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Cultural Defenses in Georgia: Cultural Pluralism and Justice - Can Georgia Have Both?

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CULTURAL DEFENSES IN GEORGIA: CULTURAL PLURALISM AND JUSTICE—CAN GEORGIA HAVE BOTH?

INTRODUCTION

A Japanese-American mother drowned her two young children and tried to drown herself in order to purge the shame of her husband's infidelity.[1] The mother later explained that her actions were a part of the customary Japanese practice of *oya-ko shinju*, or mother-child suicide.[2] She spent only the year she was on trial in jail.[3]

A Hmong immigrant abducted a Laotian-American woman from her place of work and raped her.[4] The attacker later explained that his behavior was a customary way to choose a bride in his native tribe.[5] A judge sentenced him to only 90 days in jail.[6]

After learning of his wife's adulterous affair, a Chinese-American man bludgeoned her to death with a hammer.[7] At trial, an expert explained that the husband's actions were a natural response because the Chinese traditionally viewed a wife's adultery as proof of her husband's weak character and divorce as shameful.[8] A judge sentenced him to five years probation.[9]

Police arrested an Albanian-American father after witnesses reported that he fondled his four-year-old daughter under her dress.[10] He told the prosecutors that because parent-child sex is unimaginable

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1. Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1093, 1109-10 (1996).
2. *Id.* at 1109-10 & n.79.
3. *Id.* at 1093.
4. *See* Dierdre Evens-Pritchard & Alison D. Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1, 12 (1995).
5. *See id.* at 8.
6. *Id.* at 26.
7. Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 102 (1997).
8. *Id.*
9. *Id.* at 120.
10. James J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845, 1851 (1999).

in Albania, "all forms of parental fondling constitute socially acceptable behavior."[11] The prosecutors dropped the charges.[12]

As the cases above illustrate, growing cultural diversity in the United States has created a variety of novel legal issues when determining a defendant's culpability. because cultural minorities sometimes ask the legal system to consider their cultural background.[13]

Five years ago, in the case of *Nguyen v. State*, the Georgia Supreme Court recognized that in rare situations cultural beliefs may be admissible as evidence of self-defense.[14] In *Nguyen*, the defendant, an immigrant woman from Vietnam, claimed that her husband and adult stepdaughter were verbally abusive and disrespectful toward her.[15] Even after her husband informed the defendant that he intended to divorce her, she continued to reside with him.[16] After further verbal abuse and threats of physical abuse by her stepdaughter, the defendant shot both her husband and stepdaughter.[17]

At trial, the defendant's attorney employed a battered-person defense with a cultural component.[18] The defense argued the verbal abuse the defendant suffered at the hands of her husband and stepdaughter incited a fear that a person born and raised in the United States may not experience.[19]

The trial court refused to allow the presentation of expert testimony in support of the defense's argument,, and the jury convicted Nguyen of aggravated assault.[20] Because Nguyen's family subjected her to verbal and not physical abuse, the Georgia Court of

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11. *Id.*
12. *Id.*
13. *See* Kim, *supra* note 7, at 102; ALISON DUNDES RENTELN, THE CULTURAL DEFENSE 5 (2004).
14. *See* Nguyen v. State, 520 S.E.2d 907, 909 (Ga. 1999).
15. *Id.* at 908.
16. *Id.*
17. *Id.*
18. *See* Nguyen v. State, 505 S.E.2d 846, 847-48 (Ga. Ct. App. 1998), *aff'd*, 520 S.E.2d 907 (Ga. 1999).
19. *Id.* at 848; *see* Trisha Renaud, *Battered Syndrome Defense Argued to Justices*, FULTON COUNTY DAILY REPORT, Apr. 14, 1999, at 1. The defense argued that "[t]he cultural evidence tends to prove why this woman would be threatened under the circumstances. . . . Without this, the jury can't understand." *Id.*
20. *Nguyen*, 505 S.E.2d at 847.

Appeals affirmed the lower court's decision.[21] Further, the Court of Appeals stated that evidence of a defendant's cultural background is never relevant and found it unnecessary for the jury to understand the defendant's reaction to her family's demeaning behavior.[22]

A unanimous Georgia Supreme Court disagreed with the appellate court's ruling regarding cultural evidence and explained that such evidence may be relevant to assist the jury in understanding "why an accused acted in the way he or she did," and the court held defendants may use strong cultural beliefs as justification for criminal behavior and evidence of self-defense.[23] Although the court found the cultural evidence inadmissible in this case, the Georgia Supreme Court set the stage for the use of evidence of a defendant's cultural background.[24]

This Note seeks to address how a Georgia court should treat a defendant accused of committing a crime possibly motivated by culture. Part I traces the history of the cultural defense by defining culture and analyzing the different strategies defendants have asserted under the guise of the defense.[25] Part II examines how defendants incorporate cultural arguments in the existing criminal justice framework.[26] Part III explores the nature of the debate surrounding the admissibility of cultural evidence and analyzes the rationales supporting and opposing the formal adoption of the cultural

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21. *Id.*
22. *See id.*
23. Nguyen v. State, 520 S.E.2d 907, 909 (Ga. 1999).
24. *Id.*

> The expert testimony proffered by the defense showed the loss of status, humiliation and possible adverse spiritual consequences to appellant and her family from her husband's failure to maintain appellant's proper position in the household. However, there was no evidence that individuals sharing appellant's cultural background would believe themselves to be in danger of receiving any physical harm as a result of such loss of status and disrespectful treatment. While we can envision rare situations in which such evidence might be relevant to assist the jury in understanding why an accused acted in the way he or she did, that situation is not present in this case.

