Culture Crimes against Women

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I. INTRODUCTION

About five thousand women are murdered by their families each year in the name of family honor. A young Muslim girl was murdered in Berlin by her own brother, because she "behaved like a German." Both of them had German citizenship. He was sentenced to nine years of incarceration, and was released after six years. His family celebrated his release from prison. Fatima Sehindel, a Muslim Swedish girl, was a student. She wanted to assimilate in Swedish society. She spoke to the Swedish parliament. She even had a Swedish boyfriend. She was murdered by her own father. These crimes were committed in advanced western countries.

It is difficult to get precise numbers of "honor killings," since most cases are not reported. When a woman is murdered in the name of family honor in the country of origin, it is justified by law, since the concept of family honor justifies the killing of women in these societies. The perpetrators of such killings in these societies are considered heroes of their culture. In these societies, the concept of woman as a vessel of the family reputation is prevalent, and this concept is completed and accompanied by the concept of honor killings.[1] The story of Soraya M., which was

[1] Vanessa Lesnie, *Dying for the Family Honor*, 27 HUM. RTS. 12 (2000); Sharon K. Araji, *Family Violence Including Crimes of Honor in Jordan*, 2001 VIOLENCE AGAINST WOMEN 586 (2001); Hillary Mayell, *Thousands of Women Killed for Family "Honor"*, 2.12.2002;

publicized in a book and a movie, is another example.[2] Her husband wanted to marry a younger woman, so he claimed that she was flirting with a neighbor. She was stoned to death.

This phenomenon is not exclusive to the countries of origin. Many of the women murdered by their families in the name of family honor are murdered in western societies, very advanced western societies that have open-gate policies and are absorbing immigrant populations. Some of the immigrants in these societies come from countries where the concept of honor killing is in common use, is morally acceptable and is legal. Upon settling in their new homeland, the immigrant population continues this accepted practice, as they used to in their homeland.

Reports submitted to the United Nations Commission on Human Rights show that honor killings have been committed in Great Britain, Italy, Sweden, the United States, Germany, France, and other countries absorbing immigrants. Some of these honor killings are perpetrated or assisted by women. The concept of honor killing is considered by most of the immigrants, including women, as part of their culture, which must be preserved. They sometimes rely on Article 27 of the International Covenant on Civil and Political Rights. Honor killings are not the only offenses committed against women in the name of culture.

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http://news.nationalgeographic.com/news/2002/02/0212_020212_honorkiiling.html; last visited December 27, 2009.

[2] FREIDOUNE SAHEBJAM, THE STONING OF SORAYA M.: A TRUE STORY (1995); STEPHEN MCEVEETY, JOHN SHEPHERD AND TODD BURNS, THE STONING OF SORAYA M. (2009).

When the perpetrators are charged in court, they frequently claim the "ignorance of law" defense, since they have been behaving that way for generations, and why would the legal situation be different in their new homeland. In most cases, this claim is rejected, but it is used to mitigate punishments down to ridiculous sentences. Most western countries share this problem. This article argues that the mistake of law defense is irrelevant in relation to culture-based crimes against women. It is further argued that committing an offense on the grounds of preserving a culture in and of itself justifies harsher sentencing.

In the following paragraphs culture-based crimes against women in countries absorbing immigrants will be introduced.[3] Then the relevance of the mistake of law defense shall be examined in relation to culture-based crimes against women.[4] Finally, and on those grounds, the sentencing considerations when punishing such crimes shall be examined.[5]

II. CULTURE-BASED CRIMES AGAINST WOMEN IN COUNTRIES ABSORBING IMMIGRANTS

[3] Culture-based Crimes against Women in Countries Absorbing Immigrants is discussed hereinafter at paragraph II.

[4] Rejecting the Mistake of Law Defense in Culture-based Crimes against Women is discussed hereinafter at paragraph III.

[5] Harsher Sentencing of those Convicted of Culture-based Crimes against Women is discussed hereinafter at paragraph IV.

Violence against women is, unfortunately, not a new phenomenon. It occurs in all countries and in all societies, but societies differ from each other in their legal response to that phenomenon. In the modern era, the western world uses criminal law in order to condemn violence against women, and it is a consensus in the western world that no violence against women is allowed. It took time to recognize that consensus. In Britain, a husband was allowed to rape his wife, and it was not considered an offense until 1991, when the law was changed.[6] In most non-western countries, violence against women is allowed, mostly on the grounds of family honor.

Such family "honor" cannot accept sophisticated women, educated women or any other kind of liberated woman. In these cultures, women are entitled only to produce offspring and to serve their husband or father humbly and obsequiously. According to that concept, a woman must stay out of public affairs, and her natural place is only in the home, where she can be easily dominated by her family. Some women in these societies believe themselves that this is the right way of living, because of the way they were educated. These societies do not seem to wish to change, and they hardly can.

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[6] For the legal situation before 1991 in Britain see MATTHEW HALE, HISTORIA PLACITORUM CORONAE 629 (1736) [MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN (1736)]: "But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up this kind unto her husband which she cannot retract"; Clarence, (1888) 22 Q.B.D. 23, [1890] All E.R. 133; For the change see R, [1992] 1 A.C. 599, [1991] 4 All E.R. 481, [1991] 3 W.L.R. 767, 94 Cr. App. Rep. 216, 155 J.P. 989, [1992] Crim. L.R. 207, [1992] 1 F.L.R. 217, [1992] Fam. Law 108 and art. 1 of the Sexual Offences Act, 2003, c. 42.

The situation is different when some of the population of such cultures emigrates to a new society, a western and advanced society, where no violence against women is allowed. These countries are absorbing immigrants, but they are not bound by the former customs and norms of those immigrants. When the immigrant population tries to adapt itself to the new local customs, this includes abiding by the local laws, particularly criminal law. Nevertheless, some of the immigrant population do not wish to disconnect from their original culture and assimilate in their new homeland.

Under the latter circumstance, a new sub-culture is established within the absorbing society. The new sub-culture preserves the customs of the original society and prevents its members from taking any steps towards full assimilation within the absorbing society. The members of the sub-culture create a closed community containing only members of the same origin. That community supports its members in preserving the original customs, although the members of the community are not legally bound by them at all. In fact, the original culture reproduces itself in the specific sub-culture within the absorbing society.

Modern law and international human rights recognize immigrants' rights to cultural diversity. This is the right to live in accordance with their culture, to act in accordance with the cultural customs with which the immigrants are familiar, to maintain a social and community life based on their culture, and to pass on their

cultural heritage to their descendants.[7] The strongest statement of a right to culture is found in the International Covenant on Civil and Political Rights.[8] The main reason for universal recognition of a person's right to cultural diversity derives from the recognition of the centrality of the person's original culture in the process of socialization and in the formulation of the person's outlook on life.

As long as preserving the original culture does not involve any lawbreaking, the absorbing society has no reason to intervene by legal means. Harmless multiculturalism is not prohibited. However, when preserving the original culture involves the commission of an act that is deemed an offense pursuant to the laws of the absorbing country, legal intervention by that country is required. When an offense is committed in the name of culture, it is a culture-based crime. When a brother murders his own sister in the name of family honor, according to the norms of the culture he wishes to preserve, this murder is a culture-based crime. Of course, when an offense is committed, whether a culture-based crime or otherwise, society must

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[7] Herbert Marcuse, *Repressive Tolerance*, A CRITIQUE OF PURE TOLERANCE 81 (Robert Paul Wolf ed., 1969); Lyndel v. Prott, *Cultural Rights as Peoples' Rights in International Law*, THE RIGHTS OF PEOPLE (James Crawford ed., 1988); Denis Goulet, *In Defence of Cultural Rights: Technology, Tradition and Coflicting Models of Rationality*, 3 HUMAN RIGHTS QUARTERLY 1 (1981); SUSAN MENDUS, THE POLITICS OF TOLERATION IN MODERN LIFE (2000).

[8] Article 27 of the International Covenant on Civil and Political Rights (I.C.C.P.R.) provides: "In those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".

intervene for the benefit of all of its members.

In the specific context of culture-based crimes against women, sometimes the legal intervention by the absorbing society is aimed at saving the victim, which happens to be a woman. As a worldwide phenomenon, culture-based crimes include all types of offenses, but mainly homicides,[9] sexual offenses against women or children (girls), sexual abuse,[10] and severe corporal injuries to women or girls.[11] The most known example is the Muslim custom of female circumcision, when parts of young girls' genitals are brutally removed, without any anesthesia, just in order to

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[9] E.g. in R. v. Dincer, (1983) 1 V.R. 461, a Muslim father of Turkish origin who lived in Australia, an absorbing immigrants country, suspected his daughter had left home with a non-Muslim boyfriend. The daughter was sixteen years old, when her father stabbed her to death in the name of family honor.

