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THE CULTURAL DEFENSE AND ITS IRRELEVANCY IN CHILD PROTECTION LAW

Todd Taylor*

INTRODUCTION

Child abuse and neglect are not recent developments in human history, nor are they unique to any one culture.¹ For example, the Bible is filled with well-known and commonly cited aphorisms that demonstrate the approval of severe physical punishment of children.² One of the most blatant examples is in the book of Deuteronomy where Moses told the Israelites:

If a man have a stubborn and rebellious son, which will not obey the voice of his father, or the voice of his mother, and that, when they have chastened him, will not hearken unto them: Then shall his father and his mother lay hold on him, and bring him out unto the elders of the city, and unto the gate of his place; And they shall say unto the elders of his city, This our son is stubborn and rebellious, he will not obey our voice; he is a glutton, and a drunkard. And all the men of his city shall stone him with stones, that he die, so shalt thou put evil away from among you; and all Israel shall hear, and fear.³

Records from Greek and Roman times describe numerous instances of child beating.⁴ Roman law, for instance, gave a father life and death power over his minor children based on the principle of patria potestas: he who gave life also had the power to take it away.⁵ In England as late as the Seventh Century, a father could sell a son into slavery in the case of necessity.⁶ And during the Seventeenth

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³ Id. at 49 (quoting Deuteronomy 21:18–21).
⁴ See Freiman, supra note 1, at 243.
⁶ See id. at 106.
Century in Massachusetts and Connecticut, the parents of a "rebellious child" could legally put their son or daughter to death.\textsuperscript{7} It is clear that throughout human history, the condition of children has been perilous.

Compared to history of child abuse and neglect, the argument for the recognition of a formal "cultural defense" is a relatively recent development.\textsuperscript{8} The cultural defense is an affirmative defense asserted by a defendant socialized in a foreign culture in accordance with social and legal values that differ from the culture in which he or she is accused of committing the particular crime.\textsuperscript{9} If such a defendant is able to prove that his or her actions were committed with a "reasonable, good faith belief in their propriety, based upon the actor's cultural heritage or tradition," the cultural defense would mitigate or negate his or her criminal responsibility.\textsuperscript{10} The rationale behind the cultural defense is that the moral blame-worthiness of two individuals, both unquestionably guilty of committing the same act, is not the same if one individual was socialized in a society that views the act as criminal and the other was socialized in a society that tolerates, or even encourages, the behavior in question.\textsuperscript{11} Supporters of the cultural defense argue that its adoption will preserve justice for the alien offender.\textsuperscript{12} Opponents of the cultural defense counter with the traditional criminal law maxim: "Ignorance of the law is no excuse."\textsuperscript{13}

This Note will explore and evaluate the viability of the cultural defense in the unique area of child protection law.\textsuperscript{14} Part I addresses the inherent difficulty in formulating a universally acceptable defini-

\textsuperscript{7} See id. at 107.
\textsuperscript{8} While discussed in several law review articles, American courts have been unwilling to recognize a formal defense based on conflicts between an immigrant defendant's native culture and the United States' "majority culture." See Note, The Cultural Defense in the Criminal Law, 99 Harv. L. Rev. 1293, 1293-94 (1986) [hereinafter The Cultural Defense].
\textsuperscript{10} See id.
\textsuperscript{12} See generally The Cultural Defense, supra note 8.
\textsuperscript{13} See Taryn F. Goldstein, Culture Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense?", 99 Dick. L. Rev. 141, 158 (1994).
\textsuperscript{14} In other words, this Note will address the issue of whether a person charged with child abuse or neglect in the United States may argue that since his or her actions are not illegal, but rather are condoned in the culture that he or she was raised, he or she is less morally culpable than a similar defendant socialized in the United States, and therefore, his or her charge or punishment should be mitigated to the extent that justice requires.
tion of child abuse and neglect, and is divided into three sections: the scholarly debate, statutory definitions of child abuse and neglect, and the lack of cultural considerations in these definitions. Part II examines and assesses the notion of a formally recognized cultural defense in criminal law generally and ultimately advocates its adoption. Part II is also broken into three sections: the philosophical justification for punishment in the criminal law, motive and intent, and culture and the effects of enculturation on an individual’s behavior and morals. Part III explores the applicability of the cultural defense to the specific area of child protection law and concludes that, due to the expressly and intentionally rehabilitative nature of this area of the law, the cultural defense is largely irrelevant in cases of child abuse and neglect. Part III is divided into two sections: the first section describes the rehabilitative nature of child protection law generally, and the second illustrates this rehabilitative nature more concretely with a representative case, Dumpson v. Daniel M. 15

I. THE DEFINITION OF CHILD ABUSE AND NEGLECT

While most people probably believe they can recognize child abuse and neglect when they see it, formulating an acceptable definition in the abstract has proven to be an exceedingly difficult task. In fact, the problem of achieving a single universally acceptable definition of child abuse and neglect is currently unresolved and, most likely, will remain this way for the indefinite future. 16 As Michael Freeman observed, “Arguments surrounding definitions of child abuse reflect ideological differences and may prove intractable . . . . [Too] much depends on who is doing the defining and for what purpose.” 17

Indeed, individuals raised in western cultures may consider various forms of punishment used by non-western parents—locking children in huts for several days without food, smearing excrement on their faces in public, or forcing them to take extremely hot baths—to


constitute criminal behavior. At the same time, however, many of our western child-rearing practices would be viewed as equally abusive or neglectful by individuals raised and socialized in other cultures. For example, the western practices of making children wait for arbitrarily defined periods of time for food when they are hungry, forcing children to sit in classrooms all day long, and ignoring infants while they “cry themselves out” are all behaviors that would be at odds with the proper child-rearing practices of many non-western cultures. In other words, many of the behaviors that seem benign, even beneficial, in the development of our children are viewed by other cultures as bizarre, exotic, and possibly damaging. This raises the inevitable question: “What is the correct definition of child abuse and neglect?”

A. The Scholarly Debate

With respect to the definition of child abuse and neglect, there are two primary areas of scholarly disagreement: one, whether to use broad or narrow definitions, and two, whether the definition should focus on the parents' behavior or on the actual harm suffered by the child.

1. Broad vs. Narrow Definitions of Child Abuse and Neglect

The primary goal of child protection legislation is to identify children who are currently being abused or neglected, or are in danger of becoming abused or neglected, and to get them into a system that can provide protection and assistance as quickly as possible. Some authorities argue that a broad definition of child abuse and neglect—one which is designed to protect all children at risk—is the best way

19 See id.
20 See id. Korbin notes that cultural differences in child-rearing practices can lead to misinterpretations of neglect. See id. For example, while case workers in the United States are frequently alarmed when they see several children sleeping in the same bed, traditional Hawaiians would be just as alarmed at seeing only one child in a bed, not to mention a child living in a room of his or her own. See id. at 6. Similarly, the Japanese, due to the high value that they place on family member interdependence, believe that sharing a bed with a relative is preferable to sleeping alone. See id.
21 See id. at 5–7.
23 See id. at 149–50.
to accomplish this legislative goal. Advocates argue that by using a broad definition, child protection agencies will be able to identify dangerous or potentially dangerous environments at the earliest signs of abuse, and as a result, will be better able to prevent future harm to children at risk through aggressive identification, intervention, and counseling programs.

Sanford Katz, a professor of law at Boston College Law School, argues for broad statutes and a high level of discretion for the trial judges who hear the particular cases. He writes:

Statutory words such as "neglect," "cruelty," and "depravity," and phrases such as "unfit place" or "whose environment is such as to warrant the state, in the interest of the child, in assuming its guardianship" . . . are designed to give a local judge, who is close to the family situation and knowledgeable about the community, discretion in interpretation and application . . . . [T]he judge, by virtue of parens patriae, has the freedom and perhaps the responsibility to use his own subjective views . . . . He evaluates the evidence; he decides its weight. It is his subjective response that is important. Judges, again by virtue of parens patriae, are supposed to be endowed with unique insight into the best interests of the child.

Katz believes that broad statutes enable judges to decide child maltreatment cases based on their unique circumstances, thereby avoiding the need to search for a specific statutorily defined behavior before the state may intervene in an abusive or neglectful environment.

