

NOTES

VALID-WHERE-CONSUMMATED: THE INTERSECTION OF CUSTOMARY LAW MARRIAGES AND FORMAL ADJUDICATION

LONA N. LAYMON*

“Customary law comprises unwritten longstanding rules in the areas of marriage, divorce, child custody and inheritance for each [cultural group]. Customary laws, at least theoretically, help individuals maintain their culture within a modern world.”

—Adrian K. Wing¹

I. INTRODUCTION AND GENERAL DEFINITIONS

A. INTRODUCTION

The institution of marriage is pivotal to many issues in the Western legal tradition: custody, adoption, inheritance, rights to property upon divorce, and rights to financial support are just some areas that depend upon the individual’s status as “married” or “single.” The marital institution involves social expectations that reflect basic tenets of Western culture. Marriage is also an important cultural expression and social construct in most non-Western cultures. The crossover between cultural meaning and legal framework is inevitable. But what happens when the legal framework comes into conflict with opposing cultural conceptions of marriage? Such a conflict is exemplified in the colonial situation, where a Western legal framework is imposed upon a non-Western culture. As will be seen in this Note, many cultures do not conceive “marriage” in the same binary terms used in the Western legal system. While this *conflict* has been a major topic

* B.A 1998, University of California, Irvine; J.D. Candidate 2001, University of Southern California Law School. I wish to thank Professor Alison Renteln for her helpful guidance and insight on this Note.

¹Adrien Katherine Wing, *Communitarianism vs. Individualism: Constitutionalism in Namibia and South Africa*, 11 WIS. INT’L L.J. 295, 341 (1993).

in the field of law and anthropology generally, few have explored *accommodations* for non-Western cultures in the Western legal system.

This Note investigates the treatment of non-Western “customary” marriages in “formal” legal systems. In other words, when does the “formal” legal system recognize a non-Western, often unregistered, marriage as valid? Do legislative protections for cultural groups *really* protect customary practices in ways that preserve cultural meaning, or can this be done via common-law doctrines? This analysis draws on statutory and case law from the United States and a variety of other nations, with emphasis on case law from the African continent. I draw primarily on laws from African nations because of the large volume of new scholarship and case law dealing with issues of customary marriage on that continent.

Part II of this Note focuses on the situation of minority indigenes embedded in a colonial-based system (i.e., the “classic” colonial case study for law and anthropology). There, I examine limitations to the enforcement of customary marriages in formal courts because of evidentiary and public policy standards. Finally, the Note offers a look at the United States legal system’s treatment of customary marriages that are imported from other nations. How does this formal system treat customary marriages consummated in other nations? Can the formal legal system accommodate customary law through its own equitable doctrines? I examine several United States common law constructs (the valid-where-consummated doctrine, common-law marriage, and putative marriage doctrine) that may be used to validate customary marriages. I will show, however, that the “accommodation” of customary marriages through these “equitable” doctrines is usually inconsistent with the preservation of cultural meaning or notions of group/ethnic rights.

B. WHY FOCUS ON MARRIAGE?

In Western nations that have a non-Western, indigenous population, discord between the national legal system and a non-Western cultural practice is seemingly inevitable. Most of these nations have specifically addressed indigenous groups in statutory and case law. For example, 25 U.S.C. §371 allows for the recognition of Native American marital customs that would otherwise be legally invalid.² In *Osborne v. Babbitt*,³ for example, otherwise illegitimate children sought to inherit by intestacy from a decedent whose marriage was valid only under Pawnee custom. Because federal law demanded recognition of Native American customary law, the

² See 25 U.S.C. § 371 (1983) (validating the rights of heirs to a deceased Native American to be recognized even if the individual was married or born from a marriage that is only recognized in the Native American culture). See also 25 U.S.C. § 348 (2000).

³ 61 F.3d 810 (10th Cir. 1995).

court accepted the heirs' arguments, recognizing that since customary law is usually unwritten, the validity of customary marriages must be judged by different standards than those used to determine non-Indian, "formal" marriages.⁴ The United States is not the only country that has created a separate sphere of standards for recognizing the marital customs of its indigenous population; it seems that almost every nation with an indigenous population has attempted to accommodate their customs through legislation or case law. In fact, we will see throughout this Note that cultural evidence does not enter into U.S. courtrooms nearly as often or as fully as it does in other nations. Moreover, even when evidence of customary laws is admitted into the formal court setting, the very nature of the formal legal system changes the customary laws that it seeks to preserve.

The recognition of customary unions also plays a central role in Board of Immigration ("BIA") cases in which deference is supposedly given to the law of the "place of consummation." For example, if a valid marriage is created in Iran, the general rule holds that the marriage is valid in the United States, even if it would not have been valid if consummated in the U.S.⁵ The question of whether a court should recognize a non-Western marriage also arises in cases involving divorce, custody, aid for dependant children ("AFDC"), welfare, adoption, maintenance, rape, fraud, assault, deportation, insurance, and inheritance.⁶

C. "CUSTOMARY" VERSUS "FORMAL" LAW

Before further discussion, it is necessary to define what is meant by "formal" versus "customary" law. Customary law is often discussed in terms of group or cultural rights. These are affirmative rights to cultural preservation and respect for cultural identity. South Africa and Namibia, for example, have constitutionalized group rights, thus creating positive rights to preserve culture through education and language and to have unwritten

⁴ See *id.* at 813–14 (recognizing that an otherwise illegitimate child could be deemed legitimate since she was Pawnee, which is a tribe that recognizes marriage through mere cohabitation).

⁵ See, e.g., *Van Voorhis v. Brintnall*, 86 N.Y. 18 (1881) (finding that a marriage is recognized in New York if it is valid where consummated); *People v. Ezeonu*, 588 N.Y.S.2d 116, 117 (Sup. Ct. 1992) ("Generally, a marriage is recognized in New York if it is valid where consummated."). Cf. *Spradlin v. State Comp. Comm'r*, 113 S.E.2d 832, 834 (W. Va. 1960). "The rule that a marriage which is void in the jurisdiction in which it is contracted or celebrated is void everywhere is equally well established and is likewise supported by the weight of authority." *Id.*

⁶ "Maintenance" claims are claims for financial support from a money-earning spouse before divorce. Such support claims are formally recognized in many African nations and are particularly embedded in nations with Roman-Dutch legal foundations. These claims may be brought alone, but they are often brought in conjunction with claims for alimony or claims for insurance benefits where a customary spouse challenges findings that he or she has an uninsurable interest in the decedent spouse. See, e.g., *Chawanda v. Zimmat Ins. Co.*, 1990 (1) SA 1019 (Zimb. High Court), *aff'd*, 1991 (2) SA 825 (discussed in detail below).

customary law treated as legally binding.⁷ Formal legal systems are often (but not always) aligned with a negative rights perspective. The United States legal system, for example, tends to focus upon the rights of the individual and “negative rights.” United States courts and legislatures are often hostile to the ideas of group or cultural rights since these are a form of “positive rights” outside the tradition of U.S. law.⁸ Regardless of the treatment of group rights and customary law in the United States, these issues have been a focus in the international legal community and in developing nations with strong multicultural heritages.

The difference between “customary” and “formal” law is most recognizable in a colonial context. When an inflexible, written or codified form of law or precedent is imposed upon a culture that organizes itself around an oral, flexible set of social traditions, a conflict between formal and customary systems of law exists. Almost any lawyer will note, however, that the Western legal tradition is hardly inflexible or purely coded in writing; and most anthropologists will admit that most non-Western, unwritten social traditions are somewhat fixed. But, Western formal systems themselves conceive of a distance between formal and customary law through binary categories that neatly separate the “us” from the “them.” As noted by Alison Renteln and Alan Dundes, westerners understand the distinction between formal and customary systems of law according to a set of binary oppositions:⁹

<u>Customary</u>	<u>Formal</u>
Oral	Written
Flexible	Fixed
Anonymous	Known Author
Old	New
Primitive	Civilized
Folk	Elite
Peasant	Aristocrat
Rural	Urban

Two things are quite remarkable in the above oppositions: first, the formal system connotes itself as superior to customary law; and second, one of the major definitive qualities of customary law is the fact that it is *unwritten*. Because of this, some authors have suggested that the phrase “customary law” is a contradiction in terms. For instance, early scholars like Emile de Laveleye suggest that the very purpose of law is to either

⁷ See Wing, *supra* note 1, at 341, 362.

⁸ *Id.* at 298. “Negative rights” are rights to noninterference from the state. “Positive rights” are the right to certain benefits and financial support from the state.

⁹ *What Is Folk Law?*, in 1 FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF *LEX NON SCRIPTA* 3 (Alison Dundes Renteln & Alan Dundes eds., 1994) [hereinafter FOLK LAW].

codify or alter practices that are based in nonwritten tradition.¹⁰ Some scholars, like Renteln and Dundes, apply the term “folk law” in lieu of “customary law” because the term “custom” may have confusing connotations.¹¹ Regardless of the theoretical limitations to defining systems of law, courts do use the term “customary law” as distinct from mainstream Western standards of practice. Moreover, courts often assert that a customary practice may be legislated or recorded in writing, despite the idea that such lexical actions oppose the very concept of folk law in theory.

