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MULTIPLE CULTURES, ONE CRIMINAL JUSTICE SYSTEM: THE NEED FOR A “CULTURAL OMBUDSMAN” IN THE COURTROOM

*William Y. Chin**

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I. INTRODUCTION

Vietnamese immigrant Hen Van Nguyen was charged with theft but was mistakenly tried for murder despite protesting “[n]ot me, not me.”¹ All courtroom participants failed to recognize that Mr. Nguyen was the wrong defendant.² The mistake was corrected near the end of the trial when a witness in the theft case saw that Mr. Nguyen was the wrong defendant in the murder trial and sent a note to the prosecution table.³ Justice Smith of the Georgia Supreme Court called the misidentification in the first trial that resulted in a mistrial “an inexcusable mistake.”⁴ The judge, prosecutor, defense attorney, interpreter, and sheriff’s officers all failed to listen to Mr. Nguyen and to see him as an individual instead of as an indistinguishable minority defendant.⁵

The lesson to be drawn from this case is not that a language interpreter was needed, but that a “cultural ombudsman” was needed who could overcome cultural barriers and biases, provide Mr. Nguyen with a voice that would be heard, and guide him through an unfamiliar criminal justice system. A cultural ombudsman assigned to Mr. Nguyen would have realized he was the wrong defendant, prevented the need for a mistrial, and spared him the anguish of being falsely accused of murder.

1. Dudley Clendinen, *Race and Blind Justice Behind Mixup in Court*, N.Y. TIMES, Nov. 3, 1985, at L26.

2. See *Tieu v. State*, 358 S.E.2d 247, 249 (Ga. 1987) (Smith, J., dissenting) (noting that Hen Van Nguyen “sat in the courtroom for two days while” being repeatedly identified by witnesses as Tieu).

3. Clendinen, *supra* note 1. However, the sheriff argued that his jail staff uncovered the mistaken identity error. *Id.*

4. *Tieu v. State*, 358 S.E.2d at 250 (Smith, J., dissenting).

5. See Clendinen, *supra* note 1 (noting that trial participants assumed Hen Van Nguyen was the right man because he had been placed in the defendant’s chair).

Like Mr. Nguyen, other minority defendants with diverse cultural backgrounds also need the services of a cultural ombudsman. Minority defendants in the criminal justice system encounter cultural barriers that undermine their ability to win at trial, leading to a potential loss of liberty or life.⁶ With such high stakes, the services of a cultural ombudsman are not a luxury, but a necessity.

States increasingly recognize this necessity as our society becomes more diverse, resulting in more minorities encountering the court system. The Commission on the Future of California Courts has recommended that courts “develop the ability to explain the fundamentals of the dispute resolution process to disputants from different cultures.”⁷ The Washington State Minority and Justice Task Force found that “[m]inorities believe that bias pervades the entire legal system”⁸ and proposed creating an ombudsman position to address the numerous complaints it received.⁹ The Oregon Supreme Court Task Force on Racial and Ethnic Issues in the Judicial System noted requests for “‘cultural interpreters,’ ‘cultural advocates’ or ombudspersons.”¹⁰ New Jersey instituted an ombudsman program in 1996.¹¹ Although New Jersey’s program is open to all and addresses a variety of complaints rather than specifically addressing cultural barriers faced by minority defendants, more minorities than Caucasians used the ombudsman program during the period of December 1996 to December 1997.¹² This indicates that minorities need and desire assistance in understanding court processes and would benefit from the services of a cultural ombudsman.

This Article defines the term “cultural ombudsman,” explains why a cultural ombudsman is needed, and examines the constitutional bases for a

6. See, e.g., Clendinen, *supra* note 1 (describing an error in a Georgia court where one Vietnamese man was put on trial for murder in the place of another Vietnamese man).

7. Bert Eljera, *APAs and the Law: Trial by Fire*, ASIAN WEEK, June 7-13, 1996, at <http://www.asianweek.com/060796/TrialbyFire.html>.

8. WASH. STATE MINORITY AND JUSTICE TASK FORCE, FINAL REPORT 10 (1990), available at <http://www.courts.wa.gov/committee/pdf/TaskForce.pdf>.

