



Judges in the Classroom

Cultural Defense to Crime

Source:

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Objectives:

1. To define "defense to crime."
2. To identify various defenses to crimes in Washington.
3. To examine "cultural defense" and apply it to case studies.
4. To identify arguments for and against a cultural defense.

Grade Level:

Grades 7-12

Time:

One class period (approximately 50 minutes)

Materials:

One copy of Handout 1 (Cultural Difference: A Defense?) for each student.

Procedures:

1. **Begin the class by introducing yourself** and setting the students at ease. Tell students that the purpose of today's class is to examine defenses to crime and to give them a chance to decide whether or not to accept a "cultural defense."
2. **Brainstorm with students** and write on the board a definition of a defense to crime.

Cultural evidence in criminal cases is used to justify, acquit, or mitigate a defendant's action.

3. **Ask students** to then identify as many defenses as they can. Define the defenses as they are presented. Spend about 10 minutes on this activity. Make sure that the list includes the following defenses:

Defenses:

- a. Duress occurs when a defendant participates in the crime under compulsion by another who, by threat or use of force, creates an apprehension in the mind of the defendant that in case of refusal s/he or another would be subject to immediate death or immediate grievous bodily injury. The apprehension must be reasonable and the defendant must not have participated in the crime except for the duress.

For example, Mrs. Turner was visiting her husband in prison. She was found with drugs and charged with possession of contraband. She successfully used the defense of duress when she showed that a person approached her about carrying marijuana into prison and told her that if she refused her husband would be hurt. He additionally told her that her husband had been deliberately hurt in a basketball game in prison and that he had friends in the wing in which her husband was held. He said that these friends had intimidated Mrs. Turner before, and two days after Mrs. Turner was arrested, a fire was discovered on her porch along with a threatening note.

- b. Infancy is a defense for persons younger than eight. They are not legally capable of committing a crime in Washington. Persons between 8 and 12 are presumed incapable of committing a crime. However, if the prosecution can show that the person had the ability to know right from wrong, the 8 to 12-year old may be found to have committed an offense.
- c. The insanity defense in Washington State requires that at the time of the crime, as a result of a mental disease or defect, the mind of the defendant was affected so that s/he could not understand what s/he was doing or unable to tell right from wrong regarding the crime. The defendant must establish the insanity defense by a preponderance of the evidence. Other states have a category of “guilty but mentally ill,” but this is not the law in Washington State.
- d. Diminished capacity requires that a defendant's mental condition lacks the ability to possess the necessary level of culpability to commit the crime charged. It negates intent and knowledge.
- e. Self-defense permits a person to use reasonable force in defense of self, others or property. In homicide cases, the defendant must have a reasonable belief that his or her or another's life is in imminent danger. People are not allowed to kill in

order to protect their property.

There have been adaptations of self-defense when the defendant in a homicide case has a history of abuse from the deceased. The battered person's syndrome permits self-defense when the defendant, given his or her situation, had a reasonable belief that his or her life was in imminent danger.

The trier of fact (judge or jury) must put itself in the shoes of the defendant, and determine what was reasonable for the person who committed the act to believe at the time the act was committed.

Based upon the defendant's subjective impressions of the potential for danger, s/he must reasonably believe that the spouse or parent intends to inflict death or great bodily harm and there is an imminent danger of such harm being accomplished.

The battered person's syndrome may have substantial bearing on the defendant's perceptions and behavior at the time of the killing, and is central to the claim of self-defense.

- f. Entrapment is a defense that the defendant must prove to show the criminal design originated in the mind of the police and that the defendant was lured into committing a crime s/he had otherwise not intended to commit. It is not entrapment if the police merely gave a defendant an opportunity to commit a crime.
- g. Voluntary intoxication due to alcohol or drugs is not a defense to crime. However, some crimes require proof of a specific mental state.

