The Role of Morality in Cultural Defence Cases: Insights From a Dworkinian Analysis

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Much academic and judicial energy continue to be expended over the role of culture in the law. The most contentious debate considers whether and to what extent a criminal defendant should be able to rely on his cultural background in his defence. This article draws on concepts from the fields of jurisprudence, socio-legal and cultural studies to identify and to probe the role of morality in this academic debate and in real-world judicial decisions. In doing so, this article analyses the ‘cultural defence’ debate in light of the revolutionary theory of adjudication promulgated by Professor Ronald Dworkin. Of all the competing jurisprudential theories, his arguably devotes the most attention to the importance of morality in adjudication.

The resulting analysis is then applied to a variety of prominent cases from various English-speaking legal jurisdictions in order to illuminate the hidden morality at work in judicial reasoning regarding the exculpatory power of a defendant’s culture. This reveals a hierarchical structure of interacting moral norms, indicating both a general enthusiasm for tolerance and widely varying moral responses to specific foreign cultural norms. By appreciating the mechanics of judicial reasoning in such cases, we can seek a principled and consistent response to invocations of the cultural defence.
Introduction

Never before have so many individuals resided outside their countries of origin - in 2010 the number exceeded 214 million.¹ This has led to unprecedented levels of interaction between individuals of different cultural backgrounds. The specifically unprecedented phenomenon is the amount of such interaction within a single country, subject to a single legal system. When peoples of differing customs and values coexist and interact within a uniform set of legal standards, some degree of conflict, disagreement or disputation seems ineluctable. This is given by the confluence of distinct social assumptions, expectations, and behavioural norms of the different groups within society.

A state’s courts are at the forefront of efforts to settle disputes between those subject to its jurisdiction. Consequently the law is an arena in which the individual human conflicts created or intensified by multiculturalism are thrown sharply into focus. Much academic and judicial energy continue to be expended over the admissibility, or non-admissibility, of culture in the courtroom. The most contentious form of the dispute considers to what extent, if at all, a defendant’s minority cultural background should be invokable as a defence against a criminal charge. Theorists discussing this so-called ‘cultural defence’ adopt differing definitions, and even its proponents rarely agree on how widely it should apply, or how potent its exculpatory effects should be. However, the definition of Paul Magnarella will serve the immediate purposes of this article, broadly reflecting the general tenor of the defence for which many argue.

According to Magnarella, the cultural defence:

‘... maintains that persons socialised in a minority or foreign culture, who regularly conduct themselves in accordance with their own culture’s norms, should not be held fully accountable for conduct that violates official law, if that conduct conforms to the prescriptions of their own culture.’

This article’s purpose is to illuminate the role of morality within the cultural defence debate (both academic and judicial). In doing so, it will utilise Dworkinian theories of adjudication, since of all competing jurisprudential theories, the late Professor Dworkin arguably devotes the most attention to the importance of morality in judicial reasoning. In doing this, the article also hopes to use the cultural defence debate as an example of Dworkinian judicial reasoning when dealing with contentious real-world questions.

Methodology, Scope and Outline

It is not the purpose of this article to argue for or against cultural defence. Instead, it will provide some insight into how morality plays out in the academic debate and, ultimately, how it has affected judicial decisions as to the availability of cultural defences. The primary examples will be some well-known decisions from the United States. Although cultural factors are likely at work in a wide variety of contexts, this article examines only criminal prosecutions. Whilst divid-

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3 There are a limited number of cases available for analysis due to the rarity of the invocation of ‘cultural defences’. I have selected cases in which the exculpatory power of culture appears unusually relevant and which have consequently attracted the most academic attention. The cultural defence debate rages most fiercely among American scholars, in US domestic cases such as Chen, Wu and Kimura. Such cases are heavily discussed in academic literature.
ing criminal law from civil is conceptually artificial, the subject matter covered by the criminal law tends to reflect a society’s core cultural norms. Criminal prohibitions represent the limits of permitted behavioural autonomy - the point at which society demands conformity – and therefore where society is most determined to preserve these normative values. Consequently, this is where the exculpatory power of minority enculturation is most contentiously debated and on which most commentators concentrate. Criminal law is therefore the best focal-point for analysis.

