

**THE CULTURAL OFFENSE: HOW AND  
WHY PLAINTIFFS BRING CULTURAL CLAIMS TO COURT**

Ms. Brooke Glass-O'Shea<sup>1</sup>  
The University of Southern California

**I. Introduction**

In her book, *The Cultural Defense*, Alison Dundes Renteln asserts that courts of law should be required to consider “cultural” evidence. Her argument is largely based on the idea that, because “culture shapes cognition and conduct,” evidence about a person’s culture is necessary to understand that person’s motivations.<sup>2</sup> Defendants’ motivations, Renteln argues, are directly relevant to the amount of blame, and therefore the amount of punishment, they deserve.<sup>3</sup>

Despite the book’s title, Renteln includes a number of cases in which the culture in question is that of a civil plaintiff rather than a criminal defendant. That is, some of Renteln’s cases are not about cultural defenses but instead cultural offenses. In these cases, it is plaintiffs who seek to introduce evidence of their own culture in order to explain why a defendant’s act was offensive, or why the act may have caused the damage it did. How might such evidence be used, and in what kind of case?

One classic example is the case of Mukesh K. Rai, a Hindu man who sued Taco Bell after mistakenly being served a beef burrito.<sup>4</sup> Rai explained to the Los Angeles Times that “the cow is a sacred animal to Hindus, considered a mother to everyone.”<sup>5</sup> Though Taco Bell settled with Rai, some members of the public were dubious of Rai’s claims and offended by what they saw as “cultural sensitivity” gone haywire.<sup>6</sup>

---

<sup>1</sup> Brooke Glass-O'Shea received her JD from the University of Southern California, and is currently studying sustainable international development at the University of Washington School of Law. She would like to thank Professor Chris Stone, who provided ideas and support for this article, and Wayne State University Law School, who originally published an alternate version of this article in *The Journal of Law in Society*. Please send any questions or comments to bigo@u.washington.edu.

<sup>2</sup> Renteln, Alison Dundes. *The Cultural Defense*, p. 6. New York: Oxford University Press, 2004.

<sup>3</sup> *Id.* at 189.

<sup>4</sup> *Id.* at 107.

<sup>5</sup> MacGregor, Hilary. “Faith and Food.” *Los Angeles Times*. Jan. 25, 1998, A3.

<sup>6</sup> For example, the Humanist Association of San Diego’s newsletter described the case as a “church-state threat” and rhetorically demanded, “How could such a ‘devout Hindu’ expect to placidly eat even a bean burrito while, all around him, others were munching on his ancestors?” Such an argument may reflect Christian-derived ideas about belief and tolerance, as Hindus,

The public reaction to the Rai case reveals the tension that is inherent to issues of group rights. As a society, we value diversity, but we also believe that people should be treated equally. Does this mean that different people should be treated differently, or that different people should be treated as though they were the same? Some scholars, such as Thomas Pogge, have argued that membership in a particular group should never be a basis for differential treatment, both because group membership is often subjective and unclear and also because true equality demands equal treatment (at least in the public domain) of all citizens, “regardless of their identifications and affiliations.”<sup>7</sup> In Pogge’s view, granting special status to members of a particular group can only be justified in reference to the circumstances facing the individuals in the group, and therefore the special status must also be extended to anyone else who shares those circumstances.

Christopher Stone, in discussing Pogge’s hypothesis, offers the example of Quakers being given exemptions from “hostile military service” by the United States.<sup>8</sup> Stone argues that such an exemption may be permissible if based on two premises: that every individual’s core convictions should be respected equally, and that Quakers, by their affiliation with an anti-violence religious group, have “signaled” their core-level commitment to non-violence.<sup>9</sup> While I agree with Pogge and Stone in the abstract, such formulations may be difficult to apply in a legal context, where judges must navigate the messy, conflicting reality of actual human values. How could a non-Quaker prove to a judge his core belief in non-violence? Suppose a secular humanist sued the U.S. government for conscientious objector status, arguing that harming any human being offended his deeply-felt belief in the sanctity of human life. How might he prove this, and how much deference should his beliefs be given?<sup>10</sup>

Mukesh K. Rai might agree that everyone’s core convictions should be respected equally, and might further argue that, in serving him a beef burrito, the employees of Taco Bell betrayed this principle. But even if the employees knew or should have known of Rai’s beliefs (which seems unlikely,<sup>11</sup> but would have to be proven to make the action a tort), what would it mean to treat Rai’s

---

unlike many Christians, do not believe that non-believers should be made to follow Hindu practices or proscriptions. <<http://www.godless.org/hasd/hnl04.html>>, accessed 9/29/07.

<sup>7</sup> Pogge, Thomas W. “Group Rights and Ethnicity,” in *Ethnicity and Group Rights*, p. 188. Ian Shapiro and Will Kymlicka, eds. New York: New York University Press, 1997.

<sup>8</sup> Stone, Christopher. “Groups in Law and Morals: The Case of Aboriginal Subsistence Whaling.” Draft of speech delivered at the University of Oslo.

<sup>9</sup> Id.

<sup>10</sup> According to one district court, “Whenever a belief system encompasses fundamental questions of the nature of reality and relationship of human beings to reality, it deals with essentially religious questions.” *Alabama and Coushatta Tribes of Texas v. Trustees of the Big Sandy Ind. Sch. Dist.*, 817 F. Supp. 1319, 1329 (E.D. Tex. 1993), citing *Smith v. Board of School Com'rs of Mobile County*, 655 F. Supp. 939, 979 (S.D. Ala.), as holding “that secular humanism is a religious belief system entitled to the protections of the religion clause.”

<sup>11</sup> See the *Yang* case, discussed in the Constitutional Claims section, *infra*, for an example of a court finding that a defendant knew or should have known of a plaintiff’s religious beliefs.

beliefs “equally”? Equal, that is, to what? Should Rai’s aversion to beef be treated like a Muslim’s aversion to eating pork, or like an average American’s aversion to eating dogs? Should it be given more weight than a lifelong vegetarian’s aversion to beef? What if the vegetarian is also an ardent animal-rights activist, and Rai recently converted to Hinduism, or neglects numerous commandments of that faith?

These are hard questions, and I do not propose to answer them in this paper. Instead, I wish to show some of the many different ways that plaintiffs may use cultural claims in the courtroom, and in the process illuminate some of the difficulties inherent to weighing a plaintiff’s beliefs against the rights and demands of other individuals, groups, and the state. I will discuss culture in the context of tort claims, hate speech, constitutional claims, witness credibility, and statutory law. I will then describe some of the ways in which testimony about cultural beliefs or practices should and should not be presented in court. In the last section, I will address the growing international movement to afford legal protection to elements of indigenous cultures.

### *Note on Religion and Culture*

For this paper, I will not generally distinguish between religious and cultural claims, except where the law makes such a distinction. There are two reasons for this. First, religion is a part of culture, and usually inextricably entwined with it, so the religious claims I will discuss are always cultural claims as well. Second, due to recent developments in First Amendment jurisprudence, plaintiffs in the United States may need to characterize their claims as either religious exercise or cultural expression, or even both, depending on which law governs their particular situation. However, beliefs about morality, diet, the body, and many other things may be fairly characterized either way. By describing religious claims as cultural, I hope to erode the rather artificial distinction that allows us to privilege one over the other.

## **II. Tort Cases**

### *A. The Cultural “Thin-Skull” Tort*

On August 22, 1963, a 16-year-old girl named Ruth Friedman got on a ski lift with her friend, Jack.<sup>12</sup> The pair had enjoyed an afternoon of picnicking and “sightseeing” on the mountain, and were ready to return home for the day. As they rode down the mountain, the lift suddenly stopped, and the two teenagers were suspended, helplessly, 25 feet above the ground. They yelled for help, but no one came, and Ruth started to panic. She jumped from the lift and, despite numerous injuries, managed to get down the mountain and call the police.

In her case against the State of New York, which owned and operated the ski lift, Ruth Friedman argued that her ultra-orthodox Jewish upbringing and beliefs compelled her to jump in order to avoid spending the night alone with a man. Rabbi Herschel Stahl gave expert testimony that a Hebrew law known as the Jichud strictly forbids a man and woman to stay together in a private place. A woman who violated this law would destroy her own reputation and that of

---

<sup>12</sup> The facts of this case are from *Friedman v. State*, 54 Misc. 2d 448 (N.Y. 1967).

her parents. The court accepted the rabbi's testimony, and awarded damages to Friedman and her father.

The Friedman case is an excellent example of a cultural thin skull case. The term "thin skull" refers to a tort case in which the victim sustains "extra" damages due to a pre-existing condition.<sup>13</sup> Though the Restatement spells out this rule in terms of a pre-existing *physical* condition,<sup>14</sup> it also describes the rule as part of a "broader rule" allowing damages for harm which was unexpected and unforeseeable.<sup>15</sup> In other words, a tortfeasor "takes his victim as he finds him."<sup>16</sup>

The thin skull doctrine works well with cultural claims because it requires an *underlying* offense. That is, the doctrine only comes into play once a plaintiff has established that the defendant committed a tort, as measured by the usual "objective" standard of foreseeable harm.<sup>17</sup> It seems fair that, when someone is harmed by someone else's bad behavior, the cost of the harm should be borne by the guilty party rather than the innocent victim.

In the Friedman case, the court took pains to establish that the State had been negligent in its operation of the ski lift, citing no less than five different examples of negligence. These included failing to notify passengers of the hours of operation, failing to search one side of the mountain before leaving for the day, and failing to announce over the loudspeaker that the lift was closing. This negligence had nothing to do with Ruth Friedman's culture or religion. The State was negligent because it knew or should have known that its behavior might cause a passenger to become stranded on the lift for the night, an experience that would surely be traumatic (and possibly hypothermia-inducing) for anyone from any cultural background.

