In Defense of Cultural "Insanity": Using Insanity as a Proxy for Culture in Criminal Cases

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Courts in the United States do not recognize a formal "cultural defense" for criminal acts committed by defendants belonging to other cultures. This means that courts ostensibly do not take foreign cultural practices, customs, or beliefs into account in evaluating the guilt of individuals who break U.S. laws. Nonetheless, courts have repeatedly permitted cultural evidence to be introduced as an explanation for criminal behavior, though not explicitly in furtherance of a cultural defense. Instead, such evidence of cultural practices, customs, and beliefs is introduced under the guise of a myriad of other traditional legal defenses including, among others, the focus of this Note — the insanity defense. Invoking the insanity defense in cultural cases troubles many critics; the defendants in these cases are rarely clinically insane — or at least would not be considered insane by those from the same culture as the defendant — and thus invoking an insanity defense may equate a defendant's culture with mental illness or defect. This Note weighs the advantages and disadvantages of employing the insanity defense in cultural cases and argues that the insanity defense can serve as an effective (albeit imperfect) proxy for a formal cultural defense. Absent a formal cultural defense, the insanity defense allows defendants to demonstrate that they lacked the required mens rea to be held culpable for their alleged crimes. Furthermore, this Note argues that the American Psychiatric Association's newest edition of the Diagnostic and Statistical Manual of Mental Disorders can provide courts with helpful guidelines for contextualizing cultural issues in psychiatric diagnoses.

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I. INTRODUCTION

The United States is often proclaimed to be a cultural melting pot, where people of every race, religion, and national origin intermingle to produce a unified populace that is vibrant, rich, and dynamic. One problem with this melting pot concept, however, is the implication that the final product of such intermingling is a homogenous, national standard of culture that evaporates the unique qualities of the individual cultures mixed into the pot. Although some degree of assimilation often occurs when immigrants come to the United States, the process of assimilation is rarely absolute and most of the newly arrived retain strong commitments to their native cultures.[1] Such diversity can be seen as a great boon, since "[b]y absorbing cultural elements from a broad spectrum of ethnic groups, American culture has remained dynamic and creative, continually evolving as it weaves threads of various immigrant cultures into its fabric."[2]

This diversity of cultures in the United States and the ability of its citizens to preserve elements of their native cultures, though commendable, can also serve as a source of serious conflict. Courts provide one arena for such conflict to play out. Though immigrants and their offspring may operate under beliefs and codes of conduct that are foreign to the dominant American culture, they are nonetheless expected to comply with American laws. Courts generally adhere to the 1872 Supreme Court decision of *Carlisle v. United States*, which stated that "an alien, whilst domiciled in the country, owes a local and temporary allegiance" to the country and adopts all U.S. laws for the duration of his residence in the country.[3] Therefore, at least in theory, Amer-

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1. ALISON DUNDES RENTELN, THE CULTURAL DEFENSE 13 (2004).

2. Note, *The Cultural Defense in Criminal Law*, 99 HARV. L. REV. 1293, 1300–01 (1986).

3. 83 U.S. 147, 152 (1872). *See* Leonhard v. Eley, 151 F.2d 409, 410 (10th Cir. 1945) ("Aliens residing in the United States . . . are entitled generally . . . to the safeguards of the Constitution and to the protection of our laws. . . . Their duties and obligations, so long as they reside in the United States, do not differ materially from those of native-born or naturalized citizens. Equally with such citizens, for the rights and privileges they enjoy, they owe allegiance to our country [and] obedience to our laws. . . ."); Hellenic Lines Ltd. v. Rhoditis, 412 F.2d 919, 924 (5th Cir. 1969), *aff'd sub nom*. Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970) ("[A]liens residing in this country are, with rare exception, subject to the same commercial and tort laws as United States citizens."); Carter v. Smith, No. 06-CV-11927, 2007 WL 325358, at *2 (E.D. Mich. Jan. 31, 2007) ("Even assuming that Petitioner is not a citizen, aliens 'owe obedience' to the laws of the state and federal government.").

ican courts do not consider whether an immigrant who committed a crime did so because his cultural beliefs, practices, or customs either dictated he must or obscured his understanding of the law. There is, in other words, no cultural defense to crimes committed in the United States.[4]

Despite the lack of a formally recognized cultural defense, the past few decades have seen a number of cases in which defendants seek to explain their behavior by reference to their native culture, and some judges have admitted and considered such cultural evidence.[5] The rationale behind allowing cultural evidence is that criminal law generally requires criminal acts to be accompanied by a particular mental state (mens rea) and that "[a]n understanding of the defendant's mental state is incomplete without an understanding of cultural context."[6] However, the cultural defense is far from universally accepted, and most attempts to use cultural evidence to mitigate a defendant's punishment fail.[7] Many judges subscribe to the "when in Rome, do as the Romans do" philosophy,[8] and thus reject the concept of a cultural defense and refuse to admit cultural evidence at trial or sentencing.[9] Nonetheless, defense attorneys have in some cases succeeded in introducing cultural evidence by incorporating cultural arguments into traditional criminal defenses like provocation[10], self-defense[11], and, the topic of this Note, insanity. For example, in

4. 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, 19–20 (1995).

5. Rashmi Goel, *Can I Call Kimura Crazy? Ethical Tensions in the Cultural Defense*, 3 SEATTLE J. SOC. JUST. 443, 460 (2004–2005); *see, e.g.*, People v. Kimura, No. A-091133 (L.A. Super. Ct. Nov. 21, 1985) (unpublished); State v. Curbello-Rodriguez, 351 N.W.2d 758, 770 (Wis. 1984) (Boblitch, J., concurring); People v. Rhines, 131 Cal. App. 3d 498 (1978); People v. Croy, 41 Cal. 3d 1 (1985); People v. Chen, No. 87-774 (N.Y. Sup. Ct. Mar. 21, 1989); People v. Kong Moua, No. 315972-0 (Cal. Super. Ct. Feb. 7, 1985).

6. Nancy S. Kim, *Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants*, 17 U. FLA. J.L. & PUB. POL'Y 199, 203 (2006).

7. Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 919–20 (2007).

8. *Id.* at 920.

9. Alison Dundes Renteln, *Raising Cultural Defenses*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE 770, 771 (Linda F. Ramirez ed., 2010).

10. *See, e.g.*, People v. Wu, 286 Cal. Rptr. 868 (1991), *reh'g denied*, 1992 Cal. LEXIS 310 (1992) (opinion ordered depublished).

11. People v. Croy, 41 Cal. 3d 1 (1985); Renteln, *supra* note 9, at 794 ("Croy's attorney presented a cultural defense in the context of self defense. The cultural argument was that because Croy [a Native American] had suffered discrimination and has been conditioned not to trust white authorities (because white settlers had massacred Indians in the nineteenth century), he was predisposed to perceive that his life was in jeopardy.").

