

Māori Self-Determination and the Pākehā Criminal Justice Process:

The Missing Link

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Since 1860 the British Crown has imposed a process on Māori to resolve criminal disputes involving Māori. In recent years, the process has undergone reform, with attempts to “indigenise” it through initiatives such as Family Group Conferences. However, as highlighted by one recent case (R v Rawiri) the status quo is not working for Māori. This paper argues that under the Treaty of Waitangi and international law, Māori have a right to a degree of self-determination and authority over a criminal justice process for Māori. Rawiri also highlights a problem: Māori criminal justice today is not as straightforward as it might once have been. Māori, for the

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most part, live a life intertwined with Pākehā. The assimilationist policies of former years cannot be undone. The solution is not necessarily a complete parallel justice system. Instead, an appropriate gate must be installed to consider who should be dealt with in which stream: the Pākehā legal process or a Māori alternative. This paper argues that a culturally based defence should be used as the drafting gate to determine to which stream an accused should be allocated when charges are brought before the common courts and that an independent tribunal should determine the outcome.

I Introduction

There have been numerous cases before the New Zealand courts in recent times where attempts have been made to impugn the jurisdiction of the courts over Māori.¹ A similar paradigm also exists: Māori calls for traditional justice. The contemporary official response to such calls has not, for the most part,² been positive and appears to have classified any alternative system for Māori as “absolutely intolerable” and “unworkably bizarre”.³ Yet, tikanga Māori⁴ has survived the imposition of Pākehā⁵ law.⁶ Accordingly, Māori processes of dispute resolution also endure.⁷ It is shown time and time again that the current New Zealand legal system operates in a culturally biased manner and

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- 1 *Berkett v. Tauranga District Court* [1992] 3 N.Z.L.R. 206 (H.C.); *R v. Clarke* CA348/97, 28 February 1998; *Warren v. Police* HC Hamilton AP133/99, 9 February 2000; *R v. Miru* CA56/01, 26 July 2001; *R v. McKinnon* (2004) 20 C.R.N.Z. 709 (H.C.); *Kohu v. Police* (1989) 5 C.R.N.Z. 194 (H.C.); *R v. Pairama* (1995) 13 C.R.N.Z. 496 (H.C.); *R v. Waetford* CA406/99, 2 December 1999; *Barrett v. Police* HC Hamilton CRI-2003-419-64, 14 June 2004; *R v. Mitchell* CA68/04, 23 August 2004; *Wall v. Police* HC Rotorua CRI-2007-069-1274, 6 August 2008; *Morunga v. Police* HC Auckland CRI-2004-404-8, 16 March 2004; *Hake v. Police* HC Rotorua AP53/01, 23 May 2003; *Hohana v. Police* HC Rotorua CIV-2009-463-334, 12 November 2009.
 - 2 Contrast the statement of Doug Graham in the *Dominion* of 18 May 1995, quoted in Juan Marcellus Tauri, “Indigenous Justice or Popular Justice? Issues in the Development of a Maori Criminal Justice System” in Paul Spoonley et al., eds., *Nga Patai: Racism and Ethnic Relations in Aotearoa/New Zealand* (Palmerston North: The Dunmore Press, 1996) at 204-205.
 - 3 Moana Jackson, “Justice and Political Power: Reasserting Maori Legal Processes” in Kayleen M Hazlehurst, ed., *Perceptions of Justice: Issues In Indigenous and Community Empowerment* (Averbury: Aldershot, 1995) 243, 260 [“Justice and Political Power”].
 - 4 Tikanga is often translated as “protocol” or “custom” but more broadly can be translated to mean “the right way to act”. Therefore, Tikanga Māori can be translated as Māori custom.
 - 5 The Māori term to identify New Zealanders from European descent.
 - 6 Atareta Poananga, “Towards a Ngati Porou Justice System” in *Maori And Criminal Justice: Ten Years On, 1988-1998: Conference Held On Wednesday 15-17 July 1998 At The Victoria University Law School in Te Whanganui-a-Tara* (Wellington: Conference Committee, 1998) 109 at 115.
 - 7 Gerry Johnstone, *A Restorative Justice Reader: Texts, Sources, Context* (Devon: Willian Publishing, 2003) at 154; see also Te Puni Kōkiri *Māori Designed, Developed and Delivered Initiatives to Reduce Māori Offending and Re-Offending* (Wellington: Te Puni Kōkiri, 2011).

only reflects the interests of Pākehā.⁸ In 2009 one high-profile case appeared before the High Court highlighting the inability and inappropriateness of one criminal justice process for all in New Zealanders: *R. v. Rawiri*.⁹ *Rawiri* was the sentencing decision of Simon France J which followed the conviction of five Māori family members for the manslaughter of their niece, Janet Moses. The five believed that Janet was under the influence of a *mākutu*—sometimes referred to as a Māori curse. In order to rid Janet of the *mākutu* the five, along with several others, collectively restrained Janet and poured water into her mouth over the course of several hours. Janet subsequently died by drowning. The evidence showed that the family generally tried to live according to *tikanga* Māori. However, it was accepted that while the family did the right thing within *tikanga* Māori by consulting a *tohunga* as to how to help Janet,¹⁰ they departed from that advice. The method used by the family to rid Janet of the *mākutu* was invented by them at the time, according to their conception of what was right—their *tikanga*. That method was not accepted practice under *tikanga* Māori.¹¹ None of the five were sentenced to a custodial sentence, instead each received differing community-based sentences depending on their level of culpability and four of the convicted were required to undertake a Department of Corrections “*Tikanga Maori*” programme.

As shown by *Rawiri*, and indeed other recent cases where such issues have arisen,¹² there are many Māori whose cultural practices have survived the Pākehā acculturation policies of the mid-twentieth century. In fact, throughout the colonised world where acculturation has occurred cultural institutions have remained.¹³ One option posited by many for reform is to provide Māori with self-determination over a criminal justice process.¹⁴ However, any such process would have to maintain some connection to the Pākehā process.¹⁵ Further, there is a real issue in identifying who can take part in a Māori justice

8 See generally Stephen Pritchard, “Between Justice and Law in Aotearoa New Zealand: Two Case Studies” (2000) 11 *Law and Critique* 267.

9 HC Wellington CRI-2007-032-5294, 14 August 2009.

10 *Ibid* at ¶50. A *tohunga* is one who is an expert in a particular area. In this case, the *tohunga* was a spiritual *tohunga*.

11 *Ibid* at ¶90; see also Rebecca Palmer, “The Devil’s in the Detail: The Power to Help Janet: Getting Rid of Demons” *Dominion Post*, Wellington (15 June 2009) A4.

12 *Clarke v. Takamore* [2010] 2 N.Z.L.R. 525 (H.C.) which has since been appealed to the Court of Appeal which decision was still reserved at the time of writing; *Warren v. Police* HC Hamilton AP133/99, 9 February 2000; *Knowles v. Police* HC Hamilton A123/97, 27 February 1998; *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641 (C.A.).

13 Jan Van Broeck, “Cultural Defence and Culturally Motivated Crimes” (2001) 9 *European Journal of Crime, Criminal Law and Criminal Justice* 1 at 12.

14 Tauri *supra* note 2; Juan Tauri and Allison Morris, “Re-Forming Justice: The Potential of Maori Processes” (1997) 30 *Australian and New Zealand Journal of Criminology* 149; Moana Jackson, *The Maori and the Criminal Justice System: A New Perspective He whaipanga hou* (Wellington: Department of Justice, 1987).

15 Tauri *supra* note 2 at 212.

process and who cannot.¹⁶ Indeed, as shown by *Rawiri*, Māori may think that they are operating according to Māori culture when they are not. One purpose of the criminal law and its coercive component is to prevent deviation from society's norms¹⁷ and to regulate behaviour by teaching the "offender" that what he or she did is forbidden because it is morally wrong.¹⁸ In order for Māori to have true self-determination this paper argues that Māori must have self-determination over not only those who act according to tikanga Māori but also those who *incorrectly* manifest Māori culture.

In order to engage an alternative process there must be a functioning screening method, a drafting gate, to be employed to discern those who should be properly dealt with under the Māori or Pākehā processes. One method used by the criminal law to undertake such a screening process is by way of a defence.

The aim of this paper is to propose such a drafting gate and provide a way in which Māori institutions may be utilised to resolve criminal disputes upon the presentation of an offender to court, while recognising the reluctance of the State to fully cut the knot. Part I discusses the proposed gateway between the mainstream criminal justice process and a criminal justice process over which Māori have self-determination. In so doing, it first outlines its justifications in the Treaty of Waitangi, the document which many New Zealanders regard as our founding document in which the British Crown purported to obtain sovereignty over New Zealand, and international law and then turns to the general notion of a culturally based defence and goes on to argue for its extension to an Indigenous population. Part II discusses the extent of that gateway and argues that the extent to which a person may fit under the confines of that defence is limited by the extent to which Māori are justified in having self-determination over a criminal justice process. In particular, Part II argues that the defence ought to extend to a situation as in *Rawiri* where the "offenders" transgressed Pākehā law and tikinga Māori but the offenders were *seeking* to manifest, and live their life according to, tikanga Māori. Part II concludes by applying the proposed defence to the situation before the Court in *Rawiri* where the defence's practicalities will be highlighted.

16 *Ibid* at 214.

17 Geoffrey Marshall, "Conceptions of Law" in Mary Hawkesworth and Maurice Kogan, eds., *Encyclopedia of Government and Politics: Volume One* (2nd ed., London: Routledge, 2003) 67 at 68; David Ormerod *Smith and Hogan Criminal Law*, 12th ed., (Oxford: Oxford University Press, 2008) at 13.

