THE AVAILABILITY OF THE "CULTURAL DEFENSE" AS AN EXCUSE FOR CRIMINAL BEHAVIOR

I. INTRODUCTION

Perhaps the best known maxim of criminal law is that "ignorance of the law is no excuse."[1] The traditional reasoning behind this maxim is that the recognition of ignorance as a defense to criminal activity would place the defendant's knowledge of the law, or lack thereof, above the law in determining what he could or could not do.[2] The ignorance of the law doctrine is universally recognized.[3]

Recently, California defense lawyers have challenged this maxim on behalf of Asian immigrants who have been criminally prosecuted for behavior that is considered acceptable in their homelands, but is illegal in the United States.[4] These attorneys have used a novel theory, called the "cultural defense,"[5] in an attempt to convince the courts to excuse their clients' crimes. The response of United States courts to this theory is significant because it stems from an increasingly

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[1] *See, e.g.*, Williams v. North Carolina, 325 U.S. 226, 258 (1945); Armour Packing Co. v. United States, 209 U.S. 56, 85-86 (1908).

Ignorance of the law is distinguishable from mistake of the law. A person falls under the former if "he did not know that any relevant legal prohibition existed," but he is under the latter "if he did know [a] potentially relevant rule, [but] decided it did not include his intended situation or conduct." J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 382 (2d ed. 1960).

[2] The harshness of this traditional rule when applied in particular cases has been justified by statements from such revered scholars as Oliver Wendell Holmes, who has stated that "justice to the individual is rightly outweighed by the larger interest on the other side of the scales." O. HOLMES, THE COMMON LAW 48 (1881).

The more modern and realistic justifications given for the rule are that a "mistake of law defense would encourage ignorance rather than a determination to know the law, and would interfere with the enforcement of the law, because the claim would be so easy to assert and hard to disprove." United States v. Barker, 546 F.2d 940, 964-65 (D.C. Cir. 1976) (Leventhal, J., dissenting). *See also* Kratz v. Kratz, 477 F. Supp. 463, 480 (E.D. Pa. 1979).

[3] HALL, *supra* note 1, at 381.

[4] Sherman, *Legal Clash of Cultures*, NAT'L L. J., Aug. 5, 1985, at 1, col. 2.

[5] The main assertion under the "cultural defense" is that the newcomers' actions are shaped by their own culture; therefore, they do not have the requisite state of mind to be found guilty of the crime under United States law. *Id.* at 26, col. 1.

urgent problem in the United States — the collision of foreign cultures with the United States legal system.[6]

One recent California case exemplifies the effect of these cultural differences on the criminal prosecution of a foreign newcomer.[7] Defendant, a Hmong tribesman,[8] was charged with kidnapping and rape for practicing a Laotian form of marriage called "zij poj niam."[9] At trial, the kidnapping and rape charges were dropped and the defendant pleaded guilty to the misdemeanor of false imprisonment.[10] At the sentencing hearing, lawyers debated whether the marriage ritual was a valid tradition in the United States, since several generations of tribesmen had lived in this country.[11] After hearing the parties' testimony and reviewing a doctoral dissertation on Hmong marriage rituals, the trial judge reduced the defendant's sentence from 180 to

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[6] This conflict has been aggravated by the rising population of immigrants and refugees, most of whom are Asian. The 1965 amendment to the Immigration Act placed a ceiling of 20,000 on the number of immigrants that any given country may send to the United States each year. 8 U.S.C. § 1152(a). Asians now represent the largest group of new arrivals. Sherman, *supra* note 4, at 26, col. 1. State Department figures show that Asians have accounted for 40% of all immigrants for the past 20 years. *Id.* Nearly 60% of the 4.1 million Asians in the United States today are foreign-born. *Id.*

[7] People v. Moua, No. 315972-0 (Fresno Cnty. Super. Ct., Feb. 7, 1985).

[8] The Hmong are Laotian mountain tribesman who fought as United States allies in the Vietnam war. About 60,000 of these tribesmen have resettled in the United States, with one-third residing in California. King, *Transplanted Hmong: Adjustment in Fresno*, L.A. Times, Apr. 7, 1985, at 1, col. 4. In addition, nearly 800,000 Indochinese refugees have been given permanent asylum in the United States since the Communist takeover in Cambodia, Laos, and Vietnam in 1975. Sherman, *supra* note 4, at 26, col. 1.

[9] This ritual, known as "marriage-by-capture," is practiced in the mountains of Laos. "Zij poj niam" is the tribesman's customary way of claiming a young bride. Sherman, *supra* note 4, at 26, col. 3.

In the instant case, the would-be Hmong suitor proceeded with the ancient pattern of courting his bride-to-be by flirting and taking her on chaperoned dates. After four months of this courtship, he then took the final step — consummation of the union at his family's home. She resisted, which is the Hmong custom. Thompson, *The Cultural Defense*, 14 STUDENT LAWYER 25, 27 (1985).

According to Hmong tradition, the woman is required to weep and moan and declare that she is not ready. Otherwise, she is not considered virtuous. Sometimes, as in this case, the woman continues to deny interest when questioned by the police. Thus, authorities have difficulty in determining whether a rape has actually occurred. Thompson, *"Cultural Defense" in California*, Wall St. J., June 6, 1985, at 28, col. 5.

[10] Sherman, *supra* note 4, at 27, col. 1.

[11] *Moua*, No. 315972-0 (Fresno Cnty. Super. Ct., Feb. 7, 1985). *See also* Thompson, *supra* note 9.