People v. Kimura,[12] a Japanese-American woman who killed her children and attempted to kill herself after learning of her husband's infidelity — in accordance with the ancient Japanese custom of *oyako-shinju* (parent-child suicide)[13] — avoided a first-degree murder charge and was sentenced to just one year in county jail and five years probation because her defense attorney successfully argued that she was suffering from temporary insanity at the time she killed her children.[14]

The cultural defense and the insanity defense are analogous insofar as both "seek to excuse a defendant because he either did not know his actions were wrong or could not control them."[15] However, comparing a culture-related crime to an act of insanity for the purpose of legal defense has received widespread criticism. Many scholars argue that such a comparison is both inaccurate and harmful, since most defendants in these cases are not mentally ill but simply act in accordance with their culture, and a ruling of insanity may hurt the defendant more than a prison sentence.[16] Furthermore, an insanity defense based on cultural evidence places blame on minority cultures for motivating the crime even if the defendants themselves are excused.[17] Even when culture is presented to courts in the form of an insanity defense, there is no guarantee that the evidence will be admitted into the trial; the "individual proclivities" of the judge, prosecutor, or defense attorney often determine whether culture may be included in a defendant's trial defense.[18]

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12. People v. Kimura, No. A-091133 (L.A. Super. Ct. Nov. 21, 1985) (unpublished).

13. Oyako-shinju, while an ancient cultural custom, is actually illegal in Japan, but those who attempt it are treated leniently by the Japanese criminal justice system. *See* Goel, *supra* note 5, at 444 n.9 ("In cases like Kimura's, offenders are convicted of something akin to involuntary manslaughter and given a suspended sentence of one to three years. The incidents are generally looked on with pity, not outrage, and are not generally reported in the media.").

14. RENTELN, *supra* note 1, at 25.

15. Neal A. Gordon, *The Implications of Memetics for the Cultural Defense*, 50 DUKE L.J. 1809, 1811 (2001).

16. This is because the Administrative Procedure Act has suggested that defendants who are acquitted by reason of insanity may spend as much if not more time committed to a psychiatric institution than if they had gone to prison for the same crime. Dahlia Lithwick, *The Insanity Defense*, SLATE (Jan. 11, 2011, 6:50 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/the_insanity_defense.html [http://perma.cc/G8M2-MMP].

17. Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1322, 1331 (2006).

18. *Id.* at 1336.

This Note argues that the insanity defense, despite the challenges it poses, may nonetheless offer the best vehicle for the introduction of cultural evidence in court as a justification for crimes committed by defendants from other cultures. Further, the recent publication of the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders*[19] (DSM-5) provides cultural criteria for the diagnosis of mental disorders that may serve as a guide to courts in determining whether cultural evidence is relevant to the court's assessment of a defendant's sanity. This Note does not take a stance on whether it is socially, morally, or ethically desirable for cultural evidence to be considered to mitigate the punishment of these defendants. Instead, this Note asserts that if such consideration is appropriate, the insanity defense offers the best approach to introduce cultural evidence. Part II of this Note provides background information on the cultural defense; Part III explains the parameters of the insanity defense; Part IV describes the advantages and disadvantages of employing the insanity defense as a proxy for the cultural defense; Part V explores the use of previous editions of the DSM (in particular the DSM-IV) in insanity defense cases; and Part VI introduces the DSM-5 and envisions how it might be used to elucidate the cultural factors that bear on a defendant's sanity and therefore guilt in the eyes of courts.

II. THE CULTURAL DEFENSE

A. BACKGROUND OF THE CULTURAL DEFENSE IN THE U.S. AND ABROAD

The cultural defense "is a legal defense strategy that uses evidence about a defendant's cultural background to negate or mitigate criminal liability" and thereby reduce the defendant's sentence.[20] The inclusion of the word "defense" in "cultural defense" — as opposed to a cultural "explanation," for example — may thus be misleading: use of the cultural defense is not always geared towards the full exculpation of a criminal defendant, but can instead mitigate the punishment imposed on a defendant if

19. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DSM-5].

20. Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M.L. REV. 101, 102–03 (1997).

"an otherwise illegal act would have been acceptable or more understandable in the defendant's homeland or culture."[21] If the cultural defense were formally established, it would require judges to consider the cultural background of defendants by admitting cultural evidence in the courtroom, whereas currently judges commonly bar such evidence.[22] The rationale behind the defense is that the defendant should be judged more leniently because he acted in accordance with the dictates of his culture.[23]

Furthermore, the label of "cultural defense" may be misleading because it implies the existence of a singular, formalized defense, while the American criminal justice system does not officially recognize a cultural defense.[24] The absence of such a formally recognized defense does not mean, however, that defense attorneys do not seek to introduce cultural information about their clients; in the absence of a standalone cultural defense, attorneys introduce such information in the context of preexisting defenses.[25] For example, in *People v. Chen*, a Chinese immigrant who bludgeoned his wife to death after learning she had been unfaithful had his charge reduced from second-degree murder to second-degree manslaughter based on evidence about his culture.[26] The defense attorney successfully argued that Chen should not be held accountable for murder because Chen's culture permitted husbands to "take out their shame on their wives"[27] and that "cultural pressures *provoked* Chen into an extreme mental state of 'diminished capacity,' leaving him without the ability to form the intent necessary for more serious charges of premeditated murder."[28] In this case, Chen's attorney was able to introduce evidence about Chen's culture by employing the well-established provocation defense,[29] without which the court would

21. Anh T. Lam, *Culture as Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 ASIAN AM. PAC. IS. L.J. 49, 50 (1993).

22. *See* Lee, *supra* note 7, at 920; RENTELN, *supra* note 1, at 5–6.

23. Leti Volpp, *(Mis) Identifying Culture: Asian Women and the "Cultural Defense*," 17 HARV. WOMEN'S L.J. 57, 57 (1994).

24. Todd Taylor, *The Cultural Defense and Its Irrelevancy in Child Protection Law*, 17 B.C. THIRD WORLD L.J. 331, 344–45 (1997).

25. *Id.*

26. People v. Chen, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989).

27. Damian Sikora, *Differing Cultures, Differing Capabilities? A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695 (2001).

28. *Id.* (emphasis added).

29. The provocation defense, which is also known as the "heat of passion" defense, is "based on the idea that a person who is provoked to kill does so without the malice afore-

have been unlikely to admit such cultural evidence. However, perhaps in part because defense attorneys have to fit cultural evidence into traditional legal defenses, the likelihood of admission of such evidence in any given case is unpredictable.[30]

The United States is not the only country whose legal system struggles with the question of whether cultural evidence is relevant to a defendant's guilt; criminal cases arise all over the world that prompt foreign courts to contend with the same cultural evidence issues, and the results are far from uniform. The Federal Court of Justice of Germany, for instance, declared in 1994 that the cultural defense could not be admitted to reduce a murder charge to manslaughter, contrary to prior case law.[31] In the Irish case *The Queen v. Zhang*,[32] the defendant, a Chinese immigrant living in Dublin, killed his girlfriend when she admitted that she had been working as a prostitute.[33] An expert witness for the defense testified that given the defendant's "upbringing and 'the concept of face' as understood in Chinese society, her admission was 'tantamount to throwing down a gauntlet, challenging his manhood,' and that its effect on a person of his background would be quite different from the effect of such an admission on others in Northern Ireland[.]"[34] The court of appeal, however, upheld the trial judge's instruction to the jury that the expert's testimony was not relevant and affirmed the conviction for murder.[35] On the other hand, in the 1983 Australian case *R. v. Dincer*,[36] in which a Turkish Muslim immigrant killed his teenage daughter after she ran away to live with a male companion, the court heard evidence about the importance of unmarried women's virginity in the defendant's culture, and the dishonor and shame brought to a

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thought required for the crime of murder and is, therefore, less culpable." Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437, 474 (1993).