Another approach toward conceptualizing customary versus formal law focuses upon the idea of “rules” versus “processes.” Competing cultural concepts of marriage provide an apt example of the distinction between rules and processes. Western culture is dependent upon binary oppositions of marital status—“married” versus “single.” Authors such as John Comaroff and Simon Roberts, however, have found that the binary concept of married versus unmarried does not exist in every culture.¹² The Tswana of Africa, for instance, do not hold a theory of marriage that corresponds to the Western institution: instead, these people formalize a relationship through a long series of processes requiring years of development.¹³ To an extent, much confusion in the formal legal system derives from simple mistranslation: dichotomous terms that represent married versus unmarried simply do not exist in the Tswana language or cultural concepts of family, while the English language lacks its own words to capture the various phases of family union in Tswana culture.¹⁴ Comaroff and Roberts point out that in Tswana custom there is no defining moment between one’s status as married or single, and there are a variety of relations between Tswana men and women which may result in rights to support or “alimony” upon separation.¹⁵ The magnitude of such rights depends mostly upon the way that each spouse’s family has processed the relationship and upon the trading of goods or obligations between two families over time. Disputes over marital status and property are resolved by tribal leaders through the balancing of individual narratives and tribal or familial consensus as to what the appropriate law should be.¹⁶ This quality of mutability in Tswana law is particularly important to members of traditional societies whose lives are often governed by nomadic movement or a subsistence that is highly conditioned on seasonal and environmental changes. Comaroff and Roberts do not suggest that Tswana custom consists of processes in the absence of

¹⁰ EMILE DE LAVELEYE, *PRIMITIVE PROPERTY* (G.R.L. Marriott, trans., 1985) (1878).

¹¹ FOLK LAW, *supra* note 9, at 4 “All folk law is customary in the sense that it is traditional, but not all custom is law!” *Id.*

¹² See JOHN L. COMAROFF & SIMON ROBERTS, *RULES AND PROCESSES*, 133 (1981).

¹³ See *id.* at 134.

¹⁴ See *id.*

¹⁵ See *id.* at 152.

¹⁶ See *id.*

binding rules, but that “the value of distinguishing ‘the legal’ as a discrete field of inquiry” from cultural processes and narrative may be of less value in some non-Western societies.¹⁷

In the United States, many American Indian tribes hold concepts of familial relations similar to the African Tswana. Many tribes, like the Hopi, the Apache, the Navajo, the Zuni, or the O’odham, do not conceive of a union between two people as permanent until there is a long-term process of transferred rights and obligations.¹⁸ Robert Cooter and Wolfgang Fikentscher explicitly note that “the married-unmarried dichotomy fits poorly when applied to Indian tribes.”¹⁹ Some tribes, like the “O’odham expect to go through several ‘marriages’ before settling into a permanent union.”²⁰ Other tribes, like the Zuni, merely require cohabitation in conjunction with a family prayer delivered over the couple in the Zuni language.²¹ In short, there is great cultural and social variation between tribes and between localities within tribes. In fact, each tribal court has different standards for determining whether a union between two people has been accomplished according to custom. Tribal courts attempt to apply and preserve local customary laws; however, customary marriages often frustrate the need to determine whether a couple is married or single in nontribal state courts. Native Americans often wish to maintain their cultural processes and customs, but the federal government, with its emphasis on written verification and the married-unmarried dichotomy, usually requires Native Americans to define marriage in a way that is contrary to their culture. In tribes that recognize permanent unions through cohabitation, it has been reported that:

Tribal government officials also advise Indians to regularize marriage by having a ceremony. Navajo authorities would like a clearer criterion for marriage. The Navajo code of 1980 covered the formalities of tribal marriage. To achieve greater legal clarity, it discourages common law marriages and encourages people to have weddings before civil or religious authorities. Indeed, some Navajos say that the statute forbids courts from recognizing common law marriage. A similar policy was reported in Acoma, where [officials have] tried to discourage common law marriage.²²

¹⁷ *Id.* at 243.

¹⁸ See Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 509, 537–41 (1998).

¹⁹ *Id.* at 537.

²⁰ *Id.* at 538.

²¹ *Id.*

²² *Id.* at 539. It should be noted that the term “common-law” marriage here is shorthand for customary marriage—courts and government officials often designate “undefinable” customary marriages as common-law marriage. This point is discussed in more detail below.

The conflict between a legal system that relies upon a dichotomy of married-unmarried and a non-Western cultural system that recognizes several variations of familial union is also exemplified in the Nigerian case *In the Matter of an Intended Marriage Between E.O. Beckley and Christiana O. Abiodun*.²³ There, an applicant requested formal legal recognition of her marriage performed according to Yoruba custom, so that her husband would be prevented from marrying another woman and foregoing support obligations.²⁴ According to Yoruba custom, there is more than one type of valid familial bond. Furthermore, permanent familial unions may manifest in a number of different ways: a valid bond between the couple may be created through cohabitation, payment of a dowry, a preliminary engagement ceremony (an *Idana*), payment of certain expenses, a series of manifestations from the husband and his family over an indefinite period of time, or by ceremony in a church (only used amongst Christianized sects of Yoruba). Finally, a union may be accomplished by a formalized “delivering” of the wife to the husband. The *Idana* may be performed by proxy and manifestations of consent to marriage may be made through an exchange of correspondences or messengers. The goal of these various procedures is twofold: the long-term process not only creates a familial bond between man and woman, but also creates a bond of gifts and obligations between the couple’s families.

At issue in *Abiodun* was precisely when the couple became “married,” if at all. Members of the Yoruba tribe could not agree to a single status of the couple at any particular point in time: some experts held that the husband’s manifest consent rendered the couple married; some believed that the exchange of a dowry was more indicative of marriage; some held that the *Idana* was a *more* complete state of union between the couple; and some claimed that the *Idana* did not create *as much of a marriage* as the actual delivery of the wife to the husband.²⁵ Despite the apparent lack of a clear married-unmarried dichotomy, the court determined that a marriage was not completed unless there was a “delivery” of the wife to the husband.²⁶ The court’s determination was partly based upon a book written

²³ Beckley v. Abiodun, 1943 (17) NIG.L.R. 59 (High Court).

²⁴ Customary law often only reaches courts of the national or state government and only through appeal. Usually, lower tribal courts will be in place to apply customary law directly to the people they govern. This is true in both the United States and most African nations. This does not change, however, the fact that subordinate courts have a “formalizing” effect upon customary law. Furthermore, state or national courts are often not required to take judicial notice of native court findings of a valid custom. See Muna Ndulo, *Ascertainment of Customary Law: Problems and Perspectives with Special Reference to Zambia*, in FOLK LAW, *supra* note 9, 339–46. Moreover, where judicial notice of a practice is required, native courts are still required to apply the same standards of proof and factual consistency demanded by the formal system of which they are a part.

²⁵ Beckley, (17) NIG. L.R. at 64–65.

²⁶ *Id.* at 65.

by a judge (a non-Yoruba expert on Yoruba custom).²⁷ Secondly, the court invoked Western contract law to hold that the giving of the bride was necessary to “effect a contract” by exchange of consideration.²⁸ In short, the court believes that contract law is surely at the heart of Yoruba custom. The imposition of Western legal principles on customary law often yields grotesque hybrids of “law” and “cultural meaning.” In the *Abioudun* case, the application of contract law to Yoruba custom inserts a sense of “wife purchase” that was not within the original cultural meaning of the practice.

The idea that Western principles of contract and consideration lie at the heart of Yoruba custom seems totally misplaced. Furthermore, by holding that the Yoruba union takes place at the moment of delivery of the woman to the husband, the formal court has set a precedent that *solidifies* the customary concept of marriage: the flexibility and dynamic nature of Yoruba customary marriage is now fixed at a specific moment in the marital process. In other words, the court has made a rule out of the Yoruba marriage process. Variation and flexibility is an attribute of customary law precisely because these social groups identify themselves through their smaller, mobile communities and family groups as opposed to larger national identities. Thus, imposing formal rules upon customary processes imposes a whole new identity upon a people who previously sought their identity through community and family.²⁹

Of course, the Western legal practitioner is sure to ask, “But what else is a judge to do if he wishes to resolve the case?” Since the married-unmarried dichotomy lies at the very heart of Western family law, it seems that courts are categorically unable to accommodate alternative, nondichotomous cultural constructions of family. In the end, there are several problems for the cultural minority dealing with customary marriage in court and for the legal practitioner. First, as noted in the previous discussion about Native American marriages, many cultures have been forced to construct a ceremony and implant the married-unmarried dichotomy into their cultural heritage. Second, how the formal system chooses to recognize customary marriages is often an unpredictable concoction of legal doctrine and cultural evidence because courts typically redefine non-Western practices into Western legal terms. As a general rule,

²⁷ The use of nontribal anthropologists or attorneys who practice on tribal land has been criticized because of the possibility for mistranslation and the tendency of these “experts” to fit any observed customary law into the preexisting paradigm.

²⁸ *Beckley*, (17) NIG. L.R. at 65. “[Delivery of the bride is] ‘in effect a contract,’ and no doubt . . . if one side only had given consideration, an action could be brought for the breach by the other side and the contract is not performed.” *Id.*

²⁹ See, e.g., John C. Messenger, Jr., *The Role of Proverbs in a Nigerian Judicial System*, in FOLK LAW, *supra* note 9, at 421, 422. “Politically preeminent is the community . . . and a hereditary leader and a council of elders direct its affairs.” *Id.* Nuclear and extended families are greater sources of law and governance than any national, or even tribal, institution.

recognition of customary unions by Western courts is limited by evidentiary or public policy standards. Part II will show that even this general rule does not reveal a predictable pattern of adjudication.

