Social Justice: Anthropology, Peace and Human Rights
Volume 6, Number 1

The Cultural Defense. Alison Dundes Renteln. New York: Oxford University Press, 2004. 416 pp.

Terry Beitzel
George Mason University

Jennifer Dougherty
George Mason University

Alison Dundes Renteln adds complexity to legal issues by introducing both explicit and subtle ways in which trans-global dynamics of cultural contact and diffusion interacts with and often confronts more traditional conceptions of the nation-state as the defining legal framework. *The Cultural Defense* advocates, though implicitly, a nonfoundational approach to legal studies, especially when addressing matters of justice by examining the nature of the debate surrounding the admissibility of cultural evidence in the courtroom (5). Should the concerns of ethnic minorities not be considered in the legal system?

The strength of *The Cultural Defense* lies more in the questions it poses than in the answers it provides. But good questions are a crucial starting point to clarify the current discussions of human rights and social justice. Dundes Renteln challenges the adage "when in Rome, do as the Romans." Documenting an extraordinary range of cases, she is critical of the dominate attitude on the part of judges who prefer "presumption of assimilation" and exclude evidence about cultural background as irrelevant. From the argument of enculturation—the notion that culture shapes cognition and conduct—she argues that legal systems should take diverse cultural imperatives into account (Chp 1). Dundes Renteln is therefore in the midst of long debates in political theory and democratic governance about how the legal system best operates.

Dundes Renteln's admirable motives for writing *The Cultural Defense* include: protection of minority rights, defense against anti-minority policy and discrimination, and guarantee of a fair and just legal system for all who break the law. Dundes Renteln considers homicide, children, drugs, animals, marriage, attire and treatment of the dead through court cases where a "cultural defense" was or could have been applied. Akin to the insanity defense or self defense, the cultural defense must meet similar criteria: motive and intent must be established before guilt can be ascertained, while culpability must be factored into blameworthiness before punishment can be assigned. In theory, for a cultural defense to be fairly applied, a knowledgeable and capable lawyer must be able to show how culture has informed the motive and intent of a law-breaker: if the motive was culturally informed and irreparable harm was not intended or committed, then the cultural defense would allow for a partial excuse (i.e. the defendant is less culpable, less blameworthy and thereby more deserving of a lesser sentence). According to the author,

© IUAES Commission on Peace and Human Rights, in association with the Institute for Conflict Analysis and Resolution, George Mason University

however, if irreparable harm was intended and committed, then the full penalty should be given.

When critiquing the legal system for not requiring the admission of cultural evidence or instituting a cultural defense, the author surfaces the quandary: “who’s culture matters?” Implied in her prescription is the notion that cross-cultural consideration on behalf of decision-makers in the legal system is paramount and supercedes that of the civic duty of new US or UK citizens to abide by the law of that nation. That is, in the context of the author’s book, it seems that the culture of the defendant (in most cases cited, defendants were of a minority, had migrated to the US or UK recently or at least within the past two or three generations) and possibly the victim (provided that victim is not of the dominant culture) matters most because typically minorities are expected to adapt culturally and conform to dominant norms. When it comes to others involved in the legal system, apparently the author views that it is not *their own culture* that matters, rather it is their capacity for cross-cultural understanding that matters most and as such, there should be an ethical and legal obligation for cross cultural understanding—not of those who commit crimes—but of the attorneys who represent them, judges who hear the case, and the jury members who evaluate the facts of the case.

After presenting her case for why a cultural defense should be instituted, Dundes Renteln spends the final chapters discussing what the cultural defense looks like in practice, considering arguments both for and against a cultural defense in criminal and civil law and contemplating how such a defense could be implemented. While the author presents the cultural defense as a “theory” it is better viewed as a policy recommendation. Rather than a robust theory in defense of cultural rights, *The Cultural Defense* is better viewed as essential reading for those entering legal professions, judges, attorneys, legal scholars and other interested public Particularly, what is presented offers a corrective for what a judicial process should embody in a liberal and plural democracy that evolves to meet the requirements of a fair, equitable and just legal system.

The significance of *The Cultural Defense* should not be underestimated, however, particularly in an era of rapid globalization. In the presence of migration, immigration and the growth of “supraterritorial communities,” the flow of people, ideas and goods ensures a complex web of interrelations across geographically bounded spaces and ensure that any discussion of culture and conflict will likewise be complex. Overall, the author does an exceptional job citing case history and providing evidence of how culture can influence values, belief systems and behavior. For the strengths offered in the text, there are some issues that may give the reader pause.