18 Jean Hampton, "The Moral Education Theory of Punishment" (2984) *Philosophy and Public Affairs* 13(3) 208 at 212; Herbert Morris, "A Paternalistic Theory of Punishment" (1981) *American Philosophical Quarterly* 18(4) 263; Robert Nozick, *Philosophical Explanations* (Cambridge: Harvard University Press, 1981) at 363; Russ Shafer-Landau, "Can Punishment Morally Educate" (1991) *Law and Philosophy* 10(2) 189; Vernon L Quinsey et al., "Behaviour Alteration and the Criminal Law (1986) *Canadian Psychology* 28(1) 85.

II The Gateway

In order to transfer consideration of an individual's conduct from the Pākehā process to one over which Māori have authority, the gateway ought to depend on the culture of the individual. The culture of the offender should be the focal point for two reasons. First, the tenor of the arguments based on the Treaty of Waitangi (the Treaty) and international law which provide for self-determination argue for a group of people, based in a common culture, to have control of their common destiny. Second, it is because Pākehā law fails to recognise that the "law" of Māori society, and indeed any society,¹⁹ is intertwined with culture that Pākehā law lacks legitimacy to Māori. A defence focussed on the culture of an offender is not novel to the criminal law in common law nations. In several jurisdictions a culturally based defence is recognised. Therefore, that defence is a useful starting point. Before turning to that starting point, in order to provide the context in which these arguments sit for a culturally based defence in New Zealand, this paper will first outline the justifications for self-determination arising out of the Treaty and international law.

The Treaty

There are two main sources of a right for Māori to self-determination in New Zealand: the Treaty and international law. The Treaty was signed in 1840 between representatives of the British Crown and individual Māori iwi (tribes). It is now commonly interpreted to have created a partnership between the Crown and Māori which allowed colonisation of New Zealand. New Zealand's Chief Justice, the Right Honourable Dame Sian Elias, has argued that we need to re-discover our "constitutional fundamentals" in order to re-justify the law.²⁰ One of those fundamentals is a compact at international law²¹ to which New Zealand is a signatory: the Treaty.²²

19 Guido Calabresi, *Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem* (Syracuse: Syracuse University Press, 1985) at 57.

20 Rt. Hon Dame Sian Elias, "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (Speech to the Institute for Comparative and International Law, Melbourne, 19 March 2003) at 3, online: <http://www.courtsofnz.govt.nz/speechpapers/speech19-03-2003.pdf>

21 Benedict Kingsbury, "The Treaty of Waitangi: Some International Law Aspects" in Kawharu, ed., *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 121 at 121-126; see contrary J.G.A. Pocock, "Waitangi as Mystery of State" in Duncan Ivison, Paul Patton and Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 25 at 26; see also *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641 (C.A.) at 655 per Cooke P.

22 *New Zealand Maori Council v. Attorney-General* [1994] 1 N.Z.L.R. 513, 5xx (P.C.) per Lord Woolf.; see also Cabinet Office *Cabinet Manual 2001* (2001, Wellington) 2; *Te Runanga o Wharekauri Rekohu Inc v. Attorney-General* [1993] 2 N.Z.L.R. 301 (C.A.) at 308-309 per Cooke P.; Tariana Turia, "Opening of Parliament, 1 February 2005, Response to the Prime Minister's Statement to Parliament" (2 February 2005) 623 N.Z.P.D. at 18160.

Some who subscribe to the doctrine of *rebus sic stantibus* argue that the Treaty (and treaties in general) is “not required to survive all the changes that time has wrought”.²³ Therefore, the change in circumstances within New Zealand over the past 170 years requires “wholesale denunciation or abandonment” of the Treaty.²⁴ As such, any injustice caused to Māori in the past is now (ex-post facto) justified.²⁵ Yet, the Treaty was seen to be perpetually binding by the Crown when signed,²⁶ and indeed, the Crown today still sees the Treaty as binding.²⁷ Further, not only has Parliament placed references to the Treaty in legislation,²⁸ but many organisations also now seek to honour “their” Treaty obligations.²⁹ Therefore, the changes that time has wrought *reinforce* the applicability of the Treaty in modern times.

Others assert that the Treaty does not apply to urban Māori.³⁰ However, care must be taken to acknowledge the changing nature of social groups. While these groups have changed in their organisational makeup, they have generally preserved their identity as Māori.³¹ Therefore, the Treaty ought to still apply to them. Alternatively, if urban Māori have changed in makeup to such an extent that *rebus sic stantibus* renders them unable to gain the benefits of the Treaty, there is a strong argument for the fact that this social change only came about due to a breach of the rights guaranteed to Māori under article II of the Treaty through coercive acculturation.³² Under Article 62(2) of the *Vienna Convention on the Interpretation of Treaties*, where one party

23 Jeremy Waldron, “F.W. Guest Memorial Lecture: August 22nd, 2005: The Half-Life of Treaties: Waitangi, Rebus Sic Stantibus” (2006) 11(2) Otago Law Review 161, 176.

24 *Ibid.*, 167.

25 *Ibid.*, 163.

26 As the British belief in the nineteenth century was that all treaties are binding perpetually: Lord McNair, *The Law of Treaties* (Oxford: Oxford University Press, 1961) 493-501; Tom Bennion, “Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi” (2004) 35 VUWLR 165, 201. See, for example, the statement of the Hon Frederick Whitaker, the then Attorney-General in justifying the New Zealand Settlements Bill 1863 where he said at (16 November 1863) N.Z.P.D. 869 that the Bill was justified as the Crown was now discharged of its obligations under the Treaty due to Māori violation of their obligations.

27 Hon. Michael Cullen, “The Meaning of the Treaty of Waitangi” (Speech at the Cathedral of St John, Napier, 2 February 2005).

28 For example, the *Education Act 1989* (N.Z.) BRS29 (s. 162(4)(b)(iv)) and the *Resource Management Act 1991* (N.Z.) BRS20.

29 For example, New Zealand universities such as Victoria University of Wellington and University of Canterbury reserve 10 spaces for students of Māori descent who would otherwise not qualify for entry to second-year law.

30 Waldron, *supra* note 23, 176; Kenneth Minogue, *Waitangi, Morality and Reality* (Wellington: New Zealand Business Roundtable, 1998) 11.

31 Waldron, *supra* note 23, 176; Jeremy Waldron, “Redressing Historical Injustice” (2002) 52 University of Toronto Law Journal 135, 148-150.

32 Khylee Quince, “Māori and the Criminal Justice System in New Zealand” in J. Tolmie and W. Brookbanks, eds., *The New Zealand Criminal Justice System* (Auckland: LexisNexis, 2007) at para 12.1; see also Tariana Turia (Speech to the New Zealand Psychological Society Conference, Hamilton, 29 August, 2000).

breaches its obligations under the treaty while that treaty is in force, the effect of the doctrine of *rebus sic stantibus* is limited on that treaty. Therefore, the effect of the Treaty cannot be so limited.

Accordingly, the Treaty is the basis on which the supposition of British sovereignty over New Zealand exists,³³ thereby giving legitimacy to the imposition of the Pākehā legal system. The quid pro quo for the renouncement of sovereignty³⁴ on the part of Māori was an obligation on the Crown to *guarantee* the rights recognised in the Treaty for Māori.³⁵ If the rights under the Treaty were not maintained, the conditional transfer of sovereignty cannot be justified. One such right is self-determination over a criminal justice process.

Interpretations as to the meaning of words, in particular those relating to the accession of sovereignty or governance over New Zealand, have been upset by differences in terminology used in the different language versions. Misunderstandings in translation aside,³⁶ I consider that there are three key common strands that can be ascertained from both the Māori and English versions of the Treaty showing that Māori have a right to self-determination over a criminal justice process.

First, the Treaty implies the continuance of Māori culture, a subset of which is tikanga Māori. Coupled with article III, article II contains an implicit requirement that not only are Māori entitled to all the rights of citizens of New Zealand, but their culture and identity must be maintained. In order to maintain the culture's existence, Lord Woolf for the Privy Council advised in *New Zealand Maori Council v. Attorney-General* that the Crown must take steps to protect vulnerable taonga.³⁷ The indicium of whether Crown action is required is whether that taonga is in a "vulnerable state", such as the Māori language was (and arguably still is³⁸) in *New Zealand Maori Council v. Attorney-General*.³⁹ In that case, the Court stated that the Māori language was in a "state of decline" and was in danger of not surviving as a living language.⁴⁰

33 Sian Elias, "The Treaty of Waitangi and Separation of Powers in New Zealand" in B.D. Gray and R.B. McClintock, eds., *Courts and Policy: Checking the Balance* (Wellington: Brookers, 1995) 206, 206; see also F.M. Brookfield, "The New Zealand Constitution: The Search for Legitimacy" in Kawharu, ed., *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 1.

34 Although I note that under the Māori translation, Māori gave up kāwanatanga (governance) to the Crown, not "sovereignty" as such.

35 Elias, *supra* note 33, 213.

36 For a discussion on the difficulties which exist through errors in translation see generally Claudia Orange, *The Story of a Treaty* (Wellington: Allen & Unwin, 1989).

37 [1994] 1 NZLR 513 (NZPC). Article II of the Treaty guarantees Māori a form of self-determination over their taonga. Taonga can be loosely translated as "treasures".

38 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wellington: Waitangi Tribunal, 2011). See in particular chapter 5 *Te Reo Māori* 153-183.

39 *Supra* note 37 at 518.

40 *Ibid.*

Māori dispute resolution processes originate out of both tikanga Māori⁴¹ and mātauranga Māori (the knowledge base and ideas associated with a particular tikanga).⁴² Both mātauranga Māori⁴³ and tikanga Māori⁴⁴ are considered to be a taonga. Thus, Māori dispute resolution processes are also a taonga. Māori dispute resolution processes are in a vulnerable state.⁴⁵ Since the imposition of Pākehā law, Māori have been dually accountable under two systems. The Pākehā system has now all but won out. Further, it is evident that the current criminal justice process cannot effectively consider the cultural aspects of the individual offender, particularly with regard to the informal, discretionary aspects of the criminal justice process. I identify five key stages when consideration of culture could occur:⁴⁶ first, the police decision to direct resources,⁴⁷ investigate, arrest and charge; second, the Crown's prosecutorial decision to continue, what charge to prosecute for and how to conduct the case; third, the judge or jury's decision to convict; fourth, judicial discretion at sentencing; and fifth, the Department of Corrections' management of the accused while carrying out the sentence.

