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

Kumaralingam Amirthalingam

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PART II

A DEFENCE OF REASONABLE MISTAKE OF LAW

CHAPTER V

Ignorantia Juris Non Excusat: Praeceptum Sine Causa Justa, Cuius Historia Est Mendosa

CHAPTER VI

The Defence of Mistake: The Bad, the Stupid or the Unlucky

CHAPTER VII

Mistake of Law in South Africa: A Defence Gone Too Far

CONCLUSION
CHAPTER V

IGNORANTIA JURIS NON EXCUSAT: PRAECEPTUM SINE CAUSA JUSTA, CUIUS HISTORIA EST MENDOSA

INTRODUCTION

Part I of the thesis argued that an objectively assessed knowledge of illegality should be an element of criminal fault. Therefore, reasonable ignorance or mistake of law should be a defence. This part addresses the law of mistake to consolidate this argument. It starts by examining the maxim, ignorantia juris non excusat – ignorance of law is no defence. Given that this rule is so entrenched in the criminal law, despite the conclusion in Part I that reasonable mistake of law should be a defence, this maxim must nevertheless be addressed. This chapter seeks to challenge the validity of this rule.

Two commonly given reasons for the maxim are that people should know the law, and that allowing ignorance of law to be a defence would result in too many accused claiming the defence, thereby frustrating the administration of justice. These two common reasons, also used by early jurists to defend the maxim, are flawed for three reasons. First, while it is desirable that everyone should know the law, it is not always fair, indeed it may arguably be unjust, to punish someone who actually does not know that he or she has engaged in criminal conduct. Similarly, it may be unfair to punish someone who positively believes that he or she is legally entitled to engage in that conduct. Secondly, the argument that the defence would open the floodgates of

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1 Ignorance of law is no excuse: A rule without reasonable justification and a history riddled with errors. Since the maxim was expressed in Latin it just seemed appropriate that the subtitle should also be in Latin. The author confesses to be quite uneducated in Latin. The phrasing of the title was with the help of a Latin dictionary and moreso with that of a colleague, Professor Jim Davis, who had the benefit of Latin studies, or so he assured me. All reasonable care was taken, but any error in translation is the author's. Perhaps this is the acid test of this thesis – if the reader accepts the argument, then the author's reasonable mistake, if any, should be excused!

inappropriate claims of ignorance is not based on any empirical evidence. In fact, the available anecdotal evidence from South Africa where mistake of law operates as a defence, suggests otherwise.\(^3\) Thirdly, denying the exculpatory effect of reasonable mistake of law could result in morally innocent individuals being made criminally liable. This is contrary to the fundamental tenet of criminal law.

Consider this example. A woman is paid to care for the children of another couple. The arrangement is that the carer keeps the children for continuous periods not exceeding one month. A statute provides that anyone, not being a relative or guardian, who cares for and maintains another’s child for any period exceeding one month is a foster parent and is required to give notice of such arrangement to the local council. The carer inquires from officials at the local council and is advised that as long as she does not keep the children for a continuous period of one month, the children are not defined as foster children and the notice requirement would not apply to her. She then cares for these children for several months, but never keeping the children for more than one month in a continuous period. She is charged with receiving foster children without giving notice to the council. It turns out that the official council advice was erroneous. Her plea is that she was mistaken as to the law. Should such a mistake of law be a defence? The ordinary person would intuitively suggest that the accused is not blameworthy and her mistake should operate as a defence. Yet, under the law she would be held criminally liable.\(^4\)

The purpose of this chapter is to demonstrate that the ignorantia juris rule is not based on authority and that it was introduced into English law by a misunderstanding of the history surrounding the maxim. It is ironic that a rule on mistake of law was itself born of a mistake of law! The ancient authorities cited by proponents of the rule do not actually support the rule. Having attacked the historical basis of the rule, the various rationales that have been offered in support of the rule will be evaluated. It

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\(^3\) In South Africa, ignorance of law has been a complete defence since 1977. The experience of the last 23 years has shown that the defence has not been abused and the feared floodgates of ignorantia pleas never occurred. See Chapter VII.

\(^4\) These were the facts in *Surrey County Council v Battersby* [1965] 2 WLR 378, where it was held that the accused’s ignorance of law was not a defence. For a fuller discussion of the case
will be shown that the early rationales are theoretically unsatisfactory while the more modern rationales seem to support a qualified version of the rule; i.e. only unreasonable ignorance of the law is not a defence. The corollary of that is that reasonable mistake of law should be a defence.

HISTORICAL ORIGIN OF THE IGNORANCE OF LAW RULE

The ignorance of law rule was originally expressed as a maxim, ignorantia juris non excusat. Its roots are thought to lie in Roman law.5 In the early days of English jurisprudence, maxims were treated as binding rules, rather than as guiding principles.6 The elevation of maxims from rough expressions of principles to binding rules has resulted in rules that are vague and based on unreliable accounts of history rather than on legal reasoning.7 Nearly a hundred years ago, an American academic, commenting on the unreliability of maxims, said, “Consequently, when a body of law has grown up around a maxim, it is desirable to ascertain the extent to which the decisions are based upon legal reasoning and analogy, and the extent to which they have been influenced by the maxim as such.”8 Sir James Stephens, once said in relation to the famous maxim, actus non facit reum, nisi mens sit rea, “[L]ike many other Latin sentences supposed to form part of the Roman law, the maxim not only looks more instructive than it really is, but suggests fallacies which it does not precisely state.”9 This sentiment was echoed by Lord Esher who stated, “[Maxims] are almost invariably misleading as they are for the most part so large and general in their language that they always include something which really is not intended to be


5 D 22 6 9. Sir William Blackstone, the seventeenth century institutional writer is widely credited with the attribution of this rule to Roman law.

6 “The fourth ground of the law of England standeth in diverse principles that be called in the law maxims, the which have always been taken for law in this realm; so that it is not lawful for any that is learned [ emphasis added] to deny them; for every one of those maxims is sufficient authority to himself.” C St German, Dialogue Between a Doctor of Divinity & a Student at Law (T F T Plucknett & J L Barton (ed) 1974) 1st Dialogue, ch 8.


8 E R Keedy, “Ignorance and Mistake in the Criminal Law” (1908) 22 Harvard Law Review 75 at 76.

9 J F Stephen, History of the Criminal Law (1883) vol 2, 94.
included in them.”¹⁰ Despite these misgivings about maxims in general, the ignorantia juris maxim has survived, although several exceptions are now recognised.

Sir William Blackstone’s statement is generally referred to as authority for the rule:

...often a mistake in point of law which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. Ignorantia juris, quod quisque tenetur scire, neminem excusat is as well the maxim of our own law as it was of the Roman.¹¹

There are at least two problems with this statement. First, Blackstone’s view that Roman law applied the ignorantia maxim to criminal law is open to challenge. Secondly, his statement of the maxim raises serious questions as to its meaning. The maxim, in his words is “ignorantia juris, quod quisque tenetur scire, neminem excusat.” Translated it means, ignorance of the law, that which every person is held to know, does not excuse. One can interpret this in two ways. The first, and orthodox approach, is to read it as laying down a presumption that everyone knows the law. The problem is that the presumption is patently false.¹²

The second approach is to read the statement in a narrower sense, whereby there is not a general presumption of knowledge of law. Instead, it is only ignorance of those laws that a person is held to know, that does not excuse. The critical question then is: “What are the laws that a person is ‘held to know’?” It is contended that a person is held to know those laws, which that person, ought reasonably to have known.

**Roman law origin of the ignorantia maxim**

Blackstone refers to the Digest of Justinian¹³ as the Roman law source of the rule. Title Six of Book Twenty Two of the Digest deals with ignorance of law and fact.

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¹⁰ Yarmouth v France (1887) 19 QBD 647 at 653 per Lord Esher MR.
¹² As Austin put it: “That any system is so knowable, or that any systems has even been so knowable, is so notoriously and ridiculously false that I shall not occupy your time with proof of the contrary.” J Austin, *Lectures on Jurisprudence*, (R Campbell (ed), 5th ed 1885, reprint 1972) vol 1, 481-2.
¹³ D 22 6 9.
However, it deals with ignorance in the context of civil matters only.\textsuperscript{14} It has no application to criminal matters.\textsuperscript{15} The passage to which Blackstone refers does not contain the maxim in the manner he describes.\textsuperscript{16} It begins, "The ordinary rule is, that ignorance of law injures anyone, but ignorance of fact does not." It is nowhere stated that ignorance of law does not excuse one from liability. The entire context is limited to an individual's civil rights, specifically property and testamentary rights.\textsuperscript{17} Thus, the Digest provides that where a person acts in ignorance of law, then in a dispute between that person and another, the ignorant person must bear the risk or the loss; ignorance of law thus injures the party. The ignorant only suffers pecuniary or proprietary loss. He or she does not suffer criminal condemnation.\textsuperscript{18} Therefore, there is no need to show blameworthiness.

Blackstone also did not go beyond the first sentence of the relevant passage. The passage in question actually did not lay down the rule; rather it outlined the limitations to the scope of the rule.\textsuperscript{19} The rule did not apply to persons under the age of twenty five because such persons, due to their youth, were permitted to be ignorant of the law. In other words ignorance of law in such a case might be reasonable, and therefore should not injure such a person. Women were also exempt from the rule. They were treated as a "weaker class" and hence it was not unreasonable for them to be ignorant of the law. It has been suggested that soldiers were also exempt from the rule,\textsuperscript{20} but it is only in limited instances where soldiers were exempt.\textsuperscript{21} A person who was unable to access the law, or was not intelligent enough to understand that ignorance of law may be detrimental to his interest, was also not affected by the ignorance of law rule. As one writer put it, the passages merely contain "a long list of

\begin{itemize}
  \item \textsuperscript{14} See, E R Keedy, "Ignorance and Mistake in the Criminal Law" (1908) 22 Harvard Law Review 75 at 78-79.
  \item \textsuperscript{15} See, for example, T C Sandars, Institutes of Justinian (7th ed 1922) 388.
  \item \textsuperscript{16} D 22 6 9.
  \item \textsuperscript{17} D 22 6 1.
  \item \textsuperscript{18} There is evidence of a more generous approach by the English than the Romans to ignorance of law in civil matters. See, T E Scrutton, The Influence of the Roman Law on the Law of England (1885, reprint 1985) 162.
  \item \textsuperscript{19} The rule itself is stated in D 22 6 1.
  \item \textsuperscript{20} E R Keedy, "Ignorance and Mistake in the Criminal Law" (1908) 22 Harvard Law Review 75 at 80.
\end{itemize}
cases in which the knowledge, or the ignorance of law may be pleaded as a defense. To take the rule out of its context and treat it as an abstract, general norm would be contrary to its original design."\(^{22}\)

The Digest also treated ignorance of fact and ignorance of law differently. The former would not injure a party in a civil dispute whereas the latter would. The justification given in the Digest for distinguishing between the two is this:

Error of law should not, in every instance, be considered to correspond with ignorance of the fact; since the law can, and should be definitely settled, but the interpretation of the fact very frequently deceives even the wisest man.\(^{23}\)

This justification is extremely cautious. First, it says that it is not in every instance that ignorance of law should be treated as ignorance of fact. Therefore, there are some instances when it should. Secondly, it states that the law can and should be definitely settled. It does not say that the law is definitely settled. Even a thousand years ago, when the Digest was written, the law was regarded as uncertain. The evidence suggests that Roman law did recognise knowledge of unlawfulness as being relevant to legal responsibility, whether civil or criminal.\(^{24}\) As the Roman Empire grew, commercial transactions and regulation of society became more and more complex. The complexity of laws led to a recognition of the relevance of knowledge of the law for valid legal transactions. The earlier notions of good faith and fairness gradually transformed into knowledge of the law. As Bolgar put it:

In Rome, these elements were determined by her growth into an empire, a growth that necessitated the expansion of her strict, provincial ius civile into a ius gentium. It was in this marvellous conglomeration of foreign laws and customs, built by the genius of the Roman praetor into a coherent body of legal procedure, that the knowledge of the law obtained importance for the validity of legal transactions.\(^{25}\)

\(^{21}\) D 22 6 9 1.  
\(^{22}\) V Bolgar, "The Present Function of the Maxim Ignorantia Juris Neminem Excusat – A Comparative Study" (1967) 52 Iowa Law Review 626 at 630-1.  
\(^{23}\) D 22 6 2.  
\(^{24}\) See F De Zulucta, The Roman Law of Sale (1945) 8.  
It can be concluded that the ignorance of law rule, as it applies in the criminal law, is not truly a product of Roman law. Any presumption of knowledge of unlawfulness in Roman law was a rebuttable presumption, not an irrebuttable one. However, given that the maxim is now firmly established in English jurisprudence, and many courts have accepted it as part of the law, would it be "heresy to deny the rule?" Or could the greater heresy be to perpetuate a mistake? Courts have repudiated old doctrine wrongly derived from Roman law. Indeed, in Mason v Hill, the court rejected certain mistaken views of Roman law advanced by none other than Blackstone.

**Common law origin of the rule**

Blackstone cited Brett v Rigden as common law authority for the ignorance of law rule. However, this was not a criminal case. It was a civil case, concerning a suit for detinue. The question was whether or not certain property came within the terms of a will. According to Sergeant Manwood, the law was that a will was to be interpreted at the time of death, not at the time of its writing. Whether or not the testator was aware of the rules of testamentary interpretation was not relevant, as it was presumed that everyone knew the law and ignorance of the law was no excuse. Clearly, this statement was made in the context of a civil matter, i.e., the determination of testamentary intention. This accords with the Roman law approach. It is pertinent to note that all the other judges disagreed with Sergeant Manwood, holding that the intention of the testator was relevant at the time of writing and publishing the will.

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26 L Hall & S Seligman, "Mistake of Law and Mens Rea" (1941) 8 University of Chicago Law Review 641 at 646, "Blackstone was in error in ascribing the origin of the ignorantia rule to the Roman law."

27 Ianella v French (1968) 119 CLR 84 at 101 per Taylor J, at 112 per Windeyer J.

28 Mackintosh v MacKintosh 1 (1864) 2 M 1357; Mason v Hill (1835) 5 B & Ad 1. See, J MacKintosh, Roman Law in Modern Practice (1934) 15-6.

29 (1835) 5 B & Ad 1.

30 (1568) 1 Plov 342, 75 ER 516.

31 (1568) 75 ER 516 at 520, citing Christopher St German, Doctor and Student Dialogues, 2nd dialogue, chapter 46.

32 (1568) 75 ER 516 at 521.
Thus, Blackstone relied on a civil, not criminal, case. Further, he relied on the view of a minority judge. Christopher St German’s Doctor and Student Dialogues, published in 1518, is one of the earliest English sources that actually does provide support for Blackstone’s view, although Blackstone does not rely on this text. Chapters sixteen and seventeen of the Second Dialogue are devoted to ignorance of law and ignorance of fact, respectively. It is stated that ignorance of law is not an excuse because everyone is bound and presumed to know the law, but ignorance of fact may be an excuse. In the discussion that follows it is made clear that, unlike the Roman position, the rule in English law applied to both civil and criminal matters. Further, the Dialogues expanded the rule by denying any of the exceptions that existed under Roman law. Therefore, infants, women, soldiers and those of low intellect were all affected by the rule. Although these exceptions were not recognised, some limitation to the rule was contemplated by St German.

According to the Dialogues, if a person violated a statute before the day appointed for its proclamation, then he or she had an excuse. It was argued in the Dialogues that this was not on the basis of ignorance of law, but on the grounds that the legislators did not intend the law to apply until the day of proclamation. If we accept the legislator’s intent theory, then it is not accurate to say that the defendant has an excuse. The defendant simply has not committed an offence, because at that time, there is no such offence. To be excused implies that there must have been some wrongdoing. It was also accepted that even if a statute were not proclaimed on the day appointed, a person committing the relevant offence after that day would still be guilty. To illustrate, let us say a statute sets 25 January as the date of proclamation. On 24 January, A offends against the statute. On 25 January, the statute is not proclaimed and B offends against the statute on 26 January. In both cases the defendants are ignorant of the law and no notice is given. According to the Dialogues, B would be guilty, but not A. This seems illogical.

33 Ultimately, the ignorance of the testator was not relevant to the outcome. The judicial comments were therefore purely obiter.
34 See Chapter I.
A further complication arises due to the Act of 7 Richard II c 6 where it was stated that every sheriff shall proclaim the statute of Winchester three times every year in every market town to the intent that offenders shall not be excused by ignorance. The argument was put in the Dialogues that according to this statute if such proclamation were not made then the offender may be excused by his or her ignorance. This conflicts with the earlier statement about the effect of non-proclamation. The position on ignorance of law according to the Dialogues is uncertain. There is, however, a clear statement in the Dialogues that reasonable ignorance of law should be a defence on the grounds that, were it otherwise, it would violate the law of reason:

And therefore it must be refourmed by conscience (that is to saye) by the lawe of reason/ for when the generall maxymes of the lawe be in any pertyculer cases agaynst the lawe of reason as this maxyme semetho be because it excepteth not theym that be ygnorant though it be an ygnoraunce in vincyble than do they not agree with the law of reason.35

While the Dialogues accepted that the better view was to permit a defence of reasonable ignorance of law, it was concluded that to allow a defence of ignorance of law would be impractical as it would encourage ignorance, or at least, the pretense of ignorance. Therefore, although the Dialogues endorsed the rule that ignorance of law is not a defence, this was done without reference to authority, and contrary to principle and common sense, as pointed out in the Dialogues itself.

From a close reading of the Digest, the Dialogues and the Commentaries it becomes apparent that the ignorance of law rule was never clearly established, and even when it was accepted, there were grave misgivings and implied exceptions. The reasons for the adoption of this rule were the assumption that somehow it was always there, and the concern that its absence would undermine the operation of the criminal law. There is no reason of principle or convincing policy that is offered. The only policy argument is that individuals should know the law, but that is outweighed by two countervailing considerations. One is that innocent people should not be punished and the second is that it is unreasonable to expect people to know all of the laws all of the time.

35 C St German, A Dialogue Between a Doctor of Divinity and a Student at Law (T F T Plucknett & J L Barton (ed) 1974) 2nd dialogue, chapter 16.
Review of cases from the sixteenth to the nineteenth century

In *Painter v Manser*,36 decided in 1584, the court had to decide a dispute between two parties. The defendant and his son were required to sign a release to the plaintiff. The son was illiterate and had no knowledge of the law and so requested that the plaintiff give him the release so he could seek legal advice. The plaintiff refused. The court decided that the defendant’s son should have signed the release at once. Although he was entitled to have the release read to him, he was not entitled to obtain legal advice, as knowledge of the law was not relevant. The court suggested that although a reasonable time should be given to persons to obtain legal advice, it was bound by an earlier decision, on similar facts, where it was held that there was no right to legal advice in such cases.37 This was a civil case and the court expressed its reservation about the ignorance of law rule.

The ignorance of law rule was applied in a defamation case, also decided in 1584.38 The defendant had published that the plaintiff did not have good title to certain land. The defendant argued that he had believed his statement to be true and that he was ignorant of the law that gave good title to the plaintiff. It was held that his ignorance of the law was no excuse because, “he had taken upon him the knowledge of the law ... [and] ... meddled with a matter which did not concern him.”39 Clearly, in this case the defendant was irresponsible in that he chose to make a statement about the legal status of another person’s affairs, without properly inquiring as to the law. His ignorance was therefore unreasonable. It should also be noted that this was a civil, not a criminal, case.

In the seventeenth century case of *King v Lord Vaux*,40 the accused was indicted for failing to take the oath of allegiance. He demanded counsel to represent him as he was not conversant with the law of the land. This request was denied on the grounds that ignorance of the law was no excuse. Hence, it was not necessary to have counsel

36 (1584) 2 Co Rep 3, 76 ER 387
37 (1584) 76 ER 387 at 394.
38 *Mildmay’s Case* (1584) 1 Co Rep 175, 76 ER 379.
39 (1584) 76 ER 379 at 384.
40 (1613) 1 Bulst 197, 80 ER 885.
speak for him as the only relevant issue was one of fact, ie whether the accused did refuse to take the oath of allegiance. This appears to be the first known case where the ignorance of law rule was invoked in a criminal case. Whether ignorance of law was relevant to the outcome is questionable. The accused merely refused to take the oath of allegiance in the manner that it was worded, and would have sworn allegiance to the King if the oath had been worded differently. The court was of the view that there was only one official oath under an Act of Parliament and refusal to take that oath was an offence. The accused was convicted not because of his ignorance of law, but because he was not allowed to put a contrary legal argument.

A few cases in the nineteenth century considered the ignorance of law rule in the criminal context. In the 1836 case of *R v Esop*,\(^ {41}\) a foreigner was charged with committing an “unnatural act”.\(^ {42}\) In his defence, the accused argued that the act was not unlawful in his own country and that he was unaware that he was doing anything wrong. The court held that this was merely a plea of ignorance of law and such a plea was not a defence in the criminal law of England. Having said that, the court acquitted the accused on the ground that the prosecution’s witness had acted in bad faith. In the 1852 case of *Re Barronet & Allan*,\(^ {43}\) two accused had been party to a duel, in which one of the duellers died. They were charged with murder. Both were Frenchmen who believed that a killing in the course of a fair duel was not murder, as it was a matter of honour. They were not aware that such killing was unlawful in England. Although the hearing was to determine a bail application, and not to determine the guilt of the parties, the court stated that ignorance of law was not a defence, and no exception should be made merely because the prisoners were foreigners.

In the 1800 decision of *R v Bailey*,\(^ {44}\) the accused was at sea when a statute was passed, and therefore had no opportunity of being aware of the law. He was charged and convicted, notwithstanding his plea of ignorance. Although he was convicted by the

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\(^ {41}\) (1836) 7 C & P 456, 73 ER 203.

\(^ {42}\) The offence in question was homosexual intercourse, which was not unlawful in his home country, now known as Iraq.

\(^ {43}\) (1852) 1 El & B1 1, 118 ER 337.
trial judge, and the conviction upheld on appeal, the accused was granted a pardon. The fact that the court pardoned the accused indicates the conflict between the requirement of blameworthiness for criminal liability and the ignorance of law rule. This conflict was formally recognised eighty years later in *Burns v Nowell*. The plaintiff had employed some natives of the South Sea Islands as labourers. After he had set sail, the *Kidnapping Act* 1872 (UK) was passed. This Act made it an offence to carry native labourers without a licence. The defendant, who commanded a British military vessel, detained the plaintiff's vessel on suspicion that the plaintiff had breached the *Kidnapping Act*. The case itself concerned a civil suit for damages for wrongful detention. In the course of judgment, some observations were made about the criminal liability of the plaintiff. It was held that, even if the Act were to apply to the plaintiff, the plaintiff should not be found guilty:

> [B]efore a continuous act or proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance; and though ignorance of the law may of itself be no excuse for the master of a vessel who may act in contravention of it, such ignorance may nevertheless be taken into account when it becomes necessary to consider the circumstances under which the act or proceeding alleged to be unlawful was continued and when and how it was discontinued, with a view to determine whether a reasonable time had elapsed without its being discontinued.

