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IGNORANCE AND MISTAKE IN CRIMINAL LAW

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At the threshold of inquiry into the criminal liability of persons who commit harms under the influence of ignorance or mistake, one confronts an insistent perennial question—why should such persons be subjected to any criminal liability? *Ignorantia facti excusat* accords with the implied challenge. But *ignorantia juris neminem excusat* seems to oppose it and to require explanation. This problem has recently been re-examined by many European scholars¹ whose discussions suggest that further study of the Anglo-American law is desirable.² Certainly, the usual taking of numerous “exceptions” to *ignorantia juris neminem excusat* and *ignorantia facti excusat* leaves the law disorganized and obscures the significance of these doctrines.³ It is easy to see that analysis may well begin with the insight that, while coercion and necessity, *e.g.*,

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1. See the symposium in *REV. INTERN'L DE DROIT PÉNAL*, Nos. 3 and 4 (1955).

2. This article revises and amplifies chapter 11 of the writer's *GENERAL PRINCIPLES OF CRIMINAL LAW* (1947).

3. Several excellent articles are available, and the writer is indebted especially to the following: Keedy, *Ignorance and Mistake in the Criminal Law*, 22 *HARV. L. REV.* 75 (1908); Stumberg, *Mistake of Law in Texas Criminal Cases*, 15 *TEX. L. REV.* 287 (1937); Perkins, *Ignorance and Mistake in Criminal Law*, 88 *U. OF PA. L. REV.* 35 (1939); L. Hall and Seligman, *Mistake of Law and Mens Rea*, 8 *U. OF CHI. L. REV.* 641 (1941).

directly concern volition, ignorance and mistake immediately involve cognition. From there the trail leads plainly to *mens rea* and other principles of criminal liability; and the indications are that a thorough elucidation of the two doctrines must deal especially with the foundation of penal law—the principle of legality.

IGNORANTIA FACTI EXCUSAT

Factual Error and the Ethics of the Doctrine

“Ignorance” and “mistake” are words of ancient mintage which have been discussed in all ages by the wise and the prudent, by realists and idealists, and many others. We need not here review this vast literature on the theories of human limitations, but we may note certain widely accepted conclusions which are important in the present legal inquiry. Except for utter skeptics (who seem to claim knowledge of their negations), it is agreed that knowledge exists; and the contrary of that is ignorance. Likewise, except for those sophisticates who hold that factual errors are non-existent because all perception is “relative” to the given conditions, mistakes also occur. This is assumed in numerous studies which have shown that mistakes of perception are much more common than even trial lawyers suspect.⁴ The existence of ignorance and mistake is also assumed in modern systems of penal law, and they are rarely distinguished. The distinction noted by Story that, “Mistake of facts always supposes some error of opinion as to the real facts; but ignorance of facts may be without any error, but result in mere want of knowledge or opinion,”⁵ has had no appreciable effect on the law.

The meaning of “factual error,” as defined in the criminal law, represents a common sense version of the philosopher’s definition: “All error consists in taking for real what is mere appearance.”⁶ For example, a person looks at a far-off object and believes he sees a man; later, on closer approach, he decides it is a tree. The first opinion is then recognized as error. But the object may not actually be a tree; perhaps it is a dead stump or a bit of sculpture. Indeed, on examining it the next morning by aid of daylight and a clear head, our actor decides that he was mistaken in both judgments the night before. In this view he will be supported by all normal persons who, viewing the object under “adequate” conditions, agree: “It is a tree stump”; moreover, they would not concede the pos-

4. See BURTT, *LEGAL PSYCHOLOGY* c. 2 (1931); SPINDLER, *THE SENSE OF SIGHT* 85 (1917); WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* 391-418 (1937).

5. 1 STORY, *EQUITY JURISPRUDENCE* 158 (13th ed. 1886). Cf. “Ignorance implies a total want of knowledge in reference to the subject matter. Mistake admits a knowledge, but implies a wrong conclusion.” Hutton v. Edgerton, 6 S.C. 485, 489 (1875).

6. STOUT, *Error*, in *STUDIES IN PHILOSOPHY AND PSYCHOLOGY* 271 (1930).

sibility of the slightest error in this opinion. Thus, an opinion (judgment or belief) is erroneous by reference to another opinion which corresponds to the facts. In sum, "error" implies:

1. That facts exist;
2. That sense *impressions* of facts, "sensa," are different from the facts;
3. That the sensa fit (correspond to, are congruent with) or do not fit the facts;⁷
4. That erroneous sensa (those that do not fit the facts) are for a time accepted as true, *i.e.* they are believed to be congruent with the facts;⁸ and
5. That this is later recognized as erroneous, *i.e.*, certain opinions become error when they are subjected to a broader experience, especially when relatively adequate conditions of correct perception obtain.

All mistakes of fact can be reduced to the above elements which are frequently directly applicable to the cases. There is, *e.g.*, a mistake in identity, in believing that a pocket or drawer contains things, that a person is being attacked, that a dangerous weapon is in an assailant's hand, and so on. But while every case of mistake of fact can be stated in terms of the above criteria, it is also true that many such mistakes involve much more than perception. For example, in situations relevant to libel, perjury, or bigamy, the defendant may never have sensed the phenomena which he erroneously interpreted. Someone may have told him that X served a term in the penitentiary for forgery; he may have heard X's employer discharge him, and read in the newspaper that forged checks had been found in the possession of a certain employee of that firm; or someone may have informed a woman that he had learned "on good authority" of the death of her husband. Thus, mistakes of fact often result not only from faulty perception but also from erroneous higher types of cognitive experience, *e.g.*, the ideas already in the interpreter's mind, including his bias. In the case of an inventor who makes certain mistakes of fact, these ideas may include invalid theories of physics.

To understand the rationale of *ignorantia facti excusat*, it is necessary to recognize and take account of the relevant ethical principle, namely, moral obligation is determined not by the actual facts but by the actor's opinion regarding them. It is determined by the actor's error concerning a situation, not by the actual situation. This is implicit in

7. ROGERS, *The Problem of Error*, in *ESSAYS IN CRITICAL REALISM* 117, 119 (1920).

8. "Error would not be error were we not convinced whilst erring that we were knowing the truth." ARON, *THE NATURE OF KNOWING* 57 (1930).

the decisions, and occasionally it has been rather definitely expressed.⁹ For example, the driver of an automobile who turned a corner very quickly, although he thought he would probably meet a car coming from the opposite direction, would certainly be doing wrong despite the fact that there was actually no car there. Again, it is often impossible to know the facts or to know that any act of ours will improve a situation. If the actual facts determined our duties, we would sometimes be under a moral obligation without knowing it, perhaps without being able to discover it. Accordingly, apart from questions of previous incapacitation, the morality of an act is determined by reference to the actor's opinion of the facts, including his erroneous beliefs.¹⁰ Aristotle came to the same conclusion on the ground that behavior in ignorance of the facts is involuntary,¹¹ and that view was adopted by Hale.¹² With reference to the above analysis of the meaning of factual error and of the relevant ethical principle, certain guides are available to aid appraisal of the penal law.

Illustrative Cases

That the above ethical principle has long been expressed in the criminal law is apparent from an early 17th century case.¹³ The defendant was awakened in the night by strange noises in his house; thinking he was attacking a burglar, he ran his sword through a cabinet where the intruder was hiding and killed a friend of his servant, present by the latter's invitation. This was held not to be manslaughter, "for he did it ignorantly without intention of hurt to the said Francis."¹⁴ Perhaps the most frequent situation in the cases and certainly the least doubted instance of the recognized defense of mistake of fact concerns apparently necessary self-defense. Here the courts hold, "it is not necessary . . . that defendant should have been actually in danger of death or great bodily harm at the time he fired the fatal shot, or that retreat would have really increased his peril, in order for him to have been justified in shooting deceased."¹⁵ So, too, if the mistake stimulates an attack,

9. *Steinmeyer v. People*, 95 Ill. 383, 389 (1880); *Pond v. People*, 8 Mich. 149 (1860); *Thomas v. The King*, 59 Commw. L.R. 279, 299-300 (Austr. 1937).

10. See Prichard, *Duty and Ignorance of Fact*, XVIII PROC. BRITISH ACADEMY 67 (1932). Prichard's essay is summarized and discussed by ROSS, *FOUNDATIONS OF ETHICS* 148-65 (1939).

11. *ETHICA NICOMACHEA*, bk. V.8, 1135a, 20-25 (Ross transl. 1925).

12. 1 HALE, *PLEAS OF THE CROWN* 42 (1736).

13. *Levett's Case*, Cro. Car. 538, 79 Eng. Rep. 1064 (K.B. 1638).

14. *Ibid.* Cf. ". . . if this be ignorance of fact it excuses. . . ." *The Mirror of Justices* 137 (Seld. Soc'y ed. 1893).

15. *Williams v. State*, 18 Ala. App. 473, 93 So. 57, 58 (1922). On the above ground the following instruction was reversed: ". . . the jury is told that the right of self-defense cannot be exercised 'in any case or to any degree NOT NECESSARY, and that the party making the defense is permitted to use no instrument and no power beyond what will prove simply effectual.'" *People v. Anderson*, 44 Cal. 65, 69 (1872).

perpetrated in apparently necessary self-defense, the harm is privileged.¹⁶ The doctrine has expanded far beyond such primary interests as those involved in the above cases. A railroad conductor "is justified in forcibly ejecting him [a passenger] from the car, because he, the conductor, honestly believes that the passenger has not paid his fare, but persistently refuses so to do."¹⁷ The defense was also allowed where the defendant voted before he was 21, believing he was of age;¹⁸ in charges of uttering a forged instrument;¹⁹ in larceny, where the defendant was mistaken as to the denomination of the bill handed him;²⁰ and in many other situations.²¹ Thus, in a very large number of cases, the criminal law seems to be in complete accord with the purely ethical appraisal of action in mistake of fact.

In the above cases the mistake of fact excluded the *mens rea*. This raises a question concerning harms which would not have been committed except for a mistake, but where the actor's intention was nonetheless criminal, *e.g.*, a mistake in the identity of the intended victim of an assault. One who inflicted a mortal wound on an intimate friend, whom he mistook for a person who had attacked him earlier in the evening, could derive no advantage from his error. There is an ambiguity in the court's assertion that "he intended to kill the man at whom the knife was directed";²² but it is clear, in any event, that such a mistake is not legally significant since the defendant intended to kill or seriously injure a human being.²³ Thus, the doctrine must be qualified as follows: mistake of fact is a defense if, because of the mistake, *mens rea* is lacking.²⁴ This qualification is quite consistent with the ethical principle represented in *ignorantia facti excusat*.

Restrictions (a) Reasonableness of the Error

But Anglo-American criminal law restricts the scope of *ignorantia facti* in ways which constitute serious limitations and, sometimes, a com-

16. *State v. Nash*, 88 N.C. 597 (1883).

17. *State v. McDonald*, 7 Mo. App. 510 (1879).

18. *Gordon v. State*, 52 Ala. 308 (1875).

19. *United States v. Carll*, 105 U.S. 611 (1881).

20. *Regina v. Hehir*, [1895] 2 Ir. R. 709.

21. See *Perkins*, *supra* note 3, at 54-55.

22. *McGehee v. State*, 62 Miss. 772, 773 (1885).

23. See also *Isham v. State*, 38 Ala. 213 (1862) and *Queen v. Lynch*, 1 Cox C.C. 361 (1846). In these cases the interest intended for destruction was of equal value to that actually destroyed. The writer's criticism concerns the terminology employed and the hypostatization of "general intent," "transferred intent" and the like. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 451-52 (1947).

24. In criminal attempt, the problem of impossibility concerns failure to actualize the intention because of a mistake of fact. See *id.* at 117-28. But the *mens rea* remains constant.

plete repudiation of the underlying policy. These restrictions concern (a) the requirement that the mistake be a "reasonable" one (the civilian expression is that the ignorance be "invincible") and (b) certain sexual offenses, bigamy and other types of strict liability.

An honest mistake of fact is not sufficient. "The apprehension of danger must be bona fide and reasonable."²⁵ Not the defendant's actual erroneous perception of the facts, but the facts "as they reasonably appeared to him" determine whether he is criminally liable.²⁶ After the usual instruction to the jury that the "defendant was bound to act as a reasonably cautious and prudent person would," a court specified that "the excitement of the moment" (the deceased had followed the defendant's daughter and other children in a frightening manner) would not modify this rule.²⁷ So, too, intoxication is irrelevant,²⁸ and only rarely is there even a hint that a court will permit consideration of serious incapacities, falling short of insanity.²⁹ Nor is the requirement that the mistake be reasonable confined to the perception of facts. For example, where the defendant, charged with bigamy, mistakenly believed his wife was dead, his opinion was based on information which was acquired and evaluated in various ways. The prevailing restrictive interpretation of the doctrine requires that the whole cognitive process function reasonably.³⁰

The plain consequence of this application of objective liability to *ignorantia facti* is that persons who commit harms solely because they are mistaken regarding the material facts are nonetheless criminally liable,³¹ *i.e.*, despite the complete lack of criminal intent. Moreover, a person who

25. Hill v. State, 194 Ala. 11, 23, 69 So. 941, 946 (1915), 2 A.L.R. 509, 518 (1919).

26. Nalley v. State, 28 Tex. Ct. App. 387, 391, 13 S.W. 670, 671 (1890).

27. State v. Towne, 180 Iowa 339, 160 N.W. 10 (1916).

28. ". . . if the defendant by voluntarily putting himself under the influence of liquor incapacitated himself for taking such a view of the situation as a reasonably prudent man would have taken under the circumstances, and, in consequence thereof, he acted upon an exaggerated or unjustifiable belief as to the necessity for taking the life of the deceased in defense of his own, such belief could not avail him as a defense to the charge in the indictment." Springfield v. State, 96 Ala. 81, 85-86, 11 So. 250, 252 (1892).