Positive steps have been undertaken to make the courts more relevant to Māori in stages three and four. These steps have included providing staff training in Māori culture, making interpreters available and "indigenising" aspects of the current process via initiatives such as Family Group Conferencing. As was done in *Rawiri*, via section 27 of the *Sentencing Act 2002*, the court *may* also take cultural factors into account when considering the sentence to be handed down.⁴⁸ The cultural background of an offender can be considered in several ways. For example, the way in which the offender's background may have related to the commission of the offence,⁴⁹ or how the offender's background may be relevant to help prevent further offending⁵⁰

41 Khylee Quince, "Maori Disputes and Their Resolution" in Peter Spiller, ed., *Dispute Resolution in New Zealand* (2nd ed.) (Melbourne: Oxford University Press, 2007) 256 at 269.

42 Hirini Moko Mead, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 8.

43 David Williams, *Mauritanga Maori and Taonga: The Nature and Extent of Treaty Rights Held by Iwi and Hapu in Indigenous Flora and Fauna, Cultural Heritage Objects, Valued Traditional Knowledge* (Wellington: Waitangi Tribunal Publication 2001) at 25; Waitangi Tribunal, *The Reo Maori Report—Wai 111* (Wellington: GP Publications, 1986).

44 Waitangi Tribunal, *The Reo Maori Report—Wai 111* (Wellington: GP Publications, 1986).

45 Quince *supra* note 41 at 271.

46 "The Cultural Defense in the Criminal Law", *infra* note 117 at 1297-1298; one could also include the way in which the various processes are managed, for example the way in which Child, Young Persons and their Families Services manages Family Group Conferences.

47 See Quince, *supra* note 32, para 12.3.2 for a discussion on the feeling by Māori that they are over-policed; Juan Tauri, "Indigenous perspectives and experiences: Maori and the criminal justice system" in Reece Walters and Trevor Bradley, eds., *Introduction to Criminological Thought* (North Shore: Pearson Education, 2005) at 131-132.

48 *Rawiri*, *supra* note 9 at ¶91-¶93.

49 *Sentencing Act 2002* (N.Z.) BRS27, s 27(1)(a).

50 *Ibid.*, s 27(1)(d).

may influence the adoption of one sentence over another.⁵¹ At least on one occasion, the section has led to a very considered analysis of the cultural ramifications of offending (e.g., whakaama—shaming).⁵² Further, with regard to the fifth stage, within the Department of Corrections much has been done to create programs to connect Māori offenders to Māori culture in order to effect positive change such as tikanga Māori programmes, Māori therapeutic programmes and undertaking specialist Māori cultural assessment.⁵³ Despite these positive steps, although their positive effect must be considered realistically as no tangible figures have yet to be forthcoming,⁵⁴ the negative aspects of the current process outweigh them.

For example, with regard to s. 27 of the *Sentencing Act 2002*, while its predecessor was introduced as a measure to combat the inflexible approach of the courts of New Zealand to adhere to Anglo-Saxon traditions of justice and recognising the disproportionately high rate of Māori imprisonment,⁵⁵ it appears that the section is underutilised. Fundamentally, institutional racism still permeates through the criminal justice process, particularly within the New Zealand Police.⁵⁶ While attempts have been made to rectify this racism,⁵⁷ it is doubtful whether these measures have filtered down to those on the front line.⁵⁸ Further, all of these stages depend on the education of the individual and their personal beliefs.⁵⁹ While modern education does lead to heightened cultural awareness, there is still a large feeling of animosity towards Māori in the wider community.⁶⁰ The Supreme Court of Canada has held that animosity

51 *Ibid.*, s 27(1)(e).

52 *R v. Huata* DC Auckland CRI-2003-041-5606, 30 September 2005.

53 See generally Department of Corrections, *Māori Strategic Plan: 2008-2013* (Wellington: Department of Corrections, 2008); G McFarlane-Nathan, *FReMO Framework for Reducing Maori Offending* (Department of Corrections, Wellington, 1999); contrast Dannelle Marie, “Maori Criminal Offending: A Critical Appraisal” (2010) 43(2) *The Australian and New Zealand Journal of Criminology* 282.

54 See Department of Corrections, *Māori Strategic Plan: 2008-2013* (Wellington: Department of Corrections, 2008) where at 12, the plan states that “Evidence emerging from effectiveness evaluations shows that [the Māori world] approach strengthens the cultural identity of Māori offenders, improves their attitudes and behaviours and motivates them to participate in rehabilitation”.

55 *Wells v. Police* [1987] 2 N.Z.L.R. 560 (H.C.) at 570.

56 Gabrielle Maxwell and Catherine Smith, *Police Perceptions of Maori: A Report to the New Zealand Police and the Ministry of Maori Development: Te Puni Kokiri* (Wellington: Institute of Criminology Victoria University of Wellington, 1998) at 12.

57 New Zealand Police, *A Practical Reference to Religious Diversity* (Wellington: New Zealand Police, 2005).

58 Maxwell and Smith, *supra* note 56 at 12.

59 Paul J Magnarella, *Justice in a Culturally Pluralistic Society: The Cultural Defense on Trial* (1991) 19(3) *The Journal of Ethnic Studies* 65 at 76; see generally Alan W Schefflin, “Jury Nullification: The Right to Say No” (1972) 45 *South California Law Review* 168, for a discussion on a juror’s inherent ability to dismiss the instructions of a judge and reach a verdict of acquittal based upon their own conscience.

60 See for example the various opinions expressed in Carol Archie, *Maori Sovereignty: The Pakeha Perspective* (Auckland: Hodder Moa Beckett, 1995); Trevor Mallard, *It Would Have Been Prison*

toward a minority group from the average citizen may affect the impartiality of jurors.⁶¹ This is problematic when empirical research has suggested that in the early 1990s Crown counsel were twice as likely to use their challenges in jury selection against Māori as non-Māori in the High Court, and three times as likely in the District Court.⁶² Lawyers and police have a broad discretion with regard to how a person is prosecuted⁶³ as there is no current law requiring the prosecution to continue to prosecute through the formal process in the District Courts.⁶⁴ The present adult diversion system is evidence of this discretion.⁶⁵ Therefore, the prosecution could lawfully divert the consideration of a Māori accused to that person's whānau (extended family), hapū (sub-tribe) or iwi (tribe).⁶⁶ However, from the writer's experience, New Zealand legal education does not include a great deal of scope for the appreciation and understanding of patterns of behaviour or alternative dispute resolution processes associated with persons of different ethnicities.

The programmes initiated by Corrections are also not without issue. In a recent paper, Dr. Dannette Marie challenges the approach of Corrections in attempting to re-establish the culture of a person who is of Māori descent's (i.e., ethnically Māori).⁶⁷ Dr. Marie raises three main reasons why Corrections' approach, i.e., focussing on re-establishing an offender's cultural roots as a way to prevent future offending, is fraught.⁶⁸ With regard to the first and second points, she argues that Corrections' approach allows individuals to adopt a collective cultural identity at a personal level and that enables the offender to absolve him or herself of individual responsibility for his or her behaviour. For example, it allows an offender to blame their offending on past

If They Weren't Maori online: <<http://blog.labour.org.nz>>; "No Demon's Worse than Ignorance" *The Southland Times*, Invercargill (15 August 2009) A8; "Exorcism Death Reflects Lack of Cultural Understanding, Says Expert" *The New Zealand Herald* (15 August 2009) online: <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10590980>; Jesse Peach, "Maori Question Sentence Laid Down for Moses' Death" (15 August 2009) online: <<http://www.3news.co.nz/Maori-question-sentence-laid-down-for-Moses-death/tabid/423/articleID/116784/Default.aspx>>.

61 *R v. Williams* [1998] 1 S.C.R. 1128 (S.C.C.) at ¶21.

62 S Dunstan, J Paulin and K Atkinson. *Trial By Peers? The Composition of New Zealand Juries* (Wellington: Department of Justice, 1995) at 67.

63 See generally Bruce Jackson, *Law and Disorder: Criminal Justice in America* (Urbana: University of Illinois Press, 1984) at 138 on the importance of the prosecutor in the criminal justice system.

64 Michelle Mitchell, "Issues of Culture in the Adult Criminal Courts" (LLM Research Paper, Victoria University of Wellington, 1996) at 8.

65 See generally New Zealand Police, *Police Adult Diversion Scheme Policy* (Wellington: New Zealand Police, 2009) at 1.

66 See for example the approach of the Gisborne Youth Court which now has a Marae-based sitting in "The Marae Youth Monitoring Court" (2008) 39 *Court in the Act* 1.

67 Dannette Marie, "Maori and Criminal Offending: A Critical Appraisal" (2010) 43(2) *The Australian and New Zealand Journal of Criminology* 282.

68 *Ibid.*, 293-294.

wrongs, such as colonialism. Her third point is that applying this approach to an individual offender provides that individual with a heightened sense of entitlement. In other words, the system can be manipulated. Dr. Marie highlights that with the point that mere participation in such a programme would be construed as evidence that the individual is genuine about rehabilitation, when, in fact, such a programme may be mandatory or the offender does not engage with the programme in a significant manner.