The court in *Burns* thus created an exception to the ignorantia rule. This exception has since been judicially affirmed and in several jurisdictions, legislated into effect. It should be noted that the exception created by these cases and legislation is limited to ignorance of delegated or subordinate legislation only. It has, however, been argued that this exception should be extended to discovery of any law that is practically impossible.

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44 (1800) Russ & Ry 1, CCR 168.
45 (1880) 5 QBD 444.
46 (1880) 5 QBD 444 at 454.
48 *Statutory Instruments Act* 1946 (UK), considered in *Simmonds v Newell; Defiant Cycle Co v Same* [1953] 1 WLR 826; *Criminal Code* 1983 (NT) s30; *Criminal Code* (Qld) s22(3); *Model Criminal Code* 1995 (Cth) s9(4).
Summary of historical analysis

This historical analysis reveals that there is no clear authority from which the rule derives. Indeed, the early Roman law does not support the rule, and the early cases indicate that the rule was limited to civil cases. However, passage of time and uncritical assertions by institutional writers\(^{50}\) gave the ignorance of law rule a place in our law. As one commentator put it, while the ignorantia principle is generally assumed “it is, however, surprising that there seem to be no cases either directly establishing the rule or unreservedly accepting it.”\(^{51}\) Nevertheless, the rule has survived, and the question now becomes whether it should continue to apply in our criminal law or whether it should be abolished.

RATIONALES FOR THE IGNORANTIA MAXIM

Some of the rationales that have been offered in support of the rule will now be examined. In chronological order, the discussion evaluates the views of Blackstone, whose rationale was based on the presumption of knowledge of law; Austin, whose rationale was based on pragmatism; Holmes, whose rationale was based on utilitarianism; Hall, whose rationale was based on the principle of legality; Fletcher, whose rationale was based on conceptual analysis; and Ashworth, whose rationale was based on the duties of citizenship. The earlier theories are basically dismissive; they dismiss the notion that ignorance of law should be a defence on the various grounds of presumptive knowledge, utility, pragmatism, policy and antiquity. The later theories are justificatory; they attempt to justify the existence of the rule by relying on principles and philosophical notions of criminal law.\(^ {52}\) Only the last two rationales offer a theoretical framework for the defence of the ignorantia rule. Paradoxically, most of these rationales can actually be interpreted to support a defence of reasonable ignorance of law.


\(^{52}\) The terms “dismissive strategy” and “justificatory strategy” in this context were originally used by D N Husak and I have adopted them for convenience. See, D N Husak, “Ignorance of Law and Duties of Citizenship” (1994) 14 Legal Studies 105 at 105-16.
Blackstone's rationale: the presumption of knowledge of the law

Page 27 of Volume 4 of the Commentaries on the Laws of England must be the most cited page of any text for a proposition on mistake of law. Blackstone states:

For a mistake in point of law, which every person of discretion not only may, but is, bound and presumed to know, is in criminal cases no sort of defence. Ignorantia juris, quod quisque tenetur scire, neminem excusat, is as well the maxim of our own law, as it was of the Roman.

The Digest does not lay down an irrebuttable presumption that everyone knows the law. Blackstone, by including the word “bound” in his statement made it an irrebuttable presumption. The Digest merely stated, “...the law can, and should be definitely settled.” There was no pretence that the law was actually settled. Neither was there the absurd pretence that everyone was presumed to know the law. Several classes of people were exempted from the presumption.

Blackstone’s approach to the presumption of knowledge is unsatisfactory. There are three types of presumptions in law - presumptiones hominis, presumptiones juris and presumptiones juris et de jure. A presumptio hominis is one where the proof to the contrary is admissible and the presumption is not necessarily conclusive even if no proof to the contrary is admitted. A presumptio juris is one where proof to the contrary is admissible, but if such proof is not adduced, the presumption holds. A presumptio juris et de jure is one where no proof to the contrary is admissible and the presumption is conclusive. The presumption of knowledge of law should be a

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55 An example would be the res ipsa loquitar rule, where negligence may be presumed under certain circumstances, but the presumption is by no means conclusive despite the absence of any evidence to the contrary.

56 An example would be the presumption of incapacity for minors between the ages of ten and fourteen. A child in that age bracket is presumed to be dolii incapax, but this presumption can be rebutted by evidence that the child did know that the conduct was wrong: Children (Criminal Proceedings) Act 1987 (NSW) s5; R v Whitty (1993) 66 A Crim R 462; Children and Young Persons Act 1963 s 16; C v DPP [1996] AC 1. But see, Crime and Disorder Act 1998 s34, which abolishes the presumption. There is some doubt as to whether the presumption was successfully abolished.

57 An example is the presumption that children under the age of ten do not have criminal capacity. This presumption cannot be rebutted by any evidence. Children (Criminal Proceedings) Act 1987 (NSW) s5.
presumptio juris. The very fact that exceptions to the rule are recognised is proof of this.\textsuperscript{58} Blackstone, however, elevated the presumption to a presumptio juris et de jure.

Blackstone's rationale for the rule rests on a false premise. The law has never been absolutely certain, and it certainly is not in this day and age. Even a century ago Maule J pointed out that the existence of courts of appeal showed that the law is inherently uncertain and that the judges themselves cannot be expected to know it in all its detail.\textsuperscript{59} The House of Lords has formally recognised judicial ignorance of the law by framing a rule of precedent with an exception for decisions given \textit{per incuriam}.\textsuperscript{60} Lord Denning once stated:

In \textit{Toepfer v Cremers}\textsuperscript{61} ... the [grain] trade set the Court an examination paper with many questions to answer. We did our best, but recently our papers were marked by the House of Lords, see \textit{Bremer v Vanden Arvenne-Izegeg PVBA}.\textsuperscript{62} They only gave us about 50%. The House of Lords are fortunate in that there is no one to examine them or mark their papers. If there were, I do not suppose they would get any higher marks than we.\textsuperscript{63}

If judges themselves may be ignorant of the law it is no longer acceptable to suggest that every ordinary person, untrained in the law, is bound and presumed to know the law.

Blackstone's rationale should be modified so that the presumption is a presumptio juris instead of a presumption juris et de jure. It can then be argued that, while prima facie, a person should know the law, where one's ignorance is reasonable in the circumstances, a defence should be permitted. This makes the rule normative rather than descriptive, encourages responsible citizenship and maintains a balance between the individual and society. It also greatly reduces any fear that ignorance of law will be pleaded by every accused person, and thus answers Austin's concern.


\textsuperscript{59} \textit{Martindale v Faulkner} (1846) 2 CB 706 at 719-20, 135 ER 1124 at 1129-30.

\textsuperscript{60} \textit{Young v Bristol Aeroplane Co} [1946] AC 163 at 169.

\textsuperscript{61} [1975] 2 Lloyds Rep 118.


\textsuperscript{63} \textit{Bremer Handelsgesellschaft v Mackprang} [1979] 1 Lloyds Rep 221, cited in M P Furmston, Ignorance of the Law (1981) 1 Legal Studies 37 at 46.
Austin’s rationale: the pragmatic imperative

In Austin’s view, there are two fundamental conditions that must be satisfied before a person can be criminally liable. First, the person must know the law by which the obligation is to be imposed and to which the sanction is annexed. Secondly, the person should actually, or should reasonably, know that the conduct is unlawful. In the absence of these two conditions, a person should not be criminally liable.64 There is no criminal culpability and punishment would not be justified.

Austin did not accept the conventional view that ignorance of law is no defence because of the presumption that everyone knew the law. He rejected this presumption in no uncertain terms. As he said, “That any system is so knowable, or that any system has even been so knowable, is so notoriously and ridiculously false that I shall not occupy your time with proof of the contrary.”65 Yet he defended the rule on two related grounds. The first was the practical impossibility argument. If ignorance of law were permitted as a defence, the courts “would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable.”66 This concern of Austin is difficult to understand in light of the orthodox subjective mens rea approach. Under that approach, courts are required to delve into the mind of the accused to determine his or her mental state, a task which is equally difficult.67

Austin draws a clear distinction between reasonable ignorance of the law and unreasonable ignorance of the law. If ignorance of law were allowed as a defence, two questions had to be determined. First, it had to be determined whether the accused was actually ignorant of the law. If the accused were, then it had to be determined whether the ignorance was inevitable. It can readily be seen that in

64 J Austin, Lectures on Jurisprudence (R Campbell (ed), 5th ed, 1885, reprint 1972.) vol 1, 480.
Austin’s ideal conception of criminal liability, reasonable ignorance of the law could excuse. This is reinforced by his reference to the classes of people exempted from the rule under Roman law, and to the partial and complete excuses under English law – insanity, infancy and intoxication.

In the former category, i.e. those exempted under Roman law, there was a presumption that ignorance of law among such people was reasonable given their age, gender, or intellectual capacity. As Austin put it, “wherever ignorance of law exempts from liability, the ignorance is presumed to be inevitable.” In the latter category, Austin acknowledges that the real reason insanity and infancy operate as partial or complete defences, is because the accused is actually unable, or presumed to be unable, to be aware of, or to understand, the law at the time of committing the offence. Such ignorance is deemed reasonable due to the pathological and/or psychological condition of the accused. This results in the paradoxical conclusion that reasonable ignorance of law excuses, but only when the ignorance is deemed to be reasonable due to special circumstances. When the ignorance may actually be reasonable, but the special circumstances are not present, it is not a defence.

Holmes’s rationale: the utilitarian approach

Holmes begins his discussion of the ignorance of law rule by attacking Austin’s pragmatic considerations. Holmes argued that difficulty of proof was no reason to justify a rule that was contrary to fairness and justice: “If justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try.” His solution to Austin’s difficulty of proof was to transfer the burden of proving ignorance to the accused. Having denounced Austin’s defence of the rule, Holmes then supported the rule on utilitarian grounds. According to Holmes:

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68 J Austin, Lectures on Jurisprudence (R Campbell (ed) 5th ed, 1885, reprint 1972) vol 1, 482.
69 Austin discusses intoxication in the context of Roman law where it was an excuse. During Austin’s time, intoxication was not a defence in English law, but now it is, although the extent to which it is, has been the subject of recent controversy. See Chapter IV.
70 J Austin, Lectures on Jurisprudence (R Campbell (ed) 5th ed, 1885, reprint 1972) vol 1, 489.
71 The insanity test devised in M’Naghten’s case (1843) 10 CI & Fin 200, [1843-60] All ER Rep 229 is squarely based on the accused’s knowledge of wrongfulness.
Public policy sacrifices the individual to the general good ... [and] ... to admit the [ignorance of law] excuse at all would be to encourage ignorance where the law maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.\textsuperscript{73}

It may be argued that the utilitarian theory of punishment does not justify Holmes' stand. Prosecution without punishment may, in some cases, be an effective educational tool. Where ignorance of law is raised in a trial, the publicity of that trial will educate the public.\textsuperscript{74} Punishing a person who is not aware that his or her conduct is unlawful is unnecessary and unjustified. This view is supported by Jeremy Bentham, himself an avowed utilitarian. According to Bentham punishment in itself is an evil, and therefore it can only be justified where it excludes a greater evil. To use punishment solely for the purpose of making the law known was not acceptable to Bentham.\textsuperscript{75} Under the utilitarian theory there are four instances where punishment is not justified. These are where the punishment is:

- groundless, ie where there is no wrongdoing to prevent
- inefficacious, ie where it cannot prevent a wrongdoing
- unprofitable, ie where it would create a greater wrong than that which it seeks to prevent
- needless, ie where the wrongdoing may be prevented without punishment.\textsuperscript{76}

Punishing a person who acted in ignorance of law is not justified under the utilitarian view as it is certainly inefficacious, unprofitable and needless. It can also be argued to be groundless, depending on how one defines wrongdoing.\textsuperscript{77} Bentham gives several examples where punishment would be inefficacious and therefore unjustified. Two of them are clearly based on reasonable ignorance of law:

- where the law has not been brought to the attention of the public, or to the individual

\textsuperscript{73} O W Holmes, The Common Law (first published, 1881, 42\textsuperscript{nd} print, 1948) 48.
\textsuperscript{74} A Ashworth, Principles of Criminal Law (3\textsuperscript{rd} ed 1999) 244.
\textsuperscript{75} J Bowring (ed), The Works of Jeremy Bentham (1843) vol 6, 519-20.
\textsuperscript{76} J Bowring (ed), The Works of Jeremy Bentham (1843) vol 1, 83-4.
\textsuperscript{77} See Chapter I.
• where the person is an infant, intoxicated or insane and therefore cannot understand the law.\textsuperscript{78}

Punishment is needless when a crime may be prevented or deterred by non-penal methods.\textsuperscript{79} Thus, where a person commits an offence as a result of his or her ignorance of law, he or she should be cautioned and informed about the law. Punishment is not necessary. As Bentham put it, "the pen is the proper weapon to combat error with, not the sword."\textsuperscript{80} Holmes himself acknowledges the need for blameworthiness before a person can be held criminally liable and punished. Indeed, he relies on retributive notions to justify his approach.\textsuperscript{81} Immediately after supporting the ignorance of law rule, he states:

It is not intended to deny that criminal liability, as well as civil, is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.\textsuperscript{82}

Holmes's reconciliation of the utilitarian and blameworthiness approaches lies in the standard of the reasonable person.

The reconciliation of the doctrine that liability is founded on blameworthiness with the existence of liability where the party is not to blame, ... is found in the conception of the average man, the man of ordinary intelligence and reasonable prudence.\textsuperscript{83}

Implicit in Holmes's view is that the reasonable person is expected to know the law. Given the complexity of the criminal law, it may be reasonable for a person of ordinary intelligence to be ignorant of some laws. Such ignorance, not being unreasonable, should be a defence. Thus, the utilitarian theory also supports a defence of reasonable ignorance of law.

\textsuperscript{78} J Bowring (ed), \textit{The Works of Jeremy Bentham} (1843) vol 1, 84.
\textsuperscript{80} J Bowring (ed), \textit{The Works of Jeremy Bentham}, (1843) vol 1, 86.
\textsuperscript{81} According to Holmes, "[T]he fact that crimes are also generally sins is one of the practical justifications for requiring a man to know the criminal law." O W Holmes, \textit{The Common Law} (first published, 1881, 42\textsuperscript{nd} print, 1948) 125.
\textsuperscript{82} O W Holmes, \textit{The Common Law} (first published, 1881, 42\textsuperscript{nd} print, 1948) 50.
\textsuperscript{83} O W Holmes, \textit{The Common Law} (first published, 1881, 42\textsuperscript{nd} print, 1948) 50.
Hall’s rationale: the principle of legality

Hall prefers Austin’s view, but finds neither Austin’s nor Holmes’ justification of the rule to be adequate. Hall combines two theories to form his rationale for the rule. The first theory is based on the principle of legality and the second is based on a version of the normative theory of mens rea.

According to Hall the principle of legality is this:

- rules of law express objective meanings
- certain persons (the authorised “competent” officials) shall, after a prescribed procedure, declare what those meanings are
- only these meanings are binding, ie only these meanings of the rules are the law

Hall argues that allowing ignorance of law to be a defence would contradict the principle of legality and undermine the rule of law. In his view, if the defence did operate, the accused would be tried by the law as he or she believed it to be, not as it actually was: “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, ie the law actually is thus and so.” [emphasis in original] This, according to Hall, contradicts the principle of legality.

The second theory is based on the notion that the criminal law embodies a common morality. The criminal law “represents an objective ethics which must sometimes oppose individual convictions of right.” Allowing ignorance of law as a defence would therefore undermine the common morality of the community, a code by which every member of that community implicitly agrees to abide by. Combining these two theories, Hall offers this rationale for the ignorance of law rule: “The legally

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84 As he put it, “[N]either Austin’s nor Holmes’ theory cuts to the heart of the problem of ignorantia juris.” J Hall, General Principles of Criminal Law (2nd ed, 1960) 381.
expressed values may not be ignored or contradicted." This rationale, with respect, is no more than saying that the criminal law may not be violated. It completely avoids ignorance of law as an issue.

With respect to his first theory, to suggest that "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, ie the law actually is thus and so" is incorrect. Hall makes the error of equating the defendant's mistaken belief of the state of the law with the actual state of the law. Although the defendant may be treated as though the law were as he or she believed, that does not mean that the law itself becomes thus and so. It is only for the purpose of assessing that particular defendant's culpability that the mistake or ignorance is relevant. The law itself does not change even if a court acquitted the defendant who acted in ignorance of law. Hall fails to distinguish between wrongdoing and culpability on the one hand, and justification and excuse on the other. Ignorance of law may not justify an action committed by a person but it may excuse the person. The act is and will be wrongful, but no culpability may attach to the person. Ignorance of law leaves the norm intact. It merely denies culpability.

Hall's common morality theory is also unconvincing. Excusing an ignorant person does not jeopardise the moral strength of the law. In fact, it increases it by reinforcing the moral norm, while fairly excusing the blameless accused. In the words of McClain J, "Respect for law which is the most cogent force in prompting orderly conduct in a civilized community is weakened, if men are punished for acts which according to the general consensus of opinion they were justified in believing to be morally right and in accordance with law..." Having supported the rule, Hall does acknowledge areas where the ignorance of law rule should not apply. He reconciles the various exceptions of mistake of private law, claim of right and offences where knowledge of illegality is specifically required under a broad theory that such

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90 See, G P Fletcher, Rethinking Criminal Law (1978) 733.
91 See text nn 97, 98 and references therein for an elaboration on the distinction between justification and excuse.
92 State v O'Neil 126 NW 454 at 456 (1910).
ignorance of law is not blameworthy. In Hall’s view, an accused is not blameworthy when he or she does not intend to subvert the moral authority of the criminal law. He illustrates his views in the context of petty offences, where he argues that the ignorance of law rule should not apply.

Hall’s distinction between petty offences and other offences lies in the nature of the knowledge that is required to impute blameworthiness. Some acts “are immoral regardless of the actor’s ignorance of their being legally forbidden ... whereas other acts are immoral only because the actor knows they are legally forbidden.”93 This is the orthodox distinction between offences mala in se and offences mala prohibita, although Hall suggests his approach is different. For the latter category of offences, “normal conscience (moral attitudes) and understanding cannot be relied upon to avoid the forbidden conduct, [and therefore] knowledge of the law is essential to culpability.”94 The ignorance is presumed to be reasonable and therefore should afford a defence. For the former category of offences, it is assumed that the offence is morally wrong, and that individuals know, or should know, that.

Hall’s categorical assertion that individuals know, or should know that the conduct in the former category is morally or legally wrong is questionable. The criminal law comprises a set of rules that every member of society is required to abide by. It is an implied social contract. It may be analogous to a moral code that a community lives by. The difference is that while a moral code can be taken to be known by each individual, as these norms are inculcated into the individual from an early age, legal rules are not in the same category. Therefore, knowledge of these rules cannot be presumed, although individuals should be expected to be familiar with the rules. There may even be a duty on individuals to be familiar with the rules. Unreasonable ignorance of the rules may well be culpable on the grounds that the individual has breached his or her duty as a citizen.95 While reasonable ignorance of law may be more successfully argued for petty offences, it should not be excluded from non-petty

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95 See text at nn 112-19.
offences. It is not the nature of the offence, but the moral blameworthiness of the accused that should determine criminal culpability.

Fletcher’s rationale: a conceptual approach

Fletcher’s work on criminal law draws heavily from German criminal law theory. Fletcher takes the view that criminal liability is contingent on the distinction between wrongdoing and attribution, and the corollary distinction between justification and excuse. A brief recapitulation of these concepts as expounded in Chapter I will be useful. In Fletcher’s analysis, wrongful conduct is that which the criminal law prohibits. Wrongdoing is the engaging in wrongful conduct.\(^6\) Attribution is the holding to account of the person who has done wrong.

The closest comparison to these concepts in our criminal law is the distinction between the concepts of criminality and responsibility. It is recognised that an insane person or an infant who has committed an unlawful act has engaged in criminality, but due to the mental state or the age, such persons are not held responsible. Fletcher argues that this approach should have general application, ie it should be inquired in every case, whether or not an accused who has engaged in criminal conduct can fairly be blamed for it. In cases where a person has engaged in wrongdoing but may not be fairly blamed for it, the wrongdoing is not attributed to the person.

The distinction between justification and excuse is that a justification makes conduct, otherwise wrongful, not wrongful.\(^7\) An excuse recognises the wrongfulness of the conduct, but holds that the particular accused should not be held criminally liable.\(^8\) Therefore, justification negatives wrongdoing; and excuse negatives attribution. A mistake of law could in some cases operate as an excuse and negative attribution,

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\(^6\) Fletcher argues that wrongdoing has a broader meaning in that it includes engaging in conduct that is not necessarily wrongful, in the sense of being prohibited by the law. Wrongdoing includes engaging in conduct that is morally wrong. However, for the purpose of this discussion the extended definition of wrongdoing need not concern us. Even Fletcher is of the view that the distinction has very little practical relevance.

although it does not negative wrongdoing. The conduct remains unlawful. It is just that the accused is not held to account for it. Hall, as discussed earlier, did not appreciate this distinction when he used the principle of legality to defend the ignorance of law rule.

The value of Fletcher’s analytical framework is that it permits us to disregard the difficult distinction between mistake of fact and mistake of law. Rather, the focus is on the effect of the mistake. Instead of focusing on technical distinctions, the focus is on the culpability of the accused. Three types of mistakes are recognised:

- mistakes that negative wrongdoing
- mistakes that negative attribution
- mistakes that are irrelevant to criminal liability

Examples of mistakes in our criminal law that illustrate these three categories are, respectively, the Morgan mistake, the Proudman mistake and mistake of law. Fletcher, however, rejects the view that mistake of law is irrelevant to criminal liability. He defends his position by relying on the German approach to mistake of law.

The modern German jurisprudence on mistake of law began with the growth of regulatory offences in the post-First World War period. It was recognised that these offences were essentially regulatory in nature and generally had no bearing on moral norms. While it may have been reasonable to expect people to be aware of moral norms, and consequently, criminal laws that are based on moral norms, it was not reasonable to expect the public to be aware of offences which were created purely to regulate trade and commerce. A statutory defence of non-culpable mistake of law

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100 [1976] AC 182.
101 Proudman v Dayman (1941) 67 CLR 536.
102 See Chapter I for elaboration.
was created.\textsuperscript{103} The recognition of mistake of law as a defence spurred vigorous debate in this area, which culminated in two different schools of thought about the general concept of blame and culpability in criminal law.\textsuperscript{104}

One school of thought subscribed to the view that knowledge of unlawfulness was an essential element of every offence. This school of thought was identified by the psychological theory. Under this approach, ignorance or mistake of law could be a defence because it negated one of the required elements of criminal culpability, i.e., knowledge of unlawfulness. The other school of thought was identified by the normative theory. Under this approach, a distinction was made between acting intentionally and acting culpably. A person acted intentionally even if he or she were unaware of the law. A person acted culpably if he or she were aware of the law, or if he or she ought reasonably to have been aware of the law. Thus, reasonable, or as preferred by German theorists, unavoidable, mistake of law was a defence.