[10] E.g. in Krasniqi v. Dallas County Child Protective Services Unit of the Texas Department of Human Services, 809 S.W.2d 927 (1991), a Muslim couple who immigrated from Albania to the United States, and the father was seen touching his four year old daughter in public in a manner that was considered to be sexual in nature. The touching was in the name of the original culture. See e.g., State v. Kargar, 679 A.2d 81 (Me.1996); William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337 (1985); Marilyn F. Milos, *Body Ownership Rights of Children: The Circumcision Question*, 1992 AMERICAN ATHEIST 50 (1992); John Tochukwu Okwubanego, *Female Circumcision and the Girl Child in Africa and the Middle East: The Eyes of the World Are Blind to the Conquered*, 33 INT'L L. 159 (1999).

[11] See e.g., R. v. Adesanya, unreported (1974); J, [1999] 2 F.C.R. 345, [1999] 2 F.L.R. 678, [1999] Fam. Law 543.

prevent them from experiencing pleasure during sexual intercourse in the future.[12] Although many countries absorbing immigrants have outlawed that custom through specific statutes, this phenomenon is still very popular among Muslim populations in western countries.[13]

Ironically, in very many cases, the legal intervention by the absorbing society is aimed at saving the woman from herself, particularly when the socialization process of the woman has been so intense that she actually believes that she deserved the action against her. In fact, in very many cases she does not consider these actions as against her, but as actions for the benefit of her family, her religion, her deepest beliefs and for her own benefit. As a result, in such cases, the woman herself

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[12] Shayla McGee, *Female Circumcision in Africa: Procedures, Rationales, Solutions, and the Road to Recovery*, 11 WASH. & LEE RACE & ETHNIC ANC. L. J. 133 (2005); Baudouin Dupret, *Sexual Morality at the Egyptian Bar: Female Circumcision, Sex Change Operations, and Motivws for Suing*, 9 ISLAMIC L. & SOC'Y 42 (2002); Jessica A. Platt, *Female Circumcision: Religious Practice v. Human Rights Violation*, 3 RUTGERS J. L. & RELIGION 5 (2002); Jeffrey P. Bishop, *Modern Liberalism, Female Circumcision, and the Rationality of Traditions*, 2004 J. MED. & PHIL. 473 (2004); Sami A. Aldeeb Abu-Sahlieh, *Women's Rights and Traditional Law: A Conflict – Islamic Law and the Issue of Male and Female Circumcision*, 1994 THIRD WORLD LEGAL STUD. 73 (1994).

[13] Geoffrey P. Miller, *Circumcision: Cultural-Legal Analysis*, 9 VA. J. SOC. POL'Y & L. 497 (2002); Amanda Cardenas, *Female Circumcision: The Road to Change*, 26 SYRACUSE J. INT'L L. & COM. 291 (1999); Barrett A. Breitung, *Interpretation and Eradication: National and International Responses to Female Circumcision*, 10 EMORY INT'L L. REV. 657 (1996); Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN'S L. J. 155 (1985).

performs the action against herself and is often supported by other members of her community.[14]

One example of such cases is the case of *Kimura* in the United States.[15] The culture-based crime issue arose in relation to the criminal liability of a mother of Japanese origin living in the United States for the deaths of her two children. When the mother was told about her husband's unfaithfulness to her, she tried to commit suicide, together with her two children (an act of "oyako-shinju" in Japan) by drowning in the Pacific Ocean. According to Japanese socialization, she was taught that her husband's unfaithfulness to her is her own fault and disgrace, and that she must commit suicide in order to regain her honor. She really believed that and acted accordingly. Of course, according to her culture's point of view, her husband was innocent and pure. In order to save her two children from living a life of disgrace, she took them with her to die.

As a result, her two children died, but she was rescued and so survived. She

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[14] Compare Alison T. Slack, *Female Circumcision: A Critical Appraisal*, 10 HUM. RTS. Q. 437 (1988); Robyn Cerny Smith, *Female Circumcision: Bringing Women's Perspectives into the International Debate*, 65 S. CAL. L. REV. 2449 (1992); Amede L. Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1996); Amede L. Obiora, *The Little Foxes that Spoil the Vine: Revisiting the Feminist Critique of Female Circumcision*, 9 CAN. J. WOMEN & L. 46 (1997).

[15] People v. Kimura, Defence Sentencing Report and Statement in Mitigation; and Application for Probation, Case No. A-091133 (1985); ALISON DUNDES RENTELN, THE CULTURAL DEFENCE 25 (2004).

was accused of the double murder of her children. However, over twenty five thousands American citizens of Japanese origin sent written statements to the Attorney General in Los Angeles stating that, according to Japanese culture, suicide that results in two motherless children is far more serious than suicide together with the children, because the latter does not expose the children to disgrace. These citizens fully supported the double murder and felt sorry for the mother who did not succeed in committing suicide. Unfortunately, this argument was also supported by experts on Japanese culture.[16]

Amazingly, the Attorney General accepted the argument, and a plea bargain was made, according to which the accused was given a one-year prison sentence and placed under supervision for five years. She was not insane; she had acted knowingly and deliberately, and had murdered her two children in the name of family honor. This resembles the way a father thinks when he murders his daughter in the name of family honor. When a father murders his own daughter in the name of family honor, his culture, according to his point of view, is far more precious than the life of his daughter. When a mother commits suicide in the name of family honor, her culture, according to her point of view, is far more precious than her own life.

This greatly attests to the power of culture to cause the commission of culture-

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[16] Alison Matsumoto, *A Plea for Consideration of Culture in the American Criminal Justice System: Japanese Law and the Kimura Case*, 4 JOURNAL OF INTERNATIONAL LAW AND PRACTICE 507 (1995); RONALD MARKMAN AND DOMINICK BOSCO, ALONE WITH THE DEVIL (1989); Deborah Woo, *The People v. Fumiko Kimura: But Which People?*, 17 INTERNATIONAL JOURNAL OF THE SOCIOLOGY OF LAW 403 (1989).

based crimes. These people are willing to pay the price, even a very expensive price, just in order to maintain their culture within the new society in which they refuse to assimilate. However, it is interesting that, almost always, women are the ones who must pay that price. Women are murdered, raped, sexually abused and brutally injured in the name of culture. Sometimes, these women were taught that there is no other way, so they commit the culture-based crimes upon themselves. Do modern societies really want to preserve such norms of specific cultures and defend culture-based crimes in the name of multiculturalism?[17]

Most countries absorbing immigrants do not accept culture-based crimes as legitimate actions of preserving the immigrants' ethnic culture. This is expressed by using legal means of criminal law, either by enforcing existing laws on the culture-based crimes or by enacting new laws.[18] Nevertheless, the imposition of criminal liability is subject to the defense arguments pleaded by the defendants. The most common defense claimed in the specific context of culture-based crime against women is the defense of "mistake of law" (ignorance of the law). This defense argues that the defendant did not know, or could not have reasonably known, that the specific

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[17] Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 LAW & INEQ. 367 (1988); Sylvia Wynter, *Genital Mutilation or Symbolic Birth – Female Circumcision, Lost Origins, and the Aculturalism of Feminist/Western Thought*, 47 CASE. W. RES. L. REV. 501 (1996).

[18] Shea Lita Bond, *State Laws Criminalizing Female Circumcision: A Violation of the Equal Protection Clause of the Fourteenth Amendment*, 32 J. MARSHALL L. REV. 353 (1998); Cynthia Fernandez-Romano, *The Banning of Female Circumcision: Cultural Imperialism or a Triumph for Women's Rights*, 13 TEMP. INT'L & COMP. L. J. 137 (1999).

action is deemed an offense. The defendant is an immigrant and, in most cases, does not speak the local language and is unfamiliar with local law. Besides, the offense in question is considered accepted practice and legal in their homeland. Can that argument be rejected on lawful grounds?

III. REJECTING THE MISTAKE OF LAW DEFENSE IN CULTURE-BASED CRIMES AGAINST WOMEN

A. The General Application of the Mistake of Law Defense in Modern Criminal Law

The defense of mistake of law, or ignorance of the law, assumes the full existence of both the external elements (factual elements, *actus reus*) and the internal elements (mental elements, *mens rea*) of the specific offense by the specific offender.[19] The defense also assumes that laws exist prohibiting the specific offense and were lawfully promulgated. The mistake of law defense claims that, despite that, the defendant did not know about the specific prohibition (ignorance of the law) or believed the specific action to be legal, due to an incorrect interpretation of the law (mistake of law). Legally, there is no difference between ignorance of the law and mistake of law, and both shall be referred to below as mistake of law, since both of

[19] Douglas Husak and Andrew von Hirsch, *Culpability and Mistake of Law*, ACTION AND VALUE IN CRIMINAL LAW 157, 161-167 (Stephen Shute, John Gardner and Jeremy Horder eds., 2003).

them are legal errors.[20]

The social question, which is not necessarily a legal question, is whether a defendant must actually know about the specific law as a precondition for imposing criminal liability. If actual knowledge of a specific law is necessary in order to impose criminal liability upon a defendant, then every slight mistake in the understanding of the law is a legal obstacle to imposing criminal liability. According to this line of reasoning, in order to impose criminal liability, the entire population must become lawyers, who are experts in all aspects of the law. But the entire population cannot become lawyers, and even if they could, lawyers do make mistakes, even in their own spheres of expertise. If actual knowledge of criminal law were an essential precondition to criminal liability, then, in most cases, no enforcement of criminal law could be possible.