---

<sup>13</sup> See, e.g., *Lee v. Regan*, 47 N.C. App. 544, 550 (N.C. Ct. App. 1980) (applying the "special sensitivity" or "thin skull" rule in an auto collision case where plaintiff's preexisting spinal cord disease was aggravated by the crash); *Vosburg v. Putney*, 80 Wis. 523 (Wis. 1891) (landmark case allowing recovery where one schoolboy lightly kicked another on the shin, thereby reopening a recently healed wound).

<sup>14</sup> "The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct." Restat. 2d of Torts, § 461.

<sup>15</sup> *Id.*, Comment (b).

<sup>16</sup> *Bryan v. City of New Orleans*, 737 So. 2d 696, 698 (La. 1999) (allowing recovery where a police officer treated plaintiff roughly, exacerbating his already fragile emotional state and causing him to require psychiatric care).

<sup>17</sup> Note the Restatement's reference to the "negligent actor"; see also *Bryan*, 737 So. 2d at 698 (a defendant "is responsible for all the natural and probable consequences of his *tortious* conduct" [emphasis added]).

What role, then, did Friedman's beliefs and the rabbi's testimony play in the case? The State had moved to dismiss the case on two grounds: that its own negligence had not been proven, and that Friedman was *contributorily negligent*. Though the court did not mention any of Friedman's personal characteristics in its finding of negligence by the State, it did refer to Friedman's "age, judgment, experience, and education" in support of its finding that she was not contributorily negligent.<sup>18</sup> Near the beginning of the opinion, the court made the explicit finding that Friedman became hysterical while trapped on the lift, citing both the normal distress that "a lightly dressed 16 year old city girl" would feel in such a situation *and* the extra distress Friedman must have felt because of the "moral compulsion" she believed herself to be under.<sup>19</sup> Because Friedman could not control either of these factors, she was not contributorily negligent when she jumped off of the ski lift.

This treatment of Friedman's cultural evidence is very analogous to the treatment of medical evidence in a thin skull tort case. In both situations, the court must find that the defendant's conduct was tortious (whether intentional, reckless, or negligent), an analysis that does not involve the plaintiff's pre-existing condition (medical or cultural) because such condition "is neither known nor should be known" by the defendant.<sup>20</sup> If the defendant acted tortiously, then he is responsible for *all* of the damage caused by his act. The plaintiff cannot be held responsible (or, legally speaking, contributorily negligent) for a pre-existing condition beyond her control, even if it exacerbates the damage. The rabbi's testimony was like that of a doctor, who in a regular thin skull tort case would testify about the nature of the plaintiff's condition and how it might have contributed to the plaintiff's damages.

Friedman's jump from the ski lift may have been an unusual reaction to the situation, perhaps even so unusual as to be unforeseeable. But if Friedman had suffered from an "unforeseeable" medical condition like severe diabetes, she might have jumped off the lift to avoid going into insulin shock and possibly falling. In that situation, the State of New York would be liable for all damages under the traditional thin skull rule. This seems fair, because the State was negligent, while Friedman would not be held at fault for having diabetes. If we agree with the judge that Friedman was not at fault for holding ultra-orthodox religious beliefs, then it makes sense that the cost of her resulting damages is more fairly borne by the negligent State than by the innocent Friedman family.

### *B. Culture Used to Assess Damages*

---

<sup>18</sup> *Friedman*, 54 Misc. 2d at 456.

<sup>19</sup> *Id.* at 452.

<sup>20</sup> Restat. 2d of Torts, § 461.

In addition to explaining a plaintiff's behavior, cultural evidence may also be used to illuminate the plaintiff's relationships with other people. In the damages context, such evidence can help a jury to measure the plaintiff's loss when a loved one is hurt or killed in an accident. This was the case in *In Re Air Crash Disaster Near New Orleans*,<sup>21</sup> a consolidation of the claims of three Uruguayan citizens arising out of the 1982 crash of Pan American Flight 759.

Ernesto Serio Pampin-Lopez was one of the plaintiffs in *New Orleans*. Pampin lost his mother, sister, and an aunt in the crash, and sought damages for the loss of his mother's and sister's love and affection. The jury awarded him fairly large sums for these nonpecuniary losses: \$250,000 for his mother and \$150,000 for his sister. The Court of Appeals reduced the award for Pampin's sister because it could not find any comparable award for a sibling's love and affection in the case law, but it upheld the award for Pampin's mother. In doing so, the court cited evidence of the unusual closeness of the Pampin family:

There were daily contacts encompassing every facet of their lives. When Pampin married, rather than draw away from his consanguineal family, he brought his wife into that close unit. They worked, lived, and played together. Pampin looked to his principled and strong-charactered mother for guidance and advice in personal and business matters.<sup>22</sup>

Though the *New Orleans* case was eventually separated into two trials, both juries were put together initially to hear the testimony of three witnesses. Two of these were women who witnessed the plane crash. The third was a Tulane University anthropologist, who gave testimony "about South American mores and familial relations."<sup>23</sup> Though the appeals court did not mention how the anthropologist's testimony was used, it seems clear that it was deemed both relevant and important to the Uruguayan plaintiffs' claims, and that it provided support for the more specific evidence about the closeness of the Pampin family.

An anthropologist provided similar evidence in another airplane crash case, *Saavedra v. Korean Air Lines*,<sup>24</sup> which arose after Korean Air Lines Flight KE007 was shot down over the Sea of Japan by Soviet missiles in 1983. The plaintiff in *Saavedra* represented the estate of a married Japanese couple, Makoto and Yoko Okai, both of whom died in the crash, and also brought claims on behalf of the Okais' parents for loss of support. In upholding the jury's award on these claims, the Court of Appeals cited the testimony of a cultural anthropologist, who explained "that in Japanese culture, the Okais' parents could reasonably

---

<sup>21</sup> 789 F.2d 1092 (5th Cir. 1986).

<sup>22</sup> *Id.* at 1099-1100.

<sup>23</sup> *Id.* at 1095.

<sup>24</sup> 93 F.3d 547 (9th Cir. 1996).

expect support from the Okais.”<sup>25</sup> This doubtlessly added weight to the testimony given by the Okais’ parents that they had expected their adult children to help support them as they got older.

### **III. Group Libel and Hate Speech**

Members of minority races, religions, and cultures may be subjected to hurtful words aimed at their identities – what is now popularly known as “hate speech.” What legal recourse, if any, do members of stigmatized groups have in this situation?

In the 1952 case of *Beauharnais v. Illinois*, the Supreme Court upheld an Illinois law that criminalized the “publication or exhibition” of materials written against a particular race or religion.<sup>26</sup> This was not a cultural offense case, but rather a criminal defendant’s free speech challenge to the Illinois law, which he was convicted under after distributing racist leaflets in Chicago.<sup>27</sup> However, the Illinois Supreme Court characterized the law as “a form of criminal libel law,” and it was treated that way by the courts.<sup>28</sup> Thus, the Court’s ruling left the gate open for potential libel actions by members of racial or cultural minorities victimized by hate speech.

However, by the 1970s, the courts had narrowed *Beauharnais* into virtual nonexistence.<sup>29</sup> For example, in 1978, the Seventh Circuit Court of Appeals struck down a local ordinance in Skokie, Illinois, with language remarkably similar to the statute in *Beauharnais*.<sup>30</sup> The court held that the Supreme Court “rewrote the rules” with the intervening free speech and libel cases, so that libel had become subject to First Amendment considerations.<sup>31</sup> Though *Beauharnais* had not been explicitly overruled (and still has not been), the court found that,

---

<sup>25</sup> *Id.* at 554.

<sup>26</sup> 343 U.S. 250 (1952). The relevant statute read: “It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . .”

<sup>27</sup> *Id.* at 252.

<sup>28</sup> *Id.* at 253-54.

<sup>29</sup> See, e.g., *Tollett v. United States*, 485 F.2d 1087, 1094 (8th Cir. 1973) (finding that “it is extremely doubtful that the Illinois statute then existing [in *Beauharnais*] would be upheld today”); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978); *American Booksellers Assoc. v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985) (citing *Collin* as holding that recent Supreme Court free speech cases “had so washed away the foundations of *Beauharnais* that it could not be considered authoritative”).

<sup>30</sup> *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

<sup>31</sup> *Id.* at 1205.

if *Beaubarnais* was good law at all, it stood for the proposition that extremely prejudicial speech could be banned if it was likely to incite violence.<sup>32</sup> This situation may have applied to mid-century Illinois, which had been “the scene of exacerbated tension between races, often flaring into violence and destruction,”<sup>33</sup> but it seems less likely to be invoked today.

Though the above cases involve criminal libel, the free speech consideration given to libelous speech applies in civil cases as well. Thus, potential damage to an individual's reputation must be balanced against the general presumption in favor of free speech. For this reason, tort suits for “group libel” are not generally allowed unless a plaintiff can show that the allegedly defamatory statements refer to him specifically, and not just to a group to which he belongs.<sup>34</sup> This may be the case if the group referred to is sufficiently small – generally, less than 25 people<sup>35</sup> -- or if the statements are made in such a way that the plaintiff is implicitly referred to. These requirements effectively preclude suits for “cultural” hate speech, unless the statement is a thinly veiled reference to a specific individual.<sup>36</sup>

One example of a cultural libel claim is the case of *Anyanwu v. Columbia Broadcasting System*.<sup>37</sup> In *Anyanwu*, a Nigerian man sued CBS, Ed Bradley, Andy Rooney, and Mike Wallace after an episode of CBS's “60 Minutes” accused Nigerian businessmen of defrauding Americans. The plaintiff, Tony Anyanwu, claimed to represent the entire class of Nigerians doing business with United States citizens, but the district court held that Anyanwu could not bring a claim because the alleged defamatory statements did not refer to him particularly, and the group he claimed to represent was too large (over 500 individuals). “It is not sufficient,” wrote the court, “that the plaintiff is libeled as a member of a large group.”<sup>38</sup>

---

<sup>32</sup> *Id.* at 1204.