II. DISSECTING EVIDENTIARY AND PUBLIC POLICY STANDARDS AS THEY APPLY TO CUSTOMARY MARRIAGES

Statutory and common laws impose limits on the recognition of customary unions due to either evidentiary standards or public policy. For example, under the Hindu Marriage Act of 1955, custom must be “certain and not unreasonable or opposed to public policy.”³⁰ The purpose of this Part is to identify some trends in evidentiary and public policy standards as applied to customary marriages. Here, I refer mostly to scholarly treatment of this subject, with some application to specific cases. Furthermore, this discussion mainly draws on studies of indigenes embedded in a colonial system (e.g., the recognition of a Zulu marriage in colonial South Africa). Part III will demonstrate that the limitations imposed on customary marriages take on a more complex character when people from foreign, non-Western communities travel into the United States.

A. EVIDENTIARY STANDARDS AND THEIR LIMITS ON RECOGNITION OF CUSTOM

In countries that express a willingness to enforce and accommodate customary law, courts must choose which customs are “real” or recognizable before they enforce the practice. The recognition of customary law in common-law courts usually turns on the evidentiary character of the custom. T.O. Elias notes, “The age-old problem of customary law has been one of ensuring its certainty.”³¹ Even as early as *The Case of Tanistry* in 1608 there was a recognition in English common law that customs could be recognized by a court only if they were certain and of “immemorial usage.”³² The idea that a real custom only embraces the most ancient traditions of unwritten law is ironically at odds with the idea that custom is a flexible form of social control. Again the formal tendency to force a customary practice into a singular, written definition freezes the dynamic ability of customary law to change, and the idea that customary law should be ancient trumps qualities of mutability and community variation.

The use of the term “evidentiary standards” in this Note refers to the types of evidence that are considered relevant and the weight given to each

³⁰ The Hindu Marriage Act, 1955 (Act No. 25 of the Laws of India, 1955), available at <http://www.sudhirlaw.com/hma55.htm>.

³¹ T.O. Elias, *The Problem of Reducing Customary Laws to Writing*, in FOLK LAW, *supra* note 9, at 319.

³² *The Case of Tanistry*, 80 Eng. Rep. 516, 520 (K.B. 1608).

form of evidence. For instance, courts usually give more evidentiary weight to documents like marriage licenses, prenuptial agreements, and written acknowledgments of a marriage than they give to witnesses' narration about the ceremonial process. Of course, there are very good policies for this distinction: documents are considered to be more reliable than witnesses, and documents may provide a consistent indication of marriage in a world full of different marriage ceremonies. But, the extra weight given to written evidence in formal courts results in a burden of proof that the vast majority of cultural minorities are unable to meet since customary law is, by definition, unwritten. Regardless of the burden of proof born by a cultural minority (e.g., "more probable than not," a "preponderance," or "beyond a reasonable doubt") the recognition of customary marriages is inevitably frustrated by an evidentiary system that favors formalized evidence.

The idea that custom must be provable and certain has been translated into a requirement for "notoriety" in some formal courts. For instance, in West Africa and Ghana, nontribal courts often measure the validity of a customary practice by the number of "expert witnesses" who have heard of the practice.³³ These expert witnesses may be tribal members called by the parties, nontribal anthropologists or sociologists, or anthropological textbooks.³⁴ If the custom is significantly "notorious," then it is likely to be considered as real customary law and thus recognizable to the formal system.³⁵ The notoriety test is not in itself inconsistent with the essence of custom—clan chiefs and tribal leaders will often decide matters in the tribe by tribal consensus as supplemented by individual narration.³⁶ Formal notions of precedential value, however, often set a single case as the definition of customary practices for a large cultural group, thus removing all community and clan distinctions. Woodman suggests that notions of *stare decisis* may not only dissipate local variations, but that "once a rule has been judicially recognized, it is liable to be applied to ethnic groups other than those whose customs were in issue in the decisive cases."³⁷ For example, the Nigerian courts have sometimes held themselves bound by Ghanaian decisions on customary law, although there is no significant ethnic group common to both countries.³⁸ On the other hand, lower courts do sometimes rebuff precedence and enforce or negate customary laws on the basis of their own discretion. This leads to contrary case decisions as to which customs are formally enforceable and which are not. Even worse, courts that do feel constrained by precedent may adjudicate by

³³ Gordon R. Woodman, *Some Realism About Customary Law—The West African Experience*, in *FOLK LAW*, *supra* note 9, at 83, 86.

³⁴ *Id.*

³⁵ Woodman, *supra* note 33, at 90.

³⁶ See COMAROFF & ROBERTS, *supra* note 12, at 26–29.

³⁷ Woodman, *supra* note 33, at 91.

³⁸ *Id.*

compromising inconsistent outcomes thus creating hybrid descriptions of customary practices that do not really exist in any culture.³⁹

Another major problem with the notoriety requirement is that courts often look for consensus among nontribal experts, treatises, and judges to test the validity of a community practice.⁴⁰ Thus, the notoriety test is not really a “time immemorial” requirement but actually a proxy for the availability of experts and textbooks. Both tests reflect the formal system’s need for certainty and consistency, and both pose serious consequences for the recognition of unwritten customary law.

In addition to proving ancient use or notoriety, many formal courts also require cultural minorities to show that a customary law corresponds to current practice. In other words, courts may judge the validity of customary laws by requiring the custom to be “ancient” and “notorious,” or a court may emphasize the need to recognize only the most current trends in social practice. Thus, the cultural minority may be caught in the conundrum of proving that a cultural practice is both maximally ancient and maximally new at the same time. For example, in *DaBaase v. INS*, the defendant sought to show that he was divorced in Nigeria according to customs of his Ghanian tribe, and thus validly divorced for purposes of the U.S. legal system.⁴¹ The court refused to recognize the divorce as valid since he did not provide a certified statement of “the *current* customary divorce law of that tribe.”⁴² Such an up-to-the-minute “certified description” of tribal customary divorce was probably unavailable to DaBaase since most customary law issues come before African tribal courts that only use oral testimony. Furthermore, and even more critical, such a certified statement would likely *not* be required in DaBaase’s nation.⁴³ It therefore seems that in order to be recognized, a customary practice must strike a fine and often unpredictable balance between being “old” enough and being “current” enough to meet court standards.

Solidifying customary law into a singular, precedent-setting description in the name of evidentiary standards has several widely criticized effects upon custom. Many critics have noted that formal courts’ emphasis on physical, verifiable manifestations of custom have drained cultural and community identity from many customs.⁴⁴ In other words, because formal courts mostly rely upon physical manifestations of a custom (as opposed to cultural meaning or narrative), they tend to treat the practice as an empty

³⁹ *Id.*

⁴⁰ *See id.* at 86–91.

⁴¹ *DaBaase v. INS*, 627 F.2d 117 (8th Cir. 1980).

⁴² *Id.* at 118 (emphasis added).

⁴³ *See* discussion *infra* Part III.A.

⁴⁴ *See, e.g.*, H. Patrick Glenn, *The Capture, Reconstruction and Marginalization of “Custom”*, 45 AM. J. COMP. L. 613 (1997).

shell. If we accept that custom is more than mere physical habit, then formal courts are perpetuating a habit that is void of cultural meaning or intent of the parties.⁴⁵ For instance, in the United States, formal courts recognized Native American marriages as manifest through mere cohabitation—if X lived with Y for so many years, the court says that they are married under tribal customary law. This is a convenient test for formal courts because it is generally easy to get an account of how long a couple cohabitates. Interviews with Zuni, Acoma, and Navajo leaders, however, suggest that each tribe requires specific prayers and public ceremony before the marriage is recognized by the tribe.⁴⁶ When the formal system asserts that the union is valid by mere cohabitation, a feeling of degradation is aroused: “If you talk of a common-law marriage in English or American common law, it’s almost a denigration. Not so in Acoma.”⁴⁷ Since courts are forced to recognize Native American customary marriages under federal law, they have done so by breaking down the rich variety of customs throughout the tribes into one recognizable act—cohabitation. This term conjures connotations of “living in sin,” it ignores distinct tribal practices, and it de-emphasizes the cultural significance of Native American marriage practices and prayers. As mentioned in Part I of this Note, the formal system’s tendency toward easily verifiable, physical manifestations of marriage also causes many government officials to request that tribes make their customs more public or more formally conspicuous through a single public ceremony. Thus, the nature of the formal system, as founded in stare decisis and verifiability, has changed both the form and cultural meaning of customary marital laws in several Native American tribes.

The use of native courts in each tribe has counteracted many of the destructive effects of the formal system upon customary law. As noted by Comaroff and Roberts, the Tswana community courts, or *kgotla*, preserve many of the mutable, customary practices through their unique processes of dispute resolution.⁴⁸ A clash between custom and formal law, however, is often greatest when a native court decision goes on appeal. Woodman observes that “superior courts have ignored native court opinions as to customary law.”⁴⁹ In *Aseno v. Nkyidwuo*,⁵⁰ the state court, on review, determined that a native court had accepted customary law in a manner that was too broad. And in *Akomea v. Biei*,⁵¹ the reviewing superior state court found the custom accepted by a native court to be “ridiculous”! Revisions

⁴⁵ See *id.* at 613.

⁴⁶ See Cooter & Fikentscher, *supra* note 18, at 538.

⁴⁷ *Id.*

⁴⁸ See COMAROFF & ROBERTS, *supra* note 12, at 132–74.

⁴⁹ Woodman, *supra* note 33, at 87.

⁵⁰ *Aseno v. Nkyidwuo*, 1956 (1) W. AFR. L.R. 243.

