

May 2015

## Cultural Bias in Judicial Decision Making

Masua Sagiv

*Buchmann Faculty of Law, Tel Aviv University, masuasagiv@post.tau.ac.il*

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/jlsj>

 Part of the [Civil Rights and Discrimination Commons](#), [Comparative and Foreign Law Commons](#), [Courts Commons](#), [Evidence Commons](#), [Judges Commons](#), and the [Jurisprudence Commons](#)

---

### Recommended Citation

Masua Sagiv, *Cultural Bias in Judicial Decision Making*, 35 B.C.J.L. & Soc. Just. 229 (2015), <http://lawdigitalcommons.bc.edu/jlsj/vol35/iss2/3>

This Essay is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Journal of Law & Social Justice by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# CULTURAL BIAS IN JUDICIAL DECISION MAKING

MASUA SAGIV\*

**Abstract:** This Essay describes the phenomenon of cultural bias in judicial decision making, and examines the use of testimonies and opinions of cultural experts as a way to diminish this bias. The Essay compares the legal regimes of the United States and Israel. Whereas in the United States, the general practice of using cultural experts in courts is well developed and regulated, the Israeli legal procedure has no formal method for admitting cultural expert testimony, and examples of opinions or testimonies of cultural experts in the Israeli legal system are sporadic. The Essay further argues that social science evidence is an essential but insufficient means of reducing the cultural bias of judges. Judges' reliance on cultural experts can also be fueled by a preexisting cultural agenda disguised as an informed judgment. The Essay concludes with a suggestion of measures that can be implemented alongside the use of cultural experts in order to increase judges' awareness of the cultural bias and mitigate its consequences.

## INTRODUCTION

The tension between the legal procedure's goals of neutrality, equality, and impartiality, and the fact that judges are human beings that are influenced by their life experiences, has been vastly debated in legal and psychological literature. This Essay focuses on one among many existing biases in judicial decision making: cultural bias.

When judges adjudicate cases, they use not only legal knowledge, but also knowledge about the world. The source of the judges' knowledge about the world is their "common sense," which is the intangible cultural system that contains people's informal knowledge about the world from their social group's point of view. Inasmuch as the judges' interpretation about the world is

---

© 2015, Masua Sagiv. All rights reserved.

\* Ph.D. Candidate, Zvi Meitar Center for Advanced Legal Studies, Buchmann Faculty of Law, Tel Aviv University. LL.B. (Law & Political Science), Bar-Ilan University Faculty of Law. LL.M., Columbia University School of Law. E-mail: masuasagiv@post.tau.ac.il. I was fortunate to have the opportunity to present this Essay at two workshops for young scholars, the Yale Law School 3rd Doctoral Scholarship Conference and the "Law in a Changing Transnational World" workshop that took place at Tel Aviv University Law Faculty. I wish to thank the participants of both workshops for their excellent comments and insights. I would like to extend particular gratitude to Menachem Mautner, James T. Richardson, Yofi Tirosh, Roman Zinigrad, Mohsin Alam Bhat and Benjamin Perryman for their helpful comments.

limited to their social group's interpretation, the proceedings regarding parties who do not share the judges' group's cultural perspective may be unjust.

One way to mitigate the cultural bias of judges is by using social science evidence in courts, particularly by way of testimonies and opinions of cultural experts (for example, anthropologists or sociologists). In the United States, judges frequently rely upon the testimony and opinions of cultural experts and the general practice of using cultural experts in courts is well developed and regulated, even if reliance upon these experts' findings is inconsistent among different courts. In contrast, Israeli legal procedure has no formal method for admitting expert testimony on cultural questions, and examples of opinions or testimonies of cultural experts in the Israeli legal system are sporadic, despite its diverse and divided cultural nature.

The use of cultural experts in courts, however, is an essential but insufficient means of reducing the cultural bias of judges. Moreover, the belief that use of cultural experts adequately diminishes cultural bias is dangerous, as the use of such experts can disguise judicial decisions based on a preexisting cultural agenda as informed judgments. Additional safeguards are needed, therefore, to ensure that judicial decisions are made independently of cultural biases of the judges themselves.

Part I of this Essay will introduce cultural bias in culture-related judicial decision making and clarify the meaning and role of cultural experts in such procedures. Parts II and III will demonstrate the use of cultural experts in American courts and their general absence from Israeli legal proceedings, respectively. In view of the American and Israeli arrangements, Part IV will then discuss the practice's vulnerability to preexisting cultural agendas of judges, and Part V will suggest measures that can be implemented alongside the use of cultural experts in order to increase judges' awareness of their own cultural biases and mitigate its consequences.

## I. CULTURAL BIAS AND CULTURAL EXPERTS

*There is in each of us a stream of tendency whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions . . . .*

—Benjamin N. Cardozo, *The Nature of the Judicial Process*<sup>1</sup>

---

<sup>1</sup> BENJAMIN N. CARDOZO, *Introduction. The Method of Philosophy*, in *THE NATURE OF THE JUDICIAL PROCESS* 9, 12 (1921).

A judge's subconscious or common sense is inseparable from her decisions. When litigants belong to different cultural groups than a judge, the influence of her common sense can be especially problematic. Even when the judge and the litigant are part of the same cultural group, the application of her common sense can lead to biased results. The testimony of cultural experts is a common tool used to mitigate these potentially unjust consequences.

### A. Defining "Culture"

This Essay uses the term "culture" as it has been defined by Professors Avishai Margalit and Moshe Halbertal. Margalit and Halbertal argue that culture is constitutive of the personality identity of human beings, which is their "ability to preserve the attributes that are seen as central by them and the members of their group," or in other words, the categories through which human beings give meaning to what transpires in their lives.<sup>2</sup> This approach is consistent with the main school of cultural anthropology. According to Clifford Geertz, the founder of cultural anthropology, culture can be thought of as "webs of significance" spun by the person herself.<sup>3</sup> It "denotes an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which [people] communicate, perpetuate, and develop their knowledge about and attitudes towards life."<sup>4</sup> The symbolic conception views culture as the categories, experiences, beliefs, and doctrines that organize, rationalize, and justify a distinct way of life.

Similarly, the dominant paradigm of social studies "conceptualizes culture as interwoven with all social practices . . ."<sup>5</sup> Culture is defined as the meanings and values that arise amongst distinctive social groups and classes, on the basis of their historical conditions and relationships, through which they handle and respond to the conditions of existence. It is also defined as the lived traditions and practices through which those "understandings" are expressed and in which they are embodied.

In almost every society, people, in their day-to-day experiences and through meeting different people, interact with several cultures. Thus, identity is determined by multiple cultures and has varied contents—every person is in a sense multicultural. For example, an African-American lesbian woman belongs to at least three cultural groups, each with its own unique cultural content and distinct manifestations in the woman's life.

---

<sup>2</sup> Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 SOC. RES. 491, 502 (1994).

<sup>3</sup> CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURE: SELECTED ESSAYS 3, 5 (2000 ed.).

<sup>4</sup> GEERTZ, *supra* note 3, at 87, 89.

<sup>5</sup> Stuart Hall, *Cultural Studies: Two Paradigms*, 2 MEDIA, CULTURE & SOC'Y 57, 63 (1980).

### B. Cultural Bias in the Courtroom

In his seminal essay, *The Nature of the Judicial Process*, from nearly a century ago, Benjamin Cardozo analyzed the ingredients of “that strange compound which is brewed daily in the caldron of the courts . . . .”<sup>6</sup> Among these ingredients, he distinguished between the judge’s conscious and subconscious decision making. Whereas the conscious element comprises “guiding principles of conduct,” the subconscious element is much more elusive, encompassing the judge’s inherited instincts, traditional beliefs and acquired convictions.<sup>7</sup> Like the conscious component, the judge’s subconscious is inseparable from her decisions. Cardozo writes that, while “[w]e [as judges] may try to see things as objectively as we please . . . we can never see them with any eyes except our own.”<sup>8</sup> Furthermore, “[i]t is often through these subconscious forces that judges are kept consistent with themselves, and inconsistent with one another.”<sup>9</sup>

What Cardozo calls the subconscious, Menachem Mautner calls “common sense.”<sup>10</sup> Mautner explains that the application of the categories of substantive law is not made solely based on “legal” categories, but also on an extensive use of the judges’ broader knowledge about the world. In the context of decisional reasoning by jurists, these two bodies of information—legal categories and knowledge about the world—are inseparable. The source of the jurist’s knowledge about the world (as used to apply substantive law) is “common sense,” that is, the intangible cultural system that contains empirical and normative information about the world, with which people can function normally in their everyday lives within their social groups. Common sense is the cultural component encompassing people’s informal knowledge regarding the ways in which the social and natural worlds work, and how to conduct relationships

---

<sup>6</sup> CARDOZO, *supra* note 1, at 10.

<sup>7</sup> *Id.* at 11–12.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> *Id.* at 12. See generally Robert J. MacCoun, *Balancing Evidence and Norms in Cultural Evolution*, (Stanford Pub. Law Working Paper No. 2516441, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2516441](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516441) (providing an analysis of this point from a different perspective). It is important to state that this Essay will not deal with the jurisprudential questions regarding the relationship between law and culture (that is, whether culture is a part of law, or whether it is distinct and independent, to the point that law acts as an entry barrier for the judge’s own culture). For the purposes of this Essay, suffice it to say that judges’ cultural backgrounds significantly influence their judicial decisions. See generally Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001) (providing further elaboration on this issue).