<sup>33</sup> *Beaubarnais*, 343 U.S. at 259.

<sup>34</sup> Restat. 2d of Torts, § 564A.

<sup>35</sup> *Id.* at Illustration 2b; see also, e.g., *Gintert v. Howard Publications*, 565 F. Supp. 829 (D. Ind. 1983) (no group libel claim allowed for plaintiff class of approximately 165 property owners); *Arcand v. Evening Call Pub. Co.*, 567 F.2d 1163 (1st Cir. 1977) (no group libel claim for statement about one unidentified member of a 21-person group); *Weatherhead v. Globe International, Inc.*, 832 F.2d 1226 (10th Cir. 1987) (affirming that a “claimant group of 955 was too large to afford relief” for group libel).

<sup>36</sup> For example, the statement that “Amish people eat babies” may be actionable if directed at the only Amish family in town (especially if there is a baby missing).

<sup>37</sup> 887 F. Supp. 690 (D.N.Y. 1995).

<sup>38</sup> 887 F. Supp. at 692, citing *Church of Scientology Int'l v. Time Warner*, 806 F. Supp. 1157, 1160 (D.N.Y. 1992).

Though not usually actionable in a civil case, hate speech may still be prohibited by law because it may be narrowly defined so as to fit within the “fighting words” exception to the First Amendment protection of speech.<sup>39</sup> However, as the Supreme Court held in *R. A. V. v. St. Paul*, such a prohibition would have to apply equally to all groups in order to avoid unconstitutional content or viewpoint discrimination.<sup>40</sup> In *R.A.V.*, the Court struck down a St. Paul, Minnesota, ordinance that criminalized hate speech directed at a person’s “race, color, creed, religion or gender,” noting that the law did not cover, for example, “political affiliation, union membership, or homosexuality.”<sup>41</sup> Justice Scalia’s reasoning for the majority was strikingly similar to Pogge’s argument, discussed in the Introduction above, that equal protection should never be contingent upon membership in any particular group or type of group.

It is important here to note the distinction between “hate speech” and “hate crimes.” The two may seem to contain similar elements – i.e., the official punishment of biased or hate-motivated beliefs. However, hate speech is generally protected by the First Amendment and, under *R. A. V.*, may only be regulated by narrowly-drawn, content-neutral laws. In contrast, the bias element that turns a crime into a “hate crime” is not considered to be “speech” for First Amendment purposes.<sup>42</sup> As the Supreme Court explained in *Wisconsin v. Mitchell*, such bias is simply a motive for the crime, and may be taken into consideration for sentencing purposes like any other motive.<sup>43</sup>

#### **IV. Constitutional Claims**

##### *A. Free Exercise of Religion*

You Vang Yang and Ia Kue Yang came to the United States from Laos.<sup>44</sup> They were Hmong, a minority ethnic group found in southern China and Southeast Asia, with their own customs, language, and religious beliefs. On December 21, 1987, their 23-year-old son, Neng Yang, had a seizure and lost consciousness. He was taken to Rhode Island Hospital, and died there three days later without ever regaining consciousness. The doctors at the hospital could not explain what caused the young man’s seizure or death.

An assistant resident at the hospital contacted the Rhode Island Medical Examiners’ Office to report the unexplained death. The Assistant Medical

---

<sup>39</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>40</sup> 505 U.S. 377, 391-92 (1992).

<sup>41</sup> *Id.* at 391.

<sup>42</sup> *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (holding that a Wisconsin statute providing penalty enhancements for bias-motivated crimes was “aimed at conduct unprotected by the First Amendment”).

<sup>43</sup> *Id.* at 485.

<sup>44</sup> The facts of this case are from *Yang v. Sturner*, 728 F. Supp. 845 (R.I. 1990).

Examiner had Neng Yang's body sent over. The next day, Dr. William Sturner, the Chief Medical Examiner for the State of Rhode Island, performed an autopsy on the body but could not determine a cause of death.

The Hmong believe that human bodies must never be mutilated, even after death. Neng Yang's parents would never have consented to the autopsy, but Dr. Sturner did not consult them. Instead, he relied on state law, which permits autopsies where there is a reasonable suspicion that the death was caused by (among other things) a criminal act or "an infectious agent capable of spreading an epidemic within the state."<sup>45</sup> The doctor decided that it was necessary to perform an autopsy on Neng Yang in order to "ensure that the cause of death was not attributable to some act or agent that posed a threat to the health, safety and welfare of the citizens of . . . Rhode Island."<sup>46</sup>

The Yangs were devastated. They believed that, because of the autopsy, "the spirit of Neng would not be free, therefore his spirit will come back and take another person in his family."<sup>47</sup> They sued Dr. Sturner, both individually and in his official capacity, for violating their rights to religious freedom, due process, and equal protection, as well as various state law claims. The district court held that, while the Yangs could not sue for damages under 42 U.S.C. § 1983, they had a valid *Bivens* claim for the violation of their First Amendment rights.<sup>48</sup>

In analyzing the Yangs' First Amendment claims, the court primarily cited to *Wisconsin v. Yoder*<sup>49</sup> and *Sherbert v. Verner*,<sup>50</sup> two cases in which the Supreme Court applied strict scrutiny to laws that burdened the free exercise of religion. The district court found that the Yangs' beliefs had been violated to an even greater extent than the parties in *Yoder* and *Sherbert*. Moreover, the court found no "compelling state interest" which could justify such a violation. Also, Dr. Sturner was not entitled to qualified immunity as a government official, because a reasonable medical examiner would have known that some citizens of Rhode Island, including the Hmong, have profound religious objections to autopsies. Therefore, Dr. Sturner should have known that performing an autopsy on a

---

<sup>45</sup> *Id.* at 847.

<sup>46</sup> *Id.*

<sup>47</sup> *Yang v. Sturner*, 750 F. Supp. 558, 558 (R.I. 1990b).

<sup>48</sup> In *Bivens v. Six Unknown Named Agents of the FBI*, 403 U.S. 388 (1971), the Supreme Court held that a private right of action for damages may be implied for violation of a plaintiff's constitutional rights where there is no other federal remedy available.

<sup>49</sup> 406 U.S. 205 (1972). In *Yoder*, the Supreme Court held that the Amish must be given an exception to the Wisconsin law requiring children to stay in school until the age of 16. The Amish feared that keeping their children in school beyond the 8th grade would expose them to "worldly" and unhealthy influences.

<sup>50</sup> 374 U.S. 398 (1963). In *Sherbert*, the Supreme Court held that a state could not deny unemployment benefits to someone who was fired for refusing to work on the Sabbath.

body that might be Hmong “would violate the religious beliefs of the decedent’s next of kin.”<sup>51</sup> The court found that Dr. Sturner was liable to the Yangs for the emotional distress he had caused them, and ordered a future hearing to be scheduled on the extent of damages.

Unfortunately for the Yangs, their victory was short-lived. Several months after the district court’s initial opinion, the U.S. Supreme Court decided the case of *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>52</sup> which essentially overturned the compelling interest test for free exercise, as used in *Yoder* and *Sherbert*. The district court judge, after reading the *Smith* decision, issued an addendum withdrawing his original opinion and dismissing the case with prejudice.

What went wrong? It wasn’t the Yangs’ cultural evidence. Dr. Sturner had not even attempted to challenge the Yangs’ stated beliefs or the centrality of those beliefs to the Hmong religion. And the judge was profoundly moved by their plight, stating:

“I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of the large number of Hmong who had gathered to witness the hearing. Their silent tears shed in the still courtroom as they heard the Yangs’ testimony provided stark support for the depth of the Yangs’ grief.”<sup>53</sup>

The problem was that, after *Smith*, “state laws of general applicability” are not subject to restriction by the free exercise clause.<sup>54</sup> That is, governmental laws or actions may violate people’s religious beliefs with impunity, so long as they are not targeting a particular group. For the Yangs, this meant that it did not matter if their religious freedom was burdened, because Dr. Sturner had acted in accordance with a neutral, generally applicable state law governing autopsies. The judge for the Yangs made it perfectly clear that he did not agree with this result, nor with the *Smith* majority’s reading of the relevant legal precedent, but that he was “constrained to apply the majority’s opinion to the instant case.”<sup>55</sup>

The *Smith* decision marked the end of the U.S. Supreme Court’s overhaul of free exercise jurisprudence that, arguably, began with *Bowen v. Roy*<sup>56</sup> in 1986. The plaintiff in *Roy* was a Native American man who refused to obtain a Social Security number for his 2-year-old daughter, Little Bird of the Snow. He believed that the number would rob his daughter’s spirit and keep her from

---

<sup>51</sup> 728 F. Supp. at 855.

<sup>52</sup> 494 U.S. 872 (1990).

<sup>53</sup> 750 F. Supp. at 558.

<sup>54</sup> *Smith*, 494 U.S. at 908 (Blackmun, J. dissenting).

<sup>55</sup> 750 F. Supp. at 559.

<sup>56</sup> 476 U.S. 693 (1986).

attaining spiritual purity and power. Because Roy would not provide a Social Security number for his daughter, the Pennsylvania Department of Public Welfare terminated the girl's benefits, medical insurance, and food stamps. The Supreme Court found that Roy's religious freedom was not violated by government use of a Social Security number. "The Free exercise Clause," held the Court, "simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."<sup>57</sup> The Court emphasized that Roy's freedom to express and exercise his religion had not been impaired.