Author’s Discussion of Culture

The author offers a useful exploration of case law where cultural practices conflicted with dominant norms and expectations of behavior. The author discusses the topics of enculturation, assimilation, acculturation and cultural pluralism. Although the author comments early on “the reality is that many individuals are bicultural or multicultural,

© IUAES Commission on Peace and Human Rights, in association with the Institute for Conflict Analysis and Resolution, George Mason University

operating with more than one identity," this sentiment is not incorporated into her discussion of individual cases. That is, at times it sounds as if the author subscribes to a structural "banking deposit" view of culture: namely, "culture" (as practices, traditions, rituals, behavior) is what gets deposited into an individual and what he or she draws upon when acting or reacting. With such a view implicit in her analytical framework, it becomes the legal system that must change to accommodate individuals, rather than individuals acting in accordance with the legal system. This in and of itself is not a bad thing; structural violence, to use Galtung's (1969) terminology, does exist and should be addressed. However, if individuals are capable of learning new social cues and acceptable behaviors while keeping their cultural identity intact and while still exercising their cultural rights within reason, then it is possible to both uphold the rule of law and respect other's cultural rights.

There seems to be an assumption that people from far away lands (huddled masses) who come to the US have culture, they bring it with them here, and we can understand their culture if we educate ourselves. The author seems reluctant to grant that US citizens who have spent generations within this country's borders also have been influenced and formed by "their" culture: to be equitable, should they too have the option for "a cultural defense" of their legal systems?

Although not within the parameters of the book, a more thorough, robust discussion of culture would be advantageous. The author notes that cultures may evolve, but when and how this happens is outside of the purview of her argument. Could the legal system play a *positive* role in cultural development? This seems to be an essential consideration, given the nature of the cultural practices which were called into question throughout the case history she offers. She does mention that new immigrants sometimes are much stricter in their adherence to cultural traditions and rituals than others of their cultural grouping from their home country. Other than this mentioning, she seems to view culture as fixed with members who "have" culture because they commit cultural practices which are informed by values or beliefs. A more fluid conception of culture—such as that found in Avruch and Black's work (2000) —while perhaps more complex and problematic in light of a cultural defense would have rendered less totalizing view of culture.

Influence of Culture on Action

Dundes Renteln cites *Kwai Fan Mak v. Blodgett* (1991, 1992, 1993) where the misinterpretation of Kwai Fan Mak, an immigrant from Hong Kong, body language contributed to his sentencing: "There is no denying that Mak was implicated in a most dastardly crime. Nevertheless, the decision about the death penalty should not hinge on something as trivial as one's body language, particularly when that may be culturally misunderstood" (42). She argues that had pertinent cultural evidence been admitted into the courtroom by the attorney, a more fair trial would have been ensured and justice better served. She also cautions that "Failure of an attorney to try to avoid cross-cultural misunderstanding could have fatal consequences" (42). It is unclear how or whether Dundes Renteln distinguishes among culture (she typically uses "national" culture such

© IUAES Commission on Peace and Human Rights, in association with the Institute for Conflict Analysis and Resolution, George Mason University

as American, Arab, Armenian…it is not clear where African American culture fits in), subculture (family culture, gang culture…she would not agree that gang's have culture) and personal disposition (psychology, pathology). That is, how do you know which facet of one's identity becomes more salient than the rest and best accounts for the motive and intent behind an infraction of a law?

Consider the Scott Peterson case. The jury sited lack of emotion as supporting their conclusion to punish him with the death penalty. As Associated Press writer Brian Skoloff writes, "Upon learning of his death sentence, Scott Peterson sat defiantly still and tight-jawed, the same vacant expression he wore throughout a murder trial in which he never spoke. And to hear the jurors tell it, Peterson' apparent lack of emotion—from the day his wife disappeared through the last day of testimony two years later—was the final piece that doomed him." What is Scott Peterson's culture? Because he is a North American white male, does his culture matter? Or is that a subculture? Or is that just the way he is? It seems that the media and his jury are content to rule that he is a cold, calculating killer and should be sentenced to death. One wonders what effect, if any, a cultural defense could have had in his case?

How would *The Cultural Defense* handle the experience of those from Western societies who relocate and reside in non-Western societies? Consider the case of Abu Ghraib prison. When the case of torture at Abu Ghraib prison appears in an Iraqi court of law, will US Army culture or the culture of the military police soldiers matter? The torture Iraqi prisoners suffered at the hands of US Army soldiers while detained at Abu Ghraib prison were deplorable by any human rights standards. Their maltreatment is particularly dehumanizing because some of those acts are against Islamic law. Those tasked by the US Army with running the prison had little to no prior experience, not to mention apparently little understanding, consideration or care of Islamic law. Writing for the *New Yorker*, Seymour Hersh reports, "Gary Myers, Frederick's civilian attorney, told me that he would argue at the court-martial that culpability in the case extended far beyond his client. 'I'm going to drag every involved intelligence officer and civilian contractor I can find into court,' he said. 'Do you really believe the Army relieved a general officer because of six soldiers? Not a chance.' This raises some questions: Should the US Army be as culpable and thus blameworthy of hiring incapable military police soldiers? Is it military culture that informed the soldiers' behavior? Or should those individuals be considered deviants? Should the military police soldier's lack of cross-cultural understanding matter and taken into account when appearing before a court of law? Or should an Iraqi court of law accept a cultural defense when hearing the case and determining the offenders' sentences?