<sup>10</sup> Menachem Mautner, *Common Sense, Legitimacy, Coercion: Judges as Narrators*, 7 PLILIM (ISRAEL J. OF CRIM. JUSTICE) 11, 14 (1998); see also MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* 72 n.89, 80 (2011) (providing a short English summary of his theory on judges’ “common sense”). Menachem Mautner is the Daniel Rubinstein Chair Professor of Comparative Civil Law and Jurisprudence at the Tel Aviv University, Faculty of Law.

with people. In short, common sense is people's informal knowledge about the world from their social group's point of view.

Consider, as an example of shared common sense, a May 2013 case in which the Israeli Supreme Court heard an appeal of a Palestinian child who was injured by soldiers in the Israel Defense Forces (IDF).<sup>11</sup> The child, Ahmad Abu Fadah, argued that he was shot unjustifiably while walking to the grocery store, whereas the IDF argued that there was a disturbance of the peace in the area, which resulted in one soldier's uniform catching fire from a Molotov cocktail. In the trial court, the soldier described his reaction to the fire by demonstrating his movement, and comparing it to Keanu Reeves' movement in the movie *The Matrix*. The appellant argued that the soldier's reference to a violent movie during serious legal proceedings undermined the credibility of his testimony.

In his ruling, Justice Amit referred to the appellant's argument, stating: "I will leave the reader to judge whether demonstrating the movement by comparing it to the movie *The Matrix* injures the witness' credibility. The appellant's attorney did not clarify whether he refers to *The Matrix* 1, 2 or 3, but I am willing to assume that he means all three movies in which the characters, bad or good, and not just 'the one,' avoid bullets as fast as lightning and assault each other."<sup>12</sup> Justice Amit saw no problem with the soldier's testimony, asserting that the soldier only intended to spontaneously demonstrate a quick movement and that he probably did it much slower than it was done in the *Matrix* movies. The cultural reference here to the movie *The Matrix* is obvious and understood in more or less the same way by the parties and judge as members of a liberal democracy where American movies are accessible.

Judges' application of common sense can be especially problematic when a case involves individuals who belong to a different cultural group than the judge.<sup>13</sup> The judge applies her cultural group's common sense, whereas the person or group before the court applies a different common sense. When either the information subject to interpretation by each group's common sense, or the interpretation itself, is different, the judge's use of common sense may result in cultural coercion. Consider a different, hypothetical case, in which the cultural reference presents a conundrum to the court because the liberal judge's knowledge about the world does not extend to the metaphor used by the witness or litigant. In the best case scenario, the judge will acknowledge her lack of understanding, and might ignore the cultural reference, or ask the member of the cultural group to clarify its meaning. In the worst case scenario, the

---

<sup>11</sup> CA 5179/11 Abu Fadah (minor) v. State of Israel (May 2, 2013), Nevo Legal Database (by subscription) (Isr.).

<sup>12</sup> *Id.* ¶ 4.

<sup>13</sup> Mautner, *supra* note 10, at 58–69.

judge will be unaware of any different cultural interpretations, and will incorrectly apply her common sense.

The Canadian case *Delgamuukw v. The Queen* is a real world example of the latter.<sup>14</sup> When the case was first brought to the Supreme Court of British Columbia, the court was required to decide upon land claims of the Gitksan and Wet'suwet'en aboriginal tribes.<sup>15</sup> No less than forty-eight tribal chiefs as well as anthropological experts testified in favor of the tribes' claims, yet Chief Justice Allan McEachern doubted the sincerity of the anthropological experts' testimony because, according to him, it was not objective.<sup>16</sup> Anthropologist Robert Paine, for example, in his commentary after the trial, illustrated the many gaps of cultural understanding and interpretation that existed between the Chief Justice and the tribal chiefs.<sup>17</sup> For example, he explained that, while the tribal chiefs understood the phrase "literally true" to refer to an "*ipso facto* truth," the Chief Justice interpreted it to mean "*factually* true in a proven sense (in written documents preferably)."<sup>18</sup> Both sides, however, were unaware of the gaps of cultural interpretation between them, and this ultimately influenced the result of the trial and the tribes' perception of the legal process.<sup>19</sup>

It should be noted that the other side of the coin is also troubling. When judges apply their common sense in cases involving individuals who belong to their own cultural group, the application of this group's common sense might lead to partiality of the judge. For example, in the Canadian case *R.D.S. v. The Queen*, a white officer arrested a black fifteen year-old who had allegedly interfered with the arrest of another youth.<sup>20</sup> While delivering her oral reasons for acquitting the accused, the Youth Court Judge—a black woman—stated "that police officers had been known to mislead the court in the past, that they had been known to overreact particularly with non-white groups, and that that would indicate a questionable state of mind."<sup>21</sup> The judge noted that "her comments were not [specific] to the police officer testifying before the court."<sup>22</sup> The Supreme Court of Canada ruled that the judge's words raised "a

---

<sup>14</sup> *Delgamuukw v. The Queen* [1997] 3 S.C.R. 1010 (Can.).

<sup>15</sup> *Delgamuukw v. The Queen (Delgamuukw I)*, [1991] 79 D.L.R.4th 185 (Can. B.C. Sup. Ct.).

<sup>16</sup> Antonia Mills, Problems of Establishing Authority in Testifying on Behalf of the Witsuwit'en, 19 POL. & LEGAL ANTHROPOLOGY REV. 39, 39–41 (1996).

<sup>17</sup> Robert Paine, In Chief Justice McEachern's Shoes: Anthropology's Ineffectiveness in Court, 19 POL. & LEGAL ANTHROPOLOGY REV. 59, 61 (1996).

<sup>18</sup> *See id.* ("There are different denotations of 'literal' here; for the Gitksan and Wet'suwet'en, their myths are 'literally true' in the sense that they carry an '*ipso facto* truth' . . . but for McEachern, 'literally true' means *factually true* in a proven sense (in written documents preferably).")

<sup>19</sup> *Id.* at 59, 61. It should be noted that Chief Justice McEachern's judgment was highly criticized, and his judgment was partly reversed by the Supreme Court of Canada. *Delgamuukw II*, [1997] 3 S.C.R. 1010.

<sup>20</sup> *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484 (Can.).

<sup>21</sup> *Id.* at 484–85.

<sup>22</sup> *Id.* at 485.

reasonable apprehension of bias.”<sup>23</sup> The Supreme Court held that, although “neutrality does not require judges to discount their life experiences[,]” it does prohibit them from basing (or appearing to base) their judgments “on generalizations or stereotypes” rather than on the particular evidence and witnesses that are in front of them.<sup>24</sup>

### *C. Mitigating the Effects of Cultural Bias: The Role of Anthropologists and Sociologists*

One of the most prominent ways to mitigate the potentially unjust consequences of this gap in cultural understanding is through the testimony of cultural experts, mainly anthropologists and sociologists.<sup>25</sup> These cultural experts can temper the effect of bias by serving as translators and pushing back against the empirical assumptions that advocates and jurists make in the course of presenting and hearing evidence.<sup>26</sup>

The inclination of lawyers and courts is to perceive facts and evidence as empirical, precise, and positivistic.<sup>27</sup> As a basic conception in law, this inclination has a practical logic, since legal proceedings are not an academic exercise—the purpose is to reach a decision settling a dispute, leaving no room for existential doubts. However, when the conflict involves cultural differences, this approach is problematic, since culture-dependent facts can be highly contextual and may be subject to competing interpretations by those involved in the case. In such cases, the standard tools available to the jurists are inadequate, and the expertise of cultural experts—anthropologists or sociologists—is needed.<sup>28</sup>

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

<sup>24</sup> *Id.* at 487.

<sup>25</sup> For an elaboration of the possible use of social science evidence in litigation and how it can be presented in courts, see generally Benjamin Perryman, *Social Science in Economic and Social Rights Litigation* (Apr. 10, 2013) (unpublished L.L.M. term paper, Yale Law School) (on file with author).

<sup>26</sup> See Paine, *supra* note 17, at 61; Perryman, *supra* note 25, at 12–19.

<sup>27</sup> LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* 119–20 (2006).

<sup>28</sup> *Id.* For further discussion regarding the differences of perception between jurists and anthropologists, see generally NORBERT ROULAND, *LEGAL ANTHROPOLOGY* (Philippe Planel trans., 1994); Michael Freeman & David Napier, *Introduction to Law and Anthropology*, in 12 *CURRENT LEGAL ISSUES* 1 (Michael Freeman & David Napier eds., 2009); Randy Frances Kandel, *Double Vision: Anthropologists at Law*, 11 *NAPA BULLETIN* 1, 1 (1992). Some writers advocate for the separation of academia from the legal process. According to this approach, there is no place for academic information and theories in the legal process. This approach conceives of the legal process as having a unique decisional character, similar to the practical wisdom model of moral and public decision making. Social science information, according to Mautner for example, should enter the legal process via the judge’s common sense, after it is assimilated into the social common sense the judge uses. Mautner, *supra* note 10, at 52–54. I disagree with this approach. If academia is full of debates and theories and controversies, how can we rely upon the academic information that finds its way (usually through the media) into our society’s common sense? Surely we cannot attach the latter with higher credibility

The anthropologist or sociologist has two functions in her capacity as a cultural expert.<sup>29</sup> The first is providing the court with the relevant cultural information. The second, and crucial function, is translating this information, and bridging the gaps of understanding between the judge or fact finder and the litigants or witnesses. This function is reflected in the words of anthropologist Mils Hills:

There is an inherent value in what we find and in how we interpret and communicate those findings, adding rich, contextual insight where understanding is not of words or even of sentences and single statements, but is the communication of another way of understanding things about the world . . . .<sup>30</sup>

In a lecture on the Israeli ultra-Orthodox group, Rabbi Dabid Bloch, an ultra-Orthodox rabbi, said:

Amnon Levi published a book about the “Haredim” [the ultra-orthodox public] . . . . The facts [in the book] are 95% correct, very accurate. Yet, whoever reads it still doesn’t understand the Haredim. Why? I remember when I was a child, rich people could afford to video shoot weddings in 8 mm. You don’t hear the sound there . . . . When you watch the movie, and you reach the dancing, it’s just funny. Because you don’t hear the music; you don’t get into the atmosphere; you see people jumping up and down with their mouths open doing weird movements. Since you don’t get into the vibe, it seems to you like a funny group of people doing nonsense; because you’re not in the music; you don’t hear the music. So even when you read the book and know all the facts, since you don’t hear the music—it’s not true.<sup>31</sup>

Cultural experts, when used in the course of a trial, can serve to mitigate the effects of these biases that the judge’s personal culture, or common sense, may introduce into the deliberations.

