Regulating the Criminal Conduct of Morally Innocent Persons: The Problem of the Indigenous Defendant

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REGULATING THE CRIMINAL CONDUCT OF MORALLY INNOCENT PERSONS: THE PROBLEM OF THE INDIGENOUS DEFENDANT

I. INTRODUCTION

One of the objectives of Anglo-American criminal law has been to keep the peace by punishing activity which threatens the fabric of society.¹ Not all socially dangerous behavior has, however, been treated as criminal. In the absence of a finding that a defendant is morally culpable for a harm committed, the common law has traditionally insulated persons from criminal liability.² As a result, determining what constitutes a morally culpable breach of societal norms has been an ongoing concern of the criminal law.

Moral culpability refers to a voluntary breach of known norms which guide the conduct of a community.³ All members of a community live with the expectation that they have knowledge of the community's norms and standards.⁴ When members of a community breach established norms, their actions are perceived to involve some quan-

² Sayre, supra note 1, at 55–56. This restriction rested on the principle that only blameworthy conduct warrants criminal sanction. As Holmes noted, it "would shock the moral sense of any civilized community" to find someone criminally liable who was not blameworthy. O.W. Holmes, The Common Law 55 (1881).
tum of moral turpitude, precisely because they were expected to know their conduct was offensive.\(^5\)

As a barometer of people's moral culpability, however, this expectation of knowledge is meaningful only to the extent that it is reasonable to assume that a person could have knowledge of the standard of conduct to which he is being held. Where a defendant comes from an alien culture and is, as yet, unfamiliar with the norms of the society within which she is to be judged, finding the moral blameworthiness requisite to criminal guilt becomes problematic.\(^6\) A recent case illustrates the concern.

On January 29, 1985, Fumiko Kimura, a Japanese woman living in Los Angeles, California, attempted a type of ritual suicide known in Japan as *oyako shinju*.\(^7\) Upon learning that her husband had had an affair, she, together with her two children, walked into the Pacific Ocean until the water covered their heads. The children died before they could be rescued. Kimura, however, survived and was charged with first degree murder in the deaths of her children.\(^8\)

Were Kimura a typical American the indictment would have been a reasonable result of her apparent morally culpable willful disregard of the law. Kimura, however, came from a culture in which suicide is not only a sanctioned response to personal tragedy\(^9\), but where it is often more socially acceptable for a parent to commit suicide with her children than to leave them behind.\(^10\) In addition, if it is true that she neither knew nor could have reasonably been expected to know the standard of conduct under which she was judged, then the attribution of moral culpability for her conduct is not an accurate reflection of her state of mind given the facts in this case. This results in a conflict between the interest in protecting the morally innocent and the societal need to punish harmful conduct.\(^11\)

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5 H. L. Hart explained as follows:

Obligations of conduct fixed by a fair appraisal of the minimum requirements for the maintenance and fostering of community life will, by hypothesis, be obligations which normal members of the community will be able to comply with given the necessary awareness of the circumstances of fact calling for compliance.


6 This is not a novel concern. In Europe, until the eleventh century A.D., problems in the administration of justice resulting from cultural diversity were addressed by a system of legal pluralism. Each individual was judged by the law of his own state, thereby circumventing the problem created where defendants lacked the common knowledge of the jurisdiction within which they stood accused. D. Cowen, *African Legal Studies—A Survey of the Field and the Role of the United States*, 27 *Law & Contemp. Probs.* 545, 558 (1962).

7 Boston Globe, Nov. 22, 1985 at 12, col.3.

8 Kimura was convicted of only voluntary manslaughter and sentenced to one year in the county jail with credit for time already served. *Id.* This relatively light sentence may have been intended to redeem the societal interest in punishing undesirable behavior while taking into account the unusual circumstances of the case. Thompson, *The Cultural Defense*, *The Student Law* 27 (Sept. 1985).


10 Thompson, *supra* note 8, at 27.

11 A similar type of problem has occurred in Sacramento, California where the Hmong community has witnessed a series of rape trials generated by confusion over customary elopement practices. The Hmong are recent immigrants to the United States from Laos. According to Kenneth Carrington, Deputy Public Defender in Fresno, California, members of these communities have experienced considerable difficulty in adjusting to life in the United States. While in Laos they...
This note analyzes the dilemma created by circumstances such as these. First, it discusses the role that knowledge of wrongdoing has played in the determination of criminal guilt. The focus is upon the manner in which the subjective inquiry into the defendant's moral state of mind has been merged with the objective need to discourage certain types of activities which threaten the fabric of the community. Second, the note considers tensions resulting from the creation of strict liability regulatory crimes, which are directed at conduct which involves no moral turpitude. The inquiry looks at the extent to which such laws may reflect a trend away from the requirement that moral culpability serve as an indicia of criminal guilt.

Despite some erosion in the moral culpability standard, the conclusion is that it remains basic to Anglo-American criminal justice. This ideal is then compared with the treatment of defendants whose actions were acceptable by the standards of their own community and in ignorance of the expectations of the dominant legal culture. The problem raised in these cases, protecting the public order against wrongful conduct while preserving the morally innocent from criminal punishment, is examined by looking at the ways a number of colonial and post-colonial legislatures and courts have addressed it, primarily in cases involving homicide. Finally, the conclusion will comment on the significance of this problem and considerations for the treatment of these cases in the future.

II. ETHICAL COMPONENTS OF THE CRIMINAL LAW

A. The Development of Moral Culpability as an Element of Crime

The principle that criminal conduct involves a measure of personal fault began to develop in English common law about 700 years ago. Prior to that time, criminal law operated on the basis of absolute liability. A person harmed had a right to be compensated or to avenge the harm regardless of whether it was deliberate or accidental. For

[References and footnotes]

10 T.F.T. Plucknett, A Concise History of the Common Law 445 (1956); Sayre, Mens Rea, 45 Harv. L. Rev. 974, 979-80; but see F.G. Jacobs, Criminal Responsibility 14 (1971). Although there is some basis for thinking that early criminal law was governed by the principle of absolute liability, it is probably more accurate to say that there were categories of crime where liability accrued independent of any type of intent to commit a wrong. In such cases, the Crown frequently intervened on behalf of the defendant where the act itself was neither voluntary nor intentional.

example, one who killed by accident or even in self-defense might still be held liable for the deaths.\textsuperscript{14}

Under the influence of canonist doctrine, however, criminal offenses became increasingly identified with an internal element frequently characterized as a “guilty mind.”\textsuperscript{15} Underlying this development was the adoption of “a view of man as a moral agent, possessed of reason and free will, and capable of understanding the social norms to which he is subject, and of choosing whether to conform to them.”\textsuperscript{16} The blameworthy mentality which made one criminally guilty for an offensive act resulted from a deliberate refusal to conform to given social norms.

As early as the twelfth century, efforts began to integrate the element of fault into the definitions of crimes.\textsuperscript{17} By the eighteenth century this principle had received broad acceptance in the common law\textsuperscript{18} and \textit{mens rea} had become an element of most common law crimes.\textsuperscript{19} Mens rea refers to a knowledge that one is doing something he ought not do.\textsuperscript{20} It is a measure of the state of mind which must accompany a criminal act in order to make the perpetrator morally culpable and, therefore, criminally guilty. The requisite state of mind varies according to the nature of the act in question. For example, the mens rea requirement for larceny is usually defined as an intent to unlawfully and permanently deprive another of her property. The mens rea for forgery is a state of mind characterized by an intent to defraud.\textsuperscript{21} Both states of mind are considered morally culpable and when they accompany the action to which they relate, they transform it into a criminal act.

Although mens rea refers to a person’s subjective state of mind,\textsuperscript{22} the measurement of personal culpability has always occurred within the objective framework\textsuperscript{23} established

\textsuperscript{14} J.H. Baker, \textit{An Introduction to English Legal History} 429 (1981). The well-known example in the \textit{Leges Henrici Primi}, c.88, 6, explains the operant principle. “[I]f someone in the sport of archery or other form of exercise kill another with a missile or by some such accident, let him repay; for the law is, that he who does wrong unknowingly must pay knowingly.” \textit{Quoted in} Jacobs, \textit{supra} note 12, at 15. Even a homicide committed in self-defense was not justifiable, though depending upon the circumstances the king might have issued a pardon. F. Pollack and F.W. Maitland, 2 \textit{The History of English Law} 479 n.2 (1923). The principal exception may have been killings which occurred while one was carrying out a warrant or was otherwise engaged in the enforcement of justice. Sayre, \textit{Mens Rea}, supra note 12, at 994.