Since the protection and welfare of children is the ultimate goal, broad definitions, which lean toward the over-reporting of child abuse and neglect, initially seem justified. The ethical ramifications of over-reporting, however, are significant, especially in light of the high number of abuse and neglect reports which go unsubstantiated. Therefore, in an effort to protect family autonomy and individual privacy

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24 See id. at 150.
25 See id.
26 See KATZ, supra note 16, at 59.
27 Id.
28 See id. at 64–65.
from unwarranted state intrusion, other authorities argue for a more precise statutory definition of child abuse and neglect.\textsuperscript{30} Three major reasons underlie this view: one, the desire for and recognized value in a diversity of lifestyles; two, inadequate knowledge of non-traditional or foreign child-rearing practices by judges and social workers; and most importantly, the likelihood that state intervention may actually harm, rather than help, the child.\textsuperscript{31} Broad definitions, these authorities argue, lead to unfounded allegations of abuse which, even if made in good faith, have the effect of violating the privacy of the family, disrupting intra-family relations, and unjustly stigmatizing those responsible for the child’s care as “child abusers.”\textsuperscript{32} In arguing for narrow statutory definitions, Michael Wald, a professor of law at Stanford University, wrote:

Vague [or broad] laws increase the likelihood that decisions to intervene will be made in situations where the child will be harmed by intervention. Because the statutes do not reflect a considered analysis of what types of harm justify the risks of intervention, decision-making is left to the ad hoc analysis of social workers and judges. There is substantial evidence that their decisions often reflect personal values about child-rearing, which are not supported by scientific evidence, and which result in removing children from environments in which they are doing adequately. Only through carefully drawn statutes, drafted in terms of specific harms to the child, can we limit the possibility of intervention in situations where it will do more harm than good.\textsuperscript{33}

Wald argues that unless statutes allow intervention only when specific harms have been identified, social workers and judges need not justify, in any meaningful way, their decisions to intervene in an “abusive” or “neglectful” family and as a result, are more apt to make unsound decisions.\textsuperscript{34} Moreover, Wald argues that even if the particular situation requires intervention, without the identification


\textsuperscript{31} See Meriwether, \textit{supra} note 22, at 150. A child may be subjected to investigations by state officials, appearances in court, medical and psychological examinations, and possible removal from the family while the investigation is conducted. \textit{See id.} This can have negative consequences for the child, whether the abuse or neglect is substantiated or not. \textit{See id.}

\textsuperscript{32} \textit{See id.}

\textsuperscript{33} Wald, \textit{supra} note 30, at 1001–02.

\textsuperscript{34} \textit{See id.} at 1002.
of specific harms by the state actors, subsequent evaluation of the decision to intervene will be impossible.\textsuperscript{35}

2. Definitions of Child Abuse and Neglect Based on Parental Behavior or on Harm to the Particular Child

In addition to the definition's scope, scholars also disagree on whether the definition of child abuse and neglect should focus on the parents' behavior or on the harm suffered by the child.\textsuperscript{36} Most statutes, particularly those defining neglect, focus on parental behavior and the environment in which the parental behavior occurs to gauge the likelihood of future harm.\textsuperscript{37} David G. Gil, an authority on child abuse and neglect, supports these types of definitions, arguing that definitions of child abuse and neglect which rest on

the observed effects of an attack on a child, such as injuries sustained by him, rather than in terms of the motivation and behavior of the attacking person . . . disregard the motivational and behavioral dynamics of perpetrators and result in vagueness, since the outcomes of violent, abusive acts depend not only on the perpetrators behavior, but also on the victim's reaction to the perpetrator's behavior, and on environmental and chance circumstances.\textsuperscript{38}

Gil therefore rejects definitions of child abuse and neglect based solely on the relative harm suffered by a particular child as incomplete formulations.\textsuperscript{39}

Michael Wald, on the other hand, believes that the focus of the definition should be on the harm suffered by the child in question.\textsuperscript{40} While acknowledging that parental behavior is relevant in determining whether the child is likely to suffer abuse or neglect, Wald argues that the speculation and the potential pitfalls of attempting to predict the effects of parental behavior on a specific child are problematic and can be avoided if the definition is based on the extent of the harm suffered by the child.\textsuperscript{41} In other words, Wald's definition would recognize each child as a unique individual with different thresholds for maltreatment,

\textsuperscript{35} See id.
\textsuperscript{36} See Meriwether, supra note 22, at 149.
\textsuperscript{37} See id. at 152.
\textsuperscript{38} DAVID G. GIL, VIOLENCE AGAINST CHILDREN 5 (1970).
\textsuperscript{39} See id.
\textsuperscript{40} See Wald, supra note 30, at 1002–03.
\textsuperscript{41} See id.
and offenders would only be guilty of abuse or neglect if their particular victim manifests statutorily defined symptoms of abuse or neglect. In this way, guilt for child abuse or neglect would not depend on a case worker’s or a judge’s subjective opinion of what constitutes proper child-rearing practices; it would depend on the child’s manifestation of legislatively defined symptoms. Wald wrote:

[A]ll available evidence indicates that it is extremely difficult to correlate parental behavior or home conditions with specific harms to a child, especially if the predicted harm involves long-term, rather than immediate, effects of the environment. Even in very “bad” homes, the impact of the home environment will vary depending upon the age of a child, the nature of the family interactions, developmental differences among children, and many other factors . . . . [S]ince each child may respond differently to a given home environment, the law must focus primarily on the child rather than the parent or the home environment.

Such a definition, Wald argues, will prevent unnecessary and potentially harmful state intrusions into the domestic realm.

B. Statutory Definitions of Child Abuse and Neglect

Considering the extent of scholarly debate and its lack of consensus, it is not surprising that the statutory definition of child abuse and neglect varies from state to state. For example, the state of Alaska relies on a relatively general definition of child abuse and neglect:

[T]he physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child’s health or welfare is harmed or threatened thereby.

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42 See id.
43 See id.
44 Id.
45 See id. at 1002.
46 See Meriwether, supra note 22, at 143. Meriwether notes that while definitions vary, each state’s statute essentially contains the same components: “(1) definition of reportable conditions, (2) persons required to report, (3) degree of certainty reporters must reach, (4) sanctions for failure to report, (5) immunity for good faith reports, (6) abrogation of certain communication privileges, [and] (7) delineation of reporting procedures.” Id.
Colorado's statute, on the other hand, sets forth more specific categories constituting abuse or neglect. It states:

Any case in which a child exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling, or death and either: Such condition or death is not justifiably explained; the history given concerning such condition is at variance with the degree or type of such condition or death; or the circumstances indicate that such condition may not be the product of an accidental occurrence;

Any case in which a child is subjected to sexual assault or molestation, sexual exploitation, or prostitution;

Any case in which a child is a child in need of services because the child's parents, legal guardian, or custodian fails to take the same actions to provide adequate food, clothing, shelter, medical care, or supervision that a prudent parent would take.\[48\]

The statutory definitions of child abuse and neglect in California are even more categorized.\[49\] Here the general definition is broken down into eight subsections, each of which is then defined.\[50\] The subsections are sexual abuse;\[51\] neglect,\[52\] severe neglect,\[53\] and general neglect;\[54\] willful cruelty or unjustifiable punishment of a child (including mental suffering);\[55\] unlawful corporal punishment or injury;\[56\] abuse in out-of-home care;\[57\] and child abuse.\[58\]

When these statutory definitions are compared, three significant differences become apparent. First, while physical abuse, neglect, and sexual abuse are always included in the statute, emotional abuse is not, despite the general recognition that children who are emotionally abused or neglected can suffer both severe psychological and physical damage.\[59\] One reason for the statutory absence of emotional abuse

\[49\] See CAL. PENAL CODE § 11165.1–11165.6 (West 1995).
\[50\] See id.
\[51\] See id. § 11165.1.
\[52\] See id. § 11165.2.
\[53\] See id. § 11165.2(a).
\[54\] See CAL. PENAL CODE § 11165.2(b) (West 1995).
\[55\] See id. § 11165.3.
\[56\] See id. § 11165.4.
\[57\] See id. § 11165.5.
\[58\] See id. § 11165.6.
may be based on its elusive and intangible nature. When emotional or mental abuse is included in a statute, it is often left undefined or it is based on vague standards such as the infliction of "unjustifiable . . . mental suffering" or a "substantial impairment in the intellectual or psychological ability of a child." Some authorities argue that these vague standards result in a high level of judicial discretion in private family affairs and a corresponding decrease in parental autonomy and rights. Thus, these authorities advocate a definition of emotional abuse or neglect which requires the manifestation of overt symptoms in the alleged victims. Unlike physical abuse, however, the harmful effects of emotional abuse may not manifest themselves immediately after the abuse occurs. Therefore, others argue that definitions of emotional abuse or neglect should focus on the parent's or caregiver's behavior.