The second strand asserting Māori rights to self-determination is that under both versions' article III of the Treaty, Māori are guaranteed all the rights and privileges of British subjects. Article III creates an obligation on the Crown to ensure that any advances given to Pākehā will correspondingly be given to Māori.⁶⁹ A law is, fundamentally, a codification of what society considers the correct behaviour to be in a given situation.⁷⁰ As described by H.L.A. Hart, the way in which law differs from mere habits is that laws involve an obligation (apart from, of course, those power-conferring rules such as those which specify how one is to make a contract),⁷¹ and in the case of the criminal law, coercion. Moreover, the law upholds a critical attitude toward deviation of those obligations by those who are subject to it by having a non-moral incentive: punishment.⁷² However, when a law does not achieve its aim—by communicating that critical attitude toward deviation and thus ensuring compliance with its edict—the law is ineffective. When a law is ineffective it lacks legitimacy.⁷³ When a law lacks legitimacy that law will lose its quality of obligation, for there will be nothing obliging a certain behaviour if the only thing preventing a person from undertaking an act is the positive affirmation of a law.

To some extent the statistics speak for themselves: the criminal law in New Zealand is ineffective in guiding Māori. Māori comprise 14.6 per cent of the New Zealand population.⁷⁴ Yet, 43 per cent of all convictions and 53

69 Denese Henare, "A Case Study: Health Care" in Alison Quentin-Baxter, ed., *Recognising The Rights Of Indigenous Peoples* (Wellington: Institute of Policy Studies, 1998) at 119; see also *B v. Director-General of Social Welfare* HC Wellington AP71/96, 27 May 1997; Royal Commission on Social Policy, *The April Report*, Vol II, 1988.

70 See Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1968) 1.

71 H.L.A. Hart, "Punishment and the Elimination of Responsibility" in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (Oxford: Oxford University Press, 2008) 158; H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

72 Geoffrey Marshall, "Conceptions of Law" in Mary Hawkesworth and Maurice Kogan, eds., *Encyclopedia of Government and Politics: Volume One*, 2nd ed. (London: Routledge, 2003) 67 at 68.

73 Charlotte Williams, *The Too-Hard Basket: Maori and Criminal Justice Since 1980* (Wellington: Milne Print Ltd., 2001) at 115.

74 Statistics New Zealand, *2006 Census of Population and Dwellings* (Wellington: Statistics New Zealand, 2007).

per cent of all those sentenced to a custodial sentence are Māori.⁷⁵ While there are many others, this paper offers two key explanations for this level of Māori criminality.⁷⁶

The first explanation for Māori criminality is that the criminal justice process, in its current form, is unable to “speak to” Māori. In order for a punishment (in the form of a sentence) to achieve its aim, the process and the offender must “speak the same language”.⁷⁷ That language must be one which the accused can “reasonably be expected to understand and speak for herself as a language of public values that are or could be her own”.⁷⁸ If the law takes no account of an offender’s background it cannot be said to communicate to that offender, for the offender and the process are not speaking Tikanga Māori is the embodiment of Māori values.⁷⁹ As such, its focus is, among other things, on the group as opposed to the individual. Further, under the Māori world view the motives for offending have to be addressed in order to resolve an issue and restore the balance.⁸⁰ Both of those concepts are foreign to the Pākehā process. While there is some scope for the judicial officer dealing with an offender to take into account the offender’s personal, family, whānau, community and cultural background in imposing a sentence,⁸¹ fairness to that individual must be incorporated into the sentence in order to remove any issues of discrimination or differential treatment.⁸² Pākehā processes such as criminalisation and

75 Ministry of Justice, *Conviction and Sentencing of Offenders in New Zealand: 1997 to 2006* (Wellington: Ministry of Justice, 2008) at 104; see also Quince, *supra* note 32, para 12.5 ; Moana Jackson, *The Maori and the Criminal Justice System: A New Perspective He Whaipaanga Hou* (Wellington: Department of Justice, 1987).

76 There are many other explanations for Māori criminality which are beyond the scope of this paper. See generally for a discussion on the use of culture to explain high crime rates David M. Fergusson, J. John Horwood and Nicola Swain-Campbell, “Ethnicity and Criminal Convictions: Results of a 21-Year Longitudinal Study” (2003) 36 ANZJC 354; Van Broeck, *supra* note 13, at 20; Richard Hill, “Māori, Police and Coercion in New Zealand History” in Danny Keenan, ed., *Terror In Our Midst? Searching For Terror in Aotearoa New Zealand* (Wellington: Huia, 2008) 39 at 41; Dannette Marie, “Maori and Criminal Offending: A Critical Appraisal” (2010) 43(2) *The Australian and New Zealand Journal of Criminology* 282 at 282; Moana Jackson, *The Maori and the Criminal Justice System: A New Perspective He whaipaanga hou* (Wellington: Department of Justice, 1987) at 57; Dannette Marie, “Maori and Criminal Offending: A Critical Appraisal” (2010) 43(2) *Australian and New Zealand Journal of Criminology* 282.

77 See generally Jerome Hall, “Justice in the 20th Century” (1971) *California Law Review* 752 at 753; Martin R. Gardner “The Renaissance of Retribution—An Examination of Doing Justice” (1976) *Wisconsin Law Review* 781 at 782.

78 D.A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2003) at 193.

79 J.V. Williams, *Paper to mai i te ata haapara—A Conference on the Principles, Influence and Relevance of Tikanga Maori* (Speech to the Mai I te ata haapara, 13 August 2000) at 3.

80 See generally Ministry of Justice, *He Hinātore ki te Ao Māori: A Glimpse into the Māori World* (Wellington: Ministry of Justice, 2001) at 126-129.

81 *Sentencing Act 2002*, (N.Z.) BRS27 s 8(i).

82 Barbara A. Husdon, “Doing Justice to Difference” in Andrew Ashworth and Martin Wasik, eds., *Fundamentals of Sentencing Theory* (Oxford: Clarendon Press, 1998) 243 at 239.

sentencing are therefore focused on the individual offender. Over the past twenty years, through a process of “indigenisation” (which has been limited to restorative justice initiatives), the criminal justice process has attempted to be more reflective of the Māori culture by becoming restorative and focusing on underlying motivations for offending through the use of initiatives such as Family Group Conferences. However, the criminal justice process, both structurally and operationally, was created with little input from Māori. Thus, the process as a whole still fails to “speak to” Māori.

The second explanation for Māori criminality is that the current criminal justice process lacks the mana (respect) of Māori. The criminal law has been used over the past 160 years, at times intentionally and more recently inadvertently, to suppress and oppress Māori.⁸³ Most laws enacted dealt with land, which was the economic and spiritual base for Māori society. The *Native Lands Act 1862* individualised Māori land title and the *New Zealand Settlements Act 1863* provided for confiscation in the North Island when the Governor was satisfied that any “considerable number” of a tribe was engaged in “rebellion”.⁸⁴ Other enactments, such as the *Maori Prisoners Act 1880*, removed basic civil liberties and allowed for imprisonment and the infliction of punishment of Māori without trial. Indeed, more laws still were proposed which were even more draconian. One such Bill, the *Native Offenders Bill 1856*, sought to enable the Governor to prevent communication and dealings, such as buying and selling any goods, with Māori who harboured individuals who offended against the law. In commenting on the Bill at its first reading, one Member said that it would be an offence to say tēnā koe (hello) to a Māori.⁸⁵ Thankfully the Bill was defeated on its third reading.⁸⁶ Still, laws are passed which directly oppress Māori, such as the *Foreshore and Seabed Act 2004*, which, in effect, reversed a decision of the Court of Appeal that Māori were entitled to seek customary title in the Maori Land Court over areas of New Zealand’s foreshore and seabed.⁸⁷ Even the recently enacted *Marine and Coastal Area (Takutai Moana) Act 2011*, which repeals that 2004 Act, still withholds full rights to recourse before the New Zealand courts for customary title over the foreshore and seabed. Thus, even though the later stages of the criminal justice process may consider culture, such as in sentencing or in the management of the offender by the Department of Corrections, the offender has already been labelled as a “criminal”.⁸⁸ That label comes from a

83 See Quince, *supra* note 32, para 12.5; “He Whaipaanga Hou”, *supra* note 76 at 44.

84 *New Zealand Settlements Act 1863* no 8, s 2. See *Marsh v Taranaki Education Board and Attorney-General* [1918] G.L.R. 122 (S.C.) for an example of the Act’s severe impact.

85 (12 July 1856) N.Z.P.D. 276.

86 (11 August 1856) N.Z.P.D. 353.

87 *Ngati Apa v Attorney-General* [2003] 3 N.Z.L.R. 643 (C.A.).

88 Nigel Walker, *Sentencing Theory, Law and Practice* (London: Butterworths, 1985) at 301.

law which is a British product. It has its foundations in protecting the property of the haves against the admiring eyes (and hands) of the have-nots.⁸⁹ While the law has come a long way in addressing this social imbalance, it has done little to address the cultural inequality that is a consequence of New Zealand's colonial past (or, indeed, its present).

The third strand is that there is a promise of continued authority for Māori under the Treaty.⁹⁰ Under both the Māori and English versions, the sovereignty ceded to the Crown was not absolute. Indeed, the British Government never intended for a legal code, foreign to the Māori way of life, to be imposed.⁹¹ At least, some residual authority was to remain with Māori under article II. Under the Māori text this was expressed as te tino rangatiratanga over their taonga. The use of that phrase would have conveyed to Māori that they retained “[authority] to control [their possessions] in accordance with their own customs and having regard to their own cultural preferences”.⁹² The English text of the Treaty guarantees Māori “full exclusive and undisturbed possession of their lands and estates forests fisheries and other properties which they may collectively or individually possess”. Those key differences between possession on the one hand and tino rangitiratanga/control on the other and taonga on the one hand and an exhaustive list of tangible property on the other are significant. Nevertheless, the English version has been interpreted by both the New Zealand judiciary⁹³ and the Waitangi Tribunal⁹⁴ to hold the same form of guarantee as that in the Māori text.