In either case, whether a subjective or objective mistake of law operated as a defence, the prohibitory norm itself remained unaffected, as the mistake merely operated as an excuse. The conduct was wrongful, but the defendant was not blamed for the wrongdoing due to the mistake of law. The question remained whether any mistake of law would suffice, or whether only reasonable mistake of law would operate as a defence. The German Supreme Court, in 1952, preferred the latter approach, formally endorsing the normative theory of criminal liability.\textsuperscript{105} The preference for the normative approach was grounded in the requirement of blameworthiness. A person could not be regarded as blameworthy if they did not have a fair chance to avoid criminal liability.\textsuperscript{106} As Fletcher explained:

\begin{quote}
The assessment of attribution and accountability obviously requires the application of standards to the particular situation of the actor. As worked out more elaborately in the theory of excuses, the standards have a variety of forms, but it always recurs to the same normative question: could the actor have been fairly expected to avoid the act of
\end{quote}

\begin{footnotes}
\footnote{Law of January 18 1917, [1917] RGBI 58. See Judgment of May 11 1922, 56 RGSt 337. These references are cited in G Fletcher, \textit{Rethinking Criminal Law} (1978) 741, nn 18,19.}
\footnote{See Chapter I.}
\footnote{Resolution of March 18 1952, 2 BGHSt 194.}
\end{footnotes}
wrongdoing? Did he or she have fair opportunity to perceive the risk, to avoid the mistake, to resist the external pressure, or to counteract the effects of mental illness? This is the critical question that renders the assessment of liability just. And when sanctions are justly imposed, there is no need to assume, as does Holmes, that the determination of liability sacrifices innocent individuals.107 [emphasis added]

Fairness excludes unreasonableness. Therefore “fair chance to avoid criminal liability” may permit reasonable ignorance of law as a defence, but not unreasonable ignorance of law. Fletcher’s thesis thus supports the ignorance of law rule, but only where the ignorance was unreasonable. Reasonable mistake of law should operate as a defence.

Ashworth’s rationale: duties of citizenship

In his early work on the ignorance of law rule,108 Ashworth observed that the rule was being steadily eroded by exceptions. Ashworth further expanded on the range of exceptions by including mistaken belief in justification109 and criminal estoppel.110 In his more recent work, Ashworth offers a rationale for the ignorance of law rule based on duties of citizenship.111 According to Ashworth, citizens have a legal duty to acquaint themselves with their legal obligations. The recognition of this duty lies in a

109 This exception deals with offences such as blackmail, criminal damage and homicide, where a belief as to the lawfulness of the defendant’s conduct is a relevant issue.
111 A Ashworth, Principles of Criminal Law (3rd ed, 1999) 244.
social construct of individuals as integral members of a society and not merely as autonomous beings without responsibilities and obligations to society. Simple ignorance of law is a breach of this duty and cannot be used as a defence. Reasonable ignorance on the other hand, may operate as a defence under this approach. Indeed, Ashworth explicitly states that we should recognise that “a mistake of law may excuse if it is reasonable.”

While Ashworth’s rationale for the ignorance of law rule, based on duties of citizenship is persuasive, it has been strongly criticised by Douglas Husak. While Husak himself supports the view that reasonable ignorance of law should be a defence, he argues that the “duties of citizenship” approach is flawed. It is argued in this thesis that Ashworth’s duties of citizenship provides a valuable principled approach to criminal responsibility. As this duties of citizenship approach is supported in this thesis, it is necessary to defend it and address Husak’s criticisms of it. Before that, some observations about the duties of citizenship need to be made. It is argued that the concept of citizenship cannot be strictly limited to the political notion of citizenship. If that were the case, then tourists and the stateless would have no duty to know the law. The duties of citizenship should be seen in a broad philosophical sense as the duty of an individual to respect the rule of law.

Husak challenges the notion that one can justify the ignorance of law rule by simply creating another rule, ie the duty to know the law, which itself does not need to be known. To adopt Husak’s illustration, let us assume A commits offence X, not knowing, without reasonable grounds, that X is an offence. A’s unreasonable ignorance of law is not an excuse because A is under a duty to know that X is an offence, and by breaching that duty, A is blameworthy and deserving of punishment.

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What if A is not aware that citizens are under a duty to know the law? Is that ignorance relevant to A’s culpability? If A’s knowledge of the existence of A’s duty is not relevant, then imposing such a duty is superfluous, since if knowledge of that duty can be dismissed, there is no reason why knowledge of unlawfulness cannot be similarly dismissed.

Can we differentiate between knowledge of unlawfulness and the duty to know the law, such that with the latter, one may simply disregard the need for knowledge of the existence of the duty? Husak, while acknowledging that there may be a difference between requiring knowledge of the unlawfulness of criminal conduct and knowledge of a duty to know the law, argues that no real distinction can be made. Ashworth, in his response to Husak’s criticism suggests that since the ignorance of law rule is well known, there is no practical difficulty in assuming that everyone knows of the duty.\footnote{A Ashworth, \textit{Principles of Criminal Law} (3\textsuperscript{rd} ed, 1999) 244.} It is suggested that Ashworth’s duties of citizenship can be defended on theoretical as well as logical grounds. A real distinction can be drawn between these two categories, ie knowledge of the duty and knowledge of the unlawfulness of the particular illegal act. Breach of the duty to know the law, per se, is not punishable. One can draw an analogy with the law of torts. Breach of a duty of care in and of itself is not actionable.\footnote{As Viscount Simonds put it, “there is no such thing as negligence in the air.” \textit{Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd} [1961] AC 388 at 425.} The accused is not liable unless the breach causes harm to another. Similarly an accused is not punished for failing to know that there is a duty to know the law. Therefore, imposing a duty to know the law does not place upon the individual an unfair burden, as the consequence of failure to know does not result in any detriment. It is only when one engages in conduct which is illegal, that knowledge, or lack thereof, becomes relevant to criminal liability. Thus, it is not necessary for individuals to \textit{know} of this duty to \textit{be} under a duty to know the law. It is, however, necessary for individuals to reasonably know they are engaging in unlawful conduct because otherwise, it would be unfair to blame and punish them.

Alternatively, a deductive reasoning process leads to the same conclusion. As members of a general community, we all know that there are laws that govern us. We
know that we are supposed to comply with these laws. To assume otherwise would be to assume that we live in a lawless society, which is clearly untenable. To comply with the laws we need to know what these laws are. We therefore recognise that we have a duty to know these laws. It is not a question of whether or not an individual knew of his or her duty to know the law. The question is whether or not the individual ought to have known of the duty to know the law. From the above deductive reasoning, the answer is clearly in the affirmative. It is common sense that everyone ought to know that there are laws governing our conduct and in a law-abiding society we have a duty to be aware of these laws in order to comply with them.

Where the duty to know the law is not breached, ie where the individual is reasonably ignorant of the law, then such ignorance may be raised as a defence. Where the duty is breached, ie where the ignorance is not reasonable, then the accused may not raise ignorance of law as a defence. A question now arises as to whether a person who is unreasonably ignorant of the law is as blameworthy as a person who acts with knowledge of unlawfulness. Husak argues Ashworth’s theory does not take into account the comparative blameworthiness of the ignorant offender and the knowing offender. This criticism however fails to distinguish between blameworthiness required for justifying punishment, and blameworthiness in the context of determining the severity of punishment; a distinction Husak himself recognises.\(^{119}\) The degree of blameworthiness is not relevant to the former, which is the “threshold” question.\(^{120}\) As long as there is some blameworthiness, the accused can fairly be held to be criminally culpable. The amount of punishment the accused deserves is based on the degree of blameworthiness, which is the “taliones” question.

While the ignorant offender may be less blameworthy than the non-ignorant offender, as long as the former’s ignorance is not reasonable, both offenders have crossed the

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\(^{120}\) The “threshold” blameworthiness, refers to the blameworthiness that is sufficient to justify penal sanction. For “threshold” blameworthiness, the degree of fault is not relevant. All that is required is that the accused has stepped into the arena of the criminal law, as it were. Threshold punishment determines that the accused is deserving of punishment. The degree of punishment is determined by the degree of blameworthiness, or “taliones” blameworthiness. See Chapter I for an elaboration of threshold and taliones aspects of blameworthiness and desert.
threshold required for criminal liability. The degree to which each will be punished is a matter for further deliberation. Clearly, there may be mitigating grounds for the ignorant offender as such a person may be less blameworthy than the deliberately offending person. This type of blameworthiness is properly reflected in the sentencing process.

Husak’s final argument against Ashworth’s duties of citizenship is that there is no corollary duty on the state to inform its citizens of their legal obligations. One practical, perhaps cynical, reason why there is no such duty on the state is that there is no incentive for the state to embark on an educative exercise when it can prosecute regardless of the individual’s knowledge of the law. Given that the state makes the laws, it seems unfair that it is not required to educate the public about the laws before punishing its members for violations of rules that they were not reasonably made aware of. Perhaps, recognition of a defence of reasonable ignorance of law would actually enhance the educative function of the law, instead of retarding it, as alleged by Holmes.

CONCLUSION

From the analysis offered it can be concluded that the ignorance of law rule has a tortured history. The rule was incorrectly imported into the criminal law and the attempts to justify it have only served to highlight its weakness. The cases in which the rule was considered in the criminal law context, favour the view that only unreasonable ignorance of law is culpable. The theoretical and philosophical rationales demonstrate that the rule, as it stands, offends the basic requirements of criminal culpability. It should therefore be reviewed. However, a complete rejection of the rule, quite apart from the practical problems that it may create, would also be theoretically unsound: there are many instances where a person’s ignorance of law may be blameworthy.

There is general agreement among theorists that knowledge of illegality is relevant to criminal culpability. However, because of the ignorance of law rule, knowledge of illegality is deemed to be irrelevant. The question therefore is, how these two conflicting propositions can be reconciled. As has been demonstrated in this chapter, the solution lies in modifying the ignorance of law rule, so that reasonable ignorance
of law is relevant to the determination of an individual’s culpability. Allowing reasonable ignorance of law to operate as a defence, or conversely, to make reasonable knowledge of illegality an element of the mens rea is not necessarily contrary to the traditional subjectivist approach to culpability. The mental element that is relevant is still the accused’s mental state, not that of a hypothetical person. In evaluating the accused’s mental state, i.e. in determining whether or not culpability should attach, a normative approach is necessary to determine whether or not the particular individual is morally blameworthy.
CHAPTER VI


"[T]he criminal law is designed to punish the vicious, not the stupid or the credulous."¹

INTRODUCTION

This chapter will argue that the law of mistake has been compromised by the emphasis on descriptive mental states at the expense of moral blameworthiness. Instead of assessing the effect of a mistake on the blameworthiness of the accused, the focus is on the nature of the mistake. The emphasis on the nature of the mistake has resulted in difficult and unnecessary distinctions being drawn between ignorance and mistake, as well as fact and law. A further complication is the distinction between the subjective and objective assessment of the defendant’s erroneous belief, or lack thereof. Some mistakes operate as a defence even if it were unreasonable, whereas others exculpate only if the mistake were reasonably held. These distinctions are often arbitrary and have the potential of convicting the morally innocent, or acquitting the morally blameworthy.

The chapter is divided into two parts. The first part analyses the distinction between ignorance and mistake as well as the distinction between fact and law. Some commentators have argued that the distinction between ignorance and mistake might be relevant to the ignorance of law rule. The distinction is also relevant to the honest and reasonable mistake of fact defence, which is available for strict liability crimes in Australia.² The distinction between fact and law is of utmost importance as the courts have recognised a defence of mistake of fact for many years. Thus, distinguishing a mistake on the basis of fact and law is critical to the criminal liability of an accused.

¹ R v Brown [1975] 10 SASR 139 at 148 per Bray CJ.
² Proudman v Dayman (1941) 67 CLR 536; He Kaw Teh v The Queen (1985) 157 CLR 523.
Reconceptualising Fault in the Criminal Law: A Defence of Reasonable Mistake of Law

It will be argued that the present defence of mistake of fact has the potential to exculpate morally blameworthy accused, and inculpate morally innocent accused. The classic example is the sexual assault case of DPP v Morgan,\(^3\) where it was held that an unreasonable mistaken belief in the consent of the other person could theoretically negative criminal culpability. It is arguable that a person who unreasonably believes in consent where consent is not present, may in some cases be deserving of criminal liability. On the other hand, there are cases where the accused is reasonably ignorant of a fact, but such ignorance may not afford a defence because there is no positive belief (mistake) to negative an otherwise culpable mental state. Where the ignorance is reasonable, it may be argued that the defendant is morally innocent and not deserving of punishment. Yet, the present law of mistake would result in the conviction of such a morally blameless person.\(^4\)

The second part of the chapter deals with mistake of law. While mistake of law is not a defence, several exceptions to the rule have been recognised. These exceptions have two common threads. First, where the offence expressly requires knowledge of illegality, mistake of law may negative the mental state and therefore operate as a defence. Secondly, where the mistake of law is reasonable courts have recognised a limited defence. This was on the grounds that it is unfair to punish an accused who, by reasonably relying on official advice is reasonably mistaken as to the law. At first sight this exception is promising. However, the basis of this defence is fundamentally flawed as it formally rests, not on a recognition of the lack of moral blameworthiness of the accused, but on a type of estoppel argument, which prevents the state from prosecuting.

This chapter seeks to demonstrate that the present law of mistake is inadequate because the emphasis is on technical notions of legal guilt rather than on normative notions of moral blameworthiness. The chapter argues that reasonable mistake of law should be a defence if it demonstrates that the accused is morally innocent. The exceptions to the ignorance of law rule collectively show that the rule is no longer as dominant as it was once was. Indeed as one commentator said, "[T]he rule enters the

\(^3\) [1976] AC 182.
arena a roaring lion but is so cut down by case law that it exits a timid lamb." The time has come to lead this lamb to slaughter!

DISTINGUISHING BETWEEN IGNORANCE AND MISTAKE

Although the two terms, ignorance and mistake are often used interchangeably, they are conceptually different. The distinction is particularly relevant to mens rea inquiries because ignorance is an absence of a mental state and raises conceptually different questions when compared to mistake, where there is a positive mental state. Ignorance is a total want of knowledge in reference to the subject matter. Mistake admits of some knowledge, but that knowledge implies a wrong conclusion. These two concepts clearly overlap and it is very difficult to make the distinction in practice. Glanville Williams has argued that no distinction need be drawn between the two as mistake was merely a species of ignorance. This view is inaccurate. One can be mistaken without being ignorant and vice versa. For example, if one had consulted the relevant statute on a particular matter and formed an incorrect view of its meaning, one would be mistaken as to the law, not ignorant. On the other hand, if a statute were passed by Parliament and one contravened it without being aware of it, then one could hardly be said to be acting under a mistake, as one was simply ignorant of the law.

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6 G Arzt, "Ignorance or Mistake of Law" (1976) 24 American Journal of Comparative Law 646; Anon, "Ignorance or Mistake of the Law" (1978) 37 Maryland Law Review 404; C R M Dlamini, "Ignorance or Mistake of Law as a Defence in Criminal Law" (1987) 50 Tydskrif u'r Hedendaagse Romeins-Hollandse 43.
9 Hulton v Edgerton 6 S C 485 at 489 (1875).
10 J Austin, Lectures on Jurisprudence (R Campbell (ed) 5th ed, 1885, reprint 1972) 479.
Reconceptualising Fault in the Criminal Law: A Defence of Reasonable Mistake of Law

Can we devise a limitation to the ignorantia rule by relying on this distinction and restricting the rule to either ignorance or mistake only? The Latin maxim has been expressed in several ways, including ignorantia legis neminem excusat;\(^\text{13}\) ignorantia eorum, quae quis scire tenetur, non excusat;\(^\text{14}\) ignorantia juris non excusat;\(^\text{15}\) ignorantia juris haud excusat;\(^\text{16}\) ignorantia juris, quod quisque tenetur, neminem excusat.\(^\text{17}\) In all of these expressions, ignorantia is used. The English translation of ignorantia is ignorance.\(^\text{18}\) The Latin word for mistake is erratum.\(^\text{19}\) The literal translation therefore suggests that the rule is limited to ignorance and does not apply to mistake. Such a conclusion might be premature. Indeed, an analysis of Blackstone's statement suggests the opposite conclusion to be more likely. Blackstone stated:

Ignorance or mistake is another defect of will when a man intending to do a lawful act does that which is unlawful. For here the deed and will acting separately there is not the conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact and not an error in point of law. ... For a mistake in point of law, which every person of discretion not only may but is bound and presumed to know is in the criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat.*\(^\text{20}\)

Even though the earlier statements of the principle only used the word "ignorance" in relation to the ignorantia doctrine,\(^\text{21}\) Blackstone used the terms ignorance, error and mistake in his statement of the rule. Error is defined as a "state of being wrong in

\(^{13}\) *R v Mayor of Tewkesbury* (1868) 3 QB 629 at 639 per Lush J.

\(^{14}\) M Hale *History of the Pleas of the Crown* (first published, 1736, P R Glazebrook (ed) 1971) vol 1, 42.

\(^{15}\) *R v Blunt* (1600) 1 St Tr 1450.

\(^{16}\) *Cooper v Phibbs* (1867) LR 2 149 at 170 per Lord Westbury.


\(^{21}\) C St German, *Dialogue between a Doctor of Divinity and a Student at Law* (T F T Plucknett & J L Barton (ed) 1974) the term used in relation both to law and fact is "ignorance"; *Blunt* (1600) 1 St Tr 1450 per Popham CJ.
The Defence of Mistake

belief or behaviour. Mistake is similarly defined, and in fact, the two words are treated as synonyms. Both error and mistake involve a positive state of mind. Ignorance, on the other hand, is a lack of knowledge or information.

Commentators who have considered the matter are divided on whether ignorance or mistake of law should exclude criminal liability. The academic views may be categorised into three groups:

- those who favour mistake of law as opposed to ignorance of law operating as a defence
- those who favour ignorance of law as opposed to mistake of law operating as a defence
- those who prefer to focus on the culpability of the mistake rather than on the nature of the mistake, i.e., either may be a defence if culpability is negated.

Edwin Keedy illustrates the first category by arguing that ignorance of law does not negative the criminal mind, whereas mistake of law does. According to Keedy, the criminal mind is one which has the intention to do an act that the law has made criminal. Thus, if A intends to do X, and X is a criminal offence, then despite A’s ignorance of the law, “all elements of criminality are present.” On the other hand, he argues that if a person acts under a mistake of law, the criminal mind is not present because of the erroneous belief of the accused. This argument belies logic. Unless

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26 E R Keedy, “Ignorance and Mistake in the Criminal Law” (1908) 22 Harvard Law Review 75 at 91. Keedy does recognise though that this position is unfair.
knowledge of illegality is an a element of mens rea, which Keedy does not suggest anywhere, there should be no difference between the ignorant accused and the mistaken accused in his analysis. Both intend to do the deed, which the criminal law has made unlawful. Whether they are mistaken or ignorant as to the legality of the conduct is not relevant. Keedy's argument for recognising a mistake of law defence is also limited to offences specifically requiring knowledge of unlawfulness, or to offences where a claim of right is a defence. Most of the cases cited by Keedy are in fact claim of right cases.\(^\text{27}\) Keedy's proposition therefore does not operate as a general principle.

Jerome Hall illustrates the second category by arguing that ignorance of the law should be a defence. Where a person is ignorant of the law, there is no mens rea and therefore the accused is not guilty. He argues that a person who has made a mistake of law can be said to be reckless on the grounds that "error implies acquaintance and opportunity to form a correct opinion and that might support a charge of recklessness."\(^\text{28}\) However, the opposite argument can equally be made. A person who has actually made an effort to know the law has acted more responsibly than the person who did not even consider the legality of the conduct. The weakness of both Keedy's and Hall's approaches is a failure to judge ignorance or mistake of law from the point of view of the effect on criminal culpability. The focus has been on the nature of the mistake and how that might affect the descriptive mental state in question.

Commentators who represent the third category recognise that the focus should be on the effect and not on the nature of the mistake. George Fletcher is the classic example of this school of thought.\(^\text{29}\) Fletcher advocates an approach to mistake where the focus

\(^{27}\) E R Keedy, "Ignorance and Mistake in the Criminal Law" (1908) 22 Harvard Law Review 75 at 93-4.


\(^{29}\) G P Fletcher, Rethinking Criminal Law (1978). See also the South African writers who have adopted this approach. C R Snyman, Criminal Law (3\(^{rd}\) ed, 1995); J M Burchell & J RL Milton, Principles of Criminal Law (1991, reprint 1994); M A Rabie, Aspects of the Distinction Between Ignorance or Mistake of Fact and Ignorance or Mistake of Law in Criminal Law" (1985) 48 Tydskrif u'r Hedendaagse Romeins-Hollandse 332; C R M
is on the culpability of the accused. The question is whether the mistake in any way negatives that culpability.\textsuperscript{30} The earlier approaches discussed above are limited to technical inquiries about the nature of the mistake and how the mistake may have impacted on the descriptive mental state of the accused. Because these approaches do not evaluate the moral blameworthiness of the accused, they fall victim to ingenious, or sometimes disingenuous, argument. As seen above, eminent academics have come to diametrically opposing conclusions. By evaluating the mistake in terms of moral blameworthiness, a defence of reasonable mistake of law can be justified.\textsuperscript{31} The difficult distinctions between ignorance and mistake, as well as between fact and law, are avoided.

**Distinguishing between law and fact**

The distinction between law and fact is of fundamental importance because mistake of fact has, for centuries, been recognised as relevant to criminal liability.\textsuperscript{32} Unfortunately, as Percy Winfield put it in 1943, this task of distinguishing between fact and law is almost a “practical impossibility.”\textsuperscript{33} Half a century later, courts and academics are still questioning this distinction.\textsuperscript{34} At either end of the spectrum where the distinction is clear, there is little difficulty. For example, a person who shoots and kills another, believing the target to be an animal is acting under a mistake of fact and

\textsuperscript{30} Dlamini, “Ignorance or Mistake of Law as a Defence in Criminal Law” (1987) 50 Tydskrif u’r Hedendaagse Romeins-Hollandse 43.

\textsuperscript{31} See Chapter I for a discussion of Fletcher’s model of criminal culpability based on the concepts of wrongdoing and attribution.


\textsuperscript{33} P Winfield, “Mistake of Law” (1943) 59 Law Quarterly Review 327.

is clearly not guilty of murder. A person who shoots and kills another, in the belief that killing a person is not against the law is acting under a mistake of law, and is guilty of murder. The difficulty arises in cases where the distinction is blurred, ie where there is a mixed question of fact and law. In such cases, the determination of an individual's criminal liability is dependent on tenuous, and often artificial characterisations of a mistake as either fact or law.

Situations of mixed fact and law often arose in the context of status questions, eg the legal status of an individual,\textsuperscript{35} or the legal status of a representation or state of affairs.\textsuperscript{36} It was necessary to resolve these mixed fact/law cases. If the mixed mistake were treated as a mistake of fact, that provided a defence. The High Court of Australia in \textit{Thomas v The Queen},\textsuperscript{37} by a slim majority, held that mixed questions should be resolved as questions of fact. \textit{Thomas} was a bigamy case. The defendant married a woman believing that his earlier marriage was not valid. He had been led to believe that his first wife, who had been previously married, had not legally divorced her husband as there had not been a decree absolute made by the court. This belief was found to be erroneous and therefore he was at the time of his second marriage, already a married man. The issue was whether the mistake was one of fact or of law.