\textsuperscript{15} Baker, \textit{supra} note 14, at 426; \textit{see also} Packer, \textit{supra} note 13, at 66–67.

\textsuperscript{16} Jacobs, \textit{supra} note 12, at 14.

\textsuperscript{17} Bracton commented in 1118 that “a crime is not committed unless the will to harm be present.” \textit{Id}.

\textsuperscript{18} Blackstone asserted in his \textit{Commentaries}, that “to constitute a crime against human laws, there must first be a vicious will, and secondly an unlawful act consequent upon such a vicious will.” W. Blackstone, 4 \textit{Commentaries} 21 (1765). Roscoe Pound later explained:

Historically, our substantive law is based upon a theory of punishing a vicious will.

It postulated a free agent confronted with a choice between doing right and wrong and choosing freely to do wrong.


\textsuperscript{19} Turner, \textit{supra} note 4, at 14.


\textsuperscript{23} Hall, \textit{Ignorance and Mistake in Criminal Law} 33 \textit{Ind. L.J.} 1, 27 (1957).
by the values and beliefs of a community. Therefore, if a person acts in opposition to those values and beliefs as expressed in the law, he is presumed to know that he has done so and can be said to have acted with the knowledge that he did something he ought not have done. This can be true whether a person acts with intention or with a reckless disregard for the possible consequences of his activity. For example, a homicide based on deliberation and premeditation, for instance, usually is viewed as the most morally reprehensible type of killing and invites the severest sanction, first degree murder. On the other hand, a homicide which results from the perpetrator's failure to consider the possible consequences of his behavior may be an act of omission which is also morally culpable and, therefore, invites a lesser criminal sanction, manslaughter. In both circumstances, the perpetrator's guilt arises from a failure to abide by a standard of conduct which he is held to know.

The presumption of knowledge of the law is embodied in the well known maxim, "ignorantia juris non excusat," ignorance of the law does not excuse. Among the primary justifications for this principle has been the fear that if ignorance were an excuse it would encourage people not to know the law. This, in turn, would endanger the capacity of the law to govern and regulate. The requirement of knowledge of the law, however, does not necessarily undercut society's commitment to only punish the morally culpable. H.L. Hart observed that "[i]f the legislature does a sound job of reflecting community attitudes and needs, actual knowledge of the wrongfulness of the prohibited consequences will exist." If such knowledge does not exist, the failure to know is likely to be as blameworthy as the offending conduct. Moreover, even where a person who committed an illegal act has knowledge of the obligations of conduct, the criminal law has evolved a variety of additional mechanisms, which help distinguish morally innocent from morally culpable violations of the law.

B. Criminal Law Defenses, Criminal Guilt and Moral Culpability

In some circumstances there may be no question that a criminal act occurred, but there may nevertheless be doubt as to the perpetrator's culpability for the act. In order

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24 Hart, supra note 3, at 405.
25 Mueller, supra note 20, at 1101. For example, if A takes B's suitcase with the intention of selling its contents then it can be presumed that A knew that she was stealing and since the community does not condone this type of action it must be blameworthy. On the other hand, if A took B's suitcase instead of her own and upon realizing that she had done so decided to return it, the likely conclusion would be that A lacked the evil state of mind necessary to find her conduct criminal. Accord P. Robinson, 2 CRIMINAL LAW DEFENSES 373 (1984). Although in both instances the action is the same, the difference between innocence and guilt is A's moral state of mind as measured against A's presumed knowledge of the moral standards of her community. Smith, The Guilty Mind in Criminal Law, 76 L.Q. REV. 78, 78–79 (1960).
26 G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 29 (1953).
27 Mueller, supra note 20, at 1060; see also Williams, supra note 26, at 59–63.
28 This doctrine is a vestige of the pre-Norman and early Norman law where a person could be liable irrespective of mistake of fact or law. The common law abandoned absolute liability regarding mistake of fact as the ethical concepts of punishment began to take shape under the influence of the Church. Hall and Seligman, Mistake of Law and Mens Rea, 8 U. CHI. L. REV. 641, 643 (1941).
29 Williams, supra note 26, at 385; Hall and Seligman, supra note 28, at 646–48.
30 Robinson, 2 CRIMINAL LAW DEFENSES, supra note 25, at 376.
31 Hart, supra note 3, at 413.
to protect such a person, the common law has developed a variety of defenses,\textsuperscript{32} which enable a defendant to prove that his act was not accompanied by the mens rea for the crime in question.

A justification defense, such as self-defense, where based on a reasonable belief that one's life is in immediate danger, may defeat the presumption that a particular action is accompanied by the mens rea for a crime.\textsuperscript{33} The common law recognizes that no moral culpability exists for attempting to preserve oneself from unwarranted attack.\textsuperscript{34} Therefore, an individual who undertook reasonable measures to preserve herself from harm should not be punished.\textsuperscript{35}

Similarly, excuse defenses admit that a harmful act occurred, but excuse the perpetrator because of circumstances which show that, despite the unfortunate result, the perpetrator acted in a morally non-culpable manner.\textsuperscript{36} Such a situation might arise where a person made a reasonable mistake of fact that resulted in the harmful act.\textsuperscript{37} In one case it was held that a man who killed his father in the mistaken belief that the father was about to slash his wife's throat could be excused, if the mistake of fact was reasonable given the circumstances.\textsuperscript{38} The mistake of fact would serve as disproof of the presence of malice aforethought, the mens rea for murder.\textsuperscript{39}

These exculpatory defenses take the search for justice beyond the objective facts of a situation and require that a court evaluate the defendant's subjective intentions.\textsuperscript{40} In the case just discussed, for example, the relevant question was whether the defendant intended to kill an innocent man or a person he believed was killing his mother. That the defendant's subjective intent did not include a desire to do a harmful act in violation of the law provides a basis for his legal innocence, despite the harm he caused.

The common law, however, has not gone so far as to allow the legitimacy of an exculpatory defense to turn solely on a person's subjective intent. Where the defendant's intentions arise from beliefs which are unreasonable, given the knowledge of the common person, the successful assertion of a criminal defense, such as justification or excuse, is unlikely, because such acts are usually held morally culpable.\textsuperscript{41} The basis for this rule rests on the principle that society needs to be protected from the harmful consequences of values and beliefs which deviate from those that are normative.\textsuperscript{42}

In some circumstances an individual whose actions are based on beliefs which are held unreasonable may not be culpable for a harm committed in violation of the law where, through no fault of his own, he did not share the knowledge of the common person. The common law has recognized such instances by providing defenses which

\textsuperscript{32} P. Robinson, 1 Criminal Law Defenses 70–71 (1984).
\textsuperscript{33} Aremu, Criminal Responsibility for Homicide in Nigeria and Supernatural Beliefs, 29 Int'l & Comp. L. Q. 113, 122–23 (1980).
\textsuperscript{34} Williams, supra note 26, at 577. The right of self-preservation is a higher value than a rigid compliance with the common law duty not to kill. Williams, Homicide and the Supernatural, 65 L.Q. Rev. 491, 496 (1949).
\textsuperscript{35} Robinson, 1 Criminal Law Defenses, supra note 32, at 124.
\textsuperscript{36} Robinson, 2 Criminal Law Defenses, supra note 25, at 373.
\textsuperscript{37} Id.
\textsuperscript{38} Rose, 15 Cox 540 (1884).
\textsuperscript{39} Cf. Williams, supra note 26, at 706.
\textsuperscript{40} Accord, Sellers, Mens Rea and the Judicial Approach to Bad Excuses in the Criminal Law, 41 Modern L. Rev. 245, 246–47 (1978).
\textsuperscript{41} Accord, Williams, Provocation and the Reasonable Man, [1954] Crim. L. Rev. 740, 742.
\textsuperscript{42} Accord, Hart, Punishment and Responsibility 6 (1968).
address the capacity of an individual to be responsible for his actions.45 Among those commonly noted are the infancy and insanity defenses.44 A brief look at the latter will illustrate the lengths to which the common law has gone in trying to balance the public interest in a stable social order with the interest in not convicting a defendant absent a finding of moral culpability.