Indeed, the argument can be made that Māori never assigned their authority over dispute resolution issues. The Chiefs signatory to the Treaty transferred “all the rights and powers of sovereignty which the said Confederation of Individual Chiefs respectively exercise or possess, or may be supposed to exercise or possess over their respective territories as the sole sovereigns thereof”.⁹⁵ Within tikanga Māori the power to consider issues which fall in the Pākehā world to the realm of criminal justice is held collectively, as decisions were generally made through consensus.⁹⁶ It follows that Māori chiefs did

89 See generally Douglas Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Allen Lane, 1975) at 20-35.

90 Sian Elias, “The Treaty of Waitangi and Separation of Powers in New Zealand” in B.D. Gray and R.B. McLintock, eds., *Courts and Policy: Checking the Balance* (Wellington: Brookers, 1995) 206 at 209.

91 A.H. McLintock, *An Encyclopaedia of New Zealand: Volume 3* (Wellington: Government Print, 1966) at 528.

92 Waitangi Tribunal Motunui-Waitara: Wai-6 (Wellington: Brooker & Friend Ltd, 1983) at 51.

93 *Huakina Development Trust v Waikato Valley Authority* [1987] 1 N.Z.L.R. 188 (C.A.) at 206.

94 *Supra* note 89; Waitangi Tribunal Te Roroa Report: Wai 38 (Wellington: Brooker & Friend Ltd, 1992) at 26; Waitangi Tribunal Orakei Report: Wai 9 (Wellington: Brooker & Friend Ltd, 1987) at ¶11.11.4.

95 *Treaty of Waitangi*, Article I.

96 Quince, *supra* note 41 at 13.

not necessarily have any coercive power, per se, over individuals. Thus, what was transferred to the Crown was, at most, “territorial sovereignty”,⁹⁷ and some legitimate residual sovereignty still resides within the Māori collective in order to maintain authority over their people.

International Law

In addition to the Treaty, general international law also provides a source for Māori self-determination. Traditionally, human rights were primarily about recognising every person’s fundamental right to be treated with respect and dignity.⁹⁸ However, culminating in the *United Nations Declaration on the Rights of Indigenous Peoples*⁹⁹ (the Declaration) there appears to have been a change over the last twenty years to a recognition of group rights.¹⁰⁰ Thus, it is argued that the New Zealand government’s obligations at international law through the Declaration and customary international law compel it to act to recognise a degree of self-determination for Māori.

The Declaration was passed by the United Nations General Assembly on 13 September 2007. The non-binding declaration contains the international minimum standards for the respect, protection and fulfilment of Indigenous peoples’ rights.¹⁰¹ New Zealand, has now voted in favour of adopting the declaration, thus affirming the fact that New Zealand “has always supported the overall aspirations of the declaration”,¹⁰² one of these being self-determination. However, this changes little the New Zealand government’s obligations under international law, as it is said that no new rights were contained in the non-binding Declaration.¹⁰³ Many of the Declaration’s articles are taken from existing legally binding agreements, which New Zealand has ratified, such as the *International Covenant on Civil and Political Rights*,¹⁰⁴ the *International Covenant on Economic, Social and Cultural Rights*¹⁰⁵ and the *International Convention on the Elimination of all Forms of Racial Discrimination*.¹⁰⁶

97 Elias, *supra* note 87 at 213.

98 See *Universal Declaration of Human Rights*, GA Res. 217A(III), UNGAOR, (1948) Preamble.

99 Res. 295(LXI), UNGAOR, (2007).

100 Weona T. Singel, “New Directions For International Law and Indigenous People” (2008-2009) 45 *Idaho Law Review* 509 at 511.

101 *Supra* note 96, Article 43.

102 Hon. John Key, “National Govt to Support UN Rights Declaration” online: <www.behive.govt.nz> (20 April 2010).

103 Paul Oldham and Miriam Anne Frank, “‘We the Peoples...’ The United Nations Declaration on the Rights of Indigenous Peoples” (2008) *Anthropology Today* (24) 2 at 5-6.

104 19 December 1966, 999 U.N.T.S. 171, which New Zealand ratified on 28 December 1978.

105 16 December 1966, 993 U.N.T.S. 3, which New Zealand ratified on 28 December 1978.

106 U.N.G.A..Res. 2106(XX), (21 December 1965) which New Zealand ratified on 22 November 1972.

Therefore, it is a codification of the obligations that states already owe with regard to their Indigenous peoples under international law.¹⁰⁷

The Declaration therefore *affirms* rights such as: the right to self-determination of Indigenous peoples;¹⁰⁸ the right of Indigenous peoples not to be subjected to forced assimilation or destruction of their culture;¹⁰⁹ and, most significantly for this paper, the right of Indigenous peoples, under article 34, to develop their institutional structures and, in cases where they exist, juridical systems in accordance with international human rights standards.¹¹⁰ On one interpretation, because Māori no longer have a formal juridical system, one does not “exist” for the purposes of article 34. However, to construe article 34 in such a way would not be in accordance with the scheme of the Declaration, as shown by article 5, for example, which provides that Indigenous peoples have the right to maintain and strengthen their legal institutions, and article 34 which implies that juridical systems may well be informal and not be officially recognised.

While non-binding, the Declaration imposes a positive obligation on the government of New Zealand to assist in the creation and maintenance of a formal Māori justice process in order to ensure its existence as a legitimate form of dispute resolution in New Zealand. As such, instruments such as the Declaration should provide a conduit for the placement of a moral duty on the government of New Zealand.

A common argument against providing Māori with any degree of self-determination is that it is the first step toward a separatist nation.¹¹¹ The fallacy in this argument is that it conflates issues of self-determination over compartmentalised matters to a full sovereign government for Māori.¹¹² The former is no more than what was guaranteed under the Treaty. The British Government never intended for a legal code, foreign to the Māori way of life, to be imposed.¹¹³ Moreover, Māori already have a degree of self-determination over several aspects of life, such as in fisheries and education. This move-

107 Such as the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, which New Zealand ratified on 28 December 1978; the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, which New Zealand ratified on 28 December 1978; and the *International Convention on the Elimination of all Forms of Racial Discrimination*, UNGA Res. 2106 (XX) (21 December 1965) which New Zealand ratified on 22 November 1972.

108 *Supra* note 96, Article 3.

109 *Ibid.* Article 8(1).

110 *Ibid.* Article 34.

111 Barbara Hocking, ed., *Unfinished Constitutional Business?: Rethinking Indigenous Self-Determination* (Canberra: Aboriginal Studies Press, 2005) at 2.

112 See generally Geoffrey Palmer, “Where to From Here?” in Geoff McLay, ed., *Treaty Settlements: The Unfinished Business* (Wellington: VUWLR and NZ Institute of Advanced Legal Studies, 1995) 151.

113 A.H. McLintock, *An Encyclopaedia of New Zealand: Volume 3* (Wellington: Government Print, 1966) 528.

ment towards self-determination for Māori recognises that diversity is not socially divisive,¹¹⁴ but rather attempting to impose a homogenous “society” on all New Zealanders is. To empower Māori allows partnership, to achieve the goals sought after under the rubric of criminal justice.¹¹⁵

The Defence

Generally, a defence operates as either an excuse or a justification by sending one of two alternate “moral messages” in allowing an accused to escape full criminal culpability for an offence that she has been charged with.¹¹⁶ Where a defence operates as an excuse, the accused is not punished for her actions as the conduct is considered wrongful, but understandable in the circumstances.¹¹⁷ Therefore, some moral blameworthiness still exists on the part of the accused.¹¹⁸ On the other hand, where a defence operates as a justification the accused is not punished for her actions and society, through the criminal law, accepts that the accused has acted in an appropriate and proper way.¹¹⁹ Therefore, the use of a defence as the drafting gate not only allows for one to determine the suitability of one criminal justice process over an individual, but also, can operate to remove any moral sanction on the part of the individual. The defence proposed here operates as a justification, providing an “offender” of Pākehā law a full defence.

While not a recognised defence in New Zealand, the traditional approach to a defence based on culture is to provide a partial defence to charges which reduces or negates liability.¹²⁰ Such a defence is generally limited to migrant

114 Dominic O’Sullivan, *Beyond Biculturalism: The Politics of an Indigenous Minority* (Wellington: Huia, 2007) at 139; contrast Ann Elizabeth Mayer, “Minority Rights in Multiethnic and Multiracial States” in Norman Dorsen and Prosser Gifford, eds., *Democracy and the Rule of Law* (Washington: CQ Press, 2001) 152, 152.

115 Joan Metge, “Myths for New Zealand” in *One Nation, Two Parties, Many Peoples* (Porirua: Whitireia Community Polytechnic, 1996) 32.

116 Martin P. Golding, “The Cultural Defense” (2002) 15(2) *Ratio Juris* 146; Paul H. Robinson, *Criminal Law Defenses* (St Paul: West Publishing, 1941).

117 See for example the defence of compulsion under *Crimes Act 1961* (N.Z.), s 24.

118 A.P. Simester and W.J. Brookbanks, *Principles of Criminal Law* (Wellington: Brookers Ltd, 2002) at 17; H.L.A. Hart, “Punishment and the Elimination of Responsibility” in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (Oxford: Oxford University Press) 158 at 181.

119 Golding, *supra* note 113 at 152; Simester and Brookbanks, *supra* note 115 at 16; see for example the defence of self-defence under *Crimes Act 1961* (N.Z.) BRS31, s 48.

120 Since it does not excuse the actor for the action, the defence proposed merely excuses the actor from liability under the common courts. See Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979) 322. See generally Jeremy Horder, *Excusing Crime* (Oxford: Oxford University Press, 2004); Robinson *supra* note 113; Robert Leikind, “Regulating the Criminal Conduct of Morally Innocent Persons: the Problem of the Indigenous Defendant” (1986) 6 BC Third World LJ 161 at 166. See for example “The Cultural Defense in the Criminal Law” (1985-1986) 99 *Harvard Law Review* 1293; Pieter A. Carstens, “The Cultural Defense in Criminal Law: South African Perspectives” (2004) 37 *De Jure* 312; Pascale Fournier, “The

populations and provides those individuals with an excuse to their offending. One example of the use of a culturally based defence is the United States case of *People v. Kimura*.¹²¹ In that case, Mrs. Kimura, after learning that her husband was unfaithful, tried to kill herself by drowning in the ocean. She also took her two children with her. Mrs. Kimura was saved, but her children were not. That act was accepted as a customary Japanese practice. In *Kimura*, Mrs. Kimura's liability was reduced by way of her being charged with voluntary manslaughter and escaping murder charges due to the cultural defence.