29. In Yates v. People, 32 N.Y. 509 (1865) the court did take account of the defendant's "extreme infirmity of vision."

30. "No man can be acquitted of responsibility for a wrongful act, unless he employs 'the means at command to inform himself.' Not employing such means, though he may be mistaken, he must bear the consequences of his negligence." Dotson v. State, 62 Ala. 141, 144 (1878).

31. Hill v. State, 194 Ala. 11, 69 So. 941 (1915), 2 A.L.R. 509, 518 (1919); State v. Terrell, 55 Utah 314, 186 Pac. 108 (1919), 25 A.L.R. 497, 525 (1923). The requirement of "reasonableness" does not apply to perjury, People v. Von Tiedeman, 120 Cal. 128, 52 Pac. 155 (1898), or to the various property offenses. See note 109 *infra*, referring to mistakes in property law in relation to *mens rea*. "If they [defendants] did so believe it is not material whether their belief was well founded or not." Lewis v. People, 99 Colo. 102, 117, 60 P.2d 1089, 1096 (1936).

has acted "unreasonably" seems occasionally to have been held just as culpable as he would have been if he had actually intended to commit the harm;³² and we shall see that this is often done in convictions of bigamy and sexual offenses. There are surprisingly few reports of homicide cases which specifically discuss this question, but the indicated holding is that a killing by the defendant in the unreasonable mistake that his life was in danger is manslaughter.³³ When it is recalled that recklessness is required in manslaughter, even those who would hold negligence properly within the range of penal liability, *i.e.*, as a form of *mens rea*, must recognize the invalidity of the above holding. For even on that premise, liability should be imposed for negligent ("unreasonable") behavior, not for non-existent voluntary harm-doing. Thus the requirement that a mistake of fact be reasonable has very drastic consequences and in this respect the common law is harsher than civilian legal systems.³⁴

It is not implied that "reasonableness" serves no useful purpose in criminal law. "Reasonableness" designates an alleged objective standard, and it is possible to question its significance, *e.g.*, can it mean anything more than the opinion of each individual? It may be here assumed that the standard is meaningful in the accepted sense, just as "normality" and "due care" may be assumed to have meanings which are defensible and useful. The present point is that "reasonableness"—the objective standard—serves two principal functions in law. One of these is that discussed above—a standard of liability—and the writer has long urged the elimination of that from the criminal law wherever possible.³⁵ The other function, however, is an essential one in every branch of law, namely, to guide inquiry regarding any person's actual state of mind. In the absence of any showing that the defendant is insane, feeble-minded, intoxicated, inexperienced, etc., his normality is assumed. But since no one can have direct acquaintance with the mental state of any other person, the determination of that requires, first, a determination of "reasonable" mental functioning and then, no question being raised regarding any abnormality, the defensible attribution of the mental state,

32. In *Regina v. Rose*, 15 Cox C.C. 540 (1884), the judge's instruction indicated that a verdict of murder could be returned against the defendant who unreasonably believed he was preventing a homicide. A.R.N.Cross suggests that this would now be manslaughter. 51 LAW Soc'y GAZ. 515 (1954). Cf. *Miles v. State*, 52 Tex. Crim. 561, 108 S.W. 378 (1908).

33. *Allison v. State*, 74 Ark. 444, 86 S.W. 409, 413 (1904); *State v. Thomas*, 184 N.C. 757, 761-62, 114 S.E. 834, 836 (1922); *State v. Doherty*, 72 Vt. 381, 48 Atl. 658 (1900); *State v. Sorrentino*, 31 Wyo. 129, 224 Pac. 420, 424 (1924).

34. *E.g.*, Art. 19 of the Swiss Federal Penal Code provides: "If the offender had been able to avoid the error by acting with due caution, he shall be punished for negligence, provided that the negligent commission of the act is punishable." Translation, 30 J. CRIM. L., C. & P.S. SUPP. 22 (1939).

35. HALL, *op. cit. supra* note 23, c. 6. Cf. *infra* pp. 21-23.

thus determined, to the particular defendant. This meaning of "reasonableness," as an essential instrument of inquiry, must be sharply distinguished from its application as an external standard of criminal liability represented in the substantive law on mistake of fact. It is the latter which is objectionable because some defendants are inexperienced or awkward or, for other causes, are not reasonable ("normal") persons; nor, on the other hand, do they fall within the definition of legally recognized incompetence.³⁶

Negligent behavior implies inadvertence regarding the harm caused; while in action in ignorance of the facts, the actor "intended" to inflict a harm which, however, he would not have done had he not been mistaken. Thus, it is the defendant's capacity (to know and to act with due care) which is the salient common element.

Invincible Ignorance

The defendant's capacity to acquire necessary knowledge is discussed in European law in terms of whether his ignorance was "vincible" or "invincible";³⁷ and this has resulted in more searching inquiry than is customary with reference to "reasonableness." Aristotle, from whom that notion stems, attached culpability to harms committed "in ignorance," but he absolved the doer if the harm was done not only "in ignorance" but also "through ignorance."³⁸ The former is "vincible" ignorance, the latter, "invincible," *i.e.*, the doer was competent to acquire the necessary knowledge or he lacked that ability.³⁹ As regards the latter, Aristotle's position is more discriminating than the common law which holds that if a person is sane, he is conclusively presumed to have the necessary capacity. If that presumption is rejected, *e.g.*, there are persons who, although sane, are so handicapped in certain respects that they lack normal skill⁴⁰ or knowledge, it follows that such persons are not morally culpable for harms resulting from their lack of competence and that they should not be held criminally liable.

Aristotle, however, had still another test to apply to such persons before he would exculpate them. With regard to persons who were invincibly ignorant or inefficient when they committed certain harms, *i.e.*,

36. *E.g.*, Fisher v. United States, 328 U.S. 463 (1946).

37. See *supra* note 1.

38. ETHICA NICHOMACHEA, bk. III.5, 1113b-1114a; bk. V.8, 1136a, 5-10 (Ross transl. 1925); MAGNA MORALIA bk. I.33, 1195a, 28-32 (Ross transl. 1915).

39. Cf. ". . . there is an ignorance that is superable, and that is no excuse; and there is an ignorance that is insuperable, and that is an excuse, whether it arises from nature, as from excessive age, or from a malady such as madness." The Mirror of Justices 138 (Seld. Soc'y ed. 1893).

40. See Yates v. People, 32 N.Y. 509 (1865).

they could not have done better at that time, Aristotle maintained that some of them might nevertheless be found culpable by reference to their past. While holding that morality concerns only voluntary conduct, he took an extremely rigorous position in this regard. He specifies an intoxicated person who cannot function properly and he finds him culpable on the ground that he need not have become intoxicated. In the past he "willed" in certain respects, which led to the habit of indulgence. According to Aristotle, moral culpability may be posited in such cases on the voluntary actions performed or omitted in the past which had the cumulative effect of incapacitation.

But there are serious difficulties with this subtle ethics as regards its application to criminal law. In order to implement that position, it would be necessary to survey the entire course of the defendant's life, to decide, *e.g.*, whether one who was not competent to drive an automobile with due care had deliberately refrained from bicycle-riding, chosen not to learn about machinery, etc., including all his overt acts that had any bearing on the incompetence which now makes his lack of skill or ignorance invincible. If the driver were a woman who could not gauge a distance or the angle of a curve, it would be necessary to decide whether her present ignorance was determined by her own culpable acts and omissions or was always invincible. Thus, while there is no escape from the sheer logic of the Aristotelian thesis and some may also find much merit in his ethics, the factual difficulties are so considerable as to preclude their use in criminal law. Here it is not only a question of ethical principle; the punishment of human beings within the limits and limitations of a legal system is also involved. Can any child or youth foresee that a series of petty transgressions may lead years in the future to a condition of ignorance or inefficiency that produces serious harms? Is there any feasible basis to impute present criminal liability for harms caused by voluntary lapses in the distant past? Accordingly, one would wish to delegate that kind of adjudication to an omniscient philosopher-king who had precise records and the wisdom to assess culpability for a major harm caused many years later by minor actions that were completely unrelated, in human prescience, to any serious consequences.

On the other hand, if an historical inquiry, a "case-history," is limited to the determination of the defendant's present competence, it is feasible to apply at least certain phases of it to criminal liability. For example, as will be seen later with reference to *ignorantia juris*, if illness or absence from the country made it impossible to acquire necessary information, that should be a defense. But while it will be generally agreed that such invincible ignorance should bar penal liability, it by no means follows

that vincible ignorance should incur¹ it. For vincible ignorance may imply mere negligence ("unreasonableness").

For the purposes of ethical inquiry, persons who have the competence to acquire necessary information and fail to do that may be deemed culpable. But, it is submitted, if only voluntary harm-doing merits the severe blame implied in penal liability, it cannot be shown that either negligent behavior or the commission of a harm in ignorance of material facts is culpable in that degree or in that sense.⁴¹ For there is a great difference between asserting that a person must voluntarily commit a certain harm to be sufficiently culpable to merit penal sanctions and asserting that he is thus culpable if he could have prevented himself from involuntarily causing a harm. So, too, those who support the present limitation of "reasonableness" on *ignorantia facti* might find it difficult to prove that a person who had the capacity to acquire adequate knowledge or to use due care is culpable in the above degree and sense even though he acted in the absence of such knowledge and skill.

Much of the discussion of negligent and uninformed behavior by modern writers on ethics becomes tangled in the quagmires of an ambiguous syllogism that is silent at the crucial point. Thus it is said: *If* the actor had wanted to, or *if* he had thought of it, he could have performed the act properly. But voluntary harm-doing, *i.e.*, in the knowledge of at least the risk of that, is quite different from a lack of sensitivity to the risk of injuring others or to the need for knowledge of the likelihood of doing that. Thus, it is not logical to assert that because a person is competent to do an act properly *if* he thinks about it, *therefore* he is culpable for doing harm inadvertently. If the argument is restated to base culpability upon insensitivity (incapacity) regarding the need for knowledge, it must also be rejected on the ground that what is required to support the kind or degree of moral condemnation characteristic of, and defensible in, modern penal law is voluntary action—at least reckless conduct. The chief conclusion to be drawn from the above analysis is that action in ignorance of material facts, where no more than negligence is shown, should not incur penal liability. But if the judg-

41. Cf. "If an Action be done without any malicious design, and not with Ignorance voluntarily contracted, but such only as crept in by Inconsideration and Inadvertency, the Imputation is not altogether taken away, yet it is considerably diminished. Hither we may refer the Case propos'd by *Aristotle* of a Woman that gave a Love-Potion to her Gallant of which he died. Now the *Athenian* Judges absolv'd the Woman from this Indictment, because she did the Fact undesignedly, and only miss'd the Effect of her Potion, and procur'd his Death instead of his Love, which was her only Aim. But to make this Sentence equitable, it must have been suppos'd as a Principle, that the Woman never so much as thought the Potion she administered was any way hurtful." PUFENDORF, OF THE LAWS OF NATURE AND OF NATIONS, bk. I, c. V, at 40 (1703).

ment proceeds from a finding of unreasonableness or vincibility to one of penal liability, it does not take account of the crucial difference between negligence and recklessness. Although the incompetence or ignorance may have been vincible or unreasonable, it does not follow that the harm in issue was committed voluntarily.

Harms resulting from inadvertence or ignorance signify incompetence and inefficiency rather than the voluntary misconduct that is the concern of penal law. Or, at most, those phases of such harms that are believed to connote fault are not of the grosser type of culpability that falls within the proper range of penal law. Moreover, as regards deterrence, it must be observed that efficiency and competence are not increased by punishment.⁴² This does not imply that the community should not be protected from dangerous inefficiency or ignorance. If we look about us for measures more likely than punitive ones to secure the required kind of protection, recent advances in the vocational training of handicapped persons, supervision, and revocation of licenses seem promising. The elimination of "reasonableness" as a substantive restriction of the doctrine of *ignorantia facti* would clarify the public mind regarding the nature of criminal conduct. It would facilitate analysis of the criminal law and stimulate a sounder administration of it.

Restrictions (b) Strict Liability

The strict liability imposed for public welfare offenses⁴³ excludes any consideration of mistake of fact even though the mistake was one which any reasonable person would have made. Thus, as regards many serious offenses, only "reasonable" mistakes exculpate—and we have seen the arbitrary import of that as it affects honestly mistaken harm-doers; and, as regards a large number of minor offenses, even a reasonable mistake of fact is no defense.⁴⁴ This strict liability has also been applied to various major crimes, especially sexual offenses.

42. There is considerable psychological literature indicating that punishment has little influence on learning. See, e.g., THORNDIKE, *THE PSYCHOLOGY OF WANTS, INTERESTS AND ATTITUDES* 149-52 (1935), and Estes, *An Experimental Study of Punishment*, 57 *PSYCH. MONOG.* No. 3, 1 (1944). Practically all the data relied upon concern the acquisition of various skills and not of moral sensitivity. Hence the conclusions reached in such studies do not affect the function of punishment where the offender has committed morally culpable acts.

43. HALL, *op. cit. supra* note 23, c. 10.

44. *Ibid.* In *Regina v. Bishop*, 14 Cox C.C. 404 (1880), where the defendant was convicted of receiving a "lunatic" into her house, such house not being an asylum, it was held no defense that there was an honest belief that the person received was not a lunatic.