Second, although it is possible to specifically define physical abuse, the states often choose to define it in general terms, frequently as "non-accidental physical injuries." A number of authorities argue against this definition since it requires the reporter to make the often impossible determination of whether or not the child's injury was intentionally inflicted. Additionally, because corporal punishment is, by definition, a physical injury, some states have attempted to distinguish it from child abuse. For example, under the California statute, corporal pun-

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60 See Meriwether, supra note 22, at 160.
61 CAL. PENAL CODE § 11165.3 (West 1995).
63 See Wald, supra note 30, at 1001-02.
64 See id. Wald would define emotional abuse or neglect as "severe anxiety, depression or withdrawal, or untoward aggressive behavior or hostility toward others." Id.
65 See Meriwether, supra note 22, at 160.
66 See id.
67 See id. at 144. See, e.g., CAL. PENAL CODE § 11165.6 (West 1995) (injuries "inflicted by other than accidental means"); COLO. REV. STAT. § 19-3-303(1)(a) (I) (1995): ("circumstances indicate that such condition may not be the product of an accidental occurrence").
68 See Meriwether, supra note 22, at 156-57. Meriwether notes that physical injuries which result from a parent's inattention to his or her child's actions could arguably be deemed "accidental." See id.
69 See, e.g., CAL. PENAL CODE § 11165.4 (West 1995). Brian G. Fraser distinguishes reasonable and unreasonable corporal punishment based on four factors: the age of the child, the part of the body that was struck, the instrument used to strike the child, and the amount of damage inflicted. See Brian G. Fraser, A Glance at the Past, a Gaze at the Present, a Glimpse at the Future:
ishment is not child abuse unless it is willfully "cruel or inhuman" or results "in a traumatic condition."\textsuperscript{70}

Third, since the symptoms of neglect are not as readily observable as those caused by physical abuse, each state has adopted one of two definitional standards for child neglect: the "prudent parent" standard or the necessity standard.\textsuperscript{71} Colorado uses the prudent parent standard, defining child neglect as anything less than the amount of food, clothing, shelter, medical care, and supervision that a prudent parent would provide for his or her child.\textsuperscript{72} While in theory most would agree that children should be raised by "prudent parents," the adoption of this standard raises two problems: one, the subjective judgments and cultural biases that accompany any attempt to define the "prudent parent," and two, the fact that what may appear to be child neglect is often the result of economic difficulties and not an absence of parental love or care.\textsuperscript{73} For these two reasons, many states have adopted a lesser standard for neglect: the necessity standard.\textsuperscript{74} Alaska, for instance, uses the necessity standard, defining the neglectful parent as one who fails to provide the minimum amounts of food, care, clothing, shelter, and medical attention necessary for a child.\textsuperscript{75} The fact that a parent’s guilt or innocence may depend solely on the state that he or she commits the act in only increases the confusion surrounding the definition of child abuse and neglect.

C. The Lack of Cultural Considerations in Definitions of Child Abuse and Neglect

The issues and debates presented in the previous two sections illustrate the complexity and controversy involved in the formulation

\textit{A Critical Analysis of the Development of Child Abuse Reporting Statutes}, 54 Chi.-Kent. L. Rev. 641, 652 n.62 (1979). Others argue that state intervention in the family based on parental use of corporal punishment should be restricted to extreme forms of physical punishment due to its widespread acceptance and the notion of privacy of the family. See Wald, \textit{supra} note 30, at 1008–13.

\textsuperscript{70} \textit{Cal. Penal Code} § 11165.4 (West 1995).

\textsuperscript{71} See Meriwether, \textit{supra} note 22, at 157–58.


\textsuperscript{73} See Meriwether, \textit{supra} note 22, at 157–58. Placing two children in the same bed may not be the result of neglect as much as it is the result of not being able to afford two beds due to a recent downturn in a guardian’s financial situation. See Korbin, \textit{The Cultural Context of Child Abuse and Neglect}, \textit{supra} note 18, at 6–7. Moreover, there may be cultural reasons for placing two children in the same bed. \textit{See id.}

\textsuperscript{74} See Meriwether, \textit{supra} note 22, at 157–58.

\textsuperscript{75} \textit{See Alaska Stat.} § 47.17.290(10) (Michie 1995).
of a workable definition of child abuse within our own country. One reason this issue is so emotionally charged and extremely personal is that the point at which child abuse is defined is also the point at which the state may intervene in the traditional zone of family privacy, investigate and monitor its internal workings, and mandate certain conduct for the future. However, there is another reason why agreeing on a definition of child abuse and neglect has proven so difficult: each individual’s view of acceptable and unacceptable child-rearing practices depends, to a large extent, on the way he or she was raised and what was acceptable or unacceptable within his or her culture. While some state statutes, such as Colorado’s and California’s, require child welfare officials to take note of an individual’s cultural background when determining whether or not abuse or neglect has occurred, other states, like Alaska, take no account of an individual’s culture for this determination.

Despite the difficulty in establishing a universally acceptable cross-cultural definition of child abuse and neglect, Jill E. Korbin notes that “virtually all cultures, regardless of how harsh or indulgent their child care practices appear [to other societies], have standards for acceptable child-rearing and [sanctions for] individuals who deviate from those standards.” In other words, each culture, in isolation, is reasonably capable of relying on its social norms and values to decide which parental behaviors are harmful to children and which ones are not. As different cultures come into contact with each other, however, conflicting cultural child-rearing practices and beliefs create a situation ripe with potential for disputes concerning the “correct” definition of child abuse and neglect. In order to avoid both a rigid ethnocentric position, where the dominant culture’s beliefs and practices are presumed superior, as well as a hyper-relativist view of cultural child abuse, where the welfare of children is sacrificed in the name of multicultural sensitivity, Korbin argues that individuals must learn to view the alleged

76 The Colorado statute requires child welfare investigators to “take into account accepted child rearing practices of the culture in which the child participates” as they make their determinations. See Colo. Rev. Stat. § 19–3–303(1)(b) (1995). The California statute states: “Cultural and religious child-rearing practices and beliefs which differ from general community standards shall not in themselves create a need for child welfare services unless the practices present a specific danger to the physical or emotional safety of the child.” Cal. Welf. & Inst. Code § 16509 (West 1996).


78 See id.

79 See Korbin, The Cultural Context of Child Abuse and Neglect, supra note 18, at 5.
maltreatment both from the perspective of an individual who shares the alleged perpetrator's cultural background, and also as a cultural outsider. Korbin writes:

[O]ne must be cognizant of the viewpoints of members of the cultural group in question, termed the *emic* perspective, as well as an outsider, or the *etic* perspective. An understanding of the *emic* perspective has been central in anthropologist's efforts to organize and explain the diversity of human behavior that has been documented cross-culturally. Thus, the anthropologist has sought to "... grasp the native's point of view, his relation to life, to realize his vision of his world." At the same time, one needs an *etic* frame of reference such that behavior can be interpreted from a wider perspective. An understanding of both *emic* and *etic* perspectives is a necessity in sorting out the impact of the cultural and social context in which behavior, including child abuse and neglect, takes on meaning.

Therefore, if a parent accused of child abuse or neglect claims that the punishment he or she has inflicted on his or her child is acceptable under the customary child-rearing practices of his or her native culture, the fact-finder should, according to Korbin, utilize the *emic* perspective to determine the legitimate forms of punishment within that culture. The fact-finder, however, must also view the behavior at issue from an *etic* perspective, keeping in mind the fact that cultures do not allow punishment or corrective measures to hinder the development or welfare of their children. An example will further illustrate this process.

When asked if a parent who intentionally scars his or her son's face in a ritualized ceremony should be found guilty of child abuse, most Americans would probably answer affirmatively. Korbin asks how we as a culture can decide that this parent's behavior is abusive when our own culture allows, and even encourages, practices like orthodonture. When removed from their cultural contexts, both practices would have an *etic* connotation of pain inflicted on the child. However,

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80 See id. at 4.
81 Id.
82 See id.
83 See id.
viewed within their contexts, (from the *emic* perspective) both are practices that are aimed at benefiting the child by making him or her physically acceptable to other members of the culture.85

Thus, Korbin argues that the cultural context of a given behavior "must be viewed holistically . . . [s]o that no single element of a cultural pattern can be removed from its context and examined in isolation."86 If a defendant's behavior truly cannot be interpreted or evaluated separately from its social context, when a genuine conflict between a defendant's native culture and the majority culture arises, the court adjudicating the case must consider evidence demonstrating the cultural motivations for the defendant's actions in order to understand why he or she behaved in this way.87 In other words, Korbin argues the court must allow the defendant, in such a situation, the opportunity to present a cultural defense for his or her behavior.

