

“When In Rome . . . ?” – NCFTJ’s Interactive Program on Cross-Cultural Issues in the Courts Draws Standing-Room-Only Crowd at ABA Midyear Meeting

What does “the rule of law” mean in today’s multi-cultural society? Does the adage that “all men are presumed to know the law” apply to recent immigrants? Should new immigrants be held to the same standards as everyone else, on the theory of “when in Rome . . .”? These were among the questions posed by “Stranger In A Strange Land: Cross-Cultural Issues In the Courts,” a February 8 CLE program sponsored by the National Conference of Trial Judges (“NCFTJ”). The event drew an overflow crowd of more than 150 from the Judicial Division and elsewhere throughout the ABA, and was one of the highlights of the ABA Midyear Meeting in Los Angeles.

Headlining the engaging and highly-interactive program was an inter-disciplinary panel of some of the nation’s leading cross-cultural experts, including Professor Alison Dundes Renteln, Professor of Political Science and Anthropology at the University of Southern California, and author of the seminal book “The Cultural Defense”; Rene L. Valladares, Chief of the Trial/Appellate Division of the Office of the Federal Public Defender in Las Vegas, who co-edited the first edition (and is a contributor to the newly-released second edition) of the leading treatise, “Cultural Issues in Criminal Defense”; Mark J. Mills, J.D., M.D., of Washington, D.C., one of the top three forensic psychiatrists in the country, who has extensive cross-cultural forensic psychiatric experience; and the Honorable Bernice B. Donald of the U.S. District Court for the Western District of Tennessee, who is a frequent consultant on international rule of law issues.

The panel was moderated by Professor Jonathan Turley of George Washington University School of Law, a frequent TV commentator and contributor to *USA Today*. Professor Turley has appeared more than two dozen times on Meet The Press, ABC This Week, Face The Nation, and Fox Sunday, and was ranked # 38 among the top 100 most cited public intellectuals in a recent study by Judge Richard Posner, and is the second most frequently cited law professor in the country.

Program Chair Judge Delissa A. Ridgway of the U.S. Court of International Trade, Vice Chair of the NCFTJ, opened the event by underscoring the timeliness of the topic. Cultural issues are arising more and more frequently in state and federal courts all across the country, largely due to changing patterns of immigration. The United States has always been a nation of immigrants. And, as a nation, the United States has always taken great pride in its justice system. But, with immigration at an all-time record high, the justice system is failing some of the most vulnerable in society – and, all too often, judges and others involved in the administration of justice don’t even realize it.

As of 2005, there were 35.2 million foreign-born people living in the United States – approximately 12% of the U.S. population, and the highest number of immigrants ever recorded in the country. As the ratio of immigrants to U.S.-born residents increases, immigrants are no longer necessarily quickly “immersed” into U.S. society. Assimilation may be less rapid, and greater numbers of immigrants may (in effect) live in enclaves for longer periods of time.

Not only is the immigrant population at record levels, but – in addition – those immigrants are from a greater number of countries than ever before. Further, while historically most U.S. immigrants came from Europe (where customs, mores, and laws are relatively close to those of this country), most of today’s immigrants come from Mexico, and from countries in East Asia, the Caribbean, Central America, South America, and Africa – countries that have customs, mores, and laws that sometimes are very different from those of the U.S. Moreover, driven by factors like federal refugee resettlement policies and economic opportunity, immigrants are no longer clustered in cities like New York, Miami, Los Angeles, and San Francisco. Instead, they are spread throughout the nation.

The growing size, diversity, and geographic spread of the immigrant population have major implications for judges and others dedicated to the fair and impartial administration of justice. Slower assimilation means that new immigrants in general are less exposed to, and thus less familiar with, U.S. cultural norms and values, and U.S. laws. And with immigrants settling in cities and small towns all across the country, immigrants and their customs and mores increasingly are finding their way into state and federal courtrooms “from sea to shining sea.”