30. *See* Sikora, *supra* note 27, at 1702.

31. Daniel Kroslak, *Honor Killings and Cultural Defense (with a Special Focus on Germany)* (Islamic Law and Law of the Muslim World, Paper No. 09-71, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1422503 [http://perma.cc/8WFZ-J5D4].

32. The Queen v. Zhang [2011] N.I.C.A. 25 (Ir.).

33. *Id.*

34. SANFORD H. KADISH, CRIMINAL LAW AND ITS PROCESSES 459 (quoting The Queen v. Zhang [2011] N.I.C.A. 25 (Ir.)).

35. *Id.*

36. R v. Dincer (1983) I V.R. 461 (Austl.).

family by the loss of virginity of an unmarried daughter.[37] However, this culturally accommodative approach was controversial and subsequently restricted by a series of High Court of Australia opinions in the 1990s.[38] It is clear by this variation in different countries' approaches towards cultural cases — and even variation within the same country — that courts across the world have struggled with determining the proper place for culture in the courtroom.

B. ARGUMENTS FOR AND AGAINST A FORMAL CULTURAL DEFENSE

There are compelling arguments in favor of and against the formalization of a cultural defense. At the heart of the argument for a formal cultural defense is the belief in the importance of culture and the profound effect that culture produces in people. One proponent of the cultural defense writes, "[c]ulture shapes every person's perception of reality, and as a result, guides every person's behavior . . . [therefore] in order for the judge or jury to understand what motivates the actions of a defendant, it must, by definition, consider the defendant's culture."[39] In other words, culture can be the key to understanding the viewpoint of the defendant who felt compelled to follow the rules of his culture or whose behavior was conditioned by his cultural background.[40] Thus, some scholars have suggested that a formal cultural defense would further the criminal justice system's goal of "ensuring individualized justice and assessing moral blameworthiness, enabling courts to better understand the individual defendant's situation."[41] A formal cultural defense could be seen as more fair to immigrant defendants, especially in a country where laws are "based on 'Eurocentric values,'" by helping put these defendants on "the same footing as members of the dominant culture."[42] One prominent advocate for the cultural defense, Professor Alison

37. MARIE-CLAIRE FOBLETS & ALISON DUNDES RENTELN, MULTICULURAL JURISPRUDENCE: COMPARATIVE PERSPECTIVES ON THE CULTURAL DEFENSE 53 (1st ed. 2009).

38. *Id.*

39. Taylor, *supra* note 24, at 352–53.

40. Aahren R. DePalma, *I Couldn't Help Myself — My Culture Made Me Do It: The Use of Cultural Evidence in the Heat of Passion Defense*, 28 CHICANA/O-LATINA/O L. REV. 1 (2009).

41. Sikora, *supra* note 27, at 1705.

42. *Id.*

Dundes Renteln, argues that the admission of this defense in courts is necessary to ensure equal application of the law to all citizens; she asserts that cultural evidence must be admitted because "individual justice demands that the legal system focus on the actor as well as the act, and on motive as well as intent."[43]

Proponents of a formal cultural defense also argue that it would lead to more consistent rulings in criminal cases involving immigrant defendants. Without a formal cultural defense or official rule governing the admissibility of cultural evidence, judges are free to admit or exclude cultural evidence as they see fit.[44] This inconsistency and unpredictability is "unsettling" to defendants,[45] who have no way of knowing whether a particular judge will accept cultural evidence as part of their defense. Their future and liberty therefore hangs on "the luck of the draw"[46] and "the individual proclivities of a judge or a prosecutor or a defense attorney."[47] Other arguments in favor of a formalized cultural defense include that such a defense would counteract disdain for immigrant groups, and would promote cultural pluralism.[48] Renteln notes, "By judging each person according to the standards of her native culture, the principle of individualized justice preserves the values of that culture, and thus maintains a culturally diverse society."[49] Furthermore, while denying a cultural defense may be perceived as a sign of contempt for foreign values,[50] allowing a cultural defense could signal an acceptance of and respect for the customs and beliefs of different immigrant groups.[51]

While the arguments in favor of a formal cultural defense may be persuasive, so are the arguments against it. One major criticism is that the cultural defense could undermine the deterrence function of the law: our legal system punishes illegal acts partly to deter future crime and uphold the social order, so a cultural defense that lessens potential sentences for culturally motivated crimes might fail to dissuade people from committing similar

43. RENTELN, *supra* note 1, at 187.
44. Lee, *supra* note 7, at 911, 916.
45. *Id.*
46. *Id.* at 917.
47. Chiu, *supra* note 17, at 1317, 1337.
48. Valerie L. Sacks, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. L. 523, 529–30 (1996).
49. Note, *The Cultural Defense in Criminal Law*, *supra* note 2, at 1300.
50. Sacks, *supra* note 48, at 533.
51. Note, *The Cultural Defense in Criminal Law*, *supra* note 2, at 1307.

crimes in the future.[52] A second criticism is that it would be difficult to administer a formalized cultural defense fairly because of the problems inherent in categorizing people according to their culture. Specifically, it would be difficult to determine who qualifies for the defense's protection and under what circumstances the defense can be invoked[53] (for instance, whether the defense would be equally available to first generation immigrants and sub-cultural groups).[54] Furthermore, there would be fundamental issues of fairness in instituting a stand-alone cultural defense because doing so would essentially subject immigrants to a different, more lenient, set of laws than non-immigrant defendants.[55]

The formalization of a cultural defense could also promote cultural stereotypes. In the *Chen* case, for instance, Chinese organizations criticized the court's ruling, saying that adultery is not a justification for killing in modern China and that the ruling reinforced patriarchal and racial stereotypes.[56] The National Organization of Women also argued in the aftermath of the *Chen* judgment that the cultural defense should be inadmissible because it reinforces patriarchal power.[57] Some also assert that to allow a cultural defense would be to prioritize the interests of defendants above those of victims, and would be particularly damaging to women because the victims of culturally motivated crimes are largely women and children.[58] Lastly, the cultural defense can be seen as condescending toward other cultures because it excuses culture-based actions by likening the culture to insanity[59]:

> The [cultural] defense takes the view that other cultures are inferior and barbaric but worthy of preservation. This may lead to a patronizing and subtly racist hypertolerance that 'respects' vicious and ignorant doctrines when they are propounded by officials of non-European states and religions. Thus, instead of objectively valuing a group's practices, as it arguably would for the majority, the cultural defense ends

52. RENTELN, *supra* note 1, at 192.
53. DePalma, *supra* note 40, at 14.
54. *Id.*
55. *Id.*
56. Patricia Hurtado, *Killer's Sentence Defended: "He's Not a Loose Cannon,"* NEWSDAY, Apr. 4, 1989, at 3.
57. Volpp, *supra* note 23, at 77.
58. *See* Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: the Liberal's Dilemma*, 96 COLUM. L. REV. 1093 (1994).
59. Gordon, *supra* note 15, at 1831.