C. The Relationship Between The Insanity Defense and Moral Culpability

The insanity defense, unlike other exculpatory defenses, may excuse criminal conduct despite the fact that it arises from a willful disregard for societal norms or from beliefs which are unreasonable. The defense looks to a defendant's subjective capacity to be responsible for his conduct.

In its classical form, the insanity defense grew out of the belief that mental illness deprives a person of the capacity to choose between good and evil.45 This incapacity negates the moral blameworthiness necessary for finding that criminal intent accompanied an action,46 by showing that the defendant, through no fault of his own,47 was mentally incapable of being responsible for the criminal act.48 For example, assume that A kills B under the influence of a delusion, which led him to believe that the book B was handing to A's wife was, in fact, a dagger being thrust at her. It may be held that despite the unreasonableness of A's belief, he lacked moral culpability due to his mental illness. The illness serves as evidence of the defendant's incapacity to be responsible for an act that he intended.49

Attempts to devise a formulation for determining what types and degree of mental incapacity negate criminal culpability 50 have been the subject of intense criticism due to the difficulty in measuring the degree to which mental infirmity may influence a person's actions.51 Despite this problem, society nevertheless continues to hold to a basic impulse not to punish the mentally ill where they are not found to be blameworthy for their

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44 Id.; see also Turner, supra note 4, at 78–82.
45 The capacity to distinguish between "good and evil", as an indicia of criminal culpability, goes back to at least Biblical times. Ancient Hebrew law provided a defense to criminal prosecution based on an incapacity to know that one was committing a wrong. Platt and Diamond, *The Origins of the Right and Wrong Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CAL. L. REV. 1227, 1228 (1966). In a later period Justinian's Code allowed a punishment to be mitigated where a crime was not committed of free will, as in cases where a person might have suffered a mental deficit which deprived him of moral discernment. *Id.* at 1230–31.
47 Ashworth, supra note 22, at 120.
50 See also M'Naghten's Case, 8 E.R. 718 (1843); Durham v. U.S., 214 F.2d 862 (D.C. Cir. 1954); The American Law Institute *Model Penal Code*, s4.01(1)(1962).
51 The holding in *U.S. v. Currens*, 290 F.2d 751 (3rd Cir. 1961), explained the problem. Our . . . objective is . . . to verbalize the relationship between mental disease and the concept of 'guilty mind' in a way that will be both meaningful to a jury charged with the duty of determining the issue of criminal responsibility and consistent with the basic aims and purposes and assumptions of criminal law. *Id.* at 773. Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 558, 582–84 (1972).
actions. In promoting the moral concerns of the criminal law, however, the insanity defense undercuts the public interest in being protected from wrongdoers.

This threat to the balance that the criminal law has maintained between the protection of society from harm and the protection of the morally innocent from punishment has been managed by placing the person who is not guilty by reason of insanity in a special category. Though not morally blameworthy for his criminal act, his incapacity to respond to the dictates of law and morality has entitled courts to suspend some of his civil liberties and confine such an individual until such time as he is able to conform. In so doing, it has remained possible to protect the public while reserving criminal punishment for the morally culpable. This balance, however, has not been sustained in all areas of the criminal law.

III. THE IMPACT OF PUBLIC WELFARE OFFENSES UPON THE REQUIREMENT OF PERSONAL GUILT

Classical common law crimes were designed to protect the public from the moral delinquency of deviant individuals. The control of deviance was generally sufficient to protect the public welfare in the relatively simple pre-industrial social order, in which the well-being of society and public morality were often viewed as closely related.

The developing industrial and urban social order of the late nineteenth century, however, created dangers which arose from the increased complexity and interdependence of society and not from moral deviance. As a result, regulations were needed which could maintain public order and safety by regulating conduct which had previously not been subject to moral or legal judgment.

Legislatures responded by creating new laws and regulations, called public welfare offenses, which dispensed with the requirement that personal culpability be proven to obtain a conviction. The underlying rationale was that a legislature, in the exercise of its police powers, has as its principal goal social betterment and not the punishment of individual actions. It can, therefore, elect to omit an intent to do the forbidden act from the elements of the crime associated with the performance of the act. Otherwise, the burden of proof would be so great that enforcement at a meaningful level would be untenable and the public interest would be compromised.

52 Cobun, supra note 46, at 472. Even if the insanity defense were abolished, courts would be likely to distort the law in an effort to acquit those whom they believed do not warrant criminal sanction. Id. at 473.


54 Goldstein, supra note 48, at 19–20.

55 Sayre, Mens Rea, supra note 12, at 988–89.


57 Sayre, Public Welfare Offenses, supra note 1, at 61. Thereafter, they proliferated. Sayre identified eight basic categories. These included the illegal sale of impure or adulterated food, the sale of misbranded articles, the violation of traffic regulations, the violation of motor vehicle laws and the violation of other general police regulations promulgated to protect the public safety. Id. at 73. In the more than fifty years since Sayre made this observation many new categories of public welfare offenses have developed. Wasserstrom, Strict Liability in the Criminal Law, 12 STAN. L. REV. 731, 741 (1960).


59 Sayre, Public Welfare Offenses, supra note 1, at 68–70. For example, the owner of a taxicab fleet was held liable for the fact that one of his taxis had operated without a rear light, despite the
Implicit in the creation of public welfare offenses is the problem of determining at what point the public's interest in social order is eclipsed by the individual's interest in not being punished absent a showing of moral culpability. The United States Supreme Court addressed this problem in *California v. Lambert*. 60

Mrs. Virginia Lambert was stopped by police on a Los Angeles street, searched for narcotics, handcuffed, sent to a police precinct, searched again, and questioned. This investigation produced no evidence that she possessed narcotics. In checking their records, however, the Los Angeles police did learn that Mrs. Lambert had once been convicted for forgery. In addition, they learned that she had failed to register with the Chief of Police as required of former felons by a city ordinance. In her defense, Mrs. Lambert claimed that she had been unaware of the ordinance and since it had no provisions for giving notice to affected parties, she had no way of knowing of it. This lack of knowledge was proof of her lack of criminal intent. 61

The Supreme Court's holding is notable in several respects. First, over Justice Frankfurter's vigorous dissent, 62 the Court held that it would be a violation of due process to convict a defendant of a crime of omission where she did not know of a duty and where there was no reasonable probability that she could have known of it. 65 The grounds for this holding, however, were narrow. The decision did not address whether it would be a violation of due process to convict a defendant of an act of commission, which she could not have known was illegal. It also did not address acts of omission where the defendant did not know of a legal obligation, but belonged to a class of people that was presumed to have such knowledge. 64

Consequently, the holding left doubt as to how far the law would go in permitting a conviction absent a finding that the offending action was accompanied by a wrongful intent. However, the court made clear that such convictions are not necessarily antithetical to criminal justice by holding:

> We do not go with Blackstone in saying that 'a vicious will' is necessary to constitute a crime, . . . for conduct alone without regard to the intent of the doer is often sufficient. There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence. 65

H.L. Hart was highly critical of this dicta in *Lambert*. He argued that, "in the tradition of Anglo-American law, guilt of crime is personal. The main body of criminal law from fact that there was no evidence that the defendant was personally responsible for this failure. *Provincial Motor Cab v. Dunning*, 2 K.B. 599, 602 (1909). Public safety required that taxis have such safety features. If agencies which are charged with enforcing the relevant statutes and regulations had to prove in each instance that a fleet owner was morally culpable for the failure of his taxis to have operating rear lights, the capacity of these agencies to enforce the rules would be limited. The high burden of proof would reduce the likelihood of successful prosecution while draining public resources, so that the number of people who could be charged would also be limited. Cf. Hall, *Interrelations of Criminal Law and Torts: II*, 43 COLUM. L. REV. 967, 993-94 (1943).