The types of cross-cultural cases being filed in the state and federal courts are as diverse as the immigrant parties – everything from personal injury cases, civil rights cases, and commercial litigation, to divorce and child support, and child abuse or neglect, as well as criminal matters such as kidnapping, assault, rape, and homicide. In addition, claims of ineffective assistance of counsel are being raised on appeal in federal *habeas corpus* proceedings, based on defense counsel’s failure to present relevant cultural evidence in the guilt and/or sentencing phases of a criminal case. Indeed, the U.S. Court of Appeals for the Ninth Circuit has held that “[c]ompetent counsel undertaking to represent defendants with unique cultural backgrounds have an obligation at least to consider the effect of that background on their clients’ conduct.” See Siripongs v. Calderon, 35 F.3d 1308, 1315 (9th Cir. 1994) (citation omitted).

Judge Ridgway encouraged members of the audience to replicate the program in their own courts and communities, and through other appropriate organizations, and invited anyone interested in such programming to contact her (at 212.264.5480). She emphasized that all the panelists have enthusiastically confirmed their willingness to support future educational programming on this topic – whether courses at the National Judicial College and the Federal Judicial Center, court judicial conferences, bench/bar conferences, seminars sponsored by judges’ associations, or continuing legal education programs sponsored by bar associations.

To illustrate the breadth of issues confronting the courts, the panel presented the audience with a series of vignettes drawn from real-life cross-cultural cases “ripped from the headlines” – federal as well as state cases, and civil as well as criminal. After one of the experts on the panel sketched the facts of a particular case, audience members “voted” on the outcome of the case, using hand-held “Perception Analyzer” technology provided

courtesy of TrialGraphix, a national litigation consulting firm specializing in discovery, trial consulting, and presentations. After all “votes” were electronically tallied and displayed for the audience by TrialGraphix consultants Dr. David Perrott and Kasey Herrera, the panelists revealed the result in the actual case under discussion, and critiqued it, offering their comments and insights.

Professor Renteln opened the session with New York v. Singh, 516 N.Y.S.2d 412 (N.Y. Civ. Ct. 1987). In that case, a Sikh priest wearing a *kirpan* (a ritual/ceremonial dagger) was prosecuted for violating a New York City ordinance prohibiting the wearing of a knife outside a person’s clothing or carrying a knife in open view in a public place, except when the knife is in use for a lawful purpose. In its decision, the court noted that the defendant’s Sikh faith required him to wear the *kirpan*. However, the court noted that the ordinance includes no scienter requirement, and ruled that the lack of such a requirement was justified by the city’s interest in public safety and by the burden that would be imposed on law enforcement personnel if the court were to establish an exception for practicing Sikhs. The court nevertheless dismissed the case “as a matter of judicial discretion,” concluding that – although “there [was] no basis for dismissal as a matter of law” – “the continuance of this prosecution would not [have been] in the furtherance of justice.”

Next, Judge Donald presented two cases illustrating the potential effect of culture on damages. In Rai v. Taco Bell, No. CIV-178430 (Ventura Co., Cal. Super. Ct., filed Jan. 20, 1998), a Hindu man who had ordered a bean burrito but was served – and inadvertently took a bite out of – a beef burrito sued for \$144,000, claiming that he had been traumatized and offended on cultural and religious grounds. The man’s attorney argued that the psychological impact was “the equivalent of eating his ancestors.” The man sought compensation for, among other things, fees paid to a psychiatrist and the expense of a trip to India for a purifying bath in the holy waters of the Ganges River. Although similar cases brought by non-religious vegetarians typically fail, Taco Bell settled Rai’s case for an undisclosed sum shortly before it was set to go to trial.

Marks v. Clarke, 102 F.3d 1012 (9th Cir. 1996) was a federal civil rights lawsuit against the Spokane police department brought by a family of Gypsies. While executing search warrants on several Rom homes, the police conducted “pat down” searches of everyone present, including unnecessary searches of unmarried Rom girls. The searches left the girls defiled (“*marime*”) and thus unmarriageable in the eyes of the Gypsy community. The family settled for \$1.43 million in 1997, after more than a decade of litigation.

Mr. Valladares and Dr. Mills jointly presented two cases of alleged sexual abuse that involved means of showing affection for or soothing young children in other cultures.