90 days in jail.[12] Following the trial, the prosecuting attorney stated that "[j]udging from the sentence," the judge had implicitly recognized the "cultural defense."[13]

To date, United States courts have not recognized the "cultural defense" as an excuse[14] for crimes. This attitude stems from their refusal to accept cultural differences, or any other individual characteristics,[15] as an excuse for ignorance of the law. To recognize cultural factors alone as the basis of a criminal excuse would create an exception to the "ignorance is no excuse" maxim for a special segment of the population.[16] Rather than address the "cultural defense" issue,[17] courts have merely incorporated cultural factors into other traditional defense theories.[18] Thus, rather than acknowledge the "cultural defense" and waive sanctions against criminal perpetrators completely under the excuse doctrine, the courts have left the defense in an undefined and ambiguous state. Initially, this attitude seems unfair to immigrant defendants. However, this approach is sound, due to the availability of other traditional defenses,[19] the potential repercussions of adopting the "cultural defense" into the United States legal system,[20] the unfair policy that the defense would represent towards the majority who could not use it,[21] and the potential violation of the principle of legality.[22]

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[12] *Moua*, No. 315972-0 (Fresno Cnty. Super. Ct., Feb. 7, 1985).

[13] Thompson, *supra* note 9, at 28 (quoting Deputy District Attorney Eugene Martinez).

[14] The theory of excuse in criminal law concedes that an act is wrongful, but seeks to exculpate the defendant from criminal liability because of some flaw in his personal capacity to avoid committing an intentional wrong. Insanity is the classic example of excuse. Clark, *Witchcraft and Legal Pluralism: The Case of Celimo Mirquirucama*, 15 TULSA L.J. 679, 696 (1980).

[15] *See, e.g.*, State v. Carr, 95 N.M. 755, 626 P.2d 292, *cert. denied*, 454 U.S. 853 (1981) (defendant doctor convicted of intentionally obtaining a prescription drug by fraud, where he only wrote a prescription and never had actual possession of the drug, despite his ignorance that possession could also be constructive); State v. Montoya, 91 N.M. 262, 572 P.2d 1270 (1977) (defendant convicted of carrying a firearm into a licensed liquor establishment, despite his ignorance that the act was a crime).

[16] See *infra* pp. 350-51 for the proposition that the creation of an exception to the law for the immigrants would be unfair to other United States residents.

[17] Sherman, *supra* note 4, at 1, col. 2.

[18] *See infra* 339-48.

[19] *Id.*

[20] *See infra* text accompanying notes 71-96.

[21] *See infra* text accompanying notes 97-105.

[22] *See infra* text accompanying notes 106-112.

II. IGNORANCE OF THE LAW

The idea that ignorance of the law — the mistaken belief that one's conduct is lawful — is no excuse for criminal behavior is not an absolute rule.[23] Ignorance of the law does constitute a defense "when it negatives the existence of a mental state essential to the crime charged."[24] For example, some statutes establish a legal duty to act and prohibit a "willful" or "knowing" violation of that duty.[25] If a defendant violates the statute by failing to do what is required because he is unaware of the statute, then ignorance of the law may be an accepted excuse.[26] However, an unknowing violation of a statute will not be excused, even where knowledge is required, if the defendant acts on a false belief that his conduct is legal.[27] Courts distinguish these two situations by emphasizing that in the former the defendant claims to lack the mental state required to commit the crime.[28] In

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[23] *See, e.g.*, United States v. Petito, 519 F. Supp. 838, 841 (E.D.N.Y. 1981), *aff'd* 671 F.2d 68 (2d Cir. 1982); United States v. Squires, 440 F.2d 859, 863-64 (2d Cir. 1971).

[24] W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW, § 47, at 356 (1972). *See* MODEL PENAL CODE § 2.04(1) (Proposed Official Draft 1962), which provides in pertinent part that:

> Ignorance or mistake as to a matter of fact or law is a defense if:
> (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense.

Id. § 2.04(a).

[25] *See, e.g.*, Lambert v. California, 355 U.S. 225 (1957) (statute established duty of convicted felon to register with the local police if he remained in the city more than five days and prohibited a knowing violation); Hargrove v. United States, 67 F.2d 820 (5th Cir. 1933) (statute established a duty to file an income tax return and prohibited a willful failure to do so).

[26] *Lambert*, 355 U.S. at 225 (former felon not at fault for failing to be aware of duty to register); *Hargrove*, 67 F.2d at 820 (defendant not at fault for failing to file income taxes since he was unaware of the duty to file).

[27] United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971). The statute in this case was a specialized regulation of the Interstate Commerce Commission addressing the shipment of dangerous chemicals. The defendant shipped sulfuric acid in interstate commerce without classifying the substance on shipping papers, as required by the statute. The Court did not require proof that the defendant knew that its omission concerning the shipping papers was illegal. It only required proof that the defendant knew that the papers were not completed. *Id. See also* United States v. Currier, 621 F.2d 7 (1st Cir. 1980) (statute required that the defendant knowingly fail to maintain records of firearm sales to be guilty of a violation, but did not require proof of the defendant's knowledge that he was violating federal statutory law).

[28] W. LAFAVE & A. SCOTT, *supra* note 24, at 365 n.73.