60 355 U.S. 225 (1957).
61 Accord *Lambert*, 355 U.S. at 229.
62 Justice Frankfurter stated, "I feel confident that the present decision will turn out to be an isolated deviation from the strong current of precedents — a derelict on the waters of the law." *Id.* at 232.
63 *Id.* at 229-30.
64 Mueller, *supra* note 20, at 1104.
65 *Lambert*, 355 U.S. at 228.
the Constitution on down makes sense on no other assumption."66 Therefore, any legislative enactment which provides criminal sanctions absent a finding of intent or blameworthiness should be unconstitutional.67 Lambert was a departure from this standard insofar as it left the door open for legislatures to increase the scope of strict liability offenses and erode the ethical foundations of criminal law.

Recent decades have witnessed an abundance of legislation aimed at promoting the general public welfare. Legislatures, though, with few exceptions, have not tested the constitutionality of doing away with the common law requirement that mens rea be an element of a common law crime.68 Nevertheless, where criminal defendants come from an alien legal culture and are unfamiliar with the standards with which they are to be judged, convictions for serious crimes may result absent the requisite finding of a mens rea for the crime. In such cases, the defendant may have no moral culpability for a criminal act. Yet, there may be no common law mechanism which would enable him to prove the lack of a mens rea for the act. One commentator placed the problem in the following perspective:

It is as though England had been conquered by a nation of Hindus, so that the eating of beef immediately became a high crime. Would the Englishman who ate his usual dinner possess a guilty mind? Can it fairly be said that an African under analogous circumstances possesses mens rea?69

Circumstances such as these suggest that, in the interest of regulating potentially harmful conduct by cultural aliens, courts may be willing to abandon the requirement of moral culpability for felonious conduct by expanding the scope of the strict liability crime into serious common law crimes. In order to better understand the social tensions and legal dilemmas which may result in such holdings, the next section will analyze the manner in which colonial and post-colonial courts and legislatures have engaged this type of problem.

IV. HOMICIDE, MORAL CULPABILITY, AND THE INDIGENOUS DEFENDANT

European colonialists were often faced with significant difficulties in applying European legal forms to indigenous populations whose social structure and values differed radically from that of the colonizing power.70 The administrative and legal difficulties of

66 Hart, supra note 3, at 422–23.
67 Id. at 431–35.
68 Statutory rape and bigamy have in many jurisdictions been treated as strict liability crimes subject to penal sanction. Williams, Criminal Law: The General Part, supra note 26, at 256–64; Sayre, Public Welfare Offenses, supra note 1, at 73–74. However, Jerome Hall explained that:
In all these situations it is obvious that sexual morality has overridden established principles of criminal law. Decisions directed by sex mores are notoriously irrational. Without asserting that these decisions are indefensible on some ground, it is certain that the validity of these exceptions to the fundamental requirement of mens rea cannot be assumed.
70 One commentator noted that:
The problem of the native litigant processed by the majority culture's legal system may be seen as merely one of degree when compared with similar problems faced by other ethnic groups. Nevertheless, especially with tradition oriented natives, the culture
holding indigenous peoples to a colonizing power's legal and ethical standards\textsuperscript{71} made it more practical to allow native peoples to follow their own customary law.\textsuperscript{72}

This accommodation was limited in two respects. First, native, customary practices which were considered "repugnant to European ideals of justice, humanity, or morality" were subjected to the dominant culture's civil law.\textsuperscript{73} Second, practically all colonial powers asserted the right to impose their own criminal law upon the native populations.\textsuperscript{74} As a result, many indigenous peoples found that actions previously taken for granted were suddenly subject to criminal procedures that they could not understand.

The conflict this created between the moral and the regulatory purposes of the criminal law is demonstrated by the opposing positions taken by the majority and the dissent in the Colombian case, \textit{Celimo Micquircama}.

The defendant, an Indian from an isolated tribe, was tried for aggravated homicide in the killing of a known witch, whom the defendant believed was in the process of harming a sick child. The majority held that the defendant did not bear individual responsibility for his action because he was informed by beliefs that legitimized his actions, rather than by the moral ideals of Western culture.\textsuperscript{76}

The dissent, however, vigorously disagreed. The state, they argued, has authority over all who are in its territory. Consequently, the Criminal Code of Columbia should apply to all peoples equally.\textsuperscript{77} The principle underlying their argument was that in criminal matters customary norms must be subservient to the norms of the dominant legal culture. Society has an interest in sustaining a set of minimum universally accepted standards.\textsuperscript{78} This guards the expectations of all citizens and insures that society protects the values it most deeply cherishes. To create an exception for a limited group risks

gap can be so extreme as to render the achievement of justice virtually impossible, and . . . in many cross cultural situations the elements of understanding and sensitivity are in any event missing with injustice being the causal result.


\textsuperscript{71} For example, polygamy, an institution which is an anathema to developed Western societies, is common in many lesser developed areas of the world. Criminalizing it would have caused considerable social chaos as indigenous peoples attempted to realign their behavior or resist the imposition of alien mores. Cf. Clark, \textit{Witchcraft and Legal Pluralism: The Case for Celimo Micquircama}, 15 Tulsa L. J. 679, 696–97 (1980). At the same time, the achievement of justice would have been questionable where peoples were subjected to serious sanction for polygamous conduct they had every reason to believe was both normative and innocent. Keon-Cohen, \textit{supra} note 70, at 251.

\textsuperscript{72} Customary law refers to a range of practices which are sanctioned by a cultural unit as a means of regulating a group's social structure. It is not a system designed to determine right and wrong based on the application of impartial rules. Rather, it is a system of norms and beliefs which are utilized in erasing the harmful effects to a community resulting from a dispute among its members. To this end, reconciliation is usually a primary goal. Bennett and Vermeullen, \textit{Codification of Customary Law}, 24 J. Am. L. 206, 212–13 (1980).


\textsuperscript{74} Id.

\textsuperscript{75} Clark, \textit{supra} note 71, at 684; \textit{see also} Judgment of May 14, 1970, Corte Suprema de Justicia, Bogota, Colombia, 134 Gaceta Judicial 303.

\textsuperscript{76} Clark, \textit{supra} note 71, at 688–89.

\textsuperscript{77} Id. at 692.

setting a dangerous precedent by recognizing that beliefs which may result in criminal conduct are reasonable.\footnote{Aremu, \textit{supra} note 33, at 115. It also creates a privileged class of people who are excused from the normal operation of law. Samuels, \textit{supra} note 78, at 255.}

The significant divergence of opinion between the majority and the dissent is evidence of the peculiar legal problem which results from trying to provide for people from radically different cultures within a legal system, which maintains moral culpability as an element of criminal guilt. Specifically, the sovereignty of the ruling government depends on its capacity to enforce the legal norms it prescribes. Nevertheless, it is antithetical to the principle that criminal guilt requires moral blameworthiness to punish a defendant who does not share these norms, who has limited possibilities to know they exist, and who therefore, has little or no moral culpability for his actions.

Although there are numerous factual circumstances within which this type of dilemma might arise, they generally fit into two closely related categories. First, there are circumstances where the defendant's action, though done in a good faith belief that it was proper, constituted a form of activity so incongruous with Anglo-American ideals of justice that no defense in law would exist. The second situation involves actions rooted in native beliefs and customs, which might nevertheless be amenable to one of the classical criminal law defenses, if the beliefs underlying the defendant's actions were deemed reasonable.

\textbf{A. Egregious Criminal Conduct Without Criminal Intent}

The tension between the goal of the criminal law which seeks to regulate social conduct and the ethical ideal that only morally culpable conduct should be punished becomes most acute where the norms and beliefs that informed the indigenous defendant's conduct are reprehensible to the adjudicating culture. Under such circumstances, the interest in discouraging the conduct for which the defendant is accused is most acute, because of the threat it presents to the social order. On the other hand, the fact that conduct is morally unacceptable to the adjudicating culture does not mean that a defendant was morally culpable for that action where he neither had nor could have had knowledge of wrongdoing.