In Maine v. Kargar, 679 A.2d 81 (Me. 1996), a neighbor visiting an Afghan refugee family saw the Afghan father kiss the genitals of his 18-month-old son as he was getting the boy ready for bed. The man was arrested and charged with felony “gross sexual assault.” At trial, defense counsel established that the defendant did not know that his conduct violated U.S. law. In addition, defense counsel presented the testimony of

several experts on Afghan culture, as well as numerous Afghan immigrants, all of whom confirmed that – in the defendant’s homeland – the practice is a very common way of showing affection for a young child and that no sexual feelings are involved. The prosecution presented no witnesses to refute the cultural evidence. The trial judge nevertheless found the defendant guilty, but suspended the entire sentence, recognizing that no sexual gratification was involved and that there was no harmful effect on the baby boy. However, the conviction alone had grave consequences. The man was required to register as a sex offender, was forced to live apart from his family, and was subject to deportation. On appeal, the Maine Supreme Judicial Court reversed the conviction, ruling that – although the defendant’s conduct fell within the literal definition of the crime – the trial court “erred *as a matter of law* because it found culture, lack of harm, and [the defendant’s] innocent state of mind irrelevant to [the trial court’s] . . . analysis.”

The events surrounding Krasniqi v. Dallas County Child Protective Services, 809 S.W.2d 927 (Tex. App. 1991), were featured in a 1995 segment of ABC-TV’s newsmagazine, 20/20. At the center of the case was a Muslim ethnic Albanian Kosovar, who took his nine-year-old son and his four-year-old daughter to a tae kwon do exhibition in which the boy was participating. The man was sitting in the front row of the audience, videotaping the exhibition, with his daughter standing between his knees. A woman in the audience saw the man lift his daughter’s dress and put his hand down the front of the little girl’s panties. The police were called, and the man was charged with various sexual offenses. In addition to the criminal proceedings, state Child Protective Services personnel filed a petition to terminate the parental rights of both the man and his wife as to both children, and the children were placed in a “good Christian home.”

At the termination hearing, no cultural evidence was presented, and both parents’ rights were permanently terminated – even though two of the three physicians who examined the children found no evidence of abuse, and the physician who testified stated only that there was some evidence consistent with “either stroking, penetration, [or] some sort of trauma.” A court-appointed psychiatrist recommended that the family be kept together, but also was not called to testify at the termination hearing.

At the criminal trial, the defense presented an array of expert witnesses – physicians, psychologists, and a cultural anthropologist. The anthropologist testified that “intimate touching” of children is common in Albania, that gently stroking the genitals of very young children is a common and accepted means of calming or soothing them, and that the practice involves no erotic or prurient intent. The other experts testified (in effect) that there was no physical evidence of sexual abuse, that the defendant did not fit the profile of an abuser, that the parents loved and cherished their children, and that the whole case had been a fundamental cultural misunderstanding. The jury deadlocked on a sexual abuse charge, and three of the four counts of sexual assault were dismissed. The judge eventually found the defendant not guilty of the last charge.

The parents sought to appeal the termination of their parental rights, arguing – among other things – that they were not provided with an adequate interpreter. However, because their counsel failed to timely file certain papers, the appellate court refused to

consider the merits of the Krasniqis' case. As a result, the family was never reunited, and the children were raised as Christians by their adoptive parents.

Although the press of time prevented the panel from exploring the matter in depth, the availability of adequate language interpretation services – an issue that the Krasniqis sought to raise on appeal – is a grave and growing problem in federal and state courts throughout the United States. As the Minnesota Court of Appeals underscored in a case involving Hmong culture, even when language interpretation is of a high caliber, “[a]ny translation is inevitably a screen placed between the witness and the jury, affecting the jury’s ability to assess credibility from demeanor, inflection of voice, nuances of language, and details of testimony” Minnesota v. Her, 510 N.W.2d 218, 223 (Minn. Ct. App. 1994). The court further noted: “Translation is an art more than a science, and there is no such thing as a perfect translation of . . . testimony. Indeed, in every case there will be room for disagreement among expert translators over some aspects of the translation.” *Id.* at 222 (*quoting* Minnesota v. Mitjans, 408 N.W.2d 824, 832 (Minn. 1987)).