The basis of the cultural defence is an exception to the maxim: ignorance of the law is no defence. Generally, ignorance of the law is no excuse to criminal culpability, but society only seeks to punish those who are morally culpable.¹²² H.L.A. Hart argues that ignorance may not be a defence to a prima facie breach of the law so long as the "legislature does a sound job of reflecting community attitudes and needs... [because then] knowledge of the wrongfulness of the prohibited [conduct] will exist" regardless of knowledge of the law.¹²³ Through the following chain of reasoning, the traditional approach to a cultural defence argues for an exception to the maxim "ignorance is no defence to the law" for migrant populations. In a democracy the will of the majority rules,¹²⁴ therefore, legal practice is "imbued with the cultural norms of dominant groups"¹²⁵ and the criminal law operates as a reflection of the majority of society's norms and values.¹²⁶ Thus, the law may often not reflect the cultural norms of a minority culture. When a person does not have knowledge of the law or the norms on which the law is based—due to that person having been acculturated under a culture other than that of the majority—one cannot say that that person is morally blameworthy. Therefore, it may be inappropriate to hold her to the same level of moral culpability as a person of the majority culture.¹²⁷

Ghettoisation of Differences in Canada: 'Rape by Culture' and the Danger of a 'Cultural Defence in Criminal Law Trials'" (2002) 29 *The Manitoba Law Journal* 81; Anne Phillips, "When Culture Means Gender: Issues of Cultural Defence in the English Courts" (2003) 66 *Modern Law Review* 510; Australian Law Commission, *The Recognition of Aboriginal Customary Law: Summary Report* (Canberra: Law Commission, 1986).

121 No A-091133 (Super Ct LA County 24 April 1985); see Van Broeck, *supra* note 13 at 3.

122 Leikind, *supra* note 117 at 165.

123 H.L.A. Hart, "The Aims of Criminal Law" (1958) 23 *L & Contemp Probs* 401 at 413.

124 Contrast the results of the recent referendum "Should a smack as part of good parental correction be a criminal offence in New Zealand?" where 85 per cent said "no".

125 Anne Phillips, "When Culture Means Gender: Issues of Cultural Defence in the English Courts" (2003) 66 *Modern Law Review* 510 at 517.

126 "The Cultural Defense in the Criminal Law", *supra* note 117 at 1299; Bazelon, "The Morality of the Criminal Law" (1976) 49 *S Cal L Rev* 385 at 386-387; Morris R Cohen, "Moral Aspects of the Criminal Law" (1940) 49 *Yale Law Journal* 98 at 997.

127 Van Broeck, *supra* note 13 at 5; "The Cultural Defense in the Criminal Law", *supra* note 117 1294.

Extension to an Indigenous Population

Naturally, a person acculturated under tikanga Māori will operate according to the norms of Māori culture. As the norms of the majority in New Zealand do not necessarily reflect those held by Māori, Māori often feel a lack of relevance to, and understanding of, the norms which inform the criminal law of New Zealand.¹²⁸ However, because Indigenous populations do have *knowledge* of the norms of the majority, often due to coercive acculturation, the traditional argument for a cultural defence is not persuasive for an Indigenous culture.¹²⁹ That does not, however, preclude the creation of a defence for an Indigenous population. A culturally based defence should be recognised to include an Indigenous population, particularly in the case of Māori, for three reasons.¹³⁰

First, a culturally based defence which applies to an Indigenous population upholds the notion of individualised justice. The Pākehā process seeks to achieve justice for the individual defendant. That is, punishment tailored to the degree of the individual defendant's culpability.¹³¹ In particular circumstances, such as if the accused was protecting herself or another, it may be unjust to punish that defendant to the extent of the law.¹³² A culturally based defence reinforces the notion of individualised justice;¹³³ the particular circumstances being that the person's cultural norms required them to commit an act which is considered "criminal" under the law.¹³⁴

Of course, there are those, such as Lady Wootton, who argue that the criminal law should be forward-looking and its main aim should be to prevent crime by taking measures to prevent a recurrence by a single offender.¹³⁵ On this argument, the "law" is a universal body of rules laid down to direct and

128 See generally Moana Jackson, *He Waka Eke Noa: A Report for the Faculty of Law, Victoria University of Wellington* (Wellington: Nga Kaiwhakamarama i Nga Ture, 1997) at 51.

129 Contrast "The Cultural Defense in the Criminal Law", *supra* note 117 at 1300, which argues that even if a person is aware that "her act is contrary to the criminal law may not be enough to override her adherence to fundamental cultural values".

130 Contrast Pieter A. Carstens, "The Cultural Defence in Criminal Law: South African Perspectives" (2004) 37 *De Jure* 312. See for example *People v. Chen* No 87-7774 (Supreme Court, NY County, 2 December 1988); *People of the State of California v. Kong Pheng Moua* No 315972 (Fresno County Superior Court, 7 February 1985); *People v. Kimura* No A-091133 (Super Ct LA County 24 April 1985).

131 "The Cultural Defense in the Criminal Law", *supra* note 117, at 1298.

132 *Ibid.* at 1298.

133 See George P Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Company, 1978) for a discussion on the role of defences generally upholding individualised justice.

134 Policy and Research Division Department of Justice, "A Cultural Defence" in Courts Consultative Committee, *Report of the Courts Consultative Committee on He Whaipaanga Hou* (Wellington: Courts Consultative Committee, 1991) 63 at 67; Geoffrey Hall, *Sentencing in New Zealand* (Wellington: Butterworths, 1987) at 30.

135 Barbara Wootton, *Crime And The Criminal Law: Reflections Of A Magistrate And Social Scientist*, 2nd ed. (London: Steven & Sons, 1981) at 98.

compel obedience in spite of variances in individual conceptions of morality.¹³⁶ Therefore, excuses to conduct should not exist where they may foil the criminal justice system's attempt to prevent a recurrence of offending.

However, there cannot be any moral turpitude on behalf of the defendant where he or she was legitimately acting according to his or her own culture's norms. Therefore, the concept that the law can actually be a universal espousal of principles by which individuals within "society" should live their lives is a fallacy.¹³⁷ Indeed, many defences exist in the law which have not had a great hindrance on the maintenance of social order by central government.¹³⁸

Second, extending a culturally based defence recognises that a person in New Zealand has the right to live according to Māori culture. All within society are subject to the "influences of nature" and, therefore, a person is acted on by forces, such as culture, outside that person's control.¹³⁹ Individuals may be unaware that they have internalised the norms of the minority culture to such an extent that they no longer realise that these are in contrast to those of the majority.¹⁴⁰ In some situations it could be said that Māori could not easily act as the majority's edict requires. While the whānau did not follow the advice of their consulted tohunga, consider for a moment if the whānau had acted as the tohunga suggested but that advice still led to Janet's death. The "offenders" of the Pākehā law were acculturated under (what they thought to be) tikanga Māori which, in their genuine and subjective belief, required them to transgress the Pākehā law. As their culture *required* them to act in that way, to require them to, in effect, choose whether to face criminal sanction or breach their moral duty under their culture would be unfair to the individual concerned.¹⁴¹ The cost of that breach could be severe, in terms of "supernatural sanction" or the loss of self-respect or, indeed, the respect of others.¹⁴² In the face of these costs, transgression of the criminal law, in a sense, is uncontrolled. Accordingly, those offenders are not an appropriate subject for full criminal liability as the purposes of criminal liability and punishment will not be achieved.¹⁴³

However, unlike the paradigm generally offered for the cultural defence (it will be recalled that that is a newly immigrated person or migrant entering

136 Gross, *supra* note 117 at 401.

137 Lon L. Fuller, *Anatomy of the Law* (New York: Praeger, 1968) at 106.

138 *Ibid.*

139 Gross, *supra* note 117 at 323.

140 Alison Dundes Renteln, "The Use and Abuse of the Cultural Defense" in Marie-Claire Foblets and Alison Dundes Renteln, eds., *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defence* (Oxford: Hart Publishing, 2009) 62 at 64.

141 J. Morris Clark, "Guidelines for the Free Exercise Clause" (1969) 83 *Harvard Law Review* 327 at 337.

142 *Ibid.*

143 Robinson, *supra* note 113 at 121.

a new society) it is more likely to be the case in New Zealand that a person is aware of Pākehā norms and legitimately does not adopt them. Where the majority's edict runs contrary to what tikanga Māori directs that direction may cause a person to transgress the Pākehā law. However, the fact that one lives according to Māori culture is legitimate due to the positively recognised importance of culture under both domestic and international law. Under section 20 of the *New Zealand Bill of Rights Act 1990*, incorporating article 27 of the *International Covenant on Civil and Political Rights*, persons belonging to minorities must not be denied the right, in community with the other members of their group, to enjoy their own culture and a right to self-determination.¹⁴⁴ While H.L.A. Hart argues that every person should have a fair opportunity to conform their conduct to the law, and if they are given that opportunity they should be bound by it,¹⁴⁵ article II of the Treaty guarantees Māori continued enjoyment of their culture. Assimilation is not contemplated under the Treaty. As Māori have the right to manifest their culture and where that culture requires transgression of Pākehā law it would be unfair to require adherence to the Pākehā law Māori are not only excused for, but also justified in, not conforming their conduct with the law, regardless of a fair opportunity. After all, the law ought to recognise that any other person would have acted in that same way. It would then be inappropriate for the common courts to criminalise and sentence people falling into that category in the same manner as any other offender. Thus, the Treaty gives the Indigenous people of New Zealand the justification for the use of a culturally based defence which does not exist in jurisdictions such as the United States of America or, indeed, for other migrant groups in New Zealand. Notwithstanding the Treaty, however, with regard to the Indigenous people of a nation, that nation is the only place in which a proper manifestation of their culture can occur. They have no alternative. If Māori cannot act according to tikanga Māori in New Zealand, where can they?