In this article, it will initially be shown that the cultural defence debate is thoroughly infused with moral norms. Subsequently, this article will demonstrate that the way in which morality affects the debate (especially judicial decisions) can be exposed by analysing it in light of Dworkin’s theory. Detailed conceptual assessment of Dworkin’s theory is an endlessly valuable project but is outside the scope of this article. The fundamentals of Dworkin’s approach will instead be outlined and the cultural defence debate analysed in light of its key features.

First, the academic debate surrounding the cultural defence will be examined and its heavy reliance on morality exposed. Revealing this demonstrates the potential for what Dworkin terms ‘arguments of principle’ within judicial decisions concerning the cultural defence. Dworkin’s jurisprudential theory pays close attention to the role of morality in adjudication; therefore, it would be useful in explaining how morality influences the cultural defence debate in the courtroom. Secondly, a short précis of Dworkin’s account of the interpretive nature of law and adjudication will be provided. Thirdly, with Dworkin’s theory in mind, some judicial decisions addressing the cultural defence will be analysed. From this, it will be seen whether Dworkin’s approach can expose and rationalise morality’s role in cultural defence decisions.

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4 The distinction is merely a learned cultural norm of the common law and civilian traditions. See Thorsten Sellin, ‘Culture Conflict and Crime’ (1938) 44 American Journal of Sociology 97.
The Moral Nature of the Academic Dispute

Participants in the cultural defence debate do occasionally make explicit appeals to morality, but more frequently moral concerns are implicit within their arguments. It would be possible to have a direct oppositional moral disagreement as to the merits of the cultural defence in which proponents and opponents argue from mutually exclusive or even antagonistic moral premises. For instance, a radical opponent of the defence might simply deny that multiculturalism is a morally valuable principle. However, such views are infrequent; generally, opponents of the cultural defence accept the validity of the moral values on which the proponents rely, such as tolerance, fairness, and equality.

The moral disputes regarding the cultural defence fall broadly under several headings. The two camps can disagree over a question of priority where two mutually approved norms apparently conflict. Perhaps the most frequent example is the balancing of fairness to cultural minorities, and the rights of women (both within and outside those minority communities) who may wish to invoke the superior protection against marital mistreatment that Western legal systems are thought to provide.\(^5\) In some cases, opponents of the defence respond to proponents’ arguments (which are premised on advancing one’s moral norm) by alleging that it conflicts with other values within society. For instance, Valerie Sacks\(^6\), in a critique of the cultural defence, notes and approves the moral assertions of its proponents, but highlights an additional moral value with which the pro-

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\(^5\) For instance, it is widely acknowledged that in the *Chen* that an Asian woman suffering or fearing domestic violence could not rely on the state’s protection. One Chinese-American wife reported: “‘Even thinking about that case makes me afraid. My husband told me: ‘If this is the kind of sentence you get for killing your wife, I could do anything to you. I have the money for a good attorney.’” See Leti Volpp, ‘(Mis)identifying culture: Asian women and the ‘culture defense’” (1994) 17 Harvard Women’s Law Journal 57, 77.

ponents should engage, namely the value of sexual equality and the protection of women.\footnote{ibid 535.}

Other moral disputes are methodological. Here, proponents and opponents agree on the overriding importance of a certain moral imperative, but disagree as to how best to effectuate it. A prominent example is the shared desire to eradicate racism and promote diversity and tolerance, accompanied by divergent views of how this is to be done. Some proponents of the cultural defence have claimed it will promote cultural pluralism.\footnote{Alex Samuels, ‘Legal Recognition and Protection of Minority Customs in a Plural Society in England’ (1981) 10 Anglo-American Law Review 241, 255.} A 1983 Harvard paper claims that minorities will acclimatise more easily and enjoy a better existence ‘when the majority respects their ways and ... recognizes that their cultures have something to offer’.\footnote{Anonymous, ‘The Cultural Defense in Criminal Law’, (1986) 99 Harvard Law Review 1293, 1306.} The authors imply that respecting minority cultures require permitting their otherwise illegal cultural practices. Conversely, whilst Valerie Sacks commends the ‘admirable concern about racism and intolerance’\footnote{Sacks (n 6) 524.} exhibited by supporters of the defence, she contends that ‘far from leading to ... less prejudice, adoption of the cultural defense is likely to promote [it]’\footnote{ibid 545.}.