Latham CJ identified the relevant belief as a belief “that a decree absolute had not been made by the Supreme Court of Victoria. Whether or not such a decree had been made was a question of fact.”\textsuperscript{38} Latham CJ distinguished this type of belief from a belief by the defendant that “for some reason or other which he did not understand,
the prior marriage of his wife had not effectually been dissolved." 39  This latter belief, according to Latham CJ would be one of law.

Dixon J took a slightly different approach. While agreeing with Latham CJ’s analysis, Dixon J went further and stated that “in any case, in the distinction between mistakes of fact and of law, a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law.” 40 [emphasis added] It is this statement that has been relied on by later courts and commentators and led to the view, until recently, that mixed questions of fact and law should be resolved as questions of fact. Starke and Evatt JJ, in dissent, were of the view that the mistake should have been categorised as one of law. Starke J relied on R v Wheat and Stocks 41 and distinguished it from R v Tolson. 42 Both were bigamy cases. In Tolson the accused believed her first husband was dead and it was held that such a belief, if reasonable, afforded a defence. In Wheat and Stocks, the accused believed that the man she was marrying was not already married. This was a mistake as to the person’s legal status, not merely a mistake as to a fact, ie whether a person was dead or alive. 43 In Starke J’s view such mistakes as to status were mistakes of law. Evatt J, like Dixon J, went a step further, albeit in the opposite direction, and stated that mixed questions should always be resolved as questions of law. 44

The High Court of Australia again considered the mixed fact/law question in 1968 in the case of Iannella v French. 45 The defendant was charged with wilfully demanding rent beyond that permissible under the relevant rent regulations. The defendant argued that he had mistakenly believed that the rent regulations had been lifted. A central issue in the appeal was whether the mistaken belief related to fact or law.

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39 (1937) 59 CLR 279 at 286.
40 (1937) 59 CLR 279 at 306.
41 [1921] 2 KB 119.
42 (1889) 23 QBD 168.
43 This assumes that life or death is a simple question of fact, when in fact they raise complex legal questions.
44 (1937) 59 CLR 279 at 318-9.
45 (1968) 119 CLR 84 at 97.
Once again the High Court was divided on this issue. Barwick CJ and Windeyer J held that mixed questions should be resolved as questions of fact. Barwick J stated that, "The passing of an Act, as distinct from the changes it makes in the law, is, in my opinion, a fact. So is its repeal; ..." Taylor J, with whom Owen J agreed, held that the mistake should be treated as a mistake of law.

Although the High Court of Australia has suggested that mixed questions should be treated as questions of fact, the state courts have been inclined to adopt the opposite view. In the South Australian case of Power v Huffa, the majority held that mixed question should be resolved as questions of law. In Jacob J’s view, mixed questions could be resolved as questions of fact only where there was an initial mistake of fact, which then led to an erroneous understanding of the law. Where the mistake was truly a compound one, it should be treated as a mistake of law.

In the early 1990s, the New South Wales Court of Appeal favoured the view that mixed questions should be decided as questions of law. In Strathfield MC v Elvy, Gleeson CJ said, "... these may be mixed questions of fact and law. Mistakes on matters of that kind would not ordinarily constitute mistakes of fact." Two years later, in Griffin v Marsh, the New South Wales Court of Appeal reconsidered this issue. The accused was charged under s8(d)(1)(a) of the Taxation Administration Act 1953 (Cth) for failing to answer certain questions pertaining to taxation matters.

The Income Tax Commissioner, acting under ss264(1) and 264(2) of the Income Tax Assessment Act 1936 (Cth), directed the accused to give evidence concerning the income or assessment of certain companies. While giving evidence the accused was asked about certain documents. Those documents did not concern the companies

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46 Iannella v French (1968) 119 CLR 84 at 97.
47 The fifth judge, McTiernan J did not comment on the mistake issue.
48 (1976) 14 SASR 337.
49 See also Khammash v Rowbottom [1989] 51 SASR 172.
identified in the Commissioner’s notice. The accused refused to answer the question after having been advised that she was not obliged to do so because the question did not relate to evidence concerning the income or assessment of the companies mentioned in the Commissioner’s notice. This advice was incorrect, and legally she was required to answer the question.

The accused argued that she had acted under an honest and reasonable mistake of fact, which should operate as a defence to the charge. The issue was whether the phrase “concerning his or any other person’s income or assessment” in s264 was a matter of law or a matter of fact. Smart J distinguished *Thomas v The Queen* and found that in this case the defendant’s mistake was not one of fact, but rather was a mistaken conclusion as to the effect of the statute. Such a mistake was one of law. In Smart J’s view, a mixed question could only be treated as a mistake of fact if the mistake were initially as to a matter of fact, and that mistake led to an incorrect view of the law.\(^{53}\)

The state courts have clearly taken a more dogmatic approach to the ignorance of law rule than the High Court. Given that criminal law is a matter of state jurisdiction, there is clearly a concern that morally blameless individuals may unfairly be made criminally liable. To hold an individual who has made reasonable efforts to know and to comply with the relevant laws criminally liable because the advice was wrong is unfair.

**DEFENCE OF MISTAKE OF FACT**

There are two ways in which mistake of fact operates as a defence. First, it may negative a definitional element of an offence or be relevant to a substantive defence, such as self defence. The first category can be said to include four distinct situations:

- mistake with respect to the traditional subjective mens rea offences, typified by *DPP v Morgan*.\(^{54}\)

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\(^{53}\) This is in line with the view adopted by the South Australian Supreme Court in *Power v Huffa* (1976) 14 SASR 337.

\(^{54}\) [1976] AC 182.
• mistake with respect to the objective recklessness offences, typified by *R v Caldwell*\(^5^5\) and *R v Lawrence*.\(^5^6\)

• mistake with respect to crimes of reckless inadvertence, typified by the English cases of *R v Kimber*\(^5^7\) and *R v Pigg*,\(^5^8\) and the Australian cases of *R v Kitchener*\(^5^9\) and *R v Tolmie*.\(^6^0\)

• mistake with respect to defences, where a hybrid subjective-objective approach is often taken.\(^6^1\)

Secondly, mistake of fact may be relevant with respect to strict liability crimes. Here, the mistake must be reasonable before it can have any exculpatory effect.\(^6^2\)

**Mistake of fact relevant to definitional elements**

There is an established line of authority that an honestly held mistake of fact will suffice to negative mens rea.\(^6^3\) This subjective test for the defence of mistake of fact is universally supported by leading commentators.\(^6^4\) This is a logical conclusion from the subjective mens rea doctrine. However, it was not until the latter half of the

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58 [1982] 1 WLR 762.
59 (1993) 29 NSWLR 696.
62 This development of strict liability did not occur in the United Kingdom. It applies in Australia, New Zealand and Canada.
63 *R v Turner* (1862) 9 Cox CC 145; *R v Wright* (1866) 4 F & F 967; *R v Horton* (1871) 11 Cox CC 670; *R v Gibbons* (1872) 12 Cox CC 237; *R v Prince* (1875) LR 2 CCR 154; *R v Moore* (1877) 13 Cox CC 544; *Thorne v Motor Trade Association* [1937] AC 797; *Harris v Poland* [1941] 1 KB 462.
The Defence of Mistake

twentieth century that the issue was put beyond doubt. Until then some courts took the view that for a mistake of fact to negative a mental state, the mistake had to be reasonable. This view, as explained in Chapter II, stems from the decision in Bank of New South Wales v Piper. In Piper it was stated that “the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent.” Equating mens rea with the absence of a reasonable belief is contrary to the modern subjective mens rea doctrine.

This objective approach to mistake was compounded by the now discredited rule that a person presumes the natural and probable outcome of his or her conduct. This created an objective test for mens rea. Until the decision in DPP v Morgan however, these two categories of mistake were not clearly distinguished. Morgan was a sexual assault case where the accused argued that they mistakenly believed that the victim was consenting. The trial judge held that only a reasonable mistake could exculpate the accused. On appeal the House of Lords held that the mental element of rape was intention to have intercourse without the consent of the victim. If the accused honestly, albeit unreasonably, believed that the victim was consenting, then that mistake negatived the mental element.

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66 (1897) AC 383.
67 (1897) AC 383 at 390 per Sir Richard Couch.
69 This presumption has been abolished in England by legislation. Criminal Justice Act 1967 s8: A court or jury, in determining whether a person has committed an offence, - (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances. In Australia, see Parker v The Queen (1963) 111 CLR 610; Hawkins v The Queen (1994) 68 ALJR 572 at 578.
71 There were a few cases after Morgan that continued to require an element of reasonableness before a mistake could negative mens rea. See for example, R v Phekoo [1981] 1 WLR 1117; R v Barrett and Barrett (1980) 72 Cr App R 212; R v Graham [1982] 1 WLR 294. But the subjective approach of Morgan was reaffirmed in 1998 in Beckford v R [1988] AC 130.
Morgan has been approved in New South Wales\textsuperscript{72} and Victoria.\textsuperscript{73} In South Australia, the Supreme Court had already adopted the Morgan approach a year before Morgan came before the House of Lords.\textsuperscript{74} The subjective approach in Morgan was heavily criticised on the grounds that it had created a Rapists’ Charter. This concern may have been exaggerated. The Morgan defence is rarely successful. In fact, in Morgan itself, the court did not accept the accused’s argument that they believed the victim was consenting. Although the appeal was allowed, the House of Lords upheld the convictions on the ground that there had been no substantial miscarriage of justice. Nevertheless, the Morgan approach illustrates the general argument in this thesis; the exculpatory effect of mistakes, whether of fact or law, should be assessed on the basis of its effect on blameworthiness, instead of on the basis of the nature of the mistake. The failure to assess criminal culpability from a normative perspective increases the likelihood that blameworthy individuals may escape criminal liability, and that blameless individuals may suffer criminal liability.

The Morgan view that mens rea is purely subjective has been challenged by the recognition of objective species of recklessness, such as the Caldwell/Lawrence recklessness and the Kitchener/Tolmie recklessness.\textsuperscript{75} It might be thought that this objective form of recklessness could only be negativated by an objectively held mistake. This, however, is not the case. Where the accused turns his or her mind to the relevant issue and forms an incorrect opinion, it cannot be said that the accused is reckless under Caldwell. The accused’s mistake has to be assessed subjectively.

As Lord Diplock held in Lawrence:

If satisfied that an obvious and serious risk was created by the manner of the defendant’s driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence and will probably do so; but regard must he given to any explanation he gives as to his state of mind which may displace the inference.\textsuperscript{76}

\textsuperscript{72} R v McEwan [1979] 2 NSWLR 926.
\textsuperscript{73} Welsh v Donnelly [1983] 2 VR 173.
\textsuperscript{74} R v Brown (1975) 10 SASR 139.
\textsuperscript{75} See Chapter II.
\textsuperscript{76} R v Lawrence [1982] AC 510 at 527.
This has been identified as the loophole under *Caldwell*, and although recognised by the courts, it has not been resolved. Where the accused fails to advert to the issue, the accused might be held to be reckless if the reasonable person would have adverted to the risk and not taken it. This suggests that if the accused were ignorant of a relevant fact, that could be a defence if the ignorance were reasonable. The distinction between mistake and ignorance may well have practical importance in this situation. The position with *Kitchener/Tolmie* recklessness is not dissimilar. However, unlike *Caldwell*, this form of recklessness is still subjective. It is the accused’s, and not the reasonable person’s, failure to advert to the possibility of non-consent that is relevant. Leaving to one side the conceptual problems with treating an absent mental state as an existing mental state, the relevance of mistake in such cases is equally complicated. If inadverrence may be reckless, then ignorance may be reckless. However, a mistake, which is adverrence cannot fall within this category of mens rea. Thus, a mistake may negative recklessness under *Kitchener/Tolmie* even if it were unreasonable, ie a subjective test is sufficient. However, ignorance will only suffice as a defence if it were reasonable, ie an objective test is required.

**Reasonable mistake of fact - Proudman mistake**

The rapid growth of strict liability offences concerned many judges who were of the view that criminal liability without proof of mens rea carried with it a risk of punishing morally innocent individuals. In the late nineteenth century, the English courts held that an honest and reasonable belief in circumstances, which if they existed, would make the defendant’s conduct innocent, should be a defence. The Australian courts refined this approach to strict liability offences, and borrowing

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77 *R v Reid* (1989) 91 Cr App R 263 at 269 (CA) per Mustill LJ.


79 *R v Tolmie* (1995) 37 NSWLR 660 at 672 per Kirby J.


81 See in particular, *He Kaw Teh v The Queen* (1985) 157 CLR 523.
Reconceptualising Fault in the Criminal Law: A Defence of Reasonable Mistake of Law

from the Canadian development, recognised three categories of criminal offences.\(^82\) The second category consists of strict liability offences, whereby proof of mens rea is not required but the defendant was permitted to raise a defence of honest and reasonable mistake of fact.\(^83\)

**Proudman and ignorance**

The Australian authority for this defence of honest and reasonable mistake is *Proudman v Dayman*.\(^84\) As Dixon J stated:

> As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant’s act innocent affords an excuse for doing what would otherwise be an offence.\(^85\)

This defence raises two important issues. First, it is unclear what is meant by “innocent” in the test. Secondly, the honest and reasonable mistake requires courts to distinguish between ignorance and mistake, as ignorance is excluded from this defence. Regarding the first issue, various meanings of “innocent” have been suggested, including morally innocent, innocent of any civil wrong, innocent of any crime and innocent of the crime with which the accused is charged.\(^86\) The generally accepted view is that “innocent” means innocent of a crime.\(^87\) While the intention of the courts in recognising this defence was to avoid the punishment of the morally innocent, the defence developed by reference to technical notions of guilt. Instead of asking whether the defendant’s state of mind negatives moral blameworthiness, the test is whether the defendant’s state of mind is incompatible with a particular mental

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\(^{82}\) See *R v City of Sault Ste Marie* [1978] 2 SCR 1299.  
\(^{83}\) See Chapter III for an elaboration of this tripartite classification of offences  
\(^{84}\) (1941) 67 CLR 536.  
\(^{85}\) (1941) 67 CLR 536 at 540.  
\(^{87}\) Some cases have limited it to the particular crime, while others broaden it to include any crime. See, *R v Prince* (1875) LR 2 CCR 154 at 169-70 per Brett J (dissenting): “[W]henever the facts which are present to the prisoner’s mind, and which he has reasonable grounds to believe ... to be the facts, would, if true, make his acts no criminal offence at all.” See also, *Bergin v Stack* (1953) 88 CLR 248 at 262 per Fullagar J; *R v Reynhoudt* (1962) 107 CLR 381 at 389 per KItto J; *R v Iannozzo* [1983] 1 VR 649 at 655 per Brooking J.
state. Because of this descriptive approach, the distinction between ignorance and mistake is crucial.

On a literal reading the test appears to exclude ignorance since the defence requires "a reasonable belief in the existence of circumstances". There is some judicial and academic support for the view that reasonable ignorance be included in the test.\textsuperscript{88} However, the majority of cases\textsuperscript{89} and the academic view appear to be against it.\textsuperscript{90} Colin Howard reviewed several cases following Proudman, which suggested that the defence did not include ignorance.\textsuperscript{91} Howard argued that in all of those cases, the real reason the defence failed was that the accused's ignorance was not reasonable.\textsuperscript{92} Where the ignorance was reasonable, he argued it should be included within the Proudman defence. A similar argument was made by Bray CJ of the South Australian Supreme Court. He said, "In either case there may or may not be blameworthiness. A man may be unreasonable in arriving at a mistaken conclusion; he may not be unreasonable in not thinking about the matter at all."\textsuperscript{93} The focus should be on the reasonableness of the ignorance or mistake and whether or not the accused is morally blameworthy.

While the argument is persuasive, a recent decision of the South Australian Supreme Court has confirmed that ignorance, reasonable or otherwise, is simply not sufficient to invoke the Proudman defence. In Clough v Rosevear,\textsuperscript{94} the accused was charged under s22(1) of the Nurses Act 1984 (SA) with practising as a general nurse while not

\textsuperscript{88} Kain & Shelton Pty Ltd v McDonald (1971) 1 SASR 39 at 45 per Bray CJ, strictly obiter; Mayer v Marchant (1973) 5 SASR 567 at 571 per Bray CJ, at 579 per Hogarth J.


\textsuperscript{90} D O'Connor & P A Fairall, Criminal Defences (2nd ed, 1988) 50-1 are unreserved in their view. D Brown et al, Criminal Laws (2nd ed, 1996) appear to favour the view that the Proudman defence excludes ignorance by distinguishing it from the due diligence defence.


\textsuperscript{92} C Howard, Strict Responsibility (1963) 92.

\textsuperscript{93} Kain & Shelton v McDonald (1971) 1 SASR 39 at 45.

\textsuperscript{94} (1998) 94 A Crim R 274.
being registered on the Nurses Register. The accused had not paid her fee and her registration had lapsed. The accused said that she had recently changed address and had not received the notification for renewal. Also, she had been recently burgled and was stressed. As soon as she discovered she was not registered, she immediately paid her fee, including a late fee. The magistrate found that her mistaken belief was reasonable in the circumstances. On appeal, Duggan J reversed the magistrate’s decision and held that in this case, the accused had not had a positive belief, ie she was not mistaken but was merely ignorant of a relevant fact. That was not sufficient to invoke the Proudman defence, notwithstanding the fact that the ignorance may have been reasonable.  

Proudman and due diligence

In the early 1990s, a number of cases arising out of prosecutions for environmental offences raised the question of whether the Proudman defence and the statutory due diligence defence were mutually exclusive. The Environmental Offences and Penalties Act 1989 (NSW) provided for a statutory defence of due diligence. This defence was broader than the Proudman defence in that it did not require a specific mistaken belief in relevant facts. In Australian Iron & Steel Pty Ltd v Environment Protection Authority, the appellant was charged under s16(1) of the Clean Waters Act 1990 (NSW). The due diligence defence under ss7 and 10 of the Environmental Offences and Penalties Act 1989 (NSW) was held not to apply to an offence under s16 of the Clean Waters Act 1970 (NSW). The appellant argued that the Proudman defence should be extended to include due diligence, thereby providing a common law equivalent of the statutory defence. Reliance was placed on the Canadian case of R v City of Sault Ste Marie where Dickson J said: “Once the defence of reasonable mistake of fact is accepted, there is no barrier to acceptance of the other constituent

95 (1998) 94 A Crim R 274 at 280
The Defence of Mistake

part of a defence of due diligence.\textsuperscript{98} The defence of due diligence is essentially that the defendant took all reasonable care. It does not necessarily require a positive belief about a set of facts as the Proudman defence does. Therefore, an accused could satisfy the due diligence requirement even if he or she were ignorant of relevant facts, as long as it could be shown that he or she acted reasonably.

This Canadian approach to due diligence, however, has been rejected by the High Court of Australia.\textsuperscript{99} The Canadian courts treated due diligence as an absence of negligence.\textsuperscript{100} The High Court of Australia has held that the Proudman defence is not based on absence of negligence.\textsuperscript{101} For this and other reasons,\textsuperscript{102} the argument that the Proudman defence could be extended to include due diligence was rejected. Therefore ignorance of fact was not sufficient to invoke the Proudman defence. There was however, a suggestion that ignorance may be relevant as an evidentiary matter in determining whether or not there was a reasonable mistake:

I leave to one side whether the absence of fault may be relied upon as was submitted by Mr Buchannan as an "evidentiary state but not as a legal element" to assist in the defendant establishing the evidentiary burden of an honest and reasonable mistake of fact.\textsuperscript{103}

This approach of rejecting ignorance as satisfying the Proudman requirements, and then accepting it as evidence of mistake, is fraught with danger. If reasonable ignorance gives rise to reasonable mistake then the defence may be invoked. If the ignorance does not give rise to a belief then the defence is not invoked. Should criminal culpability be grounded in such distinctions? It is arguable that in some

\textsuperscript{98} (1978) 85 DLR 161 at 174.

\textsuperscript{99} He Kow Teh v The Queen (1985) 157 CLR 523; Jiminez v The Queen (1992) 173 CLR 572; cf Allen v United Carpet Mills Pty Ltd [1989] VR 323 where it was accepted, in obiter, that due diligence may be a defence to strict liability offences.

\textsuperscript{100} Tesco Supermarkets Ltd v Nattrass [1972] AC 153 at 199 per Lord Diplock; R v City of Sault Ste Marie (1978) 2 SCR 1299.

\textsuperscript{101} He Kow Teh v The Queen (1985) 157 CLR 523 at 592 per Dawson J.

\textsuperscript{102} The other reasons included the fact that the Canadian defence reversed the burden of proof and was limited to particular types of offences, while the Proudman defence retained the burden of proof on the prosecution and was applicable to all strict liability offences.

\textsuperscript{103} Australian Iron & Steel Pty Ltd v Environment Protection Authority (1992) 29 NSWLR 497 at 510.
cases, where the distinction is too fine, ignorance may be part of the Proudman defence. As Smart J stated, "Sometimes the belief may involve ignorance of a significant circumstance."  

SUMMATIVE REMARKS ON THE DEFENCE OF MISTAKE OF FACT

The conclusions that can be drawn from the discussion thus far are that the distinctions between ignorance and mistake, as well as fact and law, are firmly entrenched in the law and are relevant to the operation of mistake of fact as a defence. It is also acknowledged that these distinctions are notoriously difficult, and in some cases "practically impossible" to make. To base criminal liability on artificial distinctions is unsatisfactory. The reason these distinctions have assumed such importance in the law is that the focus is misdirected. Instead of concentrating on the blameworthiness of the individual, the attention is on the existence or otherwise of a particular mental state. Thus, mistake of fact is a defence, but mistake of law is not. Reasonable mistake of fact may be a defence, but reasonable ignorance of fact is not. The following analysis, which examines mistake of law, further highlights the inadequacies of the law of mistake.

MISTAKE OF LAW

While the general rule is that mistake of law is not a defence, courts have recognised several exceptions where a mistake of law may operate as a defence. The various exceptions can be grouped into three broad categories:

- the mistake is relevant to a definitional element of the offence
- the mistake gives rise to a claim of right
- the mistake creates an estoppel argument

In the following analysis the conditions under which mistake of law is a defence will be examined. It will be shown that a mistake of law defence can be fairly and successfully applied. It does not render the administration of the law impossible, nor

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104 Griffin v Marsh (1994) 34 NSWLR 104.
does it encourage widespread ignorance of the law. On the contrary, it encourages responsible citizenship and results in the fair acquittal of morally innocent individuals.