This type of problem has arisen in a variety of circumstances. For example, in Papua and New Guinea, isolated tribesmen who, according to the court, relied on cannibalism for the protein in their diet were brought to trial because of their practice.\footnote{\textit{Regina v. Noboi-Bosai},[1971] P. & N.G.L.R. 271 (Territory of Papua and New Guinea) (According to the Court, the area that they lived in supported no alternative forms of consumable protein); see also Stewart, \textit{Stone Age and Twentieth Century Law in the Independent State of Papua New Guinea}, 4 \textit{Boston College Third World L. J.} 48, 64–67 (1983).} Similarly, in Canada, a young Eskimo mother who killed her third child upon its birth was charged with infanticide,\footnote{\textit{Mottow, Law and the Thin Veneer of Civilization}, 10 \textit{Alberta L. Rev.} 38, 42 (1972).} although Eskimo culture allows this practice when a family can no longer provide for additional members.\footnote{E.A. Hoebel, \textit{The Law of Primitive Man} 74 (1954) (Infanticide, inalicide, senilicide and suicide support the viability of a community trying to exist in a harsh environment and are, therefore, often highly regarded acts.).} In these situations the contrast between the defendants' apparent lack of moral guilt and their actions creates a legal dilemma.

The views of the \textit{Micquircama} dissent are indicative of the position that has been more commonly taken in countries faced with this kind of problem. In Papua and New
Guinea the general rule is that where native custom conflicts with the Constitution, the Criminal Code, or standards of humanity common to civilized society, the defendant cannot be exonerated on the basis of custom "no matter how strong or pervasive" a custom is.83

A case in point is presented by the widespread custom known as payback. It allows an injured party and her family and friends to seek retribution for a harm suffered.84 Defendants tried in payback killings have been held criminally responsible for their act, despite the fact that the custom has figured prominently in the popular conception of justice throughout Papua and New Guinea.85 For example, in Porewa Wani v. State,86 a person was tried for the crime of "dangerous driving causing death." In the course of the trial the court and parties to the case visited the scene of the accident. There they were met by 60-80 relatives of the victim. In the melee that followed, the widow of the decedent killed the defendant. Though her action was a normative exercise of social regulation in a society which has no other recognized system of criminal justice, she received a sentence of life imprisonment for "wilful murder."87

Similarly in the Kenyan case, Rex v. Atma Singh s/o Chanda Singh,88 the court rejected outright the defendant's defense that he had acted under provocation. The defendant, in accordance with Sikh custom, had disfigured his unfaithful wife by cutting off her ears and nose. The court held that there could be no provocation in law which justified this "barbarous" custom.89

In Rex v. Sitakimatata s/o Kimwage,90 the defendant killed a person who had admitted to having killed the defendant's wife by witchcraft and had threatened to do the same to the defendant.91 The defendant acknowledged that, as a result of his wife's murder and the threat to himself, he deliberately killed the deceased. At the trial, however, he tried to have the charge of murder mitigated by claiming that he had acted under provocation.92 The Court recognized that the defendant was "a simple-minded, primitive peasant of a type not intellectually likely to reject the traditional existence and potency of the witch doctor's craft."93 The court, however, held that the defendant's actions were done with deliberation and exhibited none of the signs of sudden fear and loss of self-control which might facilitate a defense of provocation.94 As a result, the defendant was found guilty of murder.

Finally, in Rex v. Tabulayenka s/o Kirya and three others,95 the four defendants killed a suspected thief. The Court acknowledged that, in East Africa, the defendants' action

83 Stewart, supra note 80, at 56–57.
84 Payback is a system of retribution which resembles the blood feud. See Sayre, supra note 12, at 975–76. It requires that the friends and family of a person who has been injured or killed "payback" — injure or kill (depending on the case) — the person most directly implicated. The actual culpability of the recipient of the payback is of no consequence. See Regina v. Iu Ketapi, [1971] P.& N.G.L.R. 446 (Territory of Papua and New Guinea).
85 Id. at 47.
87 Id.
88 9 E.A.C.A. 69 (Kenya 1942).
89 Id.
90 8 E.A.C.A. 57 (Tanganiyka 1941).
91 Id. at 58.
92 Id. at 57.
93 Id. at 58.
94 Id. at 59.
95 9 E.A.C.A. 51 (Uganda 1942).
was not an uncommon way for dealing with thieves.\textsuperscript{96} Since all the statutory elements of the crime of murder were present, however, including a "common intention" to kill, the defendants' conviction for murder and sentence of death were upheld.\textsuperscript{97}

By holding the defendants culpable for their conduct, the cases discussed above all rejected the legitimacy of the norms of the defendants' culture(s). The courts, however, appeared to have responded as much to the regulatory need to discourage conduct which led to consequences they viewed as dangerous, as to their conclusion that the defendants lacked viable arguments in law with which to justify or excuse their conduct.

In the holding of the Gold Coast case, \textit{Konkomba v. Regina},\textsuperscript{98} the West African Court of Appeals was not unmindful of the potential injustice to defendants where they have no sense of wrongdoing accompanying their action. It held:

> We have no doubt . . . that the appellant honestly believed when he struck the fatal blows that he was striking a man who had already killed one of his brothers and was in the process of killing another, but that is no defense in law.\textsuperscript{99}

Viewed differently, holdings of this kind maintain that where a defendant is not familiar with the ethics or beliefs of the "common man" by virtue of cultural diversity, such knowledge will nevertheless be attributed to him in order to find that the criminal act was accompanied by the mens rea for the crime. This legal fiction succeeds in bringing the defendant within the reach of the punitive mechanisms of the criminal law. It may also, however, eliminate mens rea as an element of the crime for which the defendant is at risk of being convicted. Even though the defendant intended the criminal act, his lack of knowledge of the norms of the adjudicating culture deprived this intent of the moral culpability normally attributed to it.

\textbf{B. Reasonableness and Defenses Against Charges of Criminal Conduct}

In some cases, indigenous defendants have tried to avoid conviction or at least to mitigate the charges against themselves by raising defenses such as self-defense or mistake of fact.\textsuperscript{100} The issue in these cases frequently is whether the belief or custom which led to the defendant's action was reasonable.\textsuperscript{101}

In the Nigerian case, \textit{Gadam v. Queen},\textsuperscript{102} the accused killed an old woman by striking her with a hoe handle. He believed that doing so would destroy the spell that the deceased had placed on his wife who lay mortally ill.\textsuperscript{103} The Court recognized that the

\begin{footnotes}
96 \textit{Id.} at 51.
97 \textit{Id.} at 53.
98 14 W.A.C.A. 236 (Gold Coast 1952). The defendant killed the deceased in the belief that the deceased was a witch who had killed one of his brothers and was about to kill another. The first brother had died of illness. A second brother also became ill and informed the defendant that he was being killed by witchcraft. A juju man confirmed the second brother's claim and also informed the defendant that the person his dying brother suspected of causing his illness was also responsible for the first brother's death. Based on this information and believing that he was saving his second brother's life, the defendant killed the alleged witch.
99 \textit{Id.} at 237.
100 Seidman, supra note 69, at 48; see also Aremu, supra note 33, at 120–124.
101 See Seidman, supra note 69, at 50. Usually, they were held unreasonable. \textit{Id.} at 48–49.
102 [1954] W.A.C.A. 442 (Nig.).
103 \textit{Id.}
\end{footnotes}
accused killed the deceased because of a belief commonly held by members of his tribe. It rejected, however, the defendant's defense of mistake of fact by holding that it would be "a dangerous precedent to recognize that because a superstition which may lead to such a terrible result is generally prevalent among a community it is therefore reasonable."\textsuperscript{104}

What is reasonable has, in most cases, been based on the "considered ethic of the common man."\textsuperscript{105} Not surprisingly, however, this ethic often reflects the norms of the dominant culture.\textsuperscript{106}

For example, in \textit{Regina v. Machekequonabe}\textsuperscript{107} the defendant was a member of the Northern Ojibwa, an Indian tribe whose members believed in evil spirits called Wendigo. Wendigo were known to assume human form, roam the landscape and eat humans.\textsuperscript{108} When a Wendigo was sighted near the defendant's camp, the defendant was among the sentries posted around the perimeter to protect against an intrusion. While standing guard he and his partner saw what they believed to be a Wendigo fleeing in the distance. After challenging it three times and receiving no response, the defendant shot it. The victim turned out to be his own foster father. On appeal, the court endorsed the view that a belief in the supernatural would not support any form of non-culpable homicide.\textsuperscript{109}

The disposition of \textit{Machekequonabe} was in sharp contrast to the treatment of a mistaken homicide in England. In \textit{R. v. Dennis},\textsuperscript{110} an English woman who accidentally shot her husband, in the mistaken belief that he was an intruder breaking into her home

\textsuperscript{104} Id. at 443.
\textsuperscript{105} Accord, J. Hall, \textit{General Principles of Criminal Law} 415. The ethics that underlie judgments of reasonableness reflect a culture's values and beliefs at a particular moment in time. For example, three centuries ago the renowned Lord Hale charged a jury as follows:

That there were such creatures as witches he has no doubt at all; for first Scriptures affirmed so much; secondly, the wisdom of all nations has provided laws against such persons, which is an argument of their confidence in such a crime. And such has been the judgment of the kingdom, as appears by the Act of Parliament which hath provided punishments proportional to the quality of the offense . . .