**III. THE CULTURAL DEFENSE**

Unlike child abuse and neglect, the cultural defense is easily defined. A cultural defense is an affirmative defense asserted by immigrants, refugees, and indigenous people based on their customs or customary law. A successful cultural defense would permit the reduction (and possible elimination) of a charge, with a concomitant reduction in punishment.88 In order to assert the defense, the defendant must have been socialized in a distinctly different culture and this foreign culture must encourage, or at least sanction, the behavior which has been deemed illegal in this country.89 In other words, there must be a direct conflict between culturally acceptable behaviors.90 The rationale for the defense is that an individual's behavior is influenced to such a large extent by his or her culture that either the individual did not *believe* that his or her actions violated a law,91 or that the individual's cultural upbringing *compelled* him or her to act in violation of a known law.92 In both cases, the individual's culpability is decreased vis-a-vis a native citizen.93 The rationale for admitting evidence which furthers a cultural defense is based not only on a desire to be culturally

85 See id.
86 Id.
87 See id.
88 See id.
89 See Renteln, supra note 11, at 439.
90 See id.
91 See id. Renteln refers to this as the "cognitive case." See id.
92 See id. Renteln refers to this as the "volitional case." See id.
93 See id.
sensitive, although that is definitely a large part of it,94 rather it is rooted in a desire to apply the law in a fair and equal manner.95

Currently, there is no formally recognized cultural defense in the American system of criminal justice.96 This absence, however, has not prevented defense attorneys from introducing cultural information about their clients under the context of preexisting defenses.97 Clearly, cultural information will be admitted into courtrooms whenever a case involves a cultural conflict; it is practically impossible to exclude it entirely.98 Therefore, the issue is not whether cultural evidence will be introduced, but whether such evidence can function to mitigate a defendant’s charge and/or punishment.

A. The Philosophical Justification for Punishment in the Criminal Law

In order to decide whether or not a defendant’s culture should be considered in criminal cases, the various philosophical justifications for punishment must be examined.99 Generally, it is said that there are three principle theories of punishment: deterrence, rehabilitation, and retribution.100 The deterrence theory views punishment as the primary means of preventing the specific defendant and other potential defendants from committing future crimes.101 The central idea is that by penalizing criminal acts in a public way, the law prevents potential criminals, who fear that they too will be punished, from acting illegally,

94 For a discussion of the value of multiculturalism, see The Cultural Defense, supra note 8, at 1300–01. The author of the Note argues: “The cultural defense is integral to the United States’ commitment to pluralism: it helps maintain a diversity of cultural identities by preserving important ethnic values.” Id. at 1301. The author further asserts that the United States should remain committed to cultural pluralism for several reasons. See id. First, cultural pluralism maintains a society’s vigor. See id. at 1300. Second, the principle of equality underlying the American system of justice ultimately requires that the majority culture respects each minority culture’s right to be different. See id. at 1301. Third, the level of cultural pluralism within our society measures, in part, the value the majority places on the concept of liberty. See id. Finally, cultural pluralism, and its positive relationship with liberty, may act as a bulwark against despotism. See id.

95 See Renteln, supra note 11, at 439–40.


97 See Renteln, supra note 11, at 437. Renteln explores the viability of incorporating cultural evidence into the framework of existing criminal defenses. See id. She examines the defenses of necessity, duress, self-defense, insanity, diminished capacity, automatism, provocation, mistake in fact, and religious defenses, and concludes that the existing affirmative defenses are inadequate, and that forcing immigrant defendants to use them in culture conflict cases results in “sophistic contortions and sometimes leads to injustice.” Id. at 487.

98 See id. at 439.

99 See id. at 441.

100 See id.

101 See id. For an in-depth discussion of deterrence theory, see generally Johannes Andenaes,
and thus, upholds the social order. Advocates of the rehabilitation theory, on the other hand, believe that punishment reforms the character of the individual criminal and prevents him or her from committing crimes in the future. According to this view, the process of being punished leads the criminal to the realization that what he or she did was wrong, and once this understanding has been reached, the individual will not repeat his or her mistake in the future. Finally, followers of the retribution theory of punishment focus on the moral blameworthiness of a defendant, arguing that an individual should be punished only to the extent that he or she deserves. The retribution view of punishment, also known as the doctrine of “just deserts,” allows the community to express the extent of its disapproval by scaling the severity of punishment according to its moral outrage.

The debate about the relative primacy of these different justifications for punishment vis-a-vis the others is old and unresolved with respect to American criminal jurisprudence. Alison Dundes Renteln, a professor of political science at the University of Southern California, argues, however, that the fundamental basis for criminal punishment lies with retribution since deterrence and rehabilitation both implicitly rely on retribution in their justifications. She argues:

Deterrence cannot stand alone, because general deterrence would be achieved by punishing the innocent. But deterrence is only valid if others are deterred by the punishment of one who is deserving of it. By like token, rehabilitation only succeeds if the prisoner accepts that he is blameworthy. Thus, the concept of just desert underlies the other theories of punishment insofar as it is a tacit assumption for their legitimacy.

In other words, if there is no relationship between the punishment society imposes on the individual and the individual’s degree of

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**Punishment and Deterrence** (1974); Franklin E. Zimring, **Perspectives on Deterrence** (1971), cited in Renteln, supra note 11, at 441.

102 See Renteln, supra note 11, at 441.


104 See Renteln, supra note 11, at 441.


106 See Renteln, supra note 11, at 442.

107 See id.

108 Id. (emphasis added).
deservingness for the punishment, the law will not deter the rational individual from acting illegally since this individual realizes that the likelihood of receiving punishment is the same regardless of whether or not he or she actually breaks the law.\(^\text{109}\) In this way, the deterrence theory of punishment functions only if those deserving of punishment are the ones actually punished, and as such, it presupposes the retribution theory of punishment.\(^\text{110}\) The same holds for the rehabilitation theory of punishment.\(^\text{111}\) Unless the criminal accepts that his or her action was wrong and that he or she is to blame personally for the wrong, the criminal will not be reformed, and there can be no rehabilitation.\(^\text{112}\) Therefore, the rehabilitation theory also assumes the retribution theory.\(^\text{113}\)

Central to the theory of retribution is the concept of proportionality: the punishment should fit the crime.\(^\text{114}\) Proportionality takes many forms, the most well-known is probably the concept of “an eye for an eye” or the *lex talionis*.\(^\text{115}\) On the other hand, there is the more flexible scaling view of retribution called general proportionality.\(^\text{116}\) Regardless of their specific view of proportionality, advocates of the retribution theory of punishment all agree on this general concept.\(^\text{117}\) It is this aspect of retribution, proportional punishment, which provides the philosophical justification for a cultural defense: a defendant whose action is motivated by “good” reasons is less blameworthy in a moral sense, and less deserving of punishment, than a defendant who acts with “bad” motives.\(^\text{118}\) In order to see why this is so, one must examine the concepts of motive and intent.\(^\text{119}\)

**B. Motive and Intent**

One of the immigrant defendant’s primary motivations for attempting to introduce evidence of his or her cultural background is to illustrate and emphasize the difference between legal and moral guilt.\(^\text{120}\) Alison Dundes Renteln attributes the gray area separating these

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\(^{109}\) See id.
\(^{110}\) See id.
\(^{111}\) See Renteln, *supra* note 11, at 442.
\(^{112}\) See id.
\(^{113}\) See id.
\(^{114}\) See id.
\(^{115}\) See id.
\(^{116}\) See Renteln, *supra* note 11, at 442.
\(^{117}\) See id.
\(^{118}\) See id.
\(^{119}\) See id.
\(^{120}\) See id. at 443.
two concepts to the confusion surrounding the distinction between motive and intent and the part these concepts play in creating legal guilt. 121

With respect to criminal law, intent, or mens rea,122 is construed narrowly so that, as a requirement, it is satisfied if a defendant meant to behave in a way that has been deemed criminal.123 For example, if a defendant meant to exceed the speed limit on a freeway, he or she satisfied the intent requirement for a speeding violation. Therefore, in the eyes of the law, two people traveling ninety-five miles per hour on the same highway, one, a husband speeding to the hospital with his pregnant wife who is in labor, the other, a bank robber fleeing the scene of the crime, are both equally guilty of violating the law with respect to the speed limit. The two defendants’ individual motivations for speeding are irrelevant; legally speaking, the only issue of importance is whether the defendants demonstrated the necessary intent to speed. Since both unquestionably intended to drive as fast as they were driving when the they were caught, they are both equally guilty in the legal sense.

