Make sure to welcome participants back to "Day 2" of the conference, review highlights of the material covered the previous day, ask each small group to report on highlights from their afternoon breakout groups, and "forecast" the information that will be covered on Day 2.

Incorporate a fifteen-minute, mid-morning break into your schedule.

(9:00 – 9:45) ***Plenary Session Description:***

Effective communication skills are a critical asset for leaders of criminal justice system agencies, both inside and outside of the courtroom. Communication styles and preferences, however, are heavily influenced by one's culture—and the effectiveness of our communication with colleagues, clients, victims, witnesses, jurors, and other community members can fall apart when cultures collide. In this session, participants will explore how cultural differences impact communication, increase their awareness of their own and others' communication styles and the stereotypes made about one another based on those styles, and discover the impact subtle verbal and non-verbal cues can have on one's understanding of a situation.

Plenary Session Objectives:

1. Identify ways in which cultural differences can impact effective communication.
2. List barriers to effective cross-cultural communication, particularly in the criminal justice context.
3. Identify personal hot button communication challenges, and their nexus with cultural differences.
4. Identify strategies for increasing effectiveness of cross-cultural communication skills.

Related Materials:

Cultural Competence & Effective Communication PowerPoint.

Miller, Nelson P. "Beyond Bias – Cultural Competence as a Lawyer Skill." *Michigan Bar Journal* (June 2008).

(9:45 – 11:15) ***Breakout Session Description:***

In this breakout session, participants will discuss strategies for increasing the effectiveness of their cross-cultural communication skills and practice communication techniques. Participants will also examine the ways in which cross-cultural communication issues may intersect with the systemic inequities and privilege issues identified in the morning session.

Breakout Session Objectives:

1. Demonstrate communication techniques.
2. Examine the relationship between barriers to effective cross-cultural communication and community confidence in the fairness, integrity, and reliability of the criminal justice system.

11:15 – 11:30 BREAK

11:30 – 12:30 "Connecting the Dots: Effective Cross-Cultural Communication & Community Confidence"

Presentation Instructions:

Ask each breakout group to report the highlights of their discussions.

Session Description:

In this session, participants will share insights regarding the connections between effective cross-cultural communication and community confidence in the criminal justice system. Participants will also begin to assess the impact that improved cross-cultural communication skills may have on community trust issues.

Session Objective:

Identify the links between effective cross-cultural communication and community confidence.

12:30 – 1:30 LUNCH BREAK

1:30 – 2:45 "Addressing the Inequities: Models & Strategies for Building Community Trust"

Presentation Instructions:

This session should cover the material set forth in "Unit 8: Addressing the Inequities: Models & Strategies for Leading Organizational Change and Building Community Trust."

Session Description:

Organizational change is a long-term, continual process—and so, too, are the culture and systems changes needed to fully realize the vision of a culturally competent criminal justice system described in the opening session of the conference. Drawing on established models for leading diversity and organizational change initiatives, this plenary session will introduce an analytical framework for addressing the issues related to race and culture that impact community perceptions and undermine community trust. Examples of how criminal justice stakeholders have addressed issues will be presented.

Session Objectives:

1. Describe framework for addressing community trust issues.
2. Give examples of how other jurisdictions have addressed issues.

Related Materials:

Pratt, Anna. "Striving for Inclusion in the Halls of Justice" (Parts 1 & 2). *Minnesota Spokesman-Recorder* (August 2007).

"State Courts' Responsibility to Address Issues of Racial and Ethnic Fairness." Policy Statement, Conference of State Court Administrators.

2:45 – 3:00 Break

3:00 – 4:15 "Putting the Pieces Together: Setting Priorities & Action Planning"

Presentation Instructions:

Breakout groups should utilize the sample action planning form as a guide to set priorities and implementation steps for addressing the issues raised during the conference.

Break-Out Session Description:

Using the framework and models discussed in the plenary session as a guide, jurisdictional teams will prioritize community trust issues that need to be addressed in their jurisdictions and discuss strategic opportunities and potential approaches. Discussion will include consideration of the stakeholders, information and resources needed to address prioritized issues, and of the opportunities that may exist for continuing efforts after the conference.

Session Objectives:

1. Assess opportunities and strategies for building community trust.
2. Determine concrete next steps.

4:15 – 5:00 "Moving Forward…"

Plenary Session Room:

In this closing plenary session, participants will share perspectives on the lessons learned through the Building Community Trust Conference, including sharing key elements of their group action plans.

Session Objectives:

1. Describe issues related to race, culture, and community trust in the jurisdiction(s) participating in the conference, and proposed action steps for responding to those issues.
2. Assess extent to which different groups identified common issues, opportunities, and challenges regarding race, culture and community trust.
3. Identify significant learning points from the conference.

5:00 Adjourn

CHAPTER 4

CULTURAL COMPETENCY CURRICULUM DESIGN THEORY & FACILITATION RESOURCES

Best Practices and Instructional Design Elements Incorporated into the Model Curriculum:[32]

The experience of cultural competency and curriculum experts in the judicial, healthcare, education, and social service domains suggests that there are widely-recognized best practices with regard to cultural competency and diversity training. These are guiding principles that should be incorporated into cultural competency learning events in order to increase the effectiveness of such programs. In keeping with guiding principles and best practices of adult learning, this curriculum has been designed to maximize:

- Opportunities for small group discussion, self-directed learning, and facilitated problem-solving;
- Application of general principles and information regarding cultural competence to specific issues and challenges faced by the criminal justice system as a whole, and by specific agencies within the criminal justice system;
- A blend of concrete experience, reflective observation, abstract conceptualization, and active experimentation with the concepts and key learning points; and
- Use of multi-agency/cross-sector teams.

Additional best practices incorporated into this model curriculum include the following:

- ***Engage "the head, the heart, and the hand"—the cognitive, personal awareness, and behavioral dimensions of development—by including knowledge, awareness, skill-development, and action-planning components.***

    - ***Knowledge:*** **What are the facts?**

        - Presents information: statistical, demographic, definitions, and models. What is culture? Cultural competency?

        - Provides rationale for cultural competency training: Why is cultural competence important? Why is it important for me and my organization to be involved in diversity work?

        - Includes such topics as:
            - Definitions of culture, cultural competency, diversity, diversity challenge

[32] Material in this section is drawn, *inter alia*, from discussions during the Building Community Trust Faculty Workshop, and Nile, Lauren N. "Developing Diversity Training for the Workplace: A Guide for Trainers." 9th ed. at p. 3-17 – 3-21 NMCI Publications (2008).

- Description of cultural disparities: internal to an agency/organization—and external or systemic issues in the criminal justice system
- Descriptions of the criminal justice system and players as a culture group.
- Social cognition: scientific or factual explanation of why differences are noticed

▪ Potential training techniques include:
- Lectures
- Facilitated discussion
- Interactive exercises through which facilitators draw out substantive learning points

○ ***Awareness:*** **What is my emotional response to these facts?**

▪ Should attend to awareness of:
- Self and of others
- Biases, prejudices, and beliefs that impact our interactions with others
- The value of diverse cultures

▪ Explore such questions as:
- What are our interpersonal and intergroup relationships like across cultural lines?
- In general, do people in our organizations/community trust each other across cultural lines?
- What are my personal and cultural filters or blind spots?
- What are my biases, prejudices and stereotypes, and how are they impacting those about whom I have them?
- What can I do to learn and manage my biases?

▪ Provide ***opportunity*** for participants to discuss how they feel about the facts; ***acknowledgement*** of cultural issues on a deeper, personal level; and ***motivation*** to change.

▪ Issues ripe for this portion of a cultural competency program include:
- Perceptions—privilege
- Microinequities
- Non-verbals
- Services provided—are they the same for all?
- It is NOT recommended to cover legal requirements or the human resources context.

▪ Effective techniques:
- Small group discussions and report-out are good but not the only techniques for raising awareness
- Case study/hypotheticals

- Simulations

- ***Skills:*** **With increased awareness and understanding, now what can I do?**

  - Understand how to navigate multicultural situations more effectively, to communicate across cultural differences, and to interact with others fairly.

  - Increase participant awareness of skills and abilities they already possess to respond to the rationale and motivation to become culturally competent.

  - Expand repertoire of skills and abilities needed to work effectively in a culturally diverse environment and impart principles of diversity within an organization or system.

  - Ask such questions as:
    - What do I do to make this organization/system better?
    - How can I behave in ways that foster the principles of diversity?
    - How can I put into practice the knowledge and awareness that I have learned?

  - Consider issues ripe for this portion of a cultural competency program such as:
    - Cross-cultural communication skills (could also address conflict resolution skills);
    - Barriers to effective cross-cultural communication;
    - Preconceptions/stereotypes;
    - Cultural patterns;
    - Nonverbal communications;
    - Assumed similarities; and
    - Responses to culturally inappropriate comments.

- ***Action Planning:*** **What will I do?**

  - Participants commit to using skills & abilities to help bring about change at the personal or organizational level.

- ***Note:*** Various studies indicate that ***sequencing is important:*** people retain more of what they learn if the cognitive component (concept) is presented first, followed by an affective (emotional, experimental) exercise.

- ***Incorporate adult learning principles to maximize the opportunity for participants to learn from one another through dialogue and interactive and experiential activities:***

  - Focus on real-world problems.
  - Emphasize how the learning can be applied.

- Relate the learning to the learners' goals.
- Relate the materials to the learners' past experiences.
- Allow debate and challenge of ideas.
- Listen to and respect the opinions of learners.
- Encourage learners to be resources to you and each other.
- Treat learners like adults.
- Give learners control.

- ***Use multiple teaching and learning techniques to appeal to different learning and thinking styles:***

  - People have different ***learning style preferences*** and ***thinking styles***, and will tend to learn more effectively if learning is oriented to their preference. Even though we each have different preferences, we all need the stimulus of styles. Effective training events and workshops will incorporate a variety of teaching and learning techniques to help ensure that all participants can access the information presented in the mode that best speaks to their preferences. Knowledge of these learning and thinking styles can also assist trainers and facilitators in developing effective strategies for working with adult learners.

  - Kolb describes the four predominant learning styles as:[33]

    - ***Diverging (feeling and watching):*** These people are able to look at things from different perspectives. They are sensitive. They prefer to watch rather than do, tending to gather information and use imagination to solve problems. They are best at viewing concrete situations from several different viewpoints. Kolb called this style diverging because these people perform better in situations that require idea-generation (e.g., brainstorming). People with a diverging learning style have broad cultural interests and like to gather information. They are interested in people, tend to be imaginative and emotional, and tend to be strong in the arts. People with the diverging style prefer to work in groups, to listen with an open mind and to receive personal feedback.

    - ***Assimilating (watching and thinking):*** The assimilating learning preference is for a concise, logical approach. Ideas and concepts are more important than people. These people require good clear explanation rather than practical opportunity. They excel at understanding wide-ranging information and organizing it in a clear logical format. People with an assimilating learning style are less focused on people and more interested in ideas and abstract concepts. People with this style are more attracted to logically sound theories than approaches based on practical value. In formal learning situations, people with this style prefer readings, lectures, exploring analytical models, and having time to think things through.

[33] Information regarding adult learning styles is from "Kolb Learning Styles: Definitions and Descriptions," available online at http://www.businessballs.com/kolblearningstyles.htm.

- ***Converging (doing and thinking):*** People with a converging learning style can solve problems and will use their learning to find solutions to practical issues. They prefer technical tasks, and are less concerned with people and interpersonal aspects. People with a converging learning style are more attracted to technical tasks and problems than to social or interpersonal issues. People with a converging learning style like to experiment with new ideas, to simulate, and to work with practical applications.

- ***Accommodating (doing and feeling):*** The accommodating learning style is hands-on and relies on intuition rather than logic. These people use other people's analysis, and prefer to take a practical, experiential approach. They are attracted to new challenges and experiences, and to carrying out plans. They commonly act on gut instinct rather than logical analysis. People with an accommodating learning style will tend to rely on others for information than carry out their own analysis. This learning style is prevalent and useful in roles requiring action and initiative. People with an accommodating learning style prefer to work in teams to complete tasks. They set targets and actively work in the field trying different ways to achieve an objective.

- Others utilize the ***visual-auditory-kinesthetic***[34] framework for delineating learning styles:

  - ***Visual learners*** prefer seeing what they are learning. They prefer pictures and images to help them understand ideas and information rather than explanations, and may use language such as "The way I see it is. . . ." Creating a mental image will assist the visual learner in holding onto information. Visual learners need written instructions, and will read and follow directions as they work.

  - ***Auditory learners*** prefer to hear messages and instructions. They prefer having someone talk them through a process rather than reading about it first, and may use language such as, "I hear what you are saying." Auditory learners may talk themselves through a process, and will remember verbal instructions well. These learners may prefer for someone else to read the directions to them while they engage in a task.

  - ***Kinesthetic learners*** want to sense the position and movement of a skill or task. Kinesthetic learners prefer classes that allow them to "do something" rather than lectures or discussions. Kinesthetic learners may use language such as "I feel like" and do well learning a physical skill when there are materials available for hands-on practice.

- A variety of ***thinking styles***[35] have also been described:

[34] *See* http://www.medscape.com/viewarticle/547417_3.

- ***Reflective thinkers*** view new information subjectively and relate new information to past experiences. These thinkers often ask "why?" and examine their feelings about what they are learning.

- ***Critical thinkers*** like to play with new information, and always ask "why?" Critical thinkers make excellent troubleshooters and create their own solutions and shortcuts.

- ***Practical thinkers*** want factual information without any "nice-to-know" additions. They seek the simplest, most efficient way to do their work, and are not satisfied until they know how to apply their new skills to their job or interest.

- ***Conceptual thinkers*** accept new information only after seeing the big picture. They want to know how things work, not just the final outcome. Conceptual thinkers learn the concepts that are presented, but also want to know the related concepts that have not been included.

Faculty Roles & Responsibilities in Presenting the Model Curriculum:[36]

Faculty members' primary role in presenting the model curriculum is to ***facilitate small group discussion and learning.*** In order to effectively facilitate learning with regard to cultural competency, faculty members need:

- Passion for the work.
- Knowledge of their own personal diversity issues.
- Ability to resist getting "hooked."
- Substantial knowledge and understanding of "isms" and oppression.
- Willingness to provoke, challenge, and criticize.
- Ability to admit that one does not know all the answers, and that we are all on a journey, just as the participants are.
- Ability to use mistakes as learning opportunities.
- Skills for group process/facilitation.
- Familiarity with adult learning principles and ability to incorporate those principles into one's work.

Just as becoming culturally competent is an on-going process, so too is becoming an effective facilitator and faculty member in the area of cultural competence. We each have strengths that we bring to this work and weaknesses that need to be addressed. Faculty members should endeavor to identify those strengths and weaknesses and engage in their own self-development to improve their ability to lead training events and workshops.

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[35] *See* "Teaching Strategies for Adult Learners," available online at http://online.rit.edu/faculty/teaching_strategies/adult_learners.cfm.

[36] Information in this section is from Nile, Lauren N. "Developing Diversity Training for the Workplace: A Guide for Trainers." 9th ed. at p. 1-15 NMCI Publications (2008).

Facilitation Tips:

- Using the concepts of ***social cognition*** and ***implicit bias*** (described more fully in Unit 3) as a ***starting point for discussion*** can help to diffuse defensiveness and resistance and open the door to learning and personal growth.

- Effective cultural competency training and diversity workshops allow participants to ***learn from others*** by ***encouraging dialogue among participants*** and provide opportunities for ***interactive and experiential learning***.

- While diversity workshops should ***engage the head, heart, and hand***, faculty members should be careful to encourage the sharing of feelings *without* crossing into the realm of "doing therapy." *Setting time limits* can be a helpful technique for maintaining this balance.

- ***Establishing norms*** (ground rules) and expectations at the outset of a workshop is an important means of clarifying expectations and creating environment that is conducive to personal growth and learning.

- ***Our differences AND our similarities are important****:* Focusing on our similarities—the ways in which we are deeply connected as human beings—can help to create an open and healing environment that supports personal development.

- Using ***mixed race and mixed gender training teams*** provides an invaluable opportunity for participants to observe culturally diverse individuals working with equality, respect, and consideration of one another.

- ***Culture is a deep concept.*** Remembering and reminding participants that ***culture is broader than race*** can help facilitators to open up conversations, dialogue, and learning.

- ***Absolute vs. qualifying generalizations.*** "I-statements" such as "I feel x" and "I think y" are more helpful and less charged than more general statements like "Hispanics feel x" or "Asian Americans think y."

    - If a participant uses absolute statements (especially if used in a negative or offensive way), facilitators can help to reframe:
        - "Can you reframe that as an I-statement?"
        - "So what I hear you saying is that you feel/think …"
        - "How might we reframe that as an I-statement?"

- ***Use the silence:*** If you hit a moment of silence, or an "-ism" makes its way into the discussion, use the moment as an opportunity to facilitate discussion with a simple question to the group, such as, "What is happening here?"

Facilitating Difficult Conversations:[37]

Facilitators must be prepared to respond effectively to difficult situations when they arise, such as:

- ***Denial:*** "The problem is not racism. It's all about personalities."
- ***Anger:*** "All this diversity stuff is just a crock. It's a waste of time and money, and quite frankly I do not want to be here."
- ***Inappropriate comments:*** "Well if a girl dresses that way for work, she deserves to be harassed."
- ***Heated discussions:*** When two participants go one-on-one with each other in a tense discussion.
- ***Misinformation:*** "Affirmative action laws were passed in order to lower standards so that minorities could qualify for certain jobs."
- ***Testing the trainer:*** This often takes two forms: challenging and disputing whatever you say and sending clear non-verbal signals that communicate boredom, lack of interest, or an "I'm not impressed" message.

Various strategies[38] can be used to facilitate these kinds of difficult conversations. For example:

- ***Use follow-up questions*** to clarify the speaker's intent:
  - "Why?"
  - "Tell me more."
  - "What do you mean?"
- ***Engage the group:***
  - "What do others think?"
  - "Do you agree/disagree with this statement?"
  - "Does anyone else feel differently?"
  - "Does everyone agree?"
- ***Vicarious experience:***
  - Use a statistic, panel discussion, film, or other means of presenting new/different information.
  - "Would your opinion change if you knew…?"

[37] Descriptions of the "difficult situations" set forth here are from the "Facilitation Skills Inventory" in Nile, Lauren N. "Developing Diversity Training for the Workplace: A Guide for Trainers." 9th ed. at p. 1-9 NMCI Publications (2008)

[38] This list of strategies is drawn from discussions during the "Building Community Trust Faculty Workshop" on October 15-17, 2009, and training materials from the National Multi-Cultural Institute cited *infra*.

- ***Test the viewpoint:***
  - "What if this changed?"

- ***Present the different viewpoint through a question:***
  - "Is it possible that…"
  - "Could there be more than one opinion on this, such as…?"

- ***Ouch—then educate:***
  - "Ouch—that statement hurt. Here's why."
  - "Ouch—did that statement hurt anyone else in the group? Can you share with us why that hurt?"

- ***Admonish if necessary:***
  - "That is not appropriate."
  - "I'm not comfortable with that comment."

- ***When conflicts arise,*** provide your group with an opportunity to process and learn from the conflict:
  - "What just happened here?"
  - "What do you see happening in our discussion?"
  - "What usually happens when this kind of conflict occurs?"
  - "What would you suggest as possible/better/alternative solutions?"

- ***Do not let misinformation stand***. If someone says something that is inaccurate, you have a variety of choices regarding how to correct the misinformation:

  - Correct the information yourself:
    - "I have a different understanding of that issue."
    - "My understanding is…"
    - "I think the studies show…"
    - "What I have read says ..."
    - "Actually, what that report says is…"
    - "Is that right? I thought …(insert alternative view)"
    - "What do you think could explain this difference of opinion?"

  - Look to others:
    - "How do others feel about that?"
    - "Does anyone have a different view?"

  - If the person persists in repeating the misinformation, you may need to assert yourself and move on. For example:
    - "The information we have been given for this training is x. I think we need to set this aside for now, agree to disagree, and move on with our discussion."
    - "Why do not you and I continue with this discussion during the break?"

Additional Thoughts About the Role of the Faculty

The faculty member's role is as a ***facilitator of learning***.

This does not require that you have all of the answers and then convey those answers to the participants in didactic style. Rather, as a facilitator, you are called upon to use open-ended questions and learning exercises to explore the issues together and to help guide the discussion. If you do not know the answer to a question, redirect the question to the group (*"What do others think?"*). If needed, acknowledge that you do not know the answer and commit to finding the answer *("I do not know the answer to that question. If no one else does, we can set it aside for the moment and ask another faculty member during the break?")*

This does not require all of the learning to take place within a specific meeting space or on a particular timeline. Much of the true learning in the arena of cultural competency will happen in the days and weeks that follow a presentation or workshop. For faculty members who also happen to be lawyers, it will be particularly important for you to resist the urge to cross-examine a participant into a revelation you want them to have or an admission you want them to make. Such an approach may serve only to back a participant into a corner and increase their defensiveness. Your role is to plant the seeds for thoughtful reflection and growth on the participant's timeline.

Faculty members should keep as many participants engaged in the learning process as possible and facilitate dialogue and discussion among the participants so that they discover answers for themselves. However, we must carefully balance the interests of one against the interests of the group to ensure that destructive/offensive behavior or comments do not compromise or undermine the learning environment.

Remember: Participants are responsible for their own learning; facilitators are responsible for providing a forum in which that learning can take place, for creating a safe enough space for everyone to be honest with themselves and each other, and for guiding the learning process.

CHAPTER 5

ADDITIONAL RESOURCES

Sample Forms

SAMPLE PRE-CONFERENCE PARTICIPANT SURVEY

1. To what extent are you familiar with the following terms?

	Not at all familiar	Not very familiar	Somewhat familiar	Very familiar
Implicit Bias				
Cultural Competency				
Micro-inequities				
Social Cognition				

2. To what extent do you agree with the following statements?

	Strongly Disagree	Somewhat Disagree	Somewhat Agree	Strongly Agree
Cultural competency is relevant to my job within the criminal justice system.				
Race, culture, and diversity impact community perceptions about the fairness, integrity, and reliability of the criminal justice system.				
Cultural diversity issues are prevalent within judicial, prosecution, and public defense agencies.				

