

Chicago Lawyer

An International Perspective: Not guilty. Just foreign.

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Soon after I arrived in Chicago and obtained my Illinois driver's license, a bright light, loud siren and stocky looking gentleman curtly informed me that I had broken the law.

Although my alleged infringement consisted of nothing more than misinterpreting a road sign, in my mind my dreams of passing character and fitness and being sworn in as a member of the Illinois bar rested in the gloved hands of the officer at my window. Unsure of what to do, I retorted in the most plausible manner I could think of: "Officer, I am new to Chicago, and this country, and didn't realize that what I was doing was illegal. ."

Slowly, as though trying to decipher the logic behind my defense, the officer wrote a warning and wished me the best.

Although I have not pleaded "not-guilty-by-reason-of-being-a-foreigner" since that faithful traffic stop, recent developments suggest that such a plea may soon become a viable defense to other infringements of the law, influential enough to be considered by juries and persuasive enough to mitigate sentences handed down by courts.

Advocates of this defense point to the case of Nary Chao, a 28-year-old Cambodian woman prosecuted last year in Las Vegas. Ms. Chao was charged with felony sexual assault of a minor under age 14 after her son informed child protective services that his mother kissed his genitals while he was sleeping.

As loathsome as this act may sound to many of us, to Cambodians and citizens of other Asian countries the act is merely a culturally acceptable expression of parental love. Recognizing this, prosecutors subsequently allowed Ms. Chao to plead to a misdemeanor and did not require her to register as a sex offender. To people unfamiliar with Cambodian culture, Ms. Chao's actions would likely be described as nauseating, and illegal, deserving of a more severe punishment than that which she received.



To members of the Cambodian community, and some members of the Asian community within the United States, however, Ms. Chao's actions would likely be deemed unworthy of meriting even the punishment that she received, as they amounted to nothing more than an accepted cultural act. Herein lies the problem.

As a nation of immigrants, the United States houses hundreds of cultural communities, each with their own set of beliefs and practices. Yet despite this rich cultural diversity, the rigid laws that control, and that judges and juries must apply, often conflict with these cultural practices. And they prevent the "perpetrators" from using their cultural background as a defense.

Interestingly, this issue was inadvertently touched upon by newly appointed Supreme Court Justice Sonya Sotomayor in her now- infamous 2001 speech at the University of California, Berkeley, School of Law.

In her speech, Justice Sotomayor recognized the importance of diversity on the bench and the effect of background and personal experiences in judicial decision-making. Whether or not Justice Sotomayor would agree with considering a defendant's cultural background as a factor in their defense is a question only she could answer.

However, her recognition of the need for cultural diversity of thought amongst judges makes for more than just a controversial speech when looked at through the eyes of a defendant like Nary Chao. Whereas a judge raised in small-town Illinois may not see past the details of Ms. Chao's crime, a judge or jury familiar with Cambodian or Asian culture may understand her behavior and choose to impose a reduced sentence or no sentence at all upon her.

Judges are not able to independently re- define criminal activity or make legal that which is illegal. As we were taught through our painfully-long negligence law lectures in law school, whether an individual meant to break the law or harm someone is not a factor contemplated by the law. What matters is whether or not you broke the law. To many people the discussion, and this column, should end here for that very reason: immigrants who break the law should be punished to the same extent as everyone else. End of story.

But as rigid as the law may be, punishing to the full extent of the law individuals who had no intention of breaking the law, and had deep-rooted cultural reasons for engaging in their behavior, surely sounds unjust to even the most callous, culturally insensitive litigator or judge amongst us.

Invariably, as the immigrant population within the United States continues to grow so will the number of immigrants tried in the federal and state courthouses across the country. Whereas some of these cases may be simple civil suits, others may be more serious infringements of the law - behavior typically "permitted" within their country of origin - such as spousal rape or arranged marriages of underage girls.

Although many argue that these immigrant offenders should be treated no differently from any other offender, others contend that they should be permitted to provide the judge or jury with evidence of their cultural background, laws, or practices as part of their defense. Whether courts and lawyers around the country will allow this, however, is a question on which the jury is still out.

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