> the inquiry when it is discovered that the action was culturally motivated.[60]

While the potential benefits and consequences of a stand-alone cultural defense are easily imagined, the current use of the cultural defense in U.S. courts is confined to preexisting, traditional criminal defenses. One of the more popular means for introducing cultural evidence in a criminal trial is through the insanity defense.

III. THE INSANITY DEFENSE

American criminal law requires that, in order for a defendant to be convicted of a crime, he must have both committed the act of the crime (actus reus) and have possessed a morally culpable state of mind (mens rea).[61] The notion that a defendant must have voluntarily committed his crime, and thus possessed the morally culpable state of mind, is essential to the American criminal justice system.[62] Therefore, when there is evidence that a defendant suffered from a cognitive or volitional impairment at the time of his crime, the American justice system acknowledges that the act may not have been completely voluntary, rendering full punishment inappropriate.[63] The affirmative defense of insanity recognizes that a mental disability may be grounds for a legal excuse when that disability prevents a defendant from possessing the intent to act in a "criminally blameworthy" way.[64] Furthermore, the admission of the insanity defense in nearly all American jurisdictions is a testament to the fact that the United States legal system acknowledges that none of the three goals of criminal law — rehabilitation, deterrence, and retribution — are achieved when those who are truly incapable of controlling their actions are punished.[65]

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60. *Id.*

61. *See* James J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845, 1849–50 (1999); Judith E. Macfarlane, *Neonaticide and the "Ethos of Maternity": Traditional Criminal Law Defenses and the Novel Syndrome*, 5 CARDOZO WOMEN'S L.J. 175, 234 (1998).

62. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 831 (3d ed. 1982).

63. RENTELN, *supra* note 1, at 24.

64. *Id.*

65. Macfarlane, *supra* note 61, at 237; *see also* United States v. Freeman, 357 F.2d 606, 615 (2d Cir. 1966) ("[S]ociety has recognized over the years that none of the three asserted purposes of the criminal law — rehabilitation, deterrence and retribution — is

To be found insane in the American criminal justice system, the defendant generally needs to have suffered from cognitive or volitional impairment at the time he committed the crime.[66] Cognitive impairment refers to the defendant's inability to distinguish between right and wrong, whereas volitional impairment refers to the defendant's inability to control his behavior even if he knows it is criminal.[67] There are several different tests in use for determining insanity, each of which considers cognitive and volitional impairment to varying degrees; the classic M'Naghten test evaluates claims of insanity characterized by only cognitive impairment, while the more modern Model Penal Code ("MPC") approach incorporates the additional requirement of volitional impairment. The M'Naghten test, also known as the "right from wrong" test, originates from an 1843 case of the same name.[68] The test holds that in order to successfully invoke an insanity defense in a criminal case:

> it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[69]

The M'Naghten test dictates that a criminal defendant is not guilty by reason of insanity if his mental defect rendered him (1) unable to understand "the nature and quality" of his action that constituted the crime, or, if he did understand, then (2) unable to understand that his action was wrong.[70] Both parts of the M'Naghten test thus pertain to the cognitive capacity of the defendant (though the second element has also been characterized as relating to a defendant's "moral capacity").[71] The MPC ap-

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satisfied when the truly irresponsible, those who lack substantial capacity to control their actions, are punished.").

66. Chiu, *supra* note 17, at 1350.

67. *Id.*

68. *M'Naghten's Case* (1843) 8 Eng. Rep. 718.

69. *Id.* at 722.

70. *Id.*

71. *Clark v. Arizona*, 548 U.S. 735, 747 (2006) ("The first part asks about cognitive capacity: whether a mental defect leaves a defendant unable to understand what he is doing. The second part presents an ostensibly alternative basis for recognizing a defense

proach, on the other hand, addresses an additional volitional element in providing that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct *or to conform his conduct to the requirements of law*."[72] While the statutory definition of insanity varies from state to state, most states have adopted variations of the M'Naghten test or the MPC approach, or a combination of the two.[73]

IV. USING THE INSANITY DEFENSE AS A CULTURAL DEFENSE

Absent a formal cultural defense, the insanity defense can provide a viable means for courts to consider cultural factors within the bounds of established doctrine.[74] This is in large part because both the insanity defense and cultural defense seek to excuse or justify a defendant's crime because he did not know his actions were wrong, or he knew his actions were wrong but was unable to control them.[75] For defendants who may not have suffered actual psychological impairment or "insanity" at the time of their actions — i.e., whose actions would not be deemed "insane" by members of their own culture, though a U.S. court may determine otherwise — but whose cultural customs, beliefs, or practices nonetheless influenced their behavior (e.g., the *Kimura* case), the insanity defense offers a way for defendants to introduce evidence illustrating the motivation behind their crime.

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of insanity understood as a lack of moral capacity: whether a mental disease or defect leaves a defendant unable to understand that his action is wrong.").

72. MODEL PENAL CODE § 4.01(1) (2015) (emphasis added).

73. *Clark*, 548 U.S. at 750–52 ("Seventeen States and the Federal Government have adopted a recognizable version of the *M'Naghten* test with both its cognitive incapacity and moral incapacity components. One State has adopted only *M'Naghten's* cognitive incapacity test, and 10 (including Arizona) have adopted the moral incapacity test alone. Fourteen jurisdictions, inspired by the Model Penal Code, have in place an amalgam of the volitional incapacity test and some variant of the moral incapacity test, satisfaction of either (generally by showing a defendant's substantial lack of capacity) being enough to excuse. Three States combine a full *M'Naghten* test with a volitional incapacity formula. And New Hampshire alone stands by the product-of-mental-illness test. The alternatives are multiplied further by variations in the prescribed insanity verdict: a significant number of these jurisdictions supplement the traditional 'not guilty by reason of insanity' verdict with an alternative of 'guilty but mentally ill.' Finally, four States have no affirmative insanity defense, though one provides for a 'guilty and mentally ill' verdict.").