Seidman, \textit{supra} note 69, at 49 n.19.

Today, it might be possible to find Africans with similar beliefs to those of Lord Hale. One commentator noted that,

The African who believes in witchcraft is . . . faced by a fearful dilemma. He believes in witches to his bones. He knows that they can destroy his [well-being] . . . in sundry mysterious ways without chance for defense, so that both his physical being and his hope for earthly success are endangered, as much as by threatened blow of panga or spear or matchet.

\textit{Id.} at 47. In an English courtroom, however, these beliefs would no longer be reasonable.

\textsuperscript{106} In \textit{Attorney General of Nyasaland v. Jackson}, [1957] R. & N. 443 (Rhodesia and Nyasaland). The Court held that reasonableness in the mistaken killing of a witch is what the average Englishman would think is reasonable.

\textsuperscript{107} 28 Ont. 309 (1898).

\textsuperscript{108} At the annual meeting of the American Ethnological Society in 1960, seventy-three cases were noted in which people were alleged to have been Wendigo. Of these thirty, three alleged Wendigo were killed, ten were wounded, nine were ostracized, two were cannibalized and one committed suicide. The disposition of the remaining fifteen cases was not known. According to the report, the killings were not carried out for revenge, but rather to spare the community episodes of cannibalism. Goldstein, Dershowitz and Schwartz, \textit{supra} note 21, at 986.

\textsuperscript{109} \textit{Machekequonabe}, 28 Ont. at 309–10.

for a felonious purpose, was able to assert a defense of mistake of fact provided that the circumstances showed that there was a reasonable basis to believe that the victim was an intruder.

What is notable is that both Machekequonabe and Dennis may have acted with equal certainty that they were endangered and with equal lack of intent to commit a crime. The difference between the two cases, however, rests on the legitimacy attributed by the court to the defendants' interpretations of the circumstances which led them to act. Where beliefs and customs led to consequences which were considered socially unacceptable they were labeled unreasonable and the defendant was deprived of a defense in law.

The holding in *Rex v. Kajunas s/o MBake* suggests the problematic aspect of such holdings. The defendant was convicted and sentenced to death for having killed his father, while subject to the belief that the father had been killing the defendant's child by supernatural means. On appeal, Chief Justice Sheridan of the East African Court of Appeals held that the question of whether the defendant's action was a result of a justifiable mistaken belief:

... would seem to turn on whether the accused's belief in his father's malevolent invocation of evil spirits in order to injure the child was not only honest, but reasonable, taking into account the fact that he is a primitive African. This is a difficult question bordering on metaphysics which I do not propose to discuss here.

In fact, had the learned judge actually taken into account the beliefs and customs of a "primitive African," the problem of determining the reasonableness of the defendant's action would have been less than metaphysical. Instead, there would have been a relatively simple task of measuring the defendant's actions against the norms of his community. It is likely, however, that such a standard for reasonableness would have led to results that the Court would have considered unacceptable.

In another opinion the holding of the East African Court of Appeals was more candid about the standards underlying their decision. An employee of the Ugandan Medical Service was brutally killed by eleven native Ugandans who believed that Europeans kidnapped and ate natives. In discussing whether mistake of fact could have afforded a basis for a defense, the Court tersely noted that though it might have been honestly believed that the victim intended to cannibalize the defendants, such a belief "could hardly be held to be reasonable."

Only in a relatively few instances have courts held that the beliefs of indigenous persons which were inconsistent with the norms of the adjudicating culture were nevertheless reasonable. In a case which is more than a century old, *Territory v. Fisk*, the court adopted the standards of the defendant's culture as a basis for deducing the

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111 The perceived harmfulness of a belief or custom reflects the adjudicating culture's bias. To a person from a culture where witchcraft is practiced allowing the harm committed by a witch to go unchecked would introduce great social danger. Seidman, *supra* note 69, at 46–47.

112 12 E.A.C.A. 104 (Tanganiyka 1945).

113 *Kajunas s/o MBake*, 12 E.A.C.A. at 104.

114 *Cf.* Williams, *Homicide and the Supernatural*, *supra* note 34, at 496.

115 *Rex v. Dominiko Omenyi s/o Obuka and ten others*, 10 E.A.C.A. 81, 87 (Uganda 1943).

reasonableness of his actions. The defendant, an Indian living in the Northwest of the United States, killed a reputed sorcerer who had threatened the life of his gravely ill wife. The judge charged the jury that the law permitted a man to kill in order to save his wife's life. In addition, if the defendant believed in good faith that his victim was a threat to his wife's life and such a belief was reasonable given his education and surroundings, it would be a sufficient defense for the defendant to be acquitted.\textsuperscript{117}

In India, the Punjab High Court came to a similar conclusion. A husband and wife, while engaged in a traditional rite at their son's tomb, were interrupted by what they understood to be a ghost. The husband beat the intruder to death. It was subsequently discovered that the victim was human and, as a result, the husband was charged and convicted of murder. The Court, on appeal, held that given how unlikely it was that another human had been present in the cemetery and given the fact that the circumstances disposed the defendant to see ghosts, the defendant had reasonably mistaken the identity of his victim.\textsuperscript{118}

Most legislatures and courts have shied away from wholesale recognition of indigenous beliefs in criminal actions, because to do so would result in judicial sanction of conduct which would be destructive to the laws and social order the courts are intended to preserve. The troubling consequences of punishing someone who evidently did not possess the mens rea for a particular act has, however, led to attempts to accommodate native custom and beliefs through legislation, judicial discretion, and executive clemency.

C. Alternative Solutions

There has often been discomfort with the harsh consequences which have befallen native litigants whose moral culpability has been doubtful. This has resulted in a variety of legislative and judicial strategies to protect them, while preserving the regulatory function of the criminal law.

1. Legislative Accommodation

Colonial and modern post-colonial legislatures have instituted numerous types of legislation to accommodate native custom within their inherited British legal systems. For example, § 305 of the Criminal Code of Papua and New Guinea\textsuperscript{119} provides that, when finding a person guilty of "wilful murder", which carries a punishment of death, a court should consider if there are extenuating circumstances making the death penalty unjust. If there are, a judgment should be made as to the appropriate term of imprisonment. In interpreting § 305, the Supreme Court of Papua and New Guinea listed five factors with which to evaluate the presence of extenuating circumstances.\textsuperscript{120}

1) The state of mind of the offender;
2) The state of development of the offender's community;

\textsuperscript{117} Id.
\textsuperscript{119} Section 305 of the Criminal Code of Papua New Guinea:

The ignorance of the accused, their upbringing and the strong tribal traditions in the society in which they have lived and in obedience to which their crime of murder was committed, may constitute extenuating circumstances which would make the imposition of a sentence of death unjust within the meaning of §305 of the Criminal Code.

3) The offender's knowledge of government procedures; 
4) The degree of accessibility and protection afforded by government agencies (i.e. police) in the offender's home region; 
5) The nature and force of native custom.