Third, there is necessarily a moral dimension to the criminal law.¹⁴⁶ The idea of "one law for all" is premised on the idea that the law is in some way a divine proclamation, chiselled away at by some infallible creator who has sculptured what has become a perfect masterpiece, capable of administering impartial justice to all. Oliver Wendell Holmes once opined that "the life of the law has not been logic: it has been experience".¹⁴⁷ As such, crime is

144 This is discussed in greater detail below in Part II.

145 Hart, *supra* note 115 at 158.

146 See generally Gross, *supra* note 117.

147 "The Common Law" (1881) 1 cited in Rt. Hon. G.W.R. Palmer, "The Reform of the Crimes Act 1961" in Neil Cameron and Simon France, eds., "Essays on Criminal Law in New Zealand" (1990) 30 VUWLR Monograph 9 at 12.

merely a product of definition.¹⁴⁸ “It is based on perceptions about the function or dysfunction of certain acts in relation to the particular cultural ideals of society”.¹⁴⁹ In a democracy, this definition is generally the will of the majority. That will is derived from the cultural norms of society. Therefore, crime is defined by actions which are culturally unacceptable; for example, killing. Taking another’s life is not an offence in and of itself. It is only prohibited within cultural boundaries. In New Zealand, for example, killing does not amount to murder where it is done in the defence of another.¹⁵⁰ Therefore, there cannot be an offence without the transgression of the morality of, in a democracy, the majority. Likewise, persons who live under a particular culture may feel morally obliged to follow certain norms.¹⁵¹ Because the morality of the majority is embodied in the criminal law, the minority “face the dilemma of having to violate either their cultural values or the criminal law”.¹⁵² In New Zealand this dilemma should not occur when, under the Treaty and international law, Māori have the right to manifest their culture. In any event, who is to say that the majority’s conception is the correct morality? Thus, the law is perpetually in a state of flux. It is never perfect. We must not forget that only five hundred years ago it was common to determine guilt or innocence via ordeal.¹⁵³ Such a practice would today be abhorrent but was once accepted as the best way to determine guilt or innocence by “civilised society”. Moreover, if law equates to culture, “one law for all” is not so much concerned with a superior form of law but a superior form of culture.¹⁵⁴ In order for the law to accommodate a pluralistic society it *must* recognise difference.

III The Scope of the Gateway

Once it is accepted that a defence is consistent with the current criminal justice process, the question becomes: who, and what conduct, should fall within its confines such that that person will be dealt with by a Māori criminal justice process? When and who should consider that defence? Does the conduct

148 See M.M. Goldsmith, “Hobbes on Law” in Tom Sorell, ed., *The Cambridge Companion to Hobbes* (Cambridge: Cambridge University Press 1996) 274 at 296; Tom Sorell, *Moral Theory and Capital Punishment* (Oxford: Blackwell, 1987) at 1-3; Quince, *supra* note 32, para 12.5.

149 Moana Jackson, “Criminality and the Exclusion of Maori” in Neil Cameron and Simon France, eds., “Essays on Criminal Law in New Zealand” (1990) 30 VUWLR Monograph 23 at 25; see also the approach of H.L.A. Hart in *The Concept of Law* (Oxford: Clarendon Press, 1961).

150 *Crimes Act 1961* (N.Z.) BRS 31 s 48 as interpreted by the court in *R v. Green* (1992) 9 C.R.N.Z. 524 (H.C.).

151 “The Cultural Defense in the Criminal Law”, *supra* note 117 at 1300.

152 *Ibid.* at 1293.

153 See George Fisher, “The Jury’s Rise as Lie Detector” (1997) 107 Yale Law Journal 587; John Hostettler, *A History of Criminal Justice in England and Wales* (Hampshire: Waterside Press, 2009) 19.

154 Dominic O’Sullivan, *Beyond Biculturalism: The Politics of an Indigenous Minority* (Wellington: Huia, 2007) at 125.

which was in accordance with tikanga Māori have to be “prescribed by the culture, permitted by the culture or excused by the culture”?¹⁵⁵

On one interpretation, as defined by Jan Van Broeck, the proper scope of a culturally based defence is to allow an excuse for cultural offences, as the nub of the problem is in linking the offence to the cultural background of the offender.¹⁵⁶ Thus, Van Broeck defines a cultural offence as an act which is “accepted as normal behaviour and approved or even endorsed and promoted in the given situation” but is an offence under the law of the dominant culture.¹⁵⁷ The defence posited here is different in character to that discussed by Van Broeck. What is argued for here is a mechanism by which those who *should* be considered by a process over which Māori have self-determination *are* considered by that process, rather than the Pākehā process. The logical starting point in determining the proper scope of that defence is, therefore, the extent to which self-determination is justified.

It is apparent from the above outline of the justification for the right to self-determination that Māori have a right to self-determination over a criminal justice process. As noted above, in order for the defence proposed above to be justified, it must operate to the extent that self-determination is justified. There are all too often calls for a parallel justice process for Māori without stopping to consider how it could work in practice.¹⁵⁸ New Zealand is now a land of a diverse range of peoples.¹⁵⁹ Notwithstanding the injustices which have been visited upon Māori over the past 160 years, both New Zealand and Māori have changed.

There are Māori who retain predominantly separate lives and livelihoods from Pākehā.¹⁶⁰ For these people, the law rarely touches their lives¹⁶¹ and it has little legitimacy in resolving their disputes, criminal or otherwise. It is Māori culture, tikanga, which orders their lives. As shown in *Rawiri*, there are

155 Gordon Woodman, “Cultural Defence in English Common Law” in Marie-Claire Foblets and Alison Dundes Renteln, eds., *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defence* (Oxford: Hart Publishing, 2009) 7 at 11.

156 Van Broeck, *supra* note 13 at 29.

157 *Ibid.* at 5.

158 See, for example Tauri *supra* note 2; Juan Tauri and Allison Morris, “Re-forming justice: the potential of Maori processes” (1997) 30 Australian and New Zealand Journal of Criminology 149; Moana Jackson, *The Maori and the Criminal Justice System: A New Perspective He whaipanga hou* (Wellington: Department of Justice, 1987). Contrast Dannelle Marie, “Maori and Criminal Offending: A Critical Appraisal” (2010) 43(2) Australian and New Zealand Journal of Criminology 282.

159 Statistics New Zealand, *supra* note 74.

160 See for example Luke Crawford, “Rūātoki, the Police and Māori Responsiveness” in Danny Keenan, ed., *Terror In Our Midst? Searching For Terror in Aotearoa New Zealand* (Wellington: Huia, 2008) 95 at 101.

161 Rawina Higgins, “‘Another Chapter in Our History’: Reflections on the Events in Rūātoki, 15 October 2007” in Danny Keenan, ed., *Terror In Our Midst? Searching For Terror in Aotearoa New Zealand* (Wellington: Huia, 2008) 205 at 219.

others whose ethnicity is Māori and who live lives integrated and intertwined with Pākehā society. Indeed, many have cast aside their Māori heritage and have, therefore, made a decision of their own volition to live according to the Pākehā world view.¹⁶² While being ethnically Māori, those individuals have cast aside Māori culture. This paper has argued above that it is culture which informs a state's law and legal processes. Therefore, an individual's culture, not ethnicity, must be the touchstone for diversion into an alternate process. Further, it is the cultural differences which Moana Jackson highlighted in his seminal work, and which have been referred to since, to show that the criminal justice process does not work for Māori.¹⁶³

While culture is the touchstone, objective assessment of the "culture" of the individual must be able to be made in order to ensure that that person ought to be considered under the Māori criminal justice process. Tikanga Māori is the guiding force in Māori culture and is the normative system of Māori society.¹⁶⁴ Therefore, this paper suggests that the touchstone as to whether a person is manifesting Māori culture should be whether the person subjectively orders her life in accordance with tikanga Māori. Not all who are of Māori descent will necessarily be included under this approach. To include all Māori fails to recognise the clear and apparent problem that faces Māori today: Māori have been alienated from their culture by assimilationist policies.¹⁶⁵ Those of Māori descent who no longer engage with and attempt to manifest Māori culture should not be able to rely on a defence which would divert them into an alternative process which will lack meaning, and legitimacy, for them.

It is apparent, therefore, that the approach proposed here is not focussed on the restoration of cultural identity, per se, unlike the programmes which Corrections has initiated. Rather, the proposal attempts to initiate a systemic change to restore Māori culture and empower Māori. By not reactively focusing on restoring the culture of an individual offender, this approach avoids the criticisms of the approach that Corrections has undertaken. First, as this approach is not a reaction to offending, per se, but a prophylactic approach, it does not enable an individual to shift blame for behaviour. It requires an individual to alter his or her life prior to offending to accord with Māori culture, if that is how that person wishes to live life. This approach therefore places the onus on Māori to regain their culture and provides Māori with some tools to do so.

162 For example in *Clarke v. Takamore* [2010] 2 N.Z.L.R. 525 (H.C.).

163 Moana Jackson, *The Maori and the Criminal Justice System: A New Perspective He whaipanga hou* (Wellington: Department of Justice, 1987).