Therefore, the state is obliged to promulgate laws, but not necessarily to inculcate them in every person's consciousness.[21] This has been the international consensus since ancient times, that is, until recently. Roman law dictated that

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[20] Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 76, 88-96 (1909); Canal Bank v. Bank of Albany, 1 Hill. 287 (1841); Hutton v. Edgerton, 6 S.C. 485 (1876); but compare Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L. J. 1 (1957) and JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 405-408 (2nd ed., 1960, 2005).

[21] Joseph E. Murphy, *The Duty of the Government to Make the Law Known*, 51 FORD L. REV. 255 (1982); Brumarescu v. Romania, (2001) 33 E.H.R.R. 35; Kokkinakis v. Greece, (1993) 17 E.H.R.R. 397; CR v. United Kingdom, (1995) 21 E.H.R.R. 363.

ignorance of the law is not an excuse to break the law (*ignorantia juris non excusat*).[22] The reason for that ruling in Roman law was that, while the facts may be complicated to understand, Roman law is simple and logical, and therefore, every person is presumed to know it. That rule also relied on the historical division of offenses into *mala in se* offenses and *mala prohibita* offenses. All offenses in Roman law were considered *mala in se* offenses.

Historically, the division of offenses into *mala in se* and *mala prohibita* was accepted worldwide. *Mala in se* offenses were deemed prohibitions that any person, regardless of culture, origin, gender, religion or age, knows and understands to be forbidden. On the other hand, *mala prohibita* offenses require knowledge of the specific law.[23] One of the main difficulties of this distinction relates to cultural differences. Murder has been considered for ages by western society as a *mala in se* offense, which does not require a specific law prohibiting it because the cultural consensus in western society already accepted that murder is a crime.

However, in countries that recognize murder in the name of family honor, for

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[22] Digesta, 22.6.9: "juris quidam ignorantiam cuique nocere, facti vero ignorantiam non nocere".

[23] *Note: The Distinction between Mala Prohibita and Mala in se in Criminal Law*, 30 COLUM. L. REV. 74 (1930); Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 414, 419 (1958); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L. J. 1533 (1997).

instance, as an accepted norm, the situation is different.[24] As long as no specific prohibition of murder in the name of family honor exists, then in these societies, an honor killing is not considered murder at all. This is particularly the case in countries where women are considered inferior, as objects, and objects cannot be murdered. This is part of the objectification of women within the context of the commission of specific culture-based crimes. In most legal systems around the world, the past distinction between *mala in se* offenses and *mala prohibita* offenses no longer has any practical significance.

The Roman law's approach towards the mistake of law defense was adopted by all legal systems in the middle ages. The first documented case in English common law of rejecting a mistake of law defense occurred in 1231. A person was convicted of trespassing on his mother's land. He claimed that he had relied on his attorney's advice that the land belongs to him as well, but the attorney was wrong. The court rejected that claim on the grounds of *ignorantia juris non excusat*.[25] This approach was not changed until the beginning of the sixteenth century.

The change occurred during the trial of *Vernon* in 1505, when a man was exonerated of the offense of trespassing for accompanying a married woman to the local church. The defense argument was that the man had accompanied her to the

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[24] Richard L. Gray, *Eliminating the (Absurd) Distinction between Malum in se and Malum Prohibitum Crimes*, 73 WASH. U. L. Q. 1369 (1995).

[25] The case of Waggehastr, as reported in HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 496 (1260; G. E. Woodbine ed., S. E. Thorne trans., 1968-1977).

church, where she intended on suing for divorce from her husband. The prosecution claimed that no divorce is allowed in that church. The defense pleaded the mistake of law defense, since the defendant did not know that. The defense was accepted, and the man was exonerated.[26] This exoneration became a precedent, changing the former approach.[27]

However, in most cases during the sixteenth and seventeenth centuries, English common law rejected the mistake of law defense while relying on Roman law.[28] In only a very few cases it was not rejected. The legal literature of that time asserted that English common law accepted that defense if the defendant had no opportunity to seek the advice of an attorney. However, when the defendant was erroneously misled by an attorney, it was not considered a mistake of law defense.[29] The dramatic change occurred during the nineteenth century.

The concept of fault developed tremendously during the nineteenth century in Anglo-American criminal law. Differentiations were made between intent and recklessness, and between recklessness and negligence, which is differentiated by

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[26] Y.B. Trin. 20 Hen. VII, f.2, pl.4 (1505): "Car par cas ils n'avoiet conusance de le Ley on le divorsce seroit sue".

[27] Dialogues II, c.46 (1518): "Ignorance of the law… doth not excuse as to the law but in a few cases; for every man is bound at his peril to take knowledge what the law of the realm is, as well the law made by statute as the common law".

[28] See e.g. Brett v. Rigden, (1568) 1 Plowd. 340, 75 E.R. 516; Mildmay, (1584) 1 Co. Rep. 175a, 76 E.R. 379; Manser, (1584) 2 Co. Rep. 3, 76 E.R. 392; Vaux, (1613) 1 Blustrode 197, 80 E.R. 885.

[29] Dialogues II, c.46 (1518); Digesta, 22.6.9; Dialogues I, c.26 (1518).

awareness and knowledge. As a result, the mistake of law defense should have been adapted to that new, modern and developed concept of fault.[30] Conceptually, it was thought to change the applicability of the mistake of law defense, so that if the mistake prevented the knowledge from existing in the defendant's mind, and the specific offense required knowledge, no criminal liability should be imposed.[31] It resembles the concept of mistake in good faith (*bona fide* mistake), which was considered relevant in a case of mistake of fact (factual mistake).[32]

When the specific offense requires negligence as its element of fault, the mistake should prevent negligence from existing in the defendant's mind. Such a mistake of law is a mistake that any reasonable person would not have made under the same circumstances.[33] After the development of strict liability offenses during the twentieth century (as developed from the absolute liability offenses of the nineteenth century),[34] a new type of mistake of law was required that would prevent strict

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[30] Bailey, (1818) Russ. & Ry. 341, 168 E.R. 835; Esop, (1836) 7 Car. & P. 456, 173 E.R. 203; Crawshaw, (1860) Bell. 303, 169 E.R. 1271; Schuster v. State, 48 Ala. 199 (1872); Grumbine v. State, 60 Md. 355 (1883).

[31] Hall, (1828) 3 Car. & P. 409, 172 E.R. 477; State v. Hollyway, 41 Iowa 200 (1875).

[32] Forbes, (1835) 7 Car. & P. 224, 173 E.R. 99; Parish, (1837) 8 Car. & P. 94, 173 E.R. 413; Allday, (1837) 8 Car. & P. 136, 173 E.R. 431; Dotson v. State, 6 Cold. 545 (1869); Cutter v. State, 36 N.J.L. 125 (1873); Squire v. State, 46 Ind. 459 (1874).

[33] State v. Goodenow, 65 Me. 30 (1876); State v. Whitoomb, 52 Iowa 85, 2 N.W. 970 (1879).

[34] Dixon, (1814) 3 M. & S. 11, 105 E.R. 516; Vantandillo, (1815) 4 M. & S. 73, 105 E.R. 762; Burnett, (1815) 4 M. & S. 272, 105 E.R. 835.

liability from existing.[35] Such a mistake is an inevitable mistake, even after all reasonable measures have been taken in order to prevent it.

Of course, it is much more difficult to prove a strict liability mistake than a negligent mistake, and it is much more difficult to prove a negligent mistake than a mistake of awareness. The modern legal systems of the end of the nineteenth century and the beginning of the twentieth century were afraid of a wide expansion of the mistake of law defense, due to the new obligations of the state that would derive from such an expansion. These obligations include the duty to make law known, including its current interpretation, to all parts of the population. In addition, modern law is far more complicated than it was during the middle ages or during ancient times. Understanding modern law requires law studies, which are not available to all parts of the population.

As a result, it was accepted in very many legal systems that the only legitimate standard for accepting a mistake of law defense is the standard of a strict liability

[35] See e.g. Sweet v. Parsley, [1970] A.C. 132, [1969] 1 All E.R. 347, [1969] 2 W.L.R. 470, 133 J.P. 188, 53 Cr. App. Rep. 221, 209 E.G. 703, [1969] E.G.D. 123; Jeremy Horder, *Strict Liability, Statutory Construction and the Spirit of Liberty*, 118 LAW Q. REV. 458 (2002); John R. Spencer and Antje Pedain, *Approaches to Strict and Constructive Liability in Continental Criminal Law*, APPRAISING STRICT LIABILITY 237 (A. P. Simester ed., 2005); compare Commonwealth v. Boynton, 84 Mass. 160, 2 Allen 160 (1861); Commonwealth v. Goodman, 97 Mass. 117 (1867); Farmer v. People, 77 Ill. 322 (1875); State v. Sasse, 6 S.D. 212, 60 N.W. 853 (1894); State v. Cain, 9 W. Va. 559 (1874); Redmond v. State, 36 Ark. 58 (1880); State v. Clottu, 33 Ind. 409 (1870); State v. Lawrence, 97 N.C. 492, 2 S.E. 367 (1887).

mistake.[36] This standard significantly reduces the probability that a mistake of law defense shall be accepted. This standard is considered as balancing society's need for public order and a defendant's lack of fault due to a mistake of law. The applicability of the mistake of law defense is identical in specific offenses that require knowledge (with or without intent or recklessness), negligence or strict liability offenses.