3. What do you consider to be the two main issues that undermine community confidence in the integrity, reliability, and fairness of your jurisdiction's criminal justice system?

Action Planning Form

1. ***What are the issues & priorities?*** What is the priority issue for your jurisdiction relating to race, culture, and community trust in the fairness, integrity, and reliability of the criminal justice system? Why?

2. ***Assessing the community's perception:*** What is the community's perception (may be multiple perceptions from different parts of your community) of that issue? Do you have an accurate assessment of community perceptions? If not, what do you need to know? How might you find out that information?

3. ***Potential responses:*** What potential responses are called for by your criminal justice system to address this issue? What would be the goal(s) of this potential response?

4. ***Opportunities:*** Is there an existing infrastructure for pursuing the effort?

5. ***Stakeholders & Guiding Team:*** Who has a stake in this issue that needs to be invited to help identify the issues and solutions? Who else do you need on your team to address this issue? How can you get them to the table? What message would entice that person to join your team?

6. ***Resources & Commitments:*** What resources do you need to move this forward? Time? Dollars? Additional people-power? What level of commitment is each of you realistically able to make, to continue this conversation?

7. ***Other Challenges:*** What other challenges exist for achieving your goals? For continuing this conversation?

8. ***Next Steps:*** In light of your team's analysis, what (3) specific steps can you take within the next two months to continue this conversation? Describe the action item in concrete terms, assigning a deadline and person responsible for completing that item.

(1)

Deadline:

Person responsible:

(2)

Deadline:

Person responsible:

(3)

Deadline:

Person responsible:

SAMPLE CONFERENCE EVALUATION FORM

Building Community Trust National Conference
November 19–21, 2009

Thank you for participating in the "Building Community Trust National Conference." We value your opinion and appreciate your feedback on your experience, as it will help us to improve this program in the future. ***Please turn this form into the registration table before you leave.***

Please rate your level of agreement with each of the following statements:	**Strongly Disagree**	**Disagree**	**Agree**	**Strongly Agree**	**No Opinion**
The conference met the articulated learning objectives.					
The *Building Community Trust National Conference* met my expectations.					
I will be able to apply the knowledge learned.					
The information covered in the conference is relevant to my role within the criminal justice system.					
The training objectives for each topic were identified and followed.					
Information was presented at the right level.					
The materials distributed were pertinent and useful.					
Class participation and interaction were encouraged.					
Adequate time was provided for questions and discussion.					
Presenters demonstrated a thorough knowledge of the content area.					
The conference facilities were adequate for my needs.					
The cultural competency framework was helpful in examining issues of race, cultural, and community perceptions about the criminal justice system.					

Overall, how would you rate this conference?

Excellent	Good	Fair	Poor
[ ]	[ ]	[ ]	[ ]

PLENARY SESSIONS:

Please rate your satisfaction with the content and presentation of the plenary sessions offered during the conference:

Session	*Not Helpful*	*Somewhat Helpful*	*Helpful*	*Very Helpful*	*No Opinion*
Opening Session: "Cultural Competency: The Framework" *Thursday, Nov. 19, 4:00 pm – 6:30 pm*					
"Race & Culture in the Criminal Justice System" *Friday, Nov. 20, 9:00 am – 10:30 am*					
"Improving Cross-Cultural Communication Skills" *Friday, Nov. 20, 1:30 pm – 3:00 pm*					
"Connecting the Dots: Effective Cross-Cultural Communication & Community Confidence" *Friday, Nov. 20, 4:30 pm – 5:00 pm*					
"Addressing the Inequities: Models & Strategies for Building Community Trust" *Saturday, Nov. 21, 9:00 pm – 10:15 pm*					
"Team Presentations" *Saturday, Nov. 21, 12:45 pm – 2:15 pm*					
"Moving Forward" *Saturday, Nov 21, 2:15 pm – 3:00 pm*					

Overall, how would you rate the presentation (pace, clarity, effectiveness, preparedness of presenter) of the plenary sessions?

Excellent	Good	Fair	Poor
[ ]	[ ]	[ ]	[ ]

Comments & suggestions on plenary presentations:

BREAKOUT SESSIONS:

My breakout sessions were facilitated by (circle one):

Catherine Beane ***Clara Hernandez*** ***Andre Koen***

Please rate your satisfaction with the breakout sessions offered during the conference:	***Not Helpful***	***Somewhat Helpful***	***Helpful***	***Very Helpful***	***No Opinion***
"What are the Issues of Race & Culture in Our Jurisdiction?" *Friday, Nov. 20, 10:45 – 12:00*					
"Improving Cross-Cultural Communication Skills" (cont'd) *Friday, Nov. 20, 3:15 – 4:30*					
"Putting the Pieces Together: Setting Priorities & Action Planning" *Saturday, Nov. 21, 10:30 – 12:00*					

Overall, how would you rate the facilitation skills of your breakout session facilitator?

Excellent	Good	Fair	Poor
[ ]	[ ]	[ ]	[ ]

What recommendations would you make for improving this program?

Other comments?
For use with "The Level Playing Field" Exercise in Unit 4. Questions 5 – 7 may be adapted for use with prosecutors and defenders.

Privilege and Cultural Competence Exercise

Processing and Meaning-Making[39]

Concrete Experience

1. What was your experience during the exercise? What stood out for you?

Reflective Observation

2. What are your reactions to the experience? How did you feel as you went through it? Did some questions elicit more feelings than others?

3. How do you connect your experience of the exercise with your own experience of privilege and cultural identity?

Abstract Conceptualization

4. What have you learned based on this experience?

Active Experimentation

5. What are the implications for court management and judging in your state?

6. What are the implications for judicial branch education in your state?

7. How can judicial branch education be used to create a more equitable system of justice in our country?

[39] Pat Murrel and Kathy Story, Leadership Institute in Judicial Education, Center for the Study of Higher Education, University of Memphis.

Appendix: Additional Potential Cases for Unit 9 Exercises

(1) New York v. Singh, 516 N.Y.S.d 412 (N.Y. Civ. Ct. 1987); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 152-53, 200, 293, 316.

Mr. Singh – a Sikh priest who was wearing a *kirpan* (ritual/ceremonial dagger) – was arrested on a New York City subway platform and charged with violating a city ordinance which prohibits any person from wearing a knife outside his or her clothing in a public place, or carrying a knife in plain view in a public place, unless the knife is actually being used at the time for a lawful purpose.

Mr. Singh argued that the kirpan was not a weapon, but a religious symbol, which his faith required him to wear at all times.

Question for Audience:

How would you find on the charge of violating the city ordinance?

1. Definitely guilty
2. Probably guilty
3. Probably not guilty
4. Definitely not guilty

Result in the Case:

The court acknowledged that Sikhs vow to observe the "5 Ks": (1) To wear long hair ("Kesh"); (2) To keep a comb in their hair ("Kangha"); (3) To wear a steel bracelet on the right wrist ("Kalha"); (4) To wear an undergarment ("Kasha"); and (5) To wear a sword ("Kirpan").

The court further stated that it did not question "the good faith and religious intentions of Sikhs in general or of the defendant, . . . who is a Sikh by religion and a priest by profession, requiring . . . the strict observance of the five 'K's.' But the rational connection between the prohibited act and the public safety justifies the lack of a scienter requirement in the enforcement of [the city ordinance]. . . . Furthermore, granting an exemption in this particular case would place an intolerable burden on law enforcement officials where someone dressed in the religious and ceremonial garb of a Sikh, carrying a "Kirpan" in full view in a public place, required an official intrusion and searching inquiry on the part of the said official as to whether in fact said person was actually a 'Sikh' in custom, practice and religion."

The court proposed its own "solution to the problem" of balancing the interests of the state as reflected in the ordinance with the rights of the Sikhs to practice their religion – "A 'symbolic kirpan' encased in a solid protective element such as plastic or lucite [which] would remove it from the category of knife or weapon."

Notwithstanding the court's determination that it was reasonable not to require scienter as an element of the crime, and notwithstanding the court's finding that it would be unduly burdensome to expect law enforcement officials to attempt to discern whether an individual carrying a dagger is actually Sikh, the court ultimately dismissed the case. The court concluded that, although "there is no basis for dismissal as a matter of law" – "the continuance of this prosecution would not be in the furtherance of justice and that dismissal is required as a matter of judicial discretion."

Additional Points/Questions for Discussion:

(a) One leading commentator who favors formal recognition of the "cultural defense" has formulated a three-part "cultural defense test": (1) Is the individual a member of the ethnic group?: (2) Does the ethnic group in fact have such a tradition?; and (3) Was the individual influenced by the tradition when he or she acted? *See* Alison Renteln, *The Cultural Defense* at 207. However, the commentator would not permit the "cultural defense" where the custom or tradition at issue involves irreparable harm to another or violates fundamental human rights. *See id*. at 203, 213-14. Under such an analytical framework, would the Defendant in this case be permitted to assert a "cultural defense"?

(b) Notwithstanding the ordinance, should the Defendant be allowed to continue to wear his kirpan in public? Why or why not?

(2) New York v. Chen, No. 87-7774 (Kings Co. Super. Ct. Dec. 2, 1988); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 34, 47, 232; Dick Polman, "When Is Cultural Difference A Legal Defense? Immigrants' Native Traditions Clash With U.S. Law," *Seattle Times* A1 (July 12, 1989); Richard Willing, "Courts Asked To Consider Culture," *USA Today* 3A (May 25, 2004); Nina Schuyler, "When in Rome," *In These Times* 27 (Feb. 17-March 2, 1997); Doriane Lambelet Coleman, "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma," 96 *Columbia Law Review* 1093, 1093, 1095-96, 1102-03, 1108-09, 1124, 1138, 1141, 1146-47, 1159 (1996).

Several weeks after his wife admitted to him that she had been unfaithful, a Chinese man in his late 40's used a claw hammer to bludgeon his wife in the head eight times, then left her to die in their bed in their Brooklyn apartment. Afterward, the man did not flee the scene, or even change his bloody shirt. When his teenage son arrived home, the man met the boy at the door and told him, "I killed your mother."

The Defendant was charged with second degree murder. In a bench trial, the Defendant mounted (in essence) a "cultural defense." The defense emphasized that the Defendant had left China for the U.S. only two years before the killing. The defense's cultural expert witness testified that, in traditional Chinese culture, a woman's adultery would be conceived as an "enormous stain" on her husband, his ancestors, and his children; that the man would find it difficult to remarry if he divorced his wife because of her adultery; and that violence against adulterous spouses was quite common in China. The defense further argued that, as a recent immigrant, the Defendant lacked

ties to a close-knit community of fellow Chinese men who – if the events had transpired in China – might have prevented the Defendant from acting on his impulses. On cross-examination, however, the defense's cultural expert could not identify even a single case where a woman in China had been killed by her husband for being unfaithful.

The prosecution did not present a cultural expert.

Question for Audience:

How would you find?

1. Definitely guilty of second degree murder
2. Probably guilty of second degree murder
3. Probably guilty of first degree manslaughter
4. Definitely guilty of first degree manslaughter

Result in the Case:

The judge actually found the Defendant guilty of *second degree* manslaughter. The judge ruled: "Were this crime committed by the defendant as someone who was born and raised in America, . . . the Court would have been constrained to find the defendant guilty of *manslaughter in the first degree.* . . . But based on the cultural aspects, the effect of the wife's behavior on someone who is essentially born in China, raised in China, and took all of his Chinese culture with him except the community which would moderate his behavior, the Court . . . based on the peculiar facts and circumstances of this case . . . and the expert testimony . . . finds the defendant guilty of *manslaughter in the second degree*." (Emphases added.)

The court then invoked culture again to reduce the Defendant's sentence from prison to five years' probation. The judge justified the grant of probation by speculating that incarceration of the Defendant might harm the marriage prospects of his daughters. Moreover, in imposing the sentence, the judge sought a promise from the Defendant "on his honor and the honor of his family" to abide by the terms and conditions of probation; he reminded the Defendant that failure to comply could result in not only a jail term, but also "a total loss of face."

The Asian community was up in arms, criticizing prosecutors for not challenging the defense's expert testimony; and feminists were outraged. The prosecutors apparently were caught "off guard" by the judge's decision, and later said they were shocked that the judge was swayed by the defense expert's testimony, which the prosecutors found incredible.

Additional Points/Questions for Discussion:

(a) At least at first blush, this case seems to be a classic illustration of what one scholar has termed the "liberals' dilemma" that confronts those who tend to support recognition of a "cultural defense" – that is, in striving to support multi-culturalism and be inclusive and respectful of other cultures, one tends to diminish the protection that the law affords to the most vulnerable and powerless (*i.e.*, women and/or children). *See* Doriane Lambelet

Coleman, "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma," 96 *Columbia Law Review* 1093, 1094-97 (June 1996). In this case, the judge was apparently seeking to be culturally-sensitive, but ended up being insensitive to domestic violence. It appears that the judge was faced with a "false choice," however. In fact, there was no evidence that men in China ever murder their adulterous wives.

(b) Courts across the country have underscored that competent defense counsel are obligated to consider the cultures of their immigrant clients in appropriate cases. As the U.S. Court of Appeals for the Ninth Circuit put it: "Competent counsel undertaking to represent defendants with unique cultural backgrounds have an obligation at least to consider the effect of that background on their clients' conduct." Siripongs v. Calderon, 35 F.3d 1308, 1315 (9th Cir. 1994) (*citing* Mak v. Blodgett, 970 F.2d 614, 617-19 (9th Cir. 1992)). Defense counsel in Chen was perhaps a little overzealous.

(c) This case illustrates the challenge of differentiating between valid, reliable cultural testimony and testimony that is not valid or is unreliable. *See*, *e.g.*, Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 193, 198, 206-07, 316-17 (explaining that "ascertainment of the validity of the cultural claim for both the group and the individual remains a major problem"); Nina Schuyler, "When in Rome," *In These Times* 27 (Feb. 17-March 2, 1997) (explaining that "a foreign country's custom or practice is not always uniform or clear-cut"). This challenge is one of the practical objections raised by critics of the "cultural defense" – that is, that the "cultural defense" is susceptible to abuse/manipulation, and that judges (and lawyers, and juries) may have difficulty determining the validity of "cultural evidence."

(d) Perhaps the most oft-cited example of the use of fraudulent "cultural evidence" is a theft case in which two Native American boys argued that they should be sentenced in accordance with tribal custom, rather than state law. An "expert" was permitted to testify that, under tribal custom, the boys would be exiled to a deserted island for one year. The judge concurred, and placed the boys in the custody of the "expert" to carry out the sentence. Both the "expert" and his claims about tribal custom were later exposed as frauds. True experts in the tribe's customs surfaced only after the two boys, and the "expert," had disappeared. *See* Timothy Egan, "Indian Boys' Exile Turns Out to Be Hoax," *New York Times* A12 (Aug. 31, 1994) (*cited in* Doriane Lambelet Coleman, "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma," 96 *Columbia Law Review* 1093, 1103 n.44 (June 1996)); *see also* Alison Renteln, "The Use and Abuse of the Cultural Defense," 20 *Canadian Journal of Law and Society* 47, 56-59 (2005) (discussing high profile case of INS fraud, where woman sought asylum allegedly to avoid forcible female circumcision (female genital mutilation, or "FGM"), but was ultimately exposed as imposter and was found to have made multiple false claims about culture in her native Ghana); Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 241 n.25 (same). Is it likely that there will be many cases of fake "cultural experts" attempting to perpetrate outright fraud on courts?

(e) Even if the judge/jury are not likely to be faced with truly fraudulent "cultural evidence" (*i.e.*, even if "cultural evidence" is not intentionally fabricated or "trumped up"), the

judge/jury may nevertheless be confronted with a "battle of the [cultural] experts." On the other hand, judges/juries are often faced with "battles of the experts" in other fields, and there is ample law emphasizing the role of the judge as the "gatekeeper" on the reliability of expert testimony. Is there any reason that "battles of *cultural* experts" would pose any different (or much more difficult) challenges for judges/juries than "battles" of other types of expert testimony? *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 207.

(f) Another objection frequently raised by critics of the "cultural defense" is that it would have the effect of encouraging negative stereotyping of other cultures. Is this a legitimate objection? *See*, *e.g.*, Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 193, 197-98 (noting that some stereotypes "at least contain a kernel of truth," and that "members of groups do share common characteristics, and the desire to obliterate prejudice and hatred [by avoiding stereotyping] should not lead to the unfair treatment of individuals [by preventing them from invoking the 'cultural defense' to explain their actions]"). Do you think that the Chen case might have led some members of the public to unfairly stereotype China and its culture as tolerant of extreme domestic violence?

(g) One leading commentator has formulated a three-part "cultural defense test": (1) Is the individual a member of the ethnic group? (2) Does the ethnic group in fact have such a tradition? and (3) Was the individual influenced by the tradition when he or she acted? *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 207. She would not permit the "cultural defense" where the custom or tradition at issue involves irreparable harm to another or violates fundamental human rights. *See id*. at 203, 213-14. Under this framework, the "cultural defense" would not be permitted because it would fail step (2); in other words, there is no custom in China of men killing their adulterous wives. But, even more fundamentally, the "cultural defense" would not be allowed under this framework because – even if such a custom did exist – it resulted in "irreparable harm to another."

(3) Omaha "Coining" Incident – *See* Joseph Morton, "Second Coining Case is Dropped; Asian Dad Hopes Case Helps Others," *Omaha World-Herald* 1B (May 14, 2002); Alison Dundes Renteln, "Making Room for Culture in the Court," 49 *Judges' Journal* 7, 10 (American Bar Association Spring 2010).

Elementary school teachers in Omaha spotted "extensive" long red welts/bruises on the backs and chests of two Vietnamese children, ages 8 and 7. Suspecting child abuse, the school called police. When the children were questioned, they explained that their parents had treated them for the flu by massaging them with "Tiger Balm" using the edge of a coin. At least one of the children also indicated that the welts/bruises were painful. The children were removed from their family home, together with their four younger siblings (ages 4, 23 months, 14 months, and 4 months), and placed in foster homes. Police cited the mother on suspicion of "misdemeanor child abuse," which carries possible penalties of up one year in jail and a $1000 fine. The prosecutor told the media that criminal child neglect charges might be filed against the mother even if she did not intend to harm her children.

Question for Audience:

How would you find on the charge of "misdemeanor child abuse"?

1. Definitely guilty
2. Probably guilty
3. Probably not guilty
4. Definitely not guilty

Result in the Case:

The immigrant community took to the streets of Omaha, demonstrating against school and government authorities, protesting the removal of the children from their home. School officials, police, child welfare authorities, and prosecutors vigorously defended their actions, insisting that they were adhering to the legally-mandated protocol for handling cases of potential child abuse. Four days after the children were removed from their parents, the children were returned to their family home, based on prosecutors' consultations with social services caseworkers, medical experts, and guardians *ad litem*, but only on condition that the parents agree not to use "coining" on their children until a final decision was reached in the case, and on condition that the parents consent to unannounced home visits by child welfare authorities. Moreover, the state retained legal custodial rights for a total of about 10 days, and prosecutors publicly weighed the possibility of filing more serious child neglect charges against the parents. Eventually, the charges were dismissed. At the hearing, the children's father asked whether the parents could continue to use "coining" on the children. The judge told the father to discuss the matter with his lawyer. The lawyer, in turn, advised the father that he could continue the practice. Within a couple of months, the family had moved back to Lincoln, Nebraska, which has a larger, more organized Vietnamese community, and where public officials were already very familiar with familiar with Vietnamese customs and traditions such as "coining."

At the exact same time the elementary school teachers called police about the Vietnamese children, they also reported the same type of welts/bruising on two young Hmong students at the same school. The two Hmong children (ages 8 and 6) were also removed from their family home. Although their two siblings, ages 4 and 2, did not have welts/bruising, they too were removed from the family home because authorities deemed them "at risk for similar injuries." Like the mother of the Vietnamese children, the 23-year-old mother of the Hmong children was cited on suspicion of "misdemeanor child abuse," which carries possible penalties of up to one year in jail and a $1000 fine. The two families' cases proceeded through the juvenile courts and the criminal justice system largely in parallel.

See generally Tom Shaw, Joe Dejka, and Karyn Spencer, "Children's Safety or Culture Clash? Parents: Bruises Part of Remedy," *Omaha World-Herald* 1A (May 2, 2002); Joe Dejka, "Asian Couples Work to Get Children Back," *Omaha World-Herald* 1B (May 3, 2002); Erin Grace and Joseph Morton, "Parents Take Plea to Streets; Police Defend the Removal of Two Families' Children As the Asian Community Protests Authorities' Investigation of Possible Child Abuse," *Omaha World-Herald* 1A (May 3, 2002); Jeremy Olson, "Asian Remedy Raises Few Alarms

Elsewhere; People in Cities With Closer Ties to Hmong Culture Say the Issue No Longer Is A Concern," *Omaha World-Herald* 1A (May 3, 2002); Joseph Morton and Erin Grace, "Children Back With Parents," *Omaha World-Herald* 1B (May 4, 2002); Cindy Gonzalez and Michael O'Connor, "Families Reunited, But Issue Lingers; Dialogue Key in Blending Cultures; Balancing Immigrant Traditions with Local Societal Standards Is Difficult for Newcomers and Agencies Alike," *Omaha World-Herald* 1A (May 5, 2002); Joseph Morton, "Vietnamese Family's 'Coining' Case Closed," *Omaha World-Herald* 1A (May 10, 2002); Joseph Morton, "Second Coining Case is Dropped; Asian Dad Hopes Case Helps Others," *Omaha World-Herald* 1B (May 14, 2002); Chris Burbach, "Hmong Use Fourth to Reflect on Ordeal," *Omaha World-Herald* 1A (July 5, 2002).