The application of § 305 has been an accommodation between the interest in deterring "a savage custom" which has been exercised in "complete disregard if not contempt for the processes of the law"\(^\text{121}\) and the injustice of putting people to death who have acted in accordance with the mores of their community.\(^\text{122}\) Justice Clarkson of the Supreme Court of Papua and New Guinea noted that:

Death remains a penalty for wilful murder in appropriate cases, but in a primitive community where daily life is controlled not by the general law but by powerful communal customs and antipathies, what may appear as a judicial payback does not seem to me to be an advance towards the desired object.\(^\text{123}\)

Interest in mitigating the conflict between the common law culture and indigenous custom led to the enactment of other legislation in the Territory of Papua and New Guinea. Section 20 of the Sorcery Ordinance of 1971 allows an act of sorcery to serve as a basis for the defense of provocation.\(^\text{124}\) Thus, in the case of Regina v. K.J. and Another,\(^\text{125}\) the defendants were able to argue that the killing was reasonable because the defendants were provoked by an act of sorcery that was perpetrated by the victim and which had endangered them.\(^\text{126}\) It is notable that were it not for § 20 of the Sorcery Ordinance the defendants would have probably been convicted of wilful murder; despite the reasonableness of their action given native beliefs.\(^\text{127}\)

Other jurisdictions adopted similar measures aimed at accommodating indigenous customs and beliefs. In the East African Territories (Kenya, Uganda and Tanganyika), a common legislative scheme existed which criminalized witchcraft. One of the regulations was a 1925 Ordinance adopted in Kenya which made numerous acts associated with witchcraft, sorcery, and other supernatural practices criminal offenses.\(^\text{128}\) Among the practices which were criminalized were witchcraft designed to cause "fear, annoyance

\(^{121}\) Id. at 45. 
\(^{122}\) Cf. Stewart, supra note 80, at 57. 
\(^{124}\) Section 20 of the Sorcery Ordinance of 1971: 
(1) For the avoidance of doubt, it is hereby declared that an act of sorcery may amount to a wrongful act or insult within the meaning of s268 of the Criminal Code. 
(2) The likely effect of an act of sorcery relied on by virtue of this section shall be judged by reference, amongst other things, to traditional beliefs of any social group of which the person provoked is a member. 
\(^{126}\) Id. at 102-4. 
\(^{127}\) In Porewa Wani, [1979] P.N.G.L.R. 593 (Papua and New Guinea), the defendant was convicted of wilful murder, despite the fact that, as in the instant case, their actions were legitimate within their own culture. 
\(^{128}\) The Witchcraft Ordinance of 1925, No. 23, Nov. 12, 1925; see also § 198 of the Ugandan Penal Code: 
[An] Act of Witchcraft which is alleged to constitute legal provocation, must have been sudden and the killing must have been done in the heat of passion by the sudden act and before there was time for the passion to cool.
or injury,"129 teaching others how to use witchcraft or charms "to bewitch or injure persons, animals or other property"130 and the encouragement of the practice of witchcraft by a chief.131 As a result, one who reasonably believed that he was the object of witchcraft could argue that the killing of the alleged witch was done in a moment of passion brought on by the victim's criminal provocation.

The impact of this policy was articulated in the case Kumwaka wa Mulumbi and 60 Others.132 All the accused brought a known witch to the sick wife of one of their number. They believed that the witch had placed a spell upon the woman and they sought to compel her to remove it. When the alleged witch tried to escape without having satisfied her captors, she was pursued, caught, and beaten to death.

The East African Court of Appeals rejected the argument that the defendants' lacked the mens rea for the crime of murder, because their actions were normative for their culture. It held that:

The belief in witchcraft is, of course, widespread and is deeply ingrained in the native character. . . . The plea has been frequently put forward in murder cases that the deceased had bewitched or threatened to bewitch the accused and the plea has been consistently rejected. . . . For courts to adopt any other attitude to such cases, would be to encourage the belief that an aggrieved party may take the law into his own hands, and no belief could be more mischievous or fraught with greater danger to public peace and tranquility.155

The court did, however, utilize the legislative scheme which allows for a defense of provocation based on a belief in witchcraft where the "accused has been put in such fear of immediate danger to his own life."154

Similarly, in Rex v. Fabiano and Others,155 the three defendants killed an alleged witch who they believed had caused the deaths of members of their family. The killing followed the discovery of the deceased crawling naked on the ground by the defendants' homes, an action recognized by the defendants as part of a rite of witchcraft. The Court noted the defendants' belief that they were endangered by the deceased's practice of witchcraft and found that the resulting terror experienced by the defendants led them to kill the alleged witch. Given these circumstances, the Court held that the defendants killed the deceased as a result of grave and sudden provocation.156

This holding reflects the position of the East African Court of Appeals, which consistently held that witchcraft which places a person in "fear of immediate danger to his own life" will serve as a basis for a defense of provocation.157 The provocation must be based on an actual physical occurrence.158 Mere beliefs are insufficient to support

129 Id. at para. 2.
130 Id. at para. 3.
131 Id. at para. 8.
133 Id. at 139.
134 Id.
135 8 E.A.C.A. 96 (Uganda 1941).
136 Id. at 101.
137 See Kajuna s/o MBake, 12 E.A.C.A. at 104–5; Eria Galikuka v. Rex, 18 E.A.C.A. 175 (Uganda 1951); Rex v. Sitakimata s/o Kimwage, 8 E.A.C.A. at 57; Rex v. Kimutai Arap Mursoi, 6 E.A.C.A. 117 (Kenya 1939).
such a defense. Finally, it must also be a response to an immediate danger and sudden provocation.

In sum, carefully drafted legislation has, under some circumstances, played a role in accommodating the regulatory functions of the criminal law to the circumstances of defendants who lack the knowledge of the common man.

2. Judicial Discretion

Judicial discretion has also been an important means of softening the impact of the criminal justice system on indigenous defendants. For example, in the Australian case, *R. v. Aboriginal Muddarubba*, the reasonableness of the defendant's action was measured by the norms of the defendant's community. This provided a basis for an aboriginal to have a defense at law. The defendant speared a woman who had verbally insulted him. Under Australian law such a killing was manslaughter, if circumstances were such that the average reasonable person would have reacted with violence. Judge Kriewaldt, who is noted for his decisions concerning Aboriginals, held that the test as to whether the behavior was due to provocation is what the average person would have done in the accused's position. The average reasonable person standard, however, had to reflect the norms of the accused's community.

This distinction was central to the outcome of the case. To the average white Australian words alone are not sufficient provocation to warrant a homicide. To the average reasonable Pitjintara, however, an insult given with specific words could be sufficient provocation to kill the speaker.

Judicial discretion has also been employed in the interpretation of a statute so that the law might better conform to a customary culture. In *Regina v. Noboi-Bosai and Others*, seven persons were charged with a violation of § 236 of the Criminal Code of Papua and New Guinea for "improperly and indecently" interfering with a dead human body. Justice Prentice of the Supreme Court of the Territory of Papua and New Guinea readily conceded that § 236 could be interpreted to apply to the accused. Moreover, he had no doubt that in England cannibalism would be held a common law misdemeanor. He rejected, however, the idea that there might be an objective standard for interpreting the words "indecent" and "improper." Absent a clear legislative intent to make the practice of cannibalism illegal, he refused to find the defendants guilty of any wrongdoing.

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139 Kajuna s/o MBake, 12 E.A.C.A. at 105.
141 [1956] N. Territory Judgments 317
142 Id. at 322.
143 Id. at 321–22.
145 Section 236 of the Criminal Code provides that:
[A]ny person, who without lawful justification or excuse, the proof of which lies on him . . .

(2) Improperly or indirectly interferes with . . . any dead human body . . . is guilty of a misdemeanor and is liable to imprisonment with hard labour for two years.
147 Cf. Id. at 284.
148 Id. at 278–79.
Finally, in *R. v. Luka Metengula*[^149] the court appeared to have gone to great lengths to avoid convicting the four defendants of murder. The defendants had been pallbearers in a tribal mourning ceremony in which the coffin is alleged to point out the person responsible for the deceased’s death. In the instant case, the coffin “pointed out” an elderly woman. She was then rammed three times with the coffin, which caused her death.