164 Mead, *supra* note 42 at 6.

165 Tariana Turia (Speech to the New Zealand Psychological Society Conference, Hamilton, 29 August 2000).

A defence allowing Māori to manifest their culture must then properly act as a justification under the Pākehā process.¹⁶⁶ While a transgression of the Pākehā law may not necessarily be “appropriate” conduct, the *actions* of the “offenders” must be considered “appropriate” where those actions are the result of a person manifesting Māori culture, which is both appropriate and legitimate in New Zealand. That is because a person seeking to rely on this defence will generally have fulfilled the *actus reus* and *mens rea* for an offence. Therefore, the justification must operate as a defence separate to the offence.¹⁶⁷

That suggested approach broadens this defence considerably from that suggested by Van Broeck, which requires that the minority group must “condone” the behaviour. However, the defence suggested here does not merely avoid liability under the Pākehā process, but also engages a separate criminal justice process. To limit consideration of behaviour that was only condoned would defeat the purpose of such a process, for any behaviour which was condoned by Māori clearly does not warrant further correction. The alternative process for Māori ought to operate to correct erroneous application of *tikanga* Māori. Indeed, that is, in effect, what the Pākehā law is, in part, for: if the “law” is a product of Pākehā culture, then it corrects an individual’s conduct where that conduct differs from the required norm. Therefore, the bar ought to be set as low as possible: where an individual seeks to, genuinely, order her life in accordance with *tikanga* Māori, a Māori criminal justice process should be engaged.

Requiring an assessment of adherence to culture in order to justify conduct presents the issue of who, or what institution ought to consider that defence. Certainly, Pākehā cannot fully understand *tikanga* Māori.¹⁶⁸ For Pākehā to have control over the drafting gate to an alternative criminal justice process for Māori would be tantamount to the same usurpation of authority that has previously existed. With the New Zealand judiciary being overwhelmingly Pākehā,¹⁶⁹ a major issue with the status quo is likely to be repeated if the New Zealand courts were to consider this issue: that it is Pākehā effectively determining whether a person is sufficiently manifesting Māori culture.¹⁷⁰ Thus, in order for diversion to the Māori process to occur, the individual ought to raise

166 Contrast the traditional approach to a cultural defence in Van Broeck, *supra* note 13, and “The Cultural Defense in the Criminal Law”, *supra* note 117 where it is argued that the defence should operate as an excuse.

167 See generally Simester and Brookbanks, *supra* note 115 at 22-23; Robinson, *supra* note 113.

168 Ministry of Justice, *Hui Report: Seeking Solutions: A Review of the New Zealand Court System* (Wellington: Ministry of Justice, 2003) at 97.

169 Out of the 62 judges currently appointed to the higher courts in New Zealand (High Court, Court of Appeal and Supreme Court) just two are Māori.

170 See for example Ani Mikaere, “Review of Waitangi: Māori and Pākehā Perspectives on the Treaty of Waitangi” (1990) 14 NZULR 97.

an evidentiary basis for her conduct being the result of her manifestation of Māori culture. That evidentiary basis might be raised expressly by an accused or might be apparent to a judge during a trial. Therefore, the basis would need to be raised much like a process such as fitness to stand trial is raised in much of the common law world. It ought to then be for the Māori process to determine whether the defence is satisfied and thus, the individual's conduct is justified under the Pākehā process.

This approach raises one further issue as highlighted by a 1995 study conducted by Juan Tauri and Allison Morris: if a Māori justice process is victim focused, what process should deal with cases where the offender or victim are not Māori?¹⁷¹ Whilst Māori victimisation is a real issue, as outlined above, the focus of the justification of self-determination is the upholding of Māori culture and alleviating the failure of the current criminal justice process on Māori, particularly for those Māori offenders. Therefore, the focus of the conflict of laws rule, as it were, must be on the culture of the *offender*. Where the victim is not Māori, the result would not be overly problematic. After all, any Māori process would be victim-orientated, and as noted by Tauri and Morris, many Pākehā have been involved in family group conferences and have, by and large, responded positively.¹⁷² However, if the offender was Pākehā and the victim Māori, issues could arise as to the legitimacy of the criminal justice process to the offender in that, again, the process would not “speak” to the offender.

Application to *Rawiri*

In *Rawiri*, the accused would need to raise the issue of their conduct being the result of their manifestation of tikanga Māori. At that point, consideration of the applicability of the defence proposed ought to be transferred to the Māori criminal justice process. In *Rawiri* the behaviour was not acceptable according to tikanga Māori.¹⁷³ As Simon France J noted in his sentencing notes, “what happened on the Thursday night was not the acting out of any cultural or religious practice. Expert witnesses were clear they have never heard of such actions and their evidence was compelling”.¹⁷⁴ They had sought the advice of a tohunga. Yet, they did not adhere to that advice. However, the method used

171 Juan Tauri and Allison Morris, “Maori Justice: Possibilities and Pitfalls” in FWM McElrea, ed., *Re-Thinking Criminal Justice (Vol 1): Justice in the Community* (Papers presented at a conference held by the Legal Research Foundation in association with the Institute of Criminology, Victoria University of Wellington, at Auckland, New Zealand on 12 and 13 May 1995) at 45; reproduced in Juan Tauri and Allison Morris, “Re-forming Justice: The Potential of Maori Processes” *The Australian and New Zealand Journal of Criminology* (1997) 30(2) 149.

172 Tauri and Allison Morris, “Re-forming Justice: The Potential of Maori Processes” *The Australian and New Zealand Journal of Criminology* (1997) 30(2) 149 at 161.

173 *Rawiri*, *supra* note 9 at ¶93.

174 *Ibid.*

by the accused was a result of what they considered to be directed, albeit subjectively and mistakenly, by tikanga Māori. Their actions were a result of their manifesting tikanga Māori (again, albeit mistakenly). In that event, I consider that the defence ought to succeed and the offenders be transferred into a Māori process. Correction of the accused's conception of tikanga is required. Indeed, that much was, at least implicitly, recognised by Simon France J in requiring the accused to undertake a tikanga Māori programme run by the Department of Corrections. Indeed, had the accused adopted the correct tikanga (such as if the family had followed the advice of the tohunga but Janet still died), no correction would be required by the Māori process. Therefore, they would be transferred to the Māori process and not require any punishment.

There are, indeed, several cases where arguments have been made entitling an accused to act in accordance with tikanga Māori where that act would transgress the Pākehā law.¹⁷⁵ None, thus far, have been met with any great success.¹⁷⁶ A case such as that in *R. v. Fuimaono* could have success with the proposed defence. In that case the appellant was convicted of one count of assaulting a police officer intending to obstruct him in the execution of his duty and one of escaping from custody. Mr. Fuimaono was involved in a peaceful occupation of a public space, Moutoa Gardens, in a small New Zealand city. He was, at the time that he was approached by the Constable, standing at a secondary entrance to the Gardens. The Constable was wearing a police uniform. The Constable asked Mr. Fuimaono if he could have a brief word. Mr. Fuimaono turned and struck the Constable in the chest. The Constable then caught Mr. Fuimaono and placed him under arrest.¹⁷⁷ Mr. Fuimaono argued that according to tikanga Māori, persons approaching a side or back entrance are not regarded in the same favourable light as persons approaching the main entrance.¹⁷⁸ Mr. Fuimaono said that his task was to stop anyone going through the entrance that he was manning. In approaching that entrance, the Constable, Mr. Fuimaono claimed, had not acted in accordance with tikanga Māori.¹⁷⁹ While that argument was not successful before the Court,¹⁸⁰ as statute cannot be read down by customary law, as Mr. Fuimaono had raised, at least on one interpretation, an evidentiary foundation on the basis of Mr. Fuimaono's own testimony that his actions were the result of manifesting tikanga Māori. On application of the proposed defence, the proceeding would be transferred to consideration by a Māori process as to whether the defence proposed here

175 *Supra* note 1.

176 See *R v. Fuimaono* CA159/96, 24 October 1996 (assault on police where police did not adhere to tikanga Māori); *Knowles v. Police* HC Hamilton A123/97, 27 February 1998 (possession of cannabis).

177 *R v. Fuimaono* CA159/96, 24 October 1996 at 2.

178 *Ibid.*

179 *Ibid.*, at 3.

180 *Ibid.*, at 5.

operates. If it were found that Mr. Fuimaono's actions were, indeed, the result of his manifesting tikanga Māori, he would not be subject to criminalisation or sanction under the Pākehā process. The more difficult issue is whether his belief of tikanga was correct. That decision would be for the Māori process. If it was, no further steps would need to follow. If it was not, then, as in *Rawiri*, the Māori process would need to implement some further sanction or remedy to that situation.

IV Conclusion

It is evident that the current criminal justice process does not work for many Māori. Moreover, Māori have a right to self-determination of a criminal justice process which could remedy this inefficacy. As the current process cannot be adapted to sufficiently enable Māori self-determination, a new process is required. However, the justification only extends so far. From time to time, Māori will be charged for a breach of Pākehā law where they were legitimately manifesting their culture through adherence to tikanga Māori. Where this is the case, a mechanism in the Pākehā process must exist to transfer these people out of the Pākehā process and into an alternative justice process. This paper proposes a novel slant on a culturally based defence to act as the drafting gate. What is proposed here is not by any means a panacea to Māori interactions with the Pākehā criminal justice process. Its limited scope will fit relatively few cases and it will certainly not include those Māori who have been dispossessed by colonisation to such an extent that they have no connection to tikanga. Nonetheless, it is hoped that it may go a small way to redressing the problems which exist under the criminal justice process by further enhancing the standing of tikanga Māori in the eyes of Māori, thus bolstering the efforts undertaken by the Department of Corrections in their tikanga Māori programmes. To adopt the words of Khylee Quince, "Maori scholars such as Moana Jackson, and Eddie and Mason Durie, posit that access to and participation in a secure and healthy Maori cultural identity is central to addressing the crisis posed by Maori caught in a vicious cycle of poverty and harm".¹⁸¹ Therefore, it is hoped that this approach, by encouraging the manifestation of tikanga Māori, could enhance the standing of tikanga in the eyes of Māori, further assisting its rejuvenation.

181 Quince, *supra* note 32, para 12.2..