Two years later, the Court expanded on *Roy* in the case of *Lyng v. Northwest Indian Cemetery Protective Association*.<sup>58</sup> In the *Lyng* case, the U.S. Forest Service sought to build a road and harvest timber in a part of the Six Rivers National Forest traditionally used by local American Indians for religious rituals. The Forest Service's own study concluded that the area was an indispensable part of the Indians' religion and that the planned road would seriously damage the Indian sacred area, but the Forest Service decided to go ahead with their plan anyway. The Indians, along with some nature groups and the State of California, filed suit to enjoin the road and the timber harvesting. The district court issued the injunction, finding that the road and the timber harvesting would violate the Indians' free exercise rights.<sup>59</sup>

The Supreme Court, however, did not agree. In fact, the majority found that the Forest Service's plan "cannot meaningfully be distinguished from the use of a Social Security number in *Roy*."<sup>60</sup> Strangely enough, these words were written by Justice O'Connor, who had written a partial dissent in *Roy*. There, O'Connor argued that the government did not need to compel Roy to provide his daughter's Social Security number, and that such compulsion was a religious burden that could only be justified by "an especially important governmental interest pursued by narrowly tailored means."<sup>61</sup> In *Lyng*, however, O'Connor wrote that the two cases were comparable in that neither the Indian plaintiffs *nor* the plaintiffs in *Roy* would be "coerced by the Government's action into violating their religious beliefs."<sup>62</sup> Even if the Forest Service plan would "virtually destroy the . . . Indians' ability to practice their religion,"<sup>63</sup> this was

---

<sup>57</sup> 476 U.S. at 699.

<sup>58</sup> 485 U.S. 439 (1988).

<sup>59</sup> *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586 (D. Cal. 1983).

<sup>60</sup> 485 U.S. at 449.

<sup>61</sup> 476 U.S. at 728. O'Connor was applying the *Sherbert* test to Roy's religious burden.

<sup>62</sup> 485 U.S. at 449.

<sup>63</sup> *Id.* at 451, quoting *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 693 (9th Cir. 1986).

not a burden on the free exercise of religion because the Indians were not being coerced into doing anything.

Justices Brennan and Marshall, both of whom had joined O'Connor's dissent in *Roy*, dissented from her opinion in *Lying*, along with Justice Blackmun. The Free Exercise Clause, wrote Brennan, covers more than just coercion or penalizing religious behavior; it covers any government action that frustrates the practice of religion. The majority had achieved its perfect analogy to *Roy* only by ignoring that decision's emphasis on internal government affairs and the lack of impairment to Roy's ability to practice his religion.

After *Lying*, the stage was set for *Smith*. In that case, two members of the Native American Church lost their jobs because they ingested peyote in a church ceremony, and were subsequently denied unemployment compensation. The Supreme Court was not sympathetic. Religious belief, wrote Scalia for the majority, cannot excuse anyone from following a neutral, generally applicable law. All of the Court's previous cases that appeared to hold otherwise were actually based on free exercise claims *plus* some other constitutional claim, like freedom of speech (though the cases themselves did not make this distinction). Free exercise claims alone did not merit strict scrutiny, or any scrutiny at all, unless the government was targeting a particular religion on purpose. After all, Scalia reasoned, why should the government have to adjust its drug laws to account for religious practice when it did not have to adjust its land management, as per *Lying*, or its administration of public benefits, as per *Roy*?

Again, Brennan, Marshall, and Blackmun dissented. Even O'Connor shied away from Scalia's abandonment of religious strict scrutiny. She concurred in the judgment, but only because she found enforcing drug laws to be a compelling state interest sufficient to overcome the obvious burden on the peyote users' religious practice.

While the *Smith* decision was a fatal blow to the *Yang* case, it was certainly not the last word on the issue. In 1993, Congress passed the Religious Freedom Restoration Act ("RFRA"), whose express purpose was to overturn *Smith* and "restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*."<sup>64</sup> Four years later, the Supreme Court struck down the RFRA, at least as applied to state law, in *City of Boerne v. Flores*.<sup>65</sup> While acknowledging Congress's authority to enforce First Amendment guarantees through legislation, the Court held that Congress did not have the authority "to decree the substance of the Amendment's restrictions on the State. [ . . . ]

---

<sup>64</sup> 42 USCS § 2000bb et seq.

<sup>65</sup> 521 U.S. 507, 529-36 (1997).

Congress does not enforce a constitutional right by changing what the right is.”<sup>66</sup>

It appears, then, that if a case similar to *Yang* were brought today, it would probably fail (at least in Rhode Island). This scenario was played out in *Kickapoo Traditional Tribe of Texas v. Chacon*,<sup>67</sup> a 1999 Texas case reminiscent of *Yang*. In *Kickapoo*, a Native woman named Norma Rodriguez died of apparent asphyxiation. Martha Chacon, the local Justice of the Peace, ordered an autopsy, allegedly with the approval of Rodriguez’s mother. Various tribal members and County officials tried to dissuade Chacon, arguing that Rodriguez had been an inhalant abuser and had clearly died from inhaling paint fumes. In the meantime, Rodriguez was buried on tribal land. When Chacon learned of this, she ordered the body disinterred so that an autopsy could be performed. This was unacceptable to the Kickapoo, who believe that “the scarring to the body caused by an autopsy and the disruption of a grave damages the spirit and can have adverse effect [sic] on the decedent’s family.”<sup>68</sup> The tribe filed suit and obtained a temporary restraining order against the disinterment. The State (as co-defendant) removed the case to district court.

The district court briefly discussed *Smith*, the RFRA, and *Boerne*, and concluded that the tribe’s free exercise claim should be evaluated by the standard set in *Smith*. That is, a state law that burdens only free exercise of religion need not be justified by a compelling state interest, so long as the law is facially neutral and generally applicable. Such was the case with the Texas law allowing a justice of the peace to order an autopsy, so there was no First Amendment violation. The court noted that similar cases that went the other way were all decided before *Smith*, and cited to the *Yang* addendum for the proposition that an autopsy statute is facially neutral. The court vacated the restraining order and granted judgment for the defendants on all claims.

So did *Smith* mark the death of the free exercise clause? Not exactly. For one thing, Congress responded to the Supreme Court’s decision in *Boerne* by enacting the Religious Land Use and Institutionalized Persons Act (“RLUIPA”),<sup>69</sup> a more carefully limited version of the RFRA. The RLUIPA applies to persons in federal or federally-funded institutions, which includes possibly the largest group of free exercise plaintiffs: prison inmates.

---

<sup>66</sup> *Id.*

<sup>67</sup> 46 F. Supp. 2d 644 (W.D. Tex. 1999).

<sup>68</sup> *Id.* at 651.

<sup>69</sup> 42 U.S.C. § 2000cc et seq. The RLUIPA was upheld by the Supreme Court in *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

Under the RLUIPA, prison inmates enjoy a pre-*Smith* level of religious protection. This is demonstrated in the recent case of *Spratt v. Rhode Island Dept. of Corrections*,<sup>70</sup> in which Wesley Spratt, a convicted murderer and maximum-security prisoner, sued for the right to preach to other inmates. Spratt initially brought his claims under the RFRA, but since the RFRA did not apply after *Boerne* and the defendants acknowledged that Spratt could re-file his claims under the RLUIPA if necessary, the court and the parties decided to treat the complaint as filed under RLUIPA. The RLUIPA basically uses the old *Sherbert* test, in which a substantial burden on religious exercise can only be justified if there is (1) “a compelling government interest,” and (2) the burdensome regulation “is the least restrictive means of furthering that compelling governmental interest.”<sup>71</sup> Using this test, the district court found that Spratt’s religious exercise was burdened by the prison’s ban on inmate preaching, but that the ban was justified by the compelling need for prison security, which could not be accomplished by less restrictive means.

The Court of Appeals, however, was not convinced. The court noted that, because of Spratt’s *prima facie* showing that his religious exercise had been substantially burdened, the burden of proof was shifted to the defendants to show that the preaching ban furthered a compelling state interest in the least restrictive fashion. While agreeing that prison security was indeed a compelling state interest, the court found that the defendants had not established that keeping Spratt from preaching was necessary for prison security. The defendants offered only one piece of evidence in support of their claim: an affidavit from the Assistant Director of Operations for the Rhode Island Department of Corrections, who stated that a prisoner who was allowed to preach would be perceived as a leader, and could abuse that power. The court, noting that the affidavit “cites no studies and discusses no research in support of its position,”<sup>72</sup> found the defendants’ evidence insufficient. The defendants’ other argument was that allowing prisoners to proselytize could lead to terrorist activity, as with some radical Muslim prisoners. This argument, said the court, only served to show that the prison had not given any individualized consideration to Spratt’s case, as required by *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.<sup>73</sup> Spratt was an ordained Christian minister who had been preaching during weekly services for seven years – a far cry from a Muslim extremist.

Aside from RLUIPA, the other reason that free exercise is not dead is that religious practitioners still have some protection under *Smith*, if only against

---

<sup>70</sup> 482 F.3d 33 (1st Cir. 2007).

<sup>71</sup> *Id.* at 37-38, quoting 42 U.S.C. § 2000cc-1(a).

<sup>72</sup> *Id.* at 39.

<sup>73</sup> 546 U.S. 418 (2006).

overt discrimination. The Supreme Court made this point soon after *Smith* in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>74</sup> the famous Florida Santeria case. Santeria, a syncretic Caribbean religion combining Catholic and animist elements, uses animal sacrifice as part of its rituals. The plaintiff in *Babalu Aye*, a Santeria church, planned to open a new house of worship, school, and cultural center in Hialeah, a town in South Florida. Many Hialeah residents were alarmed at this prospect. In response to citizens' concerns, the Hialeah city council passed several ordinances prohibiting ritual animal sacrifice. The ordinances carefully distinguished between the killing of animals for strictly food purposes and animal sacrifice, defined as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption."<sup>75</sup> This distinction was necessary because Santeria practitioners usually eat the sacrificial animals after the rituals.