74. Note, *The Cultural Defense in Criminal Law*, *supra* note 2, at 1300.

75. Gordon, *supra* note 15, at 1810.

The main issue with raising the insanity defense as a cultural defense — i.e., as a way of using evidence from the defendant's culture to explain his actions — is that it can be seen as an "affront to the dignity" of the defendant and his culture when the condemned behavior is part of, or influenced by, the defendant's culture.[76] This is especially true given that it is often unlikely that the defendant's actions would be viewed as "insane" from the perspective of people belonging to the same culture and thus an insanity defense could be viewed as ill-fitting or blatantly false:

> Immigrants and refugees in most cultural defense cases are, in fact, perfectly sane according to the standards of their own culture, and, indeed, according to Western clinical standards. Giving them no option other than an insanity defense to present the cultural dimension of the case would require a gross falsification of the facts.[77]

However, even though a defendant's actions may not be viewed as "insane" in his own culture — or the cultural motivation behind his actions was completely rational and controlled — it would not be unprecedented to characterize such cultural motivation as "insane" from the perspective of the American court, where the defendant's actions are being evaluated. Anthropologist and law professor Lawrence Rosen sheds light on this practice:

> There is . . . a clear tendency in many realms of American life to convert the culturally different into the psychologically aberrant. As the heirs of the psychoanalytic revolution we often distort the meaning of other's actions through the prism of the psychological lens to make the action coherent to our own culture. In the case of Mrs. Kimura, the Japanese mother who killed her children as part of her own suicide attempt, the court distorted the nature of the Japanese practice and reduced it to a psychological problem for which psychiatrists and counselors were the proper solution. This

76. Michele Wen Chen Wu, *Culture is No Defense for Infanticide*, 11 AM. U. J. GENDER SOC. POL'Y & L. 975, 985 (2003).

77. Renteln, *supra* note 29, at 461.

> allowed her actions to carry a much reduced penalty but at the price of negating the very meaning of her act.[78]

Professor Rosen's analysis of this tendency suggests that while it is reductive to label a cultural practice or belief that is different from American culture as "psychologically aberrant" or insane, courts may do so to make sense of the other culture in relation to American culture. In this way, the cultural behaviors that courts deem "insane" may more accurately be understood as behaviors that, because of their foreignness or "otherness" from the dominant culture, are simply incomprehensible to the court. So while American courts may choose to view some cultural practices as insane for the purpose of deciding moral culpability, this does not need to be seen as an inherent value judgment on another culture. The kind of cultural "insanity" that we assign to some practices of minority cultures is only described as such because the practices are "foreign to the ordinary cultural expectations of the Western clinician or investigator; hence, their shaping by cultural determinants is more visible."[79]

The "foreign" aspect may not even be necessary to find a culturally-based mental disorder; some authors have suggested that obesity, anorexia nervosa, and the type A behavior pattern are mental disorders shaped specifically by Western culture.[80] Furthermore, it has been suggested that a mental disorder based on socioeconomic status might exist: in a highly publicized drunk driving case in 2013, sixteen-year-old Ethan Couch's lawyer asserted that the teenager should not be held responsible for killing four pedestrians because he suffered from "affluenza."[81] A psychologist called as an expert witness testified that Couch's wealthy parents never set limits for him[82] and coddled him into a

78. Lawrence Rosen, *The Integrity of Cultures*, AM. BEHAVIORAL SCIENTIST 594, May–June 1991, at 605.

79. Ronald Simons & Charles Hughes, *Culture-Bound Syndromes*, *in* CULTURE, ETHNICITY, AND MENTAL ILLNESS 75 (Albert C. Gaw ed., 1993).

80. *Id.* at 81.

81. Danielle Eckenroth, *Wealthy "Justice": The Role Wealth Plays in Sentencing and in the Affluenza Defense*, 41 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 443, 452 (2015).

82. Ashley Hayes, *'Affluenza': Is It Real?*, CNN (Dec. 13, 2013, 8:56 AM), http://www.cnn.com/2013/12/12/health/affluenza-youth/ [http://perma.cc/58ML-KLGK].

state of irresponsibility,[83] and therefore he should not be found culpable for his victims' deaths.

It is clear both that a patient-defendant's culture is paramount in producing behaviors that may be viewed as indicative of a mental disorder and that the clinician's culture is equally influential in the clinician's identification and diagnosis of that behavior:

> To almost everyone, the behavior and expectations developed in one's own culture appear "natural" or "logical," whereas those derived from other cultures appear unnatural, culture-specific, or arising from abnormal conditions . . . . Most clinicians are more likely to consider 'culture' in the explanation of a presenting patient's problem when he or she is from a cultural setting other than the clinicians' own. However cultural factors are a substantial part of every disorder and not a descriptive, picturesque component . . . [A]ll psychiatric illnesses are culture-bound.[84]

This explanation is not meant to suggest that labeling any kind of "otherness" as insane is a good solution to the problem of trying to make sense of the cultural behavior in question. However, if "insane" can be understood not as a pejorative label but as a mere shorthand term used for describing a practice that is foreign to the dominant culture of the court, then the insanity defense might be used by people from that minority culture to escape punishment for actions they did not believe or intend to be wrong. For those who determine that the potential benefit of such exculpation outweighs the reductive and insensitive aspects of using insanity as a proxy for culture, the DSM may serve as a useful tool in advancing this defense.

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83. *No Jail for Rich 'Affluenza' Teen, Ethan Couch, After Deadly Wreck: Judge*, N.Y. DAILY NEWS (Feb. 5, 2014), http:// www.nydailynews.com/news/national/affluenza-teen-ethan-couch-due-back-court-article-1.1602998 [http://perma.cc/4WCM-UTW8].

84. Simons & Hughes, *supra* note 79, at 87–88.

V. USE OF THE DSM IN INSANITY/CULTURAL DEFENSE CASES

The *Diagnostic and Statistical Manual of Mental Disorders* (DSM), compiled by the American Psychiatric Association (APA), is a "classification of mental disorders with associated criteria designed to facilitate more reliable diagnoses of these disorders."[85] Psychiatrists use the criteria listed in the DSM to diagnose and treat mental disorders, and students and researchers also often consult the DSM for information about mental disorders. The newest version of the DSM defines a mental disorder as:

> a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder.[86]

In addition to its primary function as a diagnostic tool for clinicians, the DSM is also useful to other professionals, including legal practitioners. In its "Cautionary Statement for Forensic Use of DSM-5," the DSM states:

> DSM-5 is also used as a reference for the courts and attorneys in assessing the forensic consequences of mental disorders . . . When used appropriately, diagnoses and diagnostic information can assist legal decision makers in their determinations. For example, when the presence of a mental disorder is the predicate for a subsequent legal determination (e.g., involuntary civil commitment), the use of an established system of diagnosis enhances the value and reliability of the determination.[87]

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85. DSM-5, *supra* note 19, at xli.
86. *Id.* at 20.
87. *Id.* at 25.