Additional Points/Questions for Discussion:

(a) "Coining" ("*cao gio*," or "scratch the wind") – practiced among Southeast Asians, particularly the Vietnamese – involves massaging the body (usually the back, neck, chest, or head) with warm ointment or oil, then rubbing it with the serrated edge of a coin or with a spoon. The practice leaves long red welts/bruises on the skin. Practitioners believe that the procedure enhances circulation and speeds healing by ridding the body of "bad winds" that cause colds, flu, and headaches. *See*, *e.g.*, Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 57, 243; Jeremy Olson, "Asian Remedy Raises Few Alarms Elsewhere; People in Cities with Closer Ties to Hmong Culture Say the Issue No Longer Is A Concern," *Omaha World-Herald* 1a (May 3, 2002); Anne Fadiman, *The Spirit Catches You and You Fall Down – A Hmong Child*, *Her American Doctors*, *and The Collision of Two Cultures* (Farrar, Straus, and Giroux 1998) at 64-65. The therapeutic value of "coining" is disputed. *See* Jeremy Olson, "Asian Remedy Raises Few Alarms Elsewhere; People in Cities with Closer Ties to Hmong Culture Say the Issue No Longer Is A Concern," *Omaha World-Herald* 1A (May 3, 2002) (noting that "[m]any doctors believe coining is legitimate and have used it"). It is worth noting, however, that not so very long ago the medical establishment viewed acupuncture as virtual "voodoo" – and now acupuncture is so widely accepted in the U.S. that many insurance plans cover it.

(b) Although – after the process was explained to them – the parents acknowledged the importance of ensuring that children are not subject to abuse and the good intentions of the authorities in the case, the parents and their counsel criticized the speed of the investigative process, separating the children from their parents for much longer than necessary.

(c) Vietnamese and Hmong families fled to the U.S. as refugees, to escape communism or some other repressive regime. The parents' counsel stated that the families' trust in the U.S. government had now been betrayed.

(d) Some commentators assert that, relative to other immigrants, refugees have a more compelling right to assert a "cultural defense," because refugees were essentially forced to leave their countries. Do you agree that refugees' status makes a difference?

(e) The immigrant community in Omaha, as well as public officials in Lincoln, emphasized the tremendous trauma that both the children and the parents suffered as a result of the children's removal from their family homes. As noted above, the Vietnamese family left Omaha, and returned to Lincoln. Moreover, the Hmong family felt compelled to move their children to a different, more diverse school (which was also traumatic for the children). And the children continued to worry that their parents were going to be taken to jail, and were frightened of police.

(f) The shame and trauma suffered by innocent immigrant parents may be even greater than that suffered by innocent native-born U.S. residents who are accused of child abuse, because – in immigrants' home countries – the relationship between parents and children is often sacrosanct and not subject to government intervention. *See*, *e.g.*, Anne Fadiman, *The Spirit Catches You and You Fall Down – A Hmong Child*, *Her American Doctors*, *and The Collision of Two Cultures* (Farrar, Straus, and Giroux 1998) at 83 (quoting Hmong woman who explained that "[i]n Laos, the parent[s] have one hundred percent responsibility over the child. How can you say you can take it away unless it is orphan?").

(g) Other "Coining" Cases – In one tragic case, a Vietnamese immigrant took his three-year-old son, who was suffering from the flu, to the hospital. The child died, and – because of marks on the child's body caused by coining – the father was jailed on charges of child abuse, and later committed suicide. *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 57-58, 243; Tom Shaw, Joe Dejka, and Karyn Spencer, "Children's Safety or Culture Clash? Parents: Bruises Part of Remedy," *Omaha World-Herald* 1A (May 2, 2002) (*citing* an article in Western Journal of Medicine (March 1985)); *see also* Anne Fadiman, *The Spirit Catches You and You Fall Down – A Hmong Child*, *Her American Doctors*, *and The Collision of Two Cultures* (Farrar, Straus, and Giroux 1998) at 65 (noting that physician at Merced hospital which treated large Hmong community heard a story, which Fadiman characterizes as "probably apocryphal," about "a Hmong father in Fresno who was sent to jail after black marks [due to use of 'coining'] were discovered on his child's body by an elementary school teacher. The father hanged himself in his cell."); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 58, 243 (*citing* case where "Vietnamese family had to endure a trial for using coining 'only to be vindicated by the expert testimony of a well-read physician'"); Myrna Oliver, "Cultural Defense – A Legal Tactic," *Los Angeles Times* 1 (July 15, 1988) (reporting that "[a]t Carson High School near Los Angeles, a Vietnamese family avoided child abuse charges after a friend explained that a boy's wounds were the result of cao gio, or 'coining'"); Miles Corwin, "Cultural Sensitivity on The Beat," *Los Angeles Times* 1 (Jan. 10, 2000) (discussing case where physicians examining young boy's bruised chest and back summoned police to San Gabriel Valley hospital; police handcuffed parents and called social worker to pick up child, but – because Monterey Park Police Department confirmed parents' account of "coining" – arrest was called off and young boy was returned to parents); *id*. (quoting police captain who recalled his first exposure to custom of "coining," as a young patrol sergeant called to a hospital in early 1980s, explaining that he "was planning to take the parents to jail for felony child endangering" until a Chinese detective arrived at hospital and explained "coining" to him).

(h) The Hmong father in the Omaha case presented here told the media that his family would continue to use "coining," but probably would not rub as hard, and – if the procedure left marks on the children – the parents would accompany the children to school to explain the marks to school personnel.

(i) Public officials in Lincoln, Nebraska stated that – if the Omaha incident had occurred there – the children never would have been removed from their family homes. Since the arrival of a large Vietnamese population in the 1990s, law enforcement officers, teachers, and health care professionals in Lincoln have been trained to recognize the marks that "coining" leaves on the skin and to differentiate them from child abuse. Although they continue to investigate all reports of suspected child abuse (including those which turn out to be "coining"), Lincoln police "could not recall making arrests or removing children from their homes in any recent cases" of "coining."

(j) "Misinterpretations of coining have occurred in many cities and [have] created distrust of American health care [in Southeast Asian immigrant communities], according to a March 2000 report in the Journal of the American Academy of Nurse Practitioners" authored by Ruth Davis. *See* Jeremy Olson, "Asian Remedy Raises Few Alarms Elsewhere; People in Cities with Closer Ties to Hmong Culture Say the Issue No Longer Is A Concern," *Omaha World-Herald* 1A (May 3, 2002).

(k) To help physicians and others distinguish between child abuse and the marks left by "coining," photos of "coining" welts/bruises are posted on many hospital websites, including Vanderbilt University Medical Center and the University of Washington. *See* photos at www.ethnomed.org (noting that "[p]atients report variable degrees of comfort with coining. Some describe it as soothing like a massage and others as painful"); *see also* Anne Fadiman, *The Spirit Catches You and You Fall Down – A Hmong Child*, *Her American Doctors*, *and The Collision of Two Cultures* (Farrar, Straus, and Giroux 1998) at 64-65 (discussing Hmong practice of "coining," and noting that – when a physician lecturing at a conference on Southeast Asian health care issues said that "coining" does not hurt – a young woman from Laos whispered "Yes it does").

(l) "Cupping" is another common folk remedy in a number of immigrant communities, including Mexican immigrants, and immigrants from Eastern Europe and the former Soviet Union, as well as Asia. In cupping, "[a] cup, in which a small amount of alcohol has been ignited, is inverted over the affected part [of the body]. As the heated air in the cup cools, suction is produced, leading to localized congestion of the skin." *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 57 (quotation omitted); *see also* photos at www.ethnomed.org (noting that child in photo "complained that this cupping, done by a grandmother, hurt, but that it did not hurt when done by mother"). Practitioners believe that "cupping" stimulates the flow of blood and lymph, promoting pain relief and healing in the treated area. The practice leaves reddish-purple circular bruises on the skin. *See* Anne Fadiman, *The Spirit Catches You and You Fall Down – A Hmong Child*, *Her American Doctors*, *and The Collision of Two Cultures* (Farrar, Straus,

and Giroux 1998) at 64 (discussing practice of "cupping"). Like "coining," "cupping" has resulted in numerous cases of immigrants being charged with child physical abuse.

(m) Actress Gwyneth Paltrow caused a stir at a 2004 New York film premiere when her low-cut dress revealed bruises caused by "cupping" on her back and chest.

(n) In virtually every state, teachers, school nurses, health care professionals, and similar personnel are obligated by law to report suspected child abuse. But there is also a growing trend to provide "cultural awareness" training to such personnel, so that (among other things) they can differentiate between child abuse and the marks left by folk medicine practices such as "coining." This poses a "big picture" question: Who should be authorized to exercise discretion in "cross-cultural" cases? For example, if the marks on a child's skin are recognized as the result of a folk remedy such as "coining" (rather than child physical abuse), should a teacher (or, for example, an emergency room physician) exercise discretion and not report the parents to police? Or, if the matter is reported, should the police exercise discretion and decline to take action? Or, if child welfare authorities are called, should they exercise discretion and leave the child with the parents? Should the prosecutor be notified, and then left to decide whether or not to file criminal charges (or, later, whether to plead the case out, rather than take it to trial)? Should the judge, as a matter of discretion, consider dismissing the case? Or should the judge allow the matter to go all the way to the jury, and leave the decision to them?

(o) In a growing number of jurisdictions with significant immigrant populations, "cultural awareness" training on local immigrant communities' customs and traditions is being offered to "gatekeepers" such as teachers, school nurses, and health care professionals, as well as law enforcement. *See*, *e.g.*, Cindy Gonzalez and Michael O'Connor, "Families Reunited, But Issue Lingers; Dialogue Key in Blending Cultures; Balancing Immigrant Traditions with Local Societal Standards Is Difficult for Newcomers and Agencies Alike," *Omaha World-Herald* 1A (May 5, 2002) (discussing training for school personnel, social workers, hospitals and other health care professionals, and law enforcement); Miles Corwin, "Cultural Sensitivity on The Beat," *Los Angeles Times* 1 (Jan. 10, 2000) (discussing various cultural competency training programs for law enforcement officers in Southern California); *see generally* Cecily Baskir, "Fostering Cultural Competence in Justice System 'Gatekeepers,'" *Judicature* Magazine (March-April 2009) (surveying programs throughout the U.S.).

(p) In many cities, programs are being developed to help orient immigrants to U.S. customs and laws. *See*, *e.g.*, Cindy Gonzalez and Michael O'Connor, "Families Reunited, But Issue Lingers; Dialogue Key in Blending Cultures; Balancing Immigrant Traditions with Local Societal Standards Is Difficult for Newcomers and Agencies Alike," *Omaha World-Herald* 1A (May 5, 2002) (noting that "the Islamic Center, Latina Center and Heartland Refugee Resettlement [in Omaha] . . . offer programs to make immigrants aware of the American way," and that "Heartland Refugee Resettlement provides new refugees a three-month cultural orientation and a three-month monitoring period"; also referring to efforts of Southern Sudan Community Association "to spread the word about child neglect, spousal abuse and other concepts" to the Sudanese immigrant community);

see generally Cecily Baskir, "Fostering Cultural Competence in Justice System 'Gatekeepers,'" *Judicature* Magazine (March-April 2009) (highlighting various immigrant orientation programs throughout the U.S.). *But see* Rick Montgomery, "Iraqi Grooms Charged With Raping Brides; Nebraska Case Spurs Argument Over Muslim Mores In the U.S.," *Kansas City Star* A1 (Dec. 15, 1996) (quoting director of one immigrant orientation program, who explained that "[a]s thorough as we try to be, you cannot teach them everything they need to know. They learn most of it from the people within their culture who are already here.").

(q) For a summary of other folk medicine practices which may be misinterpreted as child abuse, *see* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 243 n.41; *see also* Associated Press, "Folk Remedies Common Cause of Lead Poisoning; Traditional Medicines Sicken Thousands of Children Each Year, Officials Say" (Jan. 22, 2008).

(r) Other Similar Cases – In re Jertrude O, 466 A.2d 885 (Md. Ct. Spec. App. 1983), *discussed in* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 58, 243 (dependency (child welfare) proceeding concerning Central African Republic immigrant parents' child-rearing practices, including the parents' use of traditional folk remedy of "cupping" on their children).

(4) Ohio v. Ramirez, 732 N.E.2d 1065 (Ohio Ct. App. 1999); s*ee also* L. Taylor, "Reversal Points Up Pitfalls in Bad Translation; New Trial Starts After Judge Faults Interpreting," *Lexington Herald-Leader* A1 (April 9, 2002).

The Defendant – a 20-year-old male who had lived his entire life in Mexico until the events at issue in this case – could not speak, read, or understand a word of English. When the Defendant and some of his 11 housemates were "partying" one night, the Defendant passed out and was carried upstairs to his bed by his housemates. At some point during the night, a male intruder entered the house. One of the Defendant's housemates physically ejected the intruder, who appeared to be on drugs. But, once the intruder was on the driveway, the Defendant shot him in the chest. The intruder collapsed on the lawn of a nearby house, and later died.

When police investigating the shooting came to the Defendant's house, one of the Defendant's housemates identified the Defendant as the shooter. At the police station, the Defendant was interviewed by a detective, assisted by a woman who served as an interpreter. The woman was employed as an administrative assistant by the local Chamber of Commerce, and had been used by the police as a Spanish-English interpreter on five or six prior occasions. The woman's knowledge of Spanish was limited to less than two years of college Spanish, and living in Mexico for approximately six months at some unspecified time in her life. (One news report stated that the woman's time in Mexico was limited to "spring break" one year.) Moreover, the woman had no familiarity with legal terminology. The detective gave the Miranda warnings in English, and the woman serving as interpreter repeated them to the Defendant in Spanish. The Defendant then gave oral and written statements admitting that he had fired the gun. (At the time,

the Defendant did not yet know that the victim had died.) The entire interview was recorded on audio tape. The Defendant was subsequently indicted for, and convicted of, murder.

The Defendant appealed his conviction on various grounds, asserting (among other things) that he had not made a knowing, voluntary, and intelligent waiver of his Miranda rights, and that the trial court therefore erred in refusing to suppress his oral and written confessions. For example, "You have the right to the advice of an attorney" had been interpreted as "You have a right-hand turn to give a visa to a lawyer."

Question for Audience:

Would you affirm the Defendant's murder conviction, or overturn it?

1. Definitely affirm
2. Probably affirm
3. Probably reverse
4. Definitely reverse

Result in the Case:

The appellate court reversed the conviction, and remanded the case to the trial court. Competing expert witnesses gave different versions of the Miranda warnings given in Spanish by the woman who served as an interpreter when the Defendant was interviewed by and confessed to police. However, the appellate court concluded that – even accepting *arguendo* the interpretation given by the prosecution's expert witness – the prosecution still could not prevail. Among other things, the appellate court criticized the woman who served as interpreter for summarizing in English the Defendant's statements, rather than giving a *verbatim* interpretation of what he said. The appellate court stated: "[A]n interpreter should not be permitted to give his own conclusions with respect to the answers of the witness but, instead, should give a literal translation of the witness' words."

Additional Points/Questions for Discussion:

(a) Interpretation is a very serious issue, and one that should concern everyone in the justice system. *See*, *e.g.*, David Bellos, "I, Translator," New York Times WK 11 (March 21, 2010) (emphasizing that "[i]n our courts and hospitals . . . underpaid and overworked [interpreters] make muddles out of millions of vital interactions"); Patrick Strawbridge and Angie Brunkow, "Interpreters in Great Demand: Health, Safety, Legal Need Is High," *Omaha World-Herald* 1 Metro (Oct. 9, 2000) (noting that shortage of police officers who can speak Spanish is now "one of the [Council Bluffs police] department's biggest concerns," that arrival in Omaha of large numbers of immigrants "has created a high demand for interpreters, especially in fields related to health, safety and legal matters," and that demand for interpreters "includes languages as diverse as Nuer, which is spoken by area Sudanese; Hmong, which is used by Laotian immigrants; and American Sign Language"). You may never have a "cultural defense" case, or a case involving

"cultural evidence." But it is highly likely that you will have a need for an interpreter, or be involved in a case where another party or witness needs an interpreter.

(b) Even if a person is completely bilingual (with a flawless command of both the "source language" and the "target language"), that person cannot necessarily serve as an adequate interpreter of even a simple conversation. Interpretation is a difficult, very specialized, and highly technical skill. Moreover, even a highly skilled interpreter is not capable of adequately interpreting in a legal setting without specialized training in legal terminology and procedure. *See*, *e.g.*, Patrick Strawbridge and Angie Brunkow, "Interpreters in Great Demand: Health, Safety, Legal Need Is High," *Omaha World-Herald* 1 Metro (Oct. 9, 2000) (explaining that "state and federal court systems have grappled with . . . quality control [in interpretation] to make sure no one's rights are violated by mistakes in translation"; quoting interpreter commenting on Nebraska's establishment of standards for court interpreters as saying, "The main problem we had in the past is anybody who looked like they could speak Spanish or looked like they could speak Sudanese would be appointed. You might have a 10-year-old son translating in a family abuse case."; emphasizing that court interpreters "must know that they cannot add comments or give [legal] advice," and that they "must translate word-for-word what is happening in the courtroom.").

(c) *See* P. Aronson, "Subject to Interpretation: Many States Face A Shortage of Interpreters, *National Law Journal* 1 (March 22, 2004) (noting that police "often . . . use Spanish-speaking officers to interpret during an interrogation – a conflict of interest that can lead to tainted confessions").

(5) <u>California v. Moua</u>, No. 315972-0 (Fresno Co. Super. Ct. Feb. 7, 1985); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 126-28, 185, 282; Myrna Oliver, "Cultural Defense – A Legal Tactic," *Los Angeles Times* 1 (July 15, 1988); Doriane Lambelet Coleman, "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma," 96 *Columbia Law Review* 1093, 1093, 1106, 1123, 1125, 11137, 1150, 1155, 1159 (1996).

With the help of two friends, a 21-year-old Hmong man took an 18-year-old Hmong woman from the Fresno City College campus, throwing her into a station wagon and taking her to his home as part of a tradition Hmong ritual, "marriage by capture" ("*zij poj nam*"). Both the man and the woman were born and raised in Laos, and had immigrated to the United States in their teens. Friends of the woman who observed the apparent abduction immediately contacted police. When the police showed up at the home of the man's family several days later, the woman identified the man as her husband and declined to leave with the police. Shortly thereafter, however, the woman decided to file kidnapping and rape charges against the man.

The man defended his behavior, explaining that – under the Hmong tradition of "marriage by capture" – the Hmong man is supposed to abduct the Hmong woman. As part of the ritual, the woman is supposed to feign vigorous resistance and protest, both physically and verbally, to signal that she is virtuous and chaste. The ritual requires that the man, in turn, overcome the

woman's "resistance," to demonstrate that he is virile and strong, and that he will be able to protect and provide for the woman during their life together. Thus, under the Hmong "marriage by capture" tradition, a woman's verbal and physical resistance is simply part of the ritual. By protesting and resisting, the woman is playing her part in the traditional Hmong marriage ritual; and – by overcoming the woman and "forcing" himself on her – the man is similarly playing out his culturally-assigned role in the ritual marriage.

The defense contended that – under the circumstances – the man did not understand that the woman was truly resisting, and that he did not understand that she actually did not consent. According to the defense, the man believed that the woman was just playing her expected role in the traditional Hmong ritual, "marriage by capture." During pretrial proceedings, the defense filed a 22-page pamphlet on Hmong marriage rituals, which included a brief description of "marriage by capture." The prosecution proffered no evidence to rebut the claims made in the pamphlet, or to challenge the Defendant's claims that he honestly did not know that the woman did not consent to his actions, and that he sincerely believed that the woman was simply playing out her role in the Hmong "marriage by capture" ritual.

Question for Audience:

Based on what you have heard so far, how would you find on the charges of kidnapping and rape?

1. Definitely guilty
2. Probably guilty
3. Probably not guilty
4. Definitely not guilty

Result in the Case:

The case did not go to trial. After the judge ruled that the Defendant could present evidence of the "marriage by capture" ritual at trial, the prosecutor decided *not* to pursue kidnapping and rape charges. The prosecutor was disinclined to take the case to trial, because he would have had difficulty explaining to a jury why the woman did not leave with police when police showed up at the man's door. In addition, the woman's testimony included some other inconsistencies which would have undermined her credibility. The public defender was also reluctant to go to trial, because he was concerned about the man's actions in ignoring the woman's protests being judged against the standard of a "reasonable [U.S.] man." The man therefore pled guilty to false imprisonment, and was sentenced by the judge to 90 days [some sources say 120 days] in jail and fined $1000 ($900 of which was paid to the woman as "reparations").

In a later statement to the media, the judge said, "In a special intent crime like murder, I think the cultural defense could go all the way to acquittal, although as a practical matter, I do not think that would happen." The Defendant had faced eight to 10 years in prison on the kidnapping and rape charges. According to the judge, the plea bargain gave him "leeway to get into all these

cultural issues and to try to tailor a sentence that would fulfill both his needs and the Hmong needs."

Additional Points/Questions for Discussion:

(a) The woman in this case was quoted in the newspapers voicing dismay at the Defendant's sentence. The woman stated that she came to the U.S. to escape cultural practices such as "marriage by capture," and expressed incredulity that the U.S. justice system would allow the Defendant to rely on such practices as a defense to charges such as those at issue here.

(b) California, Wisconsin, Minnesota, and Colorado all have sizeable Hmong populations. "There have been many reports of marriage by capture . . . among the Hmong communities" in all four states. *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 126.

(c) At least at first blush, the Hmong defendant in a "marriage by capture" case seems a lot like the typical so-called "date rape" defendant, who contends that he did not understand that the woman's "no" actually *meant* "no." Should the Hmong man have been permitted to introduce "cultural evidence" to explain the context for his actions? Why, or why not? To the extent that you would permit a "cultural defense," why should immigrant defendants be able to assert a defense that native-born U.S. defendants cannot invoke? Some commentators argue that allowing a "cultural defense" is a violation of equal protection. Does the fact that sane defendants cannot invoke the insanity defense render the insanity defense a violation of equal protection?