⁵¹ *Akomea v. Biei*, 1958 (1) W.A.L.R. 174, reprinted in N.A. OLLENNU, PRINCIPALS OF CUSTOMARY LAND LAW IN GHANA, at 186–92 (1962).

in human rights and new national constitutions have led to some changes in appellate review of native court decisions in some nations. For example, the new South African Constitution creates a right to non-Western cultural traditions that commentators predict will result in less emphasis upon marital registry and greater deference to native court findings.⁵² In the United States, customary law determinations in Native American courts have long been given great deference under the notion of “full faith and credit” to judgments of another state.⁵³ If native court sovereignty is respected, “custom is the ‘underground’ law of the courts.”⁵⁴ Therefore, native court sovereignty is a critical counter-force to the stifling effects that evidentiary standards in state or national courts have upon customary law.

B. PUBLIC POLICY LIMITATIONS TO THE RECOGNITION OF CUSTOM

Public policy limits on formal recognition of customary law may be one of the most widely discussed issues in the study of law and anthropology. Immediately, issues such as child marriage or polygamy come to mind. But there is a larger pattern of social definitions that surround each decision that one custom is “reasonable” to Western society while another is not.

First, the policy depends upon the public. In Western colonies abiding by ideals of Christian scripture, the validity of non-Western customary laws was tested by the extent to which each custom was “contrary not only to the scripture but to common sense and common humanity.”⁵⁵ In a Victorian society steeped in ideals of technological and economic progress, public policy was defined in terms of “civilized” versus “uncivilized”: civilized society was seen as doing the uncivilized a favor by pulling them from their traditional “barbaric” laws.⁵⁶

The characterization of any marital custom as “repugnant” or contrary to public policy lies in the very definition of marriage. In early colonial contexts in which the term “marriage” was defined as a “Christian union between man and woman,” the essence of marriage was its performance by

⁵² See Attorney-Editors of Int’l Legal Materials for the Am. Soc’y of Int’l Law Reports and Other Documents, *International Law in Brief, Jan. 18–29, 1999: Developments in International Law*, <http://www.asil.org/ilib18.htm> (visited Feb. 1, 2000).

⁵³ Cooter & Fikentscher *supra* note 18, at 561. The authors note that native courts have created their own “tribal laws” for substantive matters such as what constitutes a valid marriage ceremony. Other laws of procedure and some other specific issues have been specifically legislated by the federal government and thus present a body of “Indian law.” While federal courts do review and apply “Indian law,” deference is given to the substantive findings of the native court in terms of “tribal law.” *See id.* at 558–61.

⁵⁴ *Id.* at 563.

⁵⁵ *Ormichund v. Barker*, 125 Eng. Rep. 1310 (Ch. 1744).

⁵⁶ See Ross Russell, *Legal Pluralism in New Zealand over the Last One Hundred and Twenty Three Years*, 5 LAW & ANTHROPOLOGY 66, 67–68 (1990).

an ordained member of a Christian church.⁵⁷ This definition of marriage automatically precludes recognition of any union not solemnized in a Christian Church.⁵⁸ There have, however, been many alternative definitions of marriage throughout history. Some courts accept a “partnership theory of marriage” that looks to the shared relationship between spouses instead of a particular religious doctrine.⁵⁹ Indeed, it is this “partnership” concept of marriage—a trade of obligations and expectations between two people—that generally justifies common-law marriage in Western culture. The case of *Zimnat Insurance Company v. Chawanda*⁶⁰ aptly illustrates how social policies toward customary marriages mirror changes in the social definition of marriage.

In the Zimbabwean case of *Chawanda*, the court recognized an unregistered customary union in the face of precedent that defined marriage strictly in terms of proper licensing procedures. Older common-law and legislative authorities defined marriage strictly in terms of written licensing requirements for fear of unfettered liability in the context of marital disputes and lack of procedural efficiency. Moving away from formalistic notions of marriage as a written license, the *Chawanda* Court chose to redefine marriage as a series of partnership-like, familial obligations between man and woman.

This redefinition was likely a result of changing policies in South Africa (cultural rights and justice became more forceful policies). Moreover, redefining marriage allows the court to overwrite previous policies that demanded strict licensing and limited standing to sue. In fact, the court even recognizes customary marriages for purposes of recovery for wrongful death where the union was polygamous. The issue of polygamous marriage rears its head as a threat to public policy in terms of indeterminate liability and gender equality.⁶¹ Polygamous marriages, which are a traditional custom of many African tribes, are of great judicial concern in Africa because of their potential to create indeterminate liability. But, the *Chawanda* court notes:

⁵⁷ See, e.g., *id.* (discussing the recognition of customary law in New Zealand and the effect of different definitions for legal terms on social policy in legislation).

⁵⁸ For example, colonial New Zealand laws actually contained a list of churches that a marriage ceremony had to be performed in to be valid. *Id.* at 80.

⁵⁹ Some U.S. courts have propounded a definition of marriage that emphasizes the sharing of rights and duties between two people of any gender. The definition of marriage is at the heart of the single-sex marriage debate in which courts and legislatures do not always agree upon one definition or which social policies should take priority in defining marriage. See, e.g., *Baehr v. Miike* No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. 1996).

⁶⁰ 1991(2) SA 825 (claiming that widow’s customary marriage to her husband was valid for purposes of recovering damages for his wrongful death).

⁶¹ It is notable that the *Chawanda* court does not discuss polygamy as a policy concern for reasons of moral or social integrity.

Damages for loss of support resulting from the death of the breadwinner, unlike instalment [sic] payments of maintenance which are subject to variation dependent upon any change in the circumstances of the parties, are awarded in a lump sum for past and future deprivation of support. This type of action would be confined within reasonable and manageable bounds and not fraught with what has been described as ‘overwhelming potential liability’. [sic] There would not be a multitude of claims brought against one defendant, but a single claim in every instance [of a spouse’s death]. If the deceased breadwinner had more than one customary law wife, the amount of the award would be divisible between them.⁶²

In sum, by reinterpreting the definition of marriage the court is able to recognize a custom that was previously deemed contrary to public policy. This redefinition of marriage corresponds with a shift in priorities in public policy. Moreover, the court is able to open a “window” of recognition for polygamous marriages, which were previously considered contrary to public policies of finite liability.

But changes in public policy do not come rapidly and do not issue from thin air. The court finds interpretive room for valid customary marriages in legislative revisions to the law of wrongful death claims. The *Chawanda* court bases much of its seemingly expansive holding on the fact that the Workmens’ Compensation laws had recently been amended to embrace broader notions of a valid marriage. There is no indication that narrower and more formalistic definitions of marriage may still be the law in other legal contexts.⁶³ In sum, customary marriage may be enforceable in some legal contexts, but not in others. For example, even though the claimant in *Chawanda* was given standing to recover wrongful death damages, this does not mean that the union would have been recognized as valid with regard to other questions of law.⁶⁴ Thus, there is a possibility that a claimant’s marriage is “valid” for some legal claims, but not for others.

Customary law and communal rights often conflict with individual rights. For example, the *Chawanda* court discusses policies of gender equality (rights of the individual) in its assessment of potentially polygamous customary marriages (group rights). Angeline Shenje-Peyton uses the Zimbabwean example of *lobola*, or the gift of money to a wife’s family before marriage, as an example of a cultural practice (to which some tribal members claim to have a right) that perpetuates female subordination (an individual right).⁶⁵ Many anthropologists argue that *lobola* is not really

⁶² *Chawanda*, 1991(2) SA at 831.

⁶³ *Id.*

⁶⁴ *Id.* The statute in question was the South African Fatal Accidents Act 1976, as amended by § 3 of the Administration of Justice Act 1982.

⁶⁵ Angeline Shenje-Peyton, *Balancing Gender, Equality, and Cultural Identity: Marriage Payments in Post-Colonial Zimbabwe*, 9 HARV. HUM. RTS. J. 105, 105 (1996). Some commentators have also argued that customary law is “always” subordinating to women in that it is, by definition, traditional.

“wife purchase,” but instead a means of creating family and community bonds by the exchange of duties and obligations between extended family members of a man and woman.⁶⁶ It is possible, however, that where the formal system has attempted to accommodate *lobola*, it has ironically destroyed these benign motives through misinterpretation and unintended imposition.⁶⁷ Recall, for example, that the application of traditional Western contract principles to customary law may cause some cultural practices to look like a “wife purchase” even though purchase transactions are entirely outside the original cultural meaning of the custom.⁶⁸

In sum, the idea that public policy limitations are immutable, timeless, and clear is misleading. Public policy standards may contradict each other. In South Africa, for example, the newly adopted constitution guarantees both gender equality and rights of cultural traditions.⁶⁹ But, in the context of customary marriage, traditional practices like polygamy and *lobolo* pose a contradiction in policy that has not been entirely resolved.⁷⁰

Often, the issue of whether a marriage is contrary to public policy may seem easy to Western courts. Criminal offenses involving “child marriage” or “marriage by kidnap” are often regarded as repugnant to policy without further inquiry into mens rea or validity of the customary practice.⁷¹ Here, I have attempted to show that the nature of public policy toward customary unions is not always as clear cut as these headline criminal cases may seem to the westerner public.

III. EQUITABLE DOCTRINES AND POLICIES APPLIED TO CUSTOMARY MARRIAGES

In this Part, I discuss the treatment of marital customs under a variety of legal doctrines. Indigenous cultures usually have customary laws accommodated under broad federal or state statutes. As noted in Part II, however, the recognition of customary law is curtailed by evidentiary and policy standards within the formal system despite these protections. Where Western courts are asked to recognize the custom of non-Western

Many cases dealing with customary law, like *Chawanda*, however, are brought by women whose social standing and finances would be harmed if the marriage were found invalid; suggesting that very often it is the formal system’s treatment of customary law, and not the customary law itself, that is subordinating.

