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**RECONCEPTUALISING FAULT IN THE
CRIMINAL LAW:
A Defence of Reasonable Mistake of Law**

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A thesis submitted for the degree of Doctor of Philosophy
of the
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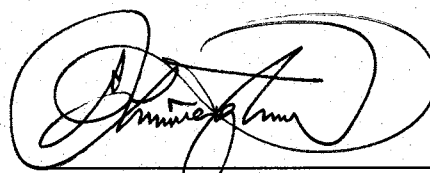


DECLARATION

This thesis is wholly based on original work carried out solely by me during the period of my candidature. This work contains no material which has been submitted for the award of any other qualification elsewhere and contains no material previously published or written by any other person, except where due reference has been made in the text.

The thesis includes minor parts of the following articles, which were written solely by me during the period of the candidature:

- “Mistake of Law : A Criminal Offence or a Reasonable Defence?” (1994) 18 Criminal Law Journal 271.
- “Distinguishing Between Ignorance and Mistake in Defence of the *De Blom* Principle” (1995) 2 South African Journal of Criminal Justice 12.
- “Mens Rea and Mistake of Law in Criminal Cases: A Lesson from South Africa” (1995) 18 University of New South Wales Law Journal 428.



Kumaralingam Amirthalingam
28 July 2000

This thesis is dedicated to:

My Parents
I thank you

&

My Wife
I love you

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ABSTRACT

This is a thesis about criminal culpability and the need for a moral theory of criminal fault. The liberal positivist ideal of separating law and morals has resulted in the moral reductionism of the doctrine of mens rea. Originally a normative concept that was used to evaluate blameworthiness in moral terms, mens rea has been transformed into a descriptive concept that merely identifies the technical, psychological mental states that are required for particular offences. It is argued that the doctrine of mens rea should be recast in an overt normative mould.

This work does not suggest that the morality of prohibited conduct or the moral virtue of the accused be brought into question in determining culpability. The thesis merely argues that morally innocent accused should not be subjected to criminal liability. In order to achieve this, the thesis reconceptualises criminal fault in terms of moral blameworthiness. The doctrine of mens rea is consequently reconstructed so that it can be expressly used to attribute moral blameworthiness more fairly.

It is argued in this dissertation that a person is morally blameworthy when he or she engages in prohibited activity, knowing that it is illegal, or where he or she ought to have known, that it is illegal. Where an accused was reasonably ignorant or mistaken as to the legality of the conduct, he or she should be regarded as morally (and hence, legally) innocent. Thus, the legal rule that ignorance of law is not a defence is unfair, contrary to fundamental principles of justice and can no longer be supported. It is proposed that a general defence of reasonable mistake of law be recognised.

The work exposes a hidden normative doctrine of fault. Because this normative doctrine is formally suppressed, internal contradictions in the key notions of culpability are inevitable. It is demonstrated that by relying on theoretical, historical, doctrinal and comparative analyses, these contradictions can be resolved.

ERRATA

PAGE NO 21 N 24, 293, 300

Correction

Radzinowicz, L & Turner J W C (eds) *The Modern Approach to Criminal Law* (1948)

should read

Winfield, P H (ed) *The Modern Approach to Criminal Law* (1948)

PAGE NO 2-3

Correction

Dot Points 5-10 should read:

- criminal fault – Criminal fault refers to the necessary conditions to hold a person blameworthy. To explain the last three terms in relation to each other – criminal fault is necessary to show that a person is blameworthy, and blameworthiness is necessary for a person to be criminally liable
- strict liability – Strict liability generally refers to the absence of a requirement to prove mens rea. Strict liability also has a narrower meaning where the context makes it clear. Therefore in jurisdictions such as Australia and Canada, strict liability offences are those which do not require proof of mens rea, but permit a defence of honest and reasonable mistake of fact or due diligence
- absolute liability – Absolute liability refers to strict liability offences which do not permit any defence at all
- knowledge of wrongfulness – This denotes knowledge that the activity engaged in is wrongful, either in the sense that it is illegal, immoral, unethical or improper
- knowledge of illegality – This is a narrow form of knowledge that is limited to knowledge of the legal status of the wrong
- ignorance and mistake – While ignorance and mistake are conceptually different, for the purposes of this thesis the two terms are sometimes used interchangeably. However, in many parts of the thesis these terms have their narrower meanings and the context will make it clear that the terms are being used in the narrower sense.

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Revision Note

This addendum to the thesis seeks to explain two minor concerns raised by one of the examiners. First, the approach to the historical analysis of nineteenth century criminal law adopted in this thesis and secondly, the ambiguity of one of the terms employed in this thesis, namely the term "orthodox theory".

The examiner has questioned the absence of reference to historical material dealing with the impact of the "shaping influences of changes in criminal procedure; the changing relationship between judge and jury and the increasing role played by defence counsel" in the nineteenth century on the substantive doctrines of the criminal law. In particular, the omission of Keith Smith's work, *Lawyers, Legislators and Theorist* was considered significant by the examiner. The thesis instead drew heavily on an alternative account of the history of nineteenth century criminal law, especially that of Alan Norrie.¹

It is acknowledged that further consideration of the procedural matters suggested by the examiner would have enhanced the thesis. To address this concern, a few illustrations of the changing procedural impact on the criminal law of the nineteenth century are given. One good example would be the accused's right to give evidence, only recognised in 1898. Previously an accused was not permitted to give evidence and it would therefore have been virtually impossible to determine the accused's subjective state of mind. This change in procedural law can be argued to have provided a catalyst for fostering the further subjectivisation of mens rea.

The considerable impact of Justice Stephen at the turn of the nineteenth century was also significant as he was both a theorist and a judge, and therefore able to directly apply his theoretical approaches to criminal fault and shape the doctrinal rules. Further, the creation of the Court of Criminal Appeal in 1907 provided the impetus for greater legal reasoning and doctrinal integrity. While some of these considerations would have added to the thesis, a conscious decision was made to limit the material, bearing in mind the clearly defined parameters, stated on Page 1 of the thesis: "The thesis is thus limited to the reconstruction of mens rea within the existing framework. The broader questions of the structure and nature of criminal law and criminalisation are not challenged."²

The term "orthodox theory" is used as a generic term in the thesis to refer to the traditional philosophical basis of criminal liability characterised by the descriptive theory of mens rea in the common law world. Where the context makes it clear, the term "orthodox theory" may refer specifically to the indigenous criminal law theory of either Australia or England.

¹ It should be noted that in a review of K J M Smith, *Lawyers, Legislators and Theorists*, Mark Lunney made the point that Smith's account was deliberately narrow and that a wider account was given by Alan Norrie. See M Lunney, "Book Review - *Lawyers, Legislators and Theorists*" (2000) 21 *Journal of Legal History* 139 at 141.

² For material that considers the impact of the procedural developments on the substantive law, see M J Wiener, "Judges v. Jurors: Courtroom Tensions in Murder Trials and the Law of Criminal Responsibility in Nineteenth-Century England" (1999) 17 *Law and History Review* 467-506; J M Beattie, "Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries" (1991) 9 *Law and History Review* 221-67; K J M Smith, *Lawyers, Legislators and Theorists* (1998).