Id.

25. *See infra* Part I.
26. *See infra* Part II.

defense.[27] Part IV canvasses the proposed methods of incorporating cultural factors in the criminal justice process.[28]

I. THE CULTURAL DEFENSE

A. *Background*

Although the term "cultural defense" has attracted media attention mostly in homicide cases, defendants have raised the cultural defense in a myriad of criminal prosecutions: sexual assault, child abuse, animal cruelty, arson, bribery, and drug offenses.[29] While American jurisprudence does not recognize it as a formal criminal defense, the term cultural defense comprises different strategies in which a defendant tries to admit evidence of his cultural background to explain, excuse, or justify otherwise criminal conduct for mitigatory or exculpatory purposes.[30] Defendants contend their culture is so ingrained that it predisposes them to actions that may conflict with the laws of the dominant Western culture.[31] By seeking to introduce cultural evidence, the defendant argues that "[his] native culture would have excused [his] conduct, that cultural factors . . . are relevant to a determination of [his] state of mind at the time of the criminal act, or that cultural factors warrant reduced charges or punishment."[32]

Defendants may raise cultural arguments during many stages of the criminal justice process.[33] "Culture can affect pretrial decisions such as whether to arrest, prosecute, or negotiate a plea. Defendants may seek to introduce cultural evidence at trial to negate a required element of a crime, to secure an acquittal, or to support an established

27. *See infra* Part III.

28. *See infra* Part IV.

29. *See* RENTELN, *supra* note 13, at 6.

30. *See* Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1296 & n.17 (1986).

31. Alison Dundes Renteln, *In Defense of Culture in the Courtroom*, *in* ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES 194, 196 (Richard A. Shweder et al. eds., 2002).

32. Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1096 (1994).

33. RENTELN, *supra* note 13, at 7.

defense such as provocation or self-defense."[34] Defendants may also present cultural factors for consideration during sentencing.[35] The crux of the cultural defense rests on the foundational criminal law concept that people should not be held responsible for their acts without the requisite intent.[36]

The majority of American courts have been unwilling to allow a defendant's culture "to constitute an independent, substantive defense in criminal trials."[37] They have stood by the proposition that ignorance of the law is no excuse, and all who live in a country are subject to the same laws regardless of their nationality or length of residence.[38] Despite the majority's general rejection of cultural evidence, some jurisdictions are progressively admitting evidence of cultural practices in certain situations.[39]

The majority of these courts have limited cultural defenses primarily to evidence of the defendant's state of mind at the time of the crime.[40] Cultural factors may also be relevant in other areas, such as establishing a case for one or more traditional criminal law defenses like negating the requisite intent of a crime and in the mitigation of charges and sentences.[41]

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34. *Id.*

35. *See id.*

36. Sing, *supra* note 10, at 1849-50.

37. Note, *supra* note 30, at 1293.

38. *See* Cheek v. United States, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.").

39. *See, e.g.*, Nguyen v. State, 520 S.E.2d 907 (Ga. 1999) (holding cultural beliefs may be relevant as evidence of self-defense at trial); People v. Kimura, No. A-091133, slip op. (Santa Monica Super. Ct. 1985) (allowing defendant to employ cultural factors when asserting a cognitive insanity defense); People v. Moua, 2004 WL 383539 at *1 (Cal. App. 3d Jan. 30, 2004) (admitting cultural evidence to bolster a mistake of fact defense); *see also* Coleman, *supra* note 1, at 1094; Malek-Mithra Sheyb, *Cultural Defense: One Person's Culture Is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L. REV. 751, 752 (1987); Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 57-58 (1994).

40. *See* Note, *supra* note 30, at 1294.

41. *Id.* at 1294-95.