More abstract moral disputes are definitional in nature. In these cases both sides consider themselves to be arguing in support of the same moral value, but they disagree about what this value actually is, or entails. In one instance, proponents and opponents both claim to be motivated by a desire to preserve the principles of fairness, but they disagree strongly about what constitutes fairness. Alison Renteln questions: ‘If members of the dominant culture are unable to justify their cultural traditions, why should they demand this of [minorities]?\footnote{Alison D Renteln, The Cultural Defense (Oxford University Press 2004) 18.}’ - emphasising the inability to objectively justify the ‘logic’ of any culturally-learned ideologies or practices. The challenge

\begin{thebibliography}{99}

\item ibid 535.
\item Sacks (n 6) 524.
\item ibid 545.
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rests on an assertion of the need for fairness and equal treatment between two cultural groupings. Sacks challenges the personal scope of the ‘fairness’ Renteln advocates. Renteln appears to consider ‘fairness’ as a question of how the minority group is treated by the majority group. Conversely, for Sacks, ‘fairness’ relates to the treatment of individuals within the minority; she returns to her contention that the defence will reduce the rights of female immigrants relative to the male.\textsuperscript{13}

\textbf{Dworkin’s Thesis}

Dworkin’s theory departs from the Hartian-positivist understanding of law as an aggregate of hierarchically validated rules. Hart’s model states that a judge enjoys discretion to choose between numerous valid outcomes where no legal rule is directly applicable: the so-called ‘hard cases’.\textsuperscript{14} For Dworkin, in every case the judge is confronted with numerous ‘arguments of principle’, including moral considerations. He adjudicates by interpreting the entire corpus of his political-legal system in its ‘best light’ and deciding legal questions to achieve consistency with that interpretive aggregate. From this, the judge will arrive, if he reasons correctly, at the objectively correct answer to a given question. Consequently, there exists no difference between ‘hard’ and ‘easy’ cases in regards to the interpretive process.

Simplistically, legal positivism advocates a separation of descriptive and normative principles: what the law ‘is’ is considered comprehensible in isolation from what the law ‘ought to be’. For Dworkin, this

\textsuperscript{13} Sacks (n 6) 535.

\textsuperscript{14} Hart, in his seminal \textit{Concept of Law}, regards ‘hard cases’ as conceptually distinct from scenarios in which there is a directly applicable legal rule determining the outcome the judge must reach. They are presented as a legal lacuna which a higher (secondary) rule permits (or requires) the judge to patch by way of judicial legislation, importing into the corpus of legal rules something that was not formerly part of it. For Dworkin, these values and principles to which the judge turns are \textit{already part} of ‘the law’. Thus ‘hard cases’ are different only in extent and not in nature from ‘easy cases’ (see below).
division is artificial since any attempt to state the factual content of the law requires ‘constructive interpretation’, which is based on moral premises. The judge seeking to state the law in fact seeks ‘the morally soundest statements about the rights of citizens which will fit’.\(^{15}\)

In *Taking Rights Seriously*,\(^{16}\) Dworkin introduces his infamous super-judge: Hercules, the model adjudicator of the rights of citizen litigants. Legal reasoning, for Hercules, is not mere comparison of individuated rules. Instead, the concept of Hercules creates a holistic moral-political theory which justifies the entire corpus of law and, based on this unified whole, decides the balance of rights in the case at hand. In *Law’s Empire*,\(^{17}\) Dworkin clarifies the threefold process by which Hercules creates and uses this holistic moral-political theory: pre-interpretive stage, interpretative stage and post-interpretative stage.

At the pre-interpretive stage, obvious examples of ‘law’ are brought together as ‘raw material’ for interpretation. These comprise, as Dworkin phrases it, the ‘paradigms of law’: things so inherently ‘legal’ that any judge denying their legal status would be guilty of ‘either corruption or ignorance’.