In the resulting lawsuit, the district court ruled for the defendant City, holding that any incidental burden on the plaintiffs' religious practice was fully justified by compelling governmental interests.<sup>76</sup> These included protecting public health from unsanitary animal remains, protecting children from the trauma of witnessing the sacrifices, protecting animals from inhumane treatment, and keeping animal slaughter within areas zoned for that purpose. The court made no factual findings to accompany its holding. The Court of Appeals affirmed, briefly noting that *Smith*, which came after the district court's decision, would have imposed an even more lenient standard on the City's restrictive regulations.

The Supreme Court, however, found that the City's regulations were invalid under *Smith*. The Court noted that the free exercise clause prohibits discrimination against religious beliefs or conduct. Though the city ordinances did not refer to a particular religion, their history, text (including references to "sacrifice" and "ritual"), and operation clearly revealed their intent to prohibit Santeria's practices. For example, while one ordinance prohibited the unnecessary killing of animals, this was interpreted by the City and the state Attorney General to include ritual killing but not hunting, fishing, euthanasia, killing animals for food, or even "the use of live rabbits to train greyhounds."<sup>77</sup> The Court could find no non-discriminatory justification for this preference for secular over religious reasons for killing animals, and therefore held that the ordinances were not neutral. Additionally, the City's alleged attempt to prevent animal cruelty and unsanitary waste disposal was addressed solely to religious

---

<sup>74</sup> 508 U.S. 520 (1993).

<sup>75</sup> *Id.* at 527.

<sup>76</sup> 723 F. Supp. 1467 (SD Fla. 1989). This case came right before the Supreme Court decided *Smith*. The district court used the *Sherbert* balancing test.

<sup>77</sup> *Id.* at 537, citing *Kiper v. State*, 310 So. 2d 42 (Fla. App. 1975).

sacrifice and not to other sources of those problems. Thus, the ordinances were not generally applicable either.

Because the ordinances were not neutral or generally applicable, the Court evaluated them with the highest level of scrutiny. Even if the state interests proffered by the City were compelling, the Court held, the ordinances were clearly not narrowly tailored to further those interests, for the same reasons that made them non-neutral and not generally applicable. The City's regulations therefore violated the church's First Amendment rights, and were invalid.

### *B. Other Constitutional Claims*

In 1963, a high school teacher in Pasadena, California, was reassigned because he had grown a beard. He sued the school board.<sup>78</sup> The California Court of Appeal held that wearing a beard was a fundamental liberty interest protected by the Fourteenth Amendment's due process clause. Furthermore, the court found "that the wearing of a beard is a form of expression of an individual's personality,"<sup>79</sup> and therefore entitled to "peripheral" First Amendment protection.

This case was cited by a Florida district court six years later, when another high school teacher was dismissed for refusing to shave off his goatee.<sup>80</sup> The Florida court found that the teacher, Booker C. Peek, should get at least as much protection for his goatee as the California plaintiff got for his beard. Additionally, the court bolstered its finding of First Amendment protection by quoting the plaintiff's assertion that the goatee was "an appropriate expression of his heritage, culture and racial pride as a black man."<sup>81</sup> Not only did the court accept the idea that a goatee might be a legitimate form of expression, it seemed to view the goatee-based discrimination as a proxy for racial discrimination. Even though there was no direct evidence of racial animus on the part of the school's Principal, the court found that his act of requesting that the plaintiff shave his goatee was "racially motivated . . . as a matter of law and fact." This was obvious, said the court, from the fact that Peek's dismissal bespoke an institutional "intolerance of ethnic diversity and racial pride."<sup>82</sup>

On the other side of the "right to hair" debate is the case of *New Rider v. Board of Education*.<sup>83</sup> The plaintiffs in *New Rider* were three Pawnee Indian children

---

<sup>78</sup> *Finot v. Pasadena City Board of Education*, 250 Cal. App. 2d 189 (1967).

<sup>79</sup> *Id.* at 199.

<sup>80</sup> The facts of this case are from *Braxton v. Board of Public Instruction*, 303 F. Supp. 958 (D. Fla. 1969).

<sup>81</sup> *Id.* at 959.

<sup>82</sup> *Id.* at 960. The court uses some fairly circular logic here – essentially, the Principal's discriminatory intent is proven by the discriminatory effect of his actions.

<sup>83</sup> 480 F.2d 693 (10th Cir. 1973).

who were suspended from school for having long hair. The dress code at their school dictated that students' hair must not be long enough to touch their ears or shirt collar. The children wanted long, braided hair because they saw it as a marker of pride in their Pawnee heritage and traditions. (It is perhaps ironic that the plaintiffs attended Pawnee Junior High School, in Pawnee County, Oklahoma.) An anthropologist named Dr. Weltfish testified that "such long braided hair has racial and cultural significance to the Pawnees" as well as religious significance, though she also testified that everything a Pawnee person does has religious significance.<sup>84</sup> Two other witnesses, presumably Pawnees, testified that young Indians were beginning to wear their hair long as part of a renewed interest in their traditions and culture. On the other hand, Dr. Muriel Wright, Editor of the Oklahoma Historical Society and author of a book on Oklahoma's Indian tribes, testified that the Pawnees did *not* have a tradition or custom of wearing long, braided hair.

The district court issued a preliminary injunction against the school board, finding that the plaintiffs' hairstyle was an expression of Pawnee heritage and religious identity. But one month later, the court reversed its findings and dismissed the complaint. The 10th Circuit Court of Appeals affirmed the dismissal, holding that the Pawnees' long hair was not a form of speech protected by the First Amendment. It was, rather, "speech-related conduct," which could be regulated under *U.S. v. O'Brian*<sup>85</sup> as long as the regulation served an important governmental interest and was narrowly tailored to that interest. The court accepted the school board's assertion that the hair regulation was necessary in order to maintain school spirit, unity, and discipline.

The Supreme Court declined to hear the *New Rider* case.<sup>86</sup> However, Justices Douglas and Marshall dissented from the denial of certiorari. Douglas protested the Court's persistent refusal to rule on the constitutionality of hair-length restrictions in schools, and noted that the Circuits were deeply divided on the issue. He was not impressed with the *New Rider* defendants' attempts to impose uniformity on students, especially in light of the historic discrimination against Indian pupils in American public schools. The Pawnee children's long hair, said Douglas, was intended to convey a specific message about their cultural pride.

---

<sup>84</sup> *Id.* at 696.

<sup>85</sup> 391 U.S. 367 (1968). In *U.S. v. O'Brian*, the Supreme Court upheld a law against destroying or mutilating draft cards. Such "speech-related conduct," held the Court, does not merit the same level of scrutiny as pure speech.

<sup>86</sup> *New Rider v. Board of Education*, 414 U.S. 1097 (1973).

As such, it merited the same level of First Amendment protection given to the plaintiff students in *Tinker v. Des Moines Indep. Cmty. School District*.<sup>87</sup>

These hair-related decisions reveal a profound uncertainty in the law about the importance of religious and cultural beliefs. Before *Smith*, a plaintiff was likely to bring a claim for the right to wear long hair under the free exercise clause. For example, in 1975, an incarcerated Native American man, Jerry Teterud, challenged a prison regulation that prevented him from wearing long, braided hair.<sup>88</sup> Teterud claimed that long hair was a part of his religion, and presented testimony from two anthropologists and a Native American spiritual leader to support his contention. The district court found that the hair regulation as applied to Teterud was unconstitutional, and the Court of Appeals affirmed, noting that the prison's interests in cleanliness and security could be satisfied by less restrictive means. Similar cases include *Moskowitz v. Wilkinson*,<sup>89</sup> in which an Orthodox Jewish inmate won the right to wear a beard in prison, and *Kabane v. Carlson*,<sup>90</sup> in which another Jewish inmate won the right to be given kosher food.

Today, such inmate claims would probably be brought under the RLUIPA, which still offers substantial free exercise protection. (If Mukesh K. Rai had been served a beef burrito in prison instead of at a Taco Bell, perhaps he would have had a stronger claim.) But for plaintiffs who aren't in prison, free exercise claims can be difficult to negotiate after *Smith*. In the case of *Alabama and Coushatta Tribes of Texas v. Trustees of the Big Sandy Ind. Sch. Dist.*,<sup>91</sup> a district court described the uncertainty of applying *Smith* to neutral civil regulations. Many jurisdictions, noted the court, have interpreted *Smith* as holding that *any* free exercise claim standing alone need only be subject to rational basis review. Other jurisdictions, however (most notably the Ninth Circuit), have limited *Smith*'s holding to free exercise challenges to criminal laws.

The *Big Sandy* case, like *New Rider*, involved several Native American schoolchildren who wished to wear their hair long in violation of their school's dress code. The children and their parents brought claims for violation of their

---

<sup>87</sup> 393 U.S. 503 (U.S. 1969). The Court in *Tinker* held that high school students wearing black armbands to protest the Vietnam War were engaging in protected speech. In order to justify prohibiting the armbands, a school would have to show that allowing them would substantially interfere with the discipline needed to operate the school. The defendants in *Tinker* failed to do this, and the Court struck down their anti-armband policy.

Note that this standard is not actually very different from the one used by the Court of Appeals in *New Rider*. However, that court accepted without proof the school board's claim that the long-hair regulation was necessary to enforce discipline.

<sup>88</sup> *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975).

<sup>89</sup> 432 F. Supp. 947 (D. Conn. 1977).

<sup>90</sup> 527 F.2d 492 (2d Cir. 1975).

<sup>91</sup> 817 F. Supp. 1319 (E.D. Tex. 1993).