9. *Id.* at 18.

10. *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System*, 73 OR. L. REV. 823, 894 (1994) [hereinafter *Oregon Task Force*].

11. N.J. SUPREME COURT COMM. ON MINORITY CONCERNS, 2000-2002 REPORT 77, available at <http://www.judiciary.state.nj.us/reports/minconpart1.pdf> [hereinafter *NEW JERSEY REPORT*].

12. *Id.* at 82. More minorities participated in the program than Caucasians—56.7% of the participants were African American, Hispanic/Latino, Asian, Native American, and other races, and 43% of participants were Caucasian. *Id.*

cultural ombudsman. Cultural ombudsman is defined in Part II. Part III sheds further light on the cultural ombudsman by showing how a cultural ombudsman is similar to a consular official. Part IV delineates the reasons why a minority defendant needs the assistance of a cultural ombudsman. The constitutional bases for providing the minority defendant with a cultural ombudsman is outlined in Part V.

II. THE DEFINITION OF AN OMBUDSMAN

An ombudsman is commonly viewed as someone who merely addresses complaints¹³—a “complaint resolver.”¹⁴ This accords with the Black’s Law Dictionary definition of ombudsman as “[a]n official appointed to receive, investigate, and report on private citizens’ complaints about the government.”¹⁵ Ombudsmen are known to protect “individual rights against the excesses of public and private bureaucracies.”¹⁶ Similarly, *cultural* ombudsmen protect the individual rights of minority defendants against biases within the criminal justice system.¹⁷ More than just a receptacle for complaints, the cultural ombudsman is an “advocate”¹⁸ who advocates on behalf of one particular constituency, that constituency being minority defendants in the criminal justice system.

III. ANALOGIZING THE CULTURAL OMBUDSMAN AND MINORITY DEFENDANT TO THE CONSULAR OFFICIAL AND FOREIGN NATIONAL

The cultural ombudsman who assists the minority defendant is similar to the consular official who assists the foreign national. Both are needed to help a defendant unfamiliar with American culture navigate the labyrinth of the American criminal justice system, and both are “fundamental to the

13. See Michele Bertran, *Judiciary Ombudsman: Solving Problems in the Courts*, 29 FORDHAM URB. L.J. 2099, 2101 (2002) (explaining that an ombudsman “designates an office that investigates and resolves complaints about the functioning of an entity”).

14. NEW JERSEY REPORT, *supra* note 11, at 77.

15. BLACK’S LAW DICTIONARY 1121 (8th ed. 2004).

16. AM. BAR ASS’N, STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES 1 (rev. Feb. 2004), *available at* <http://www.abanet.org/adminlaw/ombuds/115.pdf> [hereinafter ABA OMBUDS STANDARDS].

17. See *Oregon Task Force*, *supra* note 10, at 894.

18. Cf. ABA OMBUDS STANDARDS, *supra* note 16, at 1 (stating that “[a]n Advocate Ombuds may be located in either the public or private sector and . . . is authorized . . . to advocate on behalf of individuals . . . found to be aggrieved”).

fair administration of our justice system.”¹⁹

A. *Similarities Between the Minority Defendant and the Foreign National*

A foreign national and a minority defendant face similar cultural barriers. The foreign national “is inherently prejudiced when detained or in custody in a foreign criminal justice system”²⁰ because the foreign national “will not understand the ‘nation’s customs, police policies, or criminal proceedings.’”²¹ Similarly, the minority defendant is inherently prejudiced because the minority defendant does not understand United States court proceedings.²² For example, in *United States v. Leung*,²³ the court allowed two Chinese defendants, Chi Chak Leung and Irving Chin, to withdraw their guilty pleas because “linguistic and cultural difficulties hampered [Leung’s] understanding of the proceedings” and “linguistic and cultural barriers led to [Chin] misunderstanding his guilty plea and its consequences.”²⁴ Minority defendants such as Leung and Chin in the criminal justice system are inherently prejudiced because they are similar to foreign nationals who encounter cultural barriers that impair their understanding of the criminal proceedings.²⁵

B. *Similarities Between the Cultural Ombudsman and the Consular Official*

The consular official and cultural ombudsman perform similar functions in helping the defendant avoid legal pitfalls caused by cultural differences.²⁶ First, both can “offer information to the [defendant] about the legal system in which he [or she] is detained in comparison to [the]

19. Cf. *Robinson v. Ignacio*, 360 F.3d 1044, 1057 (9th Cir. 2004) (discussing the importance of a defendant’s right to counsel).

20. Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT’L L. 565, 606 (1997) (citation omitted).

21. *Id.* at 605 (quotation omitted).

22. See *United States v. Leung*, 783 F. Supp. 357, 360 (N.D. Ill. 1991) (describing the difficulties confronted by minority defendants in United States court proceedings).

23. *United States v. Leung*, 783 F. Supp. 357.

24. *Id.* at 360-61.

25. See *id.* (explaining the cultural difficulties confronted by minority defendants).

26. See Linda Jane Springrose, Note, *Strangers in a Strange Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations*, 14 GEO. IMMIGR. L.J. 185, 195 (1999) (describing the role of a consular official who provides information about a foreign country’s legal system to detainees).

home legal system.”²⁷ Second, both can help a defendant “obtain a greater understanding of the charges and maximum sentence” to assist the defendant “when considering plea offers and the presentation of his [or her] defense.”²⁸ Third, both can address general obstacles presented by cultural barriers.²⁹

These functions are best performed by the consular official or cultural ombudsman instead of the criminal defense attorney whose focus is on *legal*, rather than *cultural*, matters. Thus, just as “[c]riminal defense attorneys are not equipped to provide the same services as the local consulate,”³⁰ criminal defense attorneys are similarly ill-equipped to provide the same services as the cultural ombudsman. And just as a consular official “may very well make a difference to a foreign national, in a way that trial counsel is unable to provide,”³¹ the same is true of a cultural ombudsman, who can provide needed cultural expertise to the minority defendant in a way that trial counsel cannot.

In effect, the consular official and cultural ombudsman can each serve as a “cultural bridge”³² connecting two different cultures—the minority defendant’s culture and American culture. The cultural bridge provides two-way communication between the minority defendant and other participants in the legal system, which allows both sides a greater understanding of the cultural hurdles to overcome.

IV. WHY A CULTURAL OMBUDSMAN IS NEEDED

A minority defendant needs a cultural ombudsman because (1) cultural diversity in society leads to cultural clashes in the courtroom, (2) cultural differences pose a greater problem than language differences, (3) courtroom participants misunderstand the cultural habits of minority defendants, (4) cultural knowledge can help a minority defendant’s case whereas cultural ignorance can harm a minority defendant’s case, and (5) the cultural ombudsman can provide cultural expertise and guidance when other courtroom participants cannot.

27. *Id.*

28. *State v. Ledezma*, 626 N.W.2d 134, 151 (Iowa 2001).

29. *See id.* at 151-52 (describing a consular official’s duty to investigate applicable law).

30. *Id.* at 152.

31. *Id.*

32. *See United States v. Chaparro-Alcantara*, 226 F.3d 616, 622 (7th Cir. 2000) (outlining the functions of consular access) (quotation omitted).

A. *The Reality of Cultural Diversity and Cultural Clashes*

A minority defendant needs a cultural ombudsman because “American law . . . does not formally take culture into account. Indeed, for the most part, American courts assume a cultural homogeneity for purposes of applying one standard of the law to everyone.”³³ But the assumption of cultural homogeneity clashes with the reality of cultural diversity in America, where minorities constitute an increasing percentage of the population.³⁴

Cultural diversity in society inevitably leads to cultural collisions in the courtroom that may “undermin[e] the fact finding process to such an extent that factual conclusions may rest upon nothing more substantial than the quicksand of cultural bias.”³⁵ Thus, it is no surprise that minorities face numerous problems in the criminal justice system. Minorities are more likely to be arrested, charged, convicted, and incarcerated.³⁶ According to the Oregon Task Force, “[m]any of the problems . . . stem from cultural differences between minorities and nonminorities.”³⁷ Such problems are predictable when an increasing minority population, with many diverse cultures, encounters a court system based on the dominant culture where “[l]argely nonminority judges and court staff do not understand the cultures of minorities who appear in the courts.”³⁸