⁶⁶ See, Shenje-Peyton, *supra* note 65, at 105–06.

⁶⁷ See *id.* at 105.

⁶⁸ See notes 18–22 and accompanying text.

⁶⁹ See S. AFR. CONST. of Feb. 7, 1997, §§ 9, 31.

⁷⁰ See Mail & Guardian, *Marriage Law Will Be Transformed*, <http://www.mg.co.za/news/96oct1/04oct-marry1.htm> (last visited Feb. 10, 2000).

⁷¹ Deirdre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong “Marriage by Capture” Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1, 6 (1995).

immigrants, those evidentiary and policy limitations are much more stringent since courts are unfamiliar with and suspicious of foreign customs, and imported customary laws do not fall under protection of federal statutes like 25 U.S.C. § 348.⁷² Consequently, when dealing with nondomestic customs, formal courts usually turn to common-law principles. Marriages (and divorces) imported from other nations are generally considered to be “valid where consummated” (this has been codified in some states). That is, if the marriage or divorce was valid in its country of origin, it is theoretically valid in the United States. Alternatively, there is an array of other equitable doctrines that may be invoked to “save” the validity of a customary marriage. These other equitable doctrines or policies include the common-law marriage, the putative marriage doctrine, and the “cultural defense” (regarding criminal mens rea). While most of these doctrines have the potential to bring cultural evidence into the legal system and better accommodate cultural minorities, we will see that the treatment of customary law under each of these doctrines obstructs cultural meaning, actually hindering the preservation of customary law and non-Western culture.

A. “VALID WHERE CONSUMMATED” AND ACCOMMODATION OF
CUSTOMARY MARRIAGE

While the idea that a marriage valid in its country of origin is valid everywhere seems attractively clear and fair, the doctrine is not as bright lined as it appears, and the rule often subjects claimants to evidentiary double standards. “Valid-where-consummated,” as a legal construct, is also applied inconsistently between different jurisdictions and within different legal matters in the same jurisdiction. For instance, a court in the United States is likely to require documentation that would not be required for a valid marriage in the claimant’s country of origin. More critically, whether a marriage is valid in its country of origin is not always a “yes” or “no” question: a marriage can be valid for some purposes, but invalid for others (as discussed below, courts may turn to equitable doctrines to try and “save” the marriage). In general, the formal system forces the nonindigenous cultural minority to “westernize” customary laws and cultural practices by fitting them into a doctrine that is familiar to Western jurisprudence.

⁷² 25 U.S.C. § 348 (2000) (demanding formal recognition of any marriage between Native Americans under Native American custom). *See also* Osborne v. Babbitt, 61 F.3d 810 (10th Cir. 1995).

1. *Valid-Where-Consummated and Evidentiary Limits to Recognizing Customary Marriage*

The evidentiary standards that an immigrant must meet to prove the validity of a customary marriage are more complex than the standards that must be met by an indigenous claimant. The case of *DaBaase v. INS*⁷³ aptly illustrates the evidentiary double standard. In *DaBaase*, the claimant sought recognition of his customary divorce completed in Ghana. The court claims to apply the rule of “valid where consummated”: if DaBaase’s divorce is valid in Ghana, then it is valid in the United States. Trends in many African nations toward recognition of unrecorded customary marriages and divorces will likely lead people from those countries to believe that their customary marriage or divorce will be recognized in the United States under the promise of “valid-where-consummated.” Immigrant claimant, however, *actually* must meet a higher evidentiary standard than necessary in their country of origin. This is due to the fact that foreign customary laws lack federal statutory protection whereas Native American marital customs are often protected under federal statute. In *DaBaase* the U.S. court required documentation of Francis DaBaase’s marital status as valid in Ghana. This documentation would not have been required in the case of a Native American customary marriage because, as discussed above, Native American customary law is explicitly protected by federal statute. Moreover, this documentation was not required by any law in DaBaase’s home country, Ghana. Although DaBaase provides the court with affidavits from his ex-wife that “she had been divorced [from] her husband Francis A. DaBaase under the Ghanaian Tribal Native Customs Divorce” and a letter from the Ghanaian Embassy asserting that “the Ghana government recognizes tribal marriage and divorce customs,” these did not satisfy DaBaase’s burden of proving that the divorce was a valid custom under Ghanaian law.

It seems that what the court really wanted DaBaase to supply was a certified government document that individually recorded DaBaase’s divorce. This requirement poses several problems for the cultural minority seeking recognition of a customary marriage or divorce in the United States. First, Ghana does not require individual governmental recording of customary unions, and such certified documents are likely unavailable or even detrimental to the married couple.⁷⁴ More importantly, these

⁷³ 627 F.2d 117 (8th Cir. 1980).

⁷⁴ See, e.g., *Appomasu v. Bremawuo*, [1980] G.L.R. 278 (ACCRA Ct. App. Ghana) (noting that a marriage ceremony that did not yield a certificate or license was, by definition, a valid customary union). The Ghanaian law of marriage is similar to Zimbabwean marriage in that one may choose to marry in the Western fashion and subscribe to formal, Western laws, or, if a non-Western native, one may marry by tribal custom and subscribe primarily to customary law in all family matters with no written, procedural requirements. In fact, many couples may prefer to marry by custom since this entails

documents, especially the affidavit, would probably have met DaBaase's burden of proving the validity of his divorce in any Ghanaian court.⁷⁵ Therefore, it is quite possible that DaBaase's customary divorce *would* have been valid under Ghanaian law. How can one then say that customary marriages in the United States are valid-where-consummated? Inconsistent applications of the valid-where-consummated rule cause many practitioners to advise immigrant spouses to record their customary marriages in a U.S. formal proceeding: "In some cases it may be a good idea to re-marry if necessary to get a marriage certificate."⁷⁶ The problem with this advice is that, on a theoretical level, it destroys any sense of customary law. Secondly, a cultural minority may not know that a U.S. certificate is necessary unless they have access to legal advice. Lastly, there are often practical hurdles to formalizing a customary marriage in the United States, especially if the other spouse, or ex-spouse, is located in another country and the immigrant is unable to give another person power of attorney in that country.

Recall that many customary laws may be recognized as valid for some purposes, but held invalid for others.⁷⁷ This presents another problem for formal courts and the customary claimant: how is the court or the claimant to know if a customary marriage is valid under the laws of the original country if the custom is valid for some purposes and invalid for others? In uncertain cases, the courts in the United States decide against finding the ceremony to be valid. Thus, as seen in the *DaBaase* case, where the status of the marriage in its country of origin is of some question, or is invalid for any purpose, the court refuses to recognize the marriage.

United States courts interpret cases against the cultural minority for fear that "lenient" recognition of customary laws in other nations will lead to fraud in immigration and potential public policy violations. In cases of citizenship via marriage, courts are especially suspicious of fraud if the marriage was performed by custom or if a divorce in the claimant's previous country was performed by custom. In such cases, courts effectively forego the valid-where-consummated doctrine. For instance, in *Egan v. INS*,⁷⁸ the court was asked to recognize a customary divorce performed in the immigrant's home country of Nigeria. The court refused to even reach the question of whether the customary divorce was valid in

fewer procedural complications and also determines the choice of law ("formal" or "customary") under which the marriage will be treated.

⁷⁵ See *DaBaase*, 627 F.2d at 117.

⁷⁶ See Richard Madison, *A Brief Look at Marriage and Immigration*, <http://www.lawcom.com/marriage.shtm> (last modified Nov. 17, 1997).

⁷⁷ See *Zimmat Ins. Co. v. Chawanda*, 1991 (2) SA 825, 831 (determining that the customary union may not be completely valid, but is at least valid for the narrow purposes of new legislation in the Fatal Accidents Act 1976).

⁷⁸ 119 F.3d 106 (2d Cir. 1997).

Nigeria despite a confirmation of a tribal Nigerian court that the claimant was not married. The court's refusal to recognize the divorce was based on the court's finding that ambiguous circumstances made the credibility of the witness questionable and that a "foreign judgment may not be accepted by the courts where the proceedings underlying that judgment may have been conducive to fraud or collusion, even though the propriety of the judgment itself is not in question."⁷⁹ Thus, where a United States court senses a "taint of fraud," the court may refuse to recognize a marriage even if the marriage is clearly valid where consummated. The concurrence in *Egan* disparages:

[A] Customary Court in Oyo, Nigeria has confirmed, apparently to the satisfaction of the Nigerian process requirements, that despite the husband's earlier (and fraudulent) representations to the contrary, he was never married before he left Nigeria. It is one thing for the INS to challenge his credibility, but quite another to disparage the official act of the Oyo Customary Court. . . .

[T]he INS nonetheless sought to "tear asunder" an apparently long-standing, valid Connecticut marriage by deporting her husband.⁸⁰

Other courts dealing with immigration issues have simply stated that, as a general rule, naturalization cases involve very high burdens of proving the validity of any foreign marriage or divorce. Furthermore, the INS is given great deference in its decision to not recognize a marriage whether or not the marriage is valid where consummated. In *Oddo v. Reno*, the court notes, "The Attorney General may revoke an approved visa petition at any time fo.r "good and sufficient cause."⁸¹ It continues:

This court may set aside the INS's action, findings, and conclusions if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." . . . This is a highly deferential standard and our review is limited. . . . The agency will stand if the record reveals a rational basis for the decision.⁸²

2. *Valid-Where-Consummated and Public Policy Limits to Recognizing Customary Marriage*

Public policy trumps recognition of a custom, even where the valid-where-consummated doctrine applies. For example, in *People v. Ezeonu*, the court could disregard the valid-where-consummated rule if the marriage was against public policy: the court did find that the Nigerian man's marriage was valid under Nigerian law, but that it was "absolutely void

⁷⁹ *Id.* at 108 (quoting the Board of Immigration Appeals).

