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MARGARET BRIGGS

A thesis submitted for the degree of Master of Laws
at the University of Otago, Dunedin, New Zealand.
April 1994.
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Wilson v Inyang [1951] 2 KB 799


Wroblewski v Starling [1987] WAR 233

Younghusband v Luitig [1949] 2 KB 354
I INTRODUCTION

Some of the most pervasive problems in the criminal law arise from claims that an actor was ignorant or mistaken about conduct in apparent breach of a criminal prohibition. As in human affairs generally, mistakes affecting criminal liability can occur in different ways and for different reasons. In response to claims of mistake, the criminal law has developed various strategies that reflect these differences in the nature and object of mistakes. Conventional theory proceeds from the premise that mistakes can be divided into two categories: mistakes of fact and mistakes of law. As a general conclusion from that premise, mistake of fact can exclude criminal liability but mistake of law is regarded as no excuse for a breach of a criminal prohibition. Thus it is said to be a "truism" that a mistake of fact can negate the mental element of an offence. Mistake of fact may also afford a defence where it relates to a matter of justification or excuse. But in contrast to those cases of mistake of fact, the criminal law adheres to a strict exclusionary policy in the case of mistakes of law. Subject to very few established exceptions, it is no answer to a criminal accusation that a person did not know of the existence of a criminal prohibition or was mistaken as to the application, operation or scope of some provision of the criminal law.

The focus of my examination will be on the general exclusionary rule that mistake of law is no excuse for breaching a criminal prohibition. I will therefore be mainly concerned with mistakes about the existence, application and scope of legal provisions. While mistake of fact will be considered in contradistinction to mistake of law, it will not otherwise be examined in its own right. Two other preliminary matters about the scope of

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1 Being ignorant and being mistaken are not synonymous mental states. Ignorance means lack of knowledge, whereas mistake implies an incorrect understanding of, or conclusion about a particular matter. Attempts to distinguish between ignorance and mistake in this context have nonetheless been dismissed as "pure sophistry": Stuart, Canadian Criminal Law (2nd ed, 1987) 272, citing Keedy, "Ignorance and Mistake in the Criminal Law" (1908) 22 Harv L Rev 75 at 76. Ignorance is generally regarded as encompassing mistake: O'Connor, "Mistake and Ignorance in Criminal Cases" (1976) 39 Mod L Rev 644 at 652, Perkins, "Ignorance and Mistake in Criminal Law" (1930) 88 U Pa L Rev.


4 Adams, idem. See also R v Naziif [1987] 2 NZLR 122 (CA); R v White (Shane) [1988] 1 NZLR 122 (CA); R v Raroa [1987] 1 NZLR 486; (1987) 2 CRNZ 597 (CA).
my inquiry should also be established. First, I will not examine the implications of mistakes relating to justificatory and excusatory claims such as self-defence, compulsion, duress and necessity. And secondly, the general catchment of mistake will not include the relationship between mistake and impossibility in the inchoate offences of attempt, conspiracy and incitement.

Following an historical account in Chapter II of the mistake of law rule now canonised in section 25 of the Crimes Act 1961, in Chapter III I will critically assess the arguments traditionally advanced in justification of the rule.

The succeeding chapters will examine particular instances of mistake of law. In Chapter IV I will consider the position of the individual charged with violating a law that is either unknown or unknowable whether because of non-publication, unavailability or inaccessibility.

Chapter V deals with the different situation where the law, though published or otherwise made available, is misrepresented to an individual by an official of the state. I will examine the central instance of "officially induced error of law" alongside related problems arising from reliance on overruled judicial decisions, legislative enactments and the advice of private legal counsel.

In Chapter VI I turn to the general question of the exculpatory effect of mistake as a matter negating mens rea. This chapter will include an examination of the elusive distinction between mistake of fact and mistake of law, as well as an assessment of the scattered instances where mistake of law has been recognised as negating the mental element required to establish criminal liability.

The purpose of my inquiry is both descriptive and prescriptive. On examination the

5 See Fletcher, Rethinking Criminal Law (1978) ch 9 for a general conspectus of mistake organised according to structural categories of liability.

mistake of law rule emerges as a fragile proposition rationalised by appeal to fiction and utilitarianism. As actually applied, the rule is not only dependent on an uneasy distinction between fact and law but is also subject to various exceptions that have developed almost randomly around its core. Even more importantly, the rule seems to have little, if any, correspondence with fundamental notions of blameworthiness and fairness. Thus the person who has made a mistake of law is often no more or less blameworthy than the person who has made a mistake of fact. Yet the difference between inculpation and exculpation depends on the distinction between mistake of law and mistake of fact.

My claim, then, is that the mistake of law rule is suspect, both instrumentally and normatively. As an instrument for ensuring the objectivity of the law and respect for the principle of legality the rule lacks a convincing rationale and seems to rest on the questionable assumption that acceptance of an excuse of mistake of law would undermine the system itself. And normatively, the justifications traditionally intoned in defence of the rule fail to explain why it is wrong or culpable to be mistaken about the law.

However any prescription for change must, in the first instance, be relatively modest. In the final chapter I assess some of the historical, doctrinal and systemic constraints on recognition of a general "defence" of mistake of law - at least for the present. Even so, what is achievable is wider recognition of the exculpatory effect of mistake of law in place of the existing piecemeal exceptions to the current exclusionary rule. I conclude by formulating a draft provision to that effect.
II HISTORICAL ANALYSIS

The rule excluding ignorance of the law as an excuse first appeared in the Criminal Code Act 1893 and has survived unchanged in two successive re-enactments. While the original formulation was derived from the Draft Criminal Code of England 1879, the history of this rule can be traced back to the Graeco-Roman era.

One of the earliest references to mistake is in the *Nichomachean Ethics* where Aristotle argued that behaviour in ignorance of the facts was involuntary. According to one commentator "[i]t has been recognised since the time of Aristotle at least that acting under mistake or ignorance of relevant fact negatives moral liability, and the classic English writers have accepted this view."  