**Definitional element of the offence**

The ignorance of law rule is overridden in cases where the offence expressly requires proof of knowledge of illegality. Even in the early common law, certain offences required knowledge of illegality. The classic example is perjury, which is not merely swearing to that which is not really the fact, but doing this wilfully and corruptly.\(^{105}\) Hence, one who testified to a false fact is not guilty of perjury if the testimony was due to a mistake of law. Another example is extortion, which at common law required that the accused must have “wilfully and corruptly demanded and received other or greater fees than the law allowed.”\(^{106}\) A misunderstanding of the law, which induced a bona fide belief in the lawfulness of the fee charged, has been held to establish innocence.\(^{107}\) In the eighteenth century it was held that a magistrate who committed a person under a bona fide mistake of law was not guilty of a crime.\(^ {108}\)

Many modern statutory offences expressly include knowledge of unlawfulness as one of the elements. In some statutes, where such knowledge is not expressly required, courts have implied the need for proof of such knowledge by statutory interpretation. The typical examples are statutory offences where the mental element is “wilfully” or “knowingly.” Statutes that provide a defence of “without lawful excuse” or “without reasonable excuse” are further examples.

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\(^{105}\) *R v Smith* (1681) 2 Shower KB 165, 89 ER 864. It was held that one who testified that no partnership existed between himself and another man was not guilty of perjury although a legal relation of this nature actually existed, if he gave his testimony in good faith reliance upon advice of counsel that the dealings between the two did not as a matter of law create a partnership.

\(^{106}\) *Runnels v Fletcher* 15 Mass 525 (1819).

\(^{107}\) *US v Highleyman* 26 Fed Cas No 15, 361 (WD Mo) (1876).

\(^{108}\) *R v Jackson* (1737) 1 Term R 653, 99 ER 1302. This was due to the requirement of corruptness, which was interpreted to require knowledge of illegality. A better explanation would be that the magistrate was simply immune from wrongful committals.
Knowingly

Where the word "knowingly" or "knowledge" is used in a statute to denote the mental element, some courts have held that the offender’s knowledge of the law may be relevant, i.e., mistake of law may negative the mental element of "knowledge". In Secretary of State for Trade and Industry v Hart,109 the accused had acted as an auditor for a company of which he was an officer. The Companies Act 1976 (UK) s13 made it an offence for a disqualified person to act as an auditor. The Companies Act 1948 (UK) s161(2) provided that a disqualified person included any officer of the company. The Companies Act 1976 (UK) s13(5) provided:

No person shall act as auditor of a company at a time when he knows that he is disqualified for appointment to that office; and if an auditor of a company to his knowledge becomes so disqualified during his term of office he shall thereupon vacate his office and give notice in writing to the company that he has vacated it by reason of such disqualification.

The accused argued that he did not have the mens rea required under s13 because he was ignorant of the statutory provision contained in s161 of the Companies Act 1948 (UK). The trial judge accepted the accused’s argument and the Secretary of State appealed by way of case stated. On appeal, Woolf J held that the phrase “knows that he is disqualified” included knowledge of his legal status. If that knowledge were absent due to mistake or ignorance of law, then mens rea was not established. Ormrod LJ, in agreeing with Woolf J stated, “[I]f that means that he is entitled to rely on ignorance of the law as a defence, in contrast to the usual practice and the usual rule, the answer is that the section gives him that right.”110

Very shortly after Hart’s case, the House of Lords decided Grant v Borg.111 The accused was charged with knowingly remaining in England beyond the time limited by his leave, contrary to s24(1)(b)(i) of the Immigration Act 1971 (UK). The House of Lords held that the word “knowingly” in the section was limited to knowledge of

109 [1982] 1 All ER 817.
110 [1982] 1 All ER 817 at 822.
111 [1982] 2 All ER 257.
the facts and did not include knowledge of the law. However, Lord Russel acknowledged that in some cases the word “knowingly” could include knowledge of lawfulness, thereby allowing a defence of mistake of law. “It is, I suppose, conceivable that in some circumstances under some statute the requirement of “knowingly” can embrace a mistake of law.” Grant v Borg can be compared with Lim Chin Aik v R, and Lambert v California, which had similar fact situations, and concerned unlawful entry or overstaying in a jurisdiction. In the latter two cases ignorance of law was held to be a defence.

Wilfully

Iannella v French is the leading Australian authority on the interpretation of the word “wilfully” in a statutory offence. The defendant was charged with and convicted of having “wilfully demanded or wilfully recovered” as rent an irrecoverable amount, contrary to s56(A)(1) of the Housing Improvement Act 1940-1965 (SA). Among the issues on appeal before the High Court of Australia was the interpretation of s56(A)(1), and principally the meaning to be attached to the word “wilfully”. Section 56(A)(1) provided:

Any person who, whether as principal or agent or in any other capacity, wilfully demands or wilfully recovers as rent in respect of any house in respect of which a notice fixing the maximum rental thereof is in force under this Part, any sum which by virtue of this Part is irrecoverable, shall be guilty of an offence against this Act.

According to Barwick CJ, the word “wilfully” required “an intention not merely to obtain by the demand a sum of money, ...[but] the intention ... must be to achieve the full consequence of the demand, to obtain as it were, its forbidden fruit.” There must not be noted that the House did not consider the decision in Hart’s case because it had not yet been reported, although the House was aware of the decision.

[1982] 2 All ER 257 at 260.

[1963] AC 160


See also, Fraley v Charlton [1920] 1 KB 147; R v Franks [1950] 2 All ER 1172n.

(1968) 119 CLR 84.
be an "actual or imputed consciousness of wrongdoing". If the accused were unaware that he was not entitled to recover that rent, it could not be said that he wilfully did so. His ignorance of the law was relevant to the required mental state. As Barwick CJ stated:

Mens rea may in some cases, depending as I have said on the context and the subject matter, require that the defendant should know that the act is unlawful. That element of the offence itself cannot be eliminated in such a case by saying that ignorance of the law is no excuse. The defendant who is not shown in such a case to know that the act is unlawful needs no excuse. The offence has not been proved against him. [emphasis added]

Windeyer J, who agreed with Barwick CJ, concluded that the word generally connoted acting with knowledge of wrongfulness. Where the wrongfulness hinged on knowledge of the law, the ignorance of law rule had to give way. Both judges were in the minority, but their views are more persuasive than the majority judgments because they appeal to common sense and fairness. The majority essentially equated "wilfully" with intentionally or voluntarily. This rendered the word "wilfully" superfluous since the verbs following "wilfully," by definition, required intention and voluntariness. "Demand" and "recover" are not passive. To demand, one must know and intend to acquire the fruits of the demand. To wilfully demand adds nothing unless wilfully is interpreted in such manner as to define the quality of the demand, as Barwick CJ said, "the forbidden fruit." The New South Wales Supreme Court adopted this view in Environment Protection Authority v N, where Hunt CJ, with whom the other judges agreed, preferred the minority approach of Iannella.

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118 (1968) 119 CLR 84 at 94.
119 (1968) 119 CLR 84 at 97.
120 Windeyer J's analysis of "wilfully" makes fascinating reading. He included reference to the word "wilfully" in the Bible, to academic writers and to decisions in Australia, England, New Zealand and the United States. See Iannella v French (1968) 119 CLR 84 at 104-9.
121 "Ignorance of the law is no excuse. But it is a good defence if [the accused] displaces the evidence relied upon as establishing [the accused's] knowledge of the presence of some essential factual ingredient of the crime charged.": R v Turnbull (1943) 44 SR (NSW) 108 at 109, referred to with approval in Iannella v French (1968) 119 CLR 84 at 109 per Windeyer J. See also, for similar statements, Frailey v Charlton [1920] 1 KB 147 at 153 per Darling J; Donnelly v Commissioner of Inland Revenue [1960] NZLR 469 at 472-3 per Haslam J.
Both the majority and minority in *Iannella* referred to *Davies v O'Sullivan [No 2]*, a 1949 South Australian case, which dealt with an almost identical issue. In construing the word “wilfully” in s27(2) of the *Landlord and Tenant (Control of Rents) Act 1942-1948* (SA), Napier CJ held that it meant intentionally and “without any honest belief in a state of facts which would have made the receipt innocent”. Napier CJ excluded actual knowledge of law as a requirement but stated, “The onus was fully discharged when [the prosecution] proved that she knew what she was doing, and *that it might be illegal, but decided to do it whether or no* [sic].” This suggests that knowledge of unlawfulness may have been relevant in terms of recklessness. If the accused were reckless as to whether or not the conduct was unlawful, then the mental element of “wilfully” was satisfied.

Mayo J held that mistake of law should not automatically be excluded from consideration. He said:

*I am not entirely free from uncertainty that what might be regarded technically as a mistaken view of the law is *not* [emphasis in original] an ingredient of the penalized act ‘of wilfully receiving as rent’ a sum under section 27(2), in that the meaning of ‘wilfully’ may take colour from all that follows.* [emphasis added]

The minority view in *Iannella* also finds support in the Supreme Court of Canada, in the case of *R v Docherty*. The accused who had been convicted of a crime was on a probationary order, which required him to be of good behaviour. During his period of probation the accused was found guilty of having care and control of a motor vehicle while intoxicated. He was charged under s666(1) of the *Criminal Code* with wilfully failing to comply with his probation order. His argument was that he believed the car could not be started and therefore he had not thought that he was committing a criminal offence. Wilson J, who gave the court’s judgment, said that the word

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123 [1949] SASR 208.
124 [1949] SASR 208 at 211.
125 See also *Fenwick v Boucat* [1951] SASR 290.
126 [1949] SASR 208 at 211.
“wilfully” denoted a high level of mens rea, which in this case included knowledge of the unlawfulness of his conduct. As Wilson J expressed it:

Proof of the mens rea would therefore require that the [accused] intended to commit the criminal offence ... where the actus reus of section 666(1) consists of the commission of a criminal offence, an honest belief on the part of the accused that he is not committing that offence means that the accused cannot be said to have wilfully failed or refused to comply with the probation order. [emphasis added]

Claim of right

Claim of right has been recognised as an exception to the ignorance of law rule since the nineteenth century. Claim of right was often based on mistake of non-criminal law, such as mistake of civil law or mistake of customary law. One reason for excluding these types of mistakes from the ignorance of law rule was the view that these mistakes were analogous to mistakes of fact. This exception generally applies to property offences by negating the dishonesty element. As Stephen said:

Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be. This, if not the only, is nearly the only case in which ignorance of the law affects the legal character of acts done under its influence.

An analysis of some of the early cases reveals that the courts treated the claim of right defence very broadly; in some cases, almost on the basis of a simple mistake of law, and not a claim of right. In R v Reed, the accused was charged with larceny of money, which her daughter had found. The accused believed that she had a right to the money on the basis of “finder’s keepers.” Coleridge J directed the jury that Mrs

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129 R v Leppard (1864) 4 F&F 41; R v Wade (1896) 11 Cox CC 549; R v Clayton (1920) 15 Cr App R 45.
130 Cooper v Phibbs (1867) LR 2 HL.
132 Iannella v French (1967-68) 119 CLR 84 at 114
Reed’s belief about her legal right was wrong in law, but if she honestly entertained that belief, then the mental state for larceny may not exist. As he stated:

Ignorance of law cannot excuse any person; but, at the same time, when the question is, with what intent a person takes, we cannot help looking into their state of mind; as, if a person take what he believes to be his own, it is impossible to say that he is guilty of felony.135

Reed is a classic claim of right case, but some of the other early cases appear to have extended the notion of claim of right to include general mistake of law. In R v Day136 the accused was charged under s24 of 7 & 8 Geo 4, c 30 with the offence of maliciously maiming and wounding four sheep belonging to his neighbour. The sheep had strayed on to the defendant’s property and caused some damage. The sheep were detained by the accused and a demand for compensation was made, which the owner refused. The accused then decided to kill the sheep. The accused argued that he believed he had the right to keep the sheep. It was held that the accused’s belief, although based on a mistake of law, amounted to a claim of right and therefore negativeld the mental state of “maliciously.”

Another explanation is that courts took a normative approach to mens rea. “Maliciously” was interpreted as requiring more than just mere intention. It required a bad or wrongful intention,137 to return to Bracton’s description: a corrupt intent.138 Hence, if the accused honestly believed that he or she was acting with a claim of right, that mental state could not be said to be wrongful or malicious. The facts of R v Boden139 illustrate the extension of the claim of right exception. A gave 11 sovereigns to B to buy a horse. B wrongfully kept the sovereigns and refused to return them. The accused, who was with A tried unsuccessfully to retrieve the money. Some days later, the accused met B’s son at a fair. The accused assaulted B’s son and took some

135 174 ER 519 at 520.
136 (1844) JP 186.
137 As Denman CJ said, a claim of right was a “defence” because of the common law principle that an act cannot be a felony “where there is no malice in the intention.” James v Phelps (1840) 11 Ad & El 483, 113 ER 499.
138 See Chapter II.
139 (1844) 1 Car & K 395, 174 ER 863.
coins from him. It should be noted that the accused was not the owner of the money and the coins he took were not the same as those which were given by A to B.\textsuperscript{140} Nonetheless, the judge put to the jury that if the accused were acting under a claim of right, albeit due to a mistake of law, that could negative the mental element for robbery. The jury found the accused not guilty of robbery, but guilty of assault. It is difficult to argue that the accused was acting under a claim of right. At best, it may be argued that he thought he was justified in law to act as he did. This is conceptually different from a claim of right.\textsuperscript{141} The next two cases will illustrate this more vividly.

In $R v Twose$,\textsuperscript{142} the accused was charged with wilfully and maliciously setting fire to some furze on a common, a practice undertaken by people living in that area to improve the growth of grass. Lopes J held that if the accused believed she had a right to do so, that was a claim of right which could negative the mental state of "wilfully and maliciously". The difficulty with this view is that there was no recognised legal "right" to burn the furze. The accused just believed it was legal to do so because everyone else had done so. It was a simple mistaken view of the law. It cannot be said that it gave rise to a claim of right. The only claim was that the defendant believed it was lawful. That is not a claim of right. It is a plea of ignorance of law. Similarly also, in $Smith v Barnham$,\textsuperscript{143} the accused was charged under s97 of 14 Geo 3 c 96 with wilfully throwing rubbish into a river. The accused ran a tannery and had always thrown rubbish into the waterway adjacent to his tannery. His conviction was quashed on appeal on the ground that he had a claim of right. Again, there was no claim of right, merely a mistaken view that the conduct was not illegal.\textsuperscript{144}

Although the claim of right defence is not formally limited to property offences under the common law, it is in this context that it is most commonly raised. The Code

\textsuperscript{140} For larceny of money, the property is in the physical notes or coins, not the value of the currency.

\textsuperscript{141} cf $Walden v Hensler$ (1987) 163 CLR 561.

\textsuperscript{142} (1879) 14 Cox CC 327.

\textsuperscript{143} (1876) 34 LT 774.

\textsuperscript{144} For other examples, see $R v Hall$ (1823) 3 Car & P 409, 172 ER 477; $R v Wade$ (1869) 11 Cox CC 549; $Taylor v Newman$ (1863) 8 LT 424.
jurisdictions have expressly limited this defence to property offences.\textsuperscript{145} In the common law jurisdictions, Victoria and the Australian Capital Territory have legislation on theft recognising that a claim of right, even if due to an unreasonable mistake of law, negatives dishonesty.\textsuperscript{146} In New South Wales and South Australia, the common law clearly states that a claim of right based on a mistake of law will negative dishonesty.\textsuperscript{147} Claim of right based on error of law has been recognised in cases of theft,\textsuperscript{148} robbery,\textsuperscript{149} burglary,\textsuperscript{150} arson,\textsuperscript{151} malicious damage to property,\textsuperscript{152} fraud,\textsuperscript{153} conspiracy to defraud\textsuperscript{154} and trespass\textsuperscript{155} as well as to non-property offences. For example, in \textit{R v Tinkler},\textsuperscript{156} a claim of right on a charge of taking a child out of the custody of her guardian was successful. In \textit{R v Barrett}\textsuperscript{157} it was held that a claim of right based on a mistake as to private rights could afford a defence to a charge of assault.

The leading Australian decision on claim of right is the High Court case of \textit{Walden v Hensler}.\textsuperscript{158} The accused was an Aboriginal elder who was charged under s54(1)(a) of the \textit{Fauna Conservation Act 1974} (Qld), which prohibited the taking or keeping of

\textsuperscript{145} Criminal Code 1899 (Qld) s22; Criminal Code Act 1924 (Tas) s226(1); Criminal Code Act 1983 (NT) s30(2); Criminal Code 1913 (WA) s22.

\textsuperscript{146} Crimes Act 1958 (Vic) s72; Crimes Act 1900 (ACT) s96(4).


\textsuperscript{148} \textit{R v Turner} (No 2) [1971] 2 All ER 441; \textit{R v Bernhard} [1938] 2 All ER 140.

\textsuperscript{149} \textit{R v Hemmerly} (1976) 30 CCC (2d) 141; \textit{R v Carroll} (1975) 31 CRNS 398.

\textsuperscript{150} \textit{R v Collins} [1973] QB 100; [1972] 2 All ER 1105.

\textsuperscript{151} \textit{R v Twose} (1879) 14 Cox CC 327; \textit{R v Hakiwai} [1931] NZLR 405.

\textsuperscript{152} \textit{R v Smith} [1974] 1 All ER 632.

\textsuperscript{153} \textit{Aberdare Local Board v Hammet} (1875) LR 10 QB 162.

\textsuperscript{154} \textit{Peters v The Queen} (1998) 192 CLR 493.

\textsuperscript{155} \textit{Police v Cunard} [1975] 1 NZLR 511.

\textsuperscript{156} (1859) 1 F&F 513, 175 ER 832.

\textsuperscript{157} (1980) 72 Cr App R 212.

\textsuperscript{158} (1987) 163 CLR 561.
certain protected fauna. The accused had killed a bush turkey for food and had taken a chick home as a pet. The accused sought to rely on s22 of the Criminal Code 1899 (Qld) which provided a claim of right defence. By a majority of 3-2 the High Court decided that s22 was not available to the defendant. Section 22 provides that:

Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.

But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud.

Brennan J found that, although the accused did have an honest belief which would have given rise to a claim of right, s22 did not apply to s54(1)(a) on the ground that s22 was limited to offences relating to property and s54(1)(a) was not, strictly, an offence relating to property.\(^{159}\) However, Brennan J was of the view that while the first paragraph of s22 restating the common law ignorance of law rule was justified for offences “generally regarded as offensive or otherwise immoral and deserving of punishment,” it was not so in cases where the “law proscribes conduct which an ordinary person without special knowledge of the law might engage in the honest belief that he is lawfully entitled to do so.”\(^{160}\) Brennan J appeared to be of the view that ignorance of law was not a defence to the former, but should be a defence to the latter because ignorance of such technical laws may be reasonable. As Brennan J put it:

Prosecutions for offences relating to property often raise difficult questions of private law to which members of the community without special knowledge and special skill cannot be expected to know the answer. To render a person liable to punishment for an offence relating to property when, under a mistake of law, he acts honestly claiming a right to do what he does and when he has no intention to defraud would make the criminal law unjustly oppressive.\(^{161}\)

Brennan J’s judgment provides support for a defence of reasonable mistake of law.

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\(^{159}\) For a successful application of s22 see \(R\ v\ Pollard\) (1962) QWN 13.


\(^{161}\) Walden v Hensler (1987) 163 CLR 561 at 570.
Reasonable reliance on official advice/officially induced error of law

Reasonable reliance on official advice was first recognised as an exception to the ignorance of law rule in the American case of Long v State,\textsuperscript{162} decided over fifty years ago:

It is difficult to conceive what more could be reasonably expected of a “model citizen” than that he guide his conduct by “the law” ascertained in good faith, not merely by efforts which might seem adequate to a person in his situation, but by efforts as well designed to accomplish ascertainment as any available under our system.\textsuperscript{163}

This defence of reasonable reliance on official advice, or officially induced error of law, was included in the Model Penal Code 1963 (US). Section 2.04(3) provides:

A belief that conduct does not legally constitute an offence is a defence to a prosecution for that offence based upon such conduct when:

(a) the statute or other enactment defining the offence is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or

(b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) statute or other enactment; (ii) judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with the responsibility for the interpretation, administration or enforcement of the law defining the offence.\textsuperscript{164}

The non-publication of laws defence in paragraph (a) is an exception to the ignorance of law rule that is generally recognised in most common law jurisdictions.\textsuperscript{165} In England the Statutory Instruments Act 1946 (UK) provides that in proceedings for an offence under a statutory instrument, it is a defence to prove that the instrument had

\textsuperscript{162} 65 A (2d) 489 (1949).

\textsuperscript{163} 65 A (2d) 489 at 498 (1949) per Pearson J.

\textsuperscript{164} This provision has been approved at the Federal level in the case of US v Barker 546 F 2d 940 (1976).

\textsuperscript{165} In the United States it was first recognised in Lambert v California 355 US 225 (1957).
not been issued by Her Majesty’s Stationery Office, unless reasonable steps had been taken to bring its purport to the notice of those affected. Ignorance of law due to non-publication of delegated legislation has been held to be a defence. Even over a century ago it was said that, “before a continuous act or proceeding, originally not unlawful, can be treated as unlawful ... a reasonable time must be allowed for its discontinuance ... [ignorance of law] may ... be taken into account.” In two Australian jurisdictions, ignorance of a non-published statutory instrument is a defence. As Thomas Hobbes wrote, “The want of means to know the law totally excuseth. For the law whereof a man has no means to inform himself, is not obligatory.”

Section 2.04(3)(b) is slightly more controversial and provides the “reliance on official advice” exception to the ignorantia rule. The defence has been applied by several courts in the United States. The Model Penal Code 1963 (US) restricts the reasonable reliance defence to official advice only. It excludes advice provided by lawyers. The common law in some jurisdictions in the United States permits reasonable reliance on lawyers to be used as a defence in some cases, although support for this view is not universal. All the categories in s2.04 involve official or quasi official advice. Reliance on judicial decisions is permitted as judges are closely

166 See Simmonds v Newell, Defiant Cycle Co v Same [1953] 1 WLR 826.
168 Burns v Nowell (1880) 5 QBD at 454 (CA.).
169 See Criminal Code 1983 (NT) s30 and Criminal Code (Qld) s22(3). See also Model Criminal Code 1995 (Cth) s308.
170 T Hobbes, Leviathan (MacPherson (ed), 1968) 196.
172 See for example Long v State 65 A 2d 489 (1949); People v Ferguson 24 P 2d 965 (1933); State v Downs 63 Wis 2d 75 (1974) (in this case the advice was provided by a government lawyer, so it could be treated as a case of official rather than legal advice).
173 See for example, Hopkins v State 193 Md 489 (1950).
associated with the Executive in the United States, given the political appointments process.

The defence of reliance on official advice has significant academic support,¹⁷⁴ and qualified judicial support in England, Australia and Canada. The philosophy behind this exception is that it is not fair for the state to prosecute individuals when it has misled them, or has not notified them of the law. The academic theory is based on an estoppel argument, ie the state is estopped from prosecuting because it is at fault for misleading or not informing the citizens. As discussed in Chapter V, Andrew Ashworth was one of the early commentators to consider this exception to the ignorance of law rule on the basis of a criminal estoppel.¹⁷⁵ His justification was based on the notion of duties of citizenship where every citizen is under a duty to be familiar with the law.¹⁷⁶ By taking reasonable steps to ascertain the law, the citizen would have discharged his or her duty and therefore any reasonable mistake or ignorance of law should exculpate such a person.