A leading illustrative case is *Regina v. Prince*,⁴⁵ where the defendant was charged with having taken an unmarried girl, under 16, from the possession and against the will of her father. The jury found that the girl told the defendant she was 18, that he believed her and that his belief was a reasonable one, *i.e.*, all the usual requirements of exculpation on the ground of reasonable mistake of a material fact were met. Nonetheless, of the ten judges all but one upheld the conviction. Two theories were relied on: the legislature intended to exclude *mens rea*; and the defendant's conduct was immoral regardless of the girl's age, hence the mistake of that fact was irrelevant.

The first ground was persuasively challenged by Brett, J., in a detailed historical survey of the legislation. In the light of that, it is clear that the judges' own view of the relevant policy determined "the legislative intent." As regards the second ground, the judges' chief reliance was upon analogy from the misdemeanor-manslaughter rule. Brett, J., supported that rule⁴⁶ but refused to expand the analogy to the point accepted by the majority, namely, that the required *mens rea* could be posited on immoral conduct that was not illegal.⁴⁷ From convictions in cases of assault and illegal entry into a dwelling house, where the mistakes of fact were irrelevant because the intentions were nonetheless criminal, Bramwell, J., induced the wide *ratio* that liability could be supported on the ground that "the act [intended] . . . was wrong in itself."⁴⁸

With reference to the strict liability imposed,⁴⁹ it should be noted that no evidence supporting the assumed need for such arbitrariness is available. In these circumstances, one may certainly believe that application of the usual restriction of *ignorantia facti* to reasonable mistakes would result in convictions in the vast majority of such cases. Even without that unjustifiable limitation on the doctrine, judges and juries would not easily be persuaded that the defendants in such cases actually believed the girls were above the statutory age. Moreover, since recklessness is sufficient to support penal liability, it would be necessary only

45. 13 Cox C.C. 138 (1875). The earlier English cases are there cited. Similar decisions in this country are: *People v. Dolan*, 96 Cal. 315, 31 Pac. 107 (1892); *Heath v. State*, 173 Ind. 296, 90 N.E. 310 (1909); *State v. Ruhl*, 8 Iowa 447 (1859); *People v. Marks*, 146 App. Div. 11, 130 N.Y. Supp. 524 (1st Dep't 1911).

46. *Regina v. Prince*, 13 Cox C.C. 138, 155-56 (1875).

47. "I do not say illegal, but wrong." *Id.* at 141.

48. *Id.* at 143. Cf. "And though the wrong intended was even not indictable, the defendant would still be liable, . . ." *State v. Ruhl*, 8 Iowa 447, 450 (1859).

49. *Rex v. Maughan*, 24 Cr. App. R. 130 (1934).

to find that the defendant was in doubt regarding the material facts.⁵⁰

In addition to various sexual offenses, bigamy⁵¹ and adultery,⁵² strict liability, based on the exclusion of even reasonable mistakes of fact from the doctrine of *ignorantia facti*, has been applied to embezzlement, the sale of narcotics and in cases of persons defending others against apparent serious aggression.⁵³ Heavy penalties are imposed in such cases. Thus strict penal liability has swept over a vast terrain in the past century,⁵⁴ and the conclusions reached above in the context of mistake of fact support that emphasized elsewhere:⁵⁵ this branch of our law is so thoroughly disorganized, rests so largely on conjecture and dubious psychology, and effects such gross injustice as to require major reform.

Mention must be made, finally, of a type of factual ignorance which is not usually discussed in relation to *ignorantia facti*, namely, ignorance of elementary science, *e.g.*, regarding sickness, medicine and the use of physicians. The defendants in these cases are sometimes very stupid persons, unaware of the gravity of a child's illness and the availability of physicians.⁵⁶ In other cases the defendants are members of religious sects which believe, *e.g.*, that the devout cannot be harmed even by the bite of a rattlesnake⁵⁷ or that it is sinful to use medicine. There are surprisingly few reports of such cases, apparently because prosecutors are reluctant to initiate proceedings and, when they do, juries are apt to acquit.⁵⁸ But there have been a number of convictions, and the relevant holdings imply that ignorance of ordinary factual knowledge, possessed by every "normal" adult in the community except such eccentrics as these defendants, is no defense. Although mitigation is undoubtedly frequent, it is assumed that the ignorance was "unreasonable," and the

50. "Consequently, doubt is not error, nor is suspension of judgment, for in such experiences there is no conviction that we now know." Aron, *op. cit. supra* note 8, at 57 n. 1.

51. See *infra* pp. 30-34.

52. *State v. Anderson*, 140 Iowa 445, 118 N.W. 772 (1908); *Commonwealth v. Elwell*, 43 Mass. (2 Met.) 190 (1840).

53. *State v. Cook*, 78 S.C. 253, 59 S.E. 862 (1907), 15 L.R.A. (n.s.) 1013 (1908).

54. *But cf.* The English Criminal Law Amendment Act, 1922, 12 & 13 Geo. 5, c. 56, § 2, which provides: "Reasonable cause to believe that a girl was of or above the age of sixteen years shall not be a defence to a charge under section five . . . of the Criminal Law Amendment Act, 1885. . . . Provided that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offense under this section."

55. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*, c. 10 (1947).

56. *Stehr v. State*, 92 Nebr. 755, 139 N.W. 676 (1913).

57. *Kirk v. Commonwealth*, 186 Va. 839, 44 S.E.2d 409 (1947).

58. Larson, *Child Neglect in the Exercise of Religious Freedom*, 32 CHI.-KENT L. REV. 283 (1954).

conduct is held criminal. Such decisions raise difficult questions regarding the application of objective *mens rea*⁵⁹ and the quality of legal justice.

IGNORANTIA JURIS NEMINEM EXCUSAT

Fact and Law

In current discussions of criminal law theory, it is sometimes argued that *ignorantia juris neminem excusat* is an archaism that should be discarded. This doctrine seems to hold morally innocent persons criminally liable, and to do so in reliance upon an obvious fiction—that everyone is presumed to know the law. But if the meaning of *ignorantia juris* differs greatly from that of *ignorantia facti*, their respective functions should also be very different. The first step toward solution of this problem is to analyze the terms that distinguish the two doctrines.

Certain differences between fact and law are easily recognized. Law is expressed in distinctive propositions, whereas facts are qualities or events occurring at definite places and times. Facts are particulars directly sensed in perception and introspection. Legal rules are generalizations; they are not sensed, but are understood in the process of cognition.⁶⁰ Law and fact are, of course, closely interrelated—law is “about” facts, it gives distinctive meaning to facts. For example, that A kills B is a fact; that this is murder is signified by certain legal propositions.⁶¹ When practical questions must be decided, what is “fact” and what is “law” differ in various contexts, *e.g.*, if the purpose is to determine the respective functions of judge and jury or if a question of foreign law is in issue.

Although the terms of the doctrines concerning *ignorantia* indicate that it is important to make the above distinctions, it will be seen later that the crucial difference is not between fact and law, but between what is and what is not morally significant. Indeed, we have already seen that fact is subordinated to a mistaken belief about fact, *i.e.*, to what is relevant to morality. Again, the distinction of property and other non-penal law from penal law and treating the former as “fact,” to be discussed later in relation to property crimes and bigamy, will also be seen to

59. See *infra* pp. 21-23.

60. It is important to distinguish this meaning of “law” from its equally important sociological meaning, where it denotes a type of social fact, *i.e.*, it is viewed as an external “thing” which influences behavior. This would fit the following definition of “fact”: “No one doubts that there are coercive factors in general experience which certainly determine action, and also in some degree determine thought and will, though to an extent which is disputable. These existences, science, like common sense, calls facts.” BARRY, *THE SCIENTIFIC HABIT OF THOUGHT* 93 (1927). Cf. HALL, *LIVING LAW OF DEMOCRATIC SOCIETY* c. 3 (1949).

61. See Kelsen, *The Pure Theory of Law*, 50 L.Q. REV. 474, 478 (1935).

support the hypothesis that the two doctrines move in different directions because they function differently in relation to the moral significance of criminal law. But we must first relate the distinctions drawn above regarding law and fact to *ignorantia*.

“*Ignorantia*”

Of the various sources of difficulty encountered in analysis of *ignorantia juris*, the most serious one concerns the meaning of “*ignorantia*.” Since that term suggests a negative condition, *i.e.*, the absence of “knowledge,” analysis of this problem must deal with the latter term. It may be inferred from the distinctions drawn above between fact and law, that perception is a primitive form of knowledge, and that knowledge of law, the cognition of legal propositions, is much more complex. More important is that perception of facts is relatively certain; given external objects, all normal persons who perceive them under “adequate” conditions arrive at uniform judgments, and errors are attributed to excitement, negligence, poor conditions of observation, intoxication, and the like. But with reference to knowledge of law, there can never be such certainty as that. Although it is true that one is sometimes just as certain that a particular situation is within a rule as he is that he sees an external object, much more is required to determine the meaning of the rule. To do that one must take account of the vagueness of legal rules at their periphery, the unavoidable attribute of all propositions that refer to facts. Hence, no one can say with certainty that a rule of law means precisely thus and so.

These differences regarding knowledge of law and knowledge of fact indicate that *ignorantia facti* is an apt expression because “mistake” implies the possibility of certitude but that *ignorantia juris* is not apt. In any case, whatever view of the two kinds of knowledge or *ignorantia* is preferred, the relatively much greater difficulty of knowing the law suggests that the two doctrines may implement very different policies. This preliminary insight into the nature of legal knowledge provides a perspective from which to gauge the significance of various theories of *ignorantia juris*.

Earlier Theories

The Roman theory—that the law is “definite and knowable”⁶²—seems to have been interpreted quite literally. As Blackstone noted, “every person of discretion . . . may . . . know” it,⁶³ hence ignorance

62. 1 AUSTIN, LECTURES ON JURISPRUDENCE 497 (4th ed. 1879). See PUFENDORF, *op. cit. supra* note 41, bk. 1, c. 3, at 10.

63. 4 BLACKSTONE, COMMENTARIES *27.

is culpable. It is stated by many writers that the rigor of the Roman doctrine, unlike Blackstone's version, was relieved by the exception of large classes of persons (minors, women, farmers and soldiers) from its operation.⁶⁴ But whatever may have been its original persuasiveness in small communities, this theory seems so far-fetched in modern conditions as to be quixotic. Its rationale must be found in a policy that can be justified otherwise than by mere reference to a fiction.

A modern theory, constructed with due appreciation of this, was presented by Austin who maintained that it rested on, and was required by, the impossibility of determining the relevant issue. "Whether the party was *really* ignorant of the law, and was *so* ignorant of the law that he had no *surmise* of its provisions, could scarcely be determined by any evidence accessible to others."⁶⁵ He also pointed out that even if the above problem were solved, it would be impossible to determine whether the defendant had been negligent in failing to acquire the legal knowledge since it would be "incumbent upon the tribunal to unravel his previous history, and to search his whole life for the elements of a just solution."⁶⁶

Austin's theory was rejected by Holmes who "doubted whether a man's knowledge of the law is any harder to investigate than many questions which are gone into. The difficulty, such as it is, would be met by throwing the burden of proving ignorance on the law breaker."⁶⁷ Unfortunately, Holmes did not discuss Austin's claim that the determination of parallel questions regarding fact was quite different and "soluble," that they "may be solved by looking at the circumstances of the case. The inquiry is limited to a given incident . . . and is, therefore, not interminable."⁶⁸ His own theory was that *ignorantia juris neminem excusat* was merely a phase of objective liability required by social utility: "to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey. . . ."⁶⁹

Austin's theory of *ignorantia juris*, it is submitted, has much to recommend it. If, *e.g.*, a defendant claimed that he believed he had a right to kill a trespasser, how could his testimony be disproved? How could the prosecution establish that he actually believed he had no such legal right?⁷⁰ To hold, as did Holmes, that the difficulty could be met

64. This general opinion was rejected by Binding, who limited the exceptional treatment to civil law. Ryu and Silving, *Error Juris—A Comparative Study*, 24 U. OF CHI. L. REV. 421, 425 (1957).

65. AUSTIN, *op. cit. supra* note 62, at 498.

66. *Id.* at 499.

67. HOLMES, *THE COMMON LAW* 48 (1881).

68. AUSTIN, *op. cit. supra* note 62, at 499.

69. HOLMES, *op. cit. supra* note 67.

70. See *Gordon v. State*, 52 Ala. 308 (1875).

by placing the burden of proof upon the defendant does not meet Austin's position. If ignorance of the law is unprovable, how is the nature of that negative issue changed by requiring the defendant to establish his ignorance, *i.e.*, by a technical rule of procedure? Thus, it must be concluded that, if his position is literally interpreted, Austin stood on firm ground.⁷¹ In addition, Austin's doubts regarding proof of negligence are certainly warranted.

On the other hand, however, it must be recognized that it is possible to prove that a person had an opportunity to acquire certain knowledge or *per contra*, that due, *e.g.*, to illness, his ignorance in the above "operational" sense, was invincible. Thus, it might be shown that certain information had been brought to the defendant's attention, *e.g.*, that he was handed a booklet containing certain laws, that an administrative board mailed him a set of regulations, or that certain rules governing his vocation were published in a newspaper to which he subscribed. From such facts, it might be presumed that he read the law in question; it might also be inferred that, being a normal adult, he understood it or enough of it to satisfy a relevant *mens rea*. But for reasons to be discussed below, the defense of invincible ignorance of the law, since it proceeds on the premise that knowledge of law is material, can have only a limited application, *i.e.*, to certain petty offenses.