While a defendant’s motive is not necessary to determine legal guilt, it is critical in establishing his or her moral guilt or blame-worthiness for the violation.124 Returning to the example above, there is clearly a difference between these two defendants: while both the husband and the thief are equally guilty legally since they both intended to speed, the husband is in some sense less guilty morally. More specifically, the husband’s violation was motivated by his desire to get his wife and unborn child to the hospital so that the doctors could perform a safe delivery. The thief’s motivation for violating the speeding law, on the other hand, was to evade capture by the authorities. Simply stated, the husband’s motivation for breaking the speed limit was “good” in the moral sense; the thief’s motivation was “bad.” In such a situation, it is difficult to deny that a defendant’s relative culpability should depend on his or her motive in acting. 125

121 See id.
123 See Renteln, supra note 11, at 443.
124 See id.
125 One of the reasons why the law may be hesitant to allow any official consideration of motive beyond discretionary consideration may stem from a desire to maintain deterrence: there may be a fear that if a defendant’s motive was relevant, fact-finders would allow a defendant that was admittedly guilty of committing a crime to go free, and as a result, the effectiveness of the law to deter others from committing the crime would be decreased. See id. Another possible
Not surprisingly, the American criminal justice system recognizes that justice is not always served by completely ignoring the defendant's motive for acting. In order to deal with these situations, the system grants its actors and officers a high level of discretion when it comes to evaluating a defendant's motivation, and thus his or her moral blameworthiness, for behaving in a criminal manner. For example, extenuating circumstances may be factored into a prosecutor's decision when charging a defendant with a crime or when plea bargaining with the defense attorney. Due to the considerable latitude given to judges in state sentencing statutes, the sentencing process also allows extenuating variables, such as culture, to be considered when fixing appropriate punishments for defendants in culture-conflict cases. Cultural factors, in addition to influencing the discretionary decisions of prosecutors and judges, may also influence a jury's decision. For example, a jury, using its traditional power to nullify a law that it considers unjust, can use cultural evidence to convict a defendant on lesser charges or to acquit the defendant completely. The jury's ability to use cultural
evidence as a basis for nullification, however, depends on the trial judge’s willingness to allow evidence of the defendant’s cultural background in the first place.\textsuperscript{132} Since all consideration of motive is discretionary, the importance of a specific defendant’s cultural background is treated differently from case to case depending on the individuals making the discretionary decisions.\textsuperscript{133} Obviously, such a situation can lead to unequal application of the law and potentially gross injustices for the parties involved.\textsuperscript{134} Therefore, to the extent the law derives its legitimacy from morality, it should officially accommodate the distinction between legal and moral guilt and recognize cultural differences as mitigating factors which may decrease a particular defendant’s moral blame-worthiness, and hence, his or her legal guilt.\textsuperscript{135}

In order to understand why a defendant socialized in a different culture may be less morally blameworthy than a defendant socialized in the majority culture when both intentionally commit identical crimes, one must examine the influence that culture has on our behavior and moral beliefs.

C. Culture and the Effects of Enculturation

“Culture” is defined as the organized group of learned responses characteristic of a particular society.\textsuperscript{136} Anthropologists call the conscious and unconscious process by which all people learn the norms and values of their society enculturation.\textsuperscript{137} Ralph Linton explains the profound manner in which an individual’s culture shapes his or her world-view:

\begin{quote}
perception of both apprehension and imminent danger from the individual’s own perspective, but involves an objective view by the jurors of those circumstances.” \textit{Id}. While it is clear that none of the various Native American cultures within this country believe that homicide is justifiable, the jury was most likely persuaded by Serra’s “cultural” argument since it acquitted Croy of all charges. \textit{See id.}\textsuperscript{132}
\textit{See The Cultural Defense, supra} note 8, at 1295 n.16.
\textit{See id.} at 1297.
\textit{See id.} The author of the Note writes:
Prosecutorial charging and judicial sentencing, although important devices for dealing with cultural factors . . . are by nature ad hoc, offering neither guarantees of procedural safeguards nor guidelines on the relevance of cultural factors. This absence of procedural safeguards and guidelines leads to inconsistency in the treatment of cultural factors from case to case.

\textit{Id.}\textsuperscript{134}
\textit{See Renteln, supra} note 11, at 443.
\textit{See Ralph Linton, The Tree of Culture} 29 (8th prtg. 1972).
\textit{See Melville J. Herskovits, Man and His Works} 39 (7th prtg. 1956).\textsuperscript{135}
\end{quote}
No matter what the method by which the individual receives the elements of culture characteristic of his society, he is sure to internalize most of them. This process is called enculturation. Even the most deliberately unconventional person is unable to escape his culture to any significant degree. . . . Cultural influences are so deep that even the behavior of the insane reflects them strongly. 138

While recognizing that individuals are capable of independent thought, feeling, and action, Linton writes that this independence is “limited” and “profoundly modified” by the culture in which the individual develops. 139 Therefore, culture shapes every person’s perception of reality, and as a result, guides every person’s behavior. 140

Given the influence that an individual’s culture has on shaping his or her behavior, there are at least two situations where strict application of our laws may be unjust for a person socialized in a foreign culture. 141 First, such a defendant may have committed a criminal act because he or she was ignorant of the law in this country. 142 This is known as the cognitive case: due to his or her cultural background and its conflicting values, the defendant simply did not realize his or her behavior was criminal. 143 Although ignorance of the law has traditionally been no excuse for violating it, 144 the rationale for this legal maxim

138 LINTON, supra note 136, at 39.
139 See id. at 29.
140 See Renteln, supra note 11, at 445. Lucian Pye notes the durability and persistence of culture:

It . . . has this vital quality because it resides in the personality of everyone who has been socialized to it. People cling to their cultural ways not because of some vague feeling for their historical legacies and traditions, but because their culture is part and parcel of their personalities—and we know from psychoanalysis how hard . . . it is to change personality.

141 See The Cultural Defense, supra note 8, at 1299.
142 See id.
143 See Renteln, supra note 11, at 439.
144 Opponents of the formalized cultural defense argue that ignorance of the law has never been an excuse for breaking it and that an immigrant has a duty to understand and heed the laws of his or her new culture. See Goldstein, supra note 13, at 158. This view was espoused by Secretary of State Daniel Webster in 1851 when he said:

Every foreigner born residing in a country owes to that country allegiance and obedience so long as he remains in it, as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens.

Id. at 145.
does not logically apply to people socialized in cultures other than our own. For instance, the assumption behind the “ignorance of the law” maxim is that various socializing institutions—the family, schools, places of worship, etc.—can reasonably be expected to inform native people of the norms upon which their societies’ laws are based. In other words, people socialized in our society need not know the exact wording of the law in order to know generally, due to their contact with these socializing institutions, what the law expects of them. An immigrant to this country, however, has not been exposed to the same socializing institutions as a native, and therefore, he or she is more justified than a native in being ignorant of our criminal laws. For this reason, it may be unjust to apply this legal maxim to the defendant socialized in a foreign culture.

A second situation which may result in an unjust result for the immigrant defendant has been termed the volitional case. It has been noted that a society’s institutions not only make its members aware of its norms, the institutions also foster a sense of moral obligation to abide by these norms. In other words, defendants raised in foreign cultures may feel morally obligated or compelled to abide by these norms in certain situations, despite their knowledge of the conflicting laws in their newly chosen society. Thus, in certain situations the power of enculturation is so persuasive that mere awareness by the defendant that a given behavior is criminal may not be sufficient to prevent its acting out, especially if the behavior is part of a fundamental cultural value. Once norms have acquired this moral dimension, conformity with the conflicting laws of the majority culture often becomes very difficult. Therefore, because a defendant may be unable

\[145\] See The Cultural Defense, supra note 8, at 1299.
\[146\] See id.
\[147\] See id.
\[148\] See id.
\[149\] See id. at 1300.
\[150\] See id.
\[151\] See The Cultural Defense, supra note 8, at 1300.
\[152\] See id. For example, while oyako-shinju, or parent-child suicide, is illegal in Japan, this type of behavior is viewed by many within the defendant’s native culture as an acceptable thing to do in an unacceptable social situation. See People v. Kimura, cited in Goldstein, supra note 13, at 147–49; Spencer Sherman, Legal Clash of Cultures, Nat’l L. J., Aug. 5, 1985, at 1. In defending a client accused of killing her children in accordance with oyako-shinju, Gerald Klausner noted that “perhaps [his client] regressed back to earlier instincts” that she learned in Japan which made her “see her children as an extension of herself,” and thus, sharing in her disgrace and shame. See id. Unlike American women, Klausner argued that a woman socialized according to Japanese values would not conceive of leaving her children alone to face the humiliation caused by their father’s adultery after she was gone. See id.
\[153\] See The Cultural Defense, supra note 8, at 1300.
to keep himself or herself from violating the law of this country if it conflicts with one of his or her fundamental cultural values which has acquired moral stature, it may be unjust to apply strict American law in culture conflict cases.153