---

than information that is adopted directly from academia, without the filter of the media and public opinion, and with a fair opportunity to question the scholar’s statements in court.

<sup>29</sup> ROSEN, *supra* note 27, at 119–20; Mils Hills, *Anthropology at the Centre: Reflections on Research, Policy Guidance and Decision Support*, in APPLICATIONS OF ANTHROPOLOGY: PROFESSIONAL ANTHROPOLOGY IN THE TWENTY-FIRST CENTURY 130, 133 (Sarah Pink ed., 2006).

<sup>30</sup> Hills, *supra* note 29, at 133 (internal quotations omitted).

<sup>31</sup> David Bloch, Rabbi, Lecture at Match Point: The Worldview of the Ultra-Orthodox Public, Part I (Nov. 11, 2012) (transcription and translation by the author, original Hebrew *available at* <http://www.youtube.com/watch?v=pZbGsOF3CDE>).

## II. THE GENERAL USE OF CULTURAL EXPERTS IN AMERICAN COURTS

Since 1908, cultural information has been used in American courts in a variety of situations. The admission and use of these expert cultural opinions is governed by Rules 702 through 706 of the Federal Rules of Evidence and the criteria the U.S. Supreme Court established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* in 1993.<sup>32</sup> While the testimony of these experts is often admitted and relied upon by courts, judges do not always accept the testimony of cultural experts. Often, the rejection of a cultural expert's testimony is made without detailed reasoning for the rejection of the testimony. Use of such experts is therefore not a perfect solution, but the possibility of introducing anthropological or sociological evidence provides one tool for mitigating the effects of cultural bias.

The Federal Rules of Evidence govern the admissibility of all evidence put forward in American federal trials.<sup>33</sup> Federal Rule of Evidence 702 which governs testimony given by an expert witness states as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.<sup>34</sup>

Under Rule 702, the test for determining whether the court should admit testimony from an expert witness is based on the measure of that testimony's assistance to the trier of fact, which is a "common sense inquiry [into] whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute."<sup>35</sup> An opinion is excluded if it is unhelpful and therefore superfluous. "[T]he trial

---

<sup>32</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593–94 (1993). Rule 702 governs testimony given by an expert witness; Rule 703 covers the bases of an expert's opinion testimony; Rule 704 provides guidance as to whether expert witnesses can testify as to the ultimate issue of a case; Rule 705 involves the disclosure of the facts or data underlying an expert's opinion; and Rule 706 deals with court-appointed expert witnesses. FED. R. EVID. 702–706.

<sup>33</sup> FED. R. EVID. 702–706.

<sup>34</sup> *Id.* R. 702.

<sup>35</sup> Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952).

judge [has] considerable leeway in deciding in a particular case how to go about determining whether [a] particular expert testimony is reliable.”<sup>36</sup>

The criteria of expert testimony established by Rule 702 were set forth in *Daubert* in 1993,<sup>37</sup> which overturned the “general acceptance” rule established by *Frye v. U.S.* in 1923.<sup>38</sup> *Daubert* set forth a non-exhaustive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court were: “whether a theory or technique . . . can be (and has been) tested . . . whether the theory or technique has been subjected to peer review and publication . . . [its] known or potential rate of error . . .” and the existence and maintenance of standards controlling its operation, and whether it has attracted “widespread acceptance” within a relevant scientific community.<sup>39</sup> Deciding whether an expert’s testimony should be admitted is a “flexible” inquiry, according to the *Daubert* Court, and the focus of the inquiry “must be solely on principles and methodology, not on the conclusions that they generate.”<sup>40</sup> According to the advisory committee’s note on the 2000 amendment to Rule 702, the case law after *Daubert* indicates that in most cases expert testimony is accepted by courts.<sup>41</sup> In 1999, the Supreme Court held in *Kumho Tire Co. v. Carmichael* that these factors may also be applicable to nonscientific expert testimony.<sup>42</sup>

The pioneer use of cultural information in an American court was in 1908, in a brief that Louis Brandeis submitted to the Supreme Court for *Muller v. Oregon*.<sup>43</sup> The brief, later known as the Brandeis Brief, was submitted to the Court in support of a state law restricting the number of hours women were allowed to work. The brief was over one hundred pages, but only two of them

<sup>36</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999); see 2 JOHN HENRY WIGMORE, WIGMORE’S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW § 1918 (3d ed. 1940).

<sup>37</sup> *Daubert*, 509 U.S. at 593–96.

<sup>38</sup> *Id.* at 586; *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), *superseded by statute*, FED. R. EVID. 702, *as recognized in Daubert*, 509 U.S. at 587. According to the general acceptance rule, the information presented by the expert should be accepted by a substantial part of her scientific community. *Frye*, 293 F.3d at 1014. Some states still use the *Frye* test, including California, Florida, Illinois, Kansas, Maryland, Minnesota, New Jersey, New York, Pennsylvania and Washington. For elaboration, see Martin S. Kaufman, Atlantic Legal Found., *The Status of Daubert in State Courts* 15, 24, 26, 27–28, 30–31, 33, 34 (2006); Stephen J. Odgers & James T. Richardson, *Keeping Bad Science Out of the Courtroom—Changes in American and Australian Expert Evidence Law*, 18 U.N.S.W.L.J. 108 (1995).

<sup>39</sup> *Daubert*, 509 U.S. at 593–95.

<sup>40</sup> *See id.* at 595. The courts and the literature have also dealt with the evaluation of expert testimony by jurors. *See, e.g.,* Sanja Kutnjak Ivković & Valerie P. Hans, *Jurors’ Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441, 441 (2003).

<sup>41</sup> FED. R. EVID. 702 advisory committee’s note.

<sup>42</sup> 526 U.S. 137, 141 (1999).

<sup>43</sup> *See* Brief for Defendant in Error at 18, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107); *see also Muller*, 208 U.S. at 416.

were dedicated to legal argument—the rest consisted entirely of testimony by medics, social scientists and male workers.<sup>44</sup>

Forty years later, Dr. Robert Redfield's expert testimony was used by petitioners in the American desegregation cases of the 1950s.<sup>45</sup> In *Sweatt v. Painter*, Redfield, a Professor of Anthropology, testified regarding both the influence of segregation in education on the segregated population, and the consequences of court-ordered integration.<sup>46</sup> His testimony and other testimonies were widely cited in the arguments of those opposing segregation, including in *Brown v. Board of Education of Topeka Kansas*.<sup>47</sup> As Professor Rosen stated: "[t]he Court [in *Brown*] then formally repudiated the implicit psychology of the 'separate but equal' doctrine and supplied a footnote reference to the writings of Clark, Chein, Myrdal, and other social scientists to support their assertion that the harm of segregation 'is amply supported by modern authority.'"<sup>48</sup> In the Supreme Court case *Loving v. Virginia*, which struck down anti-miscegenation laws as unconstitutional, many of the briefs submitted to the Court contained significant citations to anthropological works.<sup>49</sup> Similarly, the Court's ruling in favor of Amish parents who refused to send their children to high school in *Yoder v. Wisconsin* was highly influenced by the testimony at trial of an anthropologist, Dr. John Hostetler.<sup>50</sup> More recently, social science evidence played a central role in *Parents Involved in Community Schools v. Seattle School District No. 1*, where the Court held that local public school boards' policies that used racial classifications in student school assignments in order to obtain racial diversity in public schools were unconstitutional.<sup>51</sup>

---

<sup>44</sup> Philippa Strum, *Brandeis and the Living Constitution*, in BRANDEIS AND AMERICA 118, 120 (Nelson L. Dawson, ed., 1989). For a discussion regarding the merits of briefs as opposed or in addition to testimony see Ronald Roesch et al., *Social Science and the Courts: The Role of Amicus Curiae Briefs*, 15 LAW & HUM. BEHAV. 1, 2 (1991).

<sup>45</sup> Lawrence Rosen, *The Anthropologist as Expert Witness*, 79 AM. ANTHROPOLOGIST 555, 561–562 (1977).

<sup>46</sup> *Id.* at 558–60; see *Sweatt v. Painter*, 339 U.S. 629, 636 (1950).

<sup>47</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

<sup>48</sup> Rosen, *supra* note 45, at 561. The said footnote is the infamous Footnote 11, "the most controversial footnote in American constitutional law." Paul L. Rosen, *History and State of the Art of Applied Social Research in the Courts*, in THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS 9, 9 (Michael J. Saks & Charles H. Baron eds., 1980); see also LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 34–38 (2000) (describing the national response to *Brown*).