It is significant that both Austin and Holmes,⁷² while they differed regarding the practical implementation of a defense of ignorance of the law, shared a common utilitarian viewpoint which, in addition, did not distinguished major crimes from petty offenses. Holmes's thesis, that to allow the defense would "encourage ignorance where the law-maker has determined to make men know and obey," is surely questionable. For this implies that knowledge of the penal law is material, whereas such knowledge is usually irrelevant. Moreover, it can hardly be established that a principal purpose of penal law is to stimulate legal education; even Bentham balked at punishment as a method of making the law known.⁷³ In Holmes' theory, if a defendant who, *e.g.*, had shot his wife's paramour in adultery, could show that he had studied the criminal law long and assiduously before doing that, he should be entitled at least to

71. Cf. "But the proof of a belief in the existence of private rights, such as ownership, can be found in objective evidence of conduct, while belief in the existence of a general law generally would have no such objective manifestations." Note, 45 HARV. L. REV. 336, n. 19 (2) (1931). See Winfield, *Mistake of Law*, 59 L.Q. REV. 327 (1943).

72. Holmes' theory has been accepted by GLANVILLE WILLIAMS, *CRIMINAL LAW* § 115 at 385 (1953).

73. 6 THE WORKS OF JEREMY BENTHAM 519-20 (Bowring ed. 1843).

mitigation of the punishment.⁷⁴ But no one has ever sought mitigation on that ground; indeed, it would warrant aggravation of the punishment since the *mens rea* had long been entertained. This indicates that penal policy is not to make men know the law, as such, but to help them inhibit harmful conduct.⁷⁵ The influence of penal law results not from men's learning criminal law as amateur lawyers, but from the significance of the public condemnation of, and imposition of punishment for, certain highly immoral acts. Thus, despite a lawyer's predilection, there is not the slightest evidence that the generality of men study the criminal law in order "to know and obey it." The deterrent theory here, again, reflects an over-simple, intellectualistic psychology that hardly comes into contact with the actual springs of moral conduct and conformity with penal law.

As was suggested above, neither Austin's nor Holmes' theory cuts to the heart of the problem of *ignorantia juris*. The universality of the doctrine⁷⁶ alone suggests that it rests on extremely important, positive grounds. The frequent expression of the *necessity* of reliance upon it, of the *dependence* of any administration of justice upon it, and the like⁷⁷ also indicate that the doctrine is grounded in a more fundamental rationale than was expressed by either Austin or the Holmes of *The Common Law*.

The Rationale of Ignorantia Juris

A defensible theory of *ignorantia juris* must, it is suggested, find its origin in the central fact noted above, namely, that the meaning of the rules of substantive penal law is unavoidably vague, the degree of vagueness increasing as one proceeds from the core of the rules to their periphery. It is therefore possible to disagree indefinitely regarding the meaning of these words. But in adjudication, such indefinite disputa-

74. Cf. Holmes, J.,: "It may be assumed that he intended not to break the law . . . but if the conduct described crossed the line, the fact that he desired to keep within it will not help him. It means only that he misconceived the law." *Horning v. District of Columbia*, 254 U.S. 135, 137 (1920).

75. Also cf. "If he knew that his representations were false, and if he intended to deceive by them, and, by the help of the motives thus created, to get Kearns' property, he had the only criminal intent which the statute requires." Holmes, J., in *Commonwealth v. O'Brien*, 172 Mass. 248, 256, 52 N.E. 77, 80 (1898).

76. See RADULESCO, *DE L'INFLUENCE DE L'ERREUR SUR LA RESPONSABILITÉ PÉNALE* 15-17 (1923).

77. "Without it justice could not be administered." 1 BISHOP, *CRIMINAL LAW* 197 (9th ed. 1923); *People v. O'Brien*, 96 Cal. 171, 176, 31 Pac. 45, 47 (1892). The like views of Ortolan, Laborde, Garçon and Garraud are summarized by RADULESCO, *op cit. supra* note 76, at 41-43. "That ignorance of law does not exempt from obligation is a principle which prevails in all legal orders and which must prevail, since, otherwise, it would be almost impossible to apply the legal order." KELSEN, *GENERAL THEORY OF LAW AND STATE* 72 (1945).

tion is barred because that is opposed to the character and requirements of a legal order, as is implied in the principle of legality. Accordingly, a basic axiom of legal semantics is that legal rules do or do not include certain behavior; and the linguistic problem must be definitely solved one way or the other, on that premise. These characteristics of legal adjudication imply a degree of necessary reliance upon authority. The debate must end and the court must decide one way or the other within a reasonable time. The various needs are met by prescribing a rational procedure and acceptance of the decisions of the "competent" officials as authoritative. Such official declaration of the meaning of a law is what the law is, however circuitously that is determined.

Now comes a defendant who truthfully pleads that he did not know that his conduct was criminal, implying that he thought it was legal. This may be because he did not know that any relevant legal prohibition existed (ignorance) or, if he did know any potentially relevant rule, that he decided it did not include his intended situation or conduct (mistake). In either case, such defenses always imply that the defendant thought he was acting legally. If that plea were valid, the consequence would be: whenever a defendant in a criminal case thought the law was thus and so, he is to be treated as though the law were thus and so, *i.e.*, *the law actually is thus and so*. But such a doctrine would contradict the essential requisites of a legal system, the implications of the principle of legality.

This is apparent when we examine some necessary elements of a legal order, signified by the principle of legality (the "rule of law"), in greater detail. These are:

- (1) that rules of law express objective meanings;
- (2) that certain persons (the authorized "competent" officials) shall, after a prescribed procedure, declare what those meanings are. They shall say, *e.g.*, that situations A, B, C but not X, Y, Z are included within certain rules; and
- (3) that these, and only these, interpretations are binding, *i.e.*, only these meanings of the rules are the law.

To permit an individual to plead successfully that he had a different opinion or interpretation of the law would contradict the above postulates of a legal order. For there is a basic incompatibility between asserting that the law is what certain officials declare it to be after a prescribed analysis, and asserting, also, that those officials *must* declare it to be, *i.e.*, that the law is, what defendants or their lawyers believed it to be. A legal order implies the rejection of such contradiction. It opposes objectivity to subjectivity, judicial process to individual opinion, official to lay, and authoritative to non-authoritative declarations of what the law is. This is the rationale of *ignorantia juris neminem excusat*.

This rationale can also be expressed in terms of the ethical policy of *ignorantia juris neminem excusat*, namely, that the criminal law represents certain moral principles; to recognize ignorance or mistake of the law as a defense would contradict those values.⁷⁸

Reference to the criminal cases where a defense of ignorance was pleaded supports this insight. A plea of ignorance or mistake of law is rarely encountered in prosecutions for serious crimes; it is raised almost solely in relation to minor offenses. Thus no sane defendant has pleaded ignorance that the law forbids killing a human being or forced intercourse or taking another's property or burning another person's house. In such cases, which include the common law felonies and the more serious misdemeanors, instead of asserting that knowledge of law is presumed, it would be much more to the point to assert that knowledge of law (equally, ignorance or mistake of law) is wholly irrelevant. But many have and do plead ignorance of laws requiring them to supply certain reports or forbidding the manufacture or sale of intoxicating liquor, the possession of gambling appliances, conducting a lottery, betting on horse races, keeping a saloon open on election day, and the like.⁷⁹ In the relatively few cases of major crimes where ignorance of law was pleaded, no challenge was raised concerning the validity of the moral principle generally implied, but it was claimed that the situation in which the defendant acted was "exceptional." Thus, in a murder case, the defendant sought to justify his action on the ground that his victim was a wilful trespasser;⁸⁰ in another homicide, on the ground that he was protecting his sister from one who was attempting to drug her to facilitate her rape.⁸¹ There are kidnapping cases, defended by police officers, where suspected offenders were held *incommunicado* under a claim that the penal law permitted such conduct.⁸² But none of the above defendants alleged that he was ignorant that the criminal law forbade murder or kidnapping. This problem is closely related to the valuation of harms in the criminal law, expressed in the principle of *mens rea*.

78. The same considerations do not apply to *ignorantia facti* because: (a) Such a mistake is particular, *i.e.*, it concerns a unique experience which in no way opposes the meaning of rules of law. These meanings are generalizations; they can be and are fitted to mistakes of fact, while, as seen, a plea of mistake of law challenges the meaning of the rules. (b) Behavior in ignorance of the facts is "involuntary"; it is not immoral while at least action violative of a major criminal law is immoral regardless of ignorance of the law.

79. See Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. OF PA. L. REV. 35, 36-37 (1939) and see notes 150 and 151 *infra*.

80. *Weston v. Commonwealth*, 111 Pa. 251, 2 Atl. 191 (1885).

81. *People v. Cook*, 39 Mich. 236 (1878).

82. *People v. Weiss*, 276 N.Y. 384, 12 N.E.2d 514 (1938).

Mens Rea: The Objective Ethics of Penal Law

The criminal law represents an objective ethics which must sometimes oppose individual convictions of right.⁸³ Accordingly, it will not permit a defendant to plead, in effect, that although he knew what the facts were, his moral judgment was different from that represented in the penal law. Modern penal law goes far toward mitigating the penalty in cases of extreme temptation or unselfish motivation. But there is a basic limitation expressed in the fact that the consequence is mitigation, not exculpation. In short, the value-judgments embodied in the penal law imply that any conduct, however well motivated, that falls within its orbit is wrong. This axiom of the penal law is a necessary one. On practical grounds alone, serious difficulties would beset any other position, especially that *mens rea* should be restricted to mean that the defendant also knew he was acting immorally, *i.e.*, against his conscience. The claim of good motives would not only be very frequent, since rationalization is a commonplace; it would also raise problems analogous to those discussed above in connection with the official declaration of law. Nor could the defendant's claim that he believed he was doing what was right be met by the rejection of his morals and the substitution of the judge's, since the latter's morals are not to be presumed to have greater validity because he is an official. The only defensible alternative is to apply the established ethical judgments of the community; and the only relatively certain data evidencing them are the penal laws.

The moral values represented in the criminal law can be defended on the basis of their derivation from a long historical experience and critical open discussion in which many persons, lay and expert, participated. They may not validly be contrasted with individual ethics because the individual participates in the determination and development of the community's ethics, hence these are, also, his ethics.⁸⁴ The need for efficacy and the practical limitations of a legal apparatus tend to restrict the penal law to conduct that is plainly immoral and widely disapproved. The process of legislation, viewed broadly to include discussion by the electorate, provides additional assurance that the legal valuations are soundly established.⁸⁵ Thus, as regards the homicide of a wilful trespasser or of a spouse's paramour in adultery, it is clear that the defendant, though he may have acted in accordance with honest conviction, was mistaken in his moral judgment. Indeed, his action and judg-

83. HALL, *op. cit.* *supra* note 55 at 159-61. Cf. SALMOND, JURISPRUDENCE 82 (1924).

84. See Gurvitch, *Is the Antithesis of "Moral Man" and "Immoral Society" True?*, 52 PHILOS. REV. 533 (1943).

85. Special considerations relevant to petty offenses are discussed *infra* pp. 34-39.

ment were undoubtedly influenced by his emotional disturbance; hence the probability is that he would, himself, take another view of his action if he considered the situation calmly. In sum, *mens rea* involves objective evaluations rather than individual ones; but inasmuch as normal persons share common attitudes regarding the elementary interests protected by the criminal law, it is a fair inference that the doer of a proscribed harm knows that his conduct is immoral. Thus, while a person who acts in accordance with his honest convictions is certainly not as culpable as one who commits a harm knowing it is wrong, it is also true that conscience sometimes leads one astray.⁸⁶ *Mens rea* underlines the essential difference. Penal liability based on it implies the objective wrongness of the harms proscribed—regardless of motive or conviction. This may fall short of perfect justice, but the ethics of a legal order must be objective.

This is further shown in the operation of the principle of legality. As is widely believed, the principle of legality functions as a limitation on the authority of officials⁸⁷ and, thus, as a major protection of the individual. This aspect of the "rule of law" has been emphasized in political and legal literature on the subject. But, as a necessary corollary, the shield has its other side—certain conduct definitely *does* fall within the rules and is punishable. This often predominates in the popular view as the primary function of the criminal law—to locate and take control of certain harm-doers. These functions of the criminal law are interrelated and inseparable; neither can be modified without affecting the other. If a crime were defined in vague terms (its validity being assumed) it would be easier to bring harm-doers and "anti-social" persons within its scope and under the State's control; but the protection of individuals, now assured by precise case-law implementation of legality, would also suffer proportionately.

A sharply defined concept definitely excludes everything except the class it definitely includes; but if the concept is confused by setting up incompatible criteria, its vitality to carry out both functions becomes weakened. For example, if it were to be enacted that a good motive for committing an otherwise legally forbidden harm was henceforth to be a defense, the result would be to introduce such uncertainty into the present definitions of crimes that legality would be practically abandoned. It is true, of course, that there is a constant tension between the existing legal definitions and marginal cases which have wide appeal to one's sympathy, and that problems now allocated to administrative discretion may

86. "If to act in accordance with one's conviction is always, in one sense, to do one's duty, it remains true that one's conscience may be very much mistaken and in need of improvement." ROSS, *FOUNDATIONS OF ETHICS* 165 (1939).

87. See HALL, *op. cit. supra* note 55, c. 2.

in the future be incorporated into the criminal law, as, *e.g.*, has occurred in England with reference to infanticide immediately following birth. But there is a method of making such progress which centers in the specification of criteria that are compatible with the rules and doctrines of the existing law. The survival of the principle of legality requires the preservation of the definiteness of the rules, which must not be dissolved by the incompatible recognition of the opinions of litigants and lawyers as authoritative.

There are, thus, two aspects of the rationale of *ignorantia juris neminem excusat*. The doctrine is an essential postulate of a legal order, a phase of the "rule of law." And, second, legality cannot be separated from morality in a sound system of penal law. In such a system, at least the penal law on the major crimes represents both the formal criteria of legality and sound values. It follows that the two theories discussed above, (1) that the principle of legality implies the doctrine of *ignorantia juris*, and (2) that the doctrine is necessary to the maintenance of the objective morality of the community, can be combined in a single rationale—the legally expressed values may not be ignored or contradicted. Thus, the direction of reform of the doctrine is also indicated, *e.g.*, to take account of ignorance or mistake of property laws, other technical rules and certain petty penal laws. This will be discussed later.