B. Defining Culture

In 1871, British anthropologist Sir Edward Burnett Tylor was the first to definitively define culture.[42] Culture, according to Tylor, is a complex intermingling of "knowledge, belief, art, law, morals, custom, and . . . habits" that members of a society may acquire.[43] Modern definitions tend to focus more on the differences between the behavior itself and the mental processes underlying that behavior.[44] Scholars currently regard culture as encompassing the values and beliefs that people use to generate and reflect behavior.[45] In accordance with the view of the modern scholars, this Note will adopt renowned anthropologist Professor William Haviland's definition of culture:

> [A] set of rules or standards shared by members of a society which, when acted upon by the members, produce behavior that falls within a range of variance the members consider proper and acceptable. . . . [C]ulture consists of the abstract values, beliefs, and perceptions of the world that lie behind people's behavior, and which that behavior reflects.[46]

With such a broad definition, the extent to which courts could potentially admit evidence under the cultural defense is boundless.[47]

C. Defining the Cultural Defense

Although recent immigrants to the United States have primarily been the ones to assert it, the cultural defense is not solely limited to them.[48] Nonimmigrant defendants have asserted subsets of the

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42. Michael Fischer, Note, *The Human Rights Implications of a "Cultural Defense,"* 6 S. CAL. INTERDISC. L.J. 663, 668 (1998).

43. *Id.* at 668.

44. *Id.*

45. *Id.* at 668-69.

46. *Id.*

47. *See id.* at 669.

48. *See* Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 LAW & SOC. INQUIRY 39, 41 (2003).

cultural defense based on the premise that social or environmental influences affected their mental functioning and caused the criminal conduct.[49]

1. Strategies Asserted by Immigrants

Some sociologists contend that there are two primary categories of cultural defense strategies: the cognitive and the volitional cultural defenses.[50] The cognitive cultural defense applies when a defendant asserts that his culture precluded him from realizing his actions constituted a crime.[51] The volitional cultural defense applies where a defendant asserts that although he knew the conduct was illegal, the defendant's culture compelled him to commit the act and he was unable to make his behavior conform to the law of the dominant Western culture.[52]

Other sociologists divide the defense into three categories: cultural reason, cultural tolerance, and cultural requirement.[53] "Cultural reason" is a defense strategy where a defendant attempts to introduce evidence of his culture to provide a reasonable explanation for his conduct and refute the inference that a jury would draw based on Western cultural traditions.[54] Defendants assert the cultural reason defense most often in cases of child abuse in immigrant families where the defendant intended to provide medical assistance or in suspected child molestation cases when the defendant was demonstrating affection according to his cultural traditions.[55]

"Cultural tolerance" is a defense strategy where a defendant admits that he committed the act with the requisite harmful intent, but he

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49. *See generally* Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731 (1996) (focusing on the "premise that the defendant's criminal conduct was caused, or significantly influenced, by his exposure to social environmental factors or, . . . toxins affecting his mental functioning"); MOLNAR GEORGIAN CRIMINAL LAW - CRIMES AND PUNISHMENTS §§ 4-7 (Robert E. Cleary ed., 6th ed. Supp. 2004).

50. Fischer, *supra* note 42, at 669-70.

51. *Id.*

52. *See id.* at 670.

53. *See* Levine, *supra* note 48, at 46.

54. *See* Levine, *supra* note 49, at 49.

55. *See id.* at 50.

argues that he should not be criminally liable because his culture tolerates his criminal act as an acceptable response.[56] Cultural tolerance cases typically involve charges of child or spousal abuse when the defendant asserts that he was disciplining the victim in accordance with his culture.[57]

"Cultural requirement" is a defense strategy where the defendant contends that his native cultural values compelled him to commit the criminal act.[58] This defense is most common in cases that involve ritual requirements such as female genital mutilation.[59]

2. *Strategies Asserted by Nonimmigrants*

Although it is primarily immigrant defendants who assert cultural defenses, members of indigenous groups and members of the dominant culture have also employed cultural defense strategies.[60] The following is a list and brief description of defenses nonimmigrants have raised that also fall into the category of cultural defenses, based upon the previously stated broad definition of culture.[61] Defendants who employ the "rotten social background" strategy assert that although they are technically guilty of committing the crime, they should receive a mitigated punishment because their severely disadvantaged backgrounds contributed to the commission of the criminal act.[62] Defendants who assert the "black rage" defense contend their criminal act was a result of their constantly subjection to the majority culture's oppressive racism and unfair prejudice.[63] "Urban psychosis" predicates that the defendant's unceasing exposure to violence significantly affected his cognitive functioning

56. *Id.* at 56-57.
57. *Id.* at 57.
58. *Id.* at 62.
59. *See id.* at 63.
60. *See generally* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 67-95 (2003); Kimberly M. Copp, *Black Rage: The Illegitimacy of a Criminal Defense*, 29 J. MARSHALL L. REV. 205, 207 n.14 (1995); Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 13 (1985); Falk, *supra* note 49, at 748-57.
61. *See infra* Part II.B.
62. *See* Delgado, *supra* note 60, at 13-14.
63. *See* Copp, *supra* note 60, at 207 & n.14; Falk, *supra* note 49, at 748-49.

and contributed to the commission of the criminal act.[64] A defendant who asserts a "media intoxication" strategy claims that his criminal acts were a result of his constant exposure to violence in the media.[65] "Gay panic" is the strategy where defendants try to bolster the defenses of insanity, diminished capacity, provocation, and self-defense by declaring that their deep-seeded homophobia caused temporary insanity.[66]