There are two difficulties with Ashworth’s estoppel theory. First, to be fair, the corollary of a duty of citizenship should be a duty on the part of the state to take reasonable steps to educate and inform the citizens as to the law and their legal responsibilities.¹⁷⁷ The courts have not recognised this duty.¹⁷⁸ Second, and more


¹⁷⁶  A Ashworth, Principles of Criminal (3rd ed, 1999) 244.

importantly, the estoppel approach transfers the focus away from the accused's culpability, and instead focuses on the state's responsibility. It deflects attention from criminal culpability to procedural fairness.\textsuperscript{179} If the prosecuting authority has not done anything inequitable, then it is not estopped from proceeding. For this reason, this defence is limited to reliance on state officials. Reliance on lawyers or even the courts is not sufficient since lawyers and courts are not part of the executive arm of government. Although Ashworth intended the criminal estoppel theory to extend to reliance on legal advice and diligent attempts to discover the law,\textsuperscript{180} the theory, properly applied, does not allow this because of its emphasis on the role of the state. If the emphasis were shifted to the culpability of the accused, then it is possible that reasonable reliance on the law, whether induced by officials or not, may operate as a defence.

English and Australian courts are reluctant to accept officially induced error as an exception to the ignorance of law rule. What the courts have done, is to use officially induced error in an evidentiary sense to negative the existence of a particular mental state, which may require knowledge of unlawfulness, such as wilfulness; or to provide a defence where the statute creating the offence requires that the conduct be done without lawful excuse; or to give rise to a claim of right defence; or to give rise to a mistake of civil law defence. Alternatively, the courts artificially categorise the belief as a mistake of fact to permit a defence.

A brief comparative survey of the law in England, Australia and Canada reveals the reluctance of the court to accept this defence. In most cases where the defence is raised, the courts reject it due to the ignorance of law rule, but invariably impose

\textsuperscript{178} Cooper v Halls [1968] 1 WLR 360. But see James v Cavey [1967] 2 QB 676 where the regulation was mandatory and therefore the authority's failure to provide information led to the charge being dismissed. See also the Scottish case of MacLeod v Hamilton (1965) SLT 305.

\textsuperscript{179} See A T H Smith, "Error and Mistake of Law in Anglo-American Criminal Law" (1984) 14 Anglo-American Law Review 3 at 9, where Smith identifies the two rationales for the exception to the ignorance of law rule in America as the estoppel rationale and the culpability rationale.

minimal punishment, or in some cases grant an absolute discharge. This reflects the moral innocence of the accused.

**England**

Reasonable reliance on official advice was pleaded as far back as the middle of the nineteenth century in *Cooper v Simmons*. An apprentice left his apprenticeship after the death of his master. He believed he was entitled to do this, having received legal advice to that effect. The advice was erroneous and the apprentice was convicted notwithstanding his reasonable reliance on the advice. While there is no English case accepting reasonable reliance on official advice as an exception to the ignorance of law rule, several courts have approved of the principle. In *R v Arrowsmith*, the accused was charged under the *Incitement to Disaffection Act 1934* (UK) for attempting to influence a soldier into deserting the army. The accused argued that she believed that her actions were not unlawful because she had been previously charged with the same offence and the Director of Public Prosecutions had advised that charges would not be laid for her conduct.

Lawton LJ rejected this argument and stated: "[A] belief that she would not be prosecuted, in our judgment, would have been no defence in law at all." However, Lawton LJ referred, with approval, to Ashworth’s article and to a Canadian case cited by Ashworth, which favoured a defence of mistake of law on the basis of reasonable reliance. Lawton LJ distinguished this case on the basis that the belief here did not go to the illegality of the offence but was simply a mistaken belief as to a prosecutorial discretion. Had the court accepted that the mistake went to the illegality of the conduct and that it was induced by the official advice, it is possible that the accused may have been acquitted.

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181 (1862) 7 H & N 707.
182 (1975) 1 QB 678.
183 (1975) 1 QB 678 at 689.
Arrowsmith’s case bears comparison with the South African case of S v L. In that case a woman was convicted in a magistrate’s court of contravening the Sexual Offences Act 23 of 1957 (South Africa) by unlawfully, wilfully and openly exhibiting herself in an indecent manner by sunbathing and bathing at a public beach. The accused’s argument was that she believed that there was an official policy of not prosecuting such cases unless a complaint was made, and that she would only be prosecuted if she refused to cover up. The Court of Appeal overturned the conviction on the ground that the accused’s mental state, as a result of her mistaken belief, was not sufficiently blameworthy to warrant conviction. Instead of being distracted by the nature of the mistake, the court evaluated the effect of the mistake on the culpability of the accused.

Cases involving the statutory defence of “with lawful excuse” often raised the issue of reasonable reliance on official advice. Cambridgeshire and Isle of Ely County Council v Rust involved an accused who was charged under the Highways Act 1959 (UK) with wilful obstruction of a highway without lawful excuse or authority. The accused had been operating stalls by the highway for several years with the local council’s permission. The accused had obtained advice from the council as well as from a policeman and had even been paying the council rates for his stall. The trial court acquitted the accused on the ground that the steps taken by the accused had given him a lawful excuse. The case was overturned on appeal with the court holding that the excuse had to be in fact lawful. Since it was clearly unlawful to obstruct the highway, the accused’s belief that his conduct was lawful was no defence. This suggests that the “lawful excuse” element went to the actus reus and not the mens rea of the offence. However, in Brook v Ashton, a case dealing with a charge under the same Act, the court treated the “lawful excuse” element as part of the mens rea and

186 1991 (2) SACR 329(C).
188 See also Redbridge London Borough Council v Jaques [1970] 1 WLR 1604.
not the actus reus of the offence. The court, relying on two nineteenth century cases held that mistake of fact could give rise to a lawful excuse.\textsuperscript{190}

\textit{Australia}

Australian courts are as reluctant as their English counterparts to permit a defence of reasonable reliance on the law. While the issue has not been dealt with by the High Court, it has arisen in the state courts. In the South Australian case of \textit{Power v Huffs},\textsuperscript{191} the accused was demonstrating in public and was requested by police to cease her activities. During the demonstration the accused telephoned the federal minister for Aboriginal Affairs who told her to remain where she was. She was prosecuted and argued that she had relied on the minister’s advice and was therefore acting under lawful authority. The court held that the minister’s advice could not substitute for the law as the minister had no power to authorise the defendant to do what she did. The accused’s reliance on the advice gave rise to an erroneous belief in lawfulness, and because the mistake was one of law, it could not give rise to a defence.

The South Australian Supreme Court in \textit{Power v Huffs} held that if the mistake were one of fact, then the mistaken belief in lawful authority would have been available to the accused. The fact that the three judges in the case had separate views as to the characterisation of the mistake as one of fact or law further demonstrates the unsatisfactory state of the law. Criminal liability should not depend on such impractical distinctions. The facts in \textit{Power v Huffs} were very similar to those in the American case of \textit{Cox v Louisiana}.\textsuperscript{192} In that case the accused had been given permission by the Chief of Police to demonstrate near a courthouse although the law prohibited such demonstrations. The United States Supreme Court allowed the defence of reasonable reliance on official advice even though the accused’s belief was effectively a mistake of law.

\textsuperscript{190} \textit{Roberts v Inverness Local Authority} (1889) 27 Sc LR 198; \textit{Dickins v Gill} (1896) 2 QB 310.
\textsuperscript{191} (1976) 14 SASR 337.
\textsuperscript{192} 379 US 559 (1965).
In 1980 the South Australian Supreme Court again considered the reasonable reliance defence in *Wormald v Gioia*. The accused was charged with a breach of a local planning regulation. She argued that she had received erroneous advice from the council. The magistrate acquitted her on the basis of estoppel. On appeal, the Supreme Court referred to various English decisions on criminal estoppel due to erroneous advice. While the English cases were not consistent, the court in *Wormald v Gioia* took the view that the official’s advice was one as to law. Notwithstanding the fact that it was an official who had given incorrect advice, the court held that “estoppel cannot override the law of the land.” The court reversed the acquittal but imposed no penalty to reflect the moral innocence of the accused.

In the Queensland case of *Olsen v Grain Sorghum Marketing Board; ex parte Olsen*, both reliance on legal advice and reliance on a court decision failed to assist the accused. The *Primary Producers’ Organisation and Marketing Acts 1926-1957* (Qld) prohibited the purchase of grain sorghum from any person other than the relevant marketing board. The accused contrived to avoid this restriction by transporting the grain through New South Wales. The accused believed that this would bring their activities within interstate trade and therefore afford the protection of s92 of the *Constitution*, which provides that trade, commerce and intercourse between the states shall be absolutely free. This belief was based on legal advice and also on a Queensland Supreme Court decision in which it was held that such activity did trigger the s92 protection.

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195 *Wormald v Gioia* (1980) 26 SASR 238 at 242 per Mitchell J.
197 *Bonnie Doone Trading Co (NSW) Pty Ltd v Egg Marketing Board* [1962] Qd R 301.
Unfortunately for the accused, the case upon which they had relied was appealed to the High Court, which reversed the Queensland decision.\(^{198}\) This occurred after the accused had carried out their transaction. The Queensland Supreme Court in Olsen’s case held that the accused’s reliance on legal advice and on the court decision amounted to no more than a mistake of law and therefore afforded no defence. While it may be argued that, at the time the accused acted, they had not been acting under a mistake of law, the declaratory theory of law effectively gives retrospective application to all judicial decisions.\(^{199}\) Thus, the High Court decision was law even before it was made! This declaratory theory of law is as curious as the presumption that everyone knows the law, but in the realms of ignorantia juris non excusat, everything is just “curioser and curioser.” As Jerome Hall said, “[W]hen 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.”\(^{200}\)

The unfairness of rejecting reasonable reliance on judicial decisions as a defence is clearly illustrated by the facts of the Canadian case of R v Campbell.\(^{201}\) The accused sought advice as to the legality of performing a striptease dance at a nightclub and was advised that the Supreme Court of Alberta, in the case of R v Johnson,\(^{202}\) had ruled that such conduct was legal. The accused relied on this advice but was then charged with an offence. Before her trial, the Alberta Supreme Court Appellate Division reversed the decision in Johnson.\(^{203}\) Campbell’s appeal was therefore based on a mistake of law and she was convicted. Johnson’s case was further appealed to the Supreme Court of Canada which reversed the Appellate Division’s ruling.\(^{204}\)

\(^{198}\) Egg Marketing Board v Bonnie Doone Trading Co (NSW) Pty Ltd (1962) 107 CLR 27.


\(^{200}\) See J Hall, General Principles of Criminal Law (2\textsuperscript{nd} ed, 1960) 389.

\(^{201}\) [1973] 2 WWR 246. See also, Dunn v The Queen (1977) 21 NSR (2d) 334; See discussion in P G Barton, “Officially Induced Error as a Criminal Defence” (1979-80) 22 Criminal Law Quarterly 314 at 323-5.

\(^{202}\) [1972] 3 WWR 226.

\(^{203}\) [1972] 5 WWR 638.

\(^{204}\) (1973) 23 CRNS 273.
Thus, Campbell had not, at the end of the day, been mistaken as to the law at all! Although convicted, she was given an absolute discharge.

Recent New South Wales decisions highlight the tension between the ignorance of law rule and the plea of reasonable reliance on official advice. In Pollard v Commonwealth DPP,205 the accused was charged under s227(2)(b) of the Companies (New South Wales) Code which prohibited a person who had been found guilty of offences involving fraud or dishonesty from being directly or indirectly concerned with the management of a corporation. The defendant had been convicted of an offence under s178BB of the Crimes Act 1900 (NSW) which provided:

Whosoever, with intent to obtain for himself or another person any money or valuable thing or any financial advantage of any kind whatsoever, makes or publishes, or concurs in making or publishing, any statement (whether or not in writing) which he knows to be false or misleading in a material particular or which is false or misleading in a material particular and is made with reckless disregard as to whether it is true or is false or misleading in a material particular shall be liable to imprisonment for 5 years.

The accused had pleaded guilty to the charges under s178BB but argued that he was not guilty under s227(2)(b) of the Companies (New South Wales) Code because he believed that the s178BB offence was not one that involved fraud or dishonesty. He had received advice from a solicitor that he could be involved in the management of a corporation. His defence was rejected on the grounds that it was a mistake of law.206 The court also expressly rejected any defence of reasonable reliance on legal advice when it stated, "... the argument of the plaintiff based upon the acting upon the advice of the solicitor should be rejected. ... incorrect legal advice in relation [to known facts] would be a mistake of law."207

While the New South Wales Supreme Court, in deference to the ignorance of law rule, has rejected reliance on official advice as a defence, the court has expressed its concern as to the fairness of such an approach. As Smart J said, "Considerations of

206 Note that the offence in question was strict liability offence and therefore the defence pleaded was based on the Proudman mistake.
207 (1992) 28 NSWLR 659 at 677-8 per Abadee J.
fairness occasion difficulty in regarding a person as guilty of an offence where he has acted on substantial, reasonable and honest legal advice.\footnote{238}

\textit{Canada}

The 1970s saw the introduction of two mistake defences into the Canadian criminal law. In 1978 the Supreme Court of Canada, in the case of \textit{R v City of Sault Ste Marie},\footnote{209} recognised a due diligence defence. In 1974 the Nova Scotia County Court, in the case of \textit{R v Maclean},\footnote{210} recognised a defence of officially induced error. The due diligence defence in \textit{Sault Ste Marie} was developed as an extension of the \textit{Proudman} defence.\footnote{211} It was, however, limited to strict liability offences that were of a purely regulatory nature. In 1980 the Supreme Court of Canada decided \textit{Molis v R},\footnote{212} where mistake of law was excluded from the due diligence defence. In 1982, the Supreme Court in \textit{R v Macdougall}\footnote{213} recognised that officially induced error existed as a defence that was separate from due diligence. The officially induced error defence was held to include mistake of law.\footnote{214}

\textit{MacDougall} concerned a charge of driving while disqualified. The accused was mistaken as to whether his licence was actually revoked at the time he was arrested.\footnote{215} The mistake arose as a result of an administrative error in notifying the accused. While the Supreme Court of Canada found against the accused on the facts, it approved of the officially induced error of law defence:

\begin{quote}
It is not difficult to envisage a situation in which an offence could be committed under a mistake of law arising because of, and therefore induced by, “officially induced error”, and if there was evidence in the present case to support such a situation existing
\end{quote}

\footnote{208} \textit{Griffin v Marsh} (1994) 34 NSWLR 104 at 122-3.

\footnote{209} [1978] 2 SCR 1299.

\footnote{210} (1974) 17 CCC (2d) 84.

\footnote{211} See Chapter III.

\footnote{212} [1980] 2 SCR 356.

\footnote{213} [1982] 2 SCR 605.

\footnote{214} See the earlier decision of O’Hearn J in \textit{R v Flemming} (1981) 43 NSR (2d) 249 where the phrase “officially induced error” was first used.

\footnote{215} See also \textit{R v Prue; R v Baril} [1979] 2 SCR 547; \textit{R v Pontes} [1995] 3 SCR 44.
it might well be an appropriate vehicle for applying [the defence]. In the present case, however, there is no evidence that the accused was misled by an error on the part of the Registrar.\textsuperscript{216}

Thus, the Supreme Court endorsed the approach that officially induced error of law is separate from the due diligence defence and operates as an exception to the ignorance of law rule. The only problem was that Ritchie J appeared to require that not only must the accused be in error, but that error must be induced by an error on the part of the official. Later cases that have applied, or considered this defence, did not apply Ritchie J’s test\textsuperscript{217} until 1995, when the Supreme Court of Canada decided \textit{R v Jorgenson}.\textsuperscript{218}

Jorgenson was charged under s163(2)(a) of the \textit{Criminal Code} for knowingly selling obscene material without lawful justification or excuse. His defence was that he did not know that the material was obscene and that he had relied on the Ontario Film Review Board’s approval of the material. The Supreme Court of Canada allowed Jorgenson’s appeal on the basis that the Crown had not proved that Jorgenson had knowledge that the material was obscene. While the court was unanimous in its outcome, Lamer CJC delivered a separate judgment in which he made some observations on the officially induced error defence. The other judges did not consider this defence.

Lamer CJC confirmed that due diligence and officially induced error were separate from each other. However, he held that officially induced error should not operate as a defence leading to an acquittal, rather it should only lead to a judicial stay of proceedings. In his view, this defence did not go to the culpability of the accused’s actions. Lamer CJC treated officially induced error as a procedural matter, comparing it with entrapment and holding to the view that ignorance of law was in itself

\textsuperscript{216} [1982] 2 SCR 605 at 613 per Ritchie J.


\textsuperscript{218} [1995] 43 CR (4\textsuperscript{th}) 137.
blameworthy. The justification for officially induced error of law as a procedural defence clearly lies in the estoppel theory and not in any culpability theory. As he put it, "... the state has done something which disentitles it to a conviction."219 This of course, is precisely the argument made by Ashworth twenty years earlier. It should be noted that the Law Reform Commission of Canada recommended an amendment of the Criminal Code to recognise officially induced error of law as an exception to the ignorance of law rule.220

**Summative remarks on reasonable reliance on official advice**

While the ignorance of law rule prevented reasonable reliance on official advice being a defence, courts in England,221 Australia222 and Canada223 have recognised that such accused are often morally innocent. Because of their moral innocence, an absolute discharge was given in several cases. However, an absolute discharge is not the same as an acquittal. To return to the American judgment quoted at the beginning of this section:

> We are not impressed with the suggestion that a mistake under such circumstances should aid the defendant only in inducing more lenient punishment by a court, or executive clemency after conviction. The circumstances seem so directly related to the defendant's behaviour upon which the criminal charge is based as to constitute an integral part of that behaviour, for purposes of evaluating it. ... We think such circumstances should entitle a defendant to full exoneration as a matter of right, rather than to something less, as a matter of grace."224 [emphasis added]

**CONCLUSION**

This chapter has further exposed the weakness of the orthodox theory of criminal fault. Instead of concentrating on the moral blameworthiness of the accused, the orthodox theory focuses on technical mental states. The criminal liability of an

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221 Surrey County Council v Battersby [1965] 2 QB 194.
224 Long v State 65 A (2d) 489 at 498 (1949).
accused sometimes depends not on moral blameworthiness, but on luck or chance. The analysis of the law of mistake shows that artificial (sometimes practically impossible) distinctions between fact and law, as well as between ignorance and mistake, are relied upon. Thus, mistake of fact is a defence while mistake of law is not. Where a mistake involves fact and law, it is unclear whether such a mistake will be a defence. While the general view is that mixed questions are treated as questions of law, thereby denying a defence, the courts have not been consistent. Where a mistake is clearly one of fact, further difficulties arise as to whether the belief is due to ignorance or to an erroneous conclusion. Mere ignorance precludes a defence in many cases.

Because the current approach to mistake is based on the subjective mens rea doctrine, a subjective mistake is generally sufficient. Therefore, even an unreasonable mistake of fact qualifies as a defence. This carries the risk of acquitting morally blameworthy accused, as the Morgan decision and subsequent academic criticism show. Conversely, because mistake of law is not a defence, the risk of convicting morally innocent accused is present, as illustrated by several cases. The present law of mistake sometimes fails to distinguish the bad from the unlucky or stupid.

It was argued that mistake of law should operate as a defence if it negatives the moral blameworthiness of the accused. Such a defence could be justified by an extension of the subjective mens rea doctrine. Mistake of law is currently a defence where knowledge of illegality is a requirement of an offence. If it were held as a general principle that knowledge of illegality, like voluntariness, is an implied requirement of all offences, there is scope for mistake of law to operate as a defence. Alternatively, one could treat mistake of law in the same manner as mistake of fact. Where knowledge of unlawfulness is an element of the offence, a subjective mistake of law should be a defence. In all other cases, only reasonable mistake of law should be a defence. This would be comparable to the development in the strict liability offences, which resulted in the Proudman mistake defence.

The Defence of Mistake

The ideal would be for the courts to move away from the descriptive approach to criminal liability and to adopt a normative approach to criminal fault. Instead of determining whether the mistake was one of fact or law, or whether it was ignorance or mistake, the focus should be on the effect on blameworthiness, not on the nature of the mistake. Rather than being distracted by these distinctions, a normative inquiry into the effect of the mistake would produce a far better result. It would rid the law of mistake of these troublesome and artificial distinctions and ensure that the focus is on the moral blameworthiness of the accused. Unreasonable mistake of law would in itself be morally blameworthy and therefore deserving of punishment. Creating a reasonable mistake of law defence recognises responsible citizenship and avoids the morally innocent being made criminally liable.
CHAPTER VII

MISTAKE OF LAW IN SOUTH AFRICA: A DEFENCE GONE TOO FAR

INTRODUCTION

It was argued in Chapter V that the ignorantia juris non excusat rule was not supported by authority and that there were no compelling principled reasons in favour of it. Indeed, the main argument that had persuaded courts and commentators to refrain from rejecting the rule was Austin’s pragmatic concerns that the defence would be abused and would open the floodgates to claims of mistake of law. There was also concern that such a defence would lead to irresponsible citizens deliberately refraining from knowing their legal obligations. In Chapter VI, it was argued that the ignorantia juris rule was already severely curtailed by exceptions and that, in fact, allowing a defence of reasonable mistake of law would actually enhance responsible citizenship. The concern that such a defence would encourage ignorance of law was thus partially addressed.

The purpose of this chapter is twofold. The first purpose is to address the concern that mistake of law would be practically impossible to administer and that it would open the floodgates to unmeritorious claims. The second is to demonstrate the twin arguments developed in this thesis. First, a purely subjective doctrine of mens rea is not adequate to attribute criminal culpability, and secondly, only reasonable mistake of law should be a defence. A comparative study of the criminal law of South Africa, which has a defence of mistake of law, will be used to achieve the twin purposes of this chapter. The South African doctrine of mens rea also provides some valuable insights into subjective fault and individual blameworthiness.

The defence of mistake of law has operated in South Africa since 1977, and in the twenty three years that have elapsed, the criminal justice system has not been overwhelmed with pleas of ignorance of law. The South African experience demonstrates that the floodgates argument is quite unjustified. The South African law relating to mistakes has a weakness in that it allows even an unreasonable mistake of
law to be a defence to mens rea offences. By allowing subjective mistake of law to be a defence, there is a risk that morally blameworthy individuals could escape criminal liability. In the late 1980s and early 1990s the courts realised this risk and attempted to restrict the defence to reasonable mistakes. These cases have been criticised as violating the subjective doctrine of mens rea. In the course of addressing the broader aims of this thesis, a conceptual solution will be offered to resolve the South African dilemma within the framework of South African law.