For example, in *Lambert*, discussed *supra* notes 25-26, the defendant was prosecuted for ignorance of a duty — simply being present in a city and not registering

other words, he did not know what he was doing. In the latter the defendant admittedly has the intent (or other mental state) to commit the act, but is unaware that it is proscribed by the criminal law.[29] In short, he knew what he was doing, but did not know that he was breaking the law. Ignorance may be used as a defense in the first situation, but not in the second, because a defendant is expected to know the rules governing the action he chooses to take.[30]

In applying the above rules to cases involving crimes by immigrants, if a foreign newcomer performs an act that constitutes a crime in the United States, then he is assumed to know the law governing his act. He will not be excused unless his ignorance negates the requisite mental state of the crime charged. For example, if the Hmong defendant had shown that he did not know that rape was a crime, he still could have been convicted of rape as long as he intended to have sexual intercourse without the victim's consent. His adherence to cultural tradition would not excuse his criminal behavior under the ignorance of the law defense.

III. ALTERNATIVES TO THE "CULTURAL DEFENSE"

Although it is likely that United States courts will reject the "cultural defense" under the "ignorance is no excuse" maxim, the courts still may consider cultural conflicts under other traditional defense theories.[31] These traditional theories recognize unique personal characteristics[32] as an excuse for criminal be-

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with the police because she was unaware of the statute. *See also* United States v. Rosenfield, 469 F.2d 598, 601 (3rd Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (proposition that ignorance of a crime is no excuse, but ignorance of a duty may be if willful state of mind is required).

[29] W. LAFAVE & A. SCOTT, *supra* note 24, at 362. For example, in *International Minerals & Chemical Corp.*, discussed *supra* note 27, the corporate defendant was prosecuted for ignorance of a crime — knowingly undertaking an activity that was prohibited by statute. 402 U.S. at 558. *See also* United States v. Gregg, 612 F.2d 43 (2d Cir. 1972) (in prosecution for conspiring with, aiding and abetting the embezzlers of funds, the defendant did not have to be aware of the federal statute proscribing his conduct in order to be found guilty of willful violation).

[30] *See generally* W. LAFAVE & A. SCOTT, *supra* note 24, at 362. The authors indicate that a more satisfactory explanation for the "ignorance is no excuse" maxim is that an ignorance-of-the-criminal-law defense, if available to all defendants, would make the defendant's claim of ignorance hard to refute and his fault in being ignorant hard to determine. *Id.* at 363.

[31] *See infra* text accompanying notes 36-70.

[32] Individual characteristics are subjective factors. A subjective standard "imposes criminal sanctions on an individual who voluntarily violated a legal obligation which

havior[33] or consider such characteristics as mitigating factors in reducing the punishment for illegal behavior.[34] Thus, under these traditional defenses, foreign newcomers may assert their native traditions and beliefs to lessen or negate criminal liability.[35] However, they may not use these other defenses to circumvent the laws that all other persons in the United States must obey, because these defenses do not create an exception to the laws for immigrant groups. All criminal defendants may avail themselves of these traditional defenses. On the other hand, the "cultural defense" theory creates an unfair exception to criminal laws for newcomers by allowing their ignorance of United States laws to be an excuse for acts that long-term residents of the United States would be subject to criminal liability for despite their ignorance. The creation of a special exception for immigrant defendants, by allowing the "cultural defense" coupled with the availability of other defenses that do not create this unfair exception, supports the argument that the "cultural defense" theory should not be recognized by courts.

A. The "Diminished Responsibility" Defense

One traditional defense theory that may be used by immigrants who are prosecuted for crimes in the United States is the "diminished responsibility" defense.[36] The "diminished responsibility" defense is

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he could have obeyed." Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 831 n.21 (1977).

In other words, a subjective evaluation focuses on the situation as the individual defendant viewed it — not as an objectively reasonable defendant would have viewed it. An objective standard imposes criminal liability "whenever the individual's conduct has threatened or harmed social interests protected by the criminal law without regard to the actor's subjective culpability." *Id.*

One commentator uses the defense of duress to explain the difference between the two standards: A subjective theory of criminal liability "would require proof that an offender was actually coerced into committing" the crime. An objective theory would require proof "that a reasonable person, endowed with all the characteristics believed necessary to serve the social control function of the criminal law, would have acted as the defendant did." *Id.*

[33] *See infra* text accompanying note 50.

[34] *See infra* text accompanying note 37.

[35] Non-immigrant defendants may theoretically assert their individual beliefs and customs under these defenses since they are based on the existence of certain states of mind, whether or not the mental conditions are culture-related. *See infra* text accompanying notes 37 and 51.

[36] The "diminished responsibility" defense was introduced in England by statute in 1957. Section 2 of the English Homicide Act of 1957 provides, in relevant part,

used in cases where a defendant suffered from an abnormal mental condition at the time of the crime, but the condition was not sufficient to constitute legal insanity.[37] The theory behind this defense is that the abnormality may still be relevant in determining whether a person is guilty of the crime charged or whether he is guilty of a lesser offense.[38] Under this defense, the defendant's unique condition is a mitigating factor that reduces his punishment.[39]

The "diminished responsibility" defense has been recognized in England,[40] Australia,[41] and other countries.[42] The defense has been accepted mainly in homicide cases,[43] but is not limited to such cases in the United States.[44] While the defense has not been expressly

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that:

(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

(3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

Homicide Act, 5 & 6 Eliz. 2, ch. 11 § 2(1), (3) (1957).

[37] The "diminished responsibility" defense has been accepted by the English courts in cases involving certain mental conditions of the defendant, such as "mercy killing" and murder during a state of severe depression or chronic anxiety. T. GARDNER & V. MANIAN, CRIMINAL LAW 105 (2d ed. 1980).

[38] W. LAFAVE & A. SCOTT, *supra* note 24, at 326.