However, more was made of the doctrine by the Romans than the Greeks, at least in a practical, working form. Thus the *Digest* made the distinction between mistake of fact and mistake of law ("error juris nocet, error facti non nocet"). Blackstone was of the opinion that the maxim as known at English law was a rule of both Roman and English law. Yet more contemporary authorities would temper the force of Blackstone's assertion. The preponderance of opinion is that while the *Digest* did indeed make the distinction between mistake of fact and mistake of law, the Romans never applied the doctrine to the criminal law. As Keedy notes, "[t]he context and the examples given..."
in the *Digest*, to illustrate the maxim, show that it was applied solely to civil actions and had no application in the law of crimes."

Apart from the division between civil law (*jus civile*) and criminal law, Roman law also distinguished the *jus civile* from the *jus gentium*, the law that had developed from the customs of the Italian tribes, embodying "the basic rules of conduct any civilised person would deduce from proper reasoning." Mistake (or ignorance) was no defence under the *jus gentium* because it reflected the moral law which was knowable (*naturali ratione*). But mistake (or ignorance) was a defence—to a limited extent at least—under the more complicated and less "commonsense" *jus civile*. Those who were afforded a defence under the *jus civile* were women, males under twenty-five years of age, soldiers, peasants, persons of low intelligence (lacking in capacity), and generally those who had not had an opportunity to consult counsel. The remaining sections of the community could be reasonably supposed to know the *jus civile*.

The *Digest* explored the question why *ignorantia juris* would not excuse, whereas *ignorantia facti* would, and came to the conclusion that "the law is certain and capable of being ascertained, while the construction of facts is difficult for even the most circumspect." Although the *Digest* contained "the roots from which the later division of error into error of law and error of fact, excusable and inexcusable, vincible and invincible error, evolved ...", it did "not suggest that error of fact [was] equated with excusable and error of law with inexcusable error." The Romans believed the law was ascertainable, while facts were more elusive, transitory, and harder to ascertain. On that basis, errors of fact could be excused more easily and readily than errors of law. But that is not to say that errors of law would never have been excused.

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8 Idem.
9 Cass, supra n 7. The *jus gentium* was a kind of imperial law applied to non-Roman citizens (or "barbarians").
10 Stuart, supra n 7 at 274.
11 Cass, supra n 7 .
12 Stuart, supra n 7 at 274; Cass, ibid at 685.
13 Matthews, supra n 4 at 175.
14 Keedy, supra n 6 at 78, referring to *Digest* 22.6.2. The conclusion that the law is capable of being ascertained may be more correct of a civil system than of the common law. See Stuart, supra n 7 at 274, who more accurately summarises the common law position.
15 Ryu & Silving, supra n 7 at 426.
There is evidence that the Romans did not draw a rigid distinction between error of law and error of fact.\textsuperscript{16} Thus the \textit{Digest} includes statements indicating a difference in degree rather than in kind, \textit{\emph{in facto magis, quam in jure errat}} — (he erred more as to the fact than as to the law.)\textsuperscript{17} Accordingly, there is some force to the view that the later assumption of a sharp distinction between error of fact and error of law derived from a canonist misinterpretation of Roman sources.\textsuperscript{18}

If we are to accept this explanation of the early source and form of the maxim \textit{\textit{error juris non excusat}}, then the maxim as we know it in modern law is probably only partly evolved from classical origins. While Roman concepts may have contained the germ for the less tractable early English doctrine of mistake, an amalgam of other influences understandably overlaid the sophisticated Roman theory.

Although it is difficult to glean much information on mistake until the time of Bracton\textsuperscript{19} in the thirteenth century, most historians and commentators are of the opinion that the maxim is a relic of the pre-Norman or early-Norman zeal for absolute liability, regardless of any mistake, fact or law.\textsuperscript{20} According to Potter, "[i]n both early Germanic

\begin{itemize}
  \item \textsuperscript{16} Idem.
  \item \textsuperscript{17} \textit{Digest} 22.6.2.
  \item \textsuperscript{18} Ryu & Silving, supra n 7 at 426, "the maxim \textit{\textit{error juris non excusat}} is historically traceable to a canonist misconception of Roman sources."
  \item \textsuperscript{19} Bracton, "\textit{De Legibus et Consuetudinis Anglia}" — (Bracton, "On the Laws and Customs of England"). (Woodbine ed, 1968). I Stephen, \textit{A History of the Criminal Law of England} (1883) 51, articulated the problem of locating the exact genesis of any long-established doctrine as, "a matter of great difficulty, indeed I think it would be impossible, to give a full and systematic account of the criminal law which prevailed in England in early times. The original authorities are scanty, and all presume the existence of the very knowledge of which we are in search. Both the laws of the early kings and our own statute book presuppose knowledge of an unwritten law. Our own unwritten law can still be ascertained but such parts of the earlier law which were not written down have absolutely disappeared".
  \item \textsuperscript{20} Hall & Seligman, supra n 7 at 643; Stuart, supra n 7 at 274, argues, '[i]egal historians dispute Blackstone's reference to Roman law and, despite the Roman words of the maxim, locate the origin of the arbitrary rule that ignorance of the law is no excuse in the pre-Norman or Norman enthusiasm for absolute responsibility." Cass, supra n 7 at 685, "[t]he English law adopted \textit{\textit{ignorantia legis}} without the qualifications that, under Roman law, tempered its harshness." See also Sayre, "\textit{Mens Rea}" (1931) 45 Harv L Rev 974, who cautions that the generally held perception that the ancient laws imposed absolute liability is something of an oversimplification. Early "criminal law" was based on the "blood feud", and the idea of revenge: an eye for an eye. Sayre opines that the more provocative the injury, the more appropriate would vengeance become. Sayre acknowledges that the preponderance of evidence from ancient sources points to "criminality without criminal intent" (at 976), but cautions that we must be wary of accepting this state of affairs at face value: "Just because the old records fail to show mens rea as a requisite for
and Anglo-Saxon law apparently little or no account was taken of criminal intent .... The laws of Henry I [circa 1118] said, 'Who sins unwittingly shall knowingly make amends.' "21

By the twelfth century, however, there was evidence of a new emphasis on moral culpability. This was attributable to canonist influence and a revival of interest in classical Roman legal theory,22 including such important concepts as “dolus” (dolus mala—intent) and “culpa” (culpa lata—gross negligence). These notions provided the conceptual framework for the later doctrinal development of mistake.