BACKGROUND TO THE SOUTH AFRICAN LEGAL SYSTEM AND CRIMINAL LAW

The ability of the court to depart so radically from the established ignorantia rule lies in the nature of the South African legal system and “the broader and more modern concept of mens rea developed locally, one emphasising individual blameworthiness and the consciousness of illegality.”¹ The South African legal system is a hybrid one, drawing from various influences, particularly Roman, Roman-Dutch, English and German law.² The history of South African law can be divided into three distinct stages. The first was the Dutch Stage (1652-1795), during which Roman-Dutch law was introduced to South Africa.³ Roman-Dutch law was an amalgam of Roman principles as developed in Germany and the Netherlands.⁴ The principal writers, whose works were of significant influence in South Africa included Hugo Grotius,⁵ Johannes Voet,⁶ Van der Linden,⁷ Antonius Matthaeus II,⁸ Van Leeuwen⁹ and Van der

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¹ S v Waglines (Pty) Ltd 1986 (4) SA 1135(N) at 1145(D-E).
⁵ Grotius was a child prodigy and is regarded as one of the greatest lawyers that ever lived. His treatises on Roman law often included new insights and interpretations which enriched the law. See, J W Wessels, History of the Roman-Dutch Law (1908).
⁶ His work, Commentarius ad Pandectas (1698) vol 1 and (1704) vol 2 were the most influential Roman-Dutch texts in South Africa.
Mistake of Law in South Africa

Keesel. The second stage was the English influence (1795-1910). The main contribution of English law was in terms of rules of procedure and classification of offences. The third stage was from 1910 when South Africa had developed its own unique common law drawing from the earlier influences and the contemporary developments in Germany.

The Union Of South Africa was born in 1910 and the South African Appellate Division was created. The Appellate Division recognised the hybrid system of South African law as a distinct system of law from any of the earlier systems. As Kotze JA said in 1925, “the point has ... to be decided by our [emphasis added] law and not by the rules of Roman-Dutch jurisprudence, which we only apply as subsidiary common law...” Between 1910 and 1950, the South African courts, although acknowledging a unique local legal system, were still heavily influenced by English law. From around 1950, South African criminal law shifted away from English law and increasingly relied on German criminal theory and the more refined Roman-Dutch principles.

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7 Van der Linden’s main contribution was his book Koopmans Handboek which became the official law book of South Africa pursuant to a declaration on 19 September 1859.
8 Mattheus’s contribution to the criminal law was his treatise, De Criminibus.
9 Van Leeuwin is credited with coining the term “Roman-Dutch law” in his work Roomsch Hollandsch Rech, which was used to compliment Koopmans Handboek as the official law book of South Africa.
10 Van der Keesel’s work, published at the turn of the nineteenth century was frequently quoted by South African courts. Theses seleta juris Hollandici et Zelandici, ad suppleendum Hugonis Grotii Introductionem ad jurisprudentiam Hollandicam (1800).
12 R v Mloo 1925 AD 131 at 149.
13 This was mainly due to the influence of the leading South African work on criminal law at that time which was F G Gardiner & C M H Landsdown, South African Criminal Law and Procedure (1919). The authors favoured the English approach over the Roman-Dutch approach. See also similar judicial sentiments in Littlejohn v Norwich Union Fire Insurance Society 1905 TH 374 at 378 per Wessels J; Mancho v SAR 1928 AD 89 at 100 per Solomon CJ; Feldman (Pty) Ltd v Mall 1945 AD 733 at 776 per Greenberg JA.
14 This change was due to the work of de Wet and Swanepoel who preferred Roman-Dutch principles to English authority. J C de Wet & H L Swanepoel, Die Suid-Afrikanse Strafreg (1949).
German criminal theory and mens rea

Based on the works of the Italian Commentators who had continued the development of Roman law, a German criminal code Constitutio Criminalis Carolina (CCC) was enacted in 1532. In 1635 a fairly comprehensive work, Rerum Criminalium was published, which brought together the Constitutio Criminalis Carolina, Roman law, Italian and French juristic writings. The Rerum Criminalium was translated into Dutch and became enormously influential in the Netherlands.\(^{15}\) Roman criminal law insisted on dolus or culpa as fault elements. Leading German jurists, notably Leyser\(^{16}\) and Boehmer\(^{17}\) favoured criminal liability based on dolus or culpa. The requirement of mens rea for criminal liability was being reinforced in Germany.

The concept of mens rea that developed in Germany was based on the Constitutio Criminalis Carolina. In the nineteenth century, German theory on criminal fault went through several different forms. The first was the “psychological theory”, developed principally by Franz von Liszt and Ernst Belling.\(^{18}\) The second was the “normative theory”, developed by Reinhard Frank and the third was the “finalismus theory” developed by Hans Welzel.\(^{19}\) Classical German criminal law was based on a distinction between objective and subjective components of criminal responsibility.\(^{20}\) Objective criminal responsibility was the causation of an unlawful act, while subjective criminal responsibility was the human will that desired such conduct.\(^{21}\)

Building on this distinction between subjective and objective imputation, Liszt and Belling developed a three staged approach to criminal liability. The three elements of criminal liability were an act, unlawfulness and mens rea. The act and unlawfulness

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\(^{15}\) The Dutch translation was published by Van Hogendorp in 1752. The Rerum Criminalium was already popular in Netherlands before Van Hogendorp’s translation.

\(^{16}\) Meditationes and Pandectas (1717-1747).

\(^{17}\) Boehmer published commentaries on the Constitutio Criminalis Carolina and the Rerum Criminalium and favoured basing criminal liability on dolus and culpa.

\(^{18}\) F von Liszt, Lehrbuch (1881). E Belling, Die Lehre vom Verbrechen (1906).


\(^{20}\) The seventeenth century jurist, Samuel Pufendorf drew this distinction between objective and subjective components of criminal responsibility.

\(^{21}\) This distinction is analogous to the common law distinction between actus reus and mens rea.
formed the external objective components of criminal liability while the mens rea constituted the internal subject component of criminal liability. This was the psychological concept of mens rea. This psychological concept of mens rea included within it subjective knowledge of unlawfulness.

The second stage was dominated by the normative theory of mens rea. The normative theory modified the psychological concept by including a requirement of blameworthiness in mens rea. Thus, mens rea was no longer the mere subjective state of mind of the accused. Rather, it was the wrongful formation of the will of the accused to act contrary to the law. Although this theory introduced a degree of objectivity into mens rea, it still retained the psychological factors of intention and negligence as elements of mens rea. Under this theory, unavoidable ignorance of law was a defence because such a person was not blameworthy. Similar, this theory explained liability for negligence on the grounds that although there is no mental state in negligence (it is after all a lack of care) it was blameworthy because the person did not live up to certain expectations.

The third and final stage was shaped by the "finalism theory". The significance of this theory lay in its radical redefinition of a criminal act. Essentially, this theory defined every act of a person as purpose-oriented. Because an act was purpose-oriented, the intention that accompanied an act belonged to the actus reus and not the mens rea. Having removed intention from mens rea, all that remained was knowledge of unlawfulness. Mens rea under the finalism theory was just that, criminal capacity plus knowledge of unlawfulness.

Although Germany had continued to evolve its concept of mens rea in the last hundred years, South Africa adopted the classical German theory, i.e. the psychological concept of mens rea. The influence of this theory in South African criminal law was largely

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23 This theory was discussed in Chapter I and will just be briefly recapitulated here.


due to the South African writers, de Wet and Swanepoel, who relied on the early German criminal theory. As a result, the psychological theory gained a firm foothold in South African criminal law and was applied by the Appellate Division in mens rea cases from the 1950s. The emphasis on subjective blameworthiness resulted in a series of decisions by the Appellate Division, which insisted on individual blameworthiness as a central requirement of criminal liability in South Africa. This insistence was even at the expense of the doctrine of precedent. As Stratford ACJ put it, “If the decisions had disregarded fundamental principles of our law, we might have to reassert those principles even at the cost of reversing judgments of long standing.”

Thus, the South African Appellate Division was prepared to overturn rules and precedents where fundamental principles demanded change. The clearest illustration of this was the reversal of the ignorantia juris non excusat rule. This judicial emphasis on individual blameworthiness led the authors of the present leading criminal law text in South African to state, “In the sphere of the general principles of criminal liability the most significant development since Union has been the almost complete triumph of the principle of no liability without fault.”

MENS REA AND MISTAKE OF LAW IN SOUTH AFRICA

Dolus and culpa

Mens rea in South Africa had two distinct elements to it, one being objective mens rea, known as culpa or negligence, and the other being subjective mens rea, known as

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26 J C de Wet & H L Swanepoel, Die Suid-Afrikanse Strafreg (1949).
27 R v Mkize 1951 (3) SA 28 (A) at 33; R v Huebsch 1953 (2) SA 561 (A) at 567; R v Du Randt 1954 (1) SA 313 (A); R v Hercules 1954 (3) SA 826 (A) at 831; R v Bougarde 1954 (2) SA 5 (C) at 8; R v Nsele 1955 (2) SA 145 (A).
28 See for example, R v Nsele 1955 (2) SA 145 (A) – insistence on subjective mens rea; S v Van der Mescht 1962 (1) SA 521 (A) – rejection of versari in re illicita; S v Johnson 1969 (1) SA 201 (A) – rejection of intoxication rule; S v Dlodlo 1966 (2) SA 401 (A) – adoption of subjective test for provocation; S v De Blom 1977 (3) SA 513 (A) – rejection of ignorantia juris non excusat rule.
29 Dukes v Marthinusen 1937 AD 12 at 23; reaffirmed in S v Bernardus 1965 (3) SA 287 (AD) and Peri-Urban Health Board v Munarin 1965 (3) SA 367 (AD).
dolus or intention.\textsuperscript{31} Intention was divided into three types, dolus directus, dolus indirectus and dolus eventualis. The first type of dolus corresponded to the common law notion of intention in the sense of purpose. This was where the accused meant to bring about a particular consequence or meant to engage in particular conduct. The second type of dolus was analogous to the common law notion of oblique intention, i.e. where the accused foresaw the consequence as a virtual certainty. Dolus eventualis roughly corresponded with the common law concept of recklessness, i.e. it existed where the accused foresaw the consequence as a probability or possibility.\textsuperscript{32}

Culpa on the other hand was an objective “mental state”.\textsuperscript{33} It operated as a general fault element in South African criminal law.\textsuperscript{34} Both dolus and culpa included the requirement of knowledge of unlawfulness. With crimes of dolus, the knowledge of unlawfulness had to be subjectively proved and with crimes of culpa, the knowledge of unlawfulness had to be objectively proved.\textsuperscript{35} Until 1977, the maxim ignorantia juris non excusat allowed a presumption of knowledge of unlawfulness and hence ignorance of law was considered irrelevant. All that had to be proved was knowledge of all the facts that made up the unlawful conduct. The Appellate Division in the 1977 decision of \textit{S v De Blom}, swept away the old maxim and precedents and held that the law should accord with legal principle.

At this stage of our legal development it must be accepted that the cliche that “every person is presumed to know the law” has no ground for its existence and that the view that “ignorance of the law is no excuse” is not legally applicable in the light of the present-day concept of mens rea in our law.\textsuperscript{36}[emphasis added]


\textsuperscript{32} \textit{R v Jolly} 1923 AD 176 for a discussion of the subjective and objective standards for dolus and culpa.

\textsuperscript{33} There is a question whether culpa is really a mental state of a form of blameworthy conduct. See, D A Botha “Culpa – A Form of Mens Rea or a Mode of Conduct” (1977) 94 South African Law Journal 29. Similar debate ensues in the common law.

\textsuperscript{34} The common law of England and Australia, on the other hand, rejected criminal liability for negligence except for manslaughter. Negligence of course is the fault element for a variety of statutory crimes.


\textsuperscript{36} 1977 (3) SA 513 at 529H (translation).
The defence of mistake of law in South Africa

_S v De Blom - A New Beginning_

Prior to _De Blom_, ignorance of law was generally not relevant to criminal liability in South Africa. Notwithstanding that, there were several decisions where courts did allow ignorance of law to operate as a defence.\(^{37}\) Some of these decisions were justified on the grounds of claim of right or reasonable reliance on official advice,\(^{38}\) although equally there were cases which rejected this reasoning.\(^{39}\) In addition to the judicial discontent with the ignorantia juris rule, there was considerable academic support in the early 1970s calling for the abolition of the rule.\(^{40}\) One example given by Botha illustrated the failure of the orthodox mens rea doctrine in its ability to attribute blame quite vividly.\(^{41}\) Botha referred to the case of _R v Kgau_,\(^{42}\) where a Bushman killed another Bushman. These tribal people had lived untouched by the “State” criminal law of South Africa. In their view, nothing unlawful had taken place. The court accepted that was their view, but held that because the accused had intended to kill, that was sufficient to make him a murderer. This was notwithstanding the fact that that conduct was not unlawful in the accused’s community and he had no reason to suspect that it was unlawful.\(^{43}\)

It was ultimately academic opinion that persuaded the Appellate Division to reverse the law when it decided _S v De Blom_. The facts of the case were that the appellant

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37 See D A Botha, “Mens Rea in the Form of Culpa Founded upon Ignorance of Law” (1975) 92 South African Law Journal 280

38 See for example, _S v Rabson_ 1972 (4) SA 574(T); _S v Lambat_ 1963 (2) SA 1(T).

39 See for example, _S v Bledig_ 1974 (2) SA 613 (RAD); _S v Colgate-Palmolive Ltd_ 1971 (2) SA 149(T).


42 1956 (2) SA 606 (SWA).
had attempted to leave South Africa with a large sum of money in US currency and some jewellery. She was caught at the airport and arrested. She was charged with two counts of contravening the *Exchange Control Regulations*. The first count was one of contravening regulation 3(1)(a) by taking US$40 000 in banknotes out of the country without the necessary permission. The second count was one of contravening regulation 10(1)(b) by taking jewellery to the approximate value of R14 000 out of the country without the necessary permission. At her trial, the appellant gave evidence that she was unaware of any requirement of permission to take money or jewellery out of the country. Van Winsen J held that the claim by the accused amounted to a plea of ignorance of law and convicted her on both counts.

The Appellate Division’s judgment was given by Rumpff CJ with whom the other members of the bench agreed. Relying exclusively on academic writers, Rumpff CJ ignored cases which firmly held that ignorance of law was not a defence, and held that ignorance of law had to be recognised as negating criminal liability in the same way as mistake of fact:

In a case like the present one it must be accepted that, when the State has led evidence that the prohibited act has been committed, an inference can be drawn, depending on the circumstances, that the accused willingly and knowingly (ie with knowledge of the unlawfulness) committed the act. If the accused wishes to rely on a defence that she did not know that her act was unlawful, her defence can succeed if it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful; and further, when culpa only, and not dolus alone, is required

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44 In conversation with Rabie J, who was a member of the *De Blom* bench, it was indicated to me that Rumpff CJ had already decided that the ignorance of law rule was contrary to established criminal law principles and that he was merely waiting for an opportunity to change the law. *S v de Blom* offered that opportunity. This tale is reminiscent of Lord Atkin and his neighbour principle so eloquently elucidated in *Donoghue v Stevenson* [1932] AC 562. In that case too, Lord Atkin had clearly formed his views before the case and was merely waiting for an opportunity to express his ideas. See, A Rodgers, “Mrs Donoghue and Alfenus Varus” (1988) 41 Current Legal Problems 1.

as mens rea, that there is also a reasonable possibility that juridically she could not be blamed, ie that, having regard to all the circumstances, it is reasonably possible that she acted with the necessary circumspection in order to inform herself of what was required of her in connection with the question of whether or not permission was required to take money out. Should there be, on the evidence reasonable doubt whether the accused did in fact have mens rea, in the sense described above, the State would not have proved its case beyond a reasonable doubt.46

Thus, for crimes of dolus any mistake of law was a defence while for crimes of culpa, only reasonable mistake of law was a defence. The onus of proof was on the prosecution, although there was an evidentiary burden on the accused to raise the defence.

In this case the appellant was found guilty on the first count. From the evidence it was inferred that she did know that permission was required to take such money out of the country. This was inferred from her evasive answers to questions put to her in court and also from the fact that she had concealed the money.47 This indicated guilty knowledge. With regard to the second count, concerning the jewellery, it was held that it was possible that she did not, in fact, know that she required permission to take the jewellery out. She had previously travelled to and from South Africa with similar amounts of jewellery without being detained by officials. The conviction on the second count was thus quashed due to her ignorance of law.

The Scope of De Blom

*De Blom* has been repeatedly approved and applied by the courts in South Africa.48 The scope of the *De Blom* defence was certainly very wide as it allowed ignorance or mistake of law, no matter how unreasonable, to negative mens rea in the form of dolus.49 Courts attempted to narrow the scope of *De Blom* by two qualifications.

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46. *S v de Blom* 1977 (3) SA 513 at 532 AD (trans).
47. *S v de Blom* 1977 (3) SA 513 at 532 AD (trans).
48. *S v Dalindyebo* 1980 (3) SA 1049 at 1054-1055 per Munnik J; *S v Cleminshaw* 1981 (3) SA 685 (C) at 689-691 per Van den Heever J; *S v Hoffman* 1983 (4) SA 564 (T) at 566 per Gordon R; *S v Maglason* 1984 (3) SA 825 (T) at 828-831 per Ackermann J; *S v Speedy* 1985 (2) SA 782 (A) at 788 per Hefer AR; *S v Waglines (Pty) Ltd* 1986 (4) SA 1135 (N) at 1145-1146 per Didcott J.
First, a liberal interpretation to the kind of knowledge of unlawfulness was adopted. Imputed knowledge was held to be sufficient in some cases. The second qualification related to culpa offences where the mistake of law had to be reasonable to operate as a defence. This was particularly apposite in cases where the accused were engaged in a specialised activity and therefore came under a duty to know the law.

**Kind of knowledge**

It was not necessary that the accused had to actually be aware that he or she was contravening a specific law. All that was required was that the accused was aware that he or she was doing something unlawful. This suggested that the knowledge did not have to be precise, i.e. as long as the accused knew that he or she was doing something wrong, that was sufficient. It was also held that actual knowledge was not always necessary and that imputed knowledge could be sufficient. As Ackermann J said, “It is sufficient if he realises that what he is doing may possibly be unlawful and reconciles himself with this possibility.” This suggested a lower degree of knowledge, satisfied perhaps by suspicion or foresight.

In *S v Hlomza* Corbett JA made a similar observation and stated, “The enquiry is whether the accused knew that what he was doing was, or might possibly be unlawful, irrespective of whether he knew what law was being contravened and what the precise provisions of the law might be.” Although precise knowledge was not necessary, there had to be some nexus between the knowledge and the charge that the accused was facing. Kannemeyer J observed that if a person stole a sealed parcel, not knowing what it contained but knowing that stealing was unlawful, then, if unbeknown to the accused the parcel contained a prohibited drug, the accused’s wrongful act of stealing could not supply the *mens rea* for a drug offence. Therefore

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50 *S v Magidson* 1984 (3) SA 825 (T) per Ackermann J.
51 1984 (3) SA 825 (T) at 830 B-C.
52 1987 (1) SA 25 (A).
53 1987 (1) SA 25 (A) at 32F.
54 *S v Hlomza* 1983 (4) SA 142 at 145.
the knowledge of wrongfulness, while not having to be precise, still had to be connected with the offence.\textsuperscript{55}

**Duty to know the law**

There was also authority that where an accused was engaged in a particular trade, occupation or activity, a duty was imposed on him or her to be familiar with the law relating to that trade, occupation or activity. Failure to do so meant that his or her ignorance or mistake of law would not be reasonable, and would not negative *mens rea* in the form of *culpa*.\textsuperscript{56} This rule was in fact formulated by Rumpff CJ in *De Blom*. It must be stressed however, that this rule only applied to offences where culpa was the required mens rea. Where dolus was the required mens rea, any mistake or ignorance, even if it were unreasonable, would suffice.

**Criticism of *De Blom***

The main criticism of *De Blom* was that the Appellate Division had gone too far\textsuperscript{57} in making any honest mistake, however unreasonable, a defence to crimes requiring dolus. There was concern that this new defence would open the floodgates and the courts would be burdened with pleas of ignorance of law. Nearly a quarter of a century later these fears have proved to be unfounded.\textsuperscript{58} The *De Blom* decision has been applied and approved by the courts\textsuperscript{59} and has been accepted by leading

\textsuperscript{55} This is comparable to the correspondence principle.

\textsuperscript{56} *S v Sayed* 1981 (1) SA 982 (C) at 990-1 per Friedman J (publication of a statement of a banned person in contravention of s11 (g) a of the *Internal Security Act* 44 of 1950); *S v Du Toit* 1981 (2) SA 33 (C) at 40B per Baker J (transporting petrol in container in contravention of the regulations under the *Petroleum Products Act* 120 of 1977); *S v Cleminshaw* 1981 (3) SA 685 (C) at 690-1 per Van den Heever J (possession of prohibited publications contrary to s8(1)(d) of the *Publications Act* 42 of 1974); *S v Khotle* 1981 (3) SA 937 (C) at 938-9 per Van den Heever J (conveying persons for reward in contravention of s31(1)(a) of the *Road Transportation Act* 74 of 1977).


\textsuperscript{58} “*De Blom*’s case has not, in South Africa, led to a rash of cases where this defence has either been claimed or upheld.” *Annual Survey of South African Law* (1991) 440. In the last decade, *De Blom* has continued to apply without opening the floodgates.

\textsuperscript{59} *S v Dalindyabo* 1980 (3) SA 1049 at 1054-1055 per Munnik J; *S v Cleminshaw* 1981 (3) SA 685(C) at 689-691 per Van den Heever J; *S v Hoffman* 1983 (4) SA 564(T) at 566 per Gordon J; *S v Magidson* 1984 (3) SA 825(T) at 828-831 per Ackermann J; *S v Speedy* 1985 (2) SA
academics. The principal difficulty with the De Blom approach to mistake of law was that it allowed unreasonable mistake of law to negative mens rea in the form of dolus. This had the potential of allowing morally blameworthy accused to escape criminal liability. As Whiting argued:

[T]he principle adopted by the Appellate Division will have the effect in many cases of removing from the field of criminality conduct which it is suggested ought still to be regarded as criminal, and in other cases of reducing the criminality of conduct to an extent which it is suggested is unwarranted.

Whiting used the case of R v Werner as an illustration. In this case the accused were German prisoners of war who, on the orders of one of their officers put to death a fellow prisoner suspected of collaborating with the South African authorities. The Appellate Division sustained their conviction for murder, holding that their belief that they were obliged to obey the orders of their superior officer, being a mistake of law, was no defence. Under the De Blom approach, the accused would lack the dolus required for murder but, because of the unreasonableness of the mistake, would be convicted of manslaughter. Thus, the accused’s conduct, under De Blom, would be reduced from murder to manslaughter. This, according to Whiting, was an example of reducing the criminality of conduct to an unwarranted extent. If only reasonable mistake of law were admitted as a defence, then the accused would be convicted of murder and the mistake would merely be regarded as an extenuating circumstance relevant to sentencing.

Whiting provided a further illustration by adapting the facts of Werner. Assuming the accused’s attempt to kill the victim failed, then, but for their mistake of law, they

782(A) at 788 per Hefer AR; S v Waglines (Pty) Ltd. 1986 (4) SA 1135(N) at 1145-1146 per Didcott J.


62 1947 (2) SA 828 (AD).