Thus, when a defendant did not know what the legal situation was, the mistake of law defense is irrelevant. Even when any reasonable defendant under the same circumstances also would not have known what the legal situation was, the mistake of law defense is still deemed irrelevant. Only if, after taking all reasonable measures to prevent the mistake of law, the mistake was still inevitable, then the mistake of law

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[36] E.g. article 17 of the German Penal Code provides: "Fehlt dem Täter bei Begehung der Tat die Einsicht, Unrecht zu tun, so handelt er ohne Schuld, wenn er diesen Irrtum nicht vermeiden konnte. Konnte der Täter den Irrtum vermeiden, so kann die Strafe nach Art. 49 Abs. 1 gemildert werden"; article 122-3 of the French penal code provides: "N'est pas pénalement responsable la personne qui justifie avoir cru, par une erreur sur le droit qu'elle n'était pas en mesure d'éviter, pouvoir légitimement accomplir l'acte"; article 2.04(3)(a) of the American Model Penal Code, THE AMERICAN LAW INSTITUTE, MODEL PENAL CODE – OFFICIAL DRAFT AND EXPLANATORY NOTES 27 (1962, 1985) provides: "A belief that conduct does not legally constitute an offencse is a defense to a prosecution for that offense based upon such conduct when: (a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged"; see also the German ruling in explaining the type of mistake in BGH 2, 194; BGH 3, 105; BGH 4, 1; BGH 4, 80; BGH 5, 111; BGH 9, 164; BGH 9, 358; BGH 12, 379; BGH 13, 135; BGH 15, 332; BGH 16, 155; BGH 17, 87; BGH 20, 342; BGH 21, 18; BGH 22, 223; BGH 35, 347; BGH VRS 65, 127; VRS 60, 313.

defense is relevant, regardless of the specific fault element required in the specific offense. The relevant question in this legal situation is: What exactly is an inevitable mistake of law even after all reasonable measures to prevent it have been taken?

This question is examined by courts under an objective standard. All reasonable measures are all of the measures a reasonable person would have taken under the specific circumstances in order to prevent the mistake. Sometimes the answer to the question is reached by relying on a legal interpretation of the law. When a person has no reasonable possibility of relying upon a legal interpretation of the law, this is deemed an inevitable mistake. Thus, when the law was not duly promulgated, no person could possibly have known about it. As a result, any mistake of law pertaining to that specific law is inevitable, since no person had a reasonable opportunity to rely on it.[37]

Reliance on court decisions that erroneously interpreted the law may create inevitable mistakes of law. If a competent court has interpreted a law, then it is reasonable to rely on that ruling. If a higher court, or a court of higher instance, overrules the prior decision, but, meanwhile, the defendant acted according to the first decision, then it is deemed an inevitable mistake of law.[38]

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[37] Christian, [2006] U.K.P.C. 47, [2007] 2 A.C. 400; Debardelaben v. State, 99 Tenn. 649, 42 S.W. 684 (1897); State v. Click, 2 Ala. 26 (1841); Zakrasek v. State, 197 Ind. 249, 150 N.E. 615 (1926); Jellico Coal-Min. Co. v. Commonwealth, 96 Ky. 373, 29 S.W. 26 (1895); United States v. Casson, 434 F.2d 415 (D.C.Cir.1970).

[38] People v. Fraser, 96 N.Y.2d 318, 728 N.Y.S.2d 115, 752 N.E.2d 244 (2001); People v. Marrero, 69 N.Y.2d 382, 515 N.Y.S.2d 212, 507 N.E.2d 1068 (1987); Livingston Hall and

Reliance on an erroneous decision of administrative authorities under executive power is deemed reasonable reliance,[39] although the power to interpret is that of the judicial authorities, whether the interpretation is intended for one person or for the entire population.[40] Such a mistake of law is deemed an inevitable mistake.[41] The defendant is considered as having taken all reasonable measures to prevent the mistake from occurring.[42] Similarly, if an administrative authority acted in a manner

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Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641 (1941); State v. O'Neil, 147 Iowa 513, 126 N.W. 454 (1910); State v. Longino, 109 Miss. 125, 67 So. 902 (1915); Stinnett v. Commonwealth, 55 F.2d 644 (4th Cir.1932); Lutwin v. State, 97 N.J.L. 67, 117 A. 164 (1922); State v. Whitman, 116 Fla. 196, 156 So. 705 (1934); United States v. Mancuso, 139 F.2d 90 (3rd Cir.1943); State v. Chicago, M. & St.P.R. Co., 130 Minn. 144, 153 N.W. 320 (1915); Coal & C.R. v. Conley, 67 W.Va. 129, 67 S.E. 613 (1910); State v. Striggles, 202 Iowa 1318, 210 N.W. 137 (1926); United States v. Albertini, 830 F.2d 985 (9th Cir.1987).

[39] State v. Patten, 353 N.W.2d 30 (N.D.1984).

[40] State v. Sheedy, 125 N.H. 108, 480 A.2d 887 (1984); People v. Ferguson, 134 Cal.App. 41, 24 P.2d 965 (1933); compare State v. Foster, 22 R.I. 163, 46 A. 833 (1900).

[41] United States v. Hancock, 231 F.3d 557 (9th Cir.2000); Andrew Ashworth, *Testing Fidelity to Legal Values: Official Involvement and Criminal Justice* , 63 MOD. L. REV. 663 (2000); Glanville Williams, *The Draft Code and Reliance upon Official Statements*, 9 LEGAL STUD. 177 (1989).

[42] State v. Davis, 63 Wis.2d 75, 216 N.W.2d 31 (1974); Arrowsmith, [1975] Q.B. 678, [1975] 1 All E.R. 463, [1975] 2 W.L.R. 484, 60 Cr. App. Rep. 211, 139 J.P. 221; Kingston, [1995] 2 A.C. 355, [1994] 3 All E.R. 353, [1994] 3 W.L.R. 519, [1994] Crim. L.R. 846, 99 Cr. App. Rep. 286, 158 J.P. 717.

exceeding its powers (*ultra vires*), a defendant's reliance on that authority is deemed reasonable, and thus, an inevitable mistake of law may be entertained.[43] If the administrative authority deliberately misled the defendant, under American law, it is considered entrapment that may lead to exoneration.[44]

Reliance on the legal advice of a private attorney at law is deemed reasonable reliance if the attorney possesses appropriate legal credentials and the defendant relied

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[43] United States v. Barker, 546 F.2d 940 (D.C.Cir.1976); Jones v. State, 32 Tex.Crim. 533, 25 S.W. 124 (1894); State v. Simmons, 143 N.C. 613, 56 S.E. 701 (1907); United States v. Ormsby, 252 F.3d 844 (6th Cir.2001); United States v. Ramirez-Valencia, 202 F.3d 1106 (9th Cir.2000); United States v. Gutierrez-Gonzalez, 184 F.3d 1160 (10th Cir.1999); United States v. Ramos, 179 F.3d 1333 (11th Cir.1999); United States v. West Indies Transport Inc., 127 F.3d 299 (3rd Cir.1997); United States v. Achter, 52 F.3d 753 (8th Cir.1995); Bsharah v. United States, 646 A.2d 993 (D.C.App.1994); State v. DeCastro, 81 Haw. 147, 913 P.2d 558 (App.1996); Miller v. Commonwealth, 25 Va.App. 727, 492 S.E.2d 482 (1997). Compare United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655, 93 S.Ct. 1804, 36 L.Ed.2d 567 (1973); United States v. Clegg, 846 F.2d 1221 (9th Cir.1988); United States v. Duggan, 743 F.2d 59 (2nd Cir.1984); United States v. Austin, 915 F.2d 363 (8th Cir.1990); United States v. Tallmadge, 829 F.2d 767 (9th Cir.1987).

[44] Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965); United States v. Hancock, 231 F.3d 557 (9th Cir.2000); Commonwealth v. Kratsas, 564 Pa. 36, 764 A.2d 20 (2001); Raley v. Ohio, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959); State v. Guzman, 89 Haw. 27, 968 P.2d 194 (App.1998); People v. Donovan, 53 Misc.2d 687, 279 N.Y.S.2d 404 (Ct.Spec.Sess.1967).

on the attorney in good faith (*bona fide* reliance).[45] If not, the mistake is not deemed inevitable and the mistake of law defense is rejected. Can a mistake of law defense be relevant in cases of culture-based crimes committed in countries absorbing immigrants?