II. INCORPORATING CULTURAL ARGUMENTS INTO THE EXISTING CRIMINAL JUSTICE FRAMEWORK

Criminal defendants can assert two categories of affirmative and negative defenses.[67]

A. Affirmative Defenses

A defendant who asserts an affirmative defense argues, although the prosecution established the elements of the crime, the defendant should not be found guilty or punished because the defendant is less culpable for specified reasons.[68] Defendants can assert two broad categories of affirmative defenses: justification and excuse.[69]

1. Justification Defenses: Self-defense

"A justification defense is one that defines conduct 'otherwise criminal, which under the circumstances is socially acceptable and which deserves neither criminal liability nor even censure.'"[70]

A defendant may assert self-defense as a complete defense, if he used deadly force to defend himself because he reasonably believed

64. *See* Falk, *supra* note 49, at 758.
65. *See id.* at 742-48.
66. *See* LEE, *supra* note 60, at 68.
67. Kim, *supra* note 7, at 106.
68. *Id.* at 107.
69. *Id.*
70. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 16.03, at 202 (Lexis Publishing 3d ed. 2001) (quoting Peter D.W. Heberling, Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 916 (1975)).

deadly force was a necessary and proportionate response.[71] In cultural defense cases, the success of the defense turns on the determination of what constitutes a reasonable belief.[72] It is critical to the defendant's case in a culturally motivated crime that the judge apply a subjective interpretation of the reasonable belief test, i.e., viewed by a reasonable person from the defendant's culture. This allows the defendant to introduce cultural factors to help the jury understand how a person in the defendant's position would have reacted.[73]

2. *Excuse Defenses*

"[A]n excuse defense 'is in the nature of a claim that although the actor has harmed society, [the actor] should not be blamed or punished for causing that harm.'"[74]

a. Insanity

The insanity defense is based on the proposition that a defendant with a mental defect should not be held criminally responsible because deterrence has no effect on a person who either is unaware of what he is doing or cannot control his actions.[75] In other words, "[a] man who cannot reason cannot be subject to blame."[76]

Cognitive impairment and volitional impairment are the two basic concepts embedded in the different tests for the insanity defense.[77] Cognitive impairment "focuses attention on whether an individual perceived the nature of his act or that his conduct was wrong."[78] Conversely, the issue in volitional impairment is whether the defendant could control the his behavior and make it conform to the law even if the defendant knew it was wrong, regardless of his

71. *See* DRESSLER, *supra* note 70, §§ 18.01, 18.04.
72. *See* RENTELN, *supra* note 13, at 37.
73. *See id.* at 38.
74. DRESSLER, *supra* note 70, § 16.04, at 203.
75. *See id.*, § 25.03(A), at 341.
76. *Id.* § 25.03(B), 342 (quoting Holloway v. United States, 148 F.2d 665, 666-67 (D.C. Cir. 1945)).
77. RENTELN, *supra* note 13, at 24.
78. *Id.*

perception of the act.[79] The parent-child suicide case mentioned in the Introduction is an example of a defendant successfully asserting a cognitive insanity defense.[80] There, the defendant, "[b]ecause of her mental condition and her cultural background . . . did not perceive her parent-child suicide as an illegal act."[81]

b. Diminished Capacity

Often, courts cannot consider cultural defendants insane according to the strict tests within its given jurisdiction.[82] In those cases, defendants may raise the doctrine of diminished capacity, which holds the defendant less culpable than a fully rational defendant but more culpable than an innocent one.[83]

c. Duress

In some instances, a defendant can employ culture as part of the doctrine of duress to excuse his conduct.[84] The general elements for duress in many jurisdictions are the following:

> (1) another person threatened to kill or grievously injure the actor or a third party, . . . unless she committed the offense; (2) the actor reasonably believed that the threat was genuine; (3) the threat was 'present, imminent, and impending' at the time of the criminal act; (4) there was no reasonable escape from the threat except through compliance with the demands of the coercer; and (5) the actor was not at fault in exposing herself to the threat.[85]

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79. *Id.*

80. *See id.* at 25; *see also supra* INTRODUCTION.

81. RENTELN, *supra* note 13, at 228 n.5 (quoting Defense Sentencing Report, 13-14; People v. Kimura No. A-091133, slip. op. (Santa Monica Super. Ct. 1985)).

82. Alison Dundes Rentelin, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437, 465 (1993).

83. *See id.*

84. *See* RENTELN, *supra* note 13, at 30.