63 It should be noted that this case was before De Blom.

64 Manslaughter is a crime of culpa and the mistake of law in this case could be found to be unreasonable.
would be guilty of attempted murder. However, under *De Blom*, the mistake albeit unreasonable, would be sufficient to exclude *dolus* or intention, leading to a complete acquittal. This, according to Whiting, would be “regarded as repugnant to one’s sense of justice.”65 While *De Blom* was a welcome step in the right direction, it might have taken too big a step. By allowing unreasonable mistake of law to operate as a defence, there was a risk that persons who could fairly be held morally blameworthy might escape criminal liability.

*Has De Blom* gone too far?

There was a perception by judges that allowing even unreasonable mistake of law to be a defence was overly generous to the accused. Some courts began to require a reasonableness test even for dolus offences. Some of these cases were thus confounding the *De Blom* defence by applying the objective (culpa) test of mistake of law to dolus offences.66 The courts were reluctant to allow a defence of unreasonable mistake of law, preferring instead a narrower defence of reasonable mistake. Implicit in this was the view that unreasonable mistake of law might be blameworthy.

In *De Blom*, Rumpff CJ accepted that if a person was involved in a particular trade, occupation or activity, there was a duty on that person to acquaint him or herself with the laws relevant to his or her field. However, this “specialised-activity rule”67 was only relevant where the offence was one requiring culpa. If the offence required dolus then it was only the accused’s actual knowledge, not what the accused ought to have known that was relevant.68 In some recent cases the courts have applied this “specialised-activity” rule to offences where dolus was the required mens rea.69 Thus,

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69 See for example, *S v Coetzee en ‘n ander* 1993 (2) SACR 191 (T); *S v Adams en ‘n ander* 1993 (1) SACR 330 (C); *S v Visagie* 1991 (1) SA 177(A); *S v Madihlaba* 1990 (1) SA 76 (T); *S v*
it appeared that the subjective test for dolus was being confused with the objective test for culpa.

Snyman took the view that courts have either consciously or unconsciously treated pleas of mistake or ignorance of the law in a manner different from the principle in *De Blom*. His solution was to apply the normative test for mens rea instead of the psychological test. Instead of looking at the actual knowledge of the accused, the question became, “Was the accused’s action blameworthy, i.e., could the accused have avoided the wrongdoing and acted in accordance with the law?” If the accused could have avoided the ignorance or mistake, then the accused deserved to be blamed and thus deserved to be convicted. In short, the *De Blom* principle should be qualified so that only “unavoidable ignorance of law would be regarded as an excuse.”

Although the normative theory could provide a solution to the South African dilemma, it was contradictory to the subjective notions of the psychological theory. In the words of Dlamini:

What is unacceptable is to superimpose this requirement of reasonableness (or avoidability), which is tested objectively, on a case where the form of mens rea required is intention since intention is tested subjectively.

One way of reconciling the recent cases with *De Blom* is to rely on the distinction between ignorance and mistake. Where there is a subjective belief, *any honest mistake* of law should be a defence, but where there is an absence of a belief, *only reasonable ignorance* of law should be a defence.

*A conceptual approach utilising the distinction between ignorance and mistake*

There is no agreement as to whether there should be a distinction between ignorance and mistake, and whether either should be relevant to criminal liability. In Chapter

*Molubi* 1988 (2) SA 576 (B); *S v Lekgathe* 1982 (3) SA 104 (B); *S v Nel & another* 1980 (4) SA 28 (E).


VI, various academic views were presented. Some academics have argued that mistake of law should be a defence because it negated the criminal mind, as opposed to ignorance of the law which had no relevance to the criminal mind.\textsuperscript{73} Others have come to the opposite conclusion, arguing that ignorance of the law and not mistake of law should be a defence.\textsuperscript{74} Yet others have argued that no distinction can be drawn between ignorance and mistake as mistake was simply a kind of ignorance.\textsuperscript{75}

The South African position appears to be that although there was a difference in meaning between ignorance and mistake, for the purposes of the criminal law, the two concepts were not distinguished.\textsuperscript{76} Rabie, for example, has argued that the focus should not be on the nature of the ignorance or mistake but rather on the effect.\textsuperscript{77} According to him, there was no difference in effect, although he recognised that there was a significant difference in principle between ignorance and mistake. He argued that "ignorance ... relates to the \textit{unlawfulness}, while mistake relates to the \textit{lawfulness} of the conduct concerned."\textsuperscript{78} [emphasis added] This distinction was important as it showed that a mistake related to a belief in lawfulness or claim of right, which could raise doubts as to knowledge of unlawfulness. A person acting under a mistake of law would be acting with a positive state of mind with respect to the lawfulness of the conduct. The accused simply could not have had knowledge of unlawfulness as that would have been contrary to the mistaken belief.


\textsuperscript{73} E R Keedy, "Ignorance and Mistake in the Criminal Law" (1908) 22 Harvard Law Rev 75 at 90.

\textsuperscript{74} J Hall, \textit{General Principles of Criminal Law} (2\textsuperscript{nd} ed, 1960) at 406-7.

\textsuperscript{75} G L Williams, \textit{Criminal Law: The General Part} (2\textsuperscript{nd} ed, 1961) 151-2. For a contrary view see J Story, \textit{Commentaries on Equity Jurisprudence as Administered in England and America} (13\textsuperscript{th} ed, 1886) vol 1, 158, "Ignorance implies a total want of knowledge in reference to the subject matter. Mistake admits a knowledge, but implies a wrong conclusion."

\textsuperscript{76} E M Burchell & P M A Hunt, \textit{South African Criminal Law and Procedure} (2\textsuperscript{nd} ed, 1983) vol 1, 168 and references therein.

\textsuperscript{77} M A Rabie, "Aspects of the Distinction Between Ignorance or Mistake of Fact and Ignorance or Mistake of Law in Criminal Law" (1985) Tydskrif u'r Hedendaagse Romeins-Hollandse 332 at 334.

\textsuperscript{78} M A Rabie, "Aspects of the Distinction Between Ignorance or Mistake of Fact and Ignorance or Mistake of Law in Criminal Law" (1985) Tydskrif u'r Hedendaagse Romeins-Hollandse 332 at 337.
An accused acting in ignorance of the law, on the other hand, would not have a positive mental state that was relevant to mens rea. Thus, in relation to that element of the dolus, ie, knowledge of unlawfulness, there was a “vacuum” in the mind of the accused. There was no belief to negative knowledge of unlawfulness. As De Blom itself held, there was a rebuttable presumption of knowledge of unlawfulness. This presumption could be negatived by a belief as to lawfulness, but where there was no belief, there was nothing with which to rebut the presumption. Whenever simple ignorance was pleaded, the presumption of knowledge of unlawfulness was not rebutted. However, reasonable ignorance of law could operate separately as an excuse, and be judged objectively, akin to defences such as self-defence, necessity and duress.  

Du Plessis has argued that allowing an objective test for mistake or ignorance of law would inevitably revive the ignorantia juris rule. With respect, this argument is misconceived. Every person has a responsibility to abide by the law. For this reason, to a certain degree there is, or should be, a duty on each individual to be familiar with the law that may be relevant to him or her. For example, it has been accepted that the De Blom defence simply could not be used for an offence such as murder because such a common law offence was so well known and intricately connected with moral wrong that everyone knew such conduct was criminal. But it is not correct to say that everyone knows murder is wrong.

Take for a example, a child growing up in a war torn country who has been exposed to senseless murder everyday of his or her life. The child has been brought up to kill if the situation so demands and believes such killing is not wrong. If that child were brought to South Africa and killed a person, under circumstances where the child honestly was unaware that it was unlawful, it cannot be said that the child (assumed to be doli capax) knew that murder was wrong. Recall for a moment the example of R v

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81 See Chapters I and II. See also A Ashworth, Principles of Criminal Law (3rd ed, 1999) 244.
Reconceptualising Fault in the Criminal Law: A Defence of Reasonable Mistake of Law

*Kgau.* What is actually meant when it was said that everyone knew murder was wrong was that it was so unreasonable for people not to know it that a plea of ignorance in such a case would not be accepted. A person living in a civilised society would reasonably be expected to know the basic laws prohibiting killing another. Such ignorance would not avail them of a defence.

*Explaining the cases that may have misinterpreted the De Blom principle*

Snyman has suggested that *S v Coetzee en 'n ander*, *S v Adams en 'n ander* and *S v Molubi* were clear examples of the court applying the specialised-activity rule in the context of dolus crimes. Several other cases which may have done the same by implication include *S v Madihlaba*, *S v Lekgathe* and *S v Nel & Another.* It will be argued that these cases can be categorised into two main groups. The first category can be rationalised by distinguishing between ignorance and mistake. The second can be explained on the basis that the cases did not actually confuse the objective and subjective tests. *S v Coetzee* will be used to illustrate the former category and *S v Madhilaba* to illustrate the latter.

*S v Coetzee*

The first appellant, a funeral undertaker and her husband were convicted of the offence of violating a corpse. The first appellant had been requested by a mine authority in terms of s34(2) of the *Occupational Diseases in Mines and Works Act 78* of 1973 (South Africa) to remove the heart and lungs of the deceased, a miner, for further investigation. The first appellant did so without a medical practitioner being

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82 1956 (2) SA 606 (SWA).
83 Of course it is arguable that *Kgau* was an illustration of a conflict of cultural norms and therefore it may not have been reasonable to expect *Kgau* to know the prohibition against killing. However, situations like this would be extremely rare.
84 1993 (2) SACR 191 (T).
85 1993 (1) SACR 330 (C).
86 1988 (2) SA 576 (B).
87 1990 (1) SA 76 (T).
88 1982 (3) SA 104 (B).
89 1980 (4) SA 28 (E).
present during the removal as required by s34 of the Act. The appellants were not themselves medical practitioners for the purpose of the Act. Roos J accepted that the first appellant was clearly ignorant of the provisions of s34(2).

However, Roos J held that the accused had undertaken a specialised-activity, and that although the passage in De Blom, in which the specialised-activity rule was set out, referred primarily to culpa, it applied equally to crimes requiring intention.\textsuperscript{90} On the facts, Roos J held that it was reasonable to expect such a funeral undertaker to acquaint herself with the legal provisions relating to the removal of organs and that in the circumstances the appellant could not rely on ignorance of the law. As a result of this interpretation of the law, the court dismissed the accused’s plea that she had been unaware that what she was doing was wrong.\textsuperscript{91}

On the facts, it was clear that the accused was simply ignorant of the law. If the reasoning in this chapter is accepted, simple ignorance cannot rebut the presumption of knowledge of unlawfulness. Thus, Coetzee can be rationalised within the De Blom principle.

\textit{S v Mahdilaba}

The appellant, a member of a tribal court, had been instructed by that court to administer a sentence of corporal punishment to the complainant, who had been found guilty of stock theft by that court. The complainant’s husband was also present as he was a member of the tribal court. The appellant had also informed the complainant at the tribal court that her husband had laid a further charge against her of working without sharing her income with her husband’s other wife. The appellant whipped the complainant six times with a sjambok. The appellant was then charged with assault with intent to do grievous bodily harm and convicted.

It was found that whipping a woman was a punishment that had almost never been carried out. That, combined with the severity of the punishment and the fact that the woman’s husband was on the tribal court and had himself laid a complaint against his

\textsuperscript{90} 1993 (2) SACR 191 (T) at 196 F.
wife, were sufficient to attract the inference that "the appellant knew that the tribal court probably exceeded its powers." The court went on to say that, given the state of facts, the appellant should have known that something was wrong. But the court did not leave it at that and concluded, "[The accused’s] omission to testify, coupled with the fact that the factum probandum was peculiarly within his own knowledge, results in adequate proof that he knew the sentence of the tribal court was incompetent." [emphasis added]

This case ultimately did not confuse the subjective with the objective test. It merely highlighted the fact that applying a purely subjective test was an inherently difficult task, because at the end of the day the fact finders had to rely on objective criteria to ascertain the subjective thoughts of the accused. The point was made in De Blom itself where Rumpff CJ stated, "[The] defence can succeed if it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful."  

Indeed, in De Blom itself, it was the evidence as to the facts and the surrounding circumstances which resulted in the finding that the accused was ignorant in relation to the jewellery offence while the claim of ignorance in relation to the offence regarding the money was rejected. Basically, the belief had to be genuine and the reasonableness of that belief was relevant to its genuineness. This case did distinguish between the subjective and objective mental states. In practice however, the distinction may become slightly blurred.

91 1993 (2) SACR 191 (T) at 196 F-G.
92 1990 (1) SA 76 (T) at 80 G.
93 1990 (1) SA 76 (T) at 80 H-I.
95 S v De Blom 1977 (3) SA 513 at 532(F) (trans).
96 The classic common law illustration is the case of DPP v Morgan [1976] AC 182 where the House of Lords held that an unreasonable mistake as to consent could negative the mental state for rape, but found that the unreasonableness of the mistake was evidence that the mistake could not have been genuinely made by the accused.
CONCLUSION

South Africa recognised mistake of law as a defence by relying on principles of fundamental justice, which required individual blameworthiness. Instead of adopting the German normative approach, the South African courts relied on the subjective doctrine of mens rea and extended the psychological mental state to include knowledge of unlawfulness. This purely subjective approach to criminal fault resulted in any mistake of law being a defence, ie there was no requirement that the mistake be reasonable. Despite the concerns that the mistake of law defence may have been cast too widely, the South African experience has proven that a defence of mistake of law can successfully operate. The fear that such a defence would result in the crippling of the criminal justice system has been proved to false. As was stated in 1991, "De Blom's case has not, in South Africa, led to a rash of cases where this defence has either been claimed or upheld."97

This chapter has also sought to demonstrate that a purely subjective approach to criminal culpability is not suitable. By allowing even unreasonable mistake of law to negative mens rea, and thus criminal culpability, the South African courts had created a risk that morally blameworthy individuals could escape criminal liability. Hence, the South African courts in recent cases, endeavoured to restrict the mistake of law defence by requiring an element of reasonableness. This development was contrary to the fundamental subjectivist fault principle in South Africa. It was argued that a theoretically sound basis of limiting the mistake of law defence could be achieved by distinguishing between ignorance and mistake. Because knowledge of unlawfulness is an element of mens rea, a mistaken belief in lawfulness negatived that element. Simple ignorance on the other hand is not a mental state and therefore an objective test was necessary.

The argument developed in this thesis has been that the orthodox doctrine of mens rea should be modified so that it is not viewed as a purely subjective concept. While it is the mental state of the accused that is relevant, the blameworthiness of that mental state has to be assessed. This blameworthiness should be based on reasonable

knowledge of illegality. If the accused intentionally or recklessly engaged in unlawful conduct, and ought to have known that such conduct was unlawful, the accused would have a mens rea. By objectively evaluating the culpability of the accused’s mental state, the distinction between mistake and ignorance would not be relevant. All that needed to be shown was that the accused ought to have known that the conduct was unlawful. Whether the accused’s lack of knowledge was through reasonable ignorance or reasonable mistake did not matter. The theory of criminal culpability developed in this thesis, while recognising a defence of mistake of law, would limit that defence to reasonable mistake of law. As the South African experience has shown, that would be a preferable result.
CONCLUSION

This thesis has been concerned with the moral and legal assessment of criminal culpability. The common law, as developed in the Anglo-American tradition, has relied on the doctrine of mens rea to attribute fault in the criminal law. However, this doctrine of mens rea does not require the express evaluation of the moral blameworthiness or moral innocence of an accused. As a result, there is a risk that the morally innocent may be unfairly held criminally liable. This risk is nowhere more clearly illustrated than in the area of mistakes.

This thesis has put forth the view that the legal rule ignorantia juris non excusat cuts across the fundamental principle that only the morally blameworthy are deserving of criminal condemnation or punishment. It has been contended that this conflict could be resolved in one of three ways. First, the rule prevails; secondly, the principle prevails; or thirdly, the rule and the principle are reconciled. This principle is of fundamental importance and should not be compromised. Therefore, the first option is clearly unacceptable. However, it has not been suggested that the rule be completely rejected. It has been proposed that the rule should be curtailed within the theoretical and doctrinal framework developed in the thesis and be limited to unreasonable ignorance or mistake of law.

The unfairness of the ignorance of law rule is well recognised. The judicial solutions that have been advanced so far have been restricted to creating ad hoc exceptions to the rule. The academic solutions that have been offered, while theoretically appealing, have not yet proved to be practical. The challenge of this thesis was to develop a theoretical solution that could be realistically applied within the existing criminal law framework. To achieve this, a normative reconstruction of criminal culpability was undertaken, relying on a combined strategy of theoretical, historical, doctrinal and comparative analyses. Fault in the criminal law was reconceptualised and the doctrine of mens rea reconstructed. The new doctrine supported a defence of reasonable mistake of law.

This work has contributed to criminal law discourse in four ways. First, it has constructed a new model of mens rea. Secondly, it has proposed a new defence of
reasonable mistake of law. Thirdly, it has demonstrated the importance of a moral approach to criminal culpability. Finally, it has offered a methodology to resolve some of the contradictions in the criminal law. This methodology of combining theoretical, historical, doctrinal and comparative analyses was used to develop the central arguments of this thesis, but it can also be applied in a broader context to reconcile conflicts in any area of law. This four-pronged approach provides the necessary tools to reinterpret and recast legal doctrines and principles to better reflect the evolving moral values of society.

The reconstruction of mens rea was achieved by first reconceptualising fault. Utilising philosophical theories of punishment it was argued in Chapter I that criminal liability was only deserved when a person was morally blameworthy and had crossed the threshold of criminal culpability. Consequently, mens rea had to include moral blameworthiness. From a comparative study of German criminal law, a normative theory of mens rea was adapted to operate within the framework of Anglo-Australian criminal law. It was argued that to demonstrate moral blameworthiness it had to be shown that the accused knew or ought to have known that the conduct was wrongful. To avoid criticism that the proposed model was departing from the positivist tradition and requiring an investigation into the moral virtue of the accused, it was argued that this objective knowledge be limited to knowledge of illegality, rather than the broader notion of wrongfulness.

Under the proposed model, mens rea was divided into two components: the mental state or the "mens" which is subjectively assessed, and the blameworthiness or the "rea" which is objectively assessed. The doctrinal analysis of mens rea in Chapter II demonstrated how the courts were already relying on a normative approach to mens rea. However, because this normative element was not explicit, courts were forced to manipulate the orthodox mental states such as intention and recklessness. Although not presently expressed in normative terms, recklessness as inadvertence perfectly illustrates the model of fault that is proposed. It was held, in sexual assault cases,\(^1\) that an accused who failed to consider the issue of consent was reckless. Instead of

treating the mens rea in such cases as inadvertence, the proposed model would treat
the accused’s intention to have intercourse as the “mens” and the unreasonable
ignorance of consent (the legality of the conduct) as the “rea”. The former is
subjectively determined; the latter, objectively. In this manner, it can fairly be said
that the mens was rea and that the accused was morally blameworthy and therefore
deserving of criminal condemnation.

In addition to the theoretical and doctrinal analyses of fault and mens rea in the first
two chapters, the thesis provided case studies of fault and mens rea in Chapters III and
IV respectively to illustrate the relevance of moral blameworthiness. The intoxication
cases, as discussed in Chapter IV, provided the clearest evidence of the conflict
between the orthodox mens rea theory and the intuitive requirement of moral
blameworthiness. The House of Lords in Majewski explicitly acknowledged the
normative deficiency of the orthodox mens rea theory. The court’s reasoning was
influenced by it’s and the community’s moral intuition that an individual who
voluntarily intoxicates him or herself to the point of losing control is morally
blameworthy if he or she commits a crime. The descriptive theory was unable to
attribute fault because of its emphasis on technical, psychological mental states, rather
than on normative, blameworthy mental states. The Majewski court, in limiting the
defence of intoxication, implicitly relied on normative notions of criminal culpability.

The strict liability regime was used as a stark example of how criminal fault was
based on an objective assessment of knowledge of wrongfulness. In several
jurisdictions, courts have recognised defences of honest and reasonable mistake, or
reasonable care or due diligence. The common theme in all of these defences was that
the accused was reasonably mistaken or ignorant of the wrongfulness of the conduct.
While these strict liability offences rejected any requirement of subjective mens rea, it
could equally be argued that the reconstructed doctrine of mens rea explained these
cases. Where the defences mentioned above were absent, it could be said that the
accused had intentionally engaged in the particular conduct while unreasonably
ignorant or mistaken as to its legality. This is an example of when the mens was rea.

Having reconstructed mens rea to include an objective component of knowledge of
illegality, reasonable mistake or ignorance of law became relevant to criminal
culpability. The ignorantia juris non excusat maxim, which would have prevented this defence from operating, was challenged in Chapter V. It was demonstrated that the rule was historically unsound and that it was no longer defensible. The doctrinal analysis of mistake in Chapter VI strengthened the argument for a defence of reasonable mistake of law. The lack of a normative approach resulted in criminal liability being a matter of chance rather than measured assessment of moral blame in some cases. The comparative study of South African criminal law provided compelling evidence of the viability of a defence of reasonable mistake of law. The thesis thus achieved its twin aims of reconstructing mens rea to include an objective assessment of knowledge of illegality and proposing a defence of reasonable mistake of law.

The historical and doctrinal analyses in Chapters I and II revealed that the criminal law has almost completely departed from its moral origins. This study has advanced the view that, while criminalisation need not necessarily be justified on a moral basis (although it may be desirable), the principles governing criminal fault always should. The present debates on law and morality in the criminal law are directed at the enforcement of morals.\textsuperscript{2} This thesis, instead, has focused on the morals of enforcement. If a criminal sanction is to be imposed on an individual it must be morally justified. It is only morally justified if the accused is morally blameworthy and deserving of criminal sanction. Otherwise, it is unfair. It may be legal but it is not just, and it will be counter-productive in the long run as the moral authority of the law is weakened.

The methodology of combining theoretical, historical, doctrinal and comparative analysis has successfully reconciled some of the tensions that exist in the criminal law. Dichotomies such as subjective-objective, retributivism-utilitarianism and principle-policy are treated in contemporary discourse as opposing values, which cannot coexist. By examining the historical context and exploring descriptive and normative theories of fault, these dichotomies can be recast so as to coexist symbiotically. Rather than undermining the doctrinal integrity of criminal culpability,

these dichotomies, understood in the proper historical and theoretical context, can, in fact, strengthen it. For example, it has been shown that mens rea can remain essentially subjective while facilitating an objective, normative evaluation of fault. Instead of pitting retributivists against utilitarians, this thesis has shown how each contributes to different aspects of the debate. Thus, retributivism was relied on to justify punishment at an individual level, while utilitarianism was relied on at an institutional level. By reflective reinterpretation, the tension between principle and policy, so vividly illustrated by the intoxication cases was reconciled. The legal rule was harmonised with normative principles of culpability.

This thesis has shown that normative evaluation of blameworthiness exists as a hidden doctrine of fault in the criminal law. It creeps in through creative judicial reasoning and through juries being encouraged to use their "common sense" to evaluate the blameworthiness of the accused. As long as this normative fault doctrine is not formally recognised and expressly applied there will always be a risk that a morally innocent accused will be unfairly caught by the criminal law. This thesis offers a practical solution to avoid such injustice in one situation, namely the risk of unfairly punishing an accused who, although reasonably mistaken or ignorant of the law, is morally innocent.
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