B. Rejecting the Mistake of Law Defense in Culture-based Crimes against Women Committed by the First-Generation Immigrants

The first generation of immigrants includes those immigrants who were raised in their homelands under their original culture. They were the immigrants who emigrated from their homeland to the new country. The first-generation immigrants are the most familiar with the customs of their culture and usually continue their original habits. At least for a short period after emigrating to the new country, they are not familiar with the mainstream culture of their new country. If their original culture does not accept ideas of equality for women or does not recognize that women have any legal status under the modern concept of human rights, the absorbing society does not intervene with means of criminal law.

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[45] Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1940); compare People v. McCalla, 63 Cal.App. 783, 220 P. 436 (1923); State v. Bellows, 596 N.W.2d 509 (Iowa 1999); State v. Huff, 89 Me. 521, 36 A. 1000 (1897); State v. Western Union Tel. Co., 12 N.J. 468, 97 A.2d 480 (1953); State v. Brewer, 932 S.W.2d 1 (Tenn.Cr.App.1996); United States v. Poludniak, 657 F.2d 948 (8th Cir. 1981); Long v. State, 44 Del. 262, 65 A.2d 489 (1949); State v. Downs, 116 N.C. 1064, 21 S.E. 689 (1895).

The intervention occurs only when the original culture dictates oppression of women, which, in their new country is deemed a violation of law.[46] There are two categories of culture-based crimes against women. The first is when the offender takes action against a woman according to the accepted norm in the original culture, regardless of where they are physically situated. The first category of culture-based crime continues the standards of behavior of the original culture in the new country, regardless of the culture governing the new country. Under this category, the offender might be aware of the differences in cultures, but not necessarily.

The second category of culture-based crime is completely different. The offender is fully aware of the differences between the cultures, but the offender wants to prevent the woman from assimilating in the new culture. The offender imposes preservation of the original culture on the woman precisely because they are surrounded by a new culture and new customs. The offender might justify these offenses by considering them to be protective actions. According to the offender's point of view, these actions serve to protect the woman from the evil effects of the

[46] These cases should be distinguished from cases where the immigrant is a criminal due to the immigration laws or other laws, even before becoming an immigrant, and not because of committing culture crimes. See e.g. Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L. J. 79 (1998); Hannah R. Shapiro, *Battered Immigrant Women Caught in the Intersection of U.S. Criminal and Immigration Laws: Consequences and Remedies*, 16 TEMP. INT'L & COMP. L. J. 27 (2002); Robert Ferrari, *Immigrant in the New York County Criminal Courts*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 194 (1913); Teri E. O'Brien, *Richardson v. Reno: What is the Proper Application of the Illegal Immigration Reform and Immigrant Responsibility Act to Criminal Aliens*, 38 SAN DIEGO L. REV. 333 (2001).

new local culture. The offender believes he is saving her and becomes her savior. The local culture is considered evil, and the laws of that society are evil as well, since they serve irrational ideas of free speech, equality, liberty, etc., which will definitely corrupt the woman.

This second category of culture-based crime is based on ideology, and therefore, is far more dangerous to society. Under the first category, culture-based crimes are committed as a habit from the original culture, and not necessarily with deep thought of the consequences in the new homeland. When the crime is based on ideology, its purpose is to isolate the woman from the new culture and subjugate her to the original culture, whether she accepts it or not.

Nonetheless, the defense argument raised by offenders who commit either category of culture-based crime may be mistake of law. The specific defense argument might relate to the specific offense or to another general defense. When the mistake of law argued relates to the specific offense, it is argued that the offender did not know about a specific law that prohibits the specific conduct; e.g., a defense plea that the offender did not know that female circumcision is prohibited in the new country under criminal law by means of a specific offense or by means of a general offense of mayhem.

When the specific defense of mistake of law relates to another general defense, the offender does not deny knowledge of the specific law prohibiting the specific offense. The offender argues that the offense was committed under conditions of a general defense, which prevents the imposition of criminal liability;

e.g., the murder of a woman by her husband was committed in the name of family honor. The husband does not deny that he knew about the severe prohibition of murder under the local criminal law. The husband argues that his mistake of law was that he thought that the defense of necessity (and, in some cases, the claim of self-defense) includes the protection of family honor. As a result, he thought that the specific murder was justified. The mistake of law defense can also be raised in relation to a defense that does not exist in the local criminal law.

In order to reject these arguments substantively, it should be assumed that no evidential problem might arise. Thus, it is assumed that if the defendant argues that he really did not know that his action was an offense or about the lack of a specific defense, the court believes him that his argument is the truth. Moreover, it is assumed that the criminal law of the original culture lacked the specific law prohibiting that offense or included the relevant general defense, and it is proven the way it should be.[47]

The roots of a mistake of law defense against culture-based crimes are that the specific offender is an immigrant who is used to his homeland's customs and culture, while he has not yet fully assimilated the new mainstream culture of his new country,

[47] Of course, in general this assumption should be totally proved. Any difference between the domestic law and the foreign law should be proved by an expert opinion about the foreign law. The foreign law is considered in the Anglo-American legal systems as a matter of fact, that should be proved. See e.g. ROGER C. PARK, DAVID P. LEONARD AND STEVEN H. GOLDBERG, EVIDENCE LAW, 552-558 (2nd ed., 2004); COLLIN TAPPER, CROSS & TAPPER ON EVIDENCE 192-193 (11th ed., 2007).

and particularly, has not assimilated the laws prohibiting the specific offense. The immigrant offender makes a simple analogy between his homeland culture and the new culture and expects them to be identical. The offender claims that he has been used to acting in this way since he was born, and continued his habitual way of life after becoming an immigrant in the new society.

This analogy should be rejected in that context. Even if the offender is used to acting in a certain manner for many years, since the very day he was born, the offender surely knows that he is now an immigrant and no longer resides in his homeland. The offender is not a tourist, but rather an immigrant, who must conform to the norms of the existing population, the characteristics of which are not identical to the offender's homeland culture. A reasonable person would have surely tried to check whether there are different laws, customs, or prohibitions that differ from those in his homeland.

When arguing a mistake of law defense, the standard is even higher. For a mistake of law to be accepted, the defendant must have taken all reasonable measures to prevent it, to no avail, and thus, the mistake would be deemed inevitable. *All* reasonable means must include any reasonable attempt to check out the legal situation. If no attempt to check out the legal situation was made, the mistake of law argument cannot be accepted. If a culture-based crime was committed falling under the second category, and the motive for committing the crime was an ideological motive of preserving the original culture, the mistake of law defense is rejected by another argument as well. If the culture-based crime was committed ideologically, the defendant knew the difference between the two cultures; otherwise, there was

nothing that needed preserving.

The knowledge that there might be a difference between the two cultures is sufficient to suspect that the legal situation might be different as it relates to culture-based crimes. If a person does not clarify that suspicion, it is not considered a mistake of law, but rather willful disregard or deliberate ignorance,[48] which is equivalent to knowledge.[49] This equivalence of knowledge replaces all knowledge required in the specific law in order to impose criminal liability on a person who was deliberately ignorant or willfully disregarded the law.[50] As a result, a mistake of law defense cannot be accepted if it derives from the willful disregard of the law by the offender, or if a person commits a culture-based action, notwithstanding the fact that he

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[48] United States v. Jewell, 532 F.2d 697 (9th Cir.1976); United States v. Chen, 913 F.2d 183 (5th Cir.1990); Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEXAS L. REV. 1351 (1992); United States v. Ladish Malting Co., 135 F.3d 484 (7th Cir.1998); United States v. Scott, 159 F.3d 916 (5th Cir.1998); United States v. Shannon, 137 F.3d 1112 (9th Cir.1998); United States v. Wert-Ruiz, 228 F.3d 250 (3rd Cir.2000); United States v. Delreal-Ordonez, 213 F.3d 1263 (2000).

[49] United States v. Murrieta-Bejerano, 552 F.2d 1323 (9th Cir.1977); United States v. Mohabir, 624 F.2d 1140 (2nd Cir. 1980); United States v. Suttiswad, 696 F.2d 645 (9th Cir.1982); United States v. McAllister, 747 F.2d 1273 (9th Cir.1984); State v. Bogle, 324 N.C. 190, 376 S.E.2d 745 (1989); State v. LaFreniere, 240 Neb. 258, 481 N.W.2d 412 (1992); State v. Lewis, 263 Kan. 843, 953 P.2d 1016 (1998); Attorney Grievance Commission of Maryland v. Childress, 364 Md. 48, 770 A.2d 685 (2001).

[50] United States v. Rivera, 944 F.2d 1563 (11th Cir.1991); United States v. Aguilar, 80 F.3d 329 (9th Cir.1996); United States v. Hanzlicek, 187 F.3d 1228 (10th Cir.1999); Rollin M. Perkins, *"Knowledge" as a Mens Rea Requirement*, 29 HASTINGS L.J. 953 (1978).

suspected that such actions are prohibited by law in his new homeland.