First Amendment free exercise and free speech rights, as well as their Fourteenth Amendment equal protection and due process rights. An anthropologist testified at trial that many Southeastern Indian tribes traditionally wore their hair long and believed that hair was sacred, but he could not speak about the Alabama Coushatta Tribe specifically because tribal members did not talk to outsiders about their beliefs and rituals. Two of the plaintiff children testified that they believed their long hair was a part of their religion and their Native heritage.

The district court initially noted that, in the Fifth Circuit, school hair-length regulations were not considered a violation of free speech, and were thus subject only to rational basis review.<sup>92</sup> The court also noted that the Fifth Circuit had yet to rule on the scope of *Smith's* application, and expressed grave misgivings about applying the *Smith* rational basis test to any and all free exercise claims. Thankfully, the court decided, it did not have to do so, because the *Big Sandy* plaintiffs had “a hybrid claim of free exercise, free speech, due process, and equal protection rights.”<sup>93</sup> According to the *Smith* majority, when a free exercise claim is paired with a free speech claim, a higher standard of scrutiny is called for. Here, the court found that the plaintiffs had a valid free speech claim under *Tinker*, because the testimony of the plaintiffs and the anthropologist constituted “compelling evidence that long hair in Native American culture and tradition is rife with symbolic meaning.”<sup>94</sup> Finally, citing to prison cases like *Teterud* and *Moskowitz*, the court held that, if hair regulations were not narrowly tailored to serve a compelling state interest in prison, they definitely could not be so in the more relaxed environment of public schools.

Long hair, it seems, may be viewed as both a form of religious exercise and a symbolic expression of cultural heritage. What else might fit this description? Dress? Diet? How about the ingestion of peyote in a communal religious ceremony? In the confusing world of post-*Smith* First Amendment jurisprudence, a plaintiff would be well-advised to invoke both religion and expression, and to find an anthropologist who will testify accordingly.

## **V. Culture Used to Bolster a Plaintiff's Credibility**

In the early 1980s, a Hmong man named Vang Xiong Toyed worked for the Washington State Department of Employment Security in Spokane,

---

<sup>92</sup> *Citing Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972).

<sup>93</sup> 817 F. Supp. at 1332.

<sup>94</sup> *Id.* at 1333.

Washington.<sup>95</sup> His job was to interview refugees and help them to find work. In 1983, Xiong told Yia Moua, a Hmong client from Laos, that he would pick her up and take her somewhere so she could study for her driver's license exam. Instead, he allegedly drove her to a motel and raped her.

That same year, Xiong also allegedly raped Maichao Vang, another Hmong client who had contacted him to help her find a job. Vang testified at trial that Xiong raped her "at least sixteen times," relying each time on the pretext of helping her to find work or to study for her driver's license.<sup>96</sup> Moua and Vang eventually told their husbands about the rapes, and the couples brought a complaint against Xiong under § 1983, alleging that he had used his official position to deprive them of their constitutional right to freedom from sexual assault. A federal jury awarded the plaintiffs \$300,000.

On appeal, Xiong argued that there was no evidence supporting the jury's finding that he had acted "under color of state law."<sup>97</sup> The rapes, he asserted, had nothing to do with his authority as a state employee. The appeals court disagreed, citing the testimony of anthropologist Marshall Hurlich, who explained at trial that Hmong refugees rely heavily on government assistance when they come to the United States, and are therefore "in awe of government officials."<sup>98</sup> The court concluded that, based on Hurlich's testimony, the jury could reasonably have found that Xiong used his position at the Department of Employment Security to influence and control the plaintiffs in order to rape them.

Xiong also specifically challenged the district court's admission of Hurlich's testimony. Hurlich, an expert on Hmong culture as well as an epidemiologist at the Seattle Department of Public Health, testified at trial about the cultural roles of Hmong women and the Hmong refugees' awe of American government officials. He described the submissiveness and obedience that are expected of Hmong women, and their attitudes about sex, marriage, and infidelity. Xiong argued that this testimony was not relevant and was prejudicial to his case.

Again, the appellate court did not agree. Hurlich, the court noted, was the only expert that either side had been able to find who could explain Hmong history and culture to the jury. His testimony was relevant to helping the jury understand why the parties behaved as they did. "For example," wrote the

---

<sup>95</sup> The facts of this case are taken from *Vang v. Xiong*, 944 F.2d 476 (9th Cir. 1991).

<sup>96</sup> *Id.* at 478.

<sup>97</sup> *Id.* at 478-79. The appellate court applied the exacting "no evidence" standard because Xiong's attorney failed to move for a directed verdict at the close of the evidence, and was thus precluded from moving for a JNOV after the verdict. With a JNOV, the standard is "sufficient evidence."

<sup>98</sup> *Id.* at 480.

court, “plaintiffs continued to have contact with Xiong after he raped them. Hurlich’s testimony regarding the place of Hmong women in that culture was helpful in understanding plaintiffs’ actions after Xiong’s attacks.”<sup>99</sup> The court held that the testimony was indeed prejudicial, because it supported the plaintiffs’ claims and their credibility. However, it was not *unduly* so, because it was directly relevant and limited to general statements about Hmong culture.

As the facts of the *Vang* case suggest, this type of cultural credibility evidence can also be used in a criminal context. For example, in *Castillo v. State*,<sup>100</sup> the Texas Court of Appeals affirmed the conviction of Raul Castillo, a *curandero* (faith healer) accused of sexually assaulting a sixteen-year-old girl, O.E., under the pretense of curing her. At trial, the State had introduced testimony from Marie Teresa Hernandez, a doctoral student in cultural anthropology, about the rituals and practices of *curanderos*. On appeal, the court accepted the State’s assertion that it had called Hernandez to testify “in order to help the jury understand why impressionable young people like O.E. might feel compelled to comply with the prescriptions of a *curandero*.”<sup>101</sup> Castillo did not challenge the relevance of Hernandez’s testimony, but only its reliability. The appellate court concluded that it was within the trial court’s discretion to admit the testimony.

## **VI. Cultural Criteria as Part of Statutory Law**

In 1984, Marina Rena Katelnikoff and her father shot and skinned approximately 35 sea otters off the coast of Port Lions, Alaska.<sup>102</sup> Katelnikoff had the pelts tanned and then used them to make “stuffed bears, pillows, hats, mittens, and fur flowers which she characterizes as ‘cat-tails, pussy willows, and puffs.’”<sup>103</sup> She used some commercial patterns, copied some items that she owned, and also used some of her own designs and those of local craftspeople.

The Marine Mammal Protection Act (“MMPA”) governs the taking of marine mammals in U.S. waters. The Act contains an exemption allowing the Indians, Aleuts, and Eskimos of Alaska to kill marine mammals for subsistence or “for purposes of creating and selling authentic native articles of handicrafts and clothing.”<sup>104</sup> Katelnikoff was an Aleut, and labeled all of her crafts for sale with silver tags, obtained from the Alaska Department of Commerce and Economic Development, that read “Authentic Native Handicraft from Alaska.” However,

---

<sup>99</sup> *Id.* at 482.

<sup>100</sup> 2000 Tex. App. LEXIS 410 (Tex. Ct. App. 2000) (Unpublished).

<sup>101</sup> *Id.* at \*4.

<sup>102</sup> The facts of this case are from *Katelnikoff v. United States Dep’t of Interior*, 657 F. Supp. 659 (D. Alaska 1986).

<sup>103</sup> *Id.* at 660-61.

<sup>104</sup> *Id.* at 660, quoting 16 U.S.C. § 1371(b).

the regulations promulgated to implement the MMPA limit “authentic native articles” to those “which ... were commonly produced on or before December 21, 1972.”<sup>105</sup> U.S. Fish & Wildlife Service agents, upon determining that Katelnikoff’s crafts did not fit this criterion, seized the items and refused to give them back. Katelnikoff sued.

The primary issue in *Katelnikoff* was whether the regulation Katelnikoff had allegedly violated was consistent with the MMPA and Congressional intent. Katelnikoff argued that the MMPA’s exemption was intended to preserve native handicrafts, but that the regulation defeated this purpose by suppressing artistic expression and limiting “native” uses to a time when few, if any, natives were allowed to hunt sea otters, due to restrictive laws and low species numbers. The government argued that the exemption was only intended to preserve native traditions, and that the MMPA’s overall purpose of protecting marine mammals would hardly be consistent with expanding native commercial uses of the animals. The court sided with the government, noting Congress’s frequent use of words like “traditional” and “cultural legacy” in its testimony and reports on the exemption.

Unfortunately for Katelnikoff, the court was able to use her own evidence against her. Katelnikoff presented two experts, who testified that sea otters had been used in Alaska for a wide variety of purposes long before Russians and Europeans arrived, including parkas, hats, bone tools, bedding, and even children’s toys. Presumably, Katelnikoff felt that this testimony would demonstrate that the government’s interpretation of “traditional” was too narrow. The court, however, found that the broad range of traditional uses merely indicated that the challenged regulation would not restrict the artistry of native craftspeople. As the natives are forced to “search their cultural pasts for traditional uses,” wrote the court rather patronizingly, “they will likely broaden the range of commercial options open to them and expand their creative visions as well.”<sup>106</sup>

As *Katelnikoff* demonstrates, attempts to legislate what is “traditional” or “authentic” can result in arbitrary and frustrating legal standards. At least one commentator has pointed out that, while the idea of “tradition” appears with great frequency in Alaskan resource law, the term is rarely defined or explained.<sup>107</sup> This lack of a definition is often just as problematic as an arbitrary or inept one. In *Alaska State Snowmobile Ass’n v. Babbitt*,<sup>108</sup> for example, the plaintiff Association sued various governmental agencies for the right to use

---

<sup>105</sup> *Id.*, quoting 50 C.F.R. § 18.3.

<sup>106</sup> *Id.* at 667.