The Court tried to determine if the four pallbearers acted with malice aforethought and were therefore guilty of murder. Based on the fact that deaths in such ceremonies were no longer common, the Court concluded that the defendants did not intend for their victim to die and that her demise was partly due to her unfortunate physical frailty. As a result, the defendants were convicted of only manslaughter.[^150]

The decision discussed the strong belief of the defendant’s community in the power of a deceased individual to control its pallbearers.[^151] The great interest shown by the Court in the defendants’ beliefs suggests that despite the discomfort with this native practice, there was a reluctance to punish the defendants for activity that they may have thought was normative. The Court may have been recognizing that the intent of these defendants did not contain the moral culpability that would be attributed to the average Englishman for an intent which accompanied a comparable action. Therefore, despite the societal interest in discouraging the defendants’ conduct, it would have been unjust to bring the full weight of the law upon them.

### 3. Executive Clemency

A third and very common means of mitigating the impact of the criminal justice system upon guilty, but not blameworthy, native defendants has been through appeals to an executive authority to grant a pardon due to the unusual circumstances of a case.[^153] In colonial Africa, courts regularly convicted defendants for murder, sentenced them to death, and then recommended that the Executive grant clemency.[^154]

An example is the case of *R. v. Isekwe Ifereone*.[^155] The appellant admitted to killing the deceased. He claimed, however, that this was justified because the deceased had cast ju-ju (a type of magic) upon him causing him to become ill and had then refused to remove it. The court acknowledged the defendant’s beliefs, but could find no basis for finding the appellant’s actions “reasonable in law” within the meaning of § 25 of the Nigerian Criminal Code.[^156] Nevertheless, the court concluded that it was certain that “the circumstances of the case will be carefully considered by the proper authority.”[^157]

[^150]: Id. at 152-54.
[^151]: Id. at 152.
[^152]: Id. at 154.
[^154]: “With monotonous regularity courts have convicted [and] sentenced the defendant to death and in the same breath recommended executive clemency.” Seidman, *supra* note 69, at 48.
[^155]: Selected Judgments of the West African Court of Appeals 79 (Nig. 1950).
[^156]: Section 25 of the Criminal Code of Nigeria: A person who does or omits to do an act under an honest and reasonable, but mistaken belief in the existence of any state of things is not criminally responsible for the act of omission to any greater extent than if the real state of things had been such as he believed to exist.
Attempts by each of the governmental branches to mitigate the impact of judicial proceedings upon indigenous defendants reflect the awkward state of the law in these cases. On the one hand, there is a reluctance to sanction conduct which is perceived as immoral. On the other hand, it is troubling, if not immoral, to punish someone for activity that their own environment reinforced and which they had no means of knowing might invite criminal sanction in the adjudicating culture.

V. CONCLUSION

Morally culpable criminal conduct usually arises from a willful or blameworthy disregard for the law. Where a defendant has committed a criminal act, but is not morally culpable, a variety of legal devices exist with which he can prove his innocence. Excusing such individuals presents no risk to society precisely because they are not morally deviant and can, therefore, be expected not to disregard the law.

Where a defendant comes from a foreign culture, however, moral innocence may not be an assurance of future conformity. A person who neither knows or could reasonably be expected to know the minimum standards of conduct in the adjudicating society may be morally innocent when intentionally committing a wrongful act, but may also lack the capacity to make his behavior conform. Courts and legislatures, mindful of the dangers that may result, have tended to overlook a defendant's state of mind in finding him criminally liable for conduct which was normative in the defendant's culture.

The consequences, however, have often been troubling and various strategies have been tried to mitigate the possible injustice. These have included legislative attempts to accommodate indigenous practices, exercises of judicial discretion to mold the law more closely to the unusual circumstances presented by these cases, and frequent use of executive clemency to prevent injustice against unwitting defendants.

None of these actions, however, have afforded a comprehensive scheme for reintegrating the defendant's mental state into the determination of his guilt or innocence. At the core of the conceptual problem that legislatures and courts have faced is the insistence that ignorance of the law is not an excuse for criminal activity and is itself morally culpable. The concluding portion of this note will examine the extent to which this maxim is, in fact, true, and its applicability to the circumstances under review.

Despite the common perception that knowledge of the law is irrebuttably presumed, in the last century there has developed a variety of exceptions to the rule.\textsuperscript{158} Considerations of justice seem to have figured prominently in these changes.\textsuperscript{159} For example, where a defendant has had no realistic opportunity to know of a law's passage due to incomplete or improper publication, courts have, in some cases, acquitted the defendant.\textsuperscript{160} Currently, at least seven U.S. jurisdictions have some kind of defense arising from these or similar circumstances.\textsuperscript{161} The New Jersey statute, for example, states that:

\textsuperscript{158} Perkins, Ignorance and Mistake in Criminal Law, 88 U. Pa. L. Rev. 35, 36 (1939); Hall and Seligman, supra note 28, at 642.

\textsuperscript{159} See Cotton Planter Case, 6 F. Cas. 620, 620–22 (1810) (A law promulgated before a ship left port, which placed an embargo on all ships and vessels in the ports and harbors of the United States, was held unenforceable against the defendant. The reasoning for the holding was that, given the facts, the defendant neither had nor could have had notice of the law before the ship sailed.).

\textsuperscript{160} Id.; but see Hall and Seligman, supra note 28, at 656–58.

\textsuperscript{161} These jurisdictions include Guam, Kansas, Missouri, Montana and New Jersey. Robinson, 2 Criminal Law Defenses, supra note 25, at 381.
(c) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

(3) The actor . . . diligently pursues all means available to ascertain the meaning and application of the offenses to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances in which a law abiding and prudent person would also so conclude. 162

Similarly, where an individual relies on an official misstatement of the law and receives an erroneous interpretation, his ignorance is usually excusable. 163 At least eighteen U.S. jurisdictions recognize this principle in some form. 164 Exceptions to the general rule, that ignorance is no excuse, look to the defendant's culpability for his ignorance.

The development of these exceptions follows the precedent set by some European legal systems, which had been influenced by canon law. In these systems a distinction has existed between culpable and non-culpable ignorance of the law. 165 Culpable ignorance has been termed vincible and arises where one practicing ordinary diligence would have had the necessary knowledge. 166 Non-culpable ignorance, on the other hand, reflected the defendant's incapacity to acquire the necessary information. 167 The new German Penal Code is an example of a statute which makes this distinction. 168

One of the arguments against admitting such a distinction is that defendants will try to escape criminal sanction by pleading ignorance of the law. Such abuses can be avoided by placing the burden of production and persuasion in proving this ignorance on the defendant. The difficulty in sustaining this burden would curtail abuses, while allowing the morally blameless to prove their special circumstances. 169

Aliens confronted with legal standards they did not or could not have known about might then be able to have a defense in law without the corresponding risk of encouraging ignorance of the law. The following consideration might guide an evaluation of an alien defendant's culpability for her ignorance.

1) Was the defendant's lack of familiarity with a particular law or the ethics of the common man reasonable in light of their cultural origins, the length of time in the United States or a similar culture, and the communal environment they have lived in since coming to America?

2) If the answer to the first question is yes, was the defendant's conduct reasonable in light of the values of his culture of origin?

The first question provides the defendant with a basis for asserting an excuse for his lack of familiarity with the law. The second question insures that the excuse is in fact justified by the defendant's lack of moral culpability.

The advantages of this formula are twofold. First, it insures that a defendant has a means for rebutting the presumption that he had the mens rea for an act. This protects

163 Robinson, 2 CRIMINAL LAW DEFENSES supra note 25, at 377-78.
165 Hall, Ignorance and Mistake in Criminal Law, supra note 23, at 8.
167 Hall, Ignorance and Mistake in Criminal Law, supra note 23, at 8.
168 Arzt, supra note 166, at 650-51.
169 Robinson, 2 CRIMINAL LAW DEFENSES supra note 25, at 378-79.
people from being convicted of a crime without a reasonable assessment of their culpability for the act. Second, it requires that the defendant prove his incapacity to know that he had committed a crime. The difficulty in proving this fact will have the corresponding effect of preventing this defense from becoming a general loophole for immigrants with criminal predilections. This, in turn, can insure that the public safety is protected.

In other words, this defense is designed to discover the truly innocent without compromising the law’s capacity to deter criminal behavior in the population at large. Such a solution would enable the courts to maintain the delicate balance between the moral dictates of the criminal justice system and the need to uphold laws which sustain the social fabric.

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