85. DRESSLER, *supra* note 70, § 23.01(B), at 297-98.

A cultural defendant may claim to be under a cultural imperative to commit an act and that failure to act would result in punishment within his community in accordance with customary law.[86]

d. Provocation

The doctrine of provocation, also known as the heat of passion rule, is based on the idea that a person provoked to kill does so without the requisite "malice aforethought" for the crime of murder and is, as a result, less culpable.[87] "In many homicide cases defendants invoke cultural arguments, many of which turn on the question of provocation."[88] The basic argument is the same circumstances would have provoked a reasonable person when the defendant's culture is considered.[89]

2. Negative Defenses

A negative or failure of proof defense is one where the defendant contends that the prosecution has not established its case against him.[90] The negative defense essentially involves showing that the prosecution has not met its burden of proof.[91] A prosecutor must establish every element of a crime beyond a reasonable doubt to convict a defendant, and a failure of proof defense asserts that the prosecution has failed to effectively prove all the elements of the alleged crime.[92]

a. Mistake of Fact

A defendant who asserts a mistake of fact defense essentially contends that he was either unaware of or mistaken about a fact related to an element of the crime.[93] The problem with arguing

86. RENTELN, *supra* note 13, at 30.
87. *Id.* at 31.
88. *Id.* at 32.
89. *See id.*
90. Kim, *supra* note 7, at 106-07.
91. *Id.* at 107.
92. *Id.*
93. DRESSLER, *supra* note 70, § 12.01, at 151.

mistake of fact in culturally motivated crimes is that the law requires that the mistake be an objectively reasonable one.[94] Because the law defines the objective reasonableness standard according to the dominant Western culture, it will be nearly impossible for a defendant from a non-Western culture to successfully present this defense.[95] A minority culture defendant may, however, argue that precluding him from effectively asserting a defense available to all others violates his equal protection rights.[96]

b. Lack of Specific Intent

In some cases, a defendant can use cultural factors to negate the requisite specific intent of a crime.[97] The previously discussed child fondling case is an example of an instance when a cultural defendant can employ such a strategy.[98] There, because the father did not touch his daughter for sexual gratification, the required specific intent was lacking.[99]

III. THE ARGUMENTS SURROUNDING A FORMAL ADOPTION OF THE CULTURAL DEFENSE

A. Arguments in Favor of Adopting a Formal Cultural Defense

The essential purpose of the cultural defense is to allow defendants to introduce cultural evidence and its relevance to the circumstances surrounding their case.[100] The rationale for the defense is a defendant's culture was so ingrained that it affected his behavior to the extent that either "(1) the individual simply did not believe that his actions contravened any laws, or (2) the individual felt compelled

94. *See* CULTURAL ISSUES IN CRIMINAL DEFENSE § 7.3(a), at 31 (James G. Connell & Rene L. Valladares eds., 2000).

95. *Id.*

96. *See id.*

97. *Id.* § 7.3(b), at 31.

98. *See id.*; *see also supra* INTRODUCTION.

99. *See* CULTURAL ISSUES IN CRIMINAL DEFENSE, *supra* note 94, § 7.3(b); *see also supra* INTRODUCTION.

100. RENTELN, *supra* note 13, at 187.

to act the way he did."[101] With the aforementioned purpose as their foundation, proponents of the cultural defense assert a variety of reasons to support its formal adoption.[102]

1. *The Principles of Multiculturalism and Cultural Plurality*

The *American Heritage Dictionary* defines multiculturalism as "[o]f or relating to a social or educational theory that encourages interest in many cultures within a society rather than in only a mainstream culture."[103] When applied to the cultural defense, the principle of multiculturalism suggests that if culture motivated a defendant's criminal act, evidence of that culture should be, at the very least, a factor in the determination of his guilt.[104] Thus, "[t]he cultural defense, by looking at relevant cultural factors, maintains and promotes cultural diversity."[105]

Finally, denying the cultural defense would send the message to minority culture communities that they must abandon their cultures because they are inferior to the dominant culture.[106] "[D]enial of the cultural defense would reveal an underlying fear of beliefs different from our own, a national ethnocentrism not consonant with the traditional American values of tolerance . . . [and] strike a blow to cultural diversity."[107]

2. *The Doctrine of Individualized Justice*

The doctrine of individualized justice is paramount to the principles that underlie the American criminal justice system.[108] It suggests that the legal system focuses on the actor, the act, motive, and intent during the criminal justice process, because defendants are

101. *Id.*
102. *See infra* Part III.A(1)-(4).
103. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1154 (4th ed. 2000).
104. Coleman, *supra* note 1, at 1118.
105. Fischer, *supra* note 42, at 684.
106. *See id.*
107. *Id.*
108. *See* RENTELN, *supra* note 13, at 187; *see also* Coleman, *supra* note 1, at 1114-18.

uniquely individual human beings.[109] Consistent with the doctrine of individualized justice, a cultural defense would result in more a tailored punishment that fits the defendant's level of guilt by ensuring the introduction of cultural factors into the courtroom.[110] As a result, treating minority culture defendants differently by considering cultural evidence would not result in favoritism, instead it would adhere to the inherent precepts of individualized justice.[111] By judging individuals by the standards of their native culture, the doctrine of individualized justice preserves the values of that culture and thus maintains a culturally diverse society.[112]