(d) Critics of the "cultural defense" argue that it is potentially subject to abuse. Concerns are expressed that "some [defendants] will pretend to be members of ethnic groups, others will falsely claim that practices are traditional, and even if some can prove they belong to a particular group and the custom is traditional, they may lie, saying that their actions were motivated by cultural factors when they were not." *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 194; *see also id*. at 198, 206-07. Thus, for example, critics of the "cultural defense" are concerned that a Hmong man who "date rapes" a woman could claim that he was simply practicing the traditional Hmong custom of "marriage by capture." The third step of the three-part test for the "cultural defense" that one commentator has proposed is addressed to this Hmong "date rape" scenario. The test asks: (1) Is the defendant a member of the ethnic group? (2) Does the group have such a tradition? (3) Was the defendant influenced by the tradition when he or she acted? *See id*. at 207. What do you think about the potential for abuse of the "cultural defense"? To what extent would application of the three-part test minimize any such abuse?

(e) The ritual of "marriage by capture" is practiced in some form in a number of places around the world. "When the men are prosecuted in American courts, they are charged with statutory rape, sexual assault, kidnapping, or false imprisonment." *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 126.

(f) Other Similar Cases – *See*, *e.g.*, Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 282 n.53 (citing California v. Chong Pao Kue (1989)); Dick Polman, "When Is Cultural Difference A Legal Defense? Immigrants' Native Traditions Clash With U.S. Law," *Seattle Times* A1 (July 12, 1989) (summarizing 1987 St. Paul, Minnesota case in which 23-year-old Hmong man who was accused of rape of 11-year-old Hmong girl, but claimed he was practicing traditional "marriage by capture," was permitted to plead guilty to sexual intercourse with a child under age of 12, and fined $1000 with no jail time); Myrna Oliver, "Cultural Defense – A Legal Tactic," *Los Angeles Times* 1 (July 15, 1988) (same); Nina Schuyler, "When in Rome," *In These Times* 27 (Feb. 17-March 2, 1997) (same); *see generally* Doriane Lambelet Coleman, "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma," 96 *Columbia Law Review* 1093, 1102, 1105-07, 1125 (1996) (discussing "marriage by capture" cases).

(6) Sorensen v. City of New York, 2003 WL 169775 (S.D.N.Y. Jan. 23, 2003), *following further proceedings*, 413 F.3d 292 (2d Cir. 2005); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 245 n.56.

While inside a Manhattan restaurant, a Danish actress dining with the father of her 14-month old baby girl, left the little girl asleep in a baby stroller on the sidewalk just outside the restaurant. The woman intentionally sat next to a window, so that she could keep an eye on the stroller on the sidewalk outside the restaurant. After a waiter at the restaurant called police, the woman was arrested and charged with reckless endangerment of the child.

The woman protested that, in her home country, it was common practice to leave children in baby carriages on the sidewalk while the parents are inside. The woman stated that leaving young children in baby carriages on the sidewalk is very safe in Denmark, and that Danes believe that it is far preferable to leave their young ones outside (rather than bringing them into restaurants where they will be exposed to second-hand smoke). U.S. authorities were initially incredulous at the mother's assertions. But the European outcry made it clear that the woman was telling the truth about the practice in Denmark. Newspapers in both Europe and the U.S. ran photos of babies in strollers and baby carriages parked on sidewalks outside restaurants throughout Europe.

Question for Audience:

How would you find on the charge of reckless endangerment/child neglect?

1. Definitely guilty
2. Probably guilty
3. Probably not guilty
4. Definitely not guilty

Result in the Case:

This is actually a "trick question." The 14-month-old girl was placed in foster care for four days; and the Defendant was held in custody for almost 42 hours, before she was arraigned. But, in light of the international outcry (as well as the fact that the little girl was unharmed), the charges against the woman were soon dropped.

There is an interesting twist to the story: When the New York Police Department took the woman into custody, they failed to advise her of her right to seek assistance from Danish consular authorities (as required by the Vienna Convention on Consular Relations). After the child endangerment charges were dropped, the woman brought a "section 1983" civil rights action against the City of New York and several NYPD officers, asserting – *inter alia* – claims of false arrest, unconstitutional strip search, unlawful imprisonment, and violation of her Vienna Convention rights. Her civil suit dragged on for more than a decade in the federal courts. She lost on all counts.

Additional Points/Questions for Discussion:

(a) Anyone who is "of a certain age" will remember this case, which made national and international headlines for at least a month in 1997.

(b) Many cross-cultural cases involve cultural differences in child-rearing practices – the nature and extent of supervision, means of showing affection and comfort, punishment, nature of (or refusal of) medical treatment, and "coming of age" rituals and "courting"/dating/marriage – which may be viewed in U.S. society as "child neglect," "child physical abuse," or "child sexual abuse."

(c) This case involves criminal charges based on alleged "child neglect" by an immigrant parent. In most such cases, parallel "dependency" (child welfare) proceedings are commenced against the parents. However, the reverse is not true: The institution of "dependency" proceedings does not always result in parallel criminal proceedings.

(d) Some Danes were quoted in the newspaper saying that the practice of leaving babies in strollers outside restaurants is limited to rural areas. And one letter to the New York Times disputed the notion that the practice was a Danish norm. Thus, this case illustrates the challenge of distinguishing between valid and reliable "cultural evidence" and that which is not – a problem which goes to step (2) of the three-part "cultural defense test" that one leading commentator has proposed. *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 207 (setting forth three-part test: (1) Is the individual a member of the ethnic group? (2) Does the ethnic group in fact have such a tradition? and (3) Was the individual influenced by the tradition when he or she acted?). It can be very difficult to obtain reliable information on the existence of practices, their prevalence, and the level of their cultural acceptance in another country. *See id*. at 206-07, 316-17.

(e) One recent case which illustrates the continuing difference in perspectives on supervision of children, even among "Western" countries, is the case of Madeleine McCann, the nearly four-year-old British girl who disappeared from a beach resort in Portugal while her family was on vacation there in May 2007 and (as of June 2010) still has not been found. Many people in the U.S. were suspicious of the parents from the start, and skeptical of the parents' story that they had left their children sleeping in their hotel room while they dined a little more than 100 yards away at a nearby tapas bar, viewing such conduct as "child neglect" at best. Europeans – who tend to have a more relaxed attitude toward the supervision of children than Americans do – were generally less critical of the parents.

(f) Even within the U.S., there are significant differences in individuals' views as to the age at which a child can walk to school alone, or stay home alone without a babysitter, or babysit for a younger sibling. And attitudes in the U.S. have *evolved* over time – at least partly in response to perceptions about the overall "safety" of U.S. society, particularly for children. (It used to be acceptable to leave children alone in situations where it would likely now be viewed as "child neglect.")

(g) Other Similar Cases – extent of supervision of children as "child neglect": *See*, *e.g.*, In re Jertrude O, 466 A.2d 885 (Md. Ct. Spec. App. 1983), *discussed in* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 58, 243 (dependency (child welfare) proceeding concerning Central African Republic immigrant parents' child-rearing practices, including the extent of their supervision of their children; two-year-old child was left in care of seven-year-old child; practice common in their homeland – as a fact of basic economic necessity – was viewed as "child neglect" in the U.S.); Cindy Gonzalez and Michael O'Connor, *Omaha Herald-Tribune* 1A (May 5, 2002) (discussing case in which children of Sudan immigrant – ages 9, 6, and 2 – were removed from home and placed in protective custody after adult cousin who had been babysitting left them alone temporarily to take a phone call in a friend's apartment; children's father explained that, in Sudan, "it is not uncommon for a 9-year-old to watch younger siblings").

(h) Another Similar Case – criminal charges based on lack of medical treatment: *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 63-64, 246 (discussing case of Hmong parents who were charged with felony child endangerment because they refused to authorize surgery for their four-month-old boy who had cancer in both eyes; charges were dropped after parents consented to surgery).

(i) Additional Similar Cases – lack of medical treatment as "child neglect": *See*, *e.g.*, Anne Fadiman, *The Spirit Catches You and You Fall Down – A Hmong Child*, *Her American Doctors*, *and The Collision of Two Cultures* (Farrar, Straus, and Giroux 1998) at 58-59, 78-92 (three-year-old epileptic Hmong girl removed from her home by child welfare authorities when parents "refused to give her the medications at least in part because of cultural or religious reasons"); *see also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 61-72, 246-49 (discussing, *inter alia*, other cases where lack of medical treatment for children was treated as "child neglect" on the part of immigrant parents).

(7) Dumpson v. Daniel M., *reported in* New York Law Journal 17 (Oct. 16, 1974); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 55-56, 242.

The Respondent was a 34-year old Nigerian man, who had been living in the U.S. for six years at the time of the relevant events. After receiving nine letters from his seven-year-old son's teacher complaining about the boy's behavior in school, the Respondent requested a meeting with school authorities to discuss the matter. During the meeting, as the Assistant Principal was describing the boy's disruptive behavior, the Respondent stood up – without warning – and began to hit the boy repeatedly with his fists and his belt. When the boy fell to the floor, the Respondent kicked him. The Assistant Principal reported the incident to the police, and the Respondent was charged with excessive corporal punishment. In court, the Respondent testified that – in his culture – the punishment he meted out was both necessary and appropriate. He explained that, in Nigeria, relatively few children have the opportunity to go to school. So, if a child is lucky enough to have the opportunity to go to school, and then misbehaves, the child brings great shame on his family, and the child's parents have a duty to punish the child immediately, and in whatever manner they see fit.

On cross-examination, the Respondent testified that he was provoked not only by his son's classroom behavior, but also by his son's lack of respect for the Assistant Principal during the meeting. The Respondent explained that the boy showed disrespect for the Assistant Principal by "looking at [her] face while we were talking."

Question for Audience:

Would you order the removal of the boy from the home?

1. Definitely yes
2. Probably yes
3. Probably no
4. Definitely no

Result in the Case:

The court's opinion in this case is interesting, because it very explicitly recognizes a tension between its "obligation to apply the law equally to all men" and the "individual and cultural differences" between people in a multi-cultural society.

The court nevertheless wrote: "Any reasonable man knows that it is not in the best interests of a child for its parents to punish in the manner we have seen here. While we are sympathetic and understanding of the defendant's motives, we must conclude that motive is irrelevant when we are confronted with the type of punishment this seven-year-old boy has received."

Ultimately, the court ruled that – under the circumstances – it would be inappropriate to order that the boy be permanently removed from the home. Instead, the court ordered "rehabilitative counseling" for both the defendant and his family, to prevent future abuse.

Additional Points/Questions for Discussion:

(a) Although this is actually a "dependency" (child welfare) case, criminal charges are sometimes filed in parallel in such situations.

(b) Many cross-cultural cases involve cultural differences in child-rearing practices, which U.S. society may view as "child neglect," "child physical abuse," or "child sexual abuse." The issue of corporal punishment is highly divisive, and fertile ground for allegations of child abuse in a cross-cultural context. *See generally* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 54-57, 242-43 (discussing a number of corporal punishment cases).

(c) Commentators have observed that there appears to have been little effort in this case to determine the truth of the Respondent's statements about Nigerian customs concerning the discipline of children, and have noted that the literature suggests that practices in the

country may have changed in recent years. *See*, *e.g.*, Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 242 n.36, 317 n.52.

(d) This case illustrates the challenge of differentiating between valid, reliable cultural testimony and testimony that is not valid or is unreliable. *See*, *e.g.*, Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 206-07, 316-17 (explaining that "ascertainment of the validity of the cultural claim for both the group and the individual remains a major problem"). This challenge is one of the practical objections raised by critics of the "cultural defense."

(e) The Respondent in this case apparently did not explicitly claim that he did not know that the corporal punishment that he administered was not legal in this country. Is it reasonable to assume that he knew how U.S. parents discipline their children, much less that corporal punishment of the type that he administered was illegal? How much are immigrant parents likely to know about the customs and practices of private family life in "dominant culture" households in the U.S.? How exactly would immigrant parents learn about the specific, intimate details of day-to-day U.S. family life – matters such as the extent to which children are supervised, how affection is expressed, how children are soothed or comforted and how they are disciplined, whether children bathe or sleep together (or even with their parents), whether children see one another (or their parents) in the nude, and the nature and extent of the chores that children are expected to perform? Do you *really* know how your friends discipline their children? Because so much of family life is private and confined largely to the home, the customs of family life are particularly likely to give rise to cross-cultural cases, because immigrant parents often are not even aware of U.S. norms and mores.

(f) U.S. law embodies the old adages that "ignorance of the law is no excuse" and "all men are presumed to know the law." But, at least as to immigrants, should not this be a rebuttable presumption? And – if we are *not* going to allow immigrants to use "ignorance of the law" as an excuse – do not we have at least a *moral* obligation to educate them about the law? *See*, *e.g.*, Nina Schuyler, "When in Rome," *In These Times* 27 (Feb. 17-March 2, 1997) (quoting Associate Director of University of Chicago's Center for International Law School as arguing that "[r]ather than throwing people in jail, . . . the justice system should focus on educating refugees about the differences between their cultural practices and U.S. law"); Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 197 (opining that "[r]ather than forcing the assimilation of the few [immigrants] who end up in prison [for adhering to customs or traditions that run afoul of U.S. law], it might be more effective to wage a major 'educational' campaign").

(g) Corporal punishment is a superb example of how cultural norms and mores may evolve over time within a society. As late as the 1950s and 1960s (and, in some parts of the country and in some families, even later), many parents in the U.S. used paddles, belts, or switches (branches) cut from trees to discipline their children. With this practice so fresh in the history of the U.S., is it reasonable for U.S. authorities to label immigrant parents who discipline their children in the same fashion as "unfit parents" and remove their

children from their homes, or even convict them of criminal charges? Where does discipline end and physical abuse begin?

(h) Although corporal punishment of any type has generally fallen into disfavor in much of U.S. society in recent years, some believe that the pendulum has swung too far. There is a substantial body of research backing the theory "spare the rod, spoil the child." *Cf*. Po Bronson, "New Research: Why Never Spanking Might Be Worse For Kids Than Spanking Them" (Dec. 30, 2009) (NurtureShock blog, at blog.newsweek.com) (reporting on research indicating that teenagers who had been spanked at ages 2 to 6 were faring better on long term indicators of life success than teenagers who were never spanked). Moreover, data from extensive cross-ethnic and international research on spanking suggest that "if a culture views spanking as the normal consequence for bad behavior, kids are not damaged by its occasional use," largely because – in cultures or communities where spanking is common – parents tend to be less agitated when administering spankings. *Id*. *But see*, *e.g.*, Alice Park, "The Long-Term Effects of Spanking: A Multi-Year Study Shows Spanking Kids Makes Them More Aggressive Later On," *Time* 51 (May 3, 2010) (reporting on Tulane University research recently reported in *Pediatrics*).

(i) Other Similar Cases – *See* Myrna Oliver, "Cultural Defense – A Legal Tactic," *Los Angeles Times* 1 (July 15, 1988) (highlighting the case of "[a] Nigerian insurance salesman in Houston, accused of child abuse for hitting his misbehaving nephew and then putting pepper in the boy's abrasions, [who] argued that the practice was acceptable discipline in his native Nigeria" and received probation, as well as the case of "[a] Mexican woman in Los Angeles [who] was accused of child abuse and had her children taken away when she beat her 15-year-old son with a wooden spoon and bit him to punish him for taking money from her purse. She argued that what she did was acceptable discipline in Mexico," and "avoided serious penalties" and "ordered to get counseling"); Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 55-57, 242-43 (surveying additional cross-cultural cases involving corporal punishment).

(j) At the hearing in this case, the Respondent father stated that one of the things that provoked him to beat his son was that the boy was looking directly at the Assistant Principal, which the father interpreted as a blatant showing of disrespect for the Assistant Principal. Of course, to the boy – who was Americanized – it would have been disrespectful *not* to look directly at the Assistant Principal while she was speaking.

(k) Certain "folk remedies" (*e.g.*, "coining" and "cupping") may also give rise to allegations of child physical abuse. *See* Omaha "Coining" Incident case study (immediately below); *see also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 57-58, 243 (discussing folk remedy cases, including "coining" and "cupping" cases).

(8) <u>Maine v. Kargar</u>, 679 A.2d 81 (Me. 1996); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 59-61, 186, 203, 243-45.

The Defendant, a refugee from Afghanistan, arrived in the U.S. approximately three years before the events at issue. One summer day, the Defendant and his family were babysitting a young neighbor girl. While she was there, the young girl saw the Defendant kissing the penis of his 18-month-old son as he was getting the boy ready for bed. When her mother picked her up, the young girl told her mother what she had seen. The young girl's mother had previously seen a photo of the Defendant kissing his son's penis in the Defendant's family's photo album. The young girl's mother then called the police. The Defendant was arrested and charged with two counts of felony "gross sexual assault" – one count for the photo of the Defendant kissing the penis of his son (who was nine months old in the photo); the second count was for the kiss witnessed by the young neighbor girl.

At the time, the applicable state law defined "gross sexual assault" as "any sexual act with a minor (non-spouse) under the age of 14"; and "sexual act" was defined to include – among other things – "direct physical contact between the genitals of one and the mouth . . . of the other." Although the statute had originally included "sexual gratification" as an element of the crime, that requirement had been eliminated eight years before the Defendant's case, because the legislators could not envision even the *possibility* of "innocent" contact of an adult's mouth with a child's genitals.

At trial, the Defendant's lawyer presented the testimony of many Afghanis who were familiar with the Afghani practice of kissing a young son on all parts of his body, as well as statements from a university professor and the Director of the Afghan Information Bureau. The defense witnesses testified that conduct such as the Defendant's is "considered neither wrong nor sexual under Islamic law and that [the Defendant] did not know his action was illegal under Maine law." The Defendant's witnesses testified that (1) kissing a son's penis is common in Afghanistan; (2) that sometimes – rather than just kissing it – instead the penis is taken entirely into the mouth; and (3) that the act is done to show love for the child. Indeed, the Defendant explained that, in his culture, kissing a boy on his penis shows just how very much the boy is loved precisely *because* the penis is viewed as the least holy and least "pure" part of the body. Testimony further indicated that the practice is acceptable until the boy is three to five years old. All witnesses agreed that "there are no sexual feelings involved." And all witnesses testified that, under Islamic law, any *sexual* activity between an adult and a child subjects the adult to the death penalty.

The prosecution presented no witnesses to refute any of the defense testimony.

Question for Audience:

How would you find on the charge of gross sexual assault (child sexual abuse)?

1. Definitely guilty
2. Probably guilty
3. Probably not guilty
4. Definitely not guilty

Result in the Case:

The trial judge found the Defendant guilty – basically because the judge did not consider the Defendant's arguments to be a cognizable legal defense. At sentencing, however, the judge recognized that no sexual gratification was involved in the act, and that it had no harmful effect on the baby boy. The judge also recognized that the act occurred in the open, in front of the neighbor girl and in the presence of the Defendant's wife, and that a photo of the same act was openly displayed in the family photo album. In view of the circumstances, the judge suspended the Defendant's entire prison sentence.

But the conviction had other grave consequences, independent of any incarceration. Among other things, the Defendant would be required to register as a "sex offender." In addition, the conviction would make him subject to deportation from the U.S.

On appeal, the state Supreme Judicial Court reversed the conviction, and ordered that the charges against the Defendant be dismissed. Specifically, the Supreme Judicial Court found that "the [trial] court erred *as a matter of law* because it found culture, lack of harm, and [the Defendant's] innocent state of mind irrelevant to its *de minimis* analysis." The Supreme Judicial Court ruled that – although the Defendant's conduct fell within the *literal definition* of the crime of gross sexual assault – the conduct was an accepted cultural practice as a sign of love and affection for a child, the defendant's conduct was not sexual, and the child was not harmed.

In its opinion, the Supreme Judicial Court explained that its decision: " . . . does not nullify the gross sexual assault statute, nor does it reflect approval of [the Defendant's] conduct. The conduct remains criminal. [The Defendant] does not argue that he should now be permitted to practice that which is accepted in his culture. The issue is whether his past conduct – under all of the circumstances – justifies criminal convictions." The Supreme Judicial Court ordered that the charges against the Defendant be dismissed under the state's "*de minimis* statute," which authorizes dismissal of criminal prosecutions where, *inter alia*, a defendant's conduct "[d]id not actually cause or threaten the harm sought to be prevented by the law defining the crime or did so only to an extent too trivial to warrant the condemnation of conviction" or where there are extenuating circumstances such that the situation "cannot reasonably be regarded as envisaged by the Legislature in defining the crime."

Additional Points/Questions for Discussion:

(a) In this case, the trial court gave the Defendant a suspended sentence. The Defendant nevertheless appealed, because – notwithstanding the suspended sentence – the conviction alone would have required him to register as a "sex offender," and he would have been subject to deportation. To what extent (if at all) should these collateral consequences be considered by prosecutors? By judges?

(b) This case was a criminal prosecution. However, parallel child welfare proceedings were instituted, and the Defendant was separated from his family for several years while legal proceedings were ongoing. *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 245 n.53.

(c) The taboo is so fundamental in U.S. society that many (if not most) of those born and raised in the U.S. find the custom at issue in this case viscerally and thoroughly repulsive, and, indeed, are convinced to a virtual certainty that it must be harmful to the child. Are we really prepared to say that that much of the populations of various other countries were victims of sexual abuse when they were children? On the other hand, if such "touching" is not harmful to children, why is it illegal in the U.S.? Note that the appellate court in this case affirmatively found that "the child was not harmed" by the genital kissing. One renowned forensic psychiatrist has summed the situation up thusly: "It [the genital kissing] is not *illegal* because it's *harmful*; it's *harmful* because it's *illegal*." As this psychiatrist explains, some conduct (*e.g.*, penetration) would be painful to a very young child, and also psychologically harmful. However, even very young children understand the loving intent behind the sort of affectionate or comforting touching at issue in this case, and would not be harmed by the touching itself. The potential for harm lies in the cultural dissonance experienced by children raised in this country who have experienced such touching. The forensic psychiatrist explains that – while incarcerating a parent or removing the child from the home is unnecessary, and would itself harm the child – the child would benefit from some counseling to ensure that the child understands that he or she was not a victim of sexual abuse. *See also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 60-61 (opining that "[i]t is probably advisable to discourage touching that is deemed inappropriate in the United States because children who are at least partly Americanized will feel humiliated if they are touched in this manner," but emphasizing that "rather than incarcerating the [parent], it is preferable to inform him [or her] that the behavior is not allowed in the new country").