With reference to the position presented above, it is possible, of course, to challenge the underlying premise—the desirability of having a legal system. Some may prefer decision by individuals who exercise completely unfettered power; and occasionally cases arise regarding which almost everyone wishes a decision could be rendered without restriction by existing laws. But this issue need not be discussed here.⁸⁸ For present purposes it is necessary to assume the existence of a legal system and the consequent implications of the principle of legality. The validity of the above theory of *ignorantia juris neminem excusat* must be tested by criteria which are relevant to that basic premise.

Application of the Rationale of Ignorantia Juris

In light of the above discussion we may consider certain problems raised in the literature and case-law on *ignorantia juris*. Two proposed exceptions to *ignorantia juris neminem excusat*—mistake based on the "advice of counsel" and the "indefiniteness" of a law—may be disposed of briefly. The above analysis reveals the reason for the uniform holding that the advice of counsel regarding the meaning of a criminal law is not a defense. It is not that the lawyer may be incompetent or cor-

88. *Ibid.*

rupt,⁸⁹ but that lawyers are not law-declaring officials; it is not their function to interpret law authoritatively. Suppose that an opinion was obtained from the most distinguished lawyers, that the subject was not complicated, that numerous precedents were found, and that the law was clear and simple—in short, a situation where knowledge of law was easy to acquire. A person acts upon such advice, then a prosecution is instituted. His plea of ignorance would nonetheless be invalid because the court before whom the case is tried cannot substitute the opinion of counsel for its own “knowledge.”⁹⁰

This leads to a major conclusion previously suggested, namely, that “knowledge” of law (and thus ignorance or mistake of it) has not only the usual meaning discussed above but also a meaning that is distinctive and decisive as regards the doctrine of *ignorantia juris*. “Knowledge” of the law in this context means *coincidence with the subsequent interpretation of the authorized law-declaring official*. If there is coincidence, the defendant knew the law and his action is legal. If there is not coincidence, it can avail nothing that the defendant thought his conduct was legal.⁹¹ This is the special meaning of *ignorantia*, which distinguishes it from the ordinary meaning of ignorance, expressed, *e.g.*, in *ignorantia facti*.

The above analysis also indicates the invalidity of the other proposal, that indefiniteness in the meaning of a penal law should provide an exception to the doctrine of *ignorantia juris*. This problem is presently dealt with in terms of strict construction and “due process.” If a criminal statute is ambiguous, its meaning is rendered “sufficiently” precise by excluding the disadvantageous sense of the words. And if a penal statute is vague, *i.e.*, “too vague,” it is unconstitutional.⁹² The survival of a rule, after being subjected to the tests of strict construction and due process, is an authoritative finding that it is sufficiently definite to constitute law.⁹³ Accordingly, the defendant cannot be permitted to raise the question of indefiniteness again under a plea of ignorance of the law and

89. Despite occasional assertions to that effect, the obvious fact is that, *e.g.*, in England, where the Bar is held in very high esteem, the doctrine of *ignorantia juris* is also rigorously applied.

90. To allow such a defense would make “the opinion of the attorney paramount to the law.” *People v. McCalla*, 63 Cal. App. 783, 795, 220 Pac. 436, 441 (1923). So, too, in *Needham v. State*, 32 P.2d 92, 93 (Okla. 1934).

91. In the discussion of bigamy *infra*, advice of counsel is approved as a defense. This advice, however, concerns the law of marriage and divorce, not criminal law.

92. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921).

93. “If the right to collect depends upon the construction of various statutes, and is apparently doubtful, the officer should stop; for if he does not, he will proceed at his peril.” *Levar v. State*, 103 Ga. 42, 49, 29 S.E. 467, 470 (1897).

avoid liability by that procedure.⁹⁴

But there are certain large areas of criminal law which are presently assumed to be within the scope of *ignorantia juris* although, actually, the doctrine is not relevant to them. If this can be shown, the presently wide range of the doctrine will be substantially narrowed and its meaning should become proportionately clearer. One of the most important of these situations concerns the effect of changes in the validity of a statute or regulation. For example, a statute forbidding the sale of intoxicants is held unconstitutional; then, this decision is overruled and the statute is held constitutional. The courts usually state that they are required to deal with *ignorantia juris* in cases involving, *e.g.*, the sale of intoxicants after the first decision and prior to the second, the validating, one. They say this is an "exception" justified on the ground that it is "manifestly unfair" to hold the defendant to a greater knowledge of the law than that possessed by the State's Supreme Court. But when an individual's conduct conforms to the decisions of the highest court, the claim that he acted "in ignorance of the law" is almost fantastic. It is submitted that the above situation does not call for application of an exceptional rule because neither ignorance nor mistake of law is involved.

This is evident if the traditional theory of the unbroken validity of the statute in question is repudiated so far as penal law is concerned. The above situation would then be interpreted, in effect, as: enactment, repeal by judicial decision, and "re-enactment" by the later decision.⁹⁵ The traditional theory should not apply to criminal law because the policy prohibiting *ex post facto* enactment excludes the dependence of penal liability upon any subsequent law-making, such as a decision reversing a previous one that held a statute unconstitutional. The traditional theory implies that the law covers all possible situations and that it is certain in meaning. At the opposite extreme is the skepticism which asserts that the law is only what the judges in each particular case say it is—nothing more. Neither theory is persuasive. Law does pre-exist, but not in the degree of specificity required for all subsequent adjudications. It pre-

94. In the *Lewis Case*, 124 Tex. Crim. 582, 64 S.W.2d 972 (1933), although some *dicta* might so imply, the decision was not placed on "indefiniteness," but rather on the ground that "wilfully" required a *mens rea* that included knowledge of illegality. In *Burns v. State*, 123 Tex. Crim. 611, 61 S.W.2d 512 (1933), both grounds were relied on; greater emphasis was placed on the fact that the statute was "obscure and confusing." Such holdings usually refer ultimately to *Cutter v. State*, 36 N.J.L. 125 (1873), which involved the taking of an illegal fee by a justice of the peace. But the language of that opinion shows that the "obscurity" of the statute was relatively unimportant. The decision emphasized *mens rea*, and did not purport to be an exception to *ignorantia juris*.

95. This, however, does not explain how a void statute can be revived by the later decision. It is preferable, therefore, to speak of the unconstitutional statute as unenforceable rather than void.

exists "sufficiently" to bar arbitrariness and to limit the scope of judicial legislation, but judicial decision plays an essential role in its development. Without adding details, it may be concluded that when a court (certainly the highest court) holds the law to be thus and so, that is what the law is from that date on. Thus the correct *ratio* of the decisions dealing with the above type of situation is not that the defendant acted in ignorance of the law, that it is unfair to require him to know the law when the Supreme Court was ignorant of it, etc. It is, on the contrary, that the defendant is not criminally liable because the law at the time he acted was what the Supreme Court declared it to be; in short, his conduct conformed to the law.⁹⁶

The above analysis can be applied to other problems which are presently confused in the same way.⁹⁷ In general, the same conclusion arrived at above is applicable to lower courts⁹⁸ and to other law-declaring officials, *e.g.*, administrative officials.⁹⁹ Hence, an individual who conforms to such declarations should be protected without invoking an "exception" to *ignorantia juris*.¹⁰⁰ This seems equally applicable to the following cases: conforming to the interpretation of a conservator of game that dynamiting fish is permissible;¹⁰¹ to that of officials of the State's corporation department, including the corporation commissioner, that certain instruments are not "securities," and that a permit to sell them is not needed;¹⁰² and to a ruling by election judges that the defendant is privileged to vote.¹⁰³ Such opinions rendered by officials who

96. See Cardozo, J., in *Great No. Ry. v. Sunburst Co.*, 287 U.S. 358, 364-65 (1932) and *State v. O'Neil*, 147 Iowa 513, 126 N.W. 454, and *Annot.*, 33 L.R.A. (n.s.) 788, 794, 797 (1910).

97. *E.g.*, to a statute that repeals an older one, during which time the act in question occurs, then the repealing statute is declared unconstitutional. See *Claybrook v. State*, 164 Tenn. 440, 51 S.W.2d 499 (1932).

98. Reliance upon a decision of a county circuit court has been supported. *Wilson v. Goodin*, 291 Ky. 144, 150, 163 S.W.2d 309, 313 (1942). See, also, *State ex rel. Williams v. Whitman*, 116 Fla. 196, 156 So. 705 (1934). But it has been held that reliance upon a decision of a municipal court is not a defense: ". . . we refuse to hold that the decisions of any court below, inferior to the Supreme Court, are available as a defense, under similar circumstances." *State v. Striggles*, 202 Iowa 1318, 1320, 210 N.W. 137, 138 (1926). And see note 104 *infra*.

99. See *United States v. 100 Barrels of Vinegar*, 188 Fed. 471 (D. Minn. 1911) and, generally, Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 25-29 (1940).

100. See Morgenthau, *Implied Regulatory Powers in Administrative Law*, 28 IOWA L. REV. 575 (1943).

101. *State v. Freeland*, 318 Mo. 560, 567, 300 S.W. 675, 677 (1927). The court cited the *Cutter* and *O'Neil* cases *supra* notes 94 and 96 and also noted that the regulation in issue was *malum prohibitum*, not *malum in se*. Cf. *People v. McCalla*, 63 Cal. App. 783, 793-94, 220 Pac. 436, 439-40 (1923) where, under similar facts, advice of counsel was rejected, and "knowingly" and "wilfully" were held not to require knowledge of the law.

102. *People v. Ferguson*, 134 Cal. App. 41, 24 P.2d 965 (1933).

103. See *State v. Pearson*, 1 S.E. 914 (N.C. 1887), and *State v. Boyett*, 32 N.C. 246 (1849).

are primarily responsible for the administration of the laws they interpret¹⁰⁴ are law-declarations within their competence. Conduct which conforms to them should be held legal.¹⁰⁵

Closely related to the above are cases of officials charged with the violation of laws governing the exercise of their own duties. Since their office requires them to interpret these statutes, such interpretations are law-declarations if they are honestly made; and their conduct in conformity with them is not criminal. The relevant cases exculpating judicial officers, usually justices of the peace, are limited to interpretations of the very statutes which prescribe their official duties. Thus an official could not defend on the ground that he conformed to his interpretation of penal statutes when that was outside the scope of his duties.¹⁰⁶ Moreover, the defense might well be limited to ordinary interpretations of the law, which, *e.g.*, would exclude opinions that the laws in question were unconstitutional.¹⁰⁷ Finally, the above defense, *i.e.*, that the conduct was legal, need not be extended to ministerial officers who, in the discharge of their duties, acted upon their own interpretations of penal laws. There is another defense, however, that is sometimes available to such persons as well as to judicial officers, namely, that certain penal statutes require a knowing violation of the law.¹⁰⁸ This is part of the larger problem to be discussed next.

Knowledge of Illegality Included in Mens Rea

This problem arises chiefly in relation to larceny, embezzlement, malicious destruction of property, wilful trespasses and other similar offenses where the defendant did not know that another person's legal rights were being violated. The uniform exculpation of the defendants in these cases¹⁰⁹ does not represent an exception to *ignorantia juris neminem ex-*

104. In *People v. Settles*, 29 C. A.2d 781, 78 P.2d 274, 276 (1938) the California Superior Court refused to exculpate a defendant who had received a license to conduct a "game of skill" from the Los Angeles police department on the ground that the statute in issue (concerning lotteries) was part of the State's Penal Code, hence the city police had no authority to interpret it and grant licenses. The Court approved the *Ferguson* decision, *supra* note 102, on the ground that the official there "was directly charged with the duty of enforcing the law. . . ."

105. See 22 CALIF. L. REV. 569, 570-71 (1934).

106. *State v. McLean*, 121 N.C. 589, 28 S.E. 140 (1897); *Skeen v. Craig*, 31 Utah 20, 86 Pac. 487 (1906).

107. *Cf. Leeman v. State*, 30 Ark. 438 (1880); *Hunter v. State*, 158 Tenn. 63, 12 S.W.2d 361 (1928), 61 A.L.R. 1148, 1153 (1929).

108. *E.g.*, *Lewis v. State*, 124 Tex. Crim. 582, 64 S.W.2d 972 (1933).

109. Larceny—*Rex v. Clayton*, 15 Crim. App. R. 45 (1920); *Queen v. Reed*, [1842] C. & M. 306, 174 Eng. Rep. 519; especially interesting is *Rex v. Gilson and Cohen*, 29 Crim. App. R. 174 (1944); Embezzlement—*Lewis v. People*, 99 Colo. 102, 60 P.2d 1089 (1936); Robbery—*Barton v. State*, 88 Tex. Crim. 368, 227 S.W. 317 (1921); Forgery—*Regina v. Parish*, [1837] 8 C. & P. 93, 173 Eng. Rep. 413; Malicious destruction of property—*Regina v. Twose*, 14 Cox C.C. 327 (1879); Receiving stolen

cusat. It is not because the defendants were ignorant of the law that they are not criminals, but because, being ignorant of certain law, they lacked the required *mens rea*. Can these cases be distinguished from criminal homicide and other crimes where ignorance of the illegality of the conduct is not relevant to the *mens rea*?