Moreover, unless the offender did not communicate with anyone in the new country, he must have seen women of the local culture. These women, who are not bound by his original culture, behave very differently than women in his former homeland. Such an offender must have suspected that the local law is different. If women possess key positions in politics, economics, business, the police force, etc., he must have suspected they are allowed to do so. If the specific offender did not suspect, this is insufficient to entertain the mistake of law defense. That defense is examined objectively, as mentioned above, and even if the specific offender actually did not suspect that different laws exist, had he taken all reasonable measures to prevent a mistake of law, the mistake would not have happened and thus, the mistake is not inevitable. In such instance, the mistake of law defense is not acceptable as a defense argument.

The question regarding that argument is whether the reasonable means (and, accordingly, the reasonable man) should be examined in courts according to the original culture's point of view. In some cases, the argument is raised that the tests of reasonability (reasonable means or reasonable man) are culturally oriented. The local courts use the local legal means and standards, which are designed for one culture, in order to measure the fault of persons who are not from that culture, and the results are unjust.[51] This argument should be rejected for two main reasons.

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[51] Alison Dundes Renteln, *A Justification of the Cultural Defence as Partial Excuse*, 7 SOUTHERN CALIFORNIA REVIEW OF LAW AND WOMEN STUDIES 437 (1993).

First, the judicial flexibility required of courts in order to use a foreign culture's standards in local courts is too wide. Such a wide flexibility calls for the mainstream culture to make accommodations for a wide spectrum of foreign cultures of immigrants who are violating criminal laws. In order to sustain cohesiveness in society, it must enforce a uniform public policy towards criminal law. The public order cannot stand a situation in which violations of specific laws are permitted for some parts of the population, while these crimes are being aimed against other members of the community. If the fundamental values of the specific society espouse equality between men and women, that society cannot allow women to be harmed in deference to a foreign culture.

Secondly, courts must balance the conflicting values. On the one hand, there are the fundamental values of the local society. These values are at the very core of that society. Although these values are not absolute, they should be balanced with other values only when the other culture's values are more crucial under the specific circumstances. In most western societies, these values consist of equality, liberty, basic human rights, civil rights, political rights, etc. These are the core values of the society. If these values are balanced with other values that contradict the very essence of democracy and the basic values of liberal society, the consequence is the negation of these values.

When a foreign culture calls for the oppression of women contrary to the fundamental values of the local society, it cannot be balanced with modern western values. In such cases, one set of values must take precedence over the other, and not be balanced. Courts of the local society must give preference to the local values,

which legitimize its rulings, over foreign values which negate these fundamental values. As long as local courts are bound by the local society's values, and as long as the specific foreign culture's values are diametrically opposed to the fundamental values of the local society, courts are bound by the local values.

Does this constitute imposition of one culture upon another? Maybe so, but the immigrants were not forced to immigrate to that new country. They chose to immigrate of their own free will. By immigrating of their own free will, they are presumed to accept the absorbing society's laws. If they do not accept the laws of their new country, they still have the choice not to immigrate or to emigrate to another country. This answer is relevant for immigrants, but perhaps is not for refugees, who did not choose to immigrate, and not for aboriginal populations (Indians in America, Aborigines in Australia, etc.) as shall be discussed hereunder.[52]

Courts in most modern western legal systems have adopted that judicial policy and give precedence to the local culture's values over the foreign culture's values. The main reason for this is the desire to maintain and preserve the fundamental values of mainstream society and to preserve the local society's cohesiveness.[53]

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[52] For Rejecting the Mistake of Law Defense in Culture-based Crimes against Women Committed by Aboriginal Peoples see hereinafter at subparagraph III.F.

[53] See e.g. R. v. Adesanya, unreported (1974); J, [1999] 2 F.C.R. 345, [1999] 2 F.L.R. 678, [1999] Fam. Law 543: "You and others who come to this country must realize that our laws must be obeyed… It cannot be stressed too strongly that any further offenses of this kind in pursuance of tribal traditions in Nigeria or other parts of Africa… can only result in prosecution. Because this is a test case… I am prepared to deal with you with the utmost

leniency. But let no one else assume that they will be treated with mercy. Others have now been warned"; Masciantonio v. R., 129 A.L.R. 575 (1995): "[t]he test involving the hypothetical ordinary person is an objective test which lays down the minimum standard of self-control required by the law. Since it is an objective test, the characteristics of the ordinary person are merely those of a person with ordinary powers of self-control. They are not the characteristics of the accused, although when it is appropriate to do so because of the accused's immaturity, the ordinary person may be taken to be of the accused's age. However, the gravity of the conduct said to constitute the provocation must be assessed by reference to relevant characteristics of the accused. Conduct which might not be insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done. But having assessed the gravity of the provocation in this way, it is then necessary to ask the question whether provocation of that degree of gravity could cause an ordinary person to lose self-control and act in a manner which would encompass the accused's actions"; Stanley Yeo, *Sex, Ethnicity, Power of Self-Control and Provocation Revisited*, 18 SYDNEY L. REV. 304 (1996); Stingel v. R. (1990) 171 C.L.R. 312, 97 A.L.R. 1; State v. Chong Sun France, 379 S.E.2d 701 (1989); Cheng v. Wheaton, 745 F.Supp. 819 (1990); Hermanson v. State, 570 So.2d 322 (1990); Hermanson v. State, 604 So.2d 775 (1992); Commonwealth v. Twitchell, 617 N.E.2d 609 (1993); Walker v. Superior Court, 47 Cal.3d 112, 253 Cal. Rptr. 1, 763 P.2d 852 (1988); United States v. Koua Thao, 712 F.2d 369 (1983); United States v. Khang, 36 F.3d 77 (9th Cir.1994); Cr. App. 4596/98 N. v. State, PD 54 (1) 145 (2000); Aisha Gill and Kaveri Sharma, *Response and Responsibility: Domestic Violence and Marriage migration in the UK*, WOMAN AND IMMIGRATION LAW 183 (Sarah van Walsum and Thomas Spijkerboer eds., 2007); Virginia Berridge, *Drug Policy: Should the Law Take a Back Seat?*, LANCET 301 (1997); RICHARD RUDGLEY, THE ALCHEMY OF CULTURE: INTOXICANTS IN SOCIETY (1993).

C. Rejecting the Mistake of Law Defense in Culture-based Crimes against Women Committed by the Second and Third Generations of Immigrants

The second and third generations of immigrants did not actually emigrate from the original society to the new country. They are the children or grandchildren of those who immigrated as the first generation of immigrants. These generations are raised with a much closer interaction with the local culture. They are much more familiar with the local language, customs and population than their elders. They know about their original culture, but only as hearsay. They have not experienced all aspects of the original culture. In most cases, they attend local schools as children, work in places outside the community of origin and even marry people of the local society.

Naturally, the greater the distance from the first generation, the looser the ties to the original culture. However, there are some exceptions, where the community is a close community that enjoys total autonomy or absolute independence. In these rare cases, the second and third generations are not different from the first generation. The reason for this is that these generations do not experience any aspect of the local culture more than their parents or grandparents did. As a result, legally they do not differ from first-generation immigrants in relation to the mistake of law defense.

The rejection of the mistake of law defense in culture-based crimes against women committed by the second and third generations of immigrants is simpler than

the rejection of that defense when argued by the first generation. As the connection to the local society strengthens with the passing generations, there are many more reasonable means for knowing the local law. As a result, the probability that a mistake of law (whether it relates to a specific offense or a general defense) would be considered as inevitable, if done by a person of the second and third generations of immigrants, is much lower than that of the first generation. First-generation immigrants have far fewer possibilities, and still, in most cases, the mistake of law defense is rejected, due to the standard of examination of the mistake of law.

However, if the defendant of the second or third generation of immigrants proves that, even after using all reasonable means, the mistake of law was inevitable, the defense is accepted. This kind of case is not different in its judicial examination than cases of culture-based crimes in the local society. If a person is educated about the values of equality and liberty towards both genders, a claim of a lack of knowledge that oppression of women is prohibited is not reasonable. The influence of the culture of origin on that offender might be negligible or significant, but when raised within the context of the local society, it cannot constitute sufficient grounds for a mistake of law defense to be accepted.

It may be argued that the rejection of the mistake of law defense in culture-based crimes against women committed by the second and third generations of immigrants is analogous to the rejection of that defense when the culture-based crimes are committed by offenders of the first generation of immigrants. The analogy is relevant, due to the specific parameters for examining the mistake of law defense as discussed above.