⁸⁰ *Id.* at 109.

⁸¹ 175 F.3d 1015, 1999 WL 170173, **2 (4th Cir. 1999).

⁸² *Id.*

even where it was legally consummated in Nigeria.”⁸³ Public policy limits to the recognition of customary law have earned much criticism from scholars of law and anthropology since public policy limits almost never address the fact that the claimant has a bona fide belief in the validity of his marriage.⁸⁴ Overall, the invocation of public policy will overcome any request that a customary marriage is recognized.

In sum, we see that the rule of valid-where-consummated is limited on several grounds. Evidentiary standards in the United States may render a marriage that is valid in its country of origin invalid in the United States. While formalizing a marriage or divorce in the United States or obtaining a certificate from a customary court of the country of origin may be helpful, this option is not always available to the immigrant. Such certification also greatly undermines the significance and meaning of customary law to those trying to preserve their culture. A taint of fraud, even if there is only a rational basis for suspicion, may overcome any claim that the custom was valid in its country of origin. Naturalization cases also present a special problem to immigrants who must overcome judicial deference in favor of the INS. In sum, despite a first impression that valid-where-consummated is a clear rule, the doctrine is actually very limited, and often puts the immigrant claimant in a no-win situation.

B. COMMON-LAW MARRIAGE AND VALIDATION OF A CUSTOMARY MARRIAGE

When a court is unable to apply the valid-where-consummated doctrine to enforce a customary marriage, the cultural minority may invoke the doctrine of common-law marriage in those jurisdictions that recognize it. The common-law marriage doctrine is often treated very differently from one state to the next. Most U.S. states simply recognize or refuse recognition of common-law marriage entirely; some allow common-law marriages made within the state, but not elsewhere; and others allow common-law marriages if they are valid where consummated, but do not recognize marriages created through cohabitation in that state.⁸⁵

Applications of the common-law marriage doctrine to customary marriages in the United States clearly present the important difference in treatment between indigenous claimants and nonindigenous claimants. Recall the case of *Osborne v. Babbitt*,⁸⁶ in which otherwise illegitimate

⁸³ 588 N.Y.S. 2d 116, 118 (Sup. Ct. 1992). See discussion *infra* Part III.D. for further discussion of the *Ezeonu* case.

⁸⁴ This has been most criticized in the criminal context where intent plays such an important role and specifically may be invoked in the context of the cultural defense. See discussion, *infra* Part II.D.

⁸⁵ See Madison, *supra* note 76.

⁸⁶ 61 F.3d 810 (10th Cir. 1995).

Native American children sought to inherit by intestacy from a decedent whose marriage was valid only under Pawnee custom. 25 U.S.C. § 371⁸⁷ allows for the recognition of Native American marriages through cohabitation even if the marriage would otherwise be invalid under state law. Thus, Native American customs that would otherwise be cognizable only under a common-law marriage doctrine are “saved” from state laws proscribing common-law marriage by the federal statute.

In the case of an immigrant to the United States, there is no federal protection for the customary practices of the claimant; if the claimant asks that a customary marriage be recognized under the common-law marriage doctrine, the outcome is usually dependent upon state law. *People v. Suarez*⁸⁸ exemplifies how and why immigrants would need to invoke legal constructs alternative to the valid-where-consummated doctrine. In *Suarez*, a Puerto Rican citizen claimed that he was married to his wife under a Puerto Rican custom. The claimant, however, did not offer sufficient evidence of the custom to prove that such a custom was valid in Puerto Rico according to the New York court. In the alternative, the claimant asserted that his marriage was valid as a common-law marriage in Ohio. The court accepted this alternative argument and thus allowed for the validation of Suarez’s marriage in the trial court.⁸⁹ Thus, Suarez’s customary marriage was “saved” under this legal construct.

From an anthropological perspective, the problem with the common-law marriage doctrine is that it does not recognize *customary law*—the doctrine does not even get cultural evidence into the courtroom at all. As a legal construct, common-law marriage is a way of validating a marriage without validating, or even acknowledging, the customary process. Indeed, the rationale behind proscribing common-law marriage in many states has been the fear that it will lead to recognition of customary laws, and that this in turn would “lead to varied, ad hoc determinations, and eventual discriminatory effects that would afford certain groups greater protection than others.”⁹⁰ Recall also that for many westerners, common-law marriage implies the moral transgression of “living in sin.” This makes cultural

⁸⁷ 25 U.S.C. § 371 (1999) (validating the rights of heirs to a deceased Native American to be recognized even if the individual was married or born from a marriage that is only recognized in the Native American culture. *See also* 25 U.S.C. § 348 (2000).

⁸⁸ 560 N.Y.S.2d 68 (Sup. Ct. 1990) (defense claim of a valid marriage so the defendant could invoke evidentiary privileges for statements made between spouses).

⁸⁹ Of course, if Suarez’s marriage had been consummated in New York, which has prohibited common-law marriage, the marriage could never be recognized as valid.

⁹⁰ *Suarez*, 560 N.Y.S.2d at 69. This rationale may be criticized for being ambiguous: why the effects of recognizing customary unions under common-law marriage doctrine would be “discriminatory” or why it would afford common-law spouses “greater protection” than non-common-law spouses is unclear.

minorities feel that their otherwise respectable and revered cultural practice has been assigned to a degraded or immoral category of formal law.⁹¹

Therefore, the application of the common-law marriage doctrine to customary marriages exemplifies apparently irresolvable problems between formal law and cultural preservation. For the formal court, customary unions must be recognized in a way that does not substantiate the custom, since the nearly infinite number of customs would lead to “ad hoc determinations,” and because the potential for fraud is so high. For courts in jurisdictions that allow it, the common-law marriage is a good means of enforcing marital rights without dealing with a morass of unfamiliar customs and cultures. For the anthropologist and cultural minority, common-law marriage is an empty shell that creates marital rights recognized by the state, while failing to recognize religious or cultural meaning.

C. THE PUTATIVE MARRIAGE DOCTRINE AND ACCOMMODATION OF CUSTOMARY MARRIAGES.

While the valid-where-consummated and common-law marriage doctrines look only at “objective” manifestations of the marriage and ignore the customary law and cultural meanings by which the marriage was actually consummated, the putative marriage doctrine could *potentially* bring cultural evidence into court. The putative marriage doctrine renders an otherwise invalid marriage valid through the reasonable expectations of one spouse. Upon finding *a reasonable, good-faith belief*, by one or both parties, that a valid marriage was consummated, the court shall divide property between these “putative spouses” according to state law.⁹² The putative marriage doctrine is often invoked in cases dealing with customary marriages because of its focus upon intent and belief: claimants wish to have the reasonableness of their beliefs judged in terms of their culture and customary law. Furthermore, the open-ended concept of “reasonableness” invites discussion of group and cultural rights in a multicultural society; an invitation that has generally been declined by courts. Despite its potential for bringing cultural evidence into United States courtrooms, the putative marriage doctrine is often limited by the simplistic notion that a belief in customary marriage may be “unreasonable” simply because the practice is different from state law or unrecognizable in traditional Western terms.

The case of *Vryonis v. Vryonis*⁹³ aptly illustrates this point. There, a woman named Fereshteh, an Iranian citizen and member of the Shiah Moslem Twelve Imams (Islam), claimed that she held a reasonable, good

⁹¹ See Cooter & Fikentscher, *supra* note 18, at 538.

⁹² See, e.g., *In re Marriage of Monti*, 185 Cal. Rptr. 72, 72 (Ct. App. 1982).

⁹³ 248 Cal. Rptr. 807 (Ct. App. 1988).

faith belief that a *Mut'a* marriage ceremony created a valid marriage. The ceremony was conducted in private, with no witnesses. It was agreed that both parties were fully informed about the customary significance of the ceremony. The "husband," Speros, did not contest that he assured petitioner that the marriage was valid in California.⁹⁴ Speros then chose to "break" the *Mut'a* and marry another woman. Upon learning that her marriage was unrecorded and thus void under regular California law, Fereshteh claimed quasi-marital property rights under the putative marriage doctrine. Nonetheless, the court found that even if Fereshteh's belief in the validity of the *Mut'a* was bona fide and true to Islamic custom, the belief was unreasonable.⁹⁵

The trial court in this case found that Fereshteh had a good faith, reasonable belief in her marriage to Speros given the customary law of her culture. The appellate court, however, found that Fereshteh's belief was unreasonable *not because it was invalid according to her culture*, but because the *Mut'a* was so incompatible with California law that Fereshteh could not believe it to be valid in that state. Thus, the ability of this doctrine to "save" customary marriages is again measured against U.S. formal standards of compliance. If the appellate court had measured "reasonableness" by Fereshteh's belief in the customary law of her culture, her claim may have been successful: the *Mut'a* is indeed contracted in private, with no witnesses, and the terms of the marriage need only be agreed upon in advance, with both parties being '*aqil* (of sound mind).⁹⁶ In short, Fereshteh's ceremony may have been valid under Islamic law and the law of Iran.⁹⁷

The appellate court in *Vryonis*, however, did not focus upon the reasonableness of Fereshteh's beliefs under Shi'ite Islamic law, but instead found that the facts of Fereshteh's customary marriage were "at odds with the formation and existence of a valid marriage pursuant to California law."⁹⁸ Thus, the less a custom "looks like" it complies with California law, the more "unreasonable" the belief in a valid marriage. The court's logic follows that since "no license was obtained and there was no authentication or recordation . . . Fereshteh could not believe reasonably a valid California

⁹⁴ See *id.* at 809.