Likewise, minorities, especially those whose cultural customs differ from long-term United States residents, are unfamiliar with United States culture and court processes.³⁹ According to the Georgia Human Relations Commission Executive Director, “immigrants and new arrivals from foreign countries face a lack of understanding of our system.”⁴⁰ They do not understand how courts function and where they fit within the court

33. JILL NORGREN & SERENA NANDA, *AMERICAN CULTURAL PLURALISM AND LAW* 265 (2d ed. 1996).

34. See Richard W. Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. NEW ENG. L. REV. 193, 193 (1997) (discussing the increasing racial and ethnic diversity).

35. *Dia v. Ashcroft*, 353 F.3d 228, 275 n.2 (3d Cir. 2003) (McKee, J., concurring in part and dissenting in part).

36. *Oregon Task Force*, *supra* note 10, at 830.

37. *Id.* at 829.

38. *Id.*

39. Ga. Supreme Court Comm’n on Racial and Ethnic Bias in the Court System, *Let Justice Be Done: Equally, Fairly, and Impartially*, 12 GA. ST. U. L. REV. 687, 735 (1996) [hereinafter Ga. Supreme Court Comm’n].

40. *Id.* at 736.

system.⁴¹ “Many [immigrants] do not understand the complexities of the system,” according to Diane Yu, California State Bar general counsel.⁴² The Oregon Task Force reported that “[s]ignificant numbers of non-English-speaking litigants are disadvantaged because they cannot understand the court system and its decisions.”⁴³

B. *Cultural Barriers Pose a Greater Challenge than Language Barriers*

A minority defendant needs a cultural ombudsman because the minority defendant faces not only *language* barriers, but also *cultural* barriers. According to Phyllis Stallman, owner of a translation agency in Atlanta, cultural barriers pose a greater challenge for immigrants because they do not understand the United States legal system.⁴⁴ For Seilavong Doeung, director of the nonprofit organization Bridging the Gap that assists immigrants, the legal issues affecting immigrant communities go “deeper than language.”⁴⁵ According to the Oregon Task Force, “[p]roblems relating to [legal] access do not result solely from language incompatibility.”⁴⁶

Cultural incompatibility also creates problems for minority defendants, such as the minority defendant waiving important rights, mistakenly admitting to charges, and suffering unanticipated consequences.⁴⁷ For example, there have been cases where an immigrant defendant pays a bond and is released, but fails to appear on the day of trial because of a mistaken belief that the bond resolved the case.⁴⁸ Another example of cultural incompatibility is if an immigrant defendant from an authoritarian regime⁴⁹ *distrusts* authority and thus fails to cooperate with his or her own defense attorney, believing the defense attorney to be aligned with the authorities.⁵⁰ Or if the immigrant defendant *fears* authority⁵¹ and thus agrees to whatever the authorities demand,

41. *Id.*

42. Eljera, *supra* note 7.

43. *Oregon Task Force, supra* note 10, at 839.

44. Renuka Rayasam, *All in the Interpretation: Georgia Court Translators Give Voice to Defendants*, ATLANTA J.-CONST., July 9, 2003, at F1.

45. *Id.*

46. *Oregon Task Force, supra* note 10, at 894.

47. Flo Messier, Note, *Alien Defendants in Criminal Proceedings: Justice Shrugs*, 36 AM. CRIM. L. REV. 1395, 1396 (Fall 1999).

48. Rayasam, *supra* note 44.

49. *Id.*

50. Messier, *supra* note 47, at 1402.

51. Rayasam, *supra* note 44.

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including admitting to crimes the defendant did not commit.⁵² These problems stem from cultural, rather than language, differences.