(d) Is the question of whether or not "touching" of this sort is harmful to very young children an appropriate question for case-by-case adjudication? In other words, if the overwhelming and credible anthropological evidence in a case is that the "touching" at issue is a traditional, commonly-accepted way of comforting/soothing or showing affection for children in a certain culture, is it necessary or appropriate for the court to order an evaluation of the child and make specific findings and determinations as to whether the child in a particular case was harmed by the "touching"? What should the court do in cases like this? Exact assurances from the parent that the "touching" will not continue, and dismiss the case? Order some kind of counseling (possibly at a later date, if the child is very young), to help the child understand that the "touching" was not abuse (notwithstanding the taboos of contemporary U.S. society)?

(e) In many states, sexual assault statutes require "sexual gratification" (or some form of sexual intent) as an element of the crime. This case is thus somewhat anomalous, in that the statute had been specifically revised to eliminate the requirement of "sexual gratification." However, immigrants who have engaged in the kind of "touching" at issue in this case have been convicted even in states where "sexual gratification" is an element of the crime, when judges or juries have rejected as incredulous the immigrants' claims that their conduct is customary in their homeland, without making any inquiry whatsoever into the truth of the immigrants' assertions.

(f) In a child welfare case, the basic focus of inquiry is on the "best interests of the child." In child welfare cases, therefore, the parent's sexual intent (or lack thereof) is not really *directly* relevant; so proof that the parent was not seeking sexual gratification does not necessarily have the same conclusive effect in a child welfare case that it generally has in a companion criminal prosecution. Of course, the parent's intent *is* probative as to whether the conduct is likely to recur – an issue that will be important in a child welfare case.

(g) As a practical matter, how realistic is the notion of attempting to educate *all* immigrants about *all* behavior that might be legal (perhaps even common) in their homelands, but illegal in the United States? Before you heard about this case, would you have ever imagined that it might be necessary to tell immigrants from many countries around the world: "Do not stroke or kiss your babies' genitals"? *See*, *e.g.*, Anne Fadiman, *The Spirit Catches You and You Fall Down – A Hmong Child*, *Her American Doctors*, *and The Collision of Two Cultures* (Farrar, Straus, and Giroux 1998) at 186-88, which discusses the monumental challenges that U.S. authorities encountered in their efforts to educate Hmong refugees from the mountains of Laos about the ways of modern U.S. life. No detail could be taken for granted. Thus, for example, one publication targeting the Hmong offered the following tips: "The door of the refrigerator must be shut," "Never put your hand in the garbage disposal," "Always ask before picking your neighbor's flowers, fruits, or vegetables," and "Never urinate in the street. This causes a smell that is offensive to Americans. They also believe that it causes disease." *Id*. *See also* Rick Montgomery, "Iraqi Grooms Charged With Raping Brides; Nebraska Case Spurs Argument Over Muslim Mores in the U.S.," *Kansas City Star* A1 (Dec. 15, 1996) (quoting refugee relief official as saying, "[a]s thorough as we try to be [in orientation manuals for immigrants], you cannot teach them everything they need to know. They learn most of it from the people within their culture who are already here.").

(h) The caselaw reveals that immigrant families may use "touching" either to show affection for a child, or to comfort or soothe the child. In some cases, the child is male and in other cases the child is female; just as, in some cases, the parent is the mother and in other cases, the father. Moreover, a little girl's genitalia is stroked, while a little boy's penis may be touched, kissed, or even taken gently into the mouth.

(i) Other similar cases of non-sexual "touching" by parents:

Krasniqi v. Dallas Co. Child Protective Services, 809 S.W. 2d 927 (Tex. App. 1991), *discussed in* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 58-59, 186, 203, 244-45 (Albanian Kosovar immigrant father, who tried to calm and comfort his four-year-old daughter by stroking her on the outside of her panties while seated in the front row of the bleachers in a crowded high school gymnasium, in plain view of hundreds of other people, was found not guilty of child sexual abuse; however, parental rights of both parents to little girl and her older brother had already been terminated in related dependency (child welfare) proceeding; family was never reunited) (high-profile, controversial case was subject of a segment on ABC news magazine, "20/20" – *see* Hugh Downs & Barbara Walters, "We Want Our Children Back" (Aug. 18, 1995)).

The Krasniqi case is a particularly striking example of the impact of "cultural evidence." The judge hearing the dependency case refused to hear any "cultural evidence." In contrast, extensive "cultural evidence" was presented in the criminal case. *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 59, 186, 203.

Nevada v. Chao, No. 07-C-230742-C (Las Vegas Justice Ct. 2006) (*discussed in* "Cambodian Woman Faces Sexual Assault Charge," *Las Vegas Review Journal* 1B (Oct. 14, 2006); "Mother Pleads Guilty: Cambodian Woman Says Act With Son Culturally Accepted," *Las Vegas Review Journal* 1B (Jan. 4, 2008) (reporting on case of Cambodian immigrant who kissed genitals of her four- or five-year-old son, who pled guilty to misdemeanor charge of unlawful contact with a child, and was sentenced to 179 days, with three years of probation; not required to register as sex offender).

Maine v. Ramirez, 2005 WL 3678032 (Me. Super. Ct. 2005) (dismissing as *de minimis* the gross sexual assault charges against woman from Dominican Republic who admitted kissing penis of her son when he was between one and two years old, but who stated, *inter alia*, that the conduct was common means of showing affection for children in her home country and that she did not know that such conduct was illegal in the U.S.; court notes that conduct caused no harm to the child, and that – even with suspended sentence – conviction would require the woman to register as sex offender with threat of potential deportation).

In a 1990 case, a South American woman in DeKalb County, Georgia faced child sexual abuse/molestation charges for stroking the genitals of her little boy. However, the District Attorney ultimately declined to press charges, stating that "this is the way her culture taught her to put healthy young boys to sleep." *See* Richard Lacayo, "The 'Cultural' Defense," *Time* 61 (Dec. 13, 1993).

Elian Gonzalez – "A controversy surrounding Elian Gonzalez, the Cuban boy whose mother died while taking him to the United States, involved a grandmother who unzipped his pants. She reportedly said, 'Let me see, let me see . . . if it has grown.' . . . His relatives denied this was a Cuban custom. . . . Though some deny that this is acceptable in the Latino culture, this argument has influenced the disposition of cases." *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 243-44.

"These 'fondling' incidents have been documented in various ethnic communities, including Albanian, Afghani, Cambodian, Eskimo, Filipino, Pakistani, and Taiwanese cultures." *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 58-59; *see also id*. at 243-44.

(j) The Defendant in this case stated that he did not know that the "touching" was illegal under U.S. law. Do you believe that he was telling the truth? How would he have learned that such "touching" was not legal? The U.S. Supreme Court has held – in a slightly different legal context – that "[l]iving under a rule of law entails various suppositions,

one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'" Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (*quoting* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)) (addressing issue of vague laws). As a matter of fundamental fairness, it is reasonable to punish someone for failure to comply with a law of which they had no knowledge?

(k) As a practical matter, how do we expect immigrants to learn the laws of the United States? The courts have acknowledged "the common sense understanding that [*even*] *the average citizen* does not read, at his leisure, every federal, state, and local statute to which he is subject." Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1105 (6th Cir. 1995). *See also* United States v. Napier, 233 F.3d 394, 397-98 (6th Cir. 2000) (explaining that the "general rule that citizens are presumed to know the requirements of the law . . . is not absolute, and may be abrogated when a law is 'so technical or obscure that it threatens to ensnare individuals engaged in apparently innocent conduct,' because to presume knowledge of such a law would violate *a core due process principle*, namely that *citizens are entitled to fair warning that their conduct may be criminal*.") (emphases added); Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1105 (6th Cir. 1995) (noting that "[t]he requirement of fair notice is not applied mechanically or without regard for the common sense judgment that people do not review copies of every law passed").

(l) With certain exceptions, true "cultural defense" cases generally involve either a claim of "ignorance of the law" or "cultural compulsion" (*i.e.*, "Although I knew it was illegal, my culture compelled me to do it"). While this case turned on the issue of "sexual gratification," the Defendant *did* claim "ignorance of the law." Would you be more inclined to recognize the "cultural defense" in a case of "ignorance of the law" than in a case of "cultural compulsion"? If so, why?

(m) All of the reported "touching" cases (and, indeed, virtually all reported cross-cultural cases with an alleged "victim") have involved parties from the same cultural background. Assuming that you were inclined to recognize a "cultural defense" in "touching" cases generally, would it make a difference to you if the child subject to "touching" was not from the same culture (and, in fact, had been born into a thoroughly American family)? In other words, what if a nanny from an immigrant culture where such "touching" is a customary means of showing affection for very young children kissed the penis of her infant charge, who was a member of a thoroughly American family? Should that case be treated any differently? *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 209.

(9) Trujillo-Garcia v. Rowland, 1992 U.S. Dist. LEXIS 6199 (N.D. Cal. April 28, 1992), *aff'd*, 9 F.3d 1553 (Table), 1993 WL 460961 (9th Cir. 1993), *cert. denied*, 511 U.S. 1132 (1994); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 34-35, 185, 232-33; Doriane Lambelet Coleman, "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma," 96 *Columbia Law Review* 1093, 1117 (1996).

A Mexican immigrant man lost $150 in a poker game to another Mexican immigrant. Several days later, the loser confronted the winner and demanded his money back. The winner refused to return the $150. The loser cursed and taunted the Defendant by yelling (among other things) "chinga tu madre!" (roughly translated as "go f--- your mother!") The Defendant then pulled a gun and fatally shot the man.

At trial, the Defendant's counsel asserted a defense of "provocation" (which, if proved, would reduce the charge from murder to manslaughter). The defense's Spanish linguistics expert – who had been born and raised in Mexico – testified to the meaning and significance of the phrase "chinga tu madre." According to the defense expert, the phrase is extremely offensive and insulting to Latin men, because of Latin American culture's incest taboo and strong sense of male honor. In addition, the phrase carries overtones of blasphemy (because "madre" can also refer to the Virgin Mary). Use of the phrase in Latin culture was analogized to the use of racial epithets (such as the "the N word") in contemporary U.S. society.

Question for Audience:

Should the charge against the defendant be reduced from murder to manslaughter?

1. Definitely yes
2. Probably yes
3. Probably no
4. Definitely no

Result in the Case:

The trial court found the Defendant guilty of second degree murder, and sentenced him to 15 years to life. The Defendant appealed, arguing that the trial court failed to take his cultural background into account in evaluating his defense of "provocation," and that the trial court had therefore violated the Equal Protection Clause of the Constitution. In essence, the Defendant claimed that the trial court erred by evaluating provocation using a "reasonable man" standard, rather than a culturally-specific "reasonable *Mexican* man" standard.

The state appellate court avoided the constitutional issue by concluding that the trial court had, in fact, considered the Defendant's cultural background. The Defendant then took the case to federal court. In the *habeas* proceedings, the federal district court agreed with the Defendant that the trial court had not considered the Defendant's cultural background in evaluating his response to the victim's taunts. But the federal district court nevertheless upheld the result reached by the state trial court.

The federal district court concluded that – even assuming that it was appropriate to consider the Defendant's cultural background – the Defendant had not established that his response to the taunts and curses was that of an ordinary, reasonable Mexican male. According to the federal district court: "[The defendant's] general characterization of Latin culture does not address the specific issue here – whether 'chinga tu madre' is the type of phrase that would incite homicidal rage in an ordinary Mexican male." The federal district court noted, *inter alia*, that the defense's

Spanish language expert "was not aware of any incidents in which use of the insult had led to a homicide." The federal district court therefore did not reach the issue of whether a defendant's culture must be considered in evaluating a claim of "provocation." The U.S. Court of Appeals for the Ninth Circuit affirmed.

Additional Points/Questions for Discussion:

(a) Does it make sense to apply an objective "reasonable man" standard (excluding all consideration of culture) in determining provocation? In reality, is not that using the "reasonable *native U.S.-born* man" (*i.e.*, a man of the dominant culture) as the standard in determining provocation? In a case involving a native-born U.S. defendant, the motivations and behavior of the defendant will be understood by the judge and jury, because they share the defendant's background. Does not the very logic behind recognizing "provocation" as a partial defense require consideration of an immigrant defendant's culture? *See*, *e.g.*, Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 15 (discussing "reasonable person" standard, explaining that "[t]he 'objective reasonable person' is merely a person from the dominant culture," and that "[n]aturally, if a member of an ethnic group is judge against the standards of the dominant culture, his or her traditions are likely to be condemned as unreasonable. If the traditions are considered in the context of the ethnic minority's standards of reasonableness, however, the result may be quite the opposite."); *id*. at 32-35, 45, 187-88, 194, 231-34 (same).

(b) Do not "fighting words," curses, epithets, and gestures of disrespect – *i.e.*, provocation – vary from one culture to another? *See*, *e.g.*, California v. Trakulrat, 1991 Cal. LEXIS 406 (Cal. Jan. 30, 1991), *denying petition for writ of habeas corpus*, 1999 Cal. LEXIS 1830 (Cal. March 31, 1999), *discussed in* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 232 n.45 (Thai man performing at "amateur night" at Los Angeles club shot and killed man in the audience who put his feet up on a table, with the soles of his shoes pointed in the direction of the singer; the gesture is extremely offensive and disrespectful in traditional Thai culture); Miles Corwin, "Cultural Sensitivity on The Beat," *Los Angeles Times* 1 (Jan. 10, 2000) (discussing Trakulrat).

(c) Most "cultural defense" cases involve two members of the same ethnic or cultural group. In Trakulrat, discussed immediately above, the ethnicity/culture of the victim is not clear. To what extent would you be less likely to recognize a "cultural defense" in a case where the victim did not share the ethnicity/culture of the defendant, but – instead – was from the "dominant" (*i.e.*, U.S.) culture? Should that factor make a difference? *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 209.

(d) The effect of applying an objective "reasonable man" standard (excluding any consideration of culture) is to take a defense (*i.e.*, the provocation defense) that is supposed to be available to all, and – as a practical matter – make it available only to defendants from the dominant (U.S.) culture.

(e) In similar cases, some courts have held that it is appropriate to take culture into consideration; and, in other cases, the courts have held that a culture-specific standard is

not appropriate. *See*, *e.g.*, New York v. Aphaylath, 502 N.E.2d 998 (N.Y. Ct. App. 1986), *reversing* 499 N.Y.S.2d 823 (App. Div. 1986) (overturning second degree murder verdict, holding that trial court committed reversible error by excluding "cultural evidence"; finding that "Defendant's ability to adequately establish his defense [of extreme emotional disturbance] was impermissibly curtailed by the trial court's exclusion of the proffered testimony of two expert witnesses concerning the stress and disorientation encountered by Laotian refugees in attempting to assimilate into the American culture," where Laotian refugee defendant repeatedly stabbed his wife after she received phone call from former boyfriend, and defense sought to establish that "under Laotian culture the conduct of the victim wife in displaying affection for another man and receiving phone calls from an unattached man brought shame on defendant and his family sufficient to trigger defendant's loss of control"); *see also* Dick Polman, "When Is Cultural Difference A Legal Defense? Immigrants' Native Traditions Clash With U.S. Law," *Seattle Times* A1 (July 12, 1989) (summarizing Aphaylath); Nguyen v. Georgia, 520 S.E. 2d 907 (Ga. 1999) (expressing disapproval of intermediate appellate court's determination that "evidence of a criminal defendant's cultural background is never relevant," but concluding that there was no abuse of discretion in trial court's decision rejecting "cultural evidence" under specific facts of case at issue).

(f) Opponents of the "cultural defense" contend that allowing immigrants to invoke their cultural customs and traditions to seek to explain their actions would be a "slippery slope." According to these critics, allowing a "cultural defense" for immigrants would open the door to similar claims by members of U.S. sub-cultures. *See*, *e.g.*, Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 193-94, 207; Nina Schuyler, "When in Rome," *In These Times* 27 (Feb. 17-March 2, 1997) (discussing late 1990s case in Alameda, California where African-American woman whose infant died while in care of her nine-year old daughter sought to argue that "the childcare norms of the single black female are different from those of the middle-class white"). Advocates of the "cultural defense" reject the opponents' argument, and maintain that members of sub-cultures do not have a "worldview" that is "radically different from the rest of [U.S.] society." *See* Renteln, *The Cultural Defense* at 207-08. To the extent that a "cultural defense" is recognized, do you believe that it should be limited to *bona fide* cultural-ethnic minority groups? Or should such a defense be available more generally to members of sub-cultures? If you would not allow members of U.S. sub-cultures to avail themselves of such a defense, how would you define those who are eligible to rely on the defense? Would you limit it to immigrants? What about *second generation* immigrants? What about Gypsies?

(10) Michigan v. Patel, No. 00-1321 (Bay Co. Cir. Ct. 2000); *see* Associated Press State & Local Wire, "Man Charged With Setting Wife on Fire" (June 27, 2000); Associated Press State & Local Wire, "Man Charged With Open Murder in Wife's Burning Death (June 30, 2000); Associated Press State & Local Wire, "Man Whose Wife Burned to Death Pleads No Contest to Other Charges" (Dec. 20, 2000).

The Defendant – a 37-year old immigrant from India, who had arrived in the U.S. with his wife three years before the events at issue – was accused of setting his 36-year-old wife on fire following a domestic dispute. Two nights before, the Defendant had hit and kicked the victim. When police had arrived that night, the Defendant – in the family's native dialect, Gujarati – had threatened to kill his wife and their three children (ages 15, 10, and 6) if they implicated him in their statements to police. When police arrived at the scene on the night of the fire, they discovered that the woman had duct tape over her mouth, and matches and a can of turpentine on the ground near her. The Defendant was initially charged with one count of assault with intent to commit murder, and four counts of extortion (based on his earlier threats to his family members). However, after the woman died two days later, the charges were upped to murder and four counts of extortion. The Defendant claimed that the woman was attempting to commit suicide, in a traditionally ritualistic way. But there was also a history of incidents of police being called to the home on reports of domestic disputes.

The defense advised the prosecution and the court that it was considering presenting evidence of a tradition of women in India committing suicide by self-immolation; and forensic evidence indicated that the woman's fingerprints were on a match at the scene of the fire. The prosecution was worried about the safety of the three children (who had spoken to authorities at length about their father's pattern of violence against their mother) if the Defendant was acquitted. The prosecution therefore agreed to drop the murder charge; and the Defendant agreed to plead no contest to four counts of extortion and one count of domestic violence, and to consent to the termination of his parental rights vis-à-vis the three children. As part of the plea deal, the judge gave a "maximum/minimum" "sentencing indication" of 18 months to 20 years in prison, followed by deportation.

At the plea hearing, at the request of the defense, the Defendant's brother (who was not an interpreter) served as interpreter. The court administered an interpreter's oath to the Defendant's brother, but did not conduct an inquiry into his competence as an interpreter. In accordance with the "sentencing indication," the judge accepted the plea and subsequently sentenced the Defendant to a minimum of 18 months and a maximum of 20 months. The Defendant went to prison, and – 18 months later – came up for parole for the first time. When parole was denied, the Defendant filed a motion for relief from judgment, claiming that his brother had not understood the plea agreement. According to the motion, the Defendant's brother had not understood the "maximum/minimum" aspect of the plea agreement, and had told the Defendant that he would be released (and deported) after a maximum of 18 months. The defense motion argued that the Defendant's brother should not have been permitted to serve as an interpreter because he was not qualified to do so, and because (as the brother of the Defendant) he was biased; and that the court should have appointed a certified interpreter. In addition, the defense motion stated that the Defendant never would have accepted the plea agreement if he had understood that he might be required to serve as much as 20 years in prison. The defense therefore argued that the Defendant's plea was not knowing and voluntary, and that the Defendant should be permitted to withdraw it.

The prosecution opposed the motion, emphasizing, *inter alia*, that the court had authorized the Defendant to serve as an interpreter at the request of the defense; that the defense had not asked the court to appoint an interpreter; and that the self-serving affidavits of the Defendant and his

brother were the only evidence of inaccurate interpretation proffered in support of the defense motion.

Question for Audience:

How would you rule on Defendant's Motion for Relief from Judgment?

1. Definitely grant the motion
2. Probably grant the motion
3. Probably deny the motion
4. Definitely deny the motion

Result in the Case:

The motion was denied without prejudice. In its opinion, the court suggested that the defense could renew its motion if it submitted a transcript of the plea hearing which reflected the Gujarati spoken between the Defendant and his brother.

Thereafter, the defense made an effort to have such a transcript prepared, and renewed its motion. In the renewed motion, the defense explained that most of the Gujarati on the audiotape of the plea hearing was not audible, but that an interpreter/translator had determined that "more than 50% of the proceeding" had not been interpreted for the Defendant, and that – of that which was interpreted – much of it was "not complete." The interpreter/translator's statement appended to the motion further indicated that the interpretation of the plea hearing also had been improper both because the Defendant's brother was not a "professionally qualified or certified interpreter," and, moreover, because (as the brother of the Defendant) "he cannot be considered neutral."

Before the judge could rule on the renewed motion, the Defendant was paroled and promptly deported back to India. The renewed motion was therefore moot.

See generally Transcript of Sentencing (Jan. 10, 2001); Brief in Support of Defendant's Motion for Relief from Judgment (May 4, 2005) (with appendices); Brief in Support of Defendant's Second Motion for Relief from Judgment (April 26, 2006) (with appendices).

Additional Points/Questions for Discussion:

(a) How would you have ruled on the defense's *renewed* motion to set aside the judgment, if that motion had not been rendered moot by the Defendant's parole and deportation?

(b) In criminal cases, "[t]he right to an interpreter rests most fundamentally . . . on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment." United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973); *see*, *e.g.*, Hon. Lynn W. Davis, Michael N. McKell, Jaysen R. Oldroyd, and Brian C. Steed, "The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation," 7 *Harvard Latino Law Review* 1, 1-2 & nn.3-11 (Spring 2004)

(discussing Oregon v. Ventura Morales, Nos. 86-630, CA A42459, 1988 Ore. App. LEXIS 1627 (Or. Ct. App. Aug. 30, 1988) (case where court appointed a Spanish interpreter in murder prosecution of 18-year-old defendant from Mexico who spoke only Mixtec (an indigenous language); defendant and defense witnesses "were confused and bewildered" throughout the proceedings, and "[r]epeated interpreter complaints on the record regarding linguistic limitations were unheeded or unnoticed by the court"; following intense media scrutiny of the case, including a segment on the Oprah show, jury's murder verdict was finally dismissed several years later)).