<sup>49</sup> Rosen, *supra* note 45, at 561; see *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>50</sup> 406 U.S. 205 (1972); Rosen, *supra* note 45, at 562.

<sup>51</sup> 551 U.S. 701 (2007); Julie Margetta Morgan & Diana Pullin, *Social Science and the Courts: Challenges and Strategies for Bridging Gaps Between Law and Research*, 39 EDUC. RESEARCHER 515, 521–22 (2010) (arguing that the four dissenting Justices relied on the social science evidence presented as a basis for their legal conclusions); Perryman, *supra* note 25, at 35–41 (arguing that the majority opinion also relied on the available social science evidence).

Naturally, cultural experts are commonly found in cases involving individuals whose culture plays a prominent role in the facts of the case. The most prevalent examples are custody, discrimination based on race, gender, sexual orientation and nationality and criminal cases involving cultural issues or practices.<sup>52</sup>

In custody cases, testimony of cultural experts is used to determine the best interest of the child or to refute claims of harm to a child that may be grounded in cultural bias. For example, in custody cases involving homosexual parents, social science evidence is often presented either to establish the claim that homosexual parenting has negative effects on the child, or to counteract the myths and assumptions about homosexual parenting.<sup>53</sup>

*Perry v. Schwarzenegger*, the case that struck down California's Proposition 8, which outlawed gay marriage, is a good example of the use of cultural experts for both discrimination and parenting arguments.<sup>54</sup> The plaintiffs in the case presented the testimony of nine expert witnesses including Letitia Anne Peplau, a psychologist, who testified about the remarkable similarities between same-sex and opposite-sex couples; Ilan Meyer, a social epidemiologist, who testified about the stigma and social stresses experienced by gays and lesbians; Gregory Herek, a social psychologist, who testified about the nature of sexual orientation and the nature of stigma and prejudice as they relate to sexual orientation and Proposition 8; and Michael Lamb, a psychologist specializing in

---

<sup>52</sup> In such cases, the criminal act was either a practice of a minority culture (such as honor killing), or the defendant has a distinct perception of the act stemming from his cultural background (such as a different cultural interpretation of provocation). There is a vast amount of scholarly writing regarding cultural defense, and both cultural bias and cultural experts play a decisive role in such cases. However, cultural defense is an independent and complex issue that exceeds the scope of this Essay. For elaboration on the issue, see ANTHONY J. CONNOLLY, *CULTURAL DIFFERENCE ON TRIAL: THE NATURE AND LIMITS OF JUDICIAL UNDERSTANDING* (2010); ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* (2004); LINDA FRIEDMAN RAMIREZ, *CULTURAL ISSUES IN CRIMINAL DEFENSE* (2d ed. 2007); Ron A. Shapira, *The Susceptibility of Formal Models of Evidentiary Interference to Cultural Sensitivity*, 5 *CARDOZO J. INT'L & COMP. L.* 165 (1997).

<sup>53</sup> See Donna Hitchens & Barbara Price, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 *GOLDEN GATE U. L. REV.* 451, 451. Furthermore, Hitchens and Price, who are lawyers advocating for gay rights, stipulate that lesbian mothers should use psychological and social science testimony in custody cases regardless of the use of such testimony by the other party, in order to deal with the judge's preexisting beliefs about homosexual parenting:

The alternative is to seek a ruling that the mother's sexual preference is irrelevant and, therefore, testimony on the issue should be prohibited or limited. The risk of such an approach is that the mother's attorney will be prohibited from presenting evidence that rebuts commonly held prejudices about homosexuals. Since the judge will know the mother is a lesbian, whatever biases and assumptions the judge holds about the propriety of lesbians raising children will never be confronted and may play a major role in the outcome of the case.

*Id.* at 452.

<sup>54</sup> See 704 F. Supp. 2d 921, 1033 (N.D. Cal. 2010).

developmental psychology of children, including those raised by gay and lesbian parents, who offered the opinion that children raised by gay and lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents, and would benefit if their parents were able to marry.<sup>55</sup>

As is the case with other experts, judges do not always accept the testimony of cultural experts. For example, in *Perry*, after a thorough analysis, Judge Walker rejected the testimony of David Blankenhorn, founder and president of the Institute for American Values, deeming it “inadmissible opinion testimony that should be given essentially no weight.”<sup>56</sup> Walker found that Blankenhorn lacked the education relevant to the fields of marriage, fatherhood, and family structure, on which he testified as an expert. The books Blankenhorn authored and edited were not subject to peer review and, according to the judge, his opinions were thus unreliable as expert testimony. For example, Blankenhorn relied on others’ definitions of marriage, yet provided no explanation as to the meaning of these definitions or their sources. Judge Walker held that the analytical gap between the data provided by Blankenhorn and his opinion was too great and that his investigation was not conducted at the same level of intellectual rigor characterizing the practice of anthropologists, sociologists or psychologists.

Not all judges, however, produce such detailed and convincing reasoning for the rejection of expert testimony, as exemplified by the case of Anna Mae He.<sup>57</sup> The case involved a custody battle between the white American foster parents (the Bakers) and Chinese birth parents (the Hes) of Anna Mae He. Shaio-Quiang (Jack) He and his wife, Qin (Casey) Lou (He) were living in the United States on graduate-student and student-spouse visas. In 1998, after a graduate student accused Mr. He of assaulting her, the Hes’ visas were invalidated. Mrs. He was pregnant at the time and gave birth to Anna Mae on January 28, 1999 in the United States.

Due to financial difficulties, the Hes determined they could not care for the newborn and approached Mid-South Christian Services, who agreed to place Anna Mae in foster care for ninety days. Jerry and Louise Baker, experienced foster parents with several children of their own, became Anna Mae’s foster family. During the following three months, the Hes visited Anna Mae weekly pursuant to a verbal agreement, and at the end of that period, requested that Anna Mae be returned. Because of their continuing financial difficulties,

---

<sup>55</sup> *Id.* at 32–34.

<sup>56</sup> *Id.* at 946.

<sup>57</sup> See *In re Adoption of A.M.H.*, No. CH-01-1302-III, 2005 WL 3132353, at \*29 (Tenn. App. 2005). The summary that follows was taken from Rashmi Goel’s article, based on the judicial opinions rendered by the chancery court, the Tennessee Court of Appeals and the Tennessee Supreme Court. Rashmi Goel, *From Tainted to Sainted: The View of Interracial Relations as Cultural Evangelism*, 2007 WIS. L. REV. 489, 522–529.

however, the Hes intended to send Anna Mae to China to live with relatives. In light of this information, the Bakers offered to keep the baby beyond the ninety-day agreement.

In June 1999, the court transferred temporary legal custody of Anna Mae to the Bakers.<sup>58</sup> The Hes continued to visit Anna Mae, but on Anna Mae's second birthday, a dispute between the parties prompted the Hes to file papers for Anna Mae's return, stating their desire to return to China as a family. Prior to the hearing to terminate the temporary custody arrangement, the Bakers filed an application to terminate the Hes' parental rights on the grounds that four months had passed since the Hes' last visitation.<sup>59</sup> The initial proceedings stopped while the termination matter was tried.

At trial, the Bakers insisted that the Hes asked them to care for Anna Mae until she reached eighteen as long as they had visitation rights, whereas the Hes insisted that the agreement was meant to continue the current arrangement and merely transfer legal custody to the Bakers so that Anna Mae could receive coverage under the Bakers' health insurance. Moreover, the Hes argued that according to the arrangement, they could change their minds at any time. After a nine-day trial, the chancery court judge, Judge Robert Childers, terminated the Hes' parental rights, citing abandonment pursuant to a willful failure to visit and a willful failure to provide support for the statutory period of four months.<sup>60</sup> The Tennessee Court of Appeals affirmed the termination of the He's parental rights in 2005.<sup>61</sup> Two years later, however, the Tennessee Supreme Court reversed the lower court's decision, and ordered that Anna Mae be returned to her biological parents.<sup>62</sup> The case garnered international attention, and generated significant controversy for two reasons: (1) the delay in achieving a final judgment on the matter, and (2) allegations of cultural and racial bias in the decisions, especially the chancery court's 2004 judgment.

Judge Childers stated that he found the testimony given by Dr. John Cooper, the Chinese cultural expert who testified on behalf of the Hes, to be "totally lacking in credibility" and "untrustworthy."<sup>63</sup> Judge Childers also found that "Dr. Cooper is not an expert in Chinese adoption law, nor is he an expert on termination of parental rights."<sup>64</sup>

At the same time, Judge Childers reached his own conclusions regarding Chinese culture and its ramifications for Anna Mae:

---

<sup>58</sup> *In re Adoption of A.M.H.*, 215 S.W.3d 793, 798–799 (Tenn. 2007).

<sup>59</sup> *Id.* at 801–802.

<sup>60</sup> *In re Adoption of A.M.H.*, 2005 WL 3132353, at \*23, \*31.

<sup>61</sup> *Id.* at \*1.

<sup>62</sup> *In re Adoption of A.M.H.*, 215 S.W.3d at 811, 813.

<sup>63</sup> *In re Adoption of A.M.H.*, 2005 WL 3132353, at \*24, \*28.

<sup>64</sup> *Id.* at \*28.