For example, when Toni is charged with burglary, she claims she was high on crack cocaine. Burglary occurs when a person, with intent to commit a crime against a person or property inside, enters or remains unlawfully in a dwelling. If she can prove that she was high, intoxication is a valid defense because it negates the specific mental state (the intent to commit a crime against a person or property inside) required to prove the crime of burglary. She can still be charged with other crimes that do not have a specific intent for one of its elements, like criminal trespass. If she decided to burglarize a home and then got high, or if she got high to get up enough nerve to commit the crime, then intoxication is not a defense to burglary.

- h. Alibi is the defense that someone other than the defendant committed the crime.
- i. No crime committed means the prosecutor fails to prove each of the elements of the crime beyond a reasonable doubt.

4. Let's consider whether another defense should be added to the list of defenses. Instruct students they will now examine a series of cases in which defendants have asked courts to excuse them from, or reduce, their liability on the basis of culture. Pass out Handout 1 and have students work in small groups of no more than five to determine how they would decide the cases. Each group should designate a reporter to write down its answers and a spokesperson to report back to the class. Tell students they have 10 minutes to work in small groups. Ask them if they understand the assignment.
5. Debrief groups by letting the spokesperson from each group give one argument or point for each of the questions before opening up the discussion to the entire class. Spend about 25 minutes on this debriefing.

Answers to the Case Studies:

Students' opinions will vary. Defense lawyers claim that the idea of using a cultural defense is to help explain a defendant's personal circumstances. This coincides with American notions of "individualized justice" and "cultural pluralism." Supporters of this defense state they are not concerned with social consequences, if other immigrants think their behavior will be tolerated, since the concern of the court is whether or not the defendant is guilty based on all the evidence.

On the other hand, there is concern that increased use of the cultural defense will expose U.S. courts to patriarchal values from abroad to the detriment of immigrant women, many of whom were treated as second-class citizens in the lands they left behind.

The director of the Asian American Legal Defense and Education Fund claims that Americans do not want to import these cultural values into the judicial system and that Americans don't want women victimized by backward customs—customs that, in fact, may no longer be permitted in the homelands. Americans don't want so-called cultural experts perpetuating certain stereotypes that may not be accurate. This also says that perpetuation of stereotypes by "experts" spreads the idea that Asian lives are worthless.

Others point to the fact that the victims of these "cultural crimes" are always society's powerless: women and children.

Others claim that foreign customs should not override American law, since "[e]very foreigner residing in a country . . . is as much bound to obey its laws as native citizens."

Some worry about backlash, that because of this defense where people get lesser penalties or convictions for lesser crimes, that people will believe that people from other countries are getting away with something.

Susan Herman of the American Civil Liberties Union (ACLU) states: "It is all so difficult and troubling. I think the judge in Chen's case was being empathetic. To understand is to forgive. But to forgive everyone means there's no criminal law. There can be a pretty

arbitrary line between those we forgive and those we condemn, and we don't like to confront the arbitrariness. But the cultural defense makes us do it."

Another view is that since most crimes require that there be a particular mental state, the judge or jury cannot understand the defendant's mental state without an understanding of cultural context. A broader understanding of the defendant's mental state would not result in exculpation in all cultural defense cases nor does it defer to non-U.S. legal systems.

Note that the last two cases raise the issue of separate cultures within the United States. The United States in fact is not one homogeneous culture. How much should group culture be taken into account?

6. Conclude by making the point that a cultural defense is one area of society where the many cultures of America present troubling issues. Add your personal experience and views of cultural defense.

Handout 1

Cultural Difference: A Defense?

Directions: Read each of the following cases and the use of culture as a possible defense.

Case 1:

Chinese immigrant Dong Lu Chen was convicted of manslaughter and given five years on probation for killing his wife. He hit his wife eight times with a hammer, leaving her to die in her bed. Chen, 51, who left China two years before, claimed a "cultural defense." He said that a person raised outside the United States should not be held fully responsible for conduct which, while illegal in the U.S., might be acceptable in the home country.