(c) In Negron v. New York, 434 F.2d 386 (2d Cir. 1970), the court reversed a murder conviction where the defendant had been denied an interpreter, emphasizing that "[c]onsiderations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is [in effect] not present at his own trial."

(d) Courtroom interpretation is one of "the dirty little secrets" of the U.S. justice system. Problems include too few interpreters, a lack of interpreters in unusual languages and dialects, and problems with the quality of interpretation. *See*, *e.g.*, Minnesota v. Her, 510 N.W. 2d 218, 223 n.1 (Minn. App. 1994) (emphasizing that "[t]he problem posed by incompetent court translation [interpretation] should not be minimized").

(e) Where an interpreter is used in the courtroom, the English record of the proceeding is the sole official record of that proceeding. Often, audiotapes of proceedings are not made or are not retained. And, even if such tapes are made and retained, they often do not adequately/audibly record the non-English statements (which generally are not spoken into microphones). Having an audiotape recording of the non-English statements is essential to preserving a challenge to the adequacy of courtroom interpretation. Indeed, even *with* such a recording, it is extremely difficult to overturn a verdict on appeal based on errors in courtroom interpretation. Applying restrictive standards of review, appellate courts tend to rule, for example, that any problems with interpretation were "harmless error" given the "overwhelming evidence" of the defendant's guilt. (Hindsight is 20/20.) *See*, *e.g.*, Hon. Lynn W. Davis, Michael N. McKell, Jaysen R. Oldroyd, and Brian C. Steed, "The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation," 7 *Harvard Latino Law Review* 1, 22-23 (Spring 2004) (highlighting cases underscoring importance of contemporaneous objection to preserve claim of interpretation error for appeal).

(f) For an excellent overview of the procedures and challenges involved in courtroom interpretation, *see* Steven M. Kahaner, "The Administration of Justice in a Multilingual Society – Open to Interpretation or Lost in Translation?", *Judicature* (March-April 2009); *see also* Linda Friedman Ramirez (Ed.), *Cultural Issues in Criminal Defense* (Juris Publishing 3d Ed. 2010) (including chapters on both "Interpreters" and "Language Proficiency").

(g) *See* M. Jullian, "Shortage of Court Interpreters Worsening in U.S.," *USA Today* (Nov. 18, 2008); P. Aronson, "Subject to Interpretation: Many States Face A Shortage of

Interpreters, *National Law Journal* 1 (March 22, 2004); Wanda Romberger, "The Provision of Court Interpreter Services in the 21st Century," 49 *Judges' Journal* 16 (American Bar Association Spring 2010); Marla N. Greenstein, "Qualified Interpreters Enhance Judicial Ethics," 49 *Judges' Journal* 40 (American Bar Association Spring 2010); Hon. Lynn W. Davis, Michael N. McKell, Jaysen R. Oldroyd, and Brian C. Steed, "The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation," 7 *Harvard Latino Law Review* 1 (Spring 2004).

(h) Given the critical shortage of court interpreters, courts have been forced to press into service individuals who lack proper training as interpreters, and, in many cases, are potentially biased. In one Oregon case, for example, a judge presiding over a spousal abuse case apparently directed the abused wife to interpret for her accused husband. *See* L. Taylor, "Rights to Accurate Legal Translations Evolving; Attorneys, Some Judges Say Poor Interpretations Botch Convictions," *Lexington Herald-Leader* A1 (April 22, 2002); *see also* P. Aronson, "Subject to Interpretation: Many States Face A Shortage of Interpreters, *National Law Journal* 1 (March 22, 2004) (discussing use of a drug defendant to interpret for other defendants, as well as use of people ranging from "Spanish-speaking pastors to the local high school Spanish teacher to the owner of the local Mexican restaurant" as court interpreters; noting that dual role of defense attorney who is also forced to serve as interpreter for his client may violate Code of Professional Responsibility); L. Feldman, "Society Increasingly Multilingual; LA Courtrooms: Judge, Jury – and Interpreter," *Los Angeles Times* 1 (May 5, 1985) (discussing court's reliance on "actresses, interior decorators, chemists, law students and housewives" as interpreters).

(i) One state Supreme Court has stated that "Translation [*i.e.*, interpretation] is an art more than a science, and there is no such thing as a perfect translation of . . . testimony. Indeed, in every case, there will be room for disagreement among expert translators [interpreters] over some aspects of the translation. *Defense counsel*, *with the assistance of the defendant's own interpreter*, *is always free to object contemporaneously if counsel believes that the court-appointed interpreter has significantly misinterpreted or omitted parts of the defendant's testimony*." *See* Minnesota v. Mitjans, 408 N.W. 2d 824, 832 (Minn. 1987) (emphasis added). How realistic is it to expect that non-English-speaking defendants will be able to afford to hire *their own interpreters* to double-check the official court interpreter, so that defense counsel can lodge a contemporaneous objection to any inaccuracies or omissions in the official court interpretation? Should defense counsel be precluded from challenging the adequacy of courtroom interpretation on appeal if there was no contemporaneous objection at trial?

(j) As one state appellate court has put it, "[a]ny translation [*i.e.*, interpretation] is inevitably a screen placed between the witness and the jury, affecting the jury's ability to assess credibility from demeanor, inflection of voice, nuances of language, and details of testimony." *See* Minnesota v. Her, 510 N.W. 2d 218, 223 (Minn. App. 1994). Where a defendant or a witness testifies through an interpreter, do you think that the judge/jury subconsciously evaluate the demeanor of the interpreter, and (in essence) reach

conclusions about the credibility of the defendant or the witness based on observation of the interpreter?

(k) *See* United States v. Makham, 2005 WL 3533263 (D. Ore. 2005) (granting judgment of acquittal and overturning jury conviction of Thai defendant on several felony counts in drug-related case, ruling that defendant could not be said to have received a fair trial, due to inadequacy of courtroom interpretation; concluding that no one – not the judge, the jury, the interpreter, or the court reporter – was able to follow and make any sense of the defendant's testimony, and that defendant also seemed unable to follow what was going on during the trial).

(l) The health care system faces many of the same challenges that confront the justice system. *See* Associated Press/MSNBC.com, "Rising Foreign Births Changing Delivery Rooms: Increasing Number of Immigrant Mothers Boost Need for Translators" (July 18, 2005). According to that article, for example, "[o]ne hospital in Madison, Wis., said requests for interpreters more than doubled, to more than 4,000 requests a year, between 2000 and 2003. In Columbus, Ohio, Children's Hospital in 2002 had almost 8,000 requests for interpreters." *Id*. "'The alternatives to a trained translator [*i.e.*, interpreter] can be, and have been, a Spanish-speaking janitor pulled into the delivery room. . . . When all else fails, children themselves have stepped in. One interpreter group does a presentation entitled, 'Can my 7-year-old interpret for me in the delivery room?'" *Id*. *See also* Associated Press, "Doctors, Patients Struggle With Language Barrier; Need for Interpreters in Hospitals and Clinics Skyrockets as Diversity Grows" (July 23, 2006) (noting that "[i]nterpreters trained in medical terminology . . . are in high demand as the country's population becomes more and more diverse," that "[i]n Albuquerque, N.M., Navajo and Vietnamese are in high demand, while in Seattle, Russian, Vietnamese, Cantonese and Cambodian are needed. Boston has more of a use for Portuguese, whole parts of Florida get requests for Haitian Creole interpreters."). "For immigrant adults who do not speak English well, children are sometimes the only option"; but "children face heavy pressure in those situations and sometimes misinterpret important information because they are not trained in medical terminology." *Id*. The parallels between the health care system and the justice system are striking. Both systems require very high-quality interpreters in a very wide range of languages and dialects, who also have commands of specialized vocabularies (whether medical or legal). Are the life-or-death consequences of many hospital scenarios significantly different from the life, liberty, or property consequences of many scenarios in the courtroom?

(11) [United States v. Unnamed Defendant] (N.D. Tex)

A judge was sentencing a Latino defendant who spoke no English. At first, the judge ignored the fact that the Defendant was averting his eyes and would not make direct eye contact with her. But, eventually, the judge admonished the Defendant, "You need to look at me when I'm talking to you." At that point, the interpreter broke in to request permission to approach the bench, and explained to the judge how to interpret the Defendant's behavior.

Question for Audience:

According to the court interpreter, what was the significance of the Defendant's lack of eye contact with the judge?

1. Indication of lack of remorse
2. Indication of remorse
3. Indication of lack of respect
4. Indication of respect

Result in the Case:

The interpreter explained to the judge that – while the Defendant's failure to meet the judge's eyes might seem to the judge to be a sign of *disrespect* – in fact the judge had it exactly 180 degrees wrong. In the Defendant's culture (as in many cultures around the world), one shows *respect* for authority by *averting* one's eyes.

Additional Points/Questions for Discussion:

(a) In any setting (courtrooms included), an overwhelming amount of information is actually communicated non-verbally (rather than verbally). And non-verbal communication (demeanor, eye-contact, etc.) is extremely culture-centric.

(b) All people (including judges and juries) take cues from body language, often without even being aware of the fact that they are forming perceptions/conclusions based in part on body language; so there are grave risks that judges/juries will "misinterpret" the body language of an immigrant defendant or witness – and that they will not even be aware of what they are doing, much less be aware of the (potentially unsound) basis for their conclusions.

(c) In the U.S., we intuitively interpret strong eye contact as an indicator of veracity/truthfulness, and as a sign of attention, respect, and deference. But, in many other cultures around the world, strong eye contact is considered rude and/or threatening. In many cultures, one is expected to avert his or her eyes to show deference and respect for authority. Thus, judges/juries may (subconsciously) interpret a defendant's or a witness's lack of strong eye contact as a sign of lack of truthfulness, or as a lack of respect for the judge or jury, or as a lack of remorse – all potentially incorrect interpretations, and all to the detriment of the defendant/witness.

(d) For a case in which a young boy's strong, direct eye contact with an authority figure was interpreted as a sign of disrespect by his Nigerian immigrant father, *see* Dumpson v. Daniel M. (one of the case studies set forth above). *See* Dumpson v. Daniel M., *reported in* New York Law Journal 17 (Oct. 16, 1974); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 55-56, 242.

(e) There is also room for concern that – in a case where a defendant or witness testifies through an interpreter – the judge/jury will subconsciously evaluate the credibility of the defendant or witness based on its observations of the *demeanor of the interpreter*. Even if the defendant does not testify, the judge/jury may misinterpret the defendant's demeanor at counsel's table. *See*, *e.g.*, Siripongs v. Calderon, 35 F.3d 1308, 1315 (9th Cir. 1994) (subsequent history omitted) (holding that Thai defendant – who admitted being present during convenience store robbery/murder, but denied that he was the shooter and refused to name accomplices – was entitled to evidentiary hearing on claim of ineffective assistance of counsel, where trial counsel failed to adduce "cultural evidence" which would have explained that defendant's refusal to name accomplices and his stoic demeanor/body language at trial were consistent with his cultural heritage and religious beliefs); Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 42-45, 185, 237-38 (discussing Siripongs) (esp. 44-45, 185, explaining that stoic demeanor should not be interpreted as reflecting a lack of remorse on the part of Siripongs).

(12) California v. Kimura, No. A 091133 (L.A. Co. Super. Ct. 1985); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 25, 228; Myrna Oliver, "Cultural Defense – A Legal Tactic," *Los Angeles Times* 1 (July 15, 1988); Nina Schuyler, "When in Rome," *In These Times* 27 (Feb. 17-March 2, 1997); Doriane Lambelet Coleman, "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma," 96 *Columbia Law Review* 1093, 1110-11, 1124-25, 1142-44, 1159 (1996).

Kimura moved to the U.S. from Japan as a young adult, 14 years before the events at issue. She spoke relatively little English, and had no real friends, other than one neighbor. At the age of 33, she learned that her husband was having an extra-marital affair, when her husband's mistress confessed to her. Nine days later, Kimura tried to drown herself and her two children (her infant daughter and her four-year-old son) in the Santa Monica Bay. Kimura was rescued by two teenagers and survived, but her two young children did not.

Kimura was charged with first degree murder. But 4,000 members of the local Asian community signed a petition supporting the defense's argument that that – in Japan – the ancient rite of *oyako-shinju* (parent-child suicide) is not considered "murder." Although o*yako-shinju* is now illegal in Japan, it is by no means unknown in the country, and often goes unpunished (or is only lightly punished).

Kimura's defense counsel raised an insanity defense, constructed around the ancient Japanese tradition of parent-child suicide. In essence, the defense argued that – in traditional Japanese culture – a wife shamed by her husband's adultery might choose suicide as the honorable course of action (because she "failed" as a wife), and that it is considered more cruel to leave any children behind (subject to shame and stigma, and with no one to care for them) rather than take them with you to the afterlife. In essence, the cultural evidence was used not to "excuse" or defend Kimura's conduct, but rather to establish her mental instability at the time of the drownings, and to support the claim that she had been rendered temporarily insane by grief and shame.

Question for Audience:

How would you find on the charge of first degree murder (with special circumstances)?

1. Definitely guilty
2. Probably guilty
3. Probably not guilty
4. Definitely not guilty

Result in the Case:

Kimura ultimately pled guilty to voluntary manslaughter, and was sentenced to one year in jail (which she had already served by the time of sentencing), five years' probation, and counseling.

Additional Points/Questions for Discussion:

(a) In an odd twist, Kimura later reconciled with her husband.

(b) In the absence of a formally recognized "cultural defense," immigrant defendants may feel forced to attempt to "shoehorn" cultural claims into a recognized defense, such as insanity or diminished capacity (as the Defendant did in this case). However, the analysis in such cases is often strained, at best. "Immigrants and refugees in most cultural defense cases are, in fact, perfectly sane according to the standards of their own culture, and, indeed, according to Western clinical standards. Giving them no option other than an insanity defense to present the cultural dimension of the case would require a gross falsification of the facts. Furthermore, comparing the logic of immigrants with that of the insane is, at the very least, insulting. Just because someone has a worldview that differs from the mainstream does not justify suggesting that [the other person's] worldview is insane. . . . Forcing cultural arguments into the insanity defense would symbolically denigrate the way of life of others. The logic of another culture is not 'irrational' when it is judged from their point of view." *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 28-29; *see also id*. at 24-29, 187-88, 194, 199, 227-29 (discussing issues surrounding use of insanity defense to raise cultural claims).

(c) At the time of the drownings, the Defendant in this case had been living in the U.S. for 14 years (although she had been relatively isolated). What (if any) is the significance of that fact? Should the "cultural defense" have an "expiration date"? Should the "cultural defense" be limited to first-generation immigrants only? Should the availability of the "cultural defense" depend, at least in part, on how long the immigrant has been in the U.S. (and/or the extent to which the immigrant has assimilated)? Should a defendant be able to invoke the "cultural defense" only to the extent that he or she can prove that he or she was actually ignorant of the law? Should the defendant be required to agree to abandon the custom? *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 193-94, 196, 198-99, 208; Doriane Lambelet Coleman, "Individualizing Justice

Through Multiculturalism: The Liberals' Dilemma," 96 *Columbia Law Review* 1093, 1150 & n.269 (1996).

(d) Should a "cultural defense" be permitted only where the conduct at issue is actually *legal* in the defendant's homeland? Or is it enough that the law in the defendant's homeland is never enforced? In a case like Kimura, for example, should it matter that oyako-shinju is illegal in Japan, but – as a practical matter – a surviving parent is rarely (if ever) prosecuted (and, if prosecuted and convicted, is shown great leniency in sentencing)?

(e) In the Kimura case, there was no suggestion that *every* Japanese wife who discovers that her husband has been faithful commits suicide and takes her children with her. To the extent that you would recognize a "cultural defense," how widespread does a custom or practice have to be to qualify for the "cultural defense"? *See*, *e.g.*, Nina Schuyler, "When in Rome," *In These Times* 27 (Feb. 17-March 2, 1997) (noting that "[a] given practice may be acceptable to everyone or only to some segments of the population" in an immigrant's homeland).

(f) Most pure "cultural defense" cases can be viewed as either based on a claim of "ignorance of the law" or based on a claim of "cultural compulsion" (*i.e.*, "I knew it was illegal, but culture made me do it"). Although it was not argued as such, the Kimura case can be viewed as a claim of "cultural compulsion." Are you more or less sympathetic to a claim of "ignorance of the law," compared to a claim of "cultural compulsion"? Why?

(g) How does the Kimura case compare to the high-profile cases of Susan Smith (the married 22-year-old South Carolina woman who was convicted of two counts of first degree murder and sentenced to life in prison for drowning her two young boys, ages three years and 14 months, by strapping them into her car and then rolling the car into a lake in 1994, because the wealthy man with whom she was having an affair had no interest in a "ready-made family") and of Andrea Yates (the 36-year old Texas woman who drowned her five children (ages 7, 5, 3, 2, and six months) in the family's bathtub in 2001, and – after an initial conviction of capital murder was overturned on appeal – was retried and found not guilty by reason of insanity, and committed to a state mental hospital)? *See*, *e.g.*, Doriane Lambelet Coleman, "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma," 96 *Columbia Law Review* 1093, 1138, 1142-44, n.217, n.236 (1996) (discussing Susan Smith case). One of the objections of those who criticize the "cultural defense" is that it is most commonly invoked by immigrant men to the detriment of their wives and children, and that the effect of the "cultural defense" in such cases is to deny equal protection to immigrant women and children (relative to women and children of U.S. culture). *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 192-93, 196. Did the outcome in the Kimura case devalue the lives of her children, as compared to the lives of the children of Susan Smith and Andrea Yates?

(h) Other Similar Cases – *See* California v. Wu, 286 Cal. Rptr. 868 (Cal. Ct. App. 1991) (reversing second degree murder conviction of Chinese mother who – after learning of husband's infidelity – strangled son then tried to strangle herself, and slashed her own wrists, allegedly in attempt to commit parent-child suicide, as an act of "a mother's

altruism," "so the mother and son can finally live together in the other heaven, other world"; where defense presented cultural/psychiatric evidence supporting diminished capacity defense of "automatism," trial court erred in refusing to give requested jury instruction that person who commits an otherwise criminal act while unconscious is not guilty of the crime; similarly, trial court erred in refusing to give jury instruction telling jury that it could consider the defendant's culture in determining the presence or absence of the mental states which were elements of crimes with which she was charged); Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 26-27, 228-29 (discussing California v. Wu, explaining that, on retrial, defendant was convicted of voluntary manslaughter); Myrna Oliver, "Cultural Defense – A Legal Tactic," *Los Angeles Times* 1 (July 15, 1988) (discussing California v. Wu); Doriane Lambelet Coleman, "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma," 96 *Columbia Law Review* 1093, 1146-47 (1996) (discussing California v. Wu); Myrna Oliver, "Cultural Defense – A Legal Tactic," *Los Angeles Times* 1 (July 15, 1988) (discussing San Francisco case in early 1980s in which Japanese woman slit her baby's throat, but did not commit suicide, when she learned of her husband's infidelity; "cultural evidence" was presented at trial, and resulted in hung jury; woman then pled guilty to manslaughter); California v. Virk (Ventura County, California 2000) (Sikh woman from India charged with two counts of attempted murder for trying to drown herself and her two children (ages 9 and 6) in Channel Islands Harbor, in face of husband's infidelity and threats of divorce; in July 2002, jury found defendant guilty of attempted murder, but legally insane at time of crime); "Ventura County Woman Sent to Mental Hospital for Trying to Drown Children," *Sacramento Bee* (Sept. 14, 2002) (reporting on sentencing in Virk case). *Cf*. Bui v. Alabama, 551 So.2d 1094 (Ala. Crim. App. 1988) (subsequent history omitted) (affirming jury's capital murder conviction of, and imposition of death sentence on, Vietnamese immigrant who slit throats of his three children (ages 8, 7, and 4), and attempted to slit his own throat, where father argued that he wanted to "die with [his] babies" and that "Vietnamese culture stresses that children should be raised by both parents, and that if one spouse is unfaithful the other often commits suicide or other violence to 'save face'"); *see* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 231 n.38 (discussing Bui).

(13) United States v. Caseer, 399 F.3d 828 (6th Cir. 2005); *see also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 74-76, 249-51 (discussing khat cases).

The Defendant spent the first 16 years of his life in Somalia, and then seven years in Kenya, before moving to the U.S. approximately two years before the relevant events. The Defendant was a user of *khat* (also spelled "*qat*"), a stimulant often compared to coffee or tea. "For centuries, persons in East African and Arabian Peninsular countries such as Somalia, Kenya, and Yemen have chewed or made tea from the stems of the native khat shrub [*Catha edulis*] . . . Khat is often consumed in social settings, and many men in the East African/Arabian Peninsular region use khat. . . . Khat is legal in many parts of East Africa, the Middle East, and Europe; however, khat is illegal in the United States because it contains cathinone, a Schedule I controlled substance, and cathine, a Schedule IV controlled substance."

The Defendant approached a co-worker at the taxi company where the Defendant worked, and asked him to travel to the Netherlands to transport khat to the U.S. The Defendant explained that he could not make the trip himself because he was awaiting approval of his application for permanent residency status in the U.S., and could not travel abroad. The Defendant assured the co-worker that khat was an agricultural product, and that – at worst – Customs might confiscate the khat and impose a fine. The co-worker agreed to make the trip, in exchange for $200 (to compensate him for a day of missed work) and the payment of all his travel expenses, which were to be covered by the Defendant and several other taxi drivers who would be dividing the khat. At the airport upon the co-worker's return from the Netherlands, a drug-detection dog alerted on one of the co-worker's bags, and a DEA agent approached him. The co-worker agreed to cooperate with the DEA, and reached an agreement to plead guilty to misdemeanor possession of cathinone with a recommendation of six months' probation, in exchange for his testimony against the Defendant.