Despite the DSM's own acknowledgement of its utility in helping "legal decision makers," the authors also warn that the DSM could cause problems when used in a legal context:

> However, the use of DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.[88]

Despite the DSM's warning, it is often used forensically and has been cited over 5,500 times in court opinions and over 320 times in legislation.[89] The inclusion of a "cautionary statement" may therefore be viewed mainly as a "safeguard against liability."[90] The manual's prevalent use in the legal field is in large part due to the DSM's "useful[ness] in determining whether it is acceptable to recognize a psychiatric disorder or symptom legally, because it reflects a consensus about the classification and diagnosis of mental disorders."[91]

Because the DSM is viewed as the "bible of psychiatry"[92] and the definitive source for diagnostic criteria for mental disorders, the DSM is of paramount importance to defendants and defense attorneys who wish to raise an insanity defense. This is because, "[w]hen deciding the factual question of which mental illnesses will qualify as the basis for an insanity plea, courts reluctantly guide themselves by the medical categories of mental illnesses as defined by the psychiatric community in the DSM. . . ."[93] The DSM's juridical importance thus derives from the fact that courts often consult it in identifying mental disorders. Even though courts may not recognize every mental disorder in the DSM as qualifying for the insanity defense, they do "usually require the

88. *Id.*
89. Ralph Slovenko, *The DSM in Litigation and Legislation*, 39 J. AM. ACAD. PSYCHIATRY L. 6, 6 (2011).
90. *Id.*
91. Macfarlane, *supra* note 61, at 204.
92. Slovenko, *supra* note 89.
93. Henry Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 40 (2007).

condition being offered as a qualifying mental disease or defect at trial to be recognized in DSM."[94] Furthermore, even though the tests for legal insanity vary across jurisdictions (and over different historical periods), an insanity defense will usually only succeed if there is a finding that the defendant suffered from a "mental disease or defect" at the time of his crime.[95] Therefore, whether the DSM recognizes certain behaviors or beliefs exhibited by a defendant as indicative of a mental disorder can directly affect the defendant's success in raising an insanity defense. The importance of DSM recognition of a mental disorder is also evidenced by the fact that many insurance companies will not provide reimbursement for treatment of mental disorders without a DSM diagnosis.[96]

The fourth edition of the DSM (DSM-IV), published in 1994, marked a significant step for the APA. Until that edition, the APA had formulated the DSM manuals entirely according to Western psychiatric ideologies and social influences and did not account for the manifestations of mental health issues of people from other cultures.[97] This seemed to reflect the perception that modern psychiatry both originated in the West and was molded by "specifically Western philosophical and scientific traditions; it developed as a child of Western culture."[98] In the fourth edition, the APA noted that it had made a concerted effort to "incorporate the awareness that the manual is used in culturally diverse populations" because clinicians who are "unfamiliar with the nuances of an individual's cultural frame of reference may incorrectly judge" the symptoms of their patients.[99] Importantly, the DSM-IV included, for the first time in the publication's history, a Glossary of Culture-Bound Syndromes.[100] The Glossary defined culture-bound syndromes as "recurrent, locality-specific patterns of aberrant behavior and troubling experience" that may or may not

94. *Id.* at 40–41.

95. Micah David Parzen, *Toward a Culture-Bound Syndrome-Based Insanity Defense?*, 27 CULTURE, MEDICINE & PSYCHIATRY 131, 138 (2003).

96. Alix Spiegel, *The Dictionary of Disorder*, NEW YORKER (Jan. 3, 2005), http://www.newyorker.com/magazine/2005/01/03/the-dictionary-of-disorder [http://perma.cc/PKQ3-LLYS].

97. Tam B. Tran, *Using DSM-IV to Diagnose Mental Illness in Asian Americans*, 10 J. CONTEMP. LEGAL ISSUES 335 (1999).

98. Lin T, *Culture and Psychology: a Chinese perspective*, 16 AUST. & N.Z.J. PSYCHIATRY 235, 235 (1982).

99. DSM-5, *supra* note 19, at 843 app. 1.

100. *Id.* at 845–49.

be linked to any particular diagnostic category in the DSM-IV.[101] In other words, "culture-bound syndrome" refers to a syndrome — a pattern of psychological distress — that is produced only by a particular culture or cultural context.[102] The DSM-IV explains,

> [a]lthough presentations conforming to the major DSM-IV categories can be found throughout the world, the particular symptoms, course, and social response are very often influenced by local cultural factors. In contrast, culture-bound syndromes are generally limited to specific societies or culture areas and are localized, folk, diagnostic categories that form coherent meanings for certain repetitive, patterned, and troubling sets of experiences and observations.[103]

One example of a culture-bound syndrome included in the DSM-IV is *amok*, a syndrome first described in Malaysia, and defined as a "dissociative episode characterized by a period of brooding followed by an outburst of violent, aggressive, or homicidal behavior directed at people and objects. The episode tends to be precipitated by a perceived slight or insult and seems to be prevalent only among males."[104]

In the eyes of psychiatric professionals, the inclusion of culture-bound syndromes in the DSM-IV provided legitimacy to mental disorders and behaviors that are not common or readily identifiable in American culture but that nonetheless are indicative of real psychological distress in other cultures.[105] The APA's choice to highlight cultural factors in the diagnosis of mental disorders is particularly important and beneficial given the differences in the way that people from different cultures exhibit the behaviors indicative of a mental disorder: "How individuals in different cultures experience and express symptoms of mental illness are not universal. Most psychiatric diagnoses are based on symptoms. When faced with symptoms that are unique to certain cultures or subcultures . . . misunderstanding and misdiagnoses are likely to follow."[106]

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101. *Id.* at 898.
102. *Id.*
103. *Id.* at 843, app. 1.
104. *Id.* at 845.
105. Parzen, *supra* note 9595, at 133.
106. Nicole A. King, *The Role of Culture in Psychology: A Look at Mental Illness and the "Cultural Defense,"* 7 TULSA J. COMP. & INT'L L. 199, 213 (1999).

The culture-bound syndromes highlighted in the DSM-IV also provided a potentially attractive defense strategy for criminal defendants from other cultures. Anthropologist and attorney Micah David Parzen suggested that the inclusion of culture-bound syndromes in the DSM-IV would likely lead to the emergence of an insanity defense based on the claim that the defendant was suffering from a culture-bound syndrome at the time of his criminal act.[107] This result, he argued, would be beneficial because "[culture-bound syndrome]-based insanity defenses may . . . prevent the unjust imprisonment of culturally different offenders who, because of a lack of moral blame, simply do not deserve to rot away years or even decades of their lives in prison."[108] Furthermore, the use of the DSM-IV to recognize and diagnose certain cultural behaviors as "mental disorders" could take away judges' discretion to exclude or allow cultural evidence. If such evidence were presented as indicative of a culture-bound syndrome, it would need to be admitted as probative of an insanity defense.

VI. THE DSM-5 AND INSANITY/CULTURAL DEFENSE CASES

A. CULTURE IN THE DSM-5

While the DSM-IV and its inclusion of culture-bound syndromes helped legitimize mental disorders unfamiliar to most Western clinicians and courts, the APA was nonetheless criticized for the perceived cultural insensitivity of the DSM-IV and its treatment of cultural behaviors.[109] As a result, when the APA produced the DSM-5, it made major changes to its treatment of cultural diagnostic issues, some of which may have important legal ramifications for the future use of the insanity defense in the context of cultural cases. The primary impetus behind the heightened emphasis on culture in the DSM-5 arose from the APA's belief that because "[m]ental disorders are defined in relation to cultural, social, and familial norms and values" and culture "provides interpretive frameworks that shape the experience

107. Parzen, *supra* note 9595.

108. *Id.*

109. Paul C. Rosenblatt, *The concept of complicated grief: Lessons from other cultures*, *in* COMPLICATED GRIEF: SCIENTIFIC FOUNDATIONS FOR HEALTH CARE PROFESSIONALS 36 (Margaret Stroebe et al. eds., 2013).