Next, at the interpretive stage, an understanding of the legal materials is formulated which is presented in their ‘best light’. Dworkin claims that law ultimately concerns the state’s exercise of its coercive power and that jurisprudence is the exercise of showing this coercion to be ethical. Thus, for Dworkin, presenting law in its ‘best light’ means presenting it in a way which is morally justified, specifically as tending to advance the human dignity of all members of the legal system.\(^{19}\)

\(^{15}\) James W Harris, *Legal Philosophies* (2\(^{nd}\) edn, Oxford University Press 2004).


\(^{19}\) The mission of promoting human dignity for all is complex. Indeed, as the Sacks-Renteln dispute demonstrates, ensuring the equal dignity of immigrants with indigenous persons (so crucial to Renteln) might conflict with the project of ensuring the
Finally at the post-interpretive stage, this interpretation is used to decide the actual legal question by the ‘process of fit’. This constitutes a form of ‘negotiation’ between various ‘arguments of principle’ (which are themselves a series of political-moral value statements affirming the existence of legal rights for one party or other) until the formal legal interpretation ‘fit’ the context. According to Dworkin, law is the process of ‘past political decisions’ determining the present exercise of state coercion. Past decisions are in fact the materials we consider the stuff of law – statutes and judicial decisions. Dworkin claims that the interpretive task of the judge is justificatory. And in order to accomplish this, Hercules must undertake the three-stage process as stated above, in which the power of past decisions will determine the present case to be morally justifiable. Hercules will reject both ‘conventionalism and ‘legal pragmatism’ as justifications for the need to ‘fit’ arguments of principle with the stuff of law; he will instead reason based on the principle of ‘law as integrity’:

The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness.\(^{20}\)

Consequently, for a judge deciding the admissibility of cultural defence, the question whether a defendant can use his culture in defence becomes a necessary exercise: does the aggregated corpus of law appear morally sounder if it is assumed that society permits persons in his position to use his culture in his defence? In answering this, the judge seeks some coherent conception of legal rights about culture in his legal system, such that a single hypothetical political agent – embodying society as a whole – working with that conception of equal dignity of immigrant women with indigenous women (a project Sacks emphasises). This tension between two nuances of equality might have implications for how the Dworkinian model of constructive interpretation is to be understood. How best to work towards the dignity of ‘all’ is thus unclear – a question prompted by the novel combination of the cultural defence question and Dworkinian jurisprudence.

\(^{20}\) Ronald Dworkin, *Law’s Empire* (n 17) 225.
tion would have arrived at the bulk of the decisions on the question recorded in statute and case law.

Morality at Work in the Cases

Naturally, arguments for and against cultural defence are delivered in greatest detail in academic commentary, free from the procedural (and professional) constraints limiting the depth to which judges may realistically go in their judgments. However, it is possible to use academic analysis to demonstrate the moral considerations at play when judges consider cultural defence. Indeed, it would be unfitting to exclude academic views from the investigation; it is a fundamental principle of Dworkin’s philosophy that ‘no firm line divides jurisprudence from adjudication or any other aspect of legal practice’, since both perform the same process of constructive interpretation of the legal system. Disputes about specific legal problems presuppose the abstract general foundation provided by a jurisprudential legal theory, which according to Dworkin is itself a constructive interpretation of law. Thus opinions on legal questions are, in a sense, expressions of the speaker’s unspoken legal philosophy, which underpins the reasoning but too profoundly to be likely made explicit. This reasoning applies in equal measure to socio-legal theorists and legal reform advocates. The values their arguments reveal are therefore a useful indication of some of the arguments of principle at work in the interpretive process in which judges are engaged.