The Defendant was charged with one count of conspiring to import cathinone, and one count of aiding and abetting the importation of cathinone, and waived a jury trial. Crimes arising out of the importation of controlled substances require proof that the defendant "knowingly or intentionally import[ed] . . . a controlled substance." At trial, the co-worker testified that the local taxicab drivers (80%-90% of whom he believed to be of Somali or East African descent) frequently chewed khat, and that – from his personal observation – khat seemed to be no stronger than caffeine. The Defendant testified that "khat is a stimulant . . . like tea and coffee." The Defendant further testified that, although he was aware that khat could be seized or confiscated at Customs, he had no idea that U.S. law treated khat or cathinone as a controlled substance. The prosecution contended, *inter alia*, that knowledge that khat is a controlled substance could be inferred from the Defendant's surreptitious behavior in arranging for the importation. A Customs agent testified at trial that the agency's practice at the time was to impose $500 fines for small amounts of khat intended for personal use if federal and local authorities decided not to prosecute.

Question for Audience:

Based on the evidence summarized above, would you find – beyond a reasonable doubt – that the Defendant knew that khat contained a controlled substance under U.S. law?

1. Definitely yes
2. Probably yes
3. Probably no
4. Definitely no

Result in the Case:

The Defendant was convicted on both counts, in a bench trial. However, the court of appeals reversed the convictions, concluding that the evidence presented at trial was not sufficient to support a determination that the Defendant had the requisite *scienter*.

The court of appeals emphasized that, although the Defendant testified that he knew that khat was subject to seizure by Customs, "[n]ot all items that may be seized by the U.S. Customs Service . . . are classified as controlled substances." The court of appeals determined that while the district court could reasonably infer that the Defendant knew that importing khat would violate U.S. customs laws, "it is less reasonable to infer that [the Defendant] knew he would be violating U.S. drug laws by importing a controlled substance." In response to the Government's argument that the Defendant's conduct permitted an inference that he knew that khat was a controlled substance, the court of appeals noted, *inter alia*, that the Defendant's conduct was also "arguably . . . consistent with that of a recent immigrant concerned with violating U.S. customs laws." The appellate court concluded that "[a]ny inference . . . that [the Defendant] knew he would be importing a controlled substance, and not simply an agricultural product regulated by customs laws, would be weak at best and insufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that [the Defendant] had actual knowledge that the khat he imported was a controlled substance."

Additional Points/Questions for Discussion:

(a) The court of appeals noted, *inter alia*, that "[s]tate and federal prosecutions relating to khat seem to be a recent phenomenon." *See*, *e.g.*, Stephanie V. Siek, "Long Popular Elsewhere, Khat Makes Inroads in U.S.," *Washington Post* (Oct. 6, 2002); *See* Associated Press, "44 Indicted in Smuggling of African Stimulant" (July 26, 2006) (available at http://www.msnbc.com/id//14045508/) (noting that, in recent years, khat busts "have increased in frequency as the Arab and East African immigrant communities have grown"); Richard Willing, "Courts Asked To Consider Culture," *USA Today* 3A (May 25, 2004) (noting khat prosecutions in Michigan, New York, Georgia, Connecticut, and Minnesota since the mid-1990s); Kari Huus, "Making a Federal Case Out of An Obscure Leaf: Courts to Decide If Khat is An Illegal Drug or More Like A Double Espresso" (May 22, 2007) (available at http://www.msnbc.msn.com/id/18096999/) (noting that some states are taking tougher stance against khat).

(b) Do you believe that the Defendant knew that khat is a controlled substance in the U.S.? Khat is completely legal "in the majority of Western countries," including, for example, England. *See* Richard Willing, "Courts Asked To Consider Culture," *USA Today* 3A (May 25, 2004) (noting that khat "is legal in Great Britain, but the U.S. government classifies it as a controlled substance in the same category as LSD and Ecstasy"); Associated Press, "44 Indicted in Smuggling of African Stimulant" (July 26, 2006) (available at http://www.msnbc.com/id//14045508/) (noting that "[k]hat is legally imported in many Western countries, including Britain, Germany, the Netherlands and Italy, and is freely used among African immigrants in those nations," while "[i]t is barred in some other countries, such as Sweden, while Australia allows khat importation only for personal use"). Indeed, the World Health Organization has concluded that the health impact of khat is "quite modest," and that the substance does not warrant international control. *See* Kari Huus, "Making a Federal Case Out of An Obscure Leaf: Courts to Decide If Khat is An Illegal Drug or More Like A Double Espresso" (May 22, 2007) (available at http://www.msnbc.msn.com/id/18096999/).

(14) <u>Nebraska v. Al-Hussaini</u>, 579 N.W. 2d 561 (Neb. Ct. App. 1998); s*ee also* Margaret Talbot, "Baghdad on the Plains," <u>New Republic</u> 18 (Aug. 11, 1997); Nina Schuyler, "When in Rome," *In These Times* 27 (Feb. 17-March 2, 1997); Rick Montgomery, "Iraqi Grooms Charged With Raping Brides; Nebraska Case Spurs Argument Over Muslim Mores in the U.S.," *Kansas City Star* A1 (Dec. 15, 1996); "Forced Marriages Bring Sanctions; Iraqi Couple Restricted from Daughters Who Were in Illegal Unions," *Kansas City Star* A11 (June 15, 1997); "Newsmakers," *Kansas City Star* A2 (Sept. 24, 1997).

An Iraqi father – a Gulf War refugee who had been in the U.S. for less than a year, and whom the U.S. Government had recently settled in Lincoln, Nebraska – married off his two daughters, who were then 13 and 14 years old, in a traditional Iraqi wedding ceremony. The grooms, ages 28 and 34, were also refugees from Iraq, whom the girls' parents had first met in a refugee camp in Saudi Arabia, where the family spent two years before the U.S. agreed to take the family in.

There was conflicting evidence as to whether the girls "consented" to the marriages at the time of the wedding ceremony. The police first learned of the marriages when the father went to the girls' school looking for the older girl, who had run away from her new "husband" about 10 days after the marriage. The girl was later discovered hiding out with her 20-year old Mexican-American boyfriend (with whom she had had consensual intercourse). Both girls later testified that they *did not* consent to the marriages, but that their father had threatened to ship them back to Iraq if they did not cooperate.

Two weeks after the "marriages," the police arrested the father and mother, and charged them with child abuse and with delinquency of a minor. The mother and father faced a maximum sentence of one year in prison and a $1,000 fine. The lawyers for the parents planned to argue that the charges should be dismissed because they were only following the Iraqi customs of "arranged marriages," that it is common in Iraq to marry off girls 13 and 14 years old, and that the parents did not know that they were violating U.S. law. The parents eventually pleaded "no contest" to child neglect charges, and were sentenced to take classes in "parenting" and "anger management."

The two "husbands" were each charged with first degree sexual assault of a child. The Defendants – who spoke virtually no English – argued that they did not feel that they had done anything wrong, because arranged marriages with young girls are customary in Iraq and in their religion. The Defendants argued that their actions were legal and proper under Islamic law, and that they had no idea at the time that their actions violated U.S. the law in this country. The Defendants stated that they now understand that the marriages were not legal in the United States, and that they now were divorcing their young "wives" in accordance with the procedures of their faith.

<u>Question for Audience</u>:

How would you find on the charges against the "husbands" of first degree sexual assault of a child?

1. Definitely guilty
2. Probably guilty
3. Probably not guilty
4. Definitely not guilty

Result in the Case:

The putative "husbands" were found guilty of first-degree sexual assault of a child, and were each sentenced to an indeterminate term of four to six years in prison.

One of the men appealed his sentence, arguing that he should have been given probation. The appellate court upheld the sentence (resulting in the only published decision concerning this incident).

According to the appellate court's opinion, "[t]he State points out that while [the Defendant] attempts to lessen his culpability by claiming that the acts were sanctioned by his religion, there is evidence in the pre-sentence investigation report that such a marriage would not be universally accepted in Iraq and, in fact, was highly unusual and would be considered wrong in the majority of Iraqi communities."

The appellate court continued: "We recognize that this is an unusual situation. To some degree, [the Defendant] is a victim of laws with which he has little, if any, familiarity and which are, according to him, vastly different from the customs and laws of his native country. But, as the district court observed when it imposed sentence, there is really only one victim of this crime and that is the 13-year-old child with whom [the Defendant] had sexual intercourse without her consent."

The appellate court concluded by endorsing the trial court's observations that "putting [the Defendant] on probation would depreciate the seriousness of the offense, promote disrespect for the law, and minimize the substantial harm the victim has suffered."

Additional Points/Questions for Discussion:

(a) Published reports do not indicate the disposition of the case against the older girl's boyfriend, the 20-year-old Mexican-American male with whom the older girl had consensual sex. He was originally charged with first degree statutory rape.

(b) Members of the Iraqi refugee community indicated that – although 18 is the legal age for marriage in Iraq – the law was routinely disregarded in southern Iraq (the native home of this Iraqi family), where people think 18 "too old, and they want to protect their daughters from [the] temptation" of pre-marital sex (which would render them unmarriageable in traditional Iraqi culture). Would you be less inclined to recognize a "cultural defense" where, although it was never prosecuted, the custom at issue was also illegal in the defendant's home country? Or would that fact make no difference to your analysis?

(c) The court's finding that "such a marriage would not be universally accepted in Iraq and, in fact, *was highly unusual* and *would be considered wrong in the majority of Iraqi communities*" (emphasis added) was contradicted by the statements of members of the Iraqi refugee community indicating that the law establishing 18 as the legal age for marriage was routinely disregarded in southern Iraq. This conflicting information highlights one of the potential problems with "cultural evidence" – the difficulty in obtaining reliable information on cultural customs, where there are regional, clan, tribal, or other differences. (Moreover, what if a custom or tradition still exists, but is dying out? Often, certain customs and traditions will have been abandoned by the educated class and/or by those living in urban areas, but will still be practiced by the less well-educated and/or those living in rural areas.) *See generally* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 193, 198, 206-07.

(d) To the extent that you might be inclined to recognize a "cultural defense," how widespread would a practice have to be to be "eligible" for the "cultural defense"? What if the custom or tradition was practiced only within an extended family or an isolated tribe?

(e) The court seems to concede that the Defendant did not know that his marriage was not legal, but then states that "there is really only one victim of this crime and that is the 13-year-old child *with whom* [*the Defendant*] *had sexual intercourse without her consent*." (Emphasis added.) Is the court affirming the conviction based on the age of the girl, or based on a determination that she did not consent to intercourse? The consequences of conviction of a sexual crime include not only the requirement to register as a "sex offender," but also – for immigrants – the prospect of deportation. Do you agree with the court that "there is really only one victim of this crime," and that the Defendant is not a victim?

(f) At the time this case began, Catholic Social Services offered a week-long crash course on U.S. culture to refugees relocated by the federal government. But, at the time, U.S. laws on marriage were not covered by the course.

(g) Many cross-cultural cases involve marriage customs, including age of marriage, "arranged marriage," "traditional marriage" or "cultural marriage," and "temporary marriage. *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 114-38, 276-87.

(15) <u>New York v. Ezeonu</u>, 588 N.Y.S.2d 116 (Bronx Co. Sup. Ct. 1992); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 130, 283.

The Defendant – a Nigerian psychiatrist residing in New York – was charged with the rape of a 13-year-old Nigerian girl. The Defendant asserted that the girl had been given to him as his "second" or "junior" wife by her parents in Nigeria, pursuant to the laws and the tribal customs of that country. The Defendant conceded that, at the time he entered into the second "marriage,"

he was already legally married to another woman under the laws of both Nigeria and the U.S. However, according to the Defendant, the laws and tribal customs of Nigeria allow a man to have multiple wives. The Defendant proposed to bring from Nigeria both (a) eyewitnesses to the ceremony in Nigeria in which he "married" the young girl, and (b) expert witnesses concerning the laws and customs concerning marriage in that country.

The prosecution and the defense jointly sought a ruling *in limine* as to whether – assuming the second marriage was legally recognized in Nigeria – the second marriage was legal in New York. New York law defined rape in the second degree (*i.e.*, statutory rape) as "when, being eighteen years old or more, [a person] engages in sexual intercourse *with another person to whom the actor is not married* [who is] less than fourteen years old." Thus, if New York recognized the second marriage, the existence of that marriage would constitute a factual defense to the charge of rape in the second degree (statutory rape).

Question for Audience:

Assuming that the second marriage is legal in Nigeria, is it legal in the U.S.?

1. Definitely yes
2. Probably yes
3. Probably no
4. Definitely no

Result in the Case:

The court ruled that – even if the marriage was legal in Nigeria – it was not legally cognizable in New York, because the Defendant was already in a marriage recognized under the laws of New York. The court ruled that, although the general rule is that a marriage is recognized if it is "valid where consummated," "this general rule does not apply where recognition of a marriage is repugnant to public policy." The court determined that, without regard to the age of the "second wife," polygamy is repugnant to New York public policy. The court further noted that, indeed, bigamy is a crime in the State of New York. The court therefore concluded that, as a matter of law, the Defendant was not married to the young girl for purposes of ascertaining his criminal liability for rape in the second degree (statutory rape). Thus, the Defendant was not permitted to raise the purported marriage as a defense to that crime.

Additional Points/Questions for Discussion:

(a) Note that the focus of this case is *not* on the age of the 13-year-old girl, but – rather – on the fact that the Defendant was already married and thus was not free (under the laws of the U.S.) to take the 13-year-old as his wife, because the court determined that polygamy is repugnant to the public policy of New York. For an overview of cross-cultural cases involving "child marriage," *see* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 115-119, 276-77.

(b) Child welfare authorities removed the Defendant's children from his home. There is no indication whether they were ever returned to him.

(c) When Muslim families immigrate to the U.S., immigration officials inform Muslim husbands that they may bring only one wife into the country, requiring them to leave any other wives and children behind. Professor Alison Renteln opines that "the intention of [U.S.] government officials to protect the rights of women by refusing to recognize polygamy may actually work to the detriment of women in some situations."

(d) As of 1998, there were an estimated 40,000 polygamous families in the state of Utah. *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 282 n.60 (and sources cited there). Most Utah polygamists are not "bigamists," however. "They marry only one wife officially and take the others in church ceremonies, so that technically they have not committed bigamy." *Id*. at 129; *see generally id*. at 128-30, 282-83 (surveying cross-cultural cases involving polygamy).

(16) <u>California v. Martinez</u> (Monterey Co. Super. Ct. 2009), *reported in* MSNBC.com, "Man Accused of Selling Daughter for Cash, Beer" (Jan. 13, 2009).

The 36-year-old Defendant was arrested and charged with crimes related to an alleged attempt to arrange the marriage of his 14-year-old daughter to an 18-year-old man. The father, daughter, and prospective bridegroom were all members of the indigenous Mexican Trique community, from the Oaxaca region, with unique cultural traditions. The Trique are considered "outsiders" even in Mexico. Members of the Trique community work in Central California as migrant laborers.

Under the arrangement between the father and the prospective groom, the groom was to give the father $16,000, 100 cases of Corona beer, 50 cases of Modelo beer, six bottles of wine, 50 cases of soft drinks, and 50 cases of Gatorade, as well as some meat. The situation came to the attention of local authorities when the father went to the police to complain that the prospective bride groom had not fulfilled his promise to pay the cash, meat, and beverages. By the time the father went to authorities, the daughter and the prospective groom had been living together for a week. The father requested the assistance of the police in getting his daughter back, since the prospective groom had not fulfilled his part of the bargain by making the agreed upon payment.

There were some reports that, in such a situation, the money is intended as a dowry, and the meat and beverages are for the wedding celebration. Members of the Trique community said the facts of the situation reflected Trique tradition, and would not be prosecuted in Mexico.

There was no claim that the father had forced or coerced his 14-year-old daughter in any way. However, under California law, the age of consent for marriage is 18, or – with parental approval – 16.

Question for Audience:

How would you find on felony child endangerment charges against the father?

1. Definitely guilty
2. Probably guilty
3. Probably not guilty
4. Definitely not guilty

Result in the Case:

This is a bit of a trick question. The father was initially charged with (1) procuring a child under 16 to engage in a lewd act, (2) aiding and abetting statutory rape, and (3) child cruelty. He would have faced up to 10 years in prison. The father ended up pleading "no contest" to felony child endangerment, and was sentenced to up to one year in jail, followed by deportation.

See generally MSNBC.com, "Man Accused of Selling Daughter for Cash, Beer" (Jan. 13, 2009); CNN.com, "Police: Man Sold Teen Daughter Into Marriage for Cash, Beer, Meat" (Jan. 13, 2009); "Culture Clash Leads to Arrest; A Father Who Allegedly Tried to Arrange His 14-Year-Old Daughter's Marriage Was Following Custom, Police Say," *Los Angeles Times* B1 (Jan. 15, 2009); Associated Press, "Dad Pleads Not Guilty in Sale of Daughter Case" (Feb. 12, 2009); Associated Press, "Father Pleads No Contest in Daughter Selling" (April 7, 2009).

Additional Points/Questions for Discussion:

(a) This case made national news in early 2009. *See*, *e.g.*, MSNBC.com, "Man Accused of Selling Daughter for Cash, Beer" (Jan. 13, 2009).

(b) Although early news reports indicated that authorities were considering prosecuting the prospective bridegroom for statutory rape, it is not clear whether any charges were ever filed against him.

(c) Does the result in this case seem just to you? It seems obvious that the Defendant father was not aware that his actions were illegal in the U.S. Otherwise, he would not have sought the assistance of the police. What purpose was served by the prosecution? Do you think that the fact that the father was an undocumented immigrant affected the treatment of the case? Would you have handled the case differently? If so, in what way?

(d) The local police had made some effort to familiarize themselves with Trique customs. Indeed, posted on the police force's website was a PowerPoint presentation on Trique culture.

(e) Although there is no indication that it was an issue in this particular case, establishing the age of a girl/young woman may be a challenge in some cases where age is an essential element of the crime. For example, births are not officially recorded in all cultures; some cultures simply do not zealously track time; some cultures do not use a regular calendar

of days, months, and years; and some cultures calculate age differently (such that an individual is "one" at birth). Forensic testing of the physical development of an alleged "victim" may be necessary to establish her actual age. And even such testing may not be entirely reliable, given the effect on physical development of diet and other cultural and social variables.

(17) Illinois v. Galicia, 659 N.E.2d 398, 1994 Ill. App. LEXIS 1374 (Ill. App. 2d Dist. 1994), *withdrawn and republished at* 684 N.E.2d 1123 (Table) (Ill. App. 2d Dist. 1994); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 39, 235-36.

The Defendant, a 24-year-old Mexican immigrant, stabbed his longtime live-in girlfriend 43 times, one week after the couple separated. The Defendant was charged with murder in the first degree. According to the Defendant, the woman was a witch ("*bruja*") who had cast a spell ("*embrujada*") on him. The defense contended that, because the Defendant could not find a folk healer ("*curandero*") to dispel the embrujada, the Defendant felt compelled to kill his girlfriend. The defense sought to present the testimony of an expert cultural psychologist at trial, to explain "curanderismo" and other basic cultural beliefs held by the Defendant.

Question for Audience:

Should the defense expert on cultural psychology be permitted to testify about curanderismo?

1. Definitely yes in the guilt phase
2. Probably yes in the guilt phase
3. Probably only in sentencing phase
4. Definitely only in sentencing phase

Result in the Case:

Although the judge did not entirely bar the Defendant's "witchcraft" defense, the judge refused to allow the expert cultural psychologist to testify during the guilt phase of the trial, ruling that such evidence was more appropriate for the sentencing phase. After the judge excluded the testimony of the cultural psychologist from the guilt phase of the trial, defense counsel essentially dropped the "witchcraft" defense. The jury convicted the Defendant of murder in the first degree.

In the sentencing phase, the expert cultural psychologist – a "social psychologist witness who is particularly interested in cross-cultural aspect of human behavior and has experience in that aspect of human behavior" – testified that "the events which led to the confrontation, in a cross-cultural context, were likely to provoke the occurrence, that the defendant's conduct was the result of circumstances unlikely to recur, and the character attitudes of the defendant indicate that he is unlikely to commit another crime."

Additional Points/Questions for Discussion:

(a) "Curanderismo" is "the art of folk healing by a curandero . . . Though the curandero has the skill to treat a wide variety of illnesses, he is the only healer in the culture who can treat *mal puesto*, illnesses caused by witchcraft. . . . His chief adversary in the struggle between good and evil is Satan and those who have made secret pacts with him – the *brujos* or *brujas* (witches). Along with the treatment of *mal puesto*, curanderos also treat *mal de ojo* (the evil eye) and *susto* (loss of spirit). Typically, the curandero works on three levels, the material, the spiritual, and the mental. He may prescribe a herbal remedy or conduct a religious ritual. Quite often, a practitioner is called upon to treat the physical symptoms that patients believe come from supernatural causes." (Definition by Joe S. Graham, posted on Latino Health Issues website of Arizona State University)

(b) The judge in this case ruled that the defense's proffered "cultural evidence" was admissible in the sentencing phase, but not the guilt phase. Do you think that the jury could have had an accurate picture of the context of the Defendant's actions without hearing the proffered "cultural evidence"? *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 14-15. As to "cultural evidence" in general, do you believe that it should be admissible only as to sentencing, or do you believe that it should be admissible as to guilt as well? *See generally id*. at 45-46 (noting, *inter alia*, that "[a]lthough the idea that culture should be considered during the guilt phase of criminal trials is highly controversial, introducing cultural factors during sentencing seems much less objectionable"); *id*. at 201 (highlighting problems with allowing cultural evidence only in sentencing phase); *id*. at 191-92 (noting that, as to admissibility of "cultural evidence," "[s]ome might distinguish between the trial and sentencing to argue that cultural considerations should be allowed at sentencing, but not at trial [as to guilt]. In reality, this argument depends on an artificial and somewhat misleading distinction. It is well known that juries may refuse to convict individuals if they are opposed to the punishment, for instance, the death penalty, that will be imposed. This suggests that the trial and sentencing stages are far too interconnected for the distinction to make much sense."); *id*. at 194.