[39] In these cases, there is a "societal determination that it is unfair to punish as severely the person who lacks a certain degree of understanding or control of his actions." Comment, *The Relevance of Innocence: Proposition 8 and the Diminished Capacity Defense*, 71 CALIF. L. REV. 1197, 1200 (1983). *See generally* Annot., 22 A.L.R.3d 1228 (1968).

[40] *See* Homicide Act, *supra* note 36.

[41] Australia recognizes a defense analogous to "diminished responsibility" to reduce punishments for native aborigines. Clark, *supra* note 14, at 694. In one case, an aborigine speared his wife for adultery, a practice which was condoned by his tribal law. He was sentenced to one year in jail for manslaughter, but the judge ruled that he would receive an early release if prison had a negative effect upon him. The judge used a tribal witchdoctor to measure the effect. *Regina v. Muddarruba* (unpublished opinion of the Australian Northern Territory Supreme Court, *reprinted in* J. GOLDSTEIN, A. DERSHOWTIZ & R. SCHWARTZ, CRIMINAL LAW: THEORY AND PROCESS, 994-98 (1974)).

[42] Scotland and Italy also recognize the defense. Arenella, *supra* note 32, at 830 n.16.

[43] *See supra* note 37.

[44] *See infra* text accompanying notes 47-49. The *Moua* case did not include homicide.

adopted by any American jurisdiction,[45] various versions of the concept have been accepted by state courts.[46] "Similar results are also obtained through the American plea bargaining system, under which American prosecutors consider the factors which comprise the defense . . . and permit defendants to plead guilty to reduced charges."[47] The *Moua* case illustrates the use of the plea bargaining system to afford the defendant a defense that resembles "diminished responsibility" in that the prosecuting attorney dropped the rape and kidnapping charges and allowed the tribesman to plead guilty to a lesser offense.[48] Also, the trial judge reduced the tribesman's sentence.[49] Possibly, the prosecutor and judge made these changes in recognition of the tribesman's cultural heritage as a mitigating factor.

Another recent case exemplifies the use of the American plea-bargaining system to impliedly recognize the cultural origin of a defendant's crime.[50] Defendant, a Japanese woman, tried to commit "oyako-shinju," a traditional ritual of parent-child suicide.[51] She was charged with first-degree murder,[52] and could have been sentenced to a maximum of thirteen years in prison.[53] Although "oyako-shinju" is prohibited under Japanese law, the punishment is considerably less harsh than murder under United States law.[54] The moderate legal sanction

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[45] Arenella, *supra* note 32, at 830.

[46] T. GARDNER & V. MANIAN, *supra* note 37, at 105-06.

[47] *Id.* at 106.

[48] *See infra* text accompanying note 10.

[49] *See infra* text accoompanying note 12. The amount of weight given the defendant's native custom by the court in its decision was not clear because the decision was not recorded. Thus, there is little guidance for future cases involving immigrants, other than an indication of willingness to consider a person's cultural heritage to mitigate his punishment.

[50] People v. Kimura, No. A091133 (Santa Monica Super. Ct., Nov. 21, 1985).

[51] "Oyako-shinju" is committed by the Japanese mother to escape some personal disgrace or shame. It occurs at least once a day in Japan and is considered an honorable way to die. The Japanese, however, consider it to be a disgrace for a mother to take her own life and to leave the children motherless. Dolan, *Mother Facing Charges in Ceremonial Drowning*, L.A. Times, Feb. 24, 1985, § 1, at 3, col. 1.

In *Kimura*, the defendant was emotionally distressed after learning that her husband had supported a mistress for three years. She took her two children on a long bus ride from their home to the beach. She then walked into the ocean with her children in her arms. Passersby attempted a rescue, but only the mother survived. Sherman, *supra* note 4, at 1, col. 3.

[52] Sherman, *supra* note 4, at 1, col. 3.

[53] Atlanta J. & Const., Nov. 22, 1985, at 4A, col. 1.

[54] According to members of the Los Angeles Japanese community who defended the mother's actions, the defendant would be charged in Japan with involuntary

reflects the attitude of the Japanese people, who do not morally condemn the act.[55] In fact, the defendant in this case received an outpouring of support from the Los Angeles Japanese community.[56]

According to the defense attorney, the defense was based on the reports of nine clinical psychiatrists, two of whom were familiar with Japanese culture, that the defendant was "temporariy insane" at the time of the crime.[57] While he did not base the defense on primarily cultural factors, the attorney theorized that the defendant's native Japanese beliefs may have led her to be "more vulnerable" to the stress created by her domestic situation.[58]

Prior to the trial, the prosecuting attorneys examined the psychiatric reports and then entered into plea negotiations with the defendant.[59] As a result, the defendant pleaded no contest to two reduced charges of involuntary manslaughter.[60] The sentence, which was approved by the prosecution, was for five years' probation, psychiatric treatment, and one year in the county jail with credit for time already served.[61]

The defense attorney noted that one can only speculate unofficially about the effect of cultural factors on the prosecution's decision to reduce the charges.[62] However, in view of the massive public support for the defendant and the unique Japanese origin of her actions, the influence of her cultural conflict on the plea negotiations was likely.

B. The "Mistake of Fact" Defense

A second traditional defense that foreign newcomers may use successfully to assert their cultural differences is the "mistake of fact"

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manslaughter or a lesser offense, and would only receive a "light, suspended sentence, probation and supervised rehabilitation." Sherman, *supra* note 4, at 26, col. 1.