Granted, the author does not make the case that all cultural practices are allowable. Indeed, she specifies that if a cultural practice causes irreparable physical harm, it should be disallowed and the perpetrator held accountable before a court of law. Further, she argues that a cultural defense should provide only *partial* excuse for the offense committed. The author may agree that these US military police soldiers should be held fully accountable for their human rights abuses and that they should not enjoy a partial

© IUAES Commission on Peace and Human Rights, in association with the Institute for Conflict Analysis and Resolution, George Mason University

excuse because a culture of violence (as that experienced during war time) or military subculture advocates, or at least allows, for such affronts. A point that is less well made is that within all cultures, groups, countries, and so on, there are those who deviate from the norm and that those norms may change over time—sometimes dramatically, given new circumstances (such as war, genocide, ecological disasters, extinction of sacred animals and so on). Perhaps the military police soldiers who committed torture at Abu Ghraib fall into this category.

Conflation of Race and Culture?

When responding to the argument that employing the cultural defense will lead to further stereotyping, the author responds: "First, the stereotypes exist whether or not the defense is used. Second, patterns of culture are not equivalent to racist stereotypes, even though in the debate about the cultural defense there is an unfortunate tendency to conflate race and culture. Third, some stereotypes are true or at least contain a kernel of truth, if by stereotype we mean one group's perception of another group…Individualized justice based on group traits may be necessary to safeguard the rights of individual defendants and thus be more important than the promotion of a progressive social policy" (198). Great care must be taken at this point.

I take issue with the remark, "patterns of culture are not equivalent to racist stereotypes, even though in the debate about the cultural defense there is an unfortunate tendency to conflate race and culture" (198). I find that there is an equivalency between racist stereotypes and stereotypes based on culture. Being stereotyped and the process of stereotyping someone else based on limited, generalized information, is equally detrimental whether done on the basis of culture or race. For some, the conflation of race and culture may be an inevitable and necessary lens through which one's identity and social identity should be viewed. If we consider the experience of Africans who were taken from their country and forced into slavery in this country, we may see how racism and colonial ideology were part of the dominant US culture and four generations later, African American experiences have been informed by a heritage of slavery, Jim Crow "laws," segregation, discrimination, fighting for minority rights and police brutality. Considering the proportion of the current prison population who are African American, it seems surprising that this topic was not explored in this text. However, one cannot fault someone for the book they did not write.

The strength of *The Cultural Defense* lies more with the questions she raises than in the answers she provides; but answers to these questions are always contested. These questions oscillate in the ontological and epistemological complexities of culture itself and its relation to the individual identity and in the relation between individual (immigrant) cultural identity and interaction with a legal system buttressed by a different (national?) culture. At the very least, *The Cultural Defense* should be incorporated in to the curriculum of law schools. More generally, this book raises issues crucial in a framework of nonfoundational approaches to human rights and justice—transcending culture and nation-state while maintaining the dynamics of the sociology of time and

© IUAES Commission on Peace and Human Rights, in association with the Institute for Conflict Analysis and Resolution, George Mason University

space. The cultural defense is not a panacea for settling legal disputes; rather, it further justifies the need for sophisticated deliberation in a liberal democratic polity. In this way, *The Cultural Defense* is a tangible way to clarify and sharpen more abstract discussions of justice and human rights. Dundes Renteln offers convincing evidence that anthropology can inform legal studies in important ways.

Bibliography

Avruch, Kevin and Peter Black. 2000. Culture and Conflict Resolution. US Institute of Peace, Washington DC.

Johan Galtung. 1969. "Violence, Peace and Peace Research," *Journal of Peace Research* 6, no. 3, pp. 167-91.

Hersh, Seymour M. 2004. Torture at Abu Ghraib. The New Yorker. Accessed on December 24, 2004 at http://www.newyorker.com/fact/content/?040510fa_fact

Skoloff, Brian. 2004. “Jury Recommends Capital Punishment: Panel members cite convicted killer’s attitude.” Associated Press. http://aolsvc.news.aol.com/news/article.adp?id=20041208100509990013

© IUAES Commission on Peace and Human Rights, in association with the Institute for Conflict Analysis and Resolution, George Mason University