In the above cases, the defendants were mistaken regarding the law of property,¹¹⁰ hence their exculpation would obviously not involve any exception to *ignorantia juris neminem excusat* if that doctrine, when employed in penal law, were interpreted to exclude property law. A good deal of confusion has resulted from the thesis that crimes against property require a "specific intent" while others, *e.g.*, criminal homicide, require only a "general intent." Actually, there is no such mental state as a "general intent"; all intentions are specific in that they are directed towards particular goals. Thus, the intent in property crimes is no more specific than is the intentional shooting at A, but hitting X.¹¹¹ Moreover, no insight or elucidation is provided regarding the above problem by asserting that property crimes require a specific intent, since this merely reiterates, only more vaguely, that the relevant *mens rea* includes a belief in the illegality of the conduct.

If we compare (1) a situation where the defendant shoots a trespasser, thinking he has a legal right to do so, and (2) the typical property case, where the defendant takes a chattel, thinking he has a legal right to its possession, we note that both situations involve private and criminal law. In (1) the defendant's ignorance of the law is not a defense to a criminal charge, whereas in (2) it is. The reason is not merely that the mistake in (2) concerns property law but rather that in (1) we have facts that are directly characterized as criminal, *i.e.*, there is a penal law that proscribes shooting a trespasser whereas in (2) we do not have such facts. In (1) no private law exists which can place any interpretation on the facts that would alter their meaning for penal law; in (2) no meaning can be ascribed to the facts that is relevant to the penal law until the defendant's opinion regarding the right of possession is determined. But this is little more than recognizing, somewhat more clearly, perhaps, that in some crimes an opinion regarding certain private law qualifies the criminal significance of the conduct. Such opinions function as facts,

property—*Robinson v. State*, 84 Ind. 452, esp. 456 (1882); *State v. Rountree*, 80 S.C. 387, 61 S.E. 1072 (1908), 22 L.R.A. (n.s.) 833 (1909); *State v. Alpert*, 88 Vt. 191, esp. 204, 92 Atl. 32, esp. 37 (1914); unlawfully removing timber from Federal lands—*Stone v. United States*, 167 U.S. 178, 189 (1897). See note 31 *supra*. The legal mistakes need not be reasonable. See *Perkins, Ignorance and Mistake in Criminal Law*, 88 U. of PA. L. REV. 35, 52 (1939).

110. See *Perkins, supra* note 109, at 51; *RADULESCO, op. cit. supra* note 76, at 13-14.

111. *HALL, GENERAL PRINCIPLES OF CRIMINAL LAW* 450-53 (1947). See *supra* note 23.

and such ignorance or mistake falls within the meaning and purpose of *ignorantia facti*. But is there an underlying reason for this?

It was suggested above that it is not the distinction between private and penal law or even the factual quality of the error regarding the former, but the moral significance of the respective norms, and consequently of the defendant's conduct, that is decisive. Accordingly, "*juris*" should not be restricted to criminal law nor should a plea of ignorance of all non-penal law be allowed. For example, parts of torts and family law, like the law defining the major crimes, also reflect simple moral values. The plea of lack of *mens rea*, resulting from ignorance of the above property law, is not inconsistent with the ethical principle that it is wrong to steal another's chattel. That value is not contradicted if the actor thinks he has a right to its possession. On the other hand, a defendant's plea of ignorance of the criminal law, *e.g.*, in killing a trespasser, would contradict the ethics of the criminal law. This conclusion regarding ignorance of certain private law is consistent with *ignorantia facti excusat*. For there, too, the defendant does not challenge the moral norms represented in the criminal law. It may be noted, finally, that "knowledge" of certain private law is given its ordinary meaning, similar to "knowledge of fact" and that, so far as penal law is concerned, the principle of legality is compatible with the recognition, as a defense, of certain mistakes of law, indicated above.

In other areas of major crime, besides the property offenses, knowledge of the illegality of an act has been recognized as an essential element of the relevant *mens rea*, *e.g.*, certain conspiracies¹¹² and serious income tax offenses. Thus a charge of wilful failure to report taxable income may be controverted by showing a mistaken interpretation of the relevant tax law. In *Hargrove*¹¹³ the defendant was convicted of "wilfully failing" to file a tax return for certain years and "wilfully and knowingly" attempting to evade payment of taxes. Evidence that he had relied upon the advice of a tax expert was excluded by the trial judge who instructed the jury: "Ignorance of the law, of course, gentlemen, is not excused. The question of wilfulness and intent rests, then and depends upon whether you find that the defendant wilfully and knowingly did what he intended to do. . . . A man may have no intention to violate the law and yet if he wilfully and knowingly does a thing which constitutes a violation of the law he has violated the law." On appeal, the conviction was reversed: Where a statute denounces "as criminal only [the] . . .

112. *Commonwealth v. Rudnick*, 318 Mass. 45, 60 N.E.2d 353 (1945); *Commonwealth v. Benesch*, 290 Mass. 125, 194 N.E. 905 (1935).

113. *Hargrove v. United States*, 67 F.2d 820 (5th Cir. 1933).

wilful doing [of an act] . . . a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence."¹¹⁴

The most serious failure to recognize that certain crimes require a belief in the illegality of the conduct is found in bigamy cases. Here the issues are clouded, partly by the assumption that the doctrine of *ignorantia juris* includes any law, private as well as penal, and partly by the dogma that bigamy does not require a criminal intent. In some States the problem has been avoided by express provisions, *e.g.*, requiring knowledge of the continuance of the first marriage. But most of the statutes are silent as to that; they run in the traditional terms of "a person who, being married, goes through a form of marriage." These statutes have often been interpreted to exclude *mens rea*, *i.e.*, just as strictly as petty "public welfare" regulations.¹¹⁵ In this country, the chief influence has been the *Mash* case, decided more than a century ago, which held that even a reasonable mistake regarding the death of the spouse was no defense.¹¹⁶ In some jurisdictions this is still the law, and the occasional judicial suggestion that the legislature ought to do something about it¹¹⁷ is small comfort to honest persons serving long sentences in prison cells. Moreover, so long as reasonable mistake of a material fact is not recognized as a defense, it is practically impossible even to consider that a mistake of law may exclude *mens rea* in bigamy.

Whatever might have been said for such strict liability when *Mash* was decided, the continued exclusion of even reasonable mistakes of fact from *ignorantia facti excusat* after the *Tolson* case¹¹⁸ is indefensible. A typical bigamy statute was carefully analyzed there by a very able court which held that a reasonable belief in a spouse's death was a defense despite the fact that the second marriage occurred prior to the expiration of the specified time, *i.e.*, that the statute, although completely silent regarding *mens rea*, nonetheless required it. Ever since the *Tolson* decision, it has been widely recognized that *mens rea* is required in bigamy.

114. *Id.* at 823. So, too, held in *Haigler v. United States*, 172 F.2d 986 (10th Cir. 1949) reversing the conviction where the trial judge, in addition to several correct instructions, instructed that ignorance of the law was no excuse. In *United States v. Di Silvestro*, 147 F. Supp. 300, 304 (E.D. Pa. 1957) the recognized rule regarding the required *mens rea* was thus stated: "Although that [ignorance of the law] is no defense to a crime in itself, it may be shown in a crime like the present where wilfulness is an element in that it may negative wilfulness in failure to perform the duty."

115. "This rule has been applied in a great variety of cases, from breaches of police regulations to bigamy, adultery, and statutory rape." *State v. Ackerly*, 79 Vt. 69, 72, 64 Atl. 450, 451 (1906). So, too, *Cornett v. Commonwealth*, 134 Ky. 613, 121 S.W. 424 (1909).

116. *Commonwealth v. Mash*, 48 Mass. (7 Met.) 472 (1844).

117. *Commonwealth v. Hayden*, 163 Mass. 453, 40 N.E. 846 (1895).

118. *Queen v. Tolson*, [1889] 23 Q.B. 168.

But that decision or, at least, what was suggested there regarding *mens rea* was restricted by *Rex v. Wheat and Stocks*¹¹⁹ to belief in the death of the spouse; elsewhere, it was held, *mens rea* is not required in bigamy.¹²⁰ Despite the prestige of English law in the Commonwealth, however, various courts in the latter jurisdictions have followed the wider implications of *Tolson*. The emphasis is properly placed on the necessity of *mens rea* in bigamy.¹²¹ Most courts which recognize reasonable mistake of fact as a defense still have difficulty in reaching sound decisions because it is assumed that wherever there is a mistake of law, there is no defense,¹²² and many of the situations include mistaken opinions regarding both facts and law—the so-called “mixed” questions. If *ignorantia juris* were limited to penal law and simple aspects of tort, family law etc., or if at least technical rules of private law, unsupported by moral attitudes, were excluded from the doctrine, it would usually be superfluous to decide whether the mistake was one of law or fact. As was suggested above, the issue would concern what was relevant to an actual *mens rea*.

The issues in the bigamy cases parallel those involved in the property offenses discussed above, and *ignorantia juris neminem excusat* is no more relevant in the former than it is in larceny; conversely, it is equally relevant to require knowledge of the illegality in both. In bigamy there is no *mens rea* if the defendant believes the first marriage was legally dissolved, just as it is now recognized that an erroneous opinion that the defendant has a legal right to the possession of a chattel excludes the *animus furandi* of larceny. Accordingly, the defendant's ignorance of technical divorce law, e.g., rules of jurisdiction, should be a defense.¹²³ Although it may not be wise to restrict the doctrine of *ignorantia juris* to penal law,¹²⁴ that is the most likely starting-point to achieve a sound

119. [1921] 2 K.B. 119. For American cases, see Annot., 27 L.R.A. (n.s.) 1097 (1910).

120. English law had previously indicated that reasonable mistake of law was a defense. *Rex v. Connatty*, 83 J.P. 292 (1919); *Rex v. Thompson*, 70 J.P. 6 (1905).

121. *Thomas v. The King*, 59 Commw. L. R. 279 (Austr. 1931); *The King v. Carswell*, [1926] N.Z. L.R. 321 (C.A. 1926); Cf. *Rex v. Sellars*, 9 Cox C.C. 153 (1905).

122. See Dixon, J., in *Thomas v. The King*, 59 Commw. L.R. 279, 306-07 (Austr. 1931) and Weigall, *Mens Rea and Bigamy*, 16 AUSTR. L. J. 3, 5-6 (1942).

123. *But cf.* *Williams v. North Carolina*, 325 U.S. 226 (1945).

124. For some of the difficulties that arose from such a sweeping restriction, see Mannheim, *Mens Rea in German and English Law*, 17 J. COMP. LEG. & INT'L L. at 248-49 (1935).

125. The range of *ignorantia juris* in private law is not directly involved in the present problem but the same considerations would seem to apply. See Note: *Mistake of Law: A Suggested Rationale*, 45 HARV. L. REV. 336 (1931). On the other hand, in agreements and in other transactions there is an autonomous sphere where the parties are, in effect, permitted to legislate for themselves. The intent of the parties is correspondingly important, e.g., in allowing reformation. The further relaxation of the

perspective.¹²⁵ This is indicated in the exclusion of the *ius civile* from the scope of the doctrine by Roman jurists,¹²⁶ in the commentaries of distinguished civilians, and in various codes of penal law.¹²⁷ In any case, it seems clear that strict liability in bigamy¹²⁸ is incompatible with the ethics of modern penal liability.

Nor does the claim that bigamy is a statutory offense warrant strict liability even if "legislative intention" and public welfare enactments suggest easy rationalizations. For, although it is true that a statute of James I gave the common law courts jurisdiction over what was previously an ecclesiastical concern, statutes of the vintage of James I have long been treated as part of the common law in this country. What is important is not that bigamy is a statutory offense, but the fact that the penalty is severe. This should definitely establish the position, supportable also on other grounds noted above, that bigamy requires a *mens rea*, e.g., entry into a marriage with knowledge of an existing one.

The tacit recognition of the validity of this position is reflected in the sentences imposed: in *Mash*,¹²⁹ a governor's pardon; in *Wheat and Stocks*, imprisonment for one day "which means that they were immediately discharged";¹³⁰ in two similar cases,¹³¹ imprisonment for one week. This contrast between hard law and soft administration makes it pertinent to ask, as did a New Zealand judge, "Why then . . . should the Legislature be held to have wished to subject him to punishment at all?"¹³² For the above reasons the continued interpretation of bigamy as a strict liability offense, the premise that this is required by *ignorantia juris*, and the imposition of severe penalties can only be characterized as both cruel and unenlightened.

doctrine in private law, e.g., as a defense to specific performance, suggests that some weight must be given to the principle implied in the Roman restriction of the maxim to *ius naturale*. See RADULESCO, *op. cit. supra*, note 76, at 25.

126. RADULESCO, *op. cit. supra* note 76, at 25, 27.

127. See *id.* at 13-15. Cf. Blackstone's statement, ". . . a mistake in point of law . . . is in criminal cases no sort of defence." 4 BLACKSTONE, COMMENTARIES *27 follows a specific illustration of a mistake in criminal law. Cf. Lord Westbury in *Cooper v. Phibbs*, 16 L.T.R. (n.s.) 678, 683 (1867); Lord King in *Lansdown v. Lansdown*, [1730] Moseley 364, 365, 25 Eng. Rep. 441 (1730); Art. 5, Italian Penal Code of 1930.

128. As regards strict liability in adultery, see *State v. Woods*, 107 Vt. 354, 179 Atl. 1 (1935).

129. *Commonwealth v. Mash*, 48 Mass. (7 Met.) 472 (1844).

130. Weigall, *supra* note 122, at 8.

131. Cited *ibid.*

132. Sim, J., In *The King v. Carswell*, [1926] N.Z.L.R. 321, 339 (C.A. 1926). Cf. ". . . it is submitted that (a) it is illogical to allow prisoner's honest belief in death to be a defence and to reject the plea of honest belief that a divorce had been granted: (b) that the prisoner should be acquitted if he raises a doubt as to the validity of the first marriage: (c) that honest belief in the invalidity of the first marriage should be a defence." Paton, *Bigamy and Mens Rea*, 17 CAN. B. REV. 94, 101 (1939).