Certainly, cultural concerns and morals influence judicial decisions regarding the effect of culture on criminal responsibility, even in ways slightly dissimilar from the archetypal cultural defence case. For example, in the New Zealand case of Epifania Suluape, a woman of Samoan origin killed her abusive and adulterous husband of 24 years. At first instance, she was found guilty. She appealed against her sentence, having been convicted of manslaughter, con

21 Dworkin (n 17) 90.
22 The Queen v Epifania Suluape (2002) NZCA 6 (NZ).
tending that the trial judge had taken inadequate account of the mar-
itial abuse and degradation that her culture had left her particularly vulnerable to abuse. Although not a case of a cultural defence in its strongest form, the Court nonetheless had to consider whether her minority cultural conditioning could reduce her sentence. The Court of Appeal agreed with Mrs Suluape’s submission, reducing her sentence considerably. The Court emphasised her ‘cultural impediment to obtaining protection or support from outside the domestic environment.’ She consequently committed the crime from ‘a position of subordination within her home and her culture’, which led her to believe there were no ‘realistic options ... to relieve herself of what had progressively become an intolerable burden.’ Sentencing is an aspect of the criminal procedure in which judicial freedom is comparatively wide. Nonetheless, the Court of Appeal could only reduce the sentence by implicitly ruling that the law permitted the cultural background of this defendant to be considered in mitigation. The motivation for this ruling seems linked closely to the moral importance of justice; the judgment of Baragwana J emphasises the need for a strong sentence for a serious crime, but also the need to temper its severity for the defendant.

From this case, it emerges that moral concerns are highly relevant when the question of cultural accommodation is raised in criminal proceedings. Dworkin’s thesis may be helpful in attempting to understand how moral concerns affect judicial decisions, since in these decisions, the dictates of morality are comparatively rarely expressly considered. Some well-known judicial decisions will now be examined in light of his theory.

Dworkinian Analysis of the Cases

As already demonstrated, the cultural defence debate is spelled out most explicitly in academic discourse. It relies heavily on moral

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23 ibid [13].
24 ibid [18].
propositions. Broadly however, proponents and opponents of cultural defence promote values such as justice, fairness and tolerance as moral goods to be promoted. Actual disagreement arises when the spectre of concrete cases is raised. These can be real cases (for instance, critics can agree or disagree with the infamous Chen decision) or broad hypothetical conflicts (such as where protection of defendants from minority cultures meets women’s rights).

Dworkin emphasises that outcomes of the interpretive process will vary more widely in questions where the legal (and indeed the general) community is divided over issues of justice. This is not because there is ‘no right answer’ in such cases, but because on such issues there exists a wider divergence of interpretive moral premises, which influences the outcome of the interpretive process. It is submitted that these disagreements regarding the outcomes of concrete cases and whether cultural defence should exist in a given scenario are heavily influenced by the moral values ‘internal’ to the case. Internal, in this context, refers to those moral concerns whose contemplation is prompted by the specific facts of a case. These internal moral values can be contrasted with what might be termed ‘back-

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25 People v Chen No 87-774 (NY Sup Ct 2 Dec 1988). In Chen, a Chinese husband who had immigrated to New York killed his wife several weeks after learning of her infidelity. At trial, Chen successfully relied on the somewhat contorted defence of diminished capacity due to cultural pressure. He invoked (supposedly) expert anthropological testimony that in China a wife’s infidelity presents the husband as weak and that the husband would experience violent impulses as a result (whilst in China the wider community would ordinarily intercede to prevent harm, in this case there was no-one to prevent Chen’s rage ending in tragedy). The prosecution wrongly assumed the court would reject the defence so did not bother to challenge the anthropological ‘evidence’. In fact the court accepted the defence of diminished capacity and specifically tied its success to Chen’s supposed cultural predispositions. The judge recorded that Chen ‘was driven to violence by traditional Chinese values’ which made him ‘susceptible to cracking under the circumstances’. The judge noted that if the defendant had been raised in America, he would have been ‘constrained’ to convict him of first-degree manslaughter. Chen was convicted only of second-degree manslaughter, receiving only a probationary (non-custodial) sentence. See Volpp (n 5) 64-77; Doriane L Coleman, ‘Individualizing Justice Through Multiculturalism: The Liberals’ Dilemma’ (1996) 96(5) Columbia Law Review 1093, 1108-9; Rorie Sherman, ‘Cultural Defenses Draw Fire; Double Standard?’ (1989) National Law Journal 37.