3. *Failure of the Preexisting Framework to Accommodate Cultural Factors*

Preexisting criminal defenses such as provocation are not generally successful in the cultural conflict context.[113] The primary reason for this failure is courts judge defendants according to the reasonable person standard as defined by the dominant Western culture.[114] When a judge refuses to admit evidence of cultural factors, the jury cannot properly consider the defendant's state of mind when deciding the issue of reasonable belief.[115]

Although the insanity defense may seem to provide a way to accommodate cultural factors, in most cultural defense cases the defendant would qualify as insane only under a distorted definition of mental disease, which would likely be unsuccessful.[116] Additionally, an insanity judgment may be more degrading than a criminal one because it condemns conduct deemed acceptable by the defendant's culture.[117] Finally, whereas criminal incarceration has a fixed term,

109. *See* Coleman, *supra* note 1, at 1114-15.
110. *See* RENTELN, *supra* note 13, at 187; Kim, *supra* note 7, at 109.
111. *See* Note, *supra* note 30, at 1299.
112. *Id.* at 1300.
113. RENTELN, *supra* note 13, at 187.
114. *See id.*
115. *See id.*
116. *See id.* at 1296.
117. *See id.*

civil commitment following a determination of insanity can be indefinite.[118]

Arguing that cultural factors caused the defendant to lack legal intent is also unlikely to be as effective as a substantive criminal defense because, in most cases, there is little question that the defendant actually intended to commit the act.[119] Additionally, the use of cultural factors only during prosecutorial charging and judicial sentencing is often inconsistent, because judges and prosecutors tend to arbitrarily exercise discretion, without any clear guidelines for determining the relevance of cultural factors.[120] Moreover, "these procedures do not subject cultural factors to scrutiny before a public forum, thus making it more difficult for the legal system to evaluate how justly and effectively it is dealing with cultural factors."[121]

4. The Principles of Punishment

The adoption of a formal cultural defense is consistent with criminal law's principles of punishment.[122] Proponents of the cultural defense argue that in cases when the defendant was unaware he was committing a crime, it is inherently unfair to prosecute him without considering cultural factors, because he did not have the opportunity to conform to the mandates of the dominant Western culture.[123] Additionally, "it would be disingenuous to punish someone who was merely acting under the forces of [his] enculturation with the same severity as someone who had an objectively malicious motive."[124]

Disallowing the cultural defense does not serve the principles of specific or general deterrence.[125] Specific deterrence is not generally needed in these types of crimes because the chances of the defendant committing the same crime again are very rare, as the act tends to be

118. *Id.* at 1297.
119. *See id.*
120. *See* Note, *supra* note 30, at 1298.
121. *See id.*
122. *See* Fischer, *supra* note 42, at 680.
123. *Id.* at 680.
124. *Id.*
125. *Id.* at 682.

deeply personalized.[126] In terms of general deterrence, empirical studies demonstrate that the minority culture's community quickly becomes aware of the nonconformity between the cultural practice and the law when a cultural defendant is charged with an offense for that practice, greatly reducing the number of such future cases.[127]

B. Arguments Against Adopting a Formal Cultural Defense

1. Deterrence

The traditional theories of punishment underlying criminal law are inconsistent with the use of cultural evidence.[128] Opponents argue the cultural defense undermines the principles of deterrence and will generally weaken the criminal justice system.[129] They contend that if the justice system does not punish a person for a culturally motivated act, he will continue to follow tradition and undermine the principle of specific deterrence.[130] Additionally, the failure to punish will likewise undermine the principle of general deterrence because members of the minority community will also continue to perpetuate the tradition.[131]

2. Equal Protection Under the Law

> [T]he use of cultural evidence risks a dangerous balkanization of the criminal law, where [dominant Western culture] Americans are subject to one set of laws and [minority culture] Americans to another. . . . [P]ermitting cultural evidence to be dispositive in criminal cases violates both the fundamental principle that

126. *Id.*
127. *See id.* at 682-83.
128. Coleman, *supra* note 1, at 1136.
129. *See* RENTELN, *supra* note 13, at 192.
130. *See id.* Specific deterrence is "[a] goal of a specific conviction and sentence to dissuade the offender from committing crimes in the future." BLACK'S LAW DICTIONARY 460 (7th ed. 1999).
131. RENTELN, *supra* note 13, at 192. General deterrence is "a goal of criminal law generally, or of a specific conviction and sentence, to discourage people from committing crimes." BLACK'S LAW DICTIONARY 460 (7th ed. 1999).