⁹⁵ *Id.* at 812.

⁹⁶ See e-mail from Dr. Hossein Ziai, Chairman of Iranian Studies, University of California, Los Angeles to Lona Laymon (Mar. 3, 2000) (noting that it is likely that Fereshteh's *Mut'a* ceremony would have established a legal form of marriage in Iran where all legal principles are based upon Islamic religion) (on file with the author).

⁹⁷ See *Vryonis*, 248 Cal. Rptr. at 813. Fereshteh's financial claim may have been erroneous under Islamic law: the *Mut'a* is not typically subject to claims on inheritance or support. However, she may have had a rightful claim to money agreed to be exchanged according to the *Mut'a* verbal contract. Although such a mutually agreed upon "brideprice" is at the heart of the *Mut'a* contract, this court does not address the issue and fails to explicate the basis for Fereshteh's financial claims.

⁹⁸ *Id.*

marriage came into being,”⁹⁹ even though the court agrees that Fereshteh was unfamiliar with California law. Moreover, the court also fails to address the fact that this marriage contract may be lawfully valid in Iran.¹⁰⁰ Lastly, Speros’ misleading assurances that the marriage was valid could not render Fereshteh’s belief in the validity of the marriage reasonable.¹⁰¹

The overall effect of the *Vryonis* decision in California is the complete preclusion of unfamiliar customary laws from the putative marriage doctrine.¹⁰² The doctrine is practically limited to cases in which the parties attempted to obtain marriage licenses that are technically deficient. The appellate court was concerned that accommodations of customary law in the putative marriage doctrine would allow parties to assert a binding marriage based on “ignorance of the law.”¹⁰³ This general concern, however, is often misplaced in the equitable doctrine of putative marriage since most of the successful putative marriage claims also involve some degree of ignorance of the law. Furthermore, the putative marriage doctrine is primarily concerned with equity and the prevention of fraudulent assurances that the marriage is valid where one party knows that it is not. By neglecting to address customary law when considering the putative marriage doctrine, courts fall seriously short of these goals: the court’s approach in *Vryonis* allowed Speros to take advantage of Fereshteh’s “unreasonable” beliefs in a fraudulent manner (hardly an “equitable” outcome).

Since the putative marriage doctrine looks to reasonableness and bona fide belief in the validity of the marriage, it does have potential to bring customary evidence into the formal legal system and open up discussion of group and cultural rights. It seems unlikely that application of the putative marriage doctrine to customary marriages would lead to a “slippery slope” of cases allowing gross ignorance of law as an excuse. This is because the threshold requirement that the belief is bona fide and related to a genuine system of customary law should weed out cases of mere ignorance and “sham” claims of marriage. However, even under an approach that gives more weight to cultural evidence, judicial biases and ignorance about non-

⁹⁹ *Id.* at 812.

¹⁰⁰ The court notes that the belief in the marriage must be a belief in a statutorily valid California marriage which the court sees as separate from a marriage valid according to religion or customary law. *See Vryonis*, 248 Cal. Rptr. at 813. This fails to account for the fact that in Iran, the legal system is based upon religious beliefs of the parties. Fereshteh may thus have had good reason to believe that the religious laws of the parties would govern “marriage” in California.

¹⁰¹ *Id.*

¹⁰² Even a “customary law approach” to the *Vryonis* case may not have helped Fereshteh at the appellate level, since there were some doubts about the sincerity of Fereshteh’s belief (e.g., she did not file a joint tax return). *Id.* It is also possible that Fereshteh’s education as a UCLA professor was also read against her since the court may have believed that she was “too sophisticated” to sincerely believe in a valid marriage. *Id.*

¹⁰³ *Id.* at 813.

Western cultural systems will still put cultural minorities in the uncomfortable position of being told that their beliefs are “wild.”¹⁰⁴ Thus, despite its promise to better ally customary and formal law, the putative marriage doctrine falls short of fostering real legal pluralism.

D. CRIMINAL CASES AND THE ACCOMMODATION OF CUSTOMARY MARRIAGES

Thus far, I have only examined the legal treatment of marital customs in the civil context. But are there any analogous doctrines of accommodation that may be invoked in a criminal case? The “cultural defense,” which holds that the criminal behavior and mens rea of certain defendants should be judged with some consideration of their cultural context, does not actually *validate* any marriages. If a claimant in a civil case successfully invokes, for instance, the putative marriage doctrine, that claimant leaves court with enforceable marital rights; this is not true for the criminal defendant. The invocation of the cultural defense never achieves such a level of validation. The cultural defense requests judge and jury to excuse defendants to the extent that they reasonably believed they were acting in accordance with cultural practices. The emphasis is on the defendant’s state of mind as an excuse for behavior and not on the actual validity or enforceability of the customary practice.

There are numerous reasons why the cultural defense does not lead to real marital rights. First, criminal cases almost always involve marriage practices that are considered to be repugnant to public policy. These are usually cases of child marriage, marriage by kidnap, marriage by money payment, or polygamy, all of which are categorically repugnant to public policy in the United States. Since public policy trumps the recognition of any custom, it logically follows that, as a practical matter, validation of customary marriages will not occur in the criminal context.

Second, the cultural defense is extremely limited in its application to criminal defendants as a result of both judicial interpretation and the level of intent required under the laws most subjected to cultural defense tactics. For instance, the cultural defense has often been employed in criminal cases dealing with customary marriage practices, especially rape cases: defendant is accused of raping a woman to whom he claims to be validly married under customary law. Or, a defendant may argue that “consent” is culturally specified. In *People v. Moua*,¹⁰⁵ a Hmong man claimed that he had a bona fide, reasonable belief that a Hmong woman, Seng Xiong, consented to sexual intercourse because her behavior perfectly fit the

¹⁰⁴ *Id.* at 812 (quoting language from Speros’ brief which terms Fereshteh’s beliefs as “wild”).

¹⁰⁵ No. 315972-0 (Cal. Sup. Ct. 1985). See also Evans-Pritchard & Renteln, *supra* note 71, at 8.

behavior of a woman consenting to marriage under Hmong custom. Other defendants assert general lack of culpability and intent as a defense to charges of rape. In *Nebraska v. Al-Hussaini*,¹⁰⁶ the defendant claimed that he had a bona fide belief that his marriage was valid under Iranian Islamic laws, and that this should warrant a more lenient sentence given general principals of culpability. Courts critically limit the cultural defense in rape cases, whether it is invoked in connection with specific elements of rape, or invoked under general principals of intent or culpability. There are several reasons for this. First, rape tends to not be a specific intent crime and it may be a strict liability crime in some cases (e.g., statutory rape). Second, many courts interpret the cultural defense as a mistake of law and thus will not accommodate cultural defenses because “ignorance of the law is no excuse.”¹⁰⁷ Finally, the use of the cultural defense almost inevitably leads to the balancing of victim’s rights against defendant’s culpability; a balancing test that usually falls in favor of the victim. In sum, while some courts concede that the non-Western defendant is “a victim of the laws which he has little, if any, familiarity and which are, according to him, vastly different from the customs and laws of his native country,”¹⁰⁸ very few courts have accepted the cultural defense as even a partial excuse, and no jurisdiction considers it to be a complete excuse.

This is not to say that the validity of the criminal defendant’s marital customs will not be an issue in court. When dealing with the cultural defense, courts focus upon the defendant’s state of mind, and not on the validity of the actual practice, but the practice must have enough validity to render the defendant’s worldview reasonable to the court. Thus, the court may have to look into the cultural meaning and processes of the custom in its nation of origin. In some cases, the defendant may even attempt to receive complete exoneration by showing that the marriage was in fact valid-where-consummated and thus valid in the United States. This is, again, usually invoked in rape cases, where actual marriage to the victim provides a full or partial excuse to rape. While this does present an opportunity for the criminal court to determine the marriage to be valid and complete with at least some marital rights and obligations, this result is never reached as a practical matter. Again, the nature of the marital customs at issue in criminal cases precludes real validation. For example, in *People v. Ezeonu*,¹⁰⁹ the court found that a marriage was validly consummated under Nigerian law; however, because it was a polygamous union, it was against public policy in the United States. The court could thus not validate

¹⁰⁶ 579 N.W.2d 561 (Neb. Ct. App. 1998).

¹⁰⁷ For a criticism of this interpretation see Evans-Pritchard & Renteln, *supra* note 71, at 22–25.

¹⁰⁸ *Al-Hussaini*, 579 N.W.2d at 563.

¹⁰⁹ 588 N.Y.S.2d 116 (Sup. Ct. 1992).

the marriage for purposes of providing Dr. Ezeonu any marital defense to charges of rape.