Bracton was himself strongly influenced by canonist and Roman law concepts.23 As Potter explains, Bracton desired to rationalise the unsatisfactory state of the law in the thirteenth century by the aid of canon and civil law, but his ideas were rather too “finished for a primitive system,” although “they led the way to discrimination” between culpable and non-culpable states of mind.24 However, at this stage there was still no firm evidence that the mistake doctrine and the distinction between fact and law had entered English law. Sayre maintains that “[t]here seems to have been at that time no well-recognised general doctrine that a reasonable mistake of fact, by negating the existence of the requisite mens rea, freed the defendant from criminal responsibility.”25

criminality, must not necessarily mean that even in very early times the mental element was entirely disregarded. This was because the very nature of the majority of the early offences rendered them impossible of commission without a criminal intent.” (at 981). Examples of such offences would have been waylaying, robbery and housebreaking. Moreover, the intent of the defendant was a decisive factor from earliest times in deciding on penalty (at 981). See also Potter, Potter's Historical Introduction to Criminal Law (Kirlady ed, 4th ed, 1958) 75 for an extensive discussion of the blood feud.

21 Potter, ibid at 357 acknowledges that the laws of Henry I also provided that neither infants nor lunatics were made liable.
22 Potter, idem, suggests that the Church became influential in the thirteenth century. See also Ryu & Silving supra, n 7 at 427-428 for a discussion of canon law, and Sayre, supra n 20 at 980, who gives the example that under early Anglo-Saxon law, the person who unwittingly caused another's death through pure misadventure, would be liable to punishment by death. To punish with death violated the idea of moral guilt derived from the canonists. By the thirteenth century progress was made towards recognition of criminal intention via a procedural device whereby the Court convicted the actor as the law required, but the king could then pardon the actor, thus saving his life.
23 Supra n 19. See Sayre, supra n 20 at 987, who found Bracton “emphasised, often beyond the actual law of his day, the mental requisites of criminality”.
24 Supra n 20 at 357.
25 Sayre, supra n 20 at 1015-1016.
This is evidenced by the very few early references to mistake in the case law. The first English case to consider mistake was decided in Hilary Term, 1231. Robert Waggehastr, the defendant, was fined for going onto land in the possession of the complainant's mother. On breach of the fine he pleaded that he believed the land belonged to him and that he based this belief upon advice given to him by counsel. His excuse was held to be no defence and he was imprisoned. Assuming that this case was one relating to mistake of law (although not defined as such in the case), the decision might arguably stand for the proposition that "mistakes of law are no excuse". This is, of course, purely speculative since the decision is equally explicable on the ground that the law's predilection for absolute responsibility was still prevalent.

By the fourteenth century there is written evidence that mistake or ignorance had been recognised as a legal concept. The Mirror of Justices discusses mistake in detail. While the Mirror has been repeatedly denounced for failing to give an accurate account of the law, its examination of mistake is nevertheless invaluable as early documentary evidence of the doctrine's existence. The Mirror examines mistake of fact in the unusual context of judges who wrongly put a man to death:

[W]e must distinguish, for one kind of ignorance is that of a thing that is unknown and not to be known, and this is an excuse; another is ignorance of a thing that is unknown but which is to be known though is not bound to know it, and this also is an excuse; but the third is ignorance of that which one is bound to know and this is no excuse. And note that ignorance in itself is no sin, but neglect to know is a sin; and the judge does not sin by not knowing the law, but he does sin if of his own folly he undertakes to judge and does so foolishly or falsely.

And there is a fourth kind of ignorance which consists in thinking otherwise than is right of some matter, and if this be ignorance of fact it excuses, but if it be ignorance of law it is no excuse. Or put it thus: there is an ignorance that is superable, and there is an ignorance that is insuperable, and that is an excuse, whether it arises from nature, as from excessive age, or from a malady such as madness.

In describing the "fourth kind of ignorance", the Mirror really sets out the doctrine of

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26 See Keedy, supra n 7 at 78.
27 Erroneous advice of counsel was at least no excuse in 1231, and that presumption has continued to present times.
mistake as it is known today. One explanation for the recognition of the doctrine may be that the authors of the *Mirror* were directly affected by canonist and civil law influences that had taken hold by this time. On the other hand it may be that the doctrine did prevail in earlier times but that the documentary evidence of this was either lost or was never in fact recorded systematically.

The next instance of mistake in the case law is the case of Sir William Hawksworth, cited by Hale as being decided in 1471.29 Hawksworth, wanting to end his life, ordered his parker to shoot the next trespasser to enter his park who would not come forward and identify himself. That night Hawksworth entered his own park and, upon refusing to come forward, was shot and killed by the parker. This was clearly a mistake of fact in that the parker was mistaken as to the identity of the trespasser. However, he was not acquitted on the ground of his mistake but rather under the Statute of Malefactores in parcis, which authorised parkers to kill trespassers in parks who would not yield or stand.30 The case is consequently of limited value for the purposes of tracing the development of mistake of fact and mistake of law.

Hale also refers to a similar case31 where a man ordered his servant to keep watch over his cornfield at night in order to prevent deer from eating the corn. The servant was commanded to shoot if he heard anything rush into the corn. The master, standing in another part of the field, himself made a sudden rush into the corn, and the servant:32

> [A]ccording to his master's direction shot and killed his master ....
>
> It was agreed on all hands, this was neither petit treason or murder, but whether it was simple homicide, or per infortunatum, was a great difficulty: First, the shooting was lawful when the deer came into the corn; ...again the error of the servant was caused by the master's direction, and his own act; but if it had been a stranger that had been killed, it had been homicide, and not misadventure; on the other side, the servant was to have taken more care; and therefore for the omission of due diligence, and better inspection, before he adventured to shoot, it might amount to manslaughter, and so be

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29 I Hale, *Pleas of the Crown*, (1680) 40. See also I East *Pleas of the Crown* (1803) 275 for further discussion of the Hawksworth case; Sayre supra n 20 at 1015.