C. *The Cultural Habits of Minority Defendants Can Be Viewed Negatively in the Courtroom*

A minority defendant needs a cultural ombudsman because the cultural habits of the minority defendant can be misunderstood by those unfamiliar with the minority defendant’s culture.⁵³ The cultural habits of minority defendants include (1) “speak[ing] in an unnaturally loud or soft voice,” (2) failing “to verbalize remorse,” (3) using “[e]xaggerated gestures” that are common to the minority defendant’s culture, (4) failing to express emotion, and (5) failing to make eye contact.⁵⁴

Examining one of these cultural habits—failing to make eye contact—suffices to show the critical role of culture in the courtroom. Although “eye contact plays a central role in evaluating the credibility of a witness in our own [Western] culture,”⁵⁵ maintaining eye contact can be problematic for some minority defendants. In Western culture, maintaining eye contact indicates trustworthiness, whereas avoiding eye contact indicates deception.⁵⁶ But “in certain Asian cultures, avoiding eye contact is a sign of respect, and direct eye contact is considered inappropriate in traditional Navajo society.”⁵⁷ According to Judge Chen, “[i]n some cultures, meeting the eyes of another is a sign of disrespect under certain circumstances.”⁵⁸ Accordingly, although a judge or juror may view avoiding eye contact as deceptive, the minority defendant may do so while testifying as a sign of respect.⁵⁹ Thus, minor “inconsistencies” that

52. *Messier*, *supra* note 47, at 1403 (citing Ga. Supreme Court Comm’n, *supra* note 39, at 777).

53. *See id.* at 1401 (discussing misinterpretation of a foreign-born person’s actions, appearance, and demeanor).

54. *Id.*

55. *Dia v. Ashcroft*, 353 F.3d 228, 275 (3d Cir. 2003) (McKee, J., concurring in part and dissenting in part).

56. *Id.* at 276 (McKee, J., concurring in part and dissenting in part) (citations omitted).

57. *Id.* (McKee, J., concurring in part and dissenting in part) (citing Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 394 (2002)).

58. Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CAL. L. REV. 1109, 1118 (2003) (citing Tremblay, *supra* note 57, at 394).

59. *Dia v. Ashcroft*, 353 F.3d at 276 (McKee, J., concurring in part and dissenting in part).

ought to convey nothing more than cultural differences or the fragile imperfections of memory can assume unwarranted importance.”⁶⁰

D. *Cultural Knowledge or Ignorance Can Affect the Outcome of a Case*

A cultural ombudsman is needed by minority defendants because cultural knowledge or ignorance can affect the outcome of a case.⁶¹ This is demonstrated by a tribal court custody case presided over by Chief District Judge Philip Lujan, a member of the Kiowa/Taos Pueblo Tribes.⁶² During closing arguments, the Caucasian lawyer representing the father criticized the Native American “mother for allowing their five-year-old son to sleep with her.”⁶³ But this was not unusual in Native American culture.⁶⁴ As Judge Lujan revealed, “I knew that most of the Indian people in the courtroom had slept with their relatives during part of their childhood as well. This was a common Indian family way and certainly not a basis to change custody.”⁶⁵ Not surprisingly, the Caucasian attorney representing the father lost the motion for a change in custody.⁶⁶ Judge Lujan’s cultural knowledge and the Caucasian attorney’s cultural ignorance helped resolve the issue in favor of the mother and against the father.

E. *The Courtroom Participants Can Fail the Minority Defendant*

A minority defendant needs a cultural ombudsman because the present composition of the criminal justice system that includes police officers, defense attorneys, prosecutors, and judges fails to ensure a minority defendant’s right to a fair trial. The case of Hen Van Nguyen, the Vietnamese immigrant mistakenly tried for murder, is an example of the courtroom participants failing a minority defendant.⁶⁷ The failure is more pronounced when even the defense attorney and judge fail the minority defendant.

60. *Id.* at 276-77 (McKee, J., concurring in part and dissenting in part).

61. Chen, *supra* note 58, at 1117-19 (arguing that diversity “enhances the quality of judicial decision making”).

62. D. Michael McBride III, *Strategies for Representing Minority Clients at Court*, GPSOLO, Jan.-Feb. 2004, at 28, 31-32.

63. *Id.* at 32.

64. *Id.*

65. *Id.*

66. *Id.*

67. *See* Clendinen, *supra* note 1.