I do not argue the extent to which the cultural defense or customary practices should or should not be considered an excuse in criminal cases involving marital customs; that topic is well beyond the scope of this Note.¹¹⁰ I only wish to outline the fact that the cultural defense is critically limited, and it is not a full accommodation of customary marriages. After all, the cultural defense only seeks some level of exoneration for the criminal defendant as a proxy for state of mind; it is not designed to actually enforce the marriage or the custom at hand. Thus, in criminal cases, it is particularly true that “[t]he disadvantage of having a cultural defense as a complete and formal excuse is that if it were successful, cultural rights could take precedence over other human rights such as those of women and children.”¹¹¹

IV. CONCLUSIONS

For members of traditional communities, the law comes in several different layers. At the closest level, the customary law of one’s community governs. At the next level, the formal legal system of one’s nation governs. Finally, the formal legal system of the country where one expatriates governs.¹¹²

Although statutory laws and courts of most nations claim to recognize the customary laws of their indigenous populations, this formal recognition usually falls short of accommodating the cultural meaning embedded in indigenous customary laws. While formal legal systems purport to uphold the rights of insular, indigenous groups, they really only do so to the extent that the customary law can be fit into preexisting formal, Western constructs that emphasize verifiability and consistency. The same is true, but to a greater extent, of the valid-where-consummated construct. Therefore, the tension between customary and formal law is deeply rooted in the very nature of each system of law, and it parallels inherent tension between the goals of anthropology and the goals of the legal system. For the anthropologist, the accommodation of customary law means more than mere enforcement of a marriage in the formal system: it means preservation of customary law in a way that preserves cultural meaning and significance.

¹¹⁰ For a more complete discussion of the cultural defense, see Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN’S STUD. 437 (1993).

¹¹¹ Evans-Pritchard & Renteln, *supra* note 71, at 58.

¹¹² Of course, an immigrant may also be governed by the customary law of his cultural group if, when he relocates, there is already an immigrant population in that nation that has established its own insular group.

Anthropologists would view the accommodation of customary law as treatment of “custom on custom’s terms,” with emphasis on oral narration, cultural growth and change, the subjective significance of the custom, and its varied, community-based nature.¹¹³ The aims of the legal system are often in stark opposition to these anthropological principles: written or “hard” evidence, consistency, objective fact-based tests, and emphasis upon national or state society rather than smaller, community units.

Doctrines like valid-where-consummated and common-law marriage validate customary marriage with no regard to the actual custom or intent of the parties, thus making the actual customary law irrelevant to the determination of its validity (e.g., cultural evidence is not admitted in court). Furthermore, at least amongst Native Americans, the legal system’s treatment of customary law under legal labels like common-law marriage leads to embarrassment about customary practices, or a sense that those practices are morally inferior.¹¹⁴ Thus, if the formal system imposed upon the customary law doesn’t immediately change the nature of the customary system through codification and formalization, the cultural meaning and significance of the customary laws will slowly erode as formal courts validate marriage customs only where they fit into preestablished Western legal concepts.

For the nonindigenous claimant, the putative marriage and the cultural defense doctrines have more potential to incorporate anthropological principles, and may be more deferential to customary law and cultural meaning. This is because the putative marriage doctrine and the cultural defense purport to scrutinize the claimant’s intent and beliefs. One would guess that these doctrines require courts to understand the worldview of the claimant and other community members in order to determine the reasonableness of the claimant’s beliefs. The concept of reasonableness also invites courts to utilize rhetorics of group and cultural rights when analyzing the worldview of a claimant. Contrary to these expectations, however, both doctrines are severely limited by evidentiary standards that favor mere documentation of marriage, and judicial discretion about which cultural beliefs are reasonable (as opposed to which beliefs in a culture are

¹¹³ For example, in a society whose marital customs are founded in the concept of a bond between two families, or even clans, an inquiry into the “validity” of a marriage in that culture would necessarily entail an inquiry into the relationship that has been established or intended between the family groups. The inquiry *would not* focus primarily on the “contract” created between the future spouses, as would be the treatment in the United States. Indeed, for such a group, the “contract” between individuals may not exist as a concept, since every change in the relations of individuals is seen as a change of relations of families and friends.

¹¹⁴ Some scholars have pointed out that this result is also apparent in non-Western immigrant communities, in which the fear of the judicial system, or embarrassment about “non-American” cultural identity makes it difficult to procure witnesses from the group to testify. Interview with Professor Alison Renteln, Vice-Chair, Political Science Department, University of Southern California, in Los Angeles, Cal. (Mar. 4, 2000).

meaningful to that culture). Much judicial bias against customary law seems to stem from the idea that these matters are more “religious” than “legal,” and thus are not within the realm of legal enforcement by the courts (even where “religious” claim would be enforceable in courts of the claimant’s country). Finally, policy limitations are the trump card to any customary marriage claim.

Is there any way to, at least partially, bridge the gap between anthropological goals and goals of the legal system? A culturally relativistic approach in the formal system does not prove satisfying since this opens the door to customary laws that are generally viewed as harmful to greater society or to people within the cultural minority itself (e.g., child marriages, or marital customs that are harmful to women within the insular minority group). But, we saw that many customary marriages are not harmful or repugnant, especially where the marriage would be valid-where-consummated. When dealing with such nonrepugnant customary laws that engender an apparently bona fide, nonfraudulent belief in the claimant, courts may bridge the gap between customary law and formal law by *reassessing standards of reasonableness*. The scope of reasonableness applied in putative marriage cases is at the heart of the bias against cultural minorities.

The materials in this Note not only demonstrate the gap between formal judicial systems and the preservation of cultural identity, but also illustrate biases against communal rights perspectives in many formal courts. In the United States, the source of this bias derives from the “individualist perspective” inherent to the American legal tradition.¹¹⁵ “The individualist perspective is hostile to the notion of group/ethnic rights because it posits that the individual is the only agent to which a right can attach.”¹¹⁶ Moreover, the idea that government need only be bound by “negative rights” continues to be very influential in many Western legal systems, and this hinders claims for the right to cultural identity through positive rights. Few accommodations of group or cultural rights originated in common law, and today most accommodations come from legislative bodies. Nations like South Africa and Namibia have constitutionalized indigenous group/ethnic rights while other nations have tried to accommodate cultural minorities through the use of statutory protections and tribal court systems. In Part II, we saw that, at least in the context of marriage, the formal system holds a myriad of problems for the claimant of cultural rights, despite legislative protection of indigenous, traditional marriage practices. But, these legislative protections rarely, if ever, reach immigrant groups. Thus, Part III explored possible routes of

¹¹⁵ See Wing, *supra* note 1, at 298.

¹¹⁶ *Id.*

accommodation for immigrant customary marriages in the United States. The common-law doctrines explored were often biased, inconsistently applied, and never engaged in a rhetoric of ethnic or group rights, even where the customary practice presented no threat to public policy of evidentiary standards.

There are some simple routes of judicial reform that may lead to fuller incorporation of group rights and cultural identity. First, courts should be encouraged to use nonlegal (e.g., anthropological) materials to supplement their analyses of reasonable beliefs; ideally, a court would have at its disposal “expert” witnesses or descriptions of cultural practices that come from within the cultural group. Cultural minorities seem to greatly increase their chances of successful claims where they provide expert witnesses from within their cultural group.

Second, courts should be encouraged to look toward progressive reforms within international law forums and within other nations. Both of these sources have explored progressive, nontraditional standards of public policy and evidentiary requirements. For instance, recall that in most African nations, a different standard of evidence—one that was more deferential to community norms and individual testimony—was applied to customary law cases. African nations have also approached public policy. Comparisons between the laws of different nations and the laws of the United States may better acquaint U.S. judges with a wider range of potential judicial responses to customary law. The comparative approach may also mend some misapplications of the valid-where-consummated doctrine.

Third, the legal education should incorporate more anthropological materials when students explore the problem of reasonableness standards: even the simple step of introducing the fact that not all cultures view “marriage” as a contract between two individuals would be a step in the right direction. Such a curriculum should also offer students the chance to compare the ways in which the United States, other nations, and international law deal with customary laws.

Fourth, if courts consider the fact that other cultures do not always conceive of a married-unmarried dichotomy, then a sliding scale of “marital status” and “rights” may develop to more equitably accommodate non-Western groups. This approach has been taken in some African nations where courts have recognized that although a couple may not meet the status of “completely” married, the relationship was enough of a union under tribal standards to require judicial enforcement of some rights and obligations.¹¹⁷ Thus, while the union does not receive all the rights and

¹¹⁷ See, e.g., *Owusu v. Nyarko*, [1980] G.L.R. 428 (Sekondi High Ct. Ghana).

benefits of a “full” marriage, the court recognizes that some level of “marriage agreement” was achieved under customary law and that there should be an enforcement of rights reasonably expected by custom. This treatment of non-Western cultures better fits those cultures that lack the married-unmarried dichotomy. This approach also avoids forcing customary laws into legal concepts like common-law marriage, which may connote immorality or render the customary practice irrelevant. Both indigenous and immigrant cultural groups would benefit from this rights-based approach to customary marriage.

If legal doctrines, like the putative marriage doctrine, or valid-where-consummated doctrine, can more fully incorporate accurate cultural evidence, the legal system will be one step closer to true legal pluralism, with some rhetoric of group/ethnic rights. Forcing cultural practices into Western legal molds and defining customary marriages by reference to Western concepts (e.g., common-law marriage) allows accommodation of only those practices that are “moldable” to Western doctrines; any other system of customary law is seen as illegitimate. The legal system thus perpetuates Western concepts through the practices of other cultures that may be catalogued in “familiar” terms. This is not legal pluralism, and it is contrary to the preservation of cultural identity. Legal pluralism will be no more than an illusion unless courts can evaluate cultural practices in and of themselves and do so in a consistent way.