30 21 Edw I (1293).

31 Hale supra n 29 at 40, 476. See also Sayre, supra n 20 at 1015.

32 Idem.
capital, and this seems to be the truer option.

Sayre maintains that this case is a valuable record for two reasons. First, it acknowledges the modern doctrine of criminal negligence. But more important in this context:

[B]ecause of the dictum that had there been no negligence the servant would have been guilty in spite of his innocent mistake unless the mistake were caused by the victim. There seems to have been at that time no well-recognized general doctrine that a reasonable mistake of fact, by negating the existence of the requisite mens rea, frees the defendant from criminal responsibility. Hale classifies the defense in both the foregoing cases under a killing by 'casualty and misfortune'.

Rather anomalously, in Vernon's case, ignorance of the law was accepted as an excuse. There the plaintiff brought an action claiming that the defendants had kidnapped his wife. The defendants argued that they were taking her to Westminster for a divorce and their claim was accepted, notwithstanding that Westminster was not the correct place to get a divorce. That decision was made upon the basis that the defendants might not have had knowledge of the law as to where divorce should be sued. While the ruling seems at odds with earlier cases, it may be rationalised with the other decisions on the footing that it was a civil case, the action being one of trespass against the defendants.

The Doctor and Student Dialogues (1523) also contain several discussions about mistake of fact and mistake of law. In the First Dialogue the Doctor, in the course of discussing a criminal action concerning the recovery of title and restitution for the wrongful taking in a fee simple, says, "ignoraunce of the dede may excuse but ygnoraunce of the

33 Idem. (1505) YB 20 Hen VII, f 2, p 14. See also Keedy, supra n 6 at 78.
34 Hall & Seligman, supra n 7 at 644.
35 Hall & Seligman, ibid at 645; Keedy, supra n 6 at 78; Matthews, supra n 4 at 174; Singer, supra n 28 at 463. Doctor and Student Dialogues (Selden Society, 1974) vol 91 at XIV-XV, record that the First Dialogue was first published in 1523, although no copy remains. The First Dialogue was reprinted in 1528. The Second Dialogue was published in 1530.
36 Selden Society ibid at 162. Singer, idem, questions the use of the adverb "may" which he suggests creates a limitation on the excuse. Alternatively, he theorises that the "may" might simply be a substitution for "does". He also argues that the "may" could require the mistake to be honest, or that a person is not entitled to close his or her eyes to create a mistake.
law excusyth not but it may be invyncyble.” This is followed by passages in the Second Dialogue where the Student says:

Ignoraunce of the law though yt be invuncyble (invincible) doth not excuse as to the lawe but in fewe cases for every man ys bounde at hys peryll to take knowledge what the lawe of the realme is as well the lawe made by statute as the comon lawe but ygnoraunce of the deede whiche may be callyd the ygnoarance of the trouth of the deede may excuse in many case.... And somtyme they that be ygnoraunt of a statute be excusydf fro the penaltye of statute because it shall be taken that the intente of the makers of the statute was that noone shall be bounde but they that have knowledge.

There is evidence therefore that St German thought that ignorance or mistake of the law would excuse in “some” cases, dependent on legislative intent and statutory purpose. Keedy notes that the doctrine was equally applicable to both civil and criminal cases.

By contrast with Vernon’s case, in Brett v Rigden (1568) ignorance of the law was held not to excuse. That was also a civil case involving a dispute about property and estate law. It was argued that a will ought to be interpreted at the testator’s death rather than at the date of execution. Counsel in support of the will argued that as “everyone is presumed to know the law”, the testator must likewise be presumed to have intended his words to be construed as at the time they would take effect. In the course of his judgment Manwood J said, “It is to be presumed that no subject of this realm is miscognisant of the law whereby he is governed. Ignorance of the law excuses no-one.”

It is doubtful whether this case is useful authority for the mistake rule as it applies at criminal law, although both Hale and Blackstone cite it as authority for the proposition that ignorance of the criminal law is no excuse. It has been pointed out that not only is this a civil case but, moreover, the excerpt cited by Hale and Blackstone refers only to argument put by counsel and not the court’s decision. The Court of Common Pleas in fact found for the opposite construction—that is, that the words should be construed at the date of the execution of the will.

38 Selden Society ibid at 279.
39 Keedy, supra n 6 at 79.
40 1 Plow 340 at 342; 75 ER 516 at 520.
41 Idem.
There are two more civil law cases decided around the same time as Brett v Rigden, each finding that ignorance or mistake as to the law was no excuse. In Mildmay\(^4\) (1568), the plaintiff brought an action against the defendant on the ground that he had slandered the plaintiff’s title by claiming that title to the land in question lay with another person. However, “[t]he Court held that, as the defendant had taken upon him a knowledge of the law, he must be bound, as ‘ignorantia juris non excusat’.”\(^4\)

The same conclusion was reached in Manser\(^5\) (1584). There, an action of debt was brought against the defendant. The evidence established that the defendant and his son were to sign a release to the plaintiff. The plaintiff prepared the release and demanded their signatures. The defendant’s son was illiterate and the defendant requested that they be allowed to take the release to someone “learned in the law”, who would be able to tell him if the document was according to the verbal agreement. The plaintiff refused to allow this and brought the action. The Court decided that the son was not entitled to have time to consult counsel but should have signed the release immediately, since his ignorance of the law was no excuse.

Manser’s case is a good example of the lack of subtlety in English law as compared with Roman law. Under the Roman jus civile those who had not had an opportunity of consulting counsel had a defence. However, despite the influence of Roman law on emergent concepts of culpability in English criminal law, it is apparent that by the end of the sixteenth century English law had not adopted the exculpatory exceptions developed for mistake at Roman law.