There is a “one-child-per-family” policy in the People’s Republic of China. Families with more than one child are subject to financial penalties or the loss of government services and benefits, including medical care and educational benefits . . . Mr. He fears returning Anna Mae to the People’s Republic of China because the death rate for children of Anna Mae’s gender is fifty (50%) percent in that country.<sup>65</sup>

The judgment was predominantly grounded upon Anna Mae’s relationship with the Bakers and the Hes’ questionable character in the eyes of the court, rather than upon Anna Mae’s interest in staying in the United States and not returning to China. Nevertheless, Judge Childers’ refused to rely on the cultural expert, instead basing his impressions about Chinese families solely on American perceptions about China.<sup>66</sup>

The Hes appealed the decision to the Tennessee Court of Appeals. The Greater Seattle Chapter of the Organization of Chinese Americans submitted an *amici curiae* brief in which they argued that the trial court failed to consider social science evidence concerning Asian culture and practices, the importance of ethnic heritage and a child’s special needs as a racial minority, and cultural and ethnic factors relevant to a successful multi-ethnic child-parent situation.<sup>67</sup> While it does not seem that the court gave much weight to these arguments, the court did acknowledge the testimony of the Hes’ expert, who addressed the issue of the one-child rule in China:

On direct examination, Dr. Cooper testified that the Chinese government does not impose fines on parents who have more than one child outside of China then return to that country. However, under cross-examination, Dr. Cooper conceded that the Chinese government could impose such fines.<sup>68</sup>

---

<sup>65</sup> Goel, *supra* note 57, at 527.

<sup>66</sup> *See id.* at 527–28. Goel notes that Judge Childers “did [not] cite any written authority for his statements,” and appeared “to have taken judicial notice of these assertions without debate or evidence[.]” suggesting that he “felt it was better for Anna Mae to be American than to be Chinese.” *See id.* This assessment, I believe, is not accurate, since the part of the judgment dealing with China and Chinese culture is minor to the conclusions regarding Anna Mae’s relationship with the Bakers, and the Hes’ questionable character. No doubt, as will be discussed *infra*, Judge Childers’s conclusions regarding Chinese culture were dictated by his preconceived beliefs, but it is important, notwithstanding this justified criticism, to acknowledge the content of the bulk of the judgment.

<sup>67</sup> Brief for Greater Seattle Chapter of the Organization of Chinese Americans, Inc. as *Amici Curiae* Supporting Appellants at 2, 5, 37, *In re Adoption of A.M.H.*, No. CH-01-1302-III, 2005 WL 3132353, at \*29 (Tenn. App. 2005).

<sup>68</sup> *In re Adoption of A.M.H.*, 2005 WL 3132353, at \*85. The courts variously referred to the expert as “Dr. Copper” and “Dr. Cooper.”

Continuing its discussion of the one-child policy, the Court of Appeals cited a letter addressed to the court by the Chinese Embassy, defending China's one-child policy by referencing circumstances in which people can have more than one or two children, including instances when Chinese citizens return to China from abroad with more than one child. Further, the letter sought to inform the court that the Chinese government does not impose financial penalties or remove governmental services and benefits for violations of this policy. The court found that the letter lacked sufficient detail to convince it that the Heses would not be penalized should they return to China with Anna Mae. Concluding this affair, the Tennessee Supreme Court minimized the influence of the Heses' culture and national origin, stating: "we note that the testimony concerning the general conditions in China is not relevant to a finding of substantial harm."<sup>69</sup>

### III. THE GENERAL ABSENCE OF CULTURAL EXPERTS FROM ISRAELI COURTS

In contrast to the United States, cultural experts are extremely rare in Israeli courts. Although there is no legal prohibition on cultural experts testifying in Israeli courts, the existence of such experts is generally not acknowledged in the academic and legal discourse. While Israel's Evidence Ordinance defines "experts" broadly, the tendency is to classify matters involving culture *not* as matters of expertise, but as matters of knowledge common to—as the retired Judge Amnon Carmi stated—"every intelligent person."<sup>70</sup> These matters may also be found in "the practical experience that is acquired by every person in everyday life."<sup>71</sup> Under common knowledge theory of understanding "culture," there is obviously no need for the expert's special knowledge, and the judge is perfectly capable of acquiring and understanding the relevant information by herself. As will be elaborated below, cultural experts are so rare in Israeli courts that these experts are absent from cases even where the need for an expert is obvious.

An expert, according to the Evidence Ordinance, testifies or gives her opinion in matters of science, research, art or professional knowledge.<sup>72</sup> This definition is broad and inclusive, with hardly any restrictions, as opposed to the restrictions and requirements placed specifically upon medical experts, psychologists, legal experts, engineers or architects, and real estate apprais-

<sup>69</sup> *In re Adoption of A.M.H.*, 215 S.W.3d 793, 813 (Tenn. 2007).

<sup>70</sup> Amnon Carmi, *The Expert Witness (Part I)*, 2 MED. & L. 12, 13 (1986).

<sup>71</sup> *Id.*

<sup>72</sup> The Evidence Ordinance [New Version], 5731–1971, 18 LSI 421, § 20 (1971) (Isr.). ("The court may, unless it apprehends a miscarriage of justice, admit as evidence, in writing, an opinion by an expert as to a matter of science, research, art or professional knowledge . . . and a certificate by a physician as to the state of health of a person . . .").

ers.<sup>73</sup> In fact, the only general limitation on being recognized as an expert is that the qualifications to give an opinion on a specific issue are acquired by means of special expertise, through academic studies or practical experience.<sup>74</sup>

Despite the broad definition of “expert” and the distinct multicultural character of Israel, there are only sporadic examples of the use of cultural experts in the Israeli legal system. Furthermore, in the expert database through which the Israeli Bar refers lawyers and parties for the purpose of consultation and expert opinions, there are no cultural experts.<sup>75</sup> Consultation with such experts in legal proceedings is rare, and usually done at the initiative of the parties. Inquiries with Israeli academic cultural experts uncovered only a few instances where expert cultural testimony was utilized in legal proceedings.

In a few instances, cultural experts have served the High Court of Justice with their opinions. From 2006 to 2012, social anthropologist Shuli Hartman served three anthropological opinions to the High Court of Justice through the “Bimkom—Planners for Planning Rights” organization.<sup>76</sup> The first, from 2006, involved the residential area of the Dallin tribe, following their appeal to approve a basic master plan;<sup>77</sup> the second, from November 2011, involved the planning of the Bedouin village of Dakika (as a part of procedures to recognize the village);<sup>78</sup> and the third, from July 2012, involved the residential area of Khirbet Znota, in light of the authorities’ refusal to regulate the planning of the village.<sup>79</sup> The anthropologist Prof. Gideon Kressel wrote a letter of opinion in 2006, also to the High Court of Justice, regarding the unique desert culture of the residents of the South Hebron Mountains, at the request of an organization

<sup>73</sup> See, e.g., Civil Law Procedure Regulations, 5744–1984, KT 4685, 2220, §§ 125, 127–128 (Isr.); ABRAHAM BEN-EZRA, TESTIMONY OF AN EXPERT 29–41 (2001) (Heb.).

<sup>74</sup> ELIYAHU HARNON, EVIDENCE LAW, Part B, 295 (1977).

<sup>75</sup> LEGAL EXPERT DATABASE—A UNIQUE LEGAL AID FOR PURPOSES OF COUNSEL AND OPINION FOR COURTS AND OTHERS, [www.sofsof.co.il/maagar.phtml?m\\_num={5E776214-8C3E-4363-8192-DE7CD7DB0E6A}](http://www.sofsof.co.il/maagar.phtml?m_num={5E776214-8C3E-4363-8192-DE7CD7DB0E6A}) (last visited Apr. 26, 2015).

<sup>76</sup> According to its website, “Bimkom” (“In Their Place”) “is an Israeli human rights organization formed in 1999 by a group of professional planners and architects, in order to strengthen democracy and human rights in the field of spatial planning and housing policies, in Israel and in Area C of the West Bank, which is under Israeli control.” See *Our Mission*, BIMKOM—PLANNERS FOR PLANNING RIGHTS, <http://bimkom.org/eng/our-mission/> (last visited Apr. 7, 2015).

<sup>77</sup> SHULI HARTMAN, AN OPINION REGARDING THE DALLIN TRIBE (2006) (Isr.), available at <http://bimkom.org/wp-content/uploads/hathaleen-social-opinion.pdf>.

<sup>78</sup> SHULI HARTMAN, A SOCIAL-ANTHROPOLOGIST OPINION, THE BEDOUIN VILLAGE OF DAKIKA, ACCOMPANIED TO THE HCJ (2011) (Isr.), available at [http://bimkom.org/wp-content/uploads/Dkaika\\_-Anthropology\\_expert-opinion-11\\_2011-final.pdf](http://bimkom.org/wp-content/uploads/Dkaika_-Anthropology_expert-opinion-11_2011-final.pdf).

<sup>79</sup> SHULI HARTMAN, AN OPINION REGARDING KHIRBET ZNOTA (2012) (Isr.), available at [www.acri.org.il/he/wp-content/uploads/2012/07/zunuta-expertopinion1.pdf](http://www.acri.org.il/he/wp-content/uploads/2012/07/zunuta-expertopinion1.pdf). For an English summary of the story, see Amira Hass, *Otherwise Occupied/Chronicle of a Demolition Foretold*, HAARETZ (Jul. 30, 2012, 4:36 AM), [www.haaretz.com/news/features/otherwise-occupied-chronicle-of-a-demolition-foretold-1.454537](http://www.haaretz.com/news/features/otherwise-occupied-chronicle-of-a-demolition-foretold-1.454537).

called “Rabbis for Human Rights,” in H CJ 3043/07 Jabbarin.<sup>80</sup> The petition involved the route of the separation wall, and Prof. Kressel’s opinion was used to illustrate the damages that will be caused to the residents of the South Hebron Mountains by the planned route.