26 Dworkin (n 17) 88.
ground’ moral values with which commentators and judges are presumed to be automatically concerned even before they turn their attention to the facts of a specific case. The most relevant of these are the values of fairness, justice and tolerance. Specific cases invariably raise casuistic ‘internal’ moral forces with which these background values must engage. As Coleman notes, the cultural defence question is contentiously difficult because the cases ‘pit foreign customs and cultural practices directly against essential elements of contemporary American legal culture, including the antidiscrimination principle’; in other words, they pit ‘internal’ morality (the specific moral content of the minority cultural practices) against ‘background’ morality (the desire for legal universality and equality on the one hand, and individuated dispositive justice).

Academics could conceivably argue whether the cultural defence should exist based purely on these background morals, their relative importance (or priority) and the best method of fulfilling them. Judges, however, do not engage in quite the same discussion. They generally do not decide the broad conceptual question of whether the cultural defence forms part of the law. Rather they settle disputes between a single defendant and the state by deciding whether the defendant can in some way invoke his culture in his defence. Judges inescapably encounter the ‘internal’ moral questions in every case. Ultimately, judges would utilize their own personal ‘background’ and moral values to ensure that they arrive at the ‘best light’ construction. This construction ensures the settlement of the dispute at the post-interpretive stage; therefore, a case’s internal morality is acutely relevant to whether a judge finds that the law allows a defence based on the defendant’s culture. This insight may account for many of the widely divergent levels of success experienced by defendants who have attempted to adduce cultural factors in their defence in a variety of different cases. Their success or failure can be

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27 Coleman (n 25) 1094. See also for a more detailed account of the tension between the two values of legal universality/equality and individually nuanced and culturally sensitive dispositive justice. See also for a sophisticated and compelling case against the cultural defence.
seen to depend on a large extent to the internal morality their case exhibits.

A pair of cases from the US are illustrative of this fact. In 1986, a senior American prosecutor, J Tom Morgan, approved the prosecution of a Somalian woman who had allegedly subjected her two-year-old niece to clitoral mutilation (also known as female circumcision), despite acknowledging that this is a widespread traditional practice in her native culture. Morgan noted that the ‘clitoris had been cut, not totally, but it was kind of a botched-up job.’ Four years later, Morgan stayed child molestation proceedings against a Latin American mother who had allegedly repeatedly stroked the genitals of her young son. Morgan stated that ‘this is the way her culture taught her to put healthy young boys to sleep.’ Subsequently, Morgan claimed to be opposed to leniency on grounds of minority enculturation: ‘We don’t have to accept thousands of years’ practice ... The child abuse statute is quite clear: Emotional, physical or mental pain to a child is illegal.’

Conceptually, the two cases are similar; in both instances, a close relative’s actions are dictated by her culture in conflict with US domestic laws. Dworkin’s theory can be used to argue that morality contributed to the divergence in how the relatives treated the children. Most importantly, the differing internal moralities in the cases lead to a differing interpretive process. The Latin American mother’s alleged acts are deviant and repugnant by the apparent majoritarian norms in the US and indeed constitute a very serious criminal offence. However, the prosecutor seemed to appreciate that such acts were based on a mother’s cultural understanding of promoting restful

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28 Female circumcision is dominant in, but by no means unique to, Africa and some parts of Asia. For information on its role in ancient European and even recent English/American history, see Angela Wasunna, *Towards Redirecting the Female Circumcision Debate: Legal, Ethical and Cultural Considerations* (2000) 5(2) McGill Journal of Medicine 104, 105.


31 ibid; For a fuller discussion, see Coleman (n 25) 1113.
sleep for her child, reflecting maternal dedication and close attention
to the needs of one’s son. Though alien and illegal, this custom was
nonetheless seen as motherly affection and diligence, to which its
culture attaches immense moral value. The motives of the act mir-
rored, rather than contradicted, the moral premises of the US legal
system because it acknowledges that the mother acted out of love
and care. Dworkin states that a legal system under interpretation is
to be constructed to be deducible from a single, consistent set of
moral principles. To promote the ‘integrity’ of the legal system, the
mother’s action should be excused. This is to reflect the legal sys-
em’s value of tolerance, which has allowed a greater role in the in-
terpretive construction of the law since the internal morality of the
case supports the legal system’s own concept of a mother’s love for
her child. In other words, the mother’s actions reflected a core moral
value of US culture, the ‘integrity’ of a legal system based on: (a) the
background morality of tolerance and (b) the internal morality of
maternal care, is best ensured by excusing the mother’ actions.