<sup>107</sup> Tomsen, Jennifer L. “Note: ‘Traditional’ Resource Uses and Activities: Articulating Values and Examining Conflicts in Alaska.” 19 Alaska L. Rev. 167 (2002).

<sup>108</sup> 79 F. Supp. 2d 1116 (D. Alaska 1999).

snowmobiles in Denali National Park. While the Alaska National Interest Lands Conservation Act allowed snowmobile access to restricted conservation areas for “traditional activities,” the court had a terrible time trying to figure out what the U.S. National Park Service considered to be “traditional.” With no official standard, the court was compelled to find that the closure of the Park to snowmobiling was arbitrary and capricious.

Laws that treat culture as a dynamic and complex feature of daily life, instead of a relic in need of pristine preservation, are likely to do a better job of respecting the needs of people and communities. For example, every voting district in Alaska is required to be “as nearly as practicable a relatively socio-economically integrated area.”<sup>109</sup> In *Hickel v. Southeast Conference*, the plaintiffs challenged the Alaska Governor’s 1991 redistricting plan as violative of this constitutional mandate. The court admitted the testimony of local residents and anthropologists about the socio-economic relationships prevailing in particular areas, and proceeded to adjust the district boundaries accordingly. Though the term “socio-economically” is not very different from “culturally,” perhaps the former’s overtones of modern life and everyday concerns make it more conducive to practical decision-making than the latter, with its hint of museum exhibits and colorful national costumes.

## **VII. The Presentation of Cultural Evidence**

In some cases, such as the *Yang* case discussed in Section IV, the court will accept the plaintiffs’ own assertions about their beliefs and culture without further evidence. Often, however, expert testimony is helpful or necessary to support the plaintiffs’ stated beliefs, or to respond to a defendant’s charge of prevarication. For example, in the *Friedman* case discussed in Section II, the defense challenged Friedman’s beliefs and Rabbi Stahl’s interpretation of Hebrew law. The court held that the rabbi’s testimony was not supposed to demonstrate the correct interpretation of Hebrew law, but only “whether there is a branch of Judaism which believes in this interpretation; and, whether Miss Friedman is a member of this group.”<sup>110</sup> Rabbi Stahl’s testimony answered yes to both questions, and provided a context for understanding Friedman’s motivations when she jumped from the ski lift.

So what exactly is “expert” testimony? In 1993, the Supreme Court decided the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>111</sup> which set the modern standard for the admission of expert testimony. The Court’s standard is based

---

<sup>109</sup> *Hickel v. Southeast Conference*, 846 P.2d 38, 43 (Alaska 1992), quoting Alaska Const. art. VI, § 6.

<sup>110</sup> 54 Misc. 2d at 452-53.

<sup>111</sup> 509 U.S. 579 (1993).

on the Federal Rules of Evidence, which allow “a witness qualified as an expert by knowledge, skill, experience, training, or education” to testify in situations where his or her “specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.”<sup>112</sup> The “qualified as an expert” requirement is to ensure that the testimony is reliable, while the “assist the trier of fact” requirement ensures that it is relevant. The *Daubert* court went on to describe some factors for courts to consider when evaluating the reliability of scientific testimony, which was the kind at issue in that case.

Though anthropology and related disciplines are not “hard sciences,” the general outlines of the *Daubert* test can still be applied to experts on culture. The court in *Castillo*, discussed in Section V, gave some good guidelines for evaluating the reliability of testimony derived from the social sciences. The court began by noting that the validity of the witness’s “technique” or “theory” is not usually the issue in social science, as it is in hard science. Instead, the court suggested three factors to consider. First, is the expert’s area of expertise legitimate? Anthropology passes this test, as would probably any social science taught at major universities. Astrology does not. Second, is the expert testifying to matters “within the scope of that field?”<sup>113</sup> Though cultural evidence is generally within the scope of cultural anthropology, a more narrow focus is likely to be much more persuasive than a general one. For example, the anthropologist in *Castillo* taught courses at the University of Houston on Mexican-American culture, and had spent over two years interviewing people involved with *curandero* practice and reading about similar practices. Third, is the expert properly relying on the principles of his or her discipline? This may be difficult to discern for anthropology, but experts should at least be able to cite the sources of their information.

The expert witness reports offered in *Recreational Dev. of Phoenix, Inc. v. City of Phoenix*<sup>114</sup> provide a good example of how *not* to present expert cultural testimony. The *Phoenix* plaintiffs were various owners and patrons of “swingers” clubs in the Phoenix area who sought to prevent the City from enforcing its ordinance against sex clubs. The City claimed that the ordinance was intended to combat the spread of sexually transmitted diseases. The plaintiffs attempted to portray swingers as a responsible, safe, and expressive “subculture” whose clubs posed no STD risk. In support of this contention, the plaintiffs submitted reports by two putative experts, Dr. Norman Scherzer and Terry Gould.

First, the court considered the legitimacy of the experts’ fields. Dr. Scherzer’s “field” could not be identified. His report stated that he had a Ph.D., but did

---

<sup>112</sup> *Id.* at 588, quoting FRE 702.

<sup>113</sup> 2000 Tex. App. LEXIS 410 at \*7.

<sup>114</sup> 220 F. Supp. 2d 1054 (D. Ariz. 2002).

not say what area the degree was in or from where it was obtained. The Gould report identified Gould as an investigative journalist. Second, the court considered whether the reports offered testimony within the experts' scope of expertise. This was impossible to say for Dr. Scherzer, who had no identifiable field. For Gould, the answer was no. Gould may have been an accomplished investigative reporter, but "[h]e was not trained as a sociologist or anthropologist, academic disciplines that *might* qualify one to provide reliable information about the particular cultural traits and behavior patterns of a particular group of people."<sup>115</sup> Third, the court looked at the experts' methods. Dr. Scherzer's methods seemed unreliable for any field, as his report relied on anecdotal evidence (which he referred to as "antidotal"), unsupported statistical assertions, and uncited professional journals. Gould also seemed to lack any sort of professional methodology. He claimed to have "inspected" the plaintiffs' clubs, but did not say when, how often, or whether he identified himself as an investigative journalist to the clubs' employees. Gould and Dr. Scherzer both claimed to rely on other experts' studies, but did not cite to any sources that could be checked or evaluated. The court found that both expert reports were inadmissible under *Daubert*, and ordered them both stricken.

### **VIII. Protecting Indigenous Culture**

On the island of Mata Nui, the Tohunga are struggling. Their heroes, whom the Tohunga call the Toa, must fight an evil creature named Makuta in order to liberate their island. This may sound to some ears like the beginning of a fantastical Polynesian legend, and in a way, it is. But this legend was told recently by a large Danish toy company, and its characters are all made of colorful plastic blocks.

The Tohunga and their imperiled island were created by Lego as part of a popular computer game/toy line called Bionicle. In 2001, shortly after the game was released, a New Zealand lawyer named Maui Solomon sent a letter to Lego on behalf of three Maori tribes. The Maori were offended by the game's use of Maori words and names, and concerned that Lego intended to claim legal rights to these words. They demanded that Lego stop selling Bionicle.<sup>116</sup> Lego met with Maori representatives in New Zealand and the parties came to an agreement, under which Lego changed the most offensive Maori names (namely "Tohunga," which is usually defined as "priest" or "healer"—not a word to be taken lightly), stopped using Maori words for new characters, and pledged to develop a code of conduct for future use of traditional cultural

---

<sup>115</sup> *Id.* at 1062, quoting *Jinro Am., Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1006 (9th Cir. 2001).

<sup>116</sup> "Lego game irks Maoris," BBC News, May 31, 2001.

elements.<sup>117</sup> Despite the agreement, a group of Maori computer hackers attacked an independently-run Bionicle fan website, prompting retaliatory attacks by the site's users on a Maori activist website.<sup>118</sup>

At the heart of this small struggle lies an increasingly important question: Should elements of a culture—words, symbols, designs, dances, medical knowledge—be treated as property? In October 2000, the World Intellectual Property Organization (WIPO), a UN agency, established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in order to answer this question. The IGC has yet to forge an international consensus on the issue, though it has researched the needs of “traditional knowledge holders” in 28 countries<sup>119</sup> and developed draft provisions for member states to use in formulating their own cultural protection laws.<sup>120</sup>

If the purpose of intellectual property (IP) law is to provide a financial incentive or reward for individual creativity, then it would seem to be a bad fit for traditional knowledge, which is shaped by many individuals over long periods of time and for reasons that transcend the financial. In this view, IP protection for traditional knowledge goes too far, because it restricts the use of certain information (the downside of IP protection) but will not stimulate the creation of new information (the usual justification for IP protection). On the other hand, the consequences of misusing cultural information may also transcend the financial, leading some to argue that regular IP protection for traditional knowledge does not go far enough.

Some recent Australian cases may help to illustrate this dilemma. Australia, a country historically indifferent to the needs of its indigenous population, has taken great strides in the past few decades towards addressing issues of Aboriginal lands and culture.<sup>121</sup> In the area of intellectual property, the courts only began to acknowledge in the late 1980s that Aboriginal artwork could be considered “original” for copyright purposes.<sup>122</sup> By 1994, in the case of *Milpururru v. Indofurn Pty. Ltd.*,<sup>123</sup> the Northern Territory court expressed

---

<sup>117</sup> Griggs, Kim. “Lego Site Irks Maori Sympathizer,” *Wired.com*, November 21, 2002. (There seems to be a lot of irking going on.)

<sup>118</sup> Coombe, Rosemary J. and Andrew Herman. “Rhetorical Virtues: Property, Speech, and the Commons on the World-Wide Web,” *Anthropological Quarterly*, Volume 77, Number 3, Summer 2004, pp. 559-574.