In other instances, the opinions of cultural experts were solicited by the lower courts. Anthropologist Dr. Malka Shabtai was occasionally asked to testify in military trials of Ethiopian soldiers, or to give counsel to lawyers handling cases involving members of the Ethiopian community.<sup>81</sup> Anthropologist and psychologist Yoram Bilu was asked years ago to write an anthropological opinion in an attempt to trace a possibility for a cultural motive in a case of a child that murdered his parents and brothers in the area of Jerusalem.<sup>82</sup>

The practice of consulting cultural experts is so rare in the Israeli legal system that such experts are even absent from cases where the need for them is obvious. Such was the case of *Jane Doe*, involving an Ethiopian toddler who was born in 2011 to a mother suffering from severe mental illness.<sup>83</sup> It was unknown who the father of the child is, and at first, it was unclear whether the child’s aunts were capable or willing to take him into their custody. After several legal and social care procedures, the child was transferred to a white foster family (with the biological family entitled to visitation), as a part of a fosterage for the intent of adoption procedure. The child’s aunt challenged the decision transferring the child to the foster family and requested to adopt him herself. The case went through extensive legal proceedings, including two appearances before the Supreme Court. The final decision, issued in December 2013 by the Supreme Court following a Civil Further Hearing, held that due to the amount of time passed and in the interest of the child, the child was to stay with the foster family, which would soon become his adoptive family. Nearing the end of her long judgment, Deputy Chief Justice Miriam Naor stated, almost incidentally, that no sufficient foundation was laid in front of the court regarding the specific difficulties facing adopted children whose skin color differs from their parents.<sup>84</sup> In addition, no data was brought in front of the court concerning the separation of the child from the Ethiopian congregation, but Naor did not seem to think the absence of these facts and data was important, covering for it with baseless assumptions.<sup>85</sup>

---

<sup>80</sup> A Petition for Order Nisi and Temporary Injunction in H CJ 3043/07 Jabbarin et al. v. The Minister of Defense, ¶ 30 (Isr.), available at [www.hamoked.org.il/items/8920.pdf](http://www.hamoked.org.il/items/8920.pdf).

<sup>81</sup> The correspondences are on file with the author.

<sup>82</sup> The correspondences are on file with the author.

<sup>83</sup> CFH 6211/13 Attorney General—Ministry of Welfare & Soc. Servs. v. Jane Doe (Dec. 23, 2013), Nevo Legal Database 8 (by subscription) (Isr.).

<sup>84</sup> *Id.* at 43–44.

<sup>85</sup> *Id.* For example, referring to an argument according to which the child will (perhaps against his will) find out that he is adopted due to his skin color, Justice Naor stated that “it may be”, that this discovery, if done rightly, “may” benefit the child and help him deal with his being adopted. She con-

The Supreme Court of Israel took a similar approach of vaguely assessing cultural arguments in a case involving ethnic segregation in the ultra-orthodox city of Immanuel, infamously known in Israel for the Immanuel “Beis-Yaakov” affair.<sup>86</sup> Beginning in 2007, the Beis-Yaakov ultra-orthodox school for girls in the city of Immanuel enforced ethnic segregation between girls of Ashkenazi descent and girls of Sephardic descent. In 2009, the school policies came before the High Court of Justice, which declared the practice of segregation illegal, and demanded its elimination.<sup>87</sup>

The ultra-orthodox respondents argued that the practice of separation—which they differentiated from segregation—is founded on religious beliefs. According to this argument, there were two explanations for the relatively homogeneous ethnic makeup of ultra-orthodox schools. The first was the existence of various ethnically homogeneous streams in the ultra-orthodox public, which differ from one another in their level of religiousness, and seek to maintain their unique way of life within their communities.<sup>88</sup> The second explanation, which followed the first, was that the sorting procedure was based on the spiritual level of the students and their families, and many Sephardic families are less religious since their ancestors were not raised and educated in a deeply rooted ultra-orthodox family.<sup>89</sup>

The court gave no serious consideration to respondents’ cultural claim, and held that the basis for the segregation was ethnicity. The judges did not consider the sincerity of the argument nor its sources, basis, or the ramifications of disregarding it for the ultra-orthodox group and its members’ way of life.

The results of this lack of consideration were soon revealed. The parents whose daughters attended the Ashkenazi Track refused to follow the judgment, and after nine months, the court issued arrest orders for them.<sup>90</sup> The ultra-orthodox public considered both the judgment and the arrest orders as challenging their beliefs and way of life, and a public campaign was organized in

---

tinued by citing a novel involving an adopted child, where the child proudly answers a friend that tried to insult him by calling him “adopted” that he was honored by being chosen by his parents.

<sup>86</sup> HCJ 1067/08 Noar KeHalacha Ass’n v. Ministry of Educ., 63(2) PD 398 [2009] (Isr.). For an English summary of events, see Shulamit Almog & Lotem Perry-Hazan, *Contesting Religious Authority: The Immanuel “Beis-Yaakov” School Segregation Case*, 26 INT’L J. FOR SEMIOTICS L. 211, 215–19 (2012); *High Court Approves Private School for Haredi Girls Involved in Segregation Row*, HAARETZ (Sep. 14, 2010, 5:27 PM), <http://www.haaretz.com/news/national/high-court-approves-private-school-for-haredi-girls-involved-in-segregation-row-1.313809>; Yifat Bitton, *Old-Fashioned Discrimination, New-Style Battle*, INSTITUTE FOR JEWISH IDEAS AND IDEALS (May 22, 2008), <http://www.jewishideas.org/articles/old-fashioned-discrim>.

<sup>87</sup> HCJ 1067/08 Noar KeHalacha Ass’n v. Ministry of Educ. (Jun. 15, 2010), Nevo Legal Database (by subscription) (Isr.).

<sup>88</sup> *Id.* at 10–11.

<sup>89</sup> *Id.* at 9.

<sup>90</sup> HCJ 1067/08 Noar KeHalacha Ass’n v. Ministry of Educ.

response, including, among other things, massive demonstrations in Jerusalem and Bnei-Brak, and a police escort of the fathers of the Ashkenazi girls to jail.<sup>91</sup> Following further efforts by the Court and other agents, an agreement was reached, according to which the girls of the former Ashkenazi Track went back to the integrated school for the last three days of the school year. The following year a new school was established, under the approval of the Ministry of Education. The school was designated for the girls of the Ashkenazi Track and was not funded by the state in its first year.

The case studies of Israel and the United States illuminate the complexity of the problem. In Israel, there is insufficient awareness of the influence of judges' cultural biases on their decisions, and the practice of using cultural experts is generally absent from the legal system. As discussed, Israeli judges are not bothered by this lack of cultural information, and deem themselves capable of independently reaching a well-informed decision in culture-related cases—usually based upon judgments and assumptions that stem from the judges' common sense. This approach harms the court's credibility in the eyes of different cultural groups living within the state, and produces inequitable judicial decisions grounded in incorrect or inaccurate information. As the American case study demonstrates, it seems that the practice of relying on cultural experts in the United States has provided a way for judges to mitigate cultural bias. American judges are *prima facie* conscious of potential cultural gaps in culture-related cases and usually welcome cultural experts to their courts. It is therefore necessary for Israel to undertake an effort to establish better practices, in part based on the United States' system of expert testimony. Such practices would be the first step toward alleviating the negative consequences of judicial cultural bias.

#### IV. CULTURAL EXPERTS AND CULTURAL BIAS IN COURTS

The differing legal regimes of the United States and Israel surrounding cultural experts suggest a strategy for dealing with courts' cultural biases. The challenges to the reliance on testimony of cultural experts are best addressed through the development of guidelines regarding the testimony of cultural experts. Even with the adoption of such standards, however, the problems and concerns associated with judges' inherent cultural biases remain.

---

<sup>91</sup> Yair Ettinger, *Jerusalem Police Gird for 20,000-Strong Ultra-Orthodox Protest*, HAARETZ (June 17, 2010, 1:44 AM), <http://www.haaretz.com/print-edition/news/jerusalem-police-gird-for-20-000-strong-ultra-orthodox-protest-1.296638>. The mothers did not go to jail. Tomer Zarchin & Yair Ettinger, *Court Exempts Immanuel Mothers from Jail Terms*, HAARETZ (June 23, 2010, 1:32 AM), <http://www.haaretz.com/print-edition/news/court-exempts-immanuel-mothers-from-jail-terms-1.297749>.

### A. Procedural Challenges to Relying on Cultural Expert Testimony

There are four central challenges to reliance on the testimony of cultural experts, most of them involving the formulation of a model for introducing such testimony into legal proceedings.<sup>92</sup> First, as with other experts, the reliability of the cultural information brought by the expert might be questionable.<sup>93</sup> For example, “facts” determined by anthropologists depend on the underlying anthropological theory, which might be vigorously debated among experts in the field.<sup>94</sup> Naturally, jurists are not always conscious of controversies in academic research. Moreover, cultural experts’ materials can be deliberately distorted by those with partisan interests, and the court’s capability to discover such distortion is limited due to the nature of the information.<sup>95</sup> Indeed, “[w]e call expert witnesses to testify about matters that are beyond the ordinary understanding of lay people . . . and then we ask lay judges and jurors to judge their testimony.”<sup>96</sup> This may lead to suboptimal outcomes.