The degree to which a defendant's actions will be excused or condemned depends on the degree to which it is comprehensible to the finder of fact.154 If culture shapes a person's perception of reality and guides his or her behavior, 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. Judge Gomes of Fresno, California, who has heard several cultural defense arguments in plea bargains between prosecutors and defense attorneys representing their Hmong clients in his court, believes that he would have difficulty excluding any evidence, cultural or otherwise, which could help him understand the defendant's actions.155 He stated: "I don't think a judge can ever get enough information when he is sentencing someone. I am surprised there are judges around who won't allow cultural defenses at least at the time of sentencing. It appears to me to be extremely relevant."156

Critics of the formalized cultural defense are not as accepting as Judge Gomes and worry, not about the abstract definition of the cultural defense, but rather about the more practical issues of who may and may not assert the defense. Critics pose a number of troubling questions for advocates of the defense.157 For example, how does one define a distinctly "foreign culture" for the purposes of the defense?158 Would a formally recognized cultural defense be limited to individuals who actually immigrated to this country from a foreign land, or could individuals born and raised in the United States, but socialized according to the norms and values of a "subculture" within this country, also

153 See id.
154 See Renteln, supra note 11, at 445.
156 Id. For example, Judge Gomes allowed a Guatemalan to plead his charge down from murder to manslaughter after the defendant slit the throat of a friend who had been severely beaten by five men. See id. Judge Gomes said:

   It was a heinous crime but not a heinous motive. As a guerrilla fighter, [the defendant] thought the guy was dying and that he was giving him a painless death. If I had not heard that, I might very well have sentenced this man for an act motivated by our very different set of values.

Id.
157 See generally Goldstein, supra note 13.
158 See id. at 158–59.
assert it?159 Another problematic issue is that of assimilation.160 For instance, if the cultural assimilation of immigrants is possible, how long does this process take?161 If, on the other hand, assimilation of immigrants is not possible, will the children and grandchildren of these immigrants also be able to assert a cultural defense if they are raised according to their family's culture?162 Many view these practical problems inherent in the definition of the defense as a "slippery slope" and "perhaps the most severe detriment toward a recognition of a cultural defense."163

While there is no doubt that these questions raise concerns about the scope of the cultural defense when applied in practice, several factors have been proposed which, when considered by courts on a case-by-case basis, will enable judges to determine when and to what extent the cultural defense should apply to a particular defendant.164 These factors are the possibility of recurrence, the severity of the crime, whether the crime is victimless, whether the crime is confined to voluntary participants within the defendant’s culture, whether serious bodily or emotional harm was inflicted on the victim, the degree of identifiability of the culture, the degree of self-containment, the size of the cultural group, the degree of the defendant’s assimilation into the majority culture, and the importance of the cultural value that motivated the criminal act.165 By considering and balancing these factors in each case, courts will be able to control the scope of the cultural defense and allow its use in only appropriate situations.166

In sum, if the fundamental philosophical justification for punishment underlying criminal jurisprudence as a whole is the retribution theory, and if the concept of enculturation is as powerful as anthropologists believe in determining and shaping an individual's actions,

159 Robert T. Perry and Carlton Long argue that an individual born and raised in the United States, but socialized according to the norms and values of a subculture distinct from the “majority culture,” should be able to assert a cultural defense. See Robert T. Perry & Carlton Long, Obscenity Law, Hip Hop Music and 2 Live Crew, N.Y.L.J., July 13, 1990, at 5. Perry and Long have argued that the African-American rap group “2 Live Crew” “reflects a [distinct] culture speaking out against the long, painful, and immediate backdrop of the ‘Reagan Revolution.’" Id.; see also People v. Croy, 710 P.2d 392 (Cal. 1985), cited in Renteln, supra note 11, at 454–55 (Native American successfully asserts a culture-based defense for murder).

160 See Goldstein, supra note 13, at 160.
161 See id.
162 See id.
163 Id.
164 See The Cultural Defense, supra note 8, at 1308–11.
165 See id.
166 See id.
then the criminal law must be flexible enough to incorporate explanations of behavior based on cultural considerations when trying defendants in criminal culture-conflict cases. The American criminal justice system should formally recognize the cultural defense and allow its use in appropriate situations.

III. THE CULTURAL DEFENSE APPLIED TO CHILD PROTECTION LAW

While an affirmative cultural defense is completely consistent with a system of law where punishment is based on retribution, how should it apply in an area of law, such as child protection law, where punishment is expressly and intentionally rehabilitative in nature? The following section explores this question and concludes that, due to the uniquely rehabilitative nature of punishment within child protection law, the cultural defense is irrelevant in most cases of child abuse and neglect. 167

A. The Rehabilitative Nature of Child Protection Law

The overriding goal of child protection law is threefold: one, to identify and protect the children who are or may be at risk; two, to assess the individual needs of the children and the families involved; and three, to institute an intervention plan which will best resolve these needs and prevent future harm to the children. 168 Modern child abuse and neglect statutes also have three primary purposes: one, to define child abuse and neglect and to identify children at risk; two, to recognize a specific agency to receive and investigate reported incidents of abuse and neglect; and three, to offer appropriate services and programs for abused and neglected children and their families. 169 While each state has adopted its own unique child protection statute and

167 Since severe cases of child abuse may result in incarceration, there may be instances where a defendant should be able to assert a cultural defense for his or her actions in a child abuse case. See id. However, because the vast majority of child abuse cases result in state enforced rehabilitation, the cultural defense is, for the most part, irrelevant in child protection law as it currently stands. See id.


169 See id. at 12. Modern child abuse and neglect statutes are commonly known as "reporting statutes" since they require certain individuals, based on their occupational contact with children, to report instances of abuse or neglect when they come into contact with it. See id. at 12, 18. A few examples of mandated reporters are physicians; hospital personnel engaged in the examination, care, or treatment of patients; public and private teachers; psychologists and psychiatrists; police officers; firefighters; social workers; and day care workers. See Mass. Ann. Laws ch. 119, § 51A (Law. Co-op. 1995). The Massachusetts statute has over 30 specified mandatory reporters.
child protection philosophy, one common theme connects them all: child abuse and neglect is perceived to be a social problem that is best handled by the rehabilitative efforts of social workers. In other words, the prosecution of abusive or neglectful adults is not considered a primary goal of child protection law.

There are generally seven steps that state authorities follow once a report of suspected abuse or neglect is filed in accordance with the particular reporting statute. The first step, called intake, is where a caseworker screens reports of alleged child abuse or neglect filed with the child protection agency for their validity and urgency. After a particular case is verified, the caseworker makes a thorough investigation of the alleged maltreatment. During this investigation stage, the caseworker determines if the child is being harmed or threatened in his or her family environment, if removal is necessary to ensure the child's safety, and if ongoing services will be necessary to end the maltreatment. Following this investigation, the caseworker makes a family assessment: he or she uses the information gathered during the investigation to identify the reasons for, and the extent of, the maltreatment. The child protection worker then formulates a case plan for the family which establishes specific enumerated goals to be achieved and services to be provided. After the case plan has been agreed to by all of the relevant parties, the caseworker is responsible for arranging the delivery of services which will assist the family in the realization of their case plan. Some of the more common services arranged by the caseworker at this stage are financial assistance, day care, crisis nurseries, homemaker care, parenting classes, and counseling services. As the family members begin receiving services and start to

See id. It also authorizes "any other person to make such a report if any such person has reasonable cause to believe that a child is suffering from or has died as a result of such abuse or neglect." Id.

170 See id.


172 See Katz Unpublished ch. 3, supra note 168, at 5.

173 See id.

174 See id.

175 See id. at 5–6.

176 See id. at 6.

177 See Katz Unpublished ch. 3, supra note 168, at 6. This case plan is often presented to the court as proposed treatment in cases requiring judicial intervention. See id. at 7.