<sup>119</sup> Report available at <<http://www.wipo.int/tk/en/tk/ffm/report/index.html>>.

<sup>120</sup> At <[http://www.wipo.int/tk/en/consultations/draft\\_provisions/draft\\_provisions.html](http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html)>.

<sup>121</sup> See, generally, Grad, Rachael. “Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia,” 13 *Duke J. Comp. & Int'l L.* 203, 209-213 (2003).

<sup>122</sup> Brown, Michael F. *Who Owns Native Culture?*, p. 44. Cambridge: Harvard University Press, 2003.

<sup>123</sup> 54 F.C.R. 240 (1994) (Australia).

surprise that the respondents would even try to contest the copyright ownership of Aboriginal artists. The court found such denial to be an “extraordinary tactical stance,” and eventually awarded partial trial costs to the artists for having their time wasted.

The *Milpurrruru* decision (commonly known as the *Carpets* case because the respondents used the artists’ designs without permission to decorate carpets) is noteworthy for the serious consideration and respect given to the Aboriginal artists’ cultural claims. For example, “[i]n accordance with Aboriginal custom,” the court refrained from using the names of the artists who were deceased, and instead referred to them by their “skin names,” or kinship group names. More importantly, the court allowed the artists to present cultural evidence to explain the damage caused by the respondents’ misappropriation of their artwork. The paintings at issue in the *Carpets* case were of sacred stories and themes, and their clan owners would never have permitted them to be used on carpets for placing on the floor and walking upon. As the artists and other witnesses testified, the right to use a clan’s designs, stories, and totemic figures may be entrusted to an individual artist, but that artist is expected to use the material only in ways that are beneficial to the clan. Moreover, the artist is held responsible for any misuse of the material by third persons, even without the artist’s consent. Punishment in modern times may include “preclusion from the right to participate in ceremonies, removal of the right to reproduce paintings of that or any other story of the clan, being outcast from the community, or being required to make a payment of money.” One witness even mentioned spearing as a punishment in “serious cases.”

Like the plane crash victims discussed in Section II, the Aboriginal artists had fairly straightforward tort claims (wrongful death in the former cases; copyright violations here), and only used cultural evidence to illustrate the extent of their damages. The court found that Australia’s Copyright Act could address the cultural harm by way of additional damages for personal humiliation and suffering (including “[a]nger and distress suffered by those around the copyright owner”) and flagrant infringement, as well as a catch-all provision directing courts to consider “all other relevant matters.”<sup>124</sup> After much discussion, the court awarded \$5000 to each of the artists for the flagrancy of the infringement, plus an additional \$10,000 to each of the still-living artists for “the harm suffered . . . in their cultural environment.”

Just four years after the *Carpets* case, George Milpurrruru, one of the artists in that case, became involved in a similar case with even wider legal implications. The painting at issue in *Bulun Bulun and Milpurrruru v. R & T Textiles Pty. Ltd.*<sup>125</sup>

---

<sup>124</sup> Copyright Act 1968 (Cth), s115(4)(b).

<sup>125</sup> 41 I.P.R. 513 (1998); 1998 AUST FEDCT LEXIS 649.

was painted by an Aboriginal artist named Johnny Bulun Bulun, and used without permission by the respondent textile company for decorating clothing fabrics. Perhaps taking a lesson from the *Carpets* case, which was heard by the same judge, the respondent in *Bulun Bulun* did not attempt to deny the copyright infringement, choosing instead to plead ignorance and quickly settle with Bulun Bulun. This left only Milpururru's claim: that, given the nature and customs of Aboriginal artwork, the entire Ganalbingu clan should be considered equitable owners of the painting and its copyright. As Justice Von Doussa succinctly noted at the outset of his opinion, "These proceedings represent another step by Aboriginal people to have communal title in their traditional ritual knowledge, and in particular in their artwork, recognised and protected by the Australian legal system."

Because Milpururru's claim was based on Ganalbingu cultural norms, the court was obliged to consider the role of Aboriginal customary law in the Australian legal system. A close reading of Von Doussa's brief but fascinating discussion of this issue reveals the truly revolutionary nature of this case. Von Doussa cites a number of recent cases holding that native customs are irrelevant to (or at least difficult to reconcile with) Western-style jurisprudence, including more than one case from the High Court. However, he then brings up the High Court's own decision in *Mabo v The State of Queensland [No 2]*,<sup>126</sup> a watershed 1992 case in which the Court ruled that Aboriginal Australians retained native title in their ancestral lands under Australian common law. The Court's decision, Von Doussa points out, required legal recognition of Aboriginal laws and customs that predate the Crown's acquisition of the territory of Australia. This is a "clear example" that "[e]vidence of customary law may be used as a basis for the foundation of rights recognised within the Australian legal system." He then goes on to cite one more clear example: his own decision in the *Carpets* case!

After establishing the admissibility of the cultural evidence, the court headed straight into Bulun Bulun's affidavit. In it, the painter describes the waterhole depicted in his painting, the importance of the site to the Ganalbingu people, and the role of painting, ceremony, and ritual in maintaining the clan's connection to their land. He concludes that reproduction of the painting without permission amounts to interference with the clan members' relationship to the land and to their creator ancestors. This testimony was confirmed by Milpururru and Djardie Ashley, another clan artist and advisor to Bulun Bulun. Ashley also explained that mass commercial reproduction of such a painting would require unanimous agreement from all of the traditional clan owners of the right to make the painting, and that "Bulun Bulun could not act alone to permit the reproduction of [the painting] in the manner as was done."

---

<sup>126</sup> 175 CLR 1 (1992); 1992 AUST HIGHCT LEXIS 86.

Further supporting evidence was given by two anthropology professors who had “conducted extensive research into the cultures of the peoples of eastern Arnhem Land [where the Ganalbingu people reside].”

While Milpururru’s evidence clearly showed that the Ganalbingu people were deeply affected by the treatment of the painting, how could this be addressed by the Australian common law? The court considered a number of possible avenues, including communal title in the painting and equitable ownership rights for the clan in Bulun Bulun’s copyright. While the first was not compatible with Australian law and the second was not justified by the facts, the court did find that a fiduciary relationship existed between Bulun Bulun and the Ganalbingu clan. Interestingly, the court found common-law precedent for this in the case law of the country of Ghana, where tribal leaders are considered fiduciaries of their tribes in their handling of tribal property. Bulun Bulun’s fiduciary obligation to his clan was “not to exploit the artistic work in a way that is contrary to the laws and custom of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work.” Because Bulun Bulun had fulfilled this obligation in the present case, the court found that no further action was needed. However, the court went on to state that, in future situations, if a fiduciary like Bulun Bulun were to fail to take the appropriate remedial actions, the court would be willing to intervene, and would even consider (if necessary) imposing a constructive trust on a copyright for the benefit of a clan.

These Australian cases reveal some of the great difficulties a judicial system may face in using Western intellectual property laws and concepts to prevent cultural harm. On the one hand, it would be unfair, or at least unrealistic, to expect non-indigenous people to know or be bound by traditional indigenous laws and customs. On the other hand, it would seem a tremendous injustice to allow any continuing offense or disrespect to indigenous cultures like the Ganalbingu, who have already suffered so much harm at the hands of outsiders. A casual observer might throw his hands in the air and conclude that the demands of IP law and the needs of traditional cultures are simply irreconcilable. But in the careful, thorough, yet trailblazing jurisprudence of Justice Von Doussa, we can see another conclusion—that the two can be reconciled if we are willing to do the work. We do not need to grant special rights to certain groups, or to incorporate traditional indigenous customs into the common law. We need only open our courtrooms to the presentation of appropriate cultural evidence, and open our ears to voices different from our own.

## **IX. Conclusion**

Plaintiffs may use cultural claims and evidence in myriad different ways. Culture may be used to explain why a plaintiff behaved in a certain way, as with Ruth Friedman and Maichao Vang. It may also help a factfinder to understand why an event was especially damaging to a plaintiff, as in the plane crash cases and the Australian *Carpets* case. Cultural claims may be described as the exercise of religion or symbolic speech for First Amendment purposes, as with the Yangs, the Kickapoo Tribe, and the Church of the Lukumi Babalu Aye. Cultural elements may be written into statutory law, forcing plaintiffs like Marina Rena Katelnikoff to litigate the validity and authenticity of their own cultural expressions.

In multicultural societies, we try to teach our children that it is important to respect different cultures and traditions. American first-graders now learn about Hanukkah and Kwanzaa during the winter months, while high-schoolers read novels by African and Asian writers. But full respect is not always easy, because it may involve acknowledging the arbitrariness or subjectivity of our own practices and beliefs. Whether or not we eat the meat of cows, wear our hair long, autopsy our dead, or retain strong bonds with our extended families, we often assume without question the correctness of our own ways of thinking and living, making it difficult to fully accept other ways of doing things.

Alison Renteln concludes *The Cultural Defense* with a plea for jurists to consider cultural evidence as a regular, systematized part of the legal process. Essentially, her argument is that culture shapes minds, and mental states determine culpability. I agree with Renteln that courts should be required to consider cultural evidence, but for much broader reasons than determining the culpability of criminal defendants. Whether presented by a criminal defendant or a civil plaintiff, cultural evidence forces us to confront our assumptions about how people should behave. In law, as in science, we cannot come to sound conclusions without recognizing the assumptions we have made along the way.

Must courts decide whether one culture or belief has more validity, more truth, than another? As many disappointed plaintiffs have discovered, the courtroom is not generally a place for discovering objective truth. It is only a place for resolving disputes. But if we give serious consideration to cultural evidence and the life stories behind it, if we do the difficult work of trying to understand other points of view, if we can humble ourselves enough to acknowledge that our own ways of thinking do not represent absolute truth, we might come closer to resolving our disputes in a way that does justice to the subjective truth in each of us.