A minority of American courts have recognized the unsoundness and injustice of treating bigamy as a strict liability offense. As long ago as 1874 the Indiana Supreme Court reversed a conviction of bigamy partly because the trial court refused to charge that "the honest belief that his former wife had been divorced from him" was a defense.¹³³ Subject to the qualification that the defendant "had used due care and made due inquiry to ascertain the truth," the Court held: "The same rule [*i.e.* acquittal] would apply to the dissolution of the marriage relation by divorce as by death."¹³⁴ In this case the defendant's error regarding the divorce was treated as a mistake of fact.

It is only quite recently, however, that these issues have been carefully analyzed by American Courts. In *Long*¹³⁵ a decree of divorce had been granted the defendant in Arkansas against his wife who continued to live in Delaware and testified that she had not been "served with any divorce papers" or had any notice by mail of the Arkansas action. The conviction of bigamy was set aside on the ground that the trial court erred in refusing to admit evidence that the defendant had in good faith followed the advice of a lawyer both before the Arkansas action and also after the decree of divorce and prior to the second marriage. Allowing the defense of mistake of law in the above circumstances (despite the invalidity of the Arkansas decree), the Supreme Court of Delaware emphasized that, "The defendant would have the burden of demonstrating that his efforts [to ascertain the relevant law] were well nigh exemplary."¹³⁶

The New Jersey Supreme Court considered the same issue in *De Meo*¹³⁷ in 1955. De Meo had gotten a Mexican "mail-order divorce" which, the Court observed, is widely considered in this country to be "valueless" and, in addition, he had taken no "reasonable steps toward ascertaining the legal validity of the divorce; indeed, if such steps had been taken they would quickly have disclosed its utter worthlessness."¹³⁸ Although the conviction was affirmed, it is very significant that the

133. *Squire v. State*, 46 Ind. 459, 461 (1874).

134. *Id.* at 463. See, too, *Baker v. State*, 86 Nebr. 775, 782-83, 126 N.W. 300, 302-03 (1910), following the Indiana decision *supra*, *Robinson v. State*, 6 Ga. App. 696, 65 S.E. 792, 795-96 (1909), *State v. Cain*, 106 La. 708, 31 So. 300 (1902). A defense was implied in *Gillum v. State*, 141 Tex. Crim. 162, 147 S.W.2d 778 (1941) although the conviction was affirmed on the ground of lack of reasonable inquiry by the defendant.

135. *Long v. State*, 44 Del. (5 Terry) 262, 65 A.2d 489 (1949).

136. *Id.* at 282-83, 65 A.2d at 499. "It would not be enough merely for him to say that he had relied on advice of an attorney, unless the circumstances indicated that his conduct throughout in seeking to ascertain the law and in relying on advice received manifested good faith and diligence beyond reproach." *Id.* at 283, 65 A.2d at 499.

137. *State v. DeMeo*, 20 N.J. 1, 118 A.2d 1 (1955).

138. *Id.* at 14, 118 A.2d at 8.

Court states in the closing lines of the decision that they "expressly withhold determination as to the availability 'in situations not before us' of a defense to a bigamy prosecution resting upon the defendant's honest belief, reasonably entertained, that he was legally free to remarry in New Jersey." Even more significant, from the viewpoint of criminal theory, is Justice Wachenfeld's vigorous dissent. He insisted that a decree of divorce should be a defense even though it is void and widely known to be void "unless this general knowledge is imputed or brought home to the defendant. . . ." ¹³⁹ De Meo had made a full disclosure of the facts on his application for the marriage license. "It must come as a distinct shock to an honest person who has made full disclosure to his sovereign state . . . to find that without wrongful or criminal intent he automatically becomes a convict on a criminal charge which he cannot even defend because the court refuses to accept the very evidence he relied upon and which was . . . approved by the state itself at the time he made his original intentions known."

The California Supreme Court recently dealt with similar issues in *Vogel*.¹⁴⁰ The defendant was not permitted by the trial court to introduce evidence that his wife had told him she was going to secure a divorce in a jurisdiction unknown to him so that he could not contest the custody of their children, that, during his absence in military service, she had lived with a certain man as his wife and that when she was injured in an automobile accident, she identified herself as that man's wife. Reversing the conviction and earlier decisions, the California Supreme Court held that "a bona fide and reasonable belief" that he was free to marry was a defense to a bigamy charge. The Court added that "reliance on a judgment of divorce or annulment that is subsequently found not to be the 'judgment of a competent Court'" is also a defense. Moreover, "since it is often difficult for laymen to know when a judgment is not that of a competent court, we cannot reasonably expect them always to have such knowledge and make them criminals if their bona fide belief proves to be erroneous."¹⁴¹ These recent decisions strengthen the American minority position considerably and indicate that other jurisdictions may pursue a similar path.

Petty Offenses

One result of the above discussion is to narrow the scope of *ignorantia juris neminem excusat* considerably since many situations presently treated as both within the meaning of, and also "exceptions" to, that

139. *Id.* at 15, 118 A.2d at 9.

140. *People v. Vogel*, 46 C.2d 798, 299 P.2d 850 (1956).

141. *Id.* at 854-55.

doctrine were shown to be irrelevant to it. The correct *ratio decidendi* of the cases dealing with those situations is either that the requisite *mens rea* included knowledge that the act was illegal (larceny, bigamy) or that the act conformed to the law declared by the authorized officials. *Ignorantia juris*, as thus restricted, was defended in terms of its rationale—a fusion of the principle of legality and the ethics of criminal law. We shall now consider the implications of this theory of *ignorantia juris* with reference to the reform of that doctrine in relation to certain petty offenses.

In an ideal system, ancient laws, no longer useful, would be discarded by a rule of desuetude. The legislature would never enact laws favoring special interests; like Plato's ideal legislator, it would be influenced only by reason and science. And all normal persons would be sufficiently sensitive and informed to recognize even very minor offenses as immoral. In such circumstances, it could be said with complete persuasiveness that any person who intentionally or recklessly did anything forbidden by the criminal law, however small the penalty, acted immorally and merited penal liability.

But actual systems of penal law fall short of such perfection. In the absence of any principle of desuetude, there are instances of prosecutors' digging into ancient books to exhume and enforce long-forgotten statutes.¹⁴² As regards some minor offenses, newly created ones, and those regulating certain businesses, there is frequently a gap between public opinion and the policy of the enactment, between mores and morality. These segments of existing criminal law raise serious questions concerning the reform of *ignorantia juris neminem excusat*.

The principle of *mens rea* requires the voluntary commission of a harm forbidden by penal law. Accordingly, if there was conduct expressing a *mens rea* and the relevant penal law had been promulgated, the ethical conditions of modern penal liability are satisfied.¹⁴³ But as regards certain criminal offenses, indicated immediately above, *the knowledge that the relevant conduct is legally forbidden is an essential element of its immorality*.¹⁴⁴ This is quite different from the judicial distinction

142. See *Everhart v. People*, 54 Colo. 272, 130 Pac. 1076 (1913).

143. Opportunity to examine and study the laws is implied in democratic theory which would not be satisfied if conflicts were adjudicated according to laws inaccessible to public inquiry. In addition, promulgation is a condition of valid determination of the law, *i.e.*, the ground of adjudication must be public to permit criticism and appraisal. But these do not imply that knowledge of law is essential to the just imposition of criminal liability. The principle of legality functions primarily as a limitation on official conduct, not as a determinate of culpability. It rests on the wide ethical considerations that concern the legitimacy of a government. And see note 165 *infra*.

144. "Knowingly and intentionally to break a statute must . . . always be morally wrong. . . ." *Queen v. Tolson*, [1889] 23 Q.B. 168, 172. Cf. *United States v. Anthony*, 24 Fed. Cas. 829, No. 14,459 (N.D. N.Y. 1873).

between *mala in se* and *mala prohibita*. For, on the one hand, it does not imply that the former (*i.e.*, major offenses) are immoral "apart from positive law"; nor, as regards the latter, does it imply that an act becomes immoral because it is legally forbidden. How could the mere prohibition under sanctions of force effect such a change? The distinction that should be made, it is submitted, is that some acts are immoral regardless of the actor's ignorance of their being legally forbidden (*e.g.*, the felonies and principal misdemeanors) whereas other acts are immoral *only* because the actor knows they are legally forbidden.¹⁴⁵ This would reinforce the writer's criticism of strict liability.¹⁴⁶ If that judicial construction were abandoned, then, instead of saying that because an act is *malum prohibitum* it is unnecessary to find any criminal intent, the rule would be that, since the only rational basis for finding a criminal intent in these cases is knowledge that the act is legally forbidden, a finding of such knowledge is essential. As was suggested above, ignorance of penal law, of itself, *i.e.*, of sheer positivist illegality, presents no general ground for exculpation. But as regards certain petty offenses, where normal conscience (moral attitudes) and understanding cannot be relied upon to avoid the forbidden conduct, knowledge of the law is essential to culpability; hence the doctrine of *ignorantia juris* should not be applied there.

Since the questions requiring determination, in order to demark the exact area within which ignorance of the law is a defense, are beyond the province of the judicial function, the need for legislation is clear. A likely area would include recent misdemeanors punishable only by small fines, various ordinances and technical regulations of administrative boards.¹⁴⁷ Here actual knowledge of the illegality should be required.¹⁴⁸ It seems necessary to retain the presumption that there was such knowledge, allowing the defendant to introduce evidence tending to prove his ignorance or mistake of the law, but placing the final burden of proving

145. Cf. "This rule, [*ignorantia juris*] essential to the orderly administration of justice, is harsh when applied to what is only *malum prohibitum*." 1 BISHOP, CRIMINAL LAW 198 (9th ed. 1923). See Glaser, *Ignorantia Juris dans le Droit Pénal*, REV. DR. PÉNAL ET DE CRIM. ET ARCH. INTN'L MÉD. LEG. 133 (1931).

146. HALL, *op. cit. supra* note 111, c. 10.

147. Cf. RADULESCO, *op. cit. supra* note 76, at 74. He quotes Haus' proposal to include new laws that penalize what was formerly legal. *Id.* at 100. See *Zakrasek v. State*, 197 Ind. 249, 150 N.E. 615 (1926) and *Rex v. Ross*, [1945] B.C. Co. Ct., 3 D.L.R. 574.

148. See Mannheim, *supra* note 124, at 247, L. Hall and Seligman, *supra* note 3, at 661-62, and the important United States Supreme Court 5-4 decision in *Lambert v. California*, 26 Law Week 4059 (Dec. 17, 1957).

mens rea, in the above sense, upon the State.¹⁴⁹

The above general direction to be taken in reform of *ignorantia juris* seems defensible, but certain difficult questions need to be considered somewhat further. If we examine the petty offenses more closely, we find that there are different types of them. First, as noted, there are archaic, long forgotten offenses—the curiosities of the statute-book and, also, other obviously unsound enactments; and second, there are new, technical and regulative offenses, *e.g.*, that it is criminal to drive an uninsured automobile, that land must be used in conformity with the purpose of a local authority, that it is criminal to sell eggs except on a prescribed grading system,¹⁵⁰ that minimum wages determined by certain classifications must be paid to certain employees,¹⁵¹ that one who undertakes the care of a foster child for reward must give notice to the local welfare authorities, and so on.¹⁵² But third, some petty offenses, *e.g.*, insults, minor assaults and others are neither new nor technical; instead, they are well known and many of them are of the same type of harm as major crimes, only less serious. And fourth, there are petty offenses which are not intuitively recognized as immoral,¹⁵³ but if the forbidden harm is considered, the correct evaluation will be made. As will appear, this criterion raises difficult questions.

Reform is also complicated by the fact that to some degree there is an unavoidable clash between the principles of criminal law and historical accretions. For example, if criminal theory¹⁵⁴ is based upon principles defining "harm" partly in terms of morality, the first class lies outside its range. So, too, if *mens rea* is defined in terms of objective morality, the law cannot admit, nor is it the judge's function to allow, nullification of any law on the ground that it is unsound. Reform can, of course, override such theoretical considerations and, on practical grounds, warrant the restriction of the doctrine of *ignorantia juris*.

In addition to a classification of petty offenses, perhaps along the lines of the criteria suggested above, there are other important questions to be decided with regard to reform of the doctrine. For example, should every kind of ignorance of the law defining the designated petty

149. As was noted *supra*, the proof would be in "operational" terms, showing, *e.g.*, that the necessary information had been brought to the defendant's attention or that he had avoided that.

150. Witte, *A Break For the Citizen*, 9 STATE GOVERNMENT 73 (1936).

151. *Borderland Const. Co. v. State*, 49 Ariz. 523, 68 P.2d 207 (1937).

152. See note 79 *supra*.

153. *E.g.*, carrying a pistol in public: *Crain v. State*, 69 Tex. Crim. 55, 153 S.W. 155 (1913). Travel interstate with intent to avoid testifying in a criminal case: *Hemans v. United States*, 163 F.2d 228 (7th Cir. 1947). Tapping the wife's telephone wire: *United States v. Gris*, 247 F.2d 860, 864 (1957).

154. HALL, *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY*, c. 1 (1958).

offenses be a defense or should only "invincible" ignorance be thus recognized? Should the prosecution be required to prove not only that the ignorance was vincible but also that it was the result of recklessness? And, still within the specified area of petty offenses, should mistake of the relevant penal law be distinguished and treated differently from ignorance of it?