[55] *See* Hayashi, *Understanding Shinju and the Tragedy of Fumiko Kimura*, L.A. Times, Apr. 10, 1985, § 2 at 5, col. 1. *See also* Brazil, *Mother Who Drowned Kids Pits Justice Against Culture*, USA Today, Oct. 18, 1985, at 3A, col. 2.

[56] *See supra* note 55.

[57] Telephone interview with defense attorney Gerald H. Klausher (Feb. 18, 1986).

[58] *Id.* The defendant's domestic life was disrupted by her husband's infidelity, which was a source of great shame to her. Prior to the trial, the defense attorney stated that he expected the psychiatric reports to show that the defendant's condition of insanity developed when she learned of the husband's unfaithfulness ten days prior to the suicide attempt. Atlanta J. & Const., Sept. 1, 1985, at 15A, col. 6 (quoting defense attorney Gerald H. Klausher).

[59] See *supra* note 57.

[60] See *supra* note 52.

[61] See *supra* note 52.

[62] See *supra* note 57.

defense.[63] Under this defense, a standard measuring the actor's subjective state of mind, as opposed to an objective standard, determines whether or not he is held responsible for committing a crime.[64] Thus, the immigrant defendant's unique beliefs and societal norms, which are a part of his subjective state of mind, can be considered by the courts in determining the immigrant's criminal responsibility.

A mistake of fact will be a defense if it negates the existence of the state of mind essential to the crime.[65] A mistake negates the state of mind, or criminal intent, when the defendant's act would have been lawful if the facts were as he supposed them to be.[66] To be relieved of criminal liability under this defense, the defendant must show that his mistake was an honest one and that his behavior was prompted by this mistake.[67]

The mistake of fact defense may be applied in cases involving crimes by immigrants. For example, in *Moua* the Hmong tribesman might have defended against the rape charge on the ground that he honestly and reasonably, but mistakenly, believed that the young woman had consented to sexual intercourse.[68] The Hmong tradition requires the bride-to-be to resist her suitor, even if she is pleased to participate in the act.[69] In light of this custom, the tribesman could have made an honest mistake concerning the woman's consent, and it would

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[63] Mistake of fact is distinguishable from mistake of law. "Law is expressed in distinctive propositions, whereas facts are qualities or events occurring at definite places and times" that are "directly sensed in perception and introspection." HALL, *supra* note 1, at 376.

[64] The actor's subjective interpretation of a situation, and not the actual situation, which is objectively measured, determines his moral obligation. The ethical principle behind this defense is that "[i]f the actual fact determined our duties, we would sometimes be under a moral obligation without knowing it." *Id.* at 363.

[65] *See generally* W. LAFAVE & A. SCOTT, *supra* note 24, at 356. *See* MODEL PENAL CODE § 2.04(1), *supra* note 24.

[66] Barker v. United States, 546 F.2d. 940, 946 (D.C. Cir. 1976).

[67] T. GARDNER & V. MANIAN, *supra* note 35, at 121.

Under the better view, even an unreasonable mistake of fact, if honest, will be a valid defense. *Barker*, 546 F.2d at 948 n.23.

[68] An honest and reasonable mistake of fact as to whether the victim has consented to sexual intercourse is a defense to the crime of rape. *See, e.g.*, People v. Acevedo, 166 Cal. App. 3d 196, 212 Cal. Rptr. 328 (1985) (proper jury instruction stated that a reasonable and good-faith belief that the victim consented was a defense to a charge of forcible rape); State v. Dizon, 47 Hawaii 444, 466, 390 P.2d 759, 769 (1964) (proposition that if the defendant's belief in his victim's consent was honest, he still is guilty of rape if his mistake was due to his negligence, fault, or carelessness).

[69] *See supra* note 9 and accompanying text.

have been reasonable[70] for him to believe that her resistance was a mere pretense. Thus, his mistake would negate the criminality of his act, and he would be excused entirely.

IV. THE PROBLEMS CREATED BY RECOGNITION OF A "CULTURAL DEFENSE"

The *Moua* case and others[71] present an ethical and social question as to whether foreign newcomers should be held responsible for crimes under United States law. Lack of cultural conformity and ignorance of United States law by such people pose serious threats to the court systems and communities in which they settle. The legal issue is whether the courts should accept the cultural defense as a separate defense that is exempt from the "ignorance is no excuse" idea or limit the assertion of cultural conflicts to traditional defense theories, such as "diminished responsibility" and mistake of fact, that recognize individual customs and beliefs.

If the "cultural defense" is formally recognized by American courts as an excuse for crimes, four acute problems will surface immediately: (1) defining which groups of defendants may assert the defense, (2) maintaining the deterrent effect of the criminal law on these groups, (3) maintaining fairness to the majority of Americans who cannot use the defense, and (4) upholding the principle of legality.

A. Defining Defendant Groups

The difficulties that the courts will face in deciding which defendant groups may use the "cultural defense" present themselves in two stages. The first stage involves the burden of separating the group of bona fide foreign newcomers from other cultural minority groups who may try to abuse the protection that the defense offers. Once the foreign newcomers are defined as a group, the courts must then define them as individuals. Hence, the second stage of problems involves the dilemma of separating the individual defendants who may legitimately assert the defense from those who are sufficiently "enculturated" to be held responsible for their actions.

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[70] As stated previously (*supra* note 52), an honest and unreasonable mistake will usually be a valid defense. However, some jurisdictions (*see supra* note 53) retained a reasonableness requirement for the crime of rape because of the morally reprehensible nature of the crime.

[71] There are numerous cases involving the Hmong marriage-by-capture ritual, but *Moua* is the only one to reach a formal disposition. Sherman, *supra* note 4, at 27, col. 1.