By the seventeenth century the exclusion of mistake of law as an excuse seems to have been firmly established. In King v Lord Vaux\(^6\) (1613), for instance, the defendant was charged with refusing to take the oath of allegiance. He asked for counsel

\(^{43}\) I Co Rep 175.  
\(^{44}\) Keedy, supra n 6 at 79.  
\(^{45}\) 2 Co Rep 3. See Keedy, idem.  
\(^{46}\) 1 Bulst 197. Keedy supra n 6 at 79. Williams, Criminal Law - The General Part (2nd ed 1961) 290, n 1, notes that Popham CJ in the case of Blunt (1600) 1 St Tr 1450 also applied the “ignorantia juris non excusat” doctrine.
to speak for him, "he being very ignorant of the proceedings of the lawes of this land."
His defence was rejected in categorical terms,"for though he do pretend ignorance in
himself in the lawes of the land (of which no subject of the land ought to be ignorant), for
that his ignorance will not excuse him, if so be that he do offend against the law."

Levett's case47 (1638) has been described as forming the foundation for the modern
doctrine that mistake of fact does excuse.48 William Levett was indicted for the homicide
of one Frances Freeman. He and his wife were woken at midnight by their servant who
said she heard someone breaking into the house. The "intruder" was located in the buttery.
However it was, in fact, Frances Freeman who had been helping the Levett's servant with
her work. When the servant believed she heard an intruder she had hidden Freeman in the
buttery before alerting her employers. Unfortunately, Levett:49

[N]ot knowing the said Frances to be there in the buttery, hastily
entered thereon with his drawn rapier, and being in the dark and
thrusting with his rapier before him, thrust the said Frances under
the left breast, giving her a mortal wound, whereof she instantly
died, and whether it were manslaughter, they prayed the discretion
of the Court—And it was resolved, that it was not: for he did it
ignorantly without intention of hurt to the said Frances: and it was
there so resolved.

While Levett's case has been cited as establishing that mistakes of fact do excuse, Singer
takes this further and considers whether the case also stands for the idea that the mistake
must be reasonable. He concludes that the case "might support strongly the view that the
law in the seventeenth century ... was relatively unconcerned with whether mistake was
reasonable or unreasonable; if done under an honestly held mistake of fact, an act was not
to be condemned simply because of unhappy results."50 If this is correct, it may be

47 The only available reference to the case itself is to be found in Cook's case, Cro Cav 557, where
Levett's case is discussed. See Keedy, supra n 6 at 79–80; Singer, supra n 28 at 461. Earlier
references to Levett's case are to be found in: 1 Hale, Pleas of the Crown 474; 1 East, Pleas
of the Crown (1803) 274; 1 Hawkins, Pleas of the Crown (1716) 73; 1 Foster, Crown Law
48 Sayre, supra n 20 at 1016.
49 Supra n 47. Cro Cav 557 at 558. Singer, supra n 28 at 461 says that Levett must have been
charged with murder, although there is no evidence of this. The case reports merely an indictment
for homicide, and the later reference is to manslaughter only.
50 Idem. Singer's primary aim in considering Levett is to trace the genesis of the inclusion of a
requirement of reasonableness within the mistake of fact limb of the doctrine.
assumed that the “reasonableness” qualification was a later development.

By the seventeenth century mens rea as a requisite of criminality had become firmly established. From the time of Bracton’s writings in the thirteenth century that moral blameworthiness ought to be an element of liability, there gradually developed a general requirement of a mental element in criminal offending. Coke expressed this in 1641 in terms of what has become a well-known maxim, “actus non facit reum nisi mens sit rea”. This acceptance of a mens rea requirement would arguably have influenced the development of mistake of fact, which negatives the mental element necessary for criminal offending.

By the late seventeenth century, the mistake doctrine was the subject of some refinement. In Pleas of the Crown (1680) Hale wrote:

Ignorance of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, doth not excuse any, that is of the age of discretion and componens from the penalty of the breach of it; because every person of the age of discretion and componens is bound to know the law, and presumed so to do... But in some cases ignorantia facti doth excuse, for such an ignorance many times makes the act itself morally involuntary.

Hale describes some of the situations in which the act is made “morally involuntary”. These include cases of “misfortune and casualty”, and the soldier who, during wartime, in ignorance strikes or shoots a superior, taking him to be an enemy. Hale’s reference to moral involuntariness indicates an inclination towards the influence of the canon law on the common law. Although now over three centuries old, Hale’s comments continue to “be considered as the basic statement of the law of England as to ignorantia.”

Blackstone, writing a century later, propounded the idea that all defences could be reduced to a single consideration: “The want or defect of will...so that to constitute a crime

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51 3 Coke, Institutes Of The Laws Of England (1641) 6, 107, translated by Lord Kenyon in Fowler v Padget 7 Term Rep 509, at 514, as “The intent and the act must both concur to constitute the crime.”
52 Hale, supra n 29 at 42.
53 Ryu & Silving, supra n 7 at 430.
54 Keedy, supra n 6 at 80. It should be noted, however, that Hale’s inclination toward canonist doctrines may have lost some of their fervour in the twentieth century.
against human laws, there must be first, the vicious will; and secondly, an unlawful act consequent upon such vicious will."\(^55\) He broke "defects of will" into different species, the fifth species dealing with ignorance or mistake:\(^56\)

Fifthly 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 the will acting separately, there is not that 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. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action: but if a man thinks he has a right to kill a person excommunicated or outlawed, whenever he meets him, and does so; this is wilful murder. 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.