> society has a right to government protection against crime, and the equal protection doctrine that holds that whatever protections are provided by government must be provided to all equally, without regard to race, gender, or national origin.[132]

Some question the cultural defense because it focuses solely on the rights of the defendant and completely fails to consider the most basic premise of criminal law: the protection of victims and the general public from criminal acts.[133] Opponents assert that singling out defendants from different cultural backgrounds is repugnant to the principle of equal protection because the victims of culturally motivated crimes often receive less protection than victims whose aggressors are from the dominant Western culture for the same acts.[134] As a result, the cultural defense may result in minority culture "would-be victims hav[ing] less protection than [dominant Western culture] would-be victims . . . ."[135]

Additionally, use of the cultural defense may raise equal protection issues for dominant culture criminal defendants.[136] Treating minority culture defendants preferentially by providing an excuse for illegal conduct may lead to the denial of equal protection rights for dominant Western culture criminal defendants who could not assert the defense but were otherwise similarly situated to the minority culture defendants entitled to use it.[137] Thus, the adoption of the cultural defense may result in the law treating a member of one cultural group harsher than one of another.[138] If no principled basis for determining which groups differ from the dominant Western culture enough to permit the use of the cultural defense in one case and prohibit it in another, instead of achieving its purported goal of

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132. Coleman, *supra* note 1, at 1098, 1136.

133. *See id.* at 1136.

134. RENTELN, *supra* note 13, at 193; *see* Valerie L. Sacks, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. L. 523, 545 (1996).

135. *See* RENTELN, *supra* note 13, at 193; Sacks, *supra* note 135, at 545.

136. Sacks, *supra* note 134, at 546.

137. *Id.*

138. *Id.* at 545-46.

promoting equality, the cultural defense may instead lead to inequality.[139]

3. *Impractical to Apply*

Cultural defense opponents believe allowing such a defense would be both unfair and unnecessary.[140] Opponents claim the defense is unfair because a cultural defense would single out minority cultures for preferential treatment in criminal proceedings.[141] "It would provide an excuse for illegal conduct which is not available to the majority of American society."[142] The underlying rationale behind refusing to recognize a formal defense is the need for uniformity in the law.[143] Opponents purport that the only way for society to maintain social order and function properly is for "the mainstream [to] subsume[] and control[] the difference of those who have different values and practices."[144]

Opponents of the cultural defense feel that having separate legal standards for different groups within the same criminal justice system would be, as a practical matter, too difficult and confusing and would ultimately lead to anarchy.[145] Because culture is such a difficult concept to identify and define, courts struggle in defining the scope of who may and may not utilize the defense.[146] Recognizing a formal cultural defense will open the proverbial Pandora's box because so many "subcultural groups with their own customs, experiences and beliefs exist within even 'mainstream' U.S. culture."[147] Under this broad definition, the "cultural defense could also logically expand to protect members of cults or gangs. Both cults and gangs consist of

139. *See id.* at 542.
140. *See supra* Part III.B.
141. Chiu, *supra* note 32, at 1104.
142. *Id.* (quoting John C. Lyman, Note, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 116 (1986)).
143. *See id.* at 1105.
144. Chiu, *supra* note 32, at 1105 (quoting Malek-Mithra Sheybani, Comment, *Cultural Defense: One Person's Culture Is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L. REV. 751, 782-83 (1987)).
145. *See* RENTELN, *supra* note 13, at 192.
146. *See* Sacks, *supra* note 134, at 538.
147. *Id.* at 539.

discrete groups with their own sets of rules, customs, and practices."[148]

Further, drawing the line between legitimate and illegitimate uses of the defense will challenge courts because it is difficult to prove the existence of particular customs.[149] Because cultures are ever changing, courts would have difficulty determining what is acceptable at various times.[150]

Moreover, it would be nearly impossible to ascertain the motive behind the defendant's actions.[151] Defendants may pretend to be members of particular cultural groups, falsely claim that practices are traditional, or lie by alleging that cultural factors motivated their actions in order to escape a more severe punishment. [152] In summary, the cultural defense "would result in tangential evidence, time delays, and unrealistic expectations [in] the powers of our judges."[153]

4. Promotes Stereotypes

The cultural defense promotes stereotypes by reinforcing "false, anachronistic" images of a defendant's culture.[154] The cultural defense "reinforces Western notions of a primitive, not quite autonomous 'other' who is too culture-bound to make reasoned judgments. . . .[D]iscussions of foreign cultures in the context of the defense assume those cultures to be static and rigid, unlike the presumably ever-changing, fluid [dominant culture of the] West."[155] The cultural defense, rather than counteracting prejudice, may actually promote contempt for minority culture groups.[156]

148. *Id.*
149. RENTELN, *supra* note 13, at 193.
150. Fischer, *supra* note 42, at 689.
151. *Id.*
152. *See id.; see also* RENTELN, *supra* note 13, at 194.
153. Fischer, *supra* note 42, at 689.
154. RENTELN, *supra* note 13, at 193.
155. Sacks, *supra* note 134, at 544.
156. *Id.*

5. *The Existing Framework Accommodates Cultural Factors*

Opponents also assert that there is no need for a formal cultural defense because "the criminal justice system already affords defendants substantial opportunities to raise established, nondiscriminatory arguments in support of their innocence or of a reduced sentence."[157] Additionally, many cultural defense opponents assert that culture should become relevant during sentencing, eliminating the need for a cultural defense during the determination of guilt.[158]