and expression of the symptoms, signs, and behaviors that are criteria for diagnosis[,]" it is necessary to identify and understand the cultural factors affecting an individual before diagnosing him with any given mental disorder.[110] This acknowledgement of the influence of culture on both the individual's expression of mental disorder and in the clinician's diagnosis of the disorder reflects the belief held by many scholars that the field of psychiatry is inextricably linked to culture:

> [T]he practice of psychiatry — *no matter where it is practiced* — is significantly influenced by its cultural setting. Although such influence is not explicitly recognized in the Western clinical protocol, that protocol is itself an artifact of the cultural structuring of human knowledge and behavior. And the structure is not, as often assumed, the pure yield of Western biomedical science — transcendent, objective, and free from the influences of a cultural system. . . . [A] cultural dimension is inherent in both the broad background patterns and the internalized expectations that guide social relationships, as well as in the interpersonal flow of behavior itself. Much of the patient's behavior is structured by his or her cultural or 'ethnic' group affiliation, and so also is that of the clinician. Each is deeply influenced by bodies of belief that give form to the perceptually defined world and dictate norms of behavior.[111]

The DSM-5 reflects the APA's concerted effort to improve its treatment of cultural issues in the diagnosis of mental disorders. The APA has stated that "[t]hroughout the DSM-5 development process, the Work Groups made a concerted effort to modify culturally determined criteria so they would be more equivalent across different cultures" and that "specific diagnostic criteria were changed to better apply across diverse cultures."[112] Most importantly, the DSM-5 completely modified the concept of the culture-bound syndrome that was introduced in the DSM-IV, explaining:

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110. DSM-5, *supra* note 19, at 14.

111. Charles C. Hughes, *Culture in Clinical Psychiatry*, *in* CULTURE, ETHNICITY, AND MENTAL ILLNESS 3 (Albert C. Gaw ed., 1993) (emphasis in original).

112. AMERICAN PSYCHIATRIC ASSOCIATION, CULTURAL CONCEPTS IN DSM-5 (2013), http://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM_Cultural-Concepts-in-DSM-5.pdf [http://perma.cc/Z94X-RJQC].

> [T]he term *culture-bound syndrome* ignores the fact that clinically important cultural differences often involve explanations or experience of distress rather than culturally distinctive configurations of symptoms. Furthermore, the term *culture-bound* overemphasizes the local particularity and limited distribution of cultural concepts of distress. The current formulation acknowledges that *all* forms of distress are locally shaped, including the DSM disorders.[113]

The construct of the culture-bound syndrome was replaced by the idea of "cultural concepts of distress," which detail the ways different cultures describe symptoms.[114] These cultural concepts of distress are described in the DSM-5's Appendix in three categories: cultural syndrome, cultural idiom of distress, and cultural explanation or perceived cause.[115] These categories, according to the DSM-5, "offer greater clinical utility" than the culture-bound syndrome construct and provide a way for clinicians to recognize how people in different cultures manifest mental disorders.[116]

The first cultural concept of distress, *cultural syndromes*, is described as "clusters of symptoms and attributions that tend to co-occur among individuals in specific cultural groups, communities, or contexts and that are recognized locally as coherent patterns of experience."[117] The DSM-5 also notes that such syndromes may not be recognized as mental disorders within the individual's own culture but that "such cultural patterns of distress and features of illness may nevertheless be recognizable by an outside observer."[118] One example of a cultural syndrome listed in the DSM-5's glossary is *ataque de nervios* ("attack of nerves"), described as

> a syndrome among individuals of Latino descent, characterized by symptoms of intense emotional upset, including acute anxiety, anger, or grief; screaming and shouting uncontrollably; attacks of crying; trembling; heat in the chest rising into the head; and becoming verbally and physically aggressive. Dissociative experiences (e.g., depersonaliza-

113. DSM-5, *supra* note 19, at 758–59 (emphasis in original).
114. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 112.
115. DSM-5, *supra* note 19, at 14–15, 758.
116. *Id.* at 14.
117. *Id.* at 758.
118. *Id.* at 14.

> tion, derealization, amnesia), seizure-like or fainting episodes, and suicidal gestures are prominent in some *ataques* but absent in others. A general feature of an *ataque de nervios* is a sense of being out of control. Attacks frequently occur as a direct result of a stressful event relating to the family, such as news of the death of a close relative, conflicts with a spouse or children, or witnessing an accident involving a family member. . . . In community samples, *ataque* is associated with suicidal ideation, disability, and outpatient psychiatric utilization, after adjustment for psychiatric diagnoses, traumatic exposure, and other covariates. However, some *ataques* represent normative expressions of acute distress (e.g., at a funeral) without clinical sequelae. The term *ataque de nervios* may also refer to an idiom of distress that includes any 'fit'-like paroxysm of emotionality (e.g., hysterical laughing) and may be used to indicate an episode of loss of control in response to an intense stressor.[119]

The Glossary also lists "indisposition in Haiti," "blacking out in the Southern United States," and "falling out in the West Indies" as conditions in other cultural contexts related to an *ataque de nervios*, and lists "panic attack," "specified or unspecified dissociative disorder," and "intermittent explosive disorder," as among the related conditions in the DSM-5.[120] By linking these new cultural concepts to existing diagnoses in the DSM as well as other cultural conditions, the DSM-5 acknowledges the differences in the manifestation of mental disorders in different cultures while at the same time recognizing cross-cultural similarities in human nature.

Second, *cultural idioms of distress* are "ways of expressing distress that may not involve specific symptoms or syndromes, but that provide collective, shared ways of experiencing and talking about personal or social concerns."[121] Such idioms of distress may include a "linguistic term, phrase, or way of talking about suffering among individuals of a cultural group (e.g., similar ethnicity and religion) referring to shared concepts of pathology and ways of expressing, communicating, or naming essential features of

119. *Id.* at 833.
120. *Id.*
121. *Id.* at 758.

distress. . . ."[122] The DSM-5 offers as an example that "everyday talk about 'nerves' or 'depression' may refer to widely varying forms of suffering without mapping onto a discrete set of symptoms, syndrome, or disorder."[123]

Lastly, *cultural explanations or perceived causes* are "labels, attributions, or features of an explanatory model that indicate culturally recognized meaning or etiology for symptoms, illness, or distress."[124] These cultural explanations may be particularly relevant in folk classifications of disease used by laypersons or healers in the individual's culture.[125] *Kufungisisa* ("thinking too much") is listed as both a cultural explanation and an idiom of distress among the Shona of Zimbabwe.[126] As a cultural explanation, *kufungisisa* is thought to cause anxiety, depression, and sleeping problems.[127] As an idiom of distress, it indicates interpersonal and social difficulties such as martial or money problems and involves "ruminating on upsetting thoughts, particularly worries."[128] The DSM-5 notes that "thinking too much" is a common idiom of distress and cultural explanation in many countries and ethnic groups (including "Africa, the Caribbean and Latin America and among East Asian and Native American groups") and is related to the DSM-5 conditions of major depressive disorder, generalized anxiety disorder, posttraumatic stress disorder, and obsessive-compulsive disorder, among others.[129]