D. Rejecting the Mistake of Law Defense in Culture-based Crimes against Women Committed by First-Generation Refugees

First-generation refugees differ from first-generation immigrants in the aspect of choice. Although immigrants and refugees of the first generation are moving from one culture to another culture, and both of them must interface with the culture of their new country, the reason for their relocation is different. Immigrants of the first generation have chosen to move from one culture to another. The reasons vary from case to case. Immigrants may choose to move in order to improve their economic conditions, their education, their social status, etc. Refugees do not choose by free will to move.[54]

Refugees are assumed to be forced to move due to a real threat to their lives or to the lives of their relatives. If they choose to stay in their homeland, they face real danger. First-generation refugees flee from their homeland to the new country. In many cases, refugees have an opportunity to choose the country of asylum. In some cases, there is no such choice, since there is only one country that does not refuse to

[54] The background of the move might be the culture crime itself. See e.g. Gregory A. Kelson, *Granting Political Asylum to Potential Victims of Female Circumcision*, 3 MICH. J. GENDER & L. 257 (1996); Gregory A. Kelson, *Female Circumcision in the Modern Age: Should Female Circumcision Now be Considered Grounds for Asylum in the United States*, 4 BUFF. HUM. RTS. L. REV. 185 (1998); Valerie Oosterveld, *Refugee Status for Female Circumcision Fugitives: Building a Canadian Precedent*, 51 U. TORONTO FAC. L. REV. 277 (1993).

absorb these refugees. In that context, a problem arises when a refugee chooses to preserve his original culture and customs and so oppresses women who are refugees as well.

When a refugee has the opportunity of choosing the country of asylum out of a number of possibilities, and he chooses a country whose laws prohibit the oppression of women, the legal situation is not substantively different from the situation of a first-generation immigrant, as discussed above.[55] In such cases, the mistake of law defense is rejected for the same reasons. The circumstances of a refugee are different than those of a first-generation immigrant if the refugee had no choice of country of asylum, since only one country opened its gates to refugees, or, in that context, if all countries of asylum have the same culture, which outlaws the oppression of women, so the refugee could not choose his new culture.

Even when the refugee has no choice of new local culture, the mistake of law defense should be examined the same way. There are two main reasons for this. First, the fact that a person is a refugee does not justify the oppression of another refugee. In most cases, the refugee commits culture-based crimes against a woman, who happens to be the refugee's wife, sister or daughter, who are refugees themselves. It is morally (and legally) justified that a society that absorbs refugees shall prohibit the oppression of one refugee by another, as long as they are physically

[55] Rejecting the Mistake of Law Defense in Culture-based Crimes against Women Committed by the First-Generation Immigrants is discussed above at subparagraph III.B.

in its territory.[56]

Secondly, a refugee who wants to flee to another country that prohibits the oppression of women, but considers it to be very important to continue oppressing women, is, essentially, making a choice. The refugee has a choice to stay in his homeland and continue oppressing women or to seek asylum in a new country and stop oppressing women, at least pursuant to the laws of the country of asylum. If the refugee has chosen to seek asylum in the new country, then there is not much difference between the refugee and the immigrant. As a result, when culture-based crimes against women are committed by refugees in their country of asylum, the standard of examination of the mistake of law defense is the same standard of examination as if the refugee had been a first-generation immigrant, who immigrated out of his own free will.[57]

E. Rejecting the Mistake of Law Defense in Culture-based Crimes against Women Committed by the Second and Third Generation of Refugees

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[56] See e.g. Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime against Humanity of Gender-Based Persecution*, 17 DUKE J. COMP. & INT'L L. 49 (2007).

[57] See e.g. Evangeline G. Abriel, *The Effect of Criminal Conduct upon Refugee and Asylum Status*, 3 SW. J. L. & TRADE AM. 359 (1996). Compare Jillian M. Siskind, *Complicity in Crimes against Humanity: The Intersection of International Criminal and Canadian Refugee Law*, 49 CRIM. L. Q. 96 (2005); Cheryl Tompkin, *A Criminal at the Gate: A Case for the Haitian Refugee*, 7 BLACK L. J. 387 (1982).

In most cases, the status of refugee is retained for a short period, until the war is over, until the plague is over or until the conflict is resolved. Sometimes, it takes time, a very long time. When it takes time, first-generation refugees continue with their lives and give birth to new generations of refugees in the country of asylum. These are the refugees of the second and third generation. They are the children or grandchildren of those who fled their homeland as the first generation of refugees. These generations are raised with much closer interaction between them and the host culture. They are much more familiar with the local language, customs and population than their elders. They know about their original culture, but only as hearsay. They have not experienced all aspects of the original culture. In many cases, they attend local schools as children, work in places outside the community of origin and even marry people of the local society.

Naturally, the greater the distance from the first generation, the looser the ties to the original culture. However, there are some exceptions, where the community is a close community that enjoys total autonomy or absolute independence. In these rare cases, the second and third generations are not different from the first generation. The reason for this is that these generations do not experience any aspect of the local culture more than their parents or grandparents did. As a result, legally they do not differ from first-generation refugees in relation to the mistake of law defense.

The rejection of the mistake of law defense in culture-based crimes against women committed by the second and third generations of refugees is simpler than the rejection of that defense when argued by the first generation. As the connection to the

local society strengthens with the passing generations, there are many more reasonable means for knowing the local law. As a result, the probability that a mistake of law (whether it relates to a specific offense or a general defense) would be considered as inevitable, if done by a person of the second and third generations of refugees, is much lower than that of the first generation. First-generation refugees have far fewer possibilities, and still, in most cases, the mistake of law defense is rejected, due to the standard of examination of the mistake of law.

However, if the defendant of the second or third generation of refugees proves that, even after using all reasonable means, the mistake of law was inevitable, the defense is accepted. This kind of case is not different in its judicial examination than cases of culture-based crimes in the local society. If a person is educated about the values of equality and liberty towards both genders, a claim of a lack of knowledge that oppression of women is prohibited is not reasonable. The influence of the culture of origin on that offender might be negligible or significant, but when raised within the context of the local society, it cannot constitute sufficient grounds for a mistake of law defense to be accepted.

It may be argued that the rejection of the mistake of law defense in culture-based crimes against women committed by the second and third generations of refugees is analogous to the rejection of that defense when the culture-based crimes are committed by offenders of the first generation of refugees. The analogy is relevant due to the specific parameters for examining the mistake of law defense as discussed above.

F. Rejecting the Mistake of Law Defense in Culture-based Crimes against Women Committed by Aboriginal Peoples

When the culture-based crimes against women are committed by immigrants or refugees, the situation is different than when these crimes are committed by aboriginal peoples. With regard to immigrants and refugees, the assumption is that they moved from a foreign country and a foreign culture to a new country with its own local culture. Morally, it is much simpler to demand that an immigrant or a refugee adopt local customs than it is to impose customs on a population that lived there long before the mainstream culture took over. The famous examples are the native Indians in North America and the aborigines in Australia.[58] These cultures were there long before the arrival of the white man. When the white population

[58] For the question, who is considered as Native American see e.g. United States v. Rogers, 45 U.S. 567, 11 L.Ed. 1105 (1846); United States v. Lawrence, 51 F.3d 150 (8th Cir.1995); United States v. Torres, 733 F.2d 449 (7th Cir.1984); State v. Sebastian, 243 Conn. 115, 701 A.2d 13 (1997); State v. LaPier, 242 Mont. 335, 790 P.2d 983 (1990); Goforth v. State, 644 P.2d 114 (Okla.Crim.App.1982); Makah Indian Tribe v. Calallam Country, 73 Wash.2d 677, 440 P.2d 442 (1968); compare United States v. Keys, 103 F.3d 758 (9th Cir.1996); United States v. Broncheau, 597 F.2d 1260 (9th Cir.1979). For other groups of native inhabitants see e.g. James Hathaway, *Native Canadians and the Criminal Justice System: A Critical Examination of the Native Courtworker Program*, 49 SASK. L. REV. 201 (1985); M. R. Phillips and T. S. Inui, *The Interaction of Mental Illness, Criminal Behavior and Culture: Native Alaskan Mentally Ill Criminal Offenders*, 1986 CULTURE, MEDICINE AND PSYCHIATRY 123 (1986); H. R. Hone, *The Native of Uganda and the Criminal Law*, 21 J. COMP. LEGIS. & INT'L L. 3D SER. 179 (1939).

became the majority population, the question raised was whether it is morally wrong to impose the customs and criminal law of the new culture on the native populations.[59]

The aboriginal population never moved from one place to another; it has been there for hundreds of generations. They did not choose to change anything, and they stayed at home, in their point of view. This situation is completely different from the situation of an immigrant who moved willfully to a new society, or of a refugee who sought asylum in the new society. The aboriginal population did not move anywhere. There are two main solutions to the issue of culture-based crimes committed within these communities.

If the aboriginal community wishes to assimilate in the majority population, then this becomes a regular issue of majority and minority. Under a democratic constitutional regime, the majority has the right to impose rules upon the minority, as long as the basic human rights of the minority are protected. The question is whether culture-based crimes against women might be considered part of basic human rights. In most democracies, oppression of women cannot be considered a human right requiring legal protection. In fact, this is the situation concerning all crimes and serious offenses in most legal systems.