The first stage of problems in defining defendant groups will arise if the courts are bombarded with people who see the "cultural defense" as a privilege or advantage by which to circumvent the criminal justice system.[72] These people might claim to belong to a certain group, or even join one, in order to claim the benefit of the defense.[73] Many fear that "if the American judicial system were to make allowances for all the foreign practices brought here by immigrants, were to allow ignorance to be an excuse, the 'cultural defense' would become a buzzword for chaos and crime . . . ."[74]

The problem of defendants wrongfully seeking the shelter of the "cultural defense" has already surfaced. Some native minority groups which cultivate their own beliefs and customs seek to evade the criminal law under the pretense that their own standards and tradition are controlling. One example is a recent California case where a black man sought to defend himself against a charge of rape.[75] The defendant contended that he reasonably, but mistakenly, believed that the black female victim consented to sexual intercourse because she did not sufficiently manifest her refusal. He alleged that the woman submitted to him after he "spoke loudly" to her, which was alleged to be customary among blacks.[76] At trial, the defendant sought to introduce the testimony of a black psychologist to the effect that black people customarily speak very loudly to each other.[77] The court flatly rejected admission of the testimony, finding that "the natural result of such proffered testimony [would be] the creation of a new defense to the crime of rape," which is not permissible.[78] Accordingly, the court held that no race or group may set its own standards of conduct and reasonableness to apply to nonconsenting invidivuals in the context of rape.[79] In reaching this conclusion, the court apparently recognized that allowing a culturally-based defense by a native minority group[80] would open the

[72] *See* Samuels, *Legal Recognition and Protection of Minority Customs in a Plural Society in England*, 10 ANGLO-AM. L. REV., 241, 254 (1981).

[73] *Id.*

[74] Atlanta J. & Const., *supra* note 58, at col. 4.

[75] People v. Rhines, 131 Cal. App. 3d 498, 182 Cal. Rptr. 478 (1982).

[76] *Id.* at 500, 182 Cal. Rptr. at 483.

[77] *Id.*

[78] *Id.* at 500, 182 Cal. Rptr. at 484.

[79] *Id.*

[80] One example of these native minority groups is indigenous Native Americans. *See* Sherman, *supra* note 4, at 27, col. 3. (discussing Oregon case where three Indians allegedly murdered a white man who they believed was disturbing burial grounds in search of marketable Indian artifacts).

floodgates to numerous other groups seeking to avoid the criminal law.[81]

After legitimate defendant groups have been separated from unrecognized ones, the individuals within the former group who may properly assert the "cultural defense" must be distinguished from those who may not. In this second stage, courts will encounter certain problems in making the separation of individuals. One such problem will be the task of deciding how long a person may reside in the United States and still be considered a recent immigrant who may be legitimately ignorant of United States laws. The courts must establish a termination point after which a defendant is considered to be enculturated. Because the circumstances of each case will vary, however, the courts must make a separate inquiry into each defendant's opportunity for orientation. One person may learn about American culture and legal standards within a few weeks, while another may remain ignorant for years.

The *Kimura* case illustrates the difficulty in determining a cut-off time for a defendant's use of the "cultural defense."[82] As previously noted, the defense attorney based the woman's defense on psychiatric reports that she was insane at the time of the suicide attempt.[83] If a "cultural defense" had been recognized by the court at that time, it might not have been available to the defendant. While her native traditions probably played a role in her sentence reduction, her ability to assert a defense based on cultural factors *alone* would have been doubtful since she had lived in the United States for fourteen years.[84] The length of her residence in this country would cast uncertainty on her ignorance of United States laws illustrating the dilemma that courts would face in setting a termination point for the defense on a case-by-case basis.

As noted, the courts must determine the appropriate cut-off time for each person's use of the defense if they are to define the defendant

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[81] Under the view of this Note, the court's refusal to accept cultural factors under the mistake of fact defense in this case does not contradict the assertion, in *supra* notes 63-70, that a mistake of fact defense may be based on cultural grounds by foreign newcomers, as distinguished from native minorities.

[82] *Kimura*, No. A091133 (Santa Monica Super. Ct., Nov. 21, 1985).

[83] *See supra* note 57 and accompanying text.

[84] Although she has lived in America for several years, the defendant has reportedly maintained a strict Japanese lifestyle. She does speak English, but not in the home. Also, she does not drive a car, has no personal interests or friends outside of the family, and knows nothing of her husband's business affairs. Dolan, *supra* note 51, at 30, col. 1.

groups who may assert it. The courts must also consider the type of culture from which each defendant came. Each of the many foreign cultures represented in the United States has its own special customs and beliefs. Thus, there is a great disparity among immigrant groups. Several factors influence this disparity, such as differences in educations, standards of living, working habits, and family relationships. Some countries may have ample exposure to American customs, language, and law, while others may be virtually isolated.[85] The courts will have to decide if such diverse groups should receive the same protection from criminal sanctions or whether different levels of exemption should be applied.

B. Maintaining Deterrence Through Criminal Law

The second major problem that American courts will face if the "cultural defense" is formally recognized is maintaining the deterrent effect of the criminal law on immigrant groups. Under the defense, a person's ignorance of American law is completely excused. Thus, allowing the use of the defense will remove the incentive for the foreign newcomers to learn the laws of their adopted country. If their incentive to learn about the judicial system is diminished, their communities will likely continue to fluctuate between following the newcomers' alien customs and those of their newly adopted American ways. This will "increase the public uncertainty and confusion as to what conduct [is] criminal."[86] Confusion among newcomers about the rules that govern their criminal behavior can, logically, only lead to an increase in their disobedience of those rules. Eventually, their respect for the rules will decay, and the persons who abide by the laws will suffer at the hands of those who do not. To avoid this negative result, the courts should uphold the "ignorance is no excuse" maxim without making an exception for immigrant groups.