Second, the compatibility of cultural disciplines with the legal process is debatable.<sup>97</sup> How can anthropologists, for example, effectively convey insights involving context, cultural change, or cultural ambiguity within a procedure that exalts binding decisions and discrete definitions and categories? This tension can complicate the task of the finder of fact.

Third, there is a concern that a cultural expert’s involvement in legal proceedings may influence her research in a way that will skew the outcome of future proceedings.<sup>98</sup> Can such involvement, for example, generate a change in the anthropological ethos of nonintervention, ending with the anthropologist

<sup>92</sup> Some of these problems are characteristic to most expert witnesses, whereas others are unique to cultural experts.

<sup>93</sup> See Rosen, *supra* note 45, at 556–57.

<sup>94</sup> In *Yoder*, expert Anthropologist Dr. John Hostetler claimed that coercing the Amish children to attend high school would cause them psychological harm, and would bring about the destruction of the Amish community. This conclusion was reached based on the organism theory, according to which a society or social structure is influenced by changes in one of its components, and may pose a danger to its continued existence. The organism theory is a controversial functional theory, yet the case was de facto decided based upon it. See Rosen, *supra* note 45, at 562–65; ROSEN, *supra* note 27, at 121–25.

<sup>95</sup> David S. Caudill & Lewis H. LaRue, *Why Judges Applying the Daubert Trilogy Need to Know About the Social, Institutional, and Rhetorical—and Not Just the Methodological—Aspects of Science*, 45 B.C. L. REV. 1, 5 (2003); John W. Wesley, Note, *Scientific Evidence and the Question of Judicial Capacity*, 25 WM. & MARY L. REV. 675, 685 (1984); see Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 113, 115, 143, 152, 156 (1993).

<sup>96</sup> Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1182.

<sup>97</sup> Rosen, *supra* note 45, at 566; see Stephanie Schwandner-Sievers, “Culture” in Court: *Albanian Migrants and the Anthropologist as Expert Witness*, in APPLICATIONS OF ANTHROPOLOGY: PROFESSIONAL ANTHROPOLOGY IN THE TWENTY-FIRST CENTURY 209, 217, 224 (Sarah Pink ed., 2006).

<sup>98</sup> Rosen, *supra* note 45, at 567–69.

losing her uniqueness as an agent of reliable information?<sup>99</sup> Or can anthropologists come to terms with representing a cultural interest that hurts weaker members of society?<sup>100</sup>

Fourth, even more so than other experts, cultural experts are susceptible to self-identification with the group about which they testify. The point of an anthropologists' study of a group of people "is to document their world, their way of seeing and doing reality . . . [which] will necessarily portray them in a sympathetic light . . ." <sup>101</sup> This may raise questions as to the credibility or potential bias of the expert's testimony.

These challenges require the development of guidelines regarding the testimony of cultural experts. Rules 702 to 706 of the Federal Rules of Evidence as interpreted by U.S. courts, discussed *supra* Part II, are a good model for such guidelines. They do not, however, deal separately with cultural experts, and are understandably lacking with respect to the specific challenges facing experts' home disciplines. Lawrence Rosen and other scholars have presented further suggestions, including providing court-appointed cultural experts, in addition to the parties' experts, that could narrow the issue for the court and define the basic theories and concepts that are relevant to the issue in the case. These scholars also have suggested requiring parties to send any expert opinion to the other party in advance and to attach a bibliography of the works relied upon by their expert.

### *B. The Risk of Perpetuating Bias Through Judicial Reliance on Certain Testimony*

Although the importance of dealing with these challenges should not be minimized, the greatest challenge facing the use of cultural experts is the elimination of cultural bias—the same problem that the use of cultural experts is itself intended to eliminate.<sup>102</sup> Judges do not enter the courtroom as a blank

<sup>99</sup> Schwandner-Sievers, *supra* note 97, at 210.

<sup>100</sup> *Id.* at 210, 211. An interpretation about a culture may become a self-fulfilling prophecy that empowers those who profit from such practices.

<sup>101</sup> Michael H. Agar, *Stranger in a Strange Land: Anthropologists in Agency Settings*, 1 REV. POL'Y RES. 133, 139 (1981) (internal italics omitted).

As we did our work and wrote our report, I know that we tried to be fair to all points of view. But I don't think I would deny that there was a slight lean toward the Indians' point of view. In a way this bias is inevitable. The point of an ethnographic view of some group is to document *their* world, *their* way of seeing and doing reality. This will necessarily portray them in a sympathetic light, or at least it should.

*Id.* In *Yoder*, the possibility of bias as a result of explicitly taking culture into account was taken to the extreme, as Hostetler grew up in an Amish community, and referred to the community in his testimony as "our Amish culture." See Rosen, *supra* note 45, at 564.

<sup>102</sup> It is argued that in criminal cases judges are less willing to accept social science evidence when it goes against pre-existing truths that have a long history of acceptance in the legal system.

slate. Their subconscious, in Cardozo's words, or common sense, in Mautner's, controls their decision making to some extent.<sup>103</sup> Adopting the practice of utilizing cultural experts as a solution for courts' cultural bias may still result in a biased judgment and one with potentially worse consequences than the alternative regime, since it is disguised as well-informed and objective. The question of what the real influence of cultural experts is on the legal process raises several concerns.

First, there is the concern that judges use cultural experts' information to rationalize a decision based on their subconscious predilection. That is, cultural information can be molded by the judge to justify any conclusion, which is dependent mainly on the judge's preexisting cultural agenda. It can be argued, for example, that in *Brown v. Board of Education* the majority of the United States Supreme Court was already leaning in favor of desegregation when it and the other desegregation cases came before the Court, so that the cultural information simply bolstered the decision the justices were predisposed to make, and was not as decisive as it seemed.<sup>104</sup> If that is the case, cultural in-

---

Erica Beecher-Monas, *Blinded by Science: How Judges Avoid the Science in Scientific Evidence*, 71 TEMP. L. REV. 55, 69–72 (1998). I argue a similar phenomenon exists in culture-related cases, where the judge's pre-existing cultural agenda will determine whether she will accept the cultural expert's testimony.

<sup>103</sup> Many scholars have noted that justice is not blind. Felix Cohen was one of the bluntest among these scholars, stating that judges' political, economic, and professional backgrounds and activities are the driving forces of their judicial decisions. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 846 (1935). Furthermore, according to behavioral psychology, the human mind is biased by nature, and regardless of interests, judicial decisions are incapable of objectivity. The biases that influence the legal process include, for example, hindsight bias and the egocentric biases. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001). Following the school of judicial behaviorism, two versions of analysis of judges' behavior have developed in American political science since the 1980s. The first is the attitudinal model, according to which judicial decisions are mostly based upon the particular judge's attitude in regard to the other judges' attitudes. See, e.g., Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 28 (1997). The second version is the strategic judicial behavior model, according to which judges' attitudes are inseparable from the context of governance relations. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 9 (1998).

<sup>104</sup> Between the years 1938 and 1950, the Supreme Court decided a series of cases involving black plaintiffs who challenged their exclusion from state institutions of higher education. See, e.g., *Sipuel v. Bd. of Regents*, 332 U.S. 631, 633 (1948) (reaffirming unanimously *Gaines v. Canada* and holding that Oklahoma was required to provide the plaintiff with a legal education as soon as it does so for applicants of any other group); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351–52 (1938) (holding that Missouri's practice of maintaining an all-white state law school, while agreeing to pay black residents' tuition at institutions in neighboring states, violated the equal protection clause). There were also social, economic, and political changes in the United States at the time that help explain the development of the legal doctrine of desegregation. See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

formation might be used to hide the judge's preexisting cultural agenda and the bias inherent in the legal process.

Second, while judges have a desire to prove that justice is blind, their inherent cultural biases cannot totally be eliminated. From an institutional point of view, judges have an interest in proving—both to society and to themselves—that justice is color blind, gender blind, wealth blind and culture blind. As has been proven countless times regarding race, gender, and economic status, justice cannot be blind.<sup>105</sup> As long as justice is determined by humans, it cannot be culture blind, since cultural bias is inherent in the natural human condition, and stems from it. Even setting aside culturally derived interests, as social beings we necessarily have our own social common sense, which affects not only our perceptions of different cultures but our ability to change those perceptions. We can try to mitigate our natural inclination, such as through the use of cultural experts, but we cannot eliminate it altogether. In this respect, we need to understand the challenge that cultural information itself poses to the (questionable) goal of cultural neutrality in the legal process. Cultural information is different from other scientific information—it is inseparable from society and politics, and it derives from them.<sup>106</sup> It seems counterintuitive, therefore, that information that is by definition not neutral can neutralize our natural social biases.

Third, judges' exercise of discretion with respect to expert testimony is also dictated by their common sense. This includes, for instance, whether to accept or reject the expert opinion; the interpretation of information that is presented to the court; and the decision of which cultures "require" an expert and which do not.<sup>107</sup> All of these factors depend on the judge's preconceptions and receptiveness to the cultural information. For example, in the case of Anna

<sup>105</sup> See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1977); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140; Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1559–60 (1989).