Clearly, therefore the distinction between fact and law was well entrenched by the time of Blackstone. Interestingly, Blackstone refers to both ignorance and mistake, which appears to be the earliest use of the two terms jointly.\(^57\)

In conclusion it can be seen that there has been a slow, if not systematic, development of the mistake doctrine in English law. Although its origins are not at all clear, by the seventeenth century Hale had worked the doctrine into a form which has changed little to the present day. A division had been drawn between mistake of fact and mistake of law, the former being recognised as an excuse and the latter being recognised as no excuse. Since those times the mistake doctrine has been encapsulated into statute law in some jurisdictions of which section 25 of the Crimes Act 1961 is an example. In other jurisdictions the rule has remained firmly entrenched in the common law. However, the time has come to question the relevance of the doctrine in the late twentieth century in the light of major changes to the law in other respects, including increased emphasis on the central concepts of blameworthiness and culpability. The following chapter will examine the justifications offered in support of the rule that ignorance or mistake of the law is no excuse and introduce some arguments against the traditional rule.

\(^{55}\) Supra n 6 at 20-21.

\(^{56}\) Idem.

\(^{57}\) O'Connor, "Mistake and Ignorance in Criminal Cases" (1976) 39 Mod L Rev 644 at 645.
III JUSTIFICATIONS FOR THE TRADITIONAL RULE: ARGUMENTS FOR AND AGAINST

The purpose of this chapter is to examine the various reasons that have been advanced to justify the general rule expressed by the maxim *ignorantia juris neminem excusat, ignorantia facti excusat*. The maxim expresses a fundamental distinction that has become formalised in legal theory. Whereas mistake of fact has long been regarded as an excuse to an accusation of criminal conduct, mistake of law has generally been regarded as irrelevant to criminal liability. Therefore the focus is on mistake of law and the reasons for denying the exculpatory effect of this kind of error. In considering the historical tradition against recognising mistakes of law I will also consider whether the formal exclusion of these mistakes is currently defensible in terms of both principle and policy.

Historically, the proposition that mistake of law is no excuse has been justified by appeal to fiction, morality and utilitarianism. The earliest attempts to rationalise the maxim *ignorantia juris neminem excusat* drew partly on the Roman view that mistake of law was culpable because the law itself consisted of a body of definite rules that were capable of discovery¹ and, perhaps even more, on the pre-Norman and Norman zeal for absolute liability. Thus Hale wrote that "[e]very person of the age of discretion and *compos mentis* is bound to know the law, and presumed to do so."² Similarly, Blackstone's view was that "a mistake 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."³

The presumption that we know the law is patently fictitious. Nobody, especially in the late twentieth century, can be said to "know the law". Why then is such a generalisation so often made? Fuller concludes that a legal fiction is either a statement which is propounded with a complete or partial consciousness of its falsity, or a false

² *Pleas of the Crown* (1680) 42, cited by Stuart, ibid at 273.
³ 4 *Commentaries* (1772) 27, cited by Stuart, ibid at 274. Note also that a modern day proponent of the idea of presumption of knowledge argues that ignorance is in itself blameworthy: Weller, "The Supreme Court of Canada and the Doctrines of Mens Rea" (1971) 49 Can Bar Rev 281 at 317.
statement recognised as having utility. In turn these two definitions can be used to help explain the presumption that we all know the criminal law. First, it is true that nobody could seriously claim that anyone knows all the law. But secondly, the fiction nevertheless does serve a useful purpose: the conclusive presumption that everyone knows the law is intended to escape an assumed moral principle that it is unjust to impose criminal liability on someone who does not know the law.\textsuperscript{5} On the one hand the law assumes a general principle of justice while, on the other hand, it invents a fiction to satisfy the principle. Indeed, Fuller correctly observes that "the only recognition that the assumed principle finds is in the very fiction by which it is evaded."\textsuperscript{6} He concludes that the presumption that everyone knows the law is a "non-historical" fiction—in other words, not one which has introduced a change into the law.\textsuperscript{7} Rather, Fuller terms the mistake of law presumption as an "apologetic or merciful" fiction in that it apologises for the necessity in which the law finds itself of attributing to people legal consequences that they could not even remotely have anticipated.\textsuperscript{8} To put it another way, "this fiction is a way of obscuring the unpleasant truth that this [knowledge of the law] cannot be the case."\textsuperscript{9}

Arguably, this explanation was less patently fictitious in times when the body of criminal prohibitions was closely linked to what the canonists pronounced to be wrong and immoral. However, as Hall observes, "whatever may have been its original persuasiveness in small communities, this [presumption] seems so far-fetched in modern conditions as to be quixotic."\textsuperscript{10}

Given the complexity of modern criminal law, the justification for denying mistake of law as an excuse must accordingly be located in some less fragile rationale.

Since the nineteenth century, at least, there has been increasing acknowledgment that it is unrealistic to rationalise the maxim in terms of a conclusive presumption of

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\textsuperscript{4} Fuller, \textit{Legal Fictions} (1967) 9.
\textsuperscript{5} Ibid at 53.
\textsuperscript{6} Idem.
\textsuperscript{7} Ibid at 81.
\textsuperscript{8} Ibid at 84.
\textsuperscript{9} Idem.
\textsuperscript{10} Hall, supra n 1 at 378.
\end{flushright}
knowledge of the law. As Maule J expressed the issue, "[t]here is no presumption...that every person knows the law: it would be contrary to common sense and reason if it were so.... The rule is, that ignorance of the law shall not excuse a man or relieve him from the consequences of a crime." But this answer is hardly more satisfactory. The notion that we all know the law has given way to a subtle rewording of the proposition to the effect that it is now simply no excuse that we do not know the law. Section 25 of the Crimes Act 1961 is one such example. Restated in these terms the maxim is marginally more realistic than conclusively presuming that all people know the law. But it is no less forgiving. It has merely altered the focus of attention. While we are not presumed to know the law, it is now irrelevant—and consequently no excuse—that we do not know the law. The conclusive presumption really remains, veiled by a different form of words that amount to a general exclusion. Whichever way the proposition is framed the effect is the same. The argument is circular and the "rationale must be found in a policy that can be justified otherwise than by reference to a fiction."

A critical examination of three of the rationales used to justify the exclusionary rule follows, after which consideration will be given to some of the policy arguments in favour of allowing ignorance or mistake of law as an excuse.