By rejecting the "cultural defense," and therefore not excusing the immigrants' ignorance, the courts will encourage them to adapt more quickly to the legal system of their new homeland. This hastened adaptation by the newcomers to unfamiliar laws may aid their assimilation into other aspects of life in the United States. The United

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[85] For example, the Hmong refugees had no written language of their own until 30 years ago when missionaries visited the region. Sherman, *supra* note 4, at 26, col. 3.

[86] W. LAFAVE & A. SCOTT, *supra* note 24, at 364.

States lifestyle is easier to adopt for immigrant groups who come from more modern countries, such as Japan and Korea. Groups like the Hmongs, however, have had little exposure to the western world.[87] Thus, "even the simple rules and regulations of everyday life . . . can be confusing."[88] For example, the Hmong have an intense fear of American police officers.[89] It is not uncommon for them to put their hands on their heads and kneel to the ground, in an "execution position" when they are pulled over by police for routine traffic violations.[90] A better understanding of law enforcement and the legal system in the United States would help to alleviate this misunderstanding.

The Hmong also have a habit of butchering pigs in their backyards.[91] This custom violates local ordinances and disturbs other residents in the neighborhoods.[92] If the tribesmen are warned by the police and punished by the courts for violating these laws, then perhaps they will alter their custom of food preparation. The Hmong's conformity will bring them within the law, thereby encouraging a better relationship between them and the Americans into whose communities they have settled. This process of conformance is known as "enculturation."[93]

The potential for these foreign cultures to survive in a sometimes hostile western environment demands partial enculturation with the dominant American society.[94] The punishment of newcomers under the criminal law aids this process by bringing United States laws to the attention of the immigrant communities. These communities will either adopt the American laws that govern acts for which their homelands had no restrictions and will alter those traditions that directly conflict with these laws, or they will be prosecuted for violating these laws. The deterrent effect of the criminal law on these communities is evident in the case of the Hmongs, who are already ad-

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[87] Sherman, *supra* note 4, at 26, col. 3.

[88] *Id.*

[89] Thompson, *supra* note 9, at 27, col. 1.

[90] *Id.* at 27, col. 2.

[91] *Id.*

[92] *Id.*

[93] "Enculturation" is "the process by which an individual learns the traditional content of a culture and assimilates its practices and values." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 747 (1967). It should be distinguished from "acculturation" which refers to the change induced in one culture by its encounter with another. P. FARB, MAN'S RISE TO CIVILIZATION: THE CULTURAL ASCENT OF THE INDIANS OF NORTH AMERICA 247, 251-52 (2d rev. ed. 1978).

[94] Clark, *supra* note 14, at 697-98.

justing their customs to comply with the new laws that they have learned in the United States.[95] The courts must continuously reinforce this enculturation process because "even as the older immigrants begin to adopt the ways of their new country, the steady flow of arrivals presents a continuing challenge to the legal system."[96]

C. *Maintaining Fairness to the Majority*

As previously noted, the courts' refusal to accept the "cultural defense" will pressure foreign newcomers to conform to the American identity. Forcing the immigrants to adjust their native customs by prosecuting them for crimes may be seen by some commentators as endangering the immigrants' individuality and cultural heritage.[97] The reasoning behind this view is twofold. First, immigrant cultures offer some valuable elements to enrich national life generally.[98] Second, respect for the individual and his personal beliefs is an integral part of human rights.[99]

The view that opposes the immigrant's conformity to the dominant American culture is accurate in many respects. Admittedly, the courts' current practice of sweeping the "cultural defense" under the umbrella of other traditional defenses[100] is not infallible. This approach by the courts may impinge upon the newcomers' personal and community identity. However, the opposing view fails to consider "the larger interest on the other side of the scales," referred to by Justice Holmes.[101]

The "larger interest on the other side" that tips the scale in favor of denying the "cultural defense" is the interest of American society. Long-term residents of the United States who are criminally prose-

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[95] Thompson, *supra* note 9, at 29, col. 2 (referring to the Hmong tribesmen who have followed the rape cases and have begun to adjust their traditions accordingly).

[96] Sherman, *supra* note 4, at 26, col. 3.

The greatest influx of aliens into the United States since the 1920's occurred in 1984. N. GLAZER, CLAMOR AT THE GATES: THE NEW AMERICAN IMMIGRATION 3 (1985). Immigration of Asians into America rose 146% in the 1970's, and the pace has accelerated since 1980 due to the flight of the Indochinese refugees from the political unrest in Southeast Asia. *Id.* at 8.

[97] Samuels, *supra* note 72, at 255.

[98] *Id.*

[99] *Id.*

[100] The current treatment of the "cultural defense" as only a mitigating factor under the "diminished responsibility" defense is exemplified by the *Moua* case. *Moua*, No. 315972-0 (Fresno Cnty. Super. Ct., Feb. 7, 1985).

[101] *See supra* note 2.

cuted may not resort to the ignorance of the law defense except under very limited circumstances.[102] In general, their individual reasons for being unaware of the existence of a particular law will not exculpate them.[103] Thus, it is unfair to allow foreign-born defendants to assert their individual beliefs and customs as an excuse for criminal behavior, when the majority of the public is not allowed to assert a similar defense.