178 If the parties refuse to agree to the case plan, a judge may impose it on them through a court order. See id. at 8.

179 See id. at 7.

180 See Besharov, supra note 29, at 316.
modify their behaviors, the caseworker must evaluate the family’s progress, determining if the case plan goals are being accomplished. The final stage is called case closure. At this point the caseworker decides whether the causes of the abuse or neglect have been significantly reduced or eliminated. If they have, the case is closed. If they have not, and no future progress is likely, the child protection agency may seek termination of the parental rights.

Except in severe cases, child protection agencies rarely consider criminal prosecution of abusive or neglectful parents to be an appropriate response for maltreatment. This aversion to prosecution is partially rooted in a fear that such action will hinder efforts at treating the offender and salvaging the family unit. This fear is based on the belief that, generally speaking, child abuse and neglect is not the result of a conscious intention by the parent to injure his or her child; rather it is seen as the result of the parent’s inability to nurture his or her offspring. Sanford Katz describes one of the central premises of the child protection philosophy:

Inadequate parenting and child abuse and neglect are influenced by personal and social factors. Most often they are manifestations of despair and failure rather than willful, premeditated behaviors. Regardless of life experiences, [social workers and experts on child abuse and neglect believe that] most people have the capacity to change if given the appropriate opportunities.

Moreover, child protection scholars argue that a policy which promotes the prosecution of abusive or neglectful parents would be

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181 See Katz Unpublished ch. 3, supra note 168, at 8.
182 See id.
183 See id.
184 See id.
185 See id.
186 See Besharov, supra note 29, at 317-18.
187 See id. at 318. Besharov, on the other hand, argues that the criminal justice system should play a larger role in child abuse and neglect cases. See generally id. In support of this position, he cites statistics in New York indicating that fewer than five percent of substantiated reports result in criminal prosecution, that twenty-five percent of all fatalities attributed to child abuse involve children already known to be at risk by child protection authorities, and that twenty-five percent of known child abusers offend again. See id. at 319, 320. Based on these types of statistics, he concludes that child protection law has become “decriminalized” and that a new philosophy which emphasizes greater prosecution of offenders is necessary. See id. at 315.
188 See Freiman, supra note 1, at 246.
ineffective in combating the problem of child maltreatment since the criminal justice courts have only limited access to support and treatment services for the troubled parents.\textsuperscript{190} Monrad Paulsen writes:

\begin{quote}
[C]riminal sanctions are a poor means of preventing child abuse. Day-to-day family life, charged with the most intimate emotions, is not likely to be an area of life easily ruled by the threat of fines or imprisonment. A criminal proceeding may punish an offender who deserves punishment, but it may also divide rather than unite a family. The criminal law can destroy a child’s family relationship; it cannot preserve or rebuild it. The most severe cases of child abuse may call for prosecution, but the prosecutors often are not able to arrange for the care a child needs.\textsuperscript{191}
\end{quote}

Brian G. Fraser comes to a similar conclusion, arguing that even if convicted, offenders are usually incarcerated for a relatively short period of time.\textsuperscript{192} Moreover, since the offender has not learned any new strategies for coping with stress or for disciplining his or her children without violence, when released back into the home environment there is nothing besides the threat of incarceration to stop him or her from repeating the harmful behavior.\textsuperscript{193} Fraser writes: “[Once released, t]he conditions which precipitated the initial abuse will still be present and may give rise to further instances of abuse.”\textsuperscript{194} A further reason child protection agencies resist arguments in favor of the prosecution of abusive and neglectful parents is that they believe criminalization would discourage offenders from seeking medical attention for their injured children due to the increased possibility of being caught and punished.\textsuperscript{195} If such a policy was to be adopted, child protection experts argue, its effect would be the further victimization of abused and neglected children.\textsuperscript{196} Finally, child protection agencies argue that their policy of not prosecuting perpetrators encourages parents who recognize their abusive or neglectful tendencies to seek help on their own without fear of adverse legal consequences.\textsuperscript{197} It is argued that if

\begin{footnotes}
\item[190] See Besharov, \textit{supra} note 29, at 318.
\item[191] Paulsen, \textit{supra} note 171, at 176.
\item[192] See Brian G. Fraser, \textit{A Pragmatic Alternative to Current Legislative Approaches to Child Abuse}, 12 \textit{AM. CRIM. L. REV.} 103, 121 (1974).
\item[193] See \textit{id}.
\item[194] \textit{Id}.
\item[195] See Besharov, \textit{supra} note 29, at 318.
\item[196] See \textit{id}.
\item[197] See \textit{id}. Many parents, it turns out, do call various state agencies when they feel like they have lost control and may actually injure their children. See \textit{id}.
\end{footnotes}
these parents decide against seeking voluntary treatment due to the likelihood of prosecution, the abuse and neglect suffered by the children may not be discovered until it is too late.\textsuperscript{198}

From the preceding discussion it is clear that the theory of punishment underlying the various states' child protection statutes is not punishment-based deterrence or retribution, but rather, educational rehabilitation. The scholarly writings in the area of child abuse and neglect consistently speak in terms of \textit{reeducating} and \textit{helping} abusive and neglectful parents to become nurturing caregivers.\textsuperscript{199} When child welfare agents verify instances of maltreatment, state action does not come in the form of police reports and the incarceration of abusive or neglectful parents; rather, "effective intervention," it is believed, "requires that the child protection services enter relationships with [the abusive or neglectful parents] non-punitively, non-critically, and with an offer of help."\textsuperscript{200} The following case illustrates the extent of child protection law's express and intentional rehabilitative philosophy, and thus, the irrelevancy of the cultural defense in this unique area of law.

B. A Representative Case: Dumpson v. Daniel M.\textsuperscript{201}

The defendant in \textit{Dumpson v. Daniel M.}\textsuperscript{202} was a thirty-four year-old Nigerian taxi driver who attended Brooklyn College where he was

\textsuperscript{198}See id.

\textsuperscript{199}See Fraser, \textit{supra} note 192, at 121; Paulsen, \textit{supra} note 171, at 176.

\textsuperscript{200}Katz Unpublished ch. 3, \textit{supra} note 168, at 3.

\textsuperscript{201}Dumpson, \textit{supra} note 15, at 69.

\textsuperscript{202}Id. While my research indicates that there are no reported child abuse cases where the defendant asserted a cultural defense in any of the standard reporters, several newspaper articles suggest that there are unreported cases of this kind in existence. For example, in Houston a Nigerian immigrant was charged with child abuse for striking his misbehaving nephew with an electrical cord and then putting pepper in the boy's bleeding abrasions. \textit{See Texas News Briefs, UPI, Apr. 8, 1987, available in LEXIS, REGNW Library, TXNWS File}. The defendant argued that this type of discipline was common in Nigeria and the court "punished" him with probation. \textit{See} Oliver, \textit{supra} note 155, at 1. The parents in a Vietnamese family near Los Angeles were charged with child abuse after suspicious injuries were reported on their child's back and shoulders. \textit{See id.} The charges were dropped, however, when a friend explained to authorities that the markings were the result of \textit{cao gio}, or "coining," a cultural folk remedy believed to cure headaches through the massaging of the child's back and shoulders with the edge of a serrated coin. \textit{See id.} In Los Angeles, a mother born and raised in Mexico was charged with child abuse, and temporarily lost the custody of her children, when she beat her 15 year-old son with a wooden spoon and bit him for taking money from her purse without permission. \textit{See id.} She argued that her behavior is considered acceptable punishment in Mexico, and as a result, she avoided any serious sanctions besides being ordered to get counseling. \textit{See id.} And finally, in San Francisco and Los Angeles, two Japanese mothers killed their children when they learned of their husbands' infidelities. \textit{See id.} However, the mothers' charges were reduced from murder to manslaughter after experts testified that \textit{ayako-shinju}, or parent-child suicide, is a practice not uncommon in the women's native culture when a wife is presented with her husband's extramarital affairs. \textit{See id.}
studying to become an engineer. He had been living in the United States for six years when the charges were filed. The defendant was married to a thirty-five year-old New York City public high school biology and chemistry teacher who was the biological mother of two of the four children living with the couple. The remaining two children were from the defendant’s first marriage in Africa. The child at issue in this case, Ekenediliz, was born to the defendant during his first marriage.

The state charged the defendant with the infliction of excessive corporal punishment on his son Ekenediliz and based its allegations on two separate incidents. The first incident occurred after the defendant received nine letters from his son’s teacher complaining of Ekenediliz’s behavior in school. In response to the letters, the defendant requested a meeting with the boy’s teacher to discuss the matter, but since the teacher was unavailable, the defendant and his son met with the assistant principal. During the meeting the assistant principal spoke of the difficulties that the defendant’s son was causing for his teacher in the classroom. Then, without warning, the defendant stood up and began to hit the boy repeatedly with his fists and his belt, and when Ekenediliz fell to the floor, the defendant kicked him with his feet. The assistant principal attempted to restrain the defendant and he responded to this interference by striking her too. After the defendant regained his composure, he apologized to the assistant principal.