In contrast, the notorious practice of female genital mutilation, ac-
cording to Western ideology, is inherently and misogynist:

[F]emale genital mutilation is a manifestation of gender in-
equality ... Like the now-abandoned foot-binding in Chi-
na ... female genital mutilation represents society’s control
over women.\footnote{\textit{World Health Organization, Eliminating Female Genital Mutilation} (2008) 5.}

A fundamental reason advanced for female circumcision is
the need to control women’s sexuality ... [It] is intended to
reduce women’s sexual desire, thus promoting women’s
virginity and protecting marital fidelity, in the interest of

Crucially, not only the practice itself but its unarticulated motiva-
tions are seen as alien (and indeed hostile) to majoritarian values of
western society and ideas of female equality. While the Somalian

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aunt’s motive was probably seen in the best interest of her niece, as in her culture, a woman’s status and prospects would be greatly diminished without genital modification. Nonetheless, for Western observers the practice and the motives behind female genital mutilation are seen as manifestations of misogyny, contradictory to the principles of sexual equality. It might be hypothesised that the touching of a child’s genitals (as in the first case) would not have been excused if motivated by a minority cultural belief that children enjoyed no rights to bodily integrity. Because this would contradict majoritarian moral premises, the ‘best light’ interpretation of the legal system, coupled with the importance of its integrity, precludes the toleration of such actions.

Another example can be found in the series of decisions in the case of People v Wu. Here we benefit from the published reasoning of both a first instance and an appellate court, and the contrast is highly informative. In Wu, a Chinese American woman killed her child before unsuccessfully attempting suicide. The court of first instance presumed that Wu acted with malicious intent and imposed the full penalty of the law.

34 See Angela Wasunna, ‘Towards Redirecting the Female Circumcision Debate: Legal, Ethical and Cultural Considerations’ (2000) 5(2) McGill Journal of Medicine 104, 107: ‘In many of these societies, failing to [circumcise] one’s daughter is to practically ensure her ruination, since no one would marry an uncircumcised woman.’

35 Popular conflation with misogyny is revealed by the astonishingly different American attitude to male circumcision: ‘While most would agree that female circumcision is driven by social conformity, few stop to consider whether the same pressures may be at work in the case of male circumcision. At least in certain parts of the world (particularly North America), parents are under pressure from society to have their sons circumcised’ (Wasunna 107-8). The debate on male circumcision rages, especially in the USA (the only Western state in which neonatal male circumcision is the norm, irrespective of parental religion). Wasunna shows how all its traditionally alleged health benefits are beset with contradictory evidence, just like the long-debunked traditional beliefs as to the medical/psychological advantages of female circumcision. Both male and female circumcisions are perpetuated by a mélange of aesthetic convention, pseudo-science and social pressure for sexual and bodily conformity. Thus the vehement rejection of female circumcision alone is likely to be due to conflation with wider patriarchal elements.

36 People v Wu (1991) 286 Cal Rptr 868.

37 Leti Volpp (n 5) 57.
the motives on which Wu herself claimed to have acted to disagree with the trial court’s ruling and allow the appeal. Wu stated that she was unable to care for the child due to the stigma attached to his illegitimate birth. She believed that she could care for him better in the next life. Thus, Wu demonstrated that she was concerned for the child’s dignity and well-being. The appeal court held that the trial jury should consider the defendant’s cultural background when evaluating the mental state at the time of the crime.

Thus, it can be hypothesised that the way in which a court views the underlying motivation for a cultural act which constitutes a crime may be an excusable defence in a legal culture that may find the actions to be morally wrong. Where the motivation resonates with the majority’s moral values, this combines with the background value of tolerance to mean that the best light construction of the legal system is one in which some form of defence is available.