As previously noted, certain traditional defenses, such as "diminished responsibility" and mistake of fact, recognize that individually subjective factors may excuse criminal behavior or serve to mitigate the punishment for it.[104] These defenses are available to both immigrants and non-immigrants. Thus, immigrants do have some means for asserting their cultural differences as a defense for crimes. Fairness demands that these newcomers be precluded from receiving an additional protection, under the "cultural defense,"[105] that is not afforded to the majority of the population. In short, the formal recognition of the "cultural defense" would be unfair to society in general.

D. Upholding the Principle of Legality

The fourth major problem associated with recognizing the "cultural defense" as an exception to the "ignorance is no excuse" maxim is the defense's violation of the principle of legality.[106] The underlying theory behind the principle of legality, in relation to criminal law, is that "no conduct may be held criminal unless it is precisely described in a penal law."[107] The principle emphasizes the importance of the ability to rely upon the authority of those laws.[108] Under the principle of legality, the necessary elements of a legal order are that rules of law with "objective meanings" are declared by "competent officials," and only those meanings of the rules are the law.[109] A legal order "opposes objectivity to subjectivity, judicial process to individual

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[102] *See supra* notes 24-30 and accompanying text.

[103] *See supra* note 15 and accompanying text.

[104] *See supra* notes 31-32 and accompanying text.

[105] The "additional protection" referred to in the text is the exception to the "ignorance is no excuse" doctrine that the "cultural defense" affords immigrants.

[106] *See generally* J. LAFAVE & A. SCOTT, *supra* note 24, at 364.

[107] HALL, *supra* note 1, at 28.

The principle has two corollaries: "penal statutes must be strictly construed, and they must not be given retroactive effect." *Id.*

[108] *Id.* at 382.

[109] HALL, *supra* note 1, at 383.

opinion, [and] official to lay" opinion.[110] Thus, "it would conflict with the principle of legality," and the essence of a legal order, "to treat a defendant in a criminal case as if the law were as [he] thought it to be."[111]

The "cultural defense" conflicts with the principle of legality. Under the defense, the newcomers' ignorance of United States law is excused. Thus, their opinions and ideas about the laws will be placed above the laws as declared by the officials. "The survival of the principle of legality requires the preservation of the definiteness of the rules, which must not be dissolved by the incompatible recognition of the opinions of litigants and lawyers as authoritative."[112] Since the "cultural defense" violates this principle, it should not be recognized.

V. CONCLUSION

The recent increase in the numbers of foreign immigrants and refugees who are settling in the United States has placed a tremendous burden on the legal system and public. The public feels directly the conflicts that occur between the cultures that newcomers bring from their homelands and United States culture whenever these newcomers participate in native customs that are crimes against individuals or against society. The trial courts, prosecutors, and defense attorneys are also affected by these cultural conflicts. In some areas of the country, court calenders are crowded with cases involving crimes by immigrants. It is the courts, therefore that must ultimately determine what role the cultural factors will play in the criminal prosecution of the immigrants.

To date, the courts have apparently followed the maxim that "ignorance of the law is no excuse." This maxim precludes the use of the "cultural defense," which asserts that the foreign-born defendant should be excused for his criminal behavior because he could not have formed the requisite mental state to commit the crime. The courts' current approach is wise for several reasons. First, there are other traditional defenses under which the immigrants may assert

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[110] *Id.*

[111] W. LAFAVE & A. SCOTT, *supra* note 24, at 364.

[112] HALL, *supra* note 1, at 386. ("[T]he doctrine is necessary to the maintenance of the objective morality of the community.") *Id.*

their cultural differences as a defense to crimes. These defenses may not afford exactly the same protection as the "cultural defense," but they are adequate in light of the remaining reasons for disallowing the "cultural defense."

One of the other reasons for refusing to recognize formally the "cultural defense" is the difficulty in defining the group of defendants who may use it. The definition process has two stages. The first stage involves separating the bona fide immigrant groups from other groups, such as native minorities, who seek to circumvent the criminal justice system by taking advantage of the defense. The second stage involves separating the individual defendants who may legitimately assert the defense from those who have lived in the United States long enough to become "enculturated."

An additional reason for disallowing the "cultural defense" is the potential reduction in the educational effect of the criminal law on the immigrants' behavior. If the newcomers are not informed, through criminal prosecution, of the laws of their adopted country, then they will not as readily conform their customs to those laws. Such conformance is necessary to serve the larger interests of society as a whole.

Another reason for excluding the "cultural defense" is the unfair policy that it would promote towards the majority who could not use it. The "ignorance is no excuse" maxim is deeply entrenched in the United States judicial system. Immigrants should not be afforded a special exception to this maxim at the expense of other citizens who must strictly obey the rule.

The final argument against the use of the "cultural defense" by recent immigrants is that the defense will violate the principle of legality. Recognition of the defense would place the opinions of the defendants and their attorneys above the legal orders created by official lawmakers. Thus, the criminal law would lose its authority.

For all of these reasons, the American judicial system and the American public should not be subjected to the "cultural defense." The defense is ridden with negative repercussions that outweigh the potential benefits to immigrant groups. These groups have and will embellish society with their diverse customs and beliefs. The exposure to foreign lifestyles promotes understanding and respect for the immigrant groups and their native countries. However, these positive effects will be nullified if United States residents are threatened by the crimes of newcomers who are excused from punishment, and if United States courts, which are already burdened by the influx of immigrants who are ignorant of the criminal

laws, are further deluged by other defendant groups who seek the shelter of the "cultural defense."

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