One argument used to justify the rule is that claims of ignorance or mistake of law are impossible to disprove. As early as the eighteenth century Selden argued that ignorance of the law was no excuse, not because everyone knows the law, "but because it

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11 Martindale v Faulkner (1846) 2 CB 706 at 719–720.
12 Empirical studies have been made indicating that not only the public, but also the legal profession, civil servants, and the judiciary are ignorant of the law. See, eg, Furmston, "Ignorance of the Law" (1981) 11 Legal Stud 37. See also Maule J who argued, "[e]verybody is presumed to know the law except his Majesty's Judges, who have a Court of Appeal set over them to put them right." Cited by Williams, Criminal Law - The General Part (2nd ed, 1961)290.
13 See Brett, "Mistake of Law as a Criminal Defence" (1966) 5 Melb Univ L Rev 179 at 194: "we no longer hear of talk of a presumption that everyone knows the law."
14 Hall, supra n 1 at 378. See also Ryu & Silving, "Error Juris: A Comparative Study" (1957) 24 U Chi L Rev 421 at 431, who suggest that the presumption is a device of judicial convenience: Common to all modern systems which preserve the maxim is a procedural consideration. This is best demonstrated by the fact that the maxim has been turned into a procedural presumption, at first a rebuttable presumption and later a conclusive presumption—in effect, a substantive rule. This presumption is not directly related to any particular difficulties of proving knowledge of law, as distinct from any other knowledge. Rather it is the result of a general aim of facilitating the burden of proof by limiting its scope. As demonstrated by historical experience, increasing stress on proof by the prosecution is usually counterbalanced by a tendency to narrow the scope of that which must be proved.
is an excuse every man will plead, and no man can tell how to confute him.” 15 Austin, writing more than a century after Selden, was also a major proponent of this argument. 16 He argued that the only satisfactory reason for the rule was that if ignorance of the law were allowed as a ground for excusing the accused’s conduct, “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.” 17 Thus, if ignorance of law were permitted to excuse, it would be raised as a defence by accused at every possible chance, continually requiring the court to consider whether the accused was ignorant of the law at the relevant time and, if so, whether that ignorance could have been avoided. According to Austin the first problem could hardly be tested by evidence, and “the second would involve an interminable inquiry into the circumstances of the man's whole life.” 18

The basis of this argument against allowing ignorance or mistake of law to excuse is essentially that procedural and evidential problems may arise at the trial. Reduced to bare bones, the gist of Austin’s objection is that if ignorance or mistake of law were allowed to excuse, the court would, in every case, be forced to make a two-stage inquiry: first, whether the individual was ignorant or mistaken as to the law; and, secondly, whether such ignorance or mistake was “inevitable” 19

From a strictly clinical perspective this theory can be defended on utilitarian

15 Selden, Table Talk Law (3rd ed, 1716) 61.
17 Ibid at 238-239.
18 Idem. See also Houlgate, supra n 16 at 37, who criticises Austin’s arguments as having “their source in that brand of philosophical skepticism which requires that the only way in which we can gain knowledge of the mental state of another person is to ‘look into his mind’”. Thus, inquiry is “insoluble” because, in the end, only the individual himself or herself can perform this task and inform the Court of the nature and/or existence of the mental state in question. But see Robinson, Criminal Law Defences (1984) 375-376 who supports Austin’s argument.
19 “Inevitable” means whether or not the ignorance or mistake was due to the accused’s own fault, or could have been avoided. See Hall & Seligman, supra n 16. at 647.
grounds. Smith has observed that:20

Acquiring evidence of wrongdoing consumes valuable resources, and juries and magistrates are sufficiently gullible to permit some who are undoubtedly guilty to go unpunished.... The brutal utilitarianism that lies behind the objection...is not so much that proof is impossible but that the pursuit of absolute justice must be curtailed by considerations of social utility and the distribution of resources...we simply cannot afford to devote infinite resources in money and manpower to ascertaining the truth, when social resources themselves are finite. If occasionally individual injustice is the result, that is an unhappy byproduct of an otherwise efficient system.... The offences concerned are usually relatively trivial ones, and justice can be approximated if not done by imposing minimum penalties.

It would be cold comfort, however, to the individual punished for a mistake of law, to be told that he or she has played an important part in maintaining the efficiency of “the system”. Moreover, while some individuals might be satisfied by escaping with a nominal penalty or a reduced sentence, others may be unhappy with the prospect of carrying the stigma of a criminal conviction and record.21

If the mistake involves an issue of fact rather than law the court will engage in the process of establishing the accused’s guilt or innocence. Similarly, if the accused relies on a matter of justification or excuse the merit of the claim must be assessed. Yet mistake of law apparently possesses some curious quality which sets it apart from other exculpatory claims and which prevents the court from engaging in the process of determining liability.

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20 Smith, “Error and Mistake of Law in Anglo-American Criminal Law” (1985) 14 Anglo-Am L Rev 3 at 16, whose arguments regarding the brutal economics of the situation closely echo Weiler’s approach. Weiler argues: (supra n 3 at 317)

[I]t may be very difficult to make a rational decision about the presence or absence of the relevant knowledge of the criminal law. Unlike matters of fact, which are related to a specific occasion, proof or disproof of ignorance of the law might require investigation of all the possible opportunities the defendant might have had for learning about the law in his previous life. Not only will the costs of avoiding this injustice be great, but also the degree of unfairness in the doctrine may be minimal. Because the criminal law represents the moral values of a community, a person who is in breach of them can and should be treated as blameworthy if he disregards them, even if he shows that it was impossible for him to be aware of the implementing law.

However, Weiler acknowledges that this theory may be adrift of modern principles, given the proliferation of technical and poorly publicised regulations.