A person who is ignorant of a law or regulation may have been on the high seas when it was adopted¹⁵⁵ or he may have been in a hospital or so distraught with serious troubles that he failed to read the newspaper or a bulletin of his Association, giving the pertinent information. These may be instances where definite use can be made of "invincible ignorance" consistently with the test of recklessness. Or, the defendant may be very inexperienced in the operation of his new business or merely stupid, but not to the point of legally recognized incompetence. On the other hand, the defendant may have received the necessary publication or other information but was indifferent to it or positively set against acquiring knowledge of the pertinent rules. Except for the last, the recklessly ignorant, there is no *mens rea* in the above cases. As has been urged with reference to negligence, education, not punishment, is indicated wherever ignorance is not the result of a voluntary indifference to the acquisition of the relevant legal knowledge. Such pleas of ignorance of the law do not contradict the principle of legality.

Mistake of law, however, raises more difficult problems.¹⁵⁶ The mistaken person is in a more meritorious position than the recklessly ignorant one since he has made an effort, perhaps to the extent of consulting a lawyer, to discover what his duty is under the criminal law. That certainly recommends mitigation; indeed, if knowledge of the illegality is the only ground for inferring a *mens rea*, there should be complete exculpation.¹⁵⁷ This would seem to apply rather clearly to the first two classes of petty offenses, noted above. On the other hand, the plea of mistake implies that the penal law in question was actually brought to the defendant's attention, that he examined the relevant words in the code, statute or decisions. This places the defendant in a much less favorable position than that of the invincibly ignorant person. For error implies acquaintance and opportunity to form a correct opinion

155. *Rex v. Bailey*, [1800] Russell and Ryan 1, 168 Eng. Rep. 651.

156. Mistake of law is distinguished from ignorance of law and it is stated that the former should not be a defense, 2 MOLINIER, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT PÉNAL 210-11 (1894), citing 1 CARRARA, PROGRAMME DU COURS DU DROIT CRIMINEL 209, note (transl. Baret).

157. This would seem to contradict the requirement of "invincibility" since, on the usual premise regarding the meaning of "*ignorantia*," a lawyer has the competence to acquire the correct legal knowledge.

and that might support a charge of recklessness.

But this estimate may be deemed too refined for everyday decision and an exaggeration of the sensitivity of normal conscience regarding the policy of petty offenses. It may be urged that all that is pertinent is analysis of the meaning of certain words and a lawyer's definite opinion of the scope of those words. As a practical matter, probably most persons would agree with Salmond, "That he who breaks the law of the land disregards at the same time the principles of justice and honesty is in many instances far from the truth. In a complex legal system a man requires other guidance than that of common sense and a good conscience."¹⁵⁸ The difficulty, however, so far as *ignorantia juris* is concerned, is that the defendant and his lawyer, in effect, are setting their interpretation of the words defining a penal law against that of the authorized officials.¹⁵⁹ From a rigorous theoretical viewpoint, this is precisely what a legal order cannot consistently admit. From that viewpoint, *i.e.*, with reference to the principles of legality and *mens rea* (in its objective meaning), and on the assumption that only social harms are proscribed, mistake of penal law cannot be recognized as a defense.

Thus, the solution of this problem seems to be caught between two fires. On the one hand, a defendant's interpretation of the law cannot prevail over official declarations of it. But, on the other hand, where mistakes of non-penal law directly exclude *mens rea*, *e.g.*, larceny, bigamy, etc., such mistakes are admitted for that purpose. But penal law, presumably, is composed of moral norms, hence even the pettiest of penal laws, by definition, proscribes a social harm binding on normal conscience. And theory also recalls the objective meaning of *mens rea* and the judicial duty to assume that all penal laws are sound. But the voice of practical sense replies that, in fact, the accepted "penal" law contains many petty proscriptions of conduct which are not recognized by normal persons as having moral significance, and that when social harm becomes so diluted that it cannot be thus recognized, it is time in the sphere of positive criminal law to do justice in light of the facts.

This is the kind of problem where authority should step in to resolve the issues; and, as was suggested above, the proper authority is the legislature. Such practical resolution of a difficult problem should be respected in a branch of law that must represent thoughtful public attitudes. Legal systems survive and prosper despite the incompatibility of some of their rules, indeed, because they are able to combine such an-

158. SALMOND, JURISPRUDENCE 408 (10 ed. 1947). So, too, Lord Atkin in *Proprietary Articles Trade Ass'n v. Atty. Gen. of Canada* [1931] A.C. 310, 324.

159. Cf. Holmes, J., in *Horning v. District of Columbia*, 254 U.S. 135 (1920), quoted *supra* note 74.

tinomies. How much of such incompatibility a legal system can and should tolerate is a question regarding which there are probably many opinions.

Summary of the Principal Problems

The principal difficulties encountered in analysis of *ignorantia juris* and the reasons, also, for the apparent divergence among writers on the subject, arise from several sources. First, is the failure to distinguish theory from reform.¹⁶⁰ It is the function of theory to elucidate a problem in the fullest measure, while sound reform includes a creative element. Accordingly, there is bound to be some difference of opinion regarding proposed reforms, which cannot be resolved by theory. But theory can guide reform, and it can discover and elucidate the bases upon which proposed reforms rest.

A second, probably the greatest, source of difficulty is the assumption that ignorance or mistake of law concerns the same kind of questions as ignorance or mistake of fact, that they are phases of a single problem, specifically, that "*ignorantia*" in the two doctrines has substantially the same meaning. Actually, however, "*ignorantia*" in the doctrine *ignorantia juris* has two quite different meanings. One of these is the straightforward, generally assumed meaning—there is a subject matter (law) and there is knowledge of it derived from the study of codes, statutes, cases, treatises, dictionaries and experience. This is the meaning of "knowledge" of law and illegality, applied, accordingly, to "*ignorantia*," which seems to appeal particularly to civilian scholars. But among common lawyers and, no doubt, for many civilians, "knowledge" of law also has a very different meaning which, so far as *ignorantia juris* is concerned, is the decisive one. In this sense, "knowledge" does not mean knowledge at all. As was seen above, it means an interpretation of a law which coincides with the later relevant interpretation by the authorized officials. This is central to an understanding of the doctrine of *ignorantia juris*.

Third, difficulties arise concerning the meaning of "*juris*." What needs to be known is whether a writer holds that at least the laws defining the major crimes have moral significance¹⁶¹ or whether, on the contrary, the premise is that law and morals are separate spheres. From that latter (positivist) viewpoint, "law," including "penal law," means a command of the Sovereign or a hypothetical judgment that originated in and conforms to superior positive laws, in brief, the so-called "formal"

160. HALL, *op. cit. supra* note 154.

161. *Ibid.*

criteria. But when a non-positivist argues the question, his premise is that morality is expressed in penal law. Thus the two theorists may agree that "knowledge of penal law is essential to penal liability" when, actually, there is sharp conflict—the one is thinking of the sheer positivity, the formal criteria, of penal law while the other is thinking of its moral significance.

This issue can be clarified if it is agreed—as is usually implicit—that "*juris*" in *ignorantia juris* be limited to the formal meaning of the term. But this does not suffice since it is necessary to determine—how much of positive law must be known? The general consensus is that "*juris*" in the doctrinal phrase has a wide meaning, *e.g.*, at least all of penal law, except certain petty enactments, and probably, also, those simple aspects of torts, family law and other non-penal law which have obvious moral significance. With reference to this meaning, the position of those who insist on knowledge of the illegality as a condition of penal liability seems obviously untenable. For it collides with the universally recognized fact that it is *impossible* for anyone to know that law; and this is quite persuasive even from the viewpoint of the ordinary meaning of "knowledge" of the law. To insist on what is impossible as a condition of liability is to exclude liability entirely. Such a patent fallacy cannot be attributed to those who urge complete abandonment of *ignorantia juris*.

They attempt to secure their position by insistence that "*juris*" means or should mean not a specialized knowledge of the law of even the major crimes but only a "general" knowledge of it. Thus, they say, the differences between murder and manslaughter need not be known, but only that it is illegal to kill a human being,¹⁶² and so on as regards the other major crimes. It is submitted, however, with deference, that this is not persuasive. This interpretation of "*juris*" departs drastically from its usual meaning; and if we are presented with a proposed change in the definition of that important term, restricting it to its simplest possible sense, it can easily be shown that the new meaning is not relevant to the problems actually met in the application of *ignorantia juris*, in its present sense. For example, every normal person knows it is illegal to steal, but is it illegal to keep money one finds, knowing that the owner can be discovered? In some places a "finder's keepers" custom represents the common opinion. Everyone knows it is illegal to steal, but in certain American states it was the custom that anyone was privileged to

162. Busch, *L'Erreur de Droit*, REV. INTN'L DE DR. PÉNAL 309, 312, Nos. 3 and 4 (1955).

take unbranded cattle.¹⁶³ Everyone knows it is illegal to kill a human being, but is it well-known that it is illegal to shoot a trespasser or to kill a wife's paramour apprehended in adultery? It is precisely these ramifications of the penal law, "exceptional" only in a formal sense, which require the doctrines of objective *mens rea* and *ignorantia juris* to support penal liability. Accordingly, since there is no escape from the fact that it is impossible to know this law regarding even the serious offenses, criminal liability imposed in the above "exceptional" areas must rest on grounds other than knowledge of the illegality.

The theory which posits criminal liability, in part, upon *mens rea* in its recognized objective sense not only provides a defensible ground of liability for the obviously immoral harms, it also provides a ground for liability in the more difficult "exceptional" situations. That ground may be criticized—legal justice is far from perfect individualized justice—but it does provide a rational basis for criminal liability which is certainly preferable to having no basis at all. Moreover, as regards the "exceptional" situations, the legal system and the methods of its interpretation by thoughtful disinterested persons improve upon lay opinion. They provide objective bases for discovering the better answers to serious moral problems.

Nor will it have escaped attention that to the extent that "knowledge" of law is given a vague, general meaning, *e.g.*, that a mere feeling or intuition of illegality suffices, that position tends to approximate *mens rea*, the traditional requirement of moral culpability. Whatever plausibility the insistence upon knowledge of illegality achieves, results from the unconscious, hardly avoidable identification of the sheer illegality of the major harms with their known immorality. But it should not be assumed by those who advocate abandonment of the doctrine of *ignorantia juris* that the contents of even the major penal laws have a common quality or that there is any relation between morality or custom and that content or that the fact that the major harms are commonly forbidden by penal law supports their position. These factors concern non-legal matters (in the agreed positivist sense); to the extent that they are relied upon, the position approximates the traditional meaning of *mens rea* and criminal responsibility.

A fourth source of uncertainty in the literature is the failure of some writers to specify whether they are thinking of *ignorantia juris* in relation to the major crimes as well as to the petty offenses or whether they have only the latter in mind. They often generalize without limitation, and the impression given is that they are advocating a very sweep-

163. *Lawrence v. State*, 20 Tex. Ct. App. 536 (1886).

ing reform, namely, that knowledge of the illegality, in the positivist sense, should be a required element in all crimes. Later, they are apt to concede—sometimes at the very end of their argument and almost as an aside—that, of course, no one will be permitted to plead that he did not know murder, robbery, etc. are legally forbidden!¹⁶⁴ Obviously, the failure to articulate the significance and implications of the concession unsettles the entire argument. If the concession were dealt with at the outset, it would be necessary to elucidate *ignorantia juris* with reference to the serious crimes and to view the remaining problem against the bulk-ing fact of that explanation. Indeed, unless one does elucidate the doctrine in relation to the major crimes, its rationale is simply ignored.

Finally, various ethical-political arguments against *ignorantia juris* are unclear because of the assumption that the moral significance of penal law is unimportant or that there are no significant differences in the content of the “commands of the State” regardless of whether they concern capital felonies or petty technical rules of property law. In this view the only defensible ground of criminal liability in any case is knowledge of the relevant illegality.¹⁶⁵ So, too, on the above premises, democratic “ideology,” as it is called, requires the abandonment of the doctrine of *ignorantia juris*.

But if normal adults understand the simple morality that is relevant to criminal law, insistence on knowledge of the formal penal law (except as regards certain petty offenses discussed above) is not persuasive, even apart from the illusory nature of such a requirement. Although such insistence seems on the surface to exhibit greater concern for individual dignity and to afford greater protection, actually it does neither. For it depreciates the moral significance of the principle of *mens rea* (requiring the voluntary commission of a legally forbidden harm) as a ground of liability and, thus, the conception of man as a responsible moral agent, *i.e.*, influenced by morality and not requiring to know, in

164. This difficulty is aggravated in comparative studies. For example, in a recent case the German Supreme Court recognized ignorance of the law as a defense to a charge of “coercion” against a lawyer who demanded fees from a client on threat of ceasing to represent him in a pending action. In an article where it is asserted that German penal law by this decision completely abandoned the doctrine of *ignorantia juris*, the writers, concluding their advocacy of such a reform, assert: “Nor would any man—in legal systems which admit error of law as a defense—be heard to say that he did not know the killing of a human being to be unlawful.” Ryu and Silving *Error Juris: A Comparative Study*, 24 U. OF CHI. L. REV. 421, 470 (1957).

165. It is sometimes argued that the *ex post facto* prohibition implies that knowledge of the law is essential to the just imposition of penal liability. But see note 143 *supra*. This cannot be the rationale of *ex post facto* because “knowledge” of the promulgated laws, in the special sense discussed above, is impossible. The above argument confuses the principle of *mens rea* with that of legality.

addition, that harms are illegal.¹⁶⁶ And, since the proposed abandonment of the doctrine of *ignorantia juris* implies the proportionate abandonment of the principle of legality (the "rule of law"), what remains is not the assured protection of the individual, but unfettered authority.¹⁶⁷ Of course, it would be very nice to have all the advantages of the criminal law and, also, to apply its sanctions only to those who knew the law. Unfortunately, no one has shown how this can be done in an inevitably "second-best" world.

166. See Hall, *Responsibility and Law*, 42 A.B.A.J. 917 (1956).

167. HALL, *op. cit. supra* note 111, c. 2.