<sup>106</sup> See, e.g., ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952–55, at 172–73 (Leon Friedman, ed. 1969). In the 1952 oral argument for *Gebhart v. Belton*, Justice Frankfurter commented that the Court "[is] in a domain which I do not yet regard as science in the sense of mathematical certainty. This is all opinion evidence. . . . I do not mean that I disrespect it. I simply know its character. . . . We are dealing here with very subtle things, very subtle testimony." *Id.*; see *Gebhart v. Belton*, 344 U.S. 891 (1952). As Counselor John W. Davis stated during oral argument in *Briggs v. Elliot*, "[M]uch of that which is handed around under the name of social science is an effort on the part of the scientist to rationalize his own preconceptions. They find usually, in my limited observation, what they go out to find." ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952–55, *supra*, at 59; see *Briggs v. Elliot*, 342 U.S. 350 (1952).

<sup>107</sup> As established by the case law presented above, American judges avail themselves more easily of cultural experts regarding African-American culture than with respect to Chinese culture, and Israeli judges avail themselves of cultural experts less reluctantly with respect to the Bedouin and Ethiopian cultures than Jewish ultra-Orthodox culture.

Mae He, discussed *supra*, the judge found the testimony given by the Chinese cultural expert who testified on behalf of the Hes to be “totally lacking in credibility” and “unbelievable,” and instead based his impressions about Chinese families on Americans’ common perceptions about China.<sup>108</sup> In *Delgamuukw*, the Chief Justice dismissed most of the experts’ testimony, stating, “apart from urging almost total acceptance of all Gitksan and Wet’suwet’en cultural values, the anthropologists add little to the important questions that must be decided in this case.”<sup>109</sup> The Chief Justice reasoned that “[he was] able to make the required important findings about the history of these people, sufficient for this case, without this evidence.”<sup>110</sup>

As the application of the practice of using cultural experts and their findings are dependent on the specific judge’s preconceived cultural agenda, then in addition to a biased judgment, the legal process suffers from lack of certainty, and we also face a challenge to the rule of law. This challenge to the rule of law is distinct from other inconsistencies in rulings among courts. As opposed to sporadic inconsistencies deriving from different interpretations of fact, law or even scientific expert opinions, the challenge cultural experts pose to the rule of law is intrinsic to the issue. A decision based upon the opinion of a cultural expert or lack thereof is necessarily a value judgment. Ironically, the decision whether to rely upon the cultural expert, and in which cases, stems from the same circumstance that raise the need for a cultural expert in the first place, that is, the judge’s common sense, which is based upon her social group’s knowledge about the world. We thus enter a vicious circle: the judge’s common sense, combined with the cultural variety of the litigants appearing in front of her, demands at times a cultural interpreter, that is, the cultural expert. However, the same common sense also dictates the judge’s receptiveness to the cultural information, as well as the weight she will attach to it in the final judgment.

This is not to say that cultural information and cultural experts have no weight or influence on judges and that judges’ cultural biases will always prevail. On the contrary, the use of cultural experts is a beneficial practice that Israel should formally adopt in its legal regime. Judges, however, must always be aware of their inherent cultural bias—their subconscious or common sense ingrained by their native cultures. This cultural bias is a natural social condition, and should not be seen in a negative light as long as it remains out in the open and does not hide in the dark recesses of the courts. This natural social condition can and should be mitigated by the use of cultural experts in courts, but it is crucial to remember that cultural bias cannot be completely eliminated.

---

<sup>108</sup> See *In re Adoption of A.M.H.*, 2005 WL 3132353 at \*29; see also *supra* notes 55–65 and accompanying text.

<sup>109</sup> *Delgamuukw v. The Queen*, [1991] 79 D.L.R. 185 (Can.), par. 375 (B.C. S.C.).

<sup>110</sup> *Id.*

## V. A PATH FORWARD: PROMOTING AWARENESS OF CULTURAL BIAS ALONGSIDE MORE ROBUST EXPERT TESTIMONY

Beyond the expanded use of cultural expert testimony, the bar, both in its professional organizations and in its law schools, should make greater efforts to identify cultural bias and develop practices for mitigating its effects. Future judges and jurists should begin obtaining awareness of their own cultural biases while they are in law school, and they should continue to reflect on their inherent biases throughout their professional careers. Awareness alone, however, is not sufficient, and must thus be coupled with a regulated practice of using cultural experts in courts. Taken together, increased reflection, preparation, and use of regulated expert testimony will mitigate courtroom cultural bias. Under such a regime, even if decisions are made on the basis of pre-existing cultural beliefs, appellate courts will have means to scrutinize these decisions based on the judge's use of cultural expert testimony.

Obtaining awareness of cultural bias should start in law school. Alongside constitutive conceptions about the law (*inter alia* legal positivism, legal realism, critical legal studies, and feminist theory of the law), law schools should incorporate into their jurisprudential philosophy an approach concerning cultural bias in the law. This concept, as the other leading jurisprudential concepts, should not be restricted to courses on the theory of jurisprudence, but should permeate most law school courses. For this to happen, apart from making this theory part of the basic curriculum of law schools, the corpus of legal literature on the subject of cultural bias needs to expand, and become a separate doctrine that stands on its own.<sup>111</sup>

Following this institutional and academic change, in order to sustain awareness of judges' and jurists' cultural bias, professional training programs for lawyers and judges on the subject should be developed and taught year round. Two examples of such programs are found in the University of Nevada, Reno that offers Judicial Studies Degree Programs,<sup>112</sup> and the Haifa University in Israel that offers the International Academy for Judges Program.<sup>113</sup>

Research in the field of law and psychology is divided as to the significance that an individual's awareness of her own bias has in reducing or diminishing it.<sup>114</sup> But even if we accept the conclusions of the research arguing that

---

<sup>111</sup> We can refer, for example, to gender bias as cultural bias, but it is important to separate the two, in order to be able to address the distinct nature of each type of bias.

<sup>112</sup> Judicial Studies Degree Programs, University of Nevada, Reno, <http://www.judicialstudies.unr.edu/benefits.htm> (last visited Apr. 27, 2015); 2015 Judicial Studies Degree Program Description, [http://www.judicialstudies.unr.edu/JS%20Prog%20Desc%202015\\_FINAL.pdf](http://www.judicialstudies.unr.edu/JS%20Prog%20Desc%202015_FINAL.pdf).

<sup>113</sup> The International Academy for Judges, University of Haifa, Faculty of Law, <http://weblaw.haifa.ac.il/en/JudgesAcademy/Pages/default.aspx> (last visited Apr. 27, 2015).

<sup>114</sup> Several studies have shown that people are able to compensate for the effects of implicit bias when they are aware of its existence. See, e.g., Linda Babcock et al., *Creating Convergence: Debi-*

awareness of bias does not reduce it, the practice of using cultural experts can reinforce a judicial decision's building blocks. Awareness of the bias, accompanied by a formal and regulated practice of using cultural experts in courts will succeed in broadening the judges' perspectives. A judge might still choose not to accept the expert testimony, or interpret it according to her preconceived cultural beliefs, but the cultural information related by the expert will be revealed, and the judge's decision will be examined based upon her use of this information. The aftermath of *Delgamuukw* and *He* serve as an excellent illustration of this point. Both judgments were severely criticized—directly and indirectly—for the role cultural bias played in the outcome of the decisions, and both cases were later reversed.<sup>115</sup> By increasing awareness and, importantly, putting in place rules relating to and increasing the use of cultural expert testimony, bias will be more readily reviewable, and may actually begin to reduce its effect on judicial decision making.

### CONCLUSION

Judges, like every other person, hold views and beliefs about the world, society, and other persons and cultures, which stem from their own cultural perspectives. These views and beliefs are manifested in the judge's subconscious or common sense, and have an impact on her judicial decisions. This impact is especially significant in culture-related cases.

The practice of relying on the opinions or testimony of cultural experts is meant to mitigate the influence of the judge's cultural bias on her decisions, as well as to bridge the cultural gap between the judge and the litigant. This practice is prevalent in the United States, but generally absent from Israel's legal system.

---

asing Biased Litigants, 22 LAW & SOC. INQUIRY 913, 916 (1997) (“[M]any researchers have tried, albeit unsuccessfully, to mitigate various biases by informing subjects about them . . . .”); see also John A. Bargh, *The Cognitive Monster: The Case Against the Controllability of Automatic Stereotype Effects*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 361, 375–78 (Shelly Chaiken & Yaacov Trope eds., 1999); Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCHOL. 835, 845–47 (2002); Bridget C. Duntun & Russell H. Fazio, *An Individual Difference Measure of Motivation to Control Prejudiced Reactions*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 316, 324–26 (1997); Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 164–65, 170–71 (2008); E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCHOL. 811, 824–28 (1998). But see Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (arguing that awareness of one's own bias might neutralize that bias).

<sup>115</sup> See *In re Adoption of A.M.H.*, 215 S.W.3d 793, 813 (Tenn. 2007); *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, 1013 (Can.); John J. Cove, *Playing the Devil's Advocate: Anthropology in Delgamuukw*, 19 Pol. & Legal Anthropology Rev. 53, 53 (1996); Goel, *supra* note 57, at 522, 527; Mills, *supra* note 16, at 43; Paine, *supra* note 17, at 59.

Although the practice of using cultural experts in courts is extremely important, and should be applied in Israel, it is dangerous to believe that it solves or neutralizes the problem of judges' cultural biases, since its application is itself culture-dependent and might be used as means to rationalize and disguise biased decisions. Cultural bias is intrinsic to human nature, and it cannot be completely eradicated. Therefore, judges must be aware of this bias even when relying on cultural experts and try as best as possible to minimize its effects on their decision making. Obtaining this awareness should start in law school and be reinforced through professional training programs for jurists and judges.