1. *Defense Counsel Can Fail the Minority Defendant*

A public defender can fail to adequately address cultural barriers facing the minority defendant because of excessive caseloads resulting in limited time with clients, limited resources, or inadequate training.⁶⁸ A defense attorney can also fail the minority defendant if the minority defendant distrusts government authority after having departed an authoritarian country, and then extends his or her distrust to the defense attorney, believing the defense attorney to be aligned with government authority.⁶⁹ Failure is assured if the defense attorney is unaware of the minority defendant's culture and fails to understand how cultures can clash in the courtroom. Cultural awareness training for defense attorneys might help, but according to the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, “[t]here is a lack of multi-cultural skills training in specific areas, for example, how to prepare a minority defendant or victim to testify as a witness.”⁷⁰

Cultural obstacles remain, however, even with cultural awareness training. As Judge McKee noted, a culturally aware defense attorney who advises the client to maintain eye contact may make the situation worse if the client then “answer[s] questions in a manner that causes discomfort and thereby exhibit[s] a demeanor that will undermine the client's credibility.”⁷¹ The presence of the defense attorney, then, can be viewed as a necessary but insufficient condition to ensure a fair trial for the minority defendant. Although the defense attorney is needed to address *legal* issues, the cultural ombudsman is needed to address *cultural* issues.

2. *Judges Can Fail the Minority Defendant*

Judges can also fail the minority defendant. For example, the judge in the case involving the Vietnamese man mistakenly tried for murder

68. See Jennifer Welch, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 CAL. L. REV. 541, 563 (2004) (listing the constraints on public defender offices) (citing Charles J. Ogletree Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1240 (1993)).

69. Messier, *supra* note 47, at 1402 (citing Cole & Maslow-Armand, *supra* note 34, at 195).

70. Minn. Supreme Court Task Force on Racial Bias in the Judicial Sys., *Executive Summary*, 16 HAMLIN L. REV. 477, 502 (1993).

71. *Dia v. Ashcroft*, 353 F.3d 228, 276-77 n.5 (3d Cir. 2003) (McKee, J., concurring in part and dissenting in part).

failed the minority defendant, Hen Van Nguyen, in several instances.⁷² First, the judge failed to realize that Mr. Nguyen was misidentified as the defendant in the murder trial.⁷³ Second, the judge failed to investigate further when the interpreter told the judge that he was having problems communicating with Mr. Nguyen.⁷⁴ Third, the judge failed to understand the importance of a minority defendant's ability to communicate when the judge dismissively responded to the interpreter's concerns that Mr. Nguyen "could understand the proceedings 'as we move along.'"⁷⁵ Mr. Nguyen's case demonstrates that judges, like others, are prone to cultural biases, and that a cultural ombudsman can play an important role in countering the cultural biases a minority defendant faces in a courtroom.

V. THE CONSTITUTIONAL BASES FOR THE CULTURAL OMBUDSMAN

A minority defendant is entitled to a cultural ombudsman based on the Fifth and Sixth Amendments, which guarantee criminal defendants due process,⁷⁶ the right to be present at trial, and the right to a fair trial.⁷⁷ However, a minority defendant is denied a fair trial if cultural barriers prevent the minority defendant from understanding the court proceedings or participating in his or her own defense. Examining other defendants with similar difficulties helps reveal the constitutional bases for the cultural ombudsman.

A. *A Criminal Defendant's Right to Counsel*

"The purpose of the Sixth Amendment counsel guarantee—and hence the purpose of invoking it—is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government"⁷⁸ Like the "unaided layman"⁷⁹ who is constitutionally entitled to an

72. See *Tieu v. State*, 358 S.E.2d 247, 248 (Ga. 1987).

73. *Id.*

74. *Id.*

75. *Id.*

76. See U.S. CONST. amend. V (guaranteeing "no person shall . . . be deprived of life, liberty, or property without due process of law").

77. See *id.* amend. VI (guaranteeing a criminal defendant the right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense").

78. *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991) (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)).