IV. THE PROPOSALS

A. *Substantive-Affirmative Cultural Defense Approach*

A substantive-affirmative cultural defense would excuse a defendant's otherwise criminal behavior because cultural factors induced the defendant to commit the criminal act.[159] The defense can work as an affirmative defense by accepting the presence of the mens rea and actus reus, while recognizing an exception in circumstances when the motive for otherwise criminal conduct is relevant.[160]

Proponents of a substantive cultural defense justify recognition of this defense because it would serve the principles of individualized justice by better tailoring the punishment to fit the defendant's culpability and further the U.S. commitment to cultural pluralism.[161]

The approach, however, is problematic because courts may not apply it evenly, it may not serve the rights of victims, and it may promote stereotypes.[162] Furthermore, there are numerous obstacles to practical application.[163]

157. Coleman, *supra* note 1, at 1098; *see supra* Part II.
158. RENTELN, *supra* note 13, at 194.
159. *See* Kim, *supra* note 7, at 109.
160. *See id.*
161. *Id.* at 109-10.
162. *See supra* Part III.B.
163. *See supra* Part III.B.3.

B. Model Penal Code Approach

The Model Penal Code approach incorporates the common law doctrine of provocation.[164] In the process, however, this approach focuses more on the defendant's state of mind during the commission of crimes and allows juries to take into account the defendant's personal characteristics when determining the reasonableness of his actions under the circumstances.[165] By focusing on the defendant's state of mind, this approach admits into evidence relevant information about a defendant's cultural background, leading to more accurate results.[166]

Additionally, "[p]rovisions within the Model Penal Code would allow admission of cultural information, but without pathologizing behavior which might otherwise have a reasonable explanation if one assessed reasonableness 'from the viewpoint of one in the actor's situation under the circumstances as he believed them to be."[167] The Model Penal Code approach does not require one to "employ artificial assumptions about 'culture'" by trying to define it, and thus essentially attempting to define who can assert the defense.[168] Rather, this approach allows any defendant to put forth evidence regarding "the social and psychological circumstances which influenced his . . . decision to commit the act in question."[169]

A major criticism of this approach is that it is unworkable in practice.[170] Because the Model Penal Code's primary purpose is to give guidance in unsettled areas of the law, most judges would likely be reluctant to turn to the Model Penal Code where there is a contrary statute.[171]

164. Sacks, *supra* note 134, at 547.
165. *Id.*
166. *See id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *See* Sacks, *supra* note 134, at 548.
171. *See id.* at 548.

C. *Partial Excuse Approach*

"The establishment of the cultural defense as partial excuse would ensure the consideration of culture in the legal system. And it is necessary and important that we have a cultural defense in a genuinely pluralistic society."[172] The partial excuse approach attempts to "balance the requirements of individual justice and cultural accommodation with the competing demands of social order and the rule of law" by allowing juries to decide whether cultural factors caused a defendant's behavior during the commission of his criminal act.[173] Additionally, the partial excuse approach allows juries to reduce the charge if they find that cultural factors were determinative, thus enabling courts to better fit the punishment to the crime.[174] The greatest advantage of this approach is that by functioning solely to either reduce a charge or sentence, it allows the law to accommodate the defendant's motivation when determining his guilt, without resulting in conviction or complete acquittal.[175]

Proponents stress that adoption of the cultural defense as a partial excuse would ensure that the law does not undervalue cultural considerations, guarantee reasonable punishment, and avoid unjust outcomes.[176] Without this approach, proponents argue there is a greater probability of jury nullification because the jury chooses to acquit if they believe the punishment is too harsh.[177] Critics of the partial excuse approach contend applying this approach would require creating a lesser included offense for each crime so the prosecutor can charge the defendant in the event the court accepts his partial excuse.[178]

172. Rentelin, *supra* note 82, at 505.
173. RENTELN, *supra* note 13, at 187-88.
174. *Id.* at 188.
175. *See id.* at 189-91.
176. *See id.* at 187-92.
177. *See id.* at 191.
178. *See id.* at 190.

CONCLUSION

The current judicial practice of refusing to formally recognize a cultural defense is inadequate because it has not effectively served the principles of individualized justice or cultural plurality.[179] The current application of cultural factors in the criminal justice system has punished defendants either too harshly or not enough.[180] Opponents of the cultural defense compellingly argue that recognizing the defense will result in inconsistency in the application of the law.[181] A limited use of cultural evidence, however, promotes, rather than undermines, the objectives of the criminal justice system.[182] The problems surrounding the use of cultural evidence arise out of its improper application; it has either been wholly excluded or uncritically accepted.[183] While each of the discussed proposals has its own inherent flaws, the continued inconsistent and arbitrary application of cultural factors in the criminal justice system will cause the greatest harm to victims and cultural defendants alike.[184]

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179. *See* Kim, *supra* note 7, at 109-10.
180. *See supra* Part IV.C.
181. *See supra* Part III.B.
182. *See supra* Parts IV.B, IV.C.
183. *See supra* INTRODUCTION, Parts III.B, IV.C.
184. *See supra* Part III.A.3.