Chen killed his wife in their apartment because she was unfaithful. At his trial in New York, his lawyer argued that traditional Chinese notions about the shame of adultery propelled him to violence. At sentencing, the judge agreed.

Directions: Identify three arguments for and three arguments against, allowing culture to be taken into account for this act committed in the United States.

Case 2:

In California, Fumiko Kimura, who came from Japan 14 years earlier, as a young adult, tried to drown herself and her two children after learning of her husband's affair. She survived, but the children did not. She was charged with murder, but 4,000 local Asians signed a petition pointing out that in Japan, the ancient rite of "oyako-shinju" (parent-child suicide) is not considered murder. In the end, she plead guilty to manslaughter and got probation.

Directions: Identify three arguments for and three arguments against, allowing culture to be taken into account for this act committed in the United States.

Case 3:

In Fresno, California, Tou Moua, a refugee member of the Hmong mountain tribe of Laos killed his wife, Yeg Yang Moua, for having an affair. He was convicted of manslaughter. His lawyer said there was no provision for divorce under Hmong custom, and that a Hmong husband was required to "execute justice" in such circumstances, as one traditional option. He got eight years in jail.

Directions: Identify three arguments for and three arguments against, allowing culture to be taken into account for this act committed in the United States.

Case 4:

A 23-year-old African male immigrant to the United States faced a rape charge after engaging in what appeared to be forcible sex with an African girl, age 13. But the prosecutor dismissed the case after learning that under the courtship ritual of "marriage by capture," the young woman only "pretends" to be resisting. The prosecutor was not completely convinced but decided the

case was too weak for a jury.

Directions: Identify three arguments for and three arguments against, allowing culture to be taken into account for this act committed in the United States.

Case 5:

Todd Bertrang and Robyn Faulkinbury were arrested after agreeing to cut the genitals of two girls. Undercover FBI agents posing as the girls' parents offered the couple \$8,000 to perform the procedure. Todd and Robyn were prosecuted under a federal law designed to protect girls in immigrant communities that support the practice. The law prohibits genital cutting on girls under the age of 18 unless it is medically necessary, and then only if performed by a licensed professional. Neither Bertrang nor Faulkinbury is licensed to practice medicine, according to the indictment. Within the cultures where female genital cutting is practiced, the procedure is believed to mark a rite of passage to adulthood, including a belief that the surgery is necessary to preserve the chastity of young girls and limit the sexuality of women; identify with a particular cultural heritage; maintain aesthetics and hygiene (female genitalia “are considered dirty” and are removed to provide “aesthetic appeal”); and support religious reasons (although the practice predates Islam, some Muslim communities believe that female genitalia mutilation (FGM) is demanded by their religious faith).

Directions: Identify three arguments for and three arguments against, allowing culture to be taken into account for this act committed in the United States.

Case 6:

Two Native American Indians were fired from their jobs in Oregon for their use of peyote in a traditional Indian ceremony during non-working hours. They were denied unemployment benefits because they were fired for misconduct. They were also criminally prosecuted for drug use. Their cultural defense to the use of peyote under freedom of religion was denied by the U.S. Supreme Court.

Directions: Identify three arguments for and three arguments against, allowing culture to be taken into account for this act committed in the United States.

Case 7:

Amish parents refused to permit their children to attend school after eighth grade in violation of state law, which required school attendance until age 16. The Amish claimed a cultural defense: that their children were required to work on their farms as part of the Amish life. The U.S. Supreme Court ruled in favor of the Amish.

Directions: Identify three arguments for and three arguments against, allowing culture to be taken into account for this act committed in the United States.

Case 8: An Ethiopian man, Khalid Adem, was arrested and charged with performing FGM on his 2-year-old daughter in the United States. Both the federal and state governments make this practice a crime. However, it is practiced in more than 40 countries around the world. He was

charged with cruelty to children and battery. One year later, he remained free.

Directions: Identify three arguments for and three arguments against, allowing culture to be taken into account for this act committed in the United States.