In the controversial case of *People v Kimura*, Kimura Fumiko engaged in pre-meditated *oyako-shinjū*: joint parent-child suicide. In this case, a Japanese-born mother drowned her children in the ocean, forcibly holding them beneath the waves as they struggled to resurface. She was rescued before her own suicide attempt succeeded. She was found guilty of manslaughter, for which she was sentenced to one year’s imprisonment (which she had in fact already served whilst awaiting and standing trial). Evidence of the cultural prevalence of *oyako-shinjū* in Kimura’s native Japan was instrumental in the court’s finding. Ultimately she was judged temporarily insane – as in the *Chen* decision, the courts recognised the cultural background of Kimura – who in effect benefited from a form of cultural de-

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38 *People v Kimura*, No A-09133 (LA Sup Ct Apr 24, 1985).
40 For a case summary see Coleman (n 25) 1110.
Given what is learned from an analysis of the previous cases, this might seem surprising. After all, the practice of oyako-shinjū seems grossly offensive to the moral norms of majoritarian American culture in whose courts Kimura was tried. Furthermore, it seemingly violated the moral norms of parental care and affection, demonstrating what might intuitively be seen as a morally culpable disregard for one’s child’s right to life.

However, the Court appears to have concentrated on what William Torry has termed the ‘culturally structured motive’ of the practice of oyako-shinjū. Discussing the Kimura case, Torry notes that the culturally structured motive behind this Japanese practice is ‘maternal-filial piety’, which in fact ‘gives oyako-shinjū an affinity to American family values and the ideal of respect for individual dignity’. Rather than disrespect for the child and an abandonment of maternal duties, oyako-shinjū can be interpreted as reflecting typically Japanese conceptions of honour, both of the mother and the child. It ‘affords the spouses and children of adulterous men a possible if drastic means of escape from the blight of lasting shame and degraded status.’

The cultural motivation of the practice correlates with the moral values of majoritarian American culture, from whose perspective the judge reasons. This means that, in the interplay between internal and background morality, the background value of tolerance is vindicated. This flavours the judge’s interpretive process and his construction of the law in its best light. This construction, which is ‘heavy on the tolerance’, resolves itself at the post-interpretive stage to afford Kimura a defence.

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43 ibid 127.
44 ibid 136.
Conclusion

In the course of this article, it was first shown that the debate around the cultural defence is imbued with moral elements. This raised the possibility of a Dworkinian analysis. After Dworkin’s thesis was outlined, it was then shown that morality appears at play in judicial decisions as well as academic disputes. Dworkin’s understanding of judicial interpretation was applied to some prominent cases on the cultural defence. By so doing, it became possible to rationalise differing results on the admissibility of cultural factors based on the extent to which the motivations behind culturally-prompted acts corresponded with the morality of the majority legal system.

It is vital to note that the clear and algorithmic reasoning Dworkin advocates will rarely be explicitly (or even consciously) followed by real-life judges. Certainly the judges in the cases analysed do not conform precisely to this structure. Dworkin acknowledges this reality, noting that decisions are ‘[matters] of feel or instinct rather than analysis’.\(^45\) Moreover the role of morality in judicial reasoning must not be overstated; judicial decisions on the cultural defence are likely to be tempered significantly by the need for pragmatism and practicality in court.\(^46\)

Hercules is, by Dworkin’s own admission, ‘a myth’.\(^47\) However, like all myths he is a fiction that helps illuminate fact. His role is to reveal ‘the hidden structure of ... judgments.’ Dworkin’s understanding of the judicial process as involving constructive and justificatory interpretation of the law has helped explain why the ‘internal’ morality of a case affects the availability of a cultural defence. This in turn gives a fuller understanding of the role of morality in the cultural defence debate. It emerges that a defendant is likely to be able to rely on his cultural background in his defence where those cultural fac-

\(^{45}\) Dworkin (n 17) 356.

\(^{46}\) However, Dworkin would perhaps retort that the desire for practical and effective courts is itself a manifestation of a moral claim about the rights of individuals to have justice.

\(^{47}\) Dworkin (n 17) 263.
tors reflect the morality of the legal system to which he is subject. This bolsters the role of the value of tolerance in the judicial construction of the legal totality in its ‘best light’, from which flows a defence for the defendant in a given case.

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