The defendant asserted a cultural defense for his actions, testifying that according to his culture, this type of punishment was both necessary and appropriate. The defendant explained that in Nigeria, when a boy misbehaves in school, he brings shame on the family and

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203 See Dumpson, supra note 15, at 69.
204 See id.
205 See id.
206 See id. On August 18, 1974, a preliminary hearing resulted in an order directing the temporary removal of Ekenediliz and two of his siblings from the defendant’s home pending a further investigation on the matter. See id.
207 See id.
208 See Dumpson, supra note 15, at 69. The date of this incident was March 7, 1974. See id.
209 See id.
210 See id.
211 See id.
212 See id. In his testimony, the defendant admitted to hitting his son with his hands and his belt, but denied kicking him or striking the assistant principal. See id.
213 See Dumpson, supra note 15, at 69.
that his parents have a duty to punish him immediately and in any manner that they see fit.214 When directly questioned by the court, the defendant testified that in his judgment, the punishment he inflicted on Ekenediliz was appropriate in order to stop any more negative school reports.215 On cross-examination, however, the defendant admitted that it was not only his son's classroom behavior that provoked him. He testified that he was also angered by his son's lack of respect for the assistant principal, explaining that "Ekenediliz was looking at [her] face while we were talking."216

The second incident of abuse217 concerned some bruises and welts on Ekenediliz's body.218 When questioned on the source of these injuries, the defendant testified that his son told him that several boys had beaten him up on the way home from school.219 According to the defendant, he accompanied his son to school the next day, to both protect him and to confront the attackers, but unfortunately, Ekenediliz was unable to identify the boys for his father.220

When the defendant's wife testified, she said that her husband had punished Ekenediliz on the day of this second incident but that his actions had not caused the bruises or welts at issue.221 While the defendant's wife admitted that her husband struck the children when they did something wrong, she adamantly maintained that he was a good father and that she never witnessed him beating them.222 She justified his method of discipline in cultural terms: it was the way he was raised in Nigeria.223

The court determined that the "sole issue" before it was "whether the [defendant's] conduct constitutes excessive corporal punishment" under the statutory definition of the term.224 After taking note of society's high level of racial and ethnic diversity and the court's "obligation to apply the law equally to all men" as it simultaneously "recogniz[es the] individual and cultural differences [between citizens]," the

214 See id.
215 See id. at 70.
216 See id.
217 This incident occurred on June 4, 1974. See id.
218 See Dumpson, supra note 15, at 70.
219 See id.
220 See id.
221 See id.
222 See id.
223 See Dumpson, supra note 15, at 70.
224 See id. at 71.
court concluded that the defendant was guilty of inflicting excessive corporal punishment on the boy.225 The court wrote:

In a society as culturally amorphous as our own, it is incumbent upon all members of society to be tolerant and understanding of customs that differ from their own . . . . While the commonly accepted definition of corporal punishment means some type of applied bodily force, there is no doubt that pummeling with the fists, striking with a belt, and kicking with the feet, satisfy the elements of even the most conservative definition of corporal punishment.226

In determining the defendant's guilt, the court wrote:

Any reasonable man knows that it is not in the best interests of a child for its parents to punish in the manner we have seen here. While we are sympathetic and understanding of the defendant's motives, we must conclude that motive is irrelevant when we are confronted with the type of punishment this seven-year-old boy has received.227

Thus, while the court expressed both sympathy and understanding of the defendant's cultural motivations for acting as he did, the decision expressly stated that motive and therefore culture, is irrelevant in cases of violent child abuse.228

In determining the proper sanction for the defendant, the court decided that despite the savage and public nature of the beating, the defendant was not "a mean, vindictive or disturbed parent," but rather "a man who honestly believes that he is acting in the best interests of his children."229 Emphasizing the rehabilitative nature of its child abuse and neglect statute, the court noted further that the New York law was "not a device for recrimination against parents who use unorthodox child-rearing practices," and that

[a] finding of neglect in this matter is not meant to cast any negative overtones on the respondent's ability to function as a parent in any other respect. Rather, it is to enable the court to get the [defendant's] family the type of assistance they

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225 See id.
226 Id.
227 Id. (emphasis added).
228 See Dumpson, supra note 15, at 71.
229 See id.
need so that the [defendant] and his children may be re-united.\textsuperscript{230}

Thus, the court expressly held that the purpose of child protection legislation is not to “cast any negative overtones” on the general parenting abilities of a recognized abusive parent or caregiver.\textsuperscript{231} Rather it should act as a vehicle by which the state can provide the assistance necessary to preserve families at risk.\textsuperscript{232} Consistent with the writings of Paulsen and Fraser,\textsuperscript{233} the court concluded that incarceration was not an appropriate sanction for the defendant’s violent behavior.\textsuperscript{234} Instead, the court believed that the defendant’s actions demonstrated the need for rehabilitative counseling and that it was the court’s “duty and responsibility” to provide the defendant and his family with “some form of treatment” to prevent future abuse and neglect from occurring.\textsuperscript{235} The facts and holding of this case clearly demonstrate that the theory of punishment underlying child protection law is rehabilitation through education, not retribution-based sanctions. As a result, the fundamental justification for the adoption of a formal cultural defense is non-existent in the area of child protection law.

\textbf{Conclusion}

This Note has demonstrated the difficulty inherent in defining child abuse and neglect in the academic arena, in statutory language, and across cultural lines. The lack of definitional uniformity between states and cultures increases the potential for disputes concerning the “correct” definition of child abuse and neglect, especially in cases where the particular defendant was socialized in a foreign culture with different values and child-rearing practices. This lack of uniformity gives rise to the central question posed in this Note: should a person accused of child abuse and neglect in this country be allowed to argue that since his or her actions are condoned in the culture in which the accused was raised, he or she is less morally culpable than a native offender, and thus, the charge or punishment should be mitigated?

\textsuperscript{230}Id. at 72.
\textsuperscript{231}See id.
\textsuperscript{232}See id.
\textsuperscript{233}See Paulsen, supra note 171, at 176; see also Fraser, supra note 192, at 121.
\textsuperscript{234}See Dumpson, supra note 15, at 72.
\textsuperscript{235}See id.
This Note advocates the formal recognition of the cultural defense in the general American criminal justice system for two interdependent reasons: one, the philosophical justification of punishment and two, the overwhelming influence that an individual’s culture has on his or her actions. This Note has argued that the deterrence and the rehabilitative theories of punishment both presuppose aspects of the retribution theory, the fundamental philosophical justification for punishment within the American criminal justice system. Central to the theory of retribution is the idea that a person’s punishment should fit the crime committed. Therefore, in determining the proper punishment for a given individual, this Note has argued that an inquiry into a defendant’s motivations for acting illegally is required, as is a moral judgment on these particular motives. In this way, a person who acts with “good” motives should be punished less severely than a person who commits exactly the same illegal act, but does so with “bad” motives.

This issue of motivation is crucial in culture-conflict cases given the profound ways in which an individual’s culture shapes his or her perception of reality, and as a result, his or her behavior. Through the process of enculturation, cultural practices become part of the individual’s personality, at times actually compelling the individual to act illegally despite knowledge of the law and the consequences of breaking it. This Note has argued that since a defendant’s culture may act as a powerful motivating force in and of itself, the legal system must consider the defendant’s culture when determining the defendant’s guilt and punishment, and thus, should formally recognize the cultural defense.

Unlike the general criminal law, the guiding principle in child protection law is expressly and intentionally rehabilitation, not retribution. As Dumpson demonstrates, the crucial issue in child protection law is not why the parent abused or neglected the child. The Dumpson decision clearly holds that motive is irrelevant in cases of this kind. Rather, the crucial question for courts applying child protection law is whether the parent did hit the child. If the answer is shown to be “no,” the case is dismissed. If the answer is shown to be “yes,” the abusive or neglectful person is not incarcerated or sanctioned personally; rather he or she is ordered to participate in various programs designed to teach the parent how to be a nurturing caregiver. Simply stated, offenders are not punished, they are rehabilitated. Because the justification for the cultural defense relies on the retribution theory of punishment and the emphasis it places on a person’s motivation when determining his or her appropriate punishment, the cultural defense, in the unique area of child protection law, is effectively rendered irrelevant.