(c) Other Similar Cases – *See* Myrna Oliver, "Cultural Defense – A Legal Tactic," *Los Angeles Times* 1 (July 15, 1988) (discussing Oakland, California case in which Ethiopian refugee, Hagos Gebreamlak, claimed he shot girlfriend because she was a "bouda [witch] controlled by the Evil Spirit and inflicting pain on him"; jury acquitted him of attempted murder, and found him guilty of lesser charge of assault with deadly weapon); Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 39-40, 236 (same); *id*. at 39-40, 235-36 (summarizing other witchcraft cases).

(18) Douangpanga v. Knowles, 2007 WL 1040967 (E.D. Cal. 2007), *adopted*, 2007 WL 1521069 (E.D. Cal. 2007).

The Defendant – a refugee from Laos – shot and killed his ex-wife's boyfriend. The Defendant was distraught over the fact that his wife of more than 20 years (whom he married while in a

refugee camp in Thailand) had recently divorced him. Since the divorce, the Defendant had made repeated threats against his ex-wife and her boyfriend.

The Defendant testified on his own behalf at trial, explaining that he believed that "the victim [*i.e.*, his ex-wife's boyfriend] had put him under a black magic spell about 15 months before the shooting. At the time, the victim gave him a liquid, which [the Defendant] drank. He thereafter felt different, 'heavy,' and like the world was on his shoulders. A week after he drank the liquid, [the Defendant] ate some fish [his ex-wife] brought him, which also affected the way he felt. He was sad and confused and had difficulty sleeping and eating. Because of his familiarity with black magic as a child in Laos, [the Defendant] believed [his ex-wife's boyfriend] had put him under a black magic spell."

The Defendant "sought help at a [Buddhist] temple, where he was told that [his ex-wife's boyfriend] had evil spirits. However, [the Defendant] could not afford the recommended treatment. [The Defendant] testified that evil spirits can kill people over a long period of time; if the person was not dead in three months, he would die within six months, and if not within six months, he would die within a year."

[The Defendant] "testified the victim [his ex-wife's boyfriend] wanted to meet him [on the day of the shooting]. The victim told [the Defendant] he had a gun and would not die because he had black magic to protect himself." According to the Defendant, the victim reached for Defendant's gun, and Defendant shot in self-defense.

At trial, "[a] cultural anthropologist testified about commonly held Laotian beliefs in black magic. According to the anthropologist, a majority of people in Laos still believe black magic exists, and many of those who migrate to the United States retain their belief that sorcerers can use black magic to put a spell on someone by giving the person a liquid or by obtaining a personal item, such as hair or clothing. If the victim of the black magic is unable to get relief from the spell, he or she might die. It is also a commonly held belief that a sorcerer can kill the victim through use of a spell."

At trial, the court refused to give a jury instruction requested by the defense, which stated: "You have received evidence of [the Defendant's] cultural background and the relationship of his culture to his mental state. You may, but are not required to, consider that evidence in determining the presence or absence of the essential mental states of the crimes [with which the Defendant was charged], or in determining any other issue in this case."

The jury found the Defendant guilty of second degree murder. The Defendant appealed to the state court of appeals, arguing, *inter alia*, that the trial court erred in denying the defense's request for a jury instruction on the relationship between the Defendant's mental state and his cultural beliefs in "black magic."

Question for Audience:

Was the Defendant entitled to the requested jury instruction on the relationship between his cultural beliefs in "black magic" and his mental state?

1. Definitely yes
2. Probably yes
3. Probably no
4. Definitely no

Result in the Case:

Applying state law, the state court of appeals held that the trial court erred in denying the defense's request for a jury instruction on the relationship between the Defendant's mental state and his cultural beliefs in "black magic," ruling that: "Since the cultural anthropologist's testimony supports the defense theory that Laotians genuinely fear the potency of black magic spells, [the Defendant] was entitled to clarify the relevancy of the cultural evidence to a determination of his actual mental state at the time of the shooting." However, the state court of appeals ultimately concluded that the trial court's error in failing to give the requested jury instruction was "harmless," in light of (a) the "powerful" evidence of guilt, (b) the fact that, even absent a jury instruction, defense counsel argued the relationship between the Defendant's mental state and his cultural beliefs in "black magic," and (c) the fact that the jury was given "a full complement of instructions" on the elements of murder and manslaughter, "as well as the elements of justifiable homicide in self-defense and . . . the actual but unreasonable belief in the necessity to defend."

In federal *habeas* proceedings, the Defendant challenged his conviction based on, *inter alia*, the trial court's failure to give the requested jury instruction. The federal district court acknowledged that a state court's failure to correctly instruct a jury on a defense may deprive a defendant of his due process right to present that defense. In addition, the federal district court noted that the trial court's refusal to give the requested instruction in the instant case was an error of state law. However, the federal district court characterized the requested jury instruction as "a pinpoint instruction to which there is no entitlement under principles of federal constitutional law," and held that "the failure to give the pinpoint instruction requested by [the Defendant] did not render his trial fundamentally unfair."

Additional Points/Questions for Discussion:

(a) Significantly, the matter at issue in this case was not the admissibility of "cultural evidence" in the guilt phase of the trial, but, rather, whether the Defendant had a right to a "pinpoint" jury instruction expressly authorizing the jury to consider that "cultural evidence" in evaluating the Defendant's mental state vis-à-vis the crimes with which he was charged.

(19) Georgia v. Adem, Nos. 03W-12220 & 03W-12221 (Gwinnett Co. Super. Ct. 2006), *discussed in*, *inter alia*, "Jury Convicts Father in Genital Mutilation of Girl," Associated Press (Nov. 1, 2006); Richard Willing, "Courts Asked To Consider Culture," *USA Today* 3A (May 25, 2004); s*ee also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 51-53, 240-42 (discussing Female Genital Mutilation ("FGM")).

In the context of a divorce and a subsequent child custody dispute, a woman from South Africa accused her Ethiopian immigrant ex-husband of the genital mutilation of his young daughter. The woman charged that her then-husband had removed the little girl's clitoris in the family's Atlanta-area apartment approximate a year-and-a-half before – when the little girl was two years old. Based on the wife's claims, the prosecutor charged the man with aggravated battery and child cruelty.

At trial, the Defendant – who came to the U.S. at the age of 16, fourteen years before – denied cutting his daughter. The girl's mother testified that the Defendant had confessed to her that he had done it, because it was allegedly necessary to preserve the girl's purity, because it was the will of God, and because – in his family – it was shameful not to be circumcised.

The Defendant testified that he grew up in Addis Ababa (the capital of Ethiopia), and stated that the practice was not common in the city, though it was more prevalent in rural parts of the country. While some authorities estimate that more than 70% of the girls in Ethiopia have undergone female genital mutilation ("FGM"), the Defendant testified that his three sisters are uncut.

The defense suggested that the procedure had been performed by his ex-wife or her family. Although FGM is not common in South Africa, it is reportedly practiced by some within the Zulu tribe (to which the mother's family belonged). Moreover, medical professionals who examined the little girl stated that the procedure had been performed with "surgical precision." The little girl's maternal grandmother had been a traditional midwife in South Africa, and was working as a pediatric nurse in the U.S.

The defense suggested that the little girl's mother and maternal grandmother had performed the procedure, then later decided to use it to "frame" the Defendant in order to punish him and gain sole custody of the little girl.

Defense witnesses particularly attacked the credibility of the ex-wife's claim that she did not discover that the little girl had been cut until more than a year after the procedure had been performed. One of the defense witnesses was an African woman who had herself been subject to the procedure, and who had witnessed approximately a dozen procedures on others in Africa. She testified that the pain is so excruciating that girls are unable even to walk for three or four days. The defense argued that it was impossible that the little girl's mother would not have discovered the excision until more than a year later, since the little girl's mother was almost always the one who bathed and dressed the little girl.

During her father's trial, the girl (then age 7) clutched a teddy bear as she testified – via video link – that her father "cut me on my private part." The defense contended that the little girl had been coached to testify against her father by the girl's mother (who has sole custody of the child), and by her maternal grandmother.

The little girl had first been interviewed in the course of the police investigation. A 45-minute videotape of that interview was shown during the trial. During the first 30 minutes of the

videotaped interview, the little girl – who was three years old at the time of the interview – repeatedly denied that her father had hurt her, before finally saying that he had. Moreover, there were significant inconsistencies in the little girl's account of how the cutting occurred.

Another key fact is that the Defendant volunteered to take a polygraph exam, and reportedly "passed." In contrast, the little girl's mother and the maternal grandmother refused to take a polygraph.

Finally, although the point was not emphasized at trial, cultural anthropologists say that it would be extraordinarily rare – virtually unheard of – for a man to perform a female circumcision. According to experts, men are often the impetus for the procedure. But it is essentially always a woman who actually performs the excision. Experts say that, for cultural reasons, it is virtually inconceivable that a man would have *personally* performed the clitoridectomy *himself* – which is what the Defendant's ex-wife and the prosecution claimed.

Question for Audience:

How would you find on the charges of aggravated battery and child cruelty?

1. Definitely guilty
2. Probably guilty
3. Probably not guilty
4. Definitely not guilty

Result in the Case:

The jury found the Defendant guilty of aggravated battery and cruelty to children. He was sentenced to two concurrent terms of 15 years – 10 years in prison, and five years probation. He was also fined $5000.

The ex-wife (*i.e.*, the little girl's mother) founded an NGO devoted to the eradication of FGM, "Amirah's Voice," and has become a minor celebrity.

Additional Points/Questions for Discussion:

(a) According to news accounts, there were some problems with the defense's case. For example, the Defendant's employer (who was called as a defense witness) disavowed the "time and attendance" records proffered by the defense, stating that he had never seen them before, leaving the impression that the records had been forged by the defense. And cross-examination of the defense's psychiatric expert brought out the fact that the expert was (or had been) the subject of some sort of professional discipline action. Both of these turns of events were apparently surprises to defense counsel.

(b) "As growing numbers of refugees from parts of Africa and elsewhere settle in the United States, the genital cutting of some 100 million girls nationwide is presenting medical, legal and ethical problems for American hospitals and courts." Jane Hansen and Deborah

Scroggins, "Female Circumcision: U.S., Georgia Forced to Face Medical, Legal Issues," *Atlanta Journal and Constitution* A1 (Nov. 15, 1992).

(c) For a detailed description of range of FGM procedures (from nicking clitoris to radical infibulation), *see* Linda Burstyn, "Female Circumcision Comes to America," *The Atlantic Monthly* 28 (Oct. 1995).

(d) "The cutting of female genitals has been practiced for thousands of years in more than 20 central African countries, Yemen, Oman and among Muslim populations of Malaysia and Indonesia. . . . Though none of the major religions makes formal mention of it, many Muslims, Christians, Jews and animists across central Africa believe female circumcision is religiously ordained. 'Religion and culture are not distinct for many of these ancient peoples,' [the Director of Princeton University's Institute of Semitic Studies] said. 'A ritual like this has a strong spiritual and religious aura about it.'" Jane Hansen and Deborah Scroggins, "Female Circumcision: U.S., Georgia Forced to Face Medical, Legal Issues," *Atlanta Journal and Constitution* A1 (Nov. 15, 1992).

(e) According to a 1995 article, "[i]t is estimated that at least 7,000 women and girls immigrate to the United States each year from countries where at least a majority of females, if not all of them, are circumcised. Most of these new immigrants live in California, New York, and the Washington, D.C., area. . . . The rate of FGM in Somalia is nearly 100 percent, in Ethiopia over 90 percent, in Egypt 50 percent. The list of places where it is traditionally practiced includes twenty-six countries in Africa and various areas of the Middle East, Asia, and South America." *See* Linda Burstyn, "Female Circumcision Comes to America," *The Atlantic Monthly* 28, 33 (Oct. 1995); *see also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 51 (noting that "[t]he practice is prevalent in Africa and the Middle East, but has also been documented in Islamic Indonesia, South America, and Australia. It exists in more than forty countries, and the number is growing because of migration.").

(f) In some cases, girls and women have already been cut when they immigrate to the U.S. In other cases, girls and women make trips to their families' homelands to undergo the procedure. Other times, the procedure is performed in the U.S. by someone who resides here. And "[f]requently families will chip in to bring someone from the homeland to the United States to perform circumcisions, because it's cheaper to import a circumciser than it is to send several girls abroad." *See* Linda Burstyn, "Female Circumcision Comes to America," *The Atlantic Monthly* 28, 30 (Oct. 1995).

(g) To the extent that one believes that the "cultural defense" should not be permitted in cases involving "irreparable harm," is not the question whether something constitutes "harm" itself inherently and intrinsically dependent on one's culture? In a culture where a woman is not marriageable unless she has been cut, is it likely that excision is viewed as a "harm"? *See*, *e.g.*, Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 217 (acknowledging that "what constitutes a 'harm' will vary from one community to the next. It is a matter of one's cultural background whether a tradition is interpreted as involving a harm. . . . Although female genital cutting would be impermissible [*i.e.*, not

eligible for a "cultural defense"] under the principle of no irreparable harm, individuals in the tradition who believe that the surgery is a necessary rite of passage for girls to ensure their marriageability (and avoidance of social ostracism) would take issue with [this] interpretation.").

(h) In many cultures where FGM is still deeply entrenched, a girl who has not had the procedure is not marriageable, and may be ostracized in her community. In one high profile prosecution in Europe, an African immigrant woman prosecuted for having the procedure performed on her daughter took the stand in her own defense, explaining that – in her tribe – her daughter would not have been marriageable without the procedure. The woman tearfully testified, in essence, "It's not child abuse to *do* the procedure. It would be child abuse *not* to do it."

(i) Most pure "cultural defense" cases can be viewed as either based on a claim of "ignorance of the law" or based on a claim of "cultural compulsion" (*i.e.*, "I knew it was illegal, but culture made me do it"). In most FGM cases prosecuted in Europe, the defense has been – in essence – "cultural compulsion" (specifically, that the family's culture requires that girls be cut, so that they will be marriageable). Are you more or less sympathetic to a claim of "cultural compulsion," compared to "ignorance of the law"? Why? Is your answer true for FGM cases only, or does it hold for other types of "cross-cultural" cases?

(j) Physicians in Atlanta and elsewhere where there are sizeable African immigrant communities are seeing growing numbers of girls and women with complications as a result of FGM. *See*, *e.g.*, Jane Hansen and Deborah Scroggins, "Female Circumcision: U.S., Georgia Forced to Face Medical, Legal Issues," *Atlanta Journal and Constitution* A1 (Nov. 15, 1992). Health care professionals who become aware (either because of complications associated with the procedure, or in the course of routine gynecological or obstetrical exams) that girls/women have had the procedure have reportedly agonized over whether to report such cases to public health authorities (as the law requires, at least as to minors), out of concern that word will spread through the immigrant community, and – in the future – other immigrant girls and women will be reluctant to seek medical treatment for complications resulting from the procedure, out of fear of prosecution, ultimately resulting in the deaths of more girls and women.

(k) In Seattle in 1996, Somali mothers giving birth at the Harborview Medical Center requested that their daughters be circumcised, as well as their sons. The hospital devised a compromise: the girls would be "nicked" on the clitoral hood, in a symbolic gesture meant to deter the families from performing the traditional practice. The plan – which the immigrants supported – was to perform the procedure under local anesthetic when the girls were old enough to give informed consent. However, when news of the proposal broke, outrage from the anti-FGM community forced the hospital to back down. Similarly, some hospitals in Georgia reportedly were considering offering a very modified form of the procedure on girls above the age of consent, to fulfill immigrants' desire for ritual, while – at the same time – seeking to limit the serious complications associated with performance of the procedure outside a hospital environment, as well as

problems associated with more extreme forms of the procedure. *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 241 n.23 (referring to "controversy over a policy that authorized a hospital to make a symbolic cut").

(l) Those who assert that FGM should not be prosecuted as a crime "caution Americans against condemning the custom without first considering some of this country's customs, such as operating on women to enlarge their breasts, fatten their lips or change the shape of their nose." *See* Jane Hansen and Deborah Scroggins, "Female Circumcision: U.S., Georgia Forced to Face Medical, Legal Issues," *Atlanta Journal and Constitution* A1 (Nov. 15, 1992). Indeed, one leading advocate for the "cultural defense" draws the line at "cosmetic surgery" or any other "permanent bodily change" performed on children, though she acknowledges that even that view is ethnocentric (in the sense that it views children as separate from their parents, a perspective not shared by some group-oriented cultures). *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 217-18. Is it fair to compare FGM to breast enhancement surgery? Are not the differences really just a matter of degree? Are not both FGM and breast enhancement driven by cultural expectations? Like FGM, does not breast enhancement at least run a risk of some loss of sensation and function?

(m) Just as the proponent of the "cultural defense" discussed above would bar the use of the defense for FGM and for cosmetic surgery on children, so too she would bar it for male circumcision. *See* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 217-18. Is it fair to compare FGM to male circumcision? Are not the differences really just a matter of degree? Has not male circumcision traditionally been performed as a social or religious custom, like FGM? Like FGM, does not male circumcision at least run a risk of some loss of sensation?

(n) There is no neat, tidy, "bright line" distinction between FGM and male circumcision, although there is certainly a huge difference in degree. Male circumcision is clearly a matter of cultural custom or tradition, if not religion. European males were never circumcised in the numbers that males were in this country. And the rate of male circumcision in the U.S. has plummeted in recent years. After peaking at approximately 80% in the 1960s, now only 56% of male newborns undergo the procedure, with growing questions about the ethics of performing what is essentially a cosmetic procedure on an individual without the individual's consent. Moreover, serious questions have arisen as to the notion that the procedure causes little or no pain to an infant, as well as the notion that the procedure does not diminish sexual sensation. One physician frames the issue in stark terms: "You are removing a perfectly normal body part. We do not allow people to do that to their daughters. We should not let them do it to their sons." This major shift in recent years in social attitudes concerning male circumcision in the U.S. – like shifts in public attitudes concerning spanking and other forms of corporal punishment – is a good illustration of how cultural mores change over time, both in the U.S. and elsewhere. However, another cultural shift may be on the horizon. Although male circumcision has traditionally been motivated primarily by culture and/or religion, there is mounting evidence documenting the procedure's significant health benefits for men. *See*, *e.g.*, Rob Stein, "Debate on Circumcision Heightened as CDC Evaluates Surgery," *Washington Post* HE1 (Jan. 19, 2010).

(o) To the extent that the purpose of FGM is to diminish a woman's libido and, as a result, the procedure is considered "barbaric" by individuals raised in contemporary U.S. society, it is worth noting that physicians in the U.S. performed clitoridectomies as recently as the 1950s, ostensibly to treat nymphomania and melancholia. *See* Linda Burstyn, "Female Circumcision Comes to America," *The Atlantic Monthly* 28, 32 (Oct. 1995); *see also* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 240 n.16 (noting that "[f]emale genital surgery was an acceptable medical procedure in the United States during the nineteenth century," and was "considered to be a cure for various ailments, including female masturbation, which was thought to cause insanity"). Moreover, U.S. physicians continue to perform purely cosmetic surgery on both the clitoris and the labia. *See* Linda Burstyn, "Female Circumcision Comes to America," *The Atlantic Monthly* 28, 33-34 (Oct. 1995).

(p) Other Similar Cases – *See* Jane Hansen and Deborah Scroggins, "Female Circumcision: U.S., Georgia Forced to Face Medical, Legal Issues," *Atlanta Journal and Constitution* A1 (Nov. 15, 1992) (discussing 1986 DeKalb County, Georgia prosecution of Somali nurse charged with performing clitoridectomy on her two-year-old niece, which resulted in acquittal in absence of evidence proving that she was the one who had done the procedure); Richard Lacayo, "The 'Cultural' Defense," *Time* 61 (Dec. 13, 1993) (same); Nina Schuyler, "When in Rome," *In These Times* 27 (Feb. 17-March 2, 1997) (same); Doriane Lambelet Coleman, "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma," 96 *Columbia Law Review* 1093, 1093, 1113 (1996) (same); Raja Mishra, "Question Left in Genital Mutilation Case: Why? Parents In Prison for Child Neglect," *Boston Globe* B1 (Jan. 17, 2001) (discussing Massachusetts v. Timmareddy, a 1999 case in which Hindu parents from India pled guilty to charge of allowing substantial bodily injury to a child and were imprisoned for clitoridectomy of their three-year-old daughter; more serious charges not pressed because authorities could not determine which of the two actually cut the little girl); UPI, "Pair Jailed for Girl's Genital Mutilation" (Jan. 5, 2001) (same); "Couple Pleads Guilty in Child's Injury," *Boston Globe* B2 (Dec. 12, 2000) (same); *see also* Cindy Gonzalez and Michael O'Connor, "Families Reunited, But Issue Lingers; Dialogue Key in Blending Cultures; Balancing Immigrant Traditions with Local Societal Standards is Difficult for Newcomers and Agencies Alike," *Omaha World-Herald* 1A (May 5, 2002) (reporting on Somalian father with two daughters who were circumcised before family's arrival in Omaha, where family took part in cultural orientation program; father "said he wouldn't continue the ritual with his youngest daughter"); *see generally* Alison Renteln, *The Cultural Defense* (Oxford Univ. Press 2004) at 51-53, 240-42 (discussing FGM).

(q) Although FGM cases are being actively prosecuted in countries including France and England, judges there have, in the past, tended to hand down fairly lenient sentences (although that practice has reportedly changed in recent years). Scholars and commentators have suggested that judges are reluctant to harshly judge parents who are under tremendous cultural pressure to circumcise their daughters, and who honestly consider themselves to be acting "in the best interests of their child" by having the procedure performed.

(r) Some immigrant parents in the U.S. have expressed relief that U.S. law prohibits the practice of FGM, because it gives the parents a reason to resist cultural pressure to continue a tradition that they personally dislike.

(s) Federal law now prohibits FGM in the U.S. A number of states have also passed laws prohibiting the procedure. The federal law, and some state laws, expressly disallow the "cultural defense" as a defense to prosecution. Some of the state laws also expressly disallow "consent" to the procedure as a defense.

(t) To the extent that you would otherwise generally allow a "cultural defense" to other types of crimes, would you allow a "cultural defense" in an FGM prosecution? If you take the position that cultural compulsion or ignorance of the law can never be a defense in an FGM case, why not?