Dr. Mills presented the newest case discussed by the panel – Georgia v. Adem, Nos. 03W-12220 & 03W-12221 (Gwinnet Co. Super. Ct. 2006). There, a jury found an Ethiopian immigrant guilty of the genital mutilation of his young daughter. Prosecutors contend that the defendant used scissors to remove his daughter’s clitoris in the family’s Atlanta-area apartment when the little girl was two years old. However, as Dr. Mills explained, anthropologists and others who followed the trial were troubled by the prosecution’s case and by the jury’s verdict.

Among other things, the mother (who is South African) did not charge that the father had performed the procedure until the parents were divorcing and embroiled in a bitter child custody dispute. When the little girl was interviewed, she repeatedly denied that her father had hurt her, before finally saying that he had cut her. In addition, one of the defense witnesses was an African woman who had herself been subject to the procedure. She testified that the pain is so excruciating that a girl is unable even to walk for three or four days, casting doubt on the mother’s testimony that she did not discover that the little girl had been cut until more than a year after the fact. Further, the defendant testified that his family did not believe in the procedure, and that his own three sisters were uncut. Finally, the defense emphasized that the prosecution contended that it was the father himself who had personally done the cutting. But the defense noted that, in cultures where female genital mutilation (“FGM”) is practiced, the procedure is invariably performed by women. For cultural reasons, no man would actually do the cutting. The defense suggested that it was in fact the girl’s mother and the girl’s maternal grandmother (a pediatric nurse in the U.S., and a midwife in her native South Africa) who cut the little girl. The man was found guilty of aggravated battery and cruelty to children, and was sentenced to 10 years in prison, and five years probation.

Dr. Mills observed that an estimated 228,000 girls and women in the U.S. alone have either undergone FGM, or are at risk for the procedure. He also pointed out that, although the Adem case was tried in a state court, there is now a federal statute

specifically prohibiting FGM. Thus, FGM cases will be prosecuted in both federal and state courts in the future.

Mr. Valladares presented New York v. Chen, No. 87-7774 (Kings Co. Super. Ct. Dec. 2, 1988), perhaps the first of the well-known cross-cultural cases, and one which ignited outrage in the immigrant community at the time of the trial and has been the subject of continuing criticism by cultural anthropologists as well as legal scholars in the years since.

Chen involved a 1987 incident in which a Chinese immigrant bludgeoned his Chinese immigrant wife with a claw hammer, striking eight blows and leaving her to die in her bed, several weeks after she had admitted to him that she had been unfaithful.

At trial, the defense's expert witness testified that the practice of killing one's wife in response to her infidelity was not unusual in China. On cross-examination, however, the expert admitted that he could not recall a single such case – and the Asian community vigorously disputed the expert's claim that homicide under such circumstances was common in Chinese culture. The prosecution presented no cultural evidence of its own, because it did not anticipate that the judge would give the defense's expert testimony any credence.

The judge ruled: “Were this crime committed by the defendant as someone who was born and raised in America, . . . the Court would have been constrained to find the defendant guilty of manslaughter in the first degree. . . . But based on cultural aspects, the effect of the wife's behavior on someone who is essentially born in China, raised in China, and took all of his Chinese culture with him . . . , the Court . . . based on the peculiar facts and circumstances of this case . . . and the expert testimony . . . finds the defendant guilty of manslaughter in the second degree.”

The judge similarly relied on culture to mitigate the defendant's sentence from prison to five years' probation, speculating that imprisonment might negatively affect the marriage prospects of the man's daughters. Moreover, in imposing sentence, the judge required the defendant to swear “on his honor and on the honor of his family” that he would fulfill the terms and conditions of his probation, admonishing him that any failure to comply with the terms of his probation might not only result in a jail term, but would also constitute “a total loss of face.”

The panel also briefly discussed Siripongs, *supra*, which illustrates how culture affects body language (and, in turn, may affect a judge or jury), and, in addition, demonstrates how criminal cases involving cultural evidence may originate in state courts but end up in the federal courts via petitions for *habeas corpus*.