In addition to these cultural concepts of distress, the DSM-5 further emphasizes the importance of cultural factors in diagnosis by including a Cultural Formulation Interview (CFI), a set of 16 questions for clinicians to ask patients during mental health assessments in order to obtain information about the impact of the patient's culture on his clinical presentation.[130] Replacing the Outline for Cultural Formulation introduced in DSM-IV, the CFI assesses the "cultural identity of the individual," "cultural conceptualizations of distress," "psychosocial stressors and cultural features of vulnerability and resilience," "cultural features of the

122. *Id.* at 14.
123. *Id.* at 758.
124. *Id.* at 758.
125. *Id.* at 15.
126. *Id.* at 835.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 750–58.

relationship between the individual and the clinician," and an "overall cultural assessment."[131] Overall, the CFI is intended to "help clinicians to assess cultural factors influencing patients' perspectives of their symptoms and treatment options" and "provides an opportunity for individuals to define their distress in their own words and then relate this to how others, who may not share their culture, see their problems."[132] The CFI includes questions about patients' background in terms of their culture, race, ethnicity, religion, or geographical origin — examples include: "What do others in your family, your friends, or others in your community think is causing your [PROBLEM]?" and "Are there any aspects of your background or identity that make a difference to your [PROBLEM]?"[133] The CFI, in conjunction with DSM-5's inclusion of cultural concepts of distress and revision of diagnostic criteria, thus reflects the APA's understanding that culture is inextricably linked to mental disorders.

B. USE OF THE DSM-5 IN CULTURAL DEFENSE CASES

The DSM-5's heightened focus and sensitivity toward cultural factors in identifying and understanding mental disorders offers a potentially enhanced opportunity for defendants from other cultures to explain their criminal actions under the insanity defense. Given that courts often consult the DSM in identifying mental disorders,[134] DSM-5's extensive treatment of culture may provide defendants with more clinical standards to legitimize an insanity defense based on cultural factors. Specifically, DSM-5's notes on "[r]elated conditions in other cultural contexts" and especially "[r]elated conditions in DSM-5" for each cultural concept of distress seem to have great potential for use by courts: by linking specific cultural concepts of distress to more familiar Western diagnoses, it may be significantly easier for courts to analogize culturally-shaped behavior to more common and universally recognized symptoms of mental disorders. For instance, an *ataque de nervios* is listed as being related to dissociative disorder — which has been successfully utilized as the grounds for an insani-

131. *Id.* at 749–50.
132. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 112.
133. DSM-5, *supra* note 19, at 752–53 (bracketed texts in original).
134. Ralph Slovenko, *The DSM in Litigation and Legislation*, 39 J. AM. ACAD. PSYCHIATRY L. 6 (2011), http://www.jaapl.org/content/39/1/6.short [http://perma.cc/S5FD-L8JN].

ty defense in the past[135] — and thus defendants who exhibit symptoms consistent with an *ataque* may be able to benefit from this comparison by contextualizing their culturally shaped behavior within a diagnosis that courts understand and recognize.

Even if the defendant's culturally-shaped behavior is not specifically listed as a cultural concept of distress in the DSM-5, there are many diagnoses in the DSM-5 that may incorporate such behavior. The DSM itself notes that:

> There is seldom a one-to-one correspondence of any cultural concept with a DSM diagnostic entity; the correspondence is more likely to be one-to-many in either direction. Symptoms or behaviors that might be sorted by DSM-5 into several disorders may be included in a single folk concept, and diverse presentations that might be classified by DSM-5 as variants of a single disorder may be sorted into several distinct concepts by an indigenous diagnostic system.[136]

For cultural behaviors that are not specifically enumerated in the Glossary, DSM-5's CFI may allow clinicians to evaluate and understand defendants' behavior so that it can be contextualized in a standard DSM diagnosis. Importantly, the CFI makes assessing cultural factors an integral part of diagnosing mental disorders and thus ostensibly an important aspect of an insanity defense. The CFI questions may elicit answers from patient-defendants that elucidate the origins of, motivations behind, and effects of the cultural behavior and thereby enable clinicians to analogize the behavior to a DSM disorder. For instance, even if the practice of *oyako-shinju* (parent-child suicide) is not listed under any cultural rubric in the DSM, the CFI could isolate the cultural motivation behind such behavior (through questions such as "What do you think are the causes of your [PROBLEM]?").[137] Through both the cultural concepts of distress and the CFI, therefore, the DSM-5 could give defendants from other cultures a better chance of having their sentence reduced or eliminated through an insanity defense.

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135. Jeb Phillips, *30 years later, multiple-personality case still fascinates*, COLUMBUS DISPATCH (Oct. 28, 2007), http://www.dispatch.com/content/stories/local/2007/10/28/BILLY.ART_ART_10-28-07_A1_EV89AGB.html [http://perma.cc/M4PM-AA45].

136. DSM-5, *supra* note 19, at 758.

137. *Id.* at 752.

VII. CONCLUSION

Using an insanity defense as a proxy for the cultural defense — to allow courts to consider cultural evidence that influenced the defendant's behavior — is not a perfect solution to the lack of a formal cultural defense in the United States. It may offend the dignity of the defendant's culture, be unfair because it permits more lenience toward some defendants than others, and even be simply inaccurate if the defendant's actions were actually rational and deliberate. Furthermore, even if the insanity defense could consistently be used successfully as a substitute for a formal cultural defense, the end result for the defendant could be mandatory civil commitment — which may be less desirable than a longer prison sentence. The APA has even suggested that defendants who are acquitted by reason of insanity may spend as much if not more time committed to a psychiatric institution than if they had gone to prison for the same crime.[138] It is also worth noting that the insanity defense has only a 26 percent success rate when it is used.[139] Further still, many would argue that there should be no "solution" to the lack of cultural defense at all, and that cultural evidence should never be considered in deciding a defendant's guilt.

Despite opponents' protests, however, it is difficult to deny the powerful effect that culture has on an individual's thoughts and actions: "Culture shapes cognition and conduct in profound ways. Individuals are predisposed to act in certain ways based on their cultural conditioning. An understanding of the cultural background and motivation of the litigants is essential to properly gauge such fundamental issues as culpability and level of punishment deserved."[140] Because we live in a society that determines punishment by assessing a defendant's psychological as well as physical blameworthiness for a crime, and given the profound effect that culture can have on an individual's thoughts and actions, it seems essential to consider relevant cultural factors when determining whether or how to punish a defendant. Given

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138. Dahlia Lithwick, *The Insanity Defense*, SLATE (Jan. 11, 2011), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/the_insanity_defense.html [http://perma.cc/22QU-8SNG].

139. *Id.*

140. Alison Dundes Renteln & Rene Valladares, *The Importance of Culture for the Justice System*, 92 JUDICATURE 194, 201 (2009).

the lack of a formal cultural defense as well as the enhanced opportunities provided by the DSM-5 for evaluating cultural factors in the diagnosis of mental disorders, the insanity defense might just be a defendant's best option.