79. *Id.* (quoting *United States v. Gouveia*, 467 U.S. at 189).

attorney, the minority defendant is entitled to a cultural ombudsman. Indeed, if the unaided layman from the majority culture requires the assistance of counsel because the layman does not understand the court proceedings, then surely a minority defendant from the minority culture requires the assistance of a cultural ombudsman because the minority defendant also does not understand the court proceedings.⁸⁰

B. *A Non-English-Speaking Defendant’s Right to an Interpreter*

A minority defendant is entitled to the services of a cultural ombudsman because “[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.”⁸¹ However, cultural barriers for the minority defendant, like language barriers for the non-English-speaking defendant, can create a situation whereby the minority defendant, though physically present in the courtroom, is effectively barred from the courtroom because the minority defendant does not understand the court proceedings. As stated in *State v. Natividad*,⁸² a case involving language interpretation, the defendant is “able to observe but not comprehend the criminal processes” and this “possibly infring[es] upon the accused’s basic right to be present in the courtroom at every stage of his trial.”⁸³ Moreover, “[t]he inability of a defendant to understand the proceedings would be . . . fundamentally unfair.”⁸⁴ Although *Natividad* addressed language barriers, its reasoning also applies to cultural barriers because both barriers impair a minority defendant’s ability to understand the court proceedings. Thus, just as “linguistic presence”⁸⁵ is critical to ensure a fair trial, “cultural presence” is also critical to ensure a fair trial.

80. See *id.* (discussing the Sixth Amendment guarantee of counsel as a protective measure) (citing *United States v. Gouveia*, 467 U.S. at 189).

81. *Illinois v. Allen*, 397 U.S. 337, 338 (1970) (discussing the parameters of the Confrontation Clause) (citing *Lewis v. United States*, 146 U.S. 370, 372 (1892)).

82. *State v. Natividad*, 526 P.2d 730 (Ariz. 1974) (en banc).

83. *Id.* at 733 (internal quotation omitted) (citing *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970); *Lewis v. United States*, 146 U.S. at 372).

84. *Id.*

85. Heather Pantoga, *Injustice in Any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin*, 82 MARQ. L. REV. 601, 619 (1999) (defining “linguistic presence” as “being able to comprehend the proceedings enough to constitute presence by a due process standard” or “legal presence in a language context”).

C. *A Foreign National Defendant's Right to Consul*

The similarities between the minority defendant and the foreign national defendant reveal a constitutional basis for the cultural ombudsman. The foreign national needs consular assistance⁸⁶ and the minority defendant needs cultural ombudsman assistance to overcome cultural obstacles within the criminal justice system. A foreign national's "right to consul is analogous to the Fifth and Sixth Amendment rights to counsel and to a fair trial, and may be implied from the right not to be deprived of liberty except under due process of law."⁸⁷ Likewise, a minority defendant's right to a cultural ombudsman can be derived from the Fifth and Sixth Amendment rights to counsel and the due process requirement.⁸⁸

D. *The Mentally Incompetent Defendant's Right Not to Be Tried*

The minority defendant and the mentally incompetent defendant face similar hurdles in the criminal justice system. "[T]he mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself."⁸⁹ This is so because the mentally incompetent defendant "lacks the capacity to understand the nature and object of the proceedings against him . . . and to assist in preparing his defense."⁹⁰ Similarly, the minority defendant with a different cultural background will not understand the court proceedings and, though physically present in the courtroom, will be unable to assist in his or her own defense. Thus, just as the "criminal trial of an incompetent defendant violates due process,"⁹¹ the criminal trial of a minority defendant without the aid of a cultural ombudsman also violates due process.

VI. CONCLUSION

A minority defendant unfamiliar with the criminal justice system needs a cultural ombudsman because the minority defendant faces significant cultural barriers in a criminal justice system that is not

86. Springrose, *supra* note 26, at 195 (describing the role of a consular official who provides information to detainees about a foreign country's legal system).

87. *Id.* at 199 (citing U.S. CONST. amends. V, VI, XIV).

88. See *supra* notes 76-77 and accompanying text.

89. Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960).

90. *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

91. *Medina v. California*, 505 U.S. 437, 453 (1992) (citations omitted).

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structured to accommodate diverse cultures. The inevitable culture clash that occurs adversely affects the minority defendant’s ability to receive a fair trial. A cultural ombudsman can help minority defendants surmount the cultural barriers and will enable a minority defendant to understand the court proceedings, assist in his or her own defense, and be fully present in the courtroom.