In Siripongs, the Thai defendant admitted that he had been present during the killing of two employees at a neighborhood market. Although he insisted that he had not killed either victim, and asserted that the deaths had been the work of two accomplices, the defendant refused to name the two other men. Because he refused to name his

accomplices, the defendant's account of the events seemed incredible. In addition, during the sentencing phase of the proceedings, the defendant showed no emotion. The jury convicted the man of first degree murder, and sentenced him to death. Both the conviction and the sentence were upheld on appeal by the state courts.

In federal *habeas* proceedings, the U.S. Court of Appeals for the Ninth Circuit concluded that the man had been deprived of the effective assistance of counsel, based in part on trial counsel's failure to present relevant cultural evidence to the jury. The Ninth Circuit noted that an anthropologist might have explained "how [the defendant's] refusal to identify accomplices was consistent with deeply imbedded Thai cultural values, including cultural concepts of shame and dishonor, and with Thai religious beliefs." Siripongs, 133 F.3d 732, 734 (9th Cir. 1998). In addition, an anthropologist might have testified that the defendant's stoic demeanor during sentencing was a reflection of his culture, and did not necessarily reflect a lack of remorse. The case was remanded to the federal district court for an evidentiary hearing. Based on that hearing, the Ninth Circuit concluded that the failure to present a cultural defense may have been a reasonable tactical decision on the part of trial counsel, suggesting – in essence – that the defendant was too "Americanized" to make such a defense credible. *See id.* at 735. The man was executed in 1999.

District Court Judge Barbara Lynn – currently Chair of the NCFTJ, and Chair-Elect of the Judicial Division – closed the program with a cross-cultural anecdote of her own. She noted that, in a recent sentencing hearing, a Latino defendant was not making eye contact with her. She started to reprimand the man to the effect of "You need to look at me when I'm talking to you," but the interpreter broke in and asked to approach the bench. The interpreter then explained to Judge Lynn that – in a number of cultures, including certain Latin cultures – one averts the eyes as a gesture of respect (in stark contrast to U.S. culture, where we intuitively interpret a strong, steady gaze as signaling respect, attention, and truthfulness/trustworthiness). Thus, by not meeting Judge Lynn's gaze, the Latino defendant was actually showing respect for her, *not* disrespect (as the judge had initially assumed).

Judge Lynn thanked the panelists, and reiterated that the program was designed to raise awareness within the judiciary and within the legal profession as a whole concerning the many, and sometimes subtle, ways that culture may impact the administration of justice. Judge Lynn noted that the program cast a spotlight on the importance of promoting "cultural competence" in the courts, to ensure that judges truly dispense *justice for all* – immigrants and non-immigrants alike. She explained, "We today are a multicultural society, and we need to recognize that in our courts and deal with it in a constructive way – with new immigrants, recognize the issues that they present, [and] the cultures that they bring, and make sure our courts are sensitive to them and their particular needs and issues." She emphasized that NCFTJ's presentation of "Stranger In A Strange Land" is "the beginning and not the end of the conversation."

The program was followed immediately by a book-signing, where Professor Renteln autographed copies of her award-winning book, "The Cultural Defense."

The NCFTJ is grateful to the 19 entities that co-sponsored the program, and extends special thanks to the Section of Litigation and the Tort Trial and Insurance Practice Section, whose generous financial contributions made the event possible. In addition to the American Judicature Society (“AJS”), other co-sponsors included the Section of International Law, the Criminal Justice Section, the Section of Labor and Employment Law, the Section of Family Law, the Section of Individual Rights and Responsibilities, the Section of Administrative Law and Regulatory Practice, the Section of Health Law, the Section of Business Law, the Law Student Division, the Commission on Immigration, the Commission on Domestic Violence, the Commission on Mental and Physical Disability Law, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Women in the Profession, the Standing Committee on Legal Aid and Indigent Defendants, and the Standing Committee on Judicial Independence.

Videography services were provided by Cody Horning, courtesy of Brandon Colburn and Legalsized Inc. (a firm specializing in video depositions, and other multi-media litigation support services), and by Los Angeles-based independent filmmaker Micah Baskir.