If the aboriginal community does not wish to assimilate in the majority population, an imposition of the mainstream culture becomes problematic, since the

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[59] Thomas J. Young, *Native American Crime and Criminal Justice Require Criminologists' Attention*, 1 J. CRIM. JUST. EDUC. 111 (1990).

aboriginal community did not freely choose to adopt the laws of the mainstream culture. One of the solutions for that problem was the establishment of reservations, in which the aboriginal population enjoys a limited autonomy in relation to specific issues.[60] Generally, when the infraction is not a serious crime affecting the entire population, the autonomy prevails.[61] When the crime is a major crime that

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[60] Christopher B. Chaney, *The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction*, 14 BYU J. PUB. L. 173 (2000); Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976); G.D. Crawford, *Looking Again at Tribal Jurisdiction: "Unwarranted Instructions on their Personal Liberty"*, 76 MARQ. L. REV. 1627 (1998); Nancy Thorington, *Civil and Criminal Jurisdiction Over Matters Arising in Indian Country: A Roadmap for Improving Interactions Among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973 (2000); Seynour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); Solem v. Bartlett, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984); Hagen v. Utah, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998); United States v. Stands, 105 F.3d 1565 (8th Cir.1997); United States v. Sandoval, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913); Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998).

[61] Wetsit v. Stafne, 44 F.3d 823 (9th Cir.1995); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978); United States v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); Duro v. Reina, 495 U.S. 676, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990); United States v. Funmaker, 10 F.3d 1327 (7th Cir.1993); United States v. Begay, 42 F.3d 486 (9th Cir.1994); United States v. Burns, 529 F.2d 114 (9th Cir.1975); United States v. Blue, 722 F.2d 383 (8th Cir.1983); United States v. Yannott, 42 F.3d 999 (6th Cir.1994); United States v. Young, 936 F.2d 1050 (9th Cir.1991); Stone v. United States, 506 F.2d 561 (8th Cir.1974); United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869 (1881); United States

contravenes public policy considerations, the laws of the majority prevail.[62] Severe oppression of women is considered a major crime that contravenes public policy considerations.[63] Consequently, when the crimes are culture-based crimes against women, there is no difference between aboriginal populations and other members of the same country as it relates to the rejection of the mistake of law defense.[64]

IV. HARSHER SENTENCING OF THOSE CONVICTED OF CULTURE-BASED CRIMES AGAINST WOMEN

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v. Thunder Hawk, 127 F.3d 705 (8th Cir.1997); Standing Bear v. United States, 68 F.3d 271 (8th Cir.1995).

[62] *Ex Parte* Crow Dog, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883); Henry v. United States, 432 F.2d 114 (9th Cir.1970); Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973); United States v. Antelope, 430 U.S. 641, 97 S.Ct. 1395, 51 L.ed.2d 701 (1977).

[63] For the situation of women in this context see Carol Pitcher LaPrairie, *Selected Criminal Justice and Socio-Demographic Data on Native Women*, 26 CANADIAN J. CRIMINOLOGY 161 (1984).

[64] See and compare Stanley Yeo, *Native Criminal Jurisdiction after MABO*, 6 CURRENT ISSUES CRIM. JUST. 9 (1995); Wesley M. Clark, *Enforcing Criminal Law on Native American Lands*, 2005 FBI LAW ENFORCEMENT BULLETIN 22 (2005); Colin J. Yerbury and Curt Taylor Griffiths, *Native and Criminal Justice Policy: The Case of Native Policing*, 26 CANADIAN J. CRIMINOLOGY 147 (1984); Rebecca Clements, *Misconceptions of Culture: Native Peoples and Cultural Property under Criminal Law*, 49 U. TORONTO FAC. L. REV. 1 (1991).

The current tendency in most Anglo-American legal systems towards culture-based crimes is to reject their justification on the grounds of cultural diversity, including the mistake of law defense. Nevertheless, some courts in the Anglo-American legal systems prefer to take the cultural context into consideration during sentencing. The tendency is to mitigate punishments, as described above.[65] The most common argument is that the culture is an integral part of the person's personality. You can take a man out of his culture, but you cannot take the culture out of the man. As a result, these courts take an understanding view towards culture-based crimes.

The cultural context of an offense committed against a woman is important, without doubt, and it may effect the punishment and sentencing. Nevertheless, the effect of that context is an aggravating effect and not a mitigating one. As discussed above, there are two categories of culture-based crimes against women.[66] One is ideological, whereby the offender is fully aware of the difference between the cultures (his original culture and the culture of his new host country), but the offender wants to prevent the woman from assimilating in the new culture. The offender imposes preservation of the original culture on the woman precisely because they are surrounded by a new culture and new customs.

The offender might justify these offenses by considering them to be protective actions. According to the offender's point of view, these actions serve to protect the woman from the evil effects of the new local culture. The offender believes he is saving her and becomes her savior, so she is told. The local culture is considered evil,

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[65] Above at paragraph II.

[66] Above at subparagraph III.B.

and the laws of that society are evil as well, since they serve irrational ideas of free speech, equality, liberty, etc., which will definitely corrupt the woman. A crime based on ideology is far more dangerous to society than other categories of culture-based crimes, because its purpose is to isolate the woman from the new culture and subjugate her to the original culture, whether she accepts it or not.

Since the late 1970's, the new penology calls for the dominance of the retributive justice over other punishment considerations (deterrence, rehabilitation and incapacitation).[67] The "just desert" concept is a retributive sentencing concept that is very common in Anglo-American legal systems. According to that concept, there are two main factors that courts should consider when sentencing. The first is the social harm caused by the offense. The second is the fault element of the specific offender.

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[67] NICHOLAS KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY (1971); David J. Rothman, *For the Good of All: The Progressive Tradition in Prison Reform*, 271 HISTORY AND CRIME: IMPLICATIONS OF CRIMINAL JUSTICE AND POLICY (James A. Inciardi and Charles E. Faupel eds., 1980); Walter C. Bailey, *Correctional Outcome: An Evaluation of 100 Reports*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 153 (1966); Roberts Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUBLIC INTEREST 22 (1974); BARBARA HUDSON, UNDERSTANDING JUSTICE: AN INTRODUCTION TO IDEAS, PERSPECTIVES AND CONTROVERSIES IN MODERN PENAL THEORY 39 (1996, 2003); JESSICA MITFORD, KIND AND USUAL PUNISHMENT: THE PRISON BUSINESS (1974); Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843 (2002); Douglas Husak, *Holistic Retribution*, 88 CAL. L. REV. 991 (2000); Douglas Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959 (2000); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001).

Other factors are considered, but these two factors are the major factors.[68]

Culture-based crimes against women, especially those committed for ideological reasons, deserve harsher punishment according to the current concept of sentencing. The social harm caused by culture-based crimes against women is tremendous, since the oppression of women damages the social image of all women in that society. If the specific culture-based crime causes severe injury to a woman, the social harm is even graver, since it calls for the humiliation of women even beyond the specific community.

Crimes against women based on cultural ideology warrant harsh sentencing. In such an offender's point of view, women are considered objects that serve the purpose of sustaining the offender's ideology. The objectification of women for ideological purposes warrants harsh sentencing. An offender's actions against a woman to deprive her of equality and liberty also warrant harsh sentencing. So does the wish to preserve the original culture while knowing that it contravenes the laws of the local culture in that crucial point.

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[68] ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENT 74-75 (1976); Andrew von Hirsch, *Proportionate Sentences: A Desert Perspective*, PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 115 (Andrew von Hirsch, Andrew Ashworth and Julian Roberts eds., 3rd ed., 2009); Paul H. Robinson and John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997); Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 CAL. L. REV. 965 (2000); Edward M. Wise, *The Concept of Desert*, 33 WAYNE L. REV. 1343 (1987).

Therefore, culture-based crimes against women, by their very essence, include harsher sentencing factors compared with the same offenses committed other than in a cultural context. Thus, for example, when a man rapes a woman, he deserves punishment. When a man rapes a woman out of cultural ideology, as an act of oppressing women or as an act preserving his culture, he deserves harsher punishment. The specific offense is important for the punishment considerations, but the cultural context is crucial for handing down harsher sentences. Thus, the courts should not only mitigate sentencing in culture-based crimes against women, but also should issue harsher sentences as well.

V. CONCLUSION

The phenomenon of culture-based crimes against women in societies absorbing immigrants is a sad phenomenon. The numbers are depressing. Sometimes, modern legal systems express their helplessness in eliminating the oppression of women under modern law due to the policy of accepting multiculturalism. Criminal liability is prevented from being imposed upon offenders, while the mistake of law defense is being accepted.

Nevertheless, modern legal examinations of the mistake of law defense enable that defense to be rejected in relation to all types of offenders in that context: first-generation immigrants, the second and third generations of immigrants, first-generation refugees, the second and third generations of refugees and aboriginal populations. The rejection of the mistake of law defense is a rejection of one of the

most effective legal defenses in criminal law in the specific context of culture-based crimes.

The tendency to mitigate offenders' punishment in the cultural context, when the defense is rejected, is itself controversial and arguable. According to the new penology, the circumstances of culture-based crimes against women warrant harsher sentencing and not mitigated sentencing. A combined social response of the imposition of criminal liability and the imposition of harsh sentencing of offenders committing culture-based crimes against women in countries absorbing immigrants gives us hope that this sad phenomenon may be minimized.