21 Admittedly, some less serious regulatory-type offences really have little or no “stigmatic” value. However, there will undoubtedly be cases where the conviction will have an effect, for example, on future employment prospects.
But is there really any fundamental difference? One suggestion is that proof of mistake of fact requires consideration of a discrete incident whereas proof of mistake of law may involve an investigation of a life history. But if this approach is accepted, evidential and procedural expediency is allowed to outweigh the benefits of an investigation into the blameworthiness of the individual. Form is therefore accorded more weight than substance. Naturally, cases may arise where a defendant's claim as to mistake or ignorance of a particular law would be extremely hard for the prosecution to disprove. But equally, cases may arise where the prosecution would be able to prove a defendant had the opportunity to obtain the necessary knowledge, or did not have that opportunity, as the case may be. Inferences could be drawn from the surrounding factual situation to show that the individual did or did not know or should have known the law.

As noted above, triers of fact often make difficult decisions relating to issues of fact. In view of this, there would appear to be some force in the argument that the same measures used to limit inquiry into the state of mind of an individual who raises a defence of mistake of fact could be applied when mistake of law is raised as a defence. Ultimately, the issue reduces to deciding which of the competing claims we ought to accept as dominant: (i) that of an efficient system in the way described by Smith; or (ii) that of a system which discriminates between the culpable and the non-culpable. The former is the easier to achieve, by imposing a rigid mistake of law prohibition. Not surprisingly, these views of evidentiary expediency have been challenged.

A second and alternative argument is that to permit a defence would encourage

22 See Houlgate, supra n 16 at 203, discussing Weiler, supra n 3.
23 See Hall's discussion of this point, supra n 1 at 380.
24 "Ignorance or Mistake of the Law" supra n 16 at 420–421. Reasonableness has sometimes been seen as a requisite for a plea of mistake of fact.
   In terms of Austin's argument that it would be impossible to conclude whether the mistake was inevitable, "it is equally true that nothing can be proven to the point of certainty, and all questions are therefore necessarily interminable." (at 421).
   Hall & Seligman, supra n 16 at 647 say that Austin is not correct in holding that it is impossible to investigate an individual's belief in questions of law. Rather, the cause of the problem is determining whether a belief that the act is not illegal, is inevitable, or due to the individual's own fault.
25 Holmes, The Common Law (1881) (49th ed, 1903) 41. See also Bolgår, supra n 16 at 638; Brett, supra n 13 at 193; Cass, supra n 16 at 684; Hall, supra n 1 at 378; Houlgate, supra n 16 at 32; Kastner, supra n 16 at 311; Matthews, supra n 16 at 185; Ryu & Silving, supra n 14 at 433; Stuart, supra n 1 at 275.
ignorance of the law. Thus Holmes defended the rule that ignorance of the law is no
excuse on the grounds that:26

The true explanation of the rule is the same as that which accounts
for the law's indifference to a man's particular temperament,
faculties, and so forth. Public policy sacrifices the individual to the
general good. It is desirable that the burden of all should be equal,
but it is still more desirable to put an end to robbery and murder. It
is no doubt true that there are many cases in which the criminal
could not have known that he was breaking the law, but to admit
the 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. (emphasis added)

Proponents of such arguments therefore balance the “general good” against the
interests of the individual, and conclude that community interests must prevail because to
permit a defence would encourage ignorance of the law. Expressed in positive terms the
exclusion of a defence of mistake of law will prompt people to ascertain what existing laws
provide, and also keep a watch on new statutes and regulations.27 Holmes thus regarded
the mistake of law doctrine as having an educative function. When an individual is
convicted of an offence in circumstances involving mistake or ignorance of law, such a
conviction supposedly generates considerable interest among the community and helps to
educate it—far more so than would an acquittal under the same circumstances, which
would cause little or no interest in the community. In other words, the conviction of an
individual for violation of a law that is not well known, or is new, is an efficient method of
reminding or educating the community about such laws. An acquittal on the ground of
mistake of law could have the reverse effect, adding to the uncertainty.

26 Holmes, ibid at 41. Holmes thought that any difficulties would be met by throwing the burden of
proving ignorance on the law breaker. But, if, as Austin said, mistake of law is virtually
unprovable, how could a procedural shift in the burden of proof make any difference? See Hall,
supra n 1 at 379 who argues that Holmes' theory does not meet Austin's position. Thus, “if
ignorance of the law is unprovable, how is the nature of that negative issue changed by requiring
the defendant to establish his ignorance, ie by a technical rule of procedure?” To reverse the burden of proof is arguably to rely on the discredited presumption that we “know the
law.” See Houlgate, supra n 16 at 37 who suggests this idea to be untenable.

27 See also Hall & Seligman, supra n 16 at 648. An amusing anecdote is quoted from De Saint
Exupéry: As de Saint Exupéry has his airline manager say, to justify cutting pilots' punctuality
bonuses whenever their planes started late, even where it was due to weather and was not
their fault: “If you only punish men enough, the weather will improve.” It is a hard
document, but an effective one.
There is much disagreement on this point. Stuart is unconvinced, arguing that the educative purpose would equally be achieved at trials where a defence of mistake of law was raised as a substantive defence, and the accused accordingly acquitted: "A rule that ignorance of the law would excuse would also encourage our lawmakers to educate the public, foreigners and immigrants."²⁸ The belief that to allow a defence would merely encourage ignorance has also been characterised as an "empirical generalisation that courts rely on, without adducing evidence for [its] truth."²⁹ A similar argument could be made against admitting mistake or ignorance of fact as an exculpatory matter. Wary individuals might avoid ascertaining all the facts pertaining to a situation lest it transpires that those facts amount to the commission of an offence.³⁰ Mistake of fact is allowed as a defence, notwithstanding this risk, and our system of criminal justice is still intact.

Holmes takes his "encouragement of ignorance" argument too far. In his view even those people who do all they reasonably can to conform to the law will still be convicted. Yet even a utilitarian might admit a defence where the accused can establish that all reasonable steps were taken to ensure conformity with the law.³¹ As Stuart describes the problem, "[i]f the criminal sanction is being used as an educative device, it should not be at the expense of blameless accused."³²

As members of a community we do have an obligation to ensure that we adhere to the limits placed upon our conduct by the law-makers. But it is wrong to suppose (as did Holmes) that if a defence of ignorance or mistake of law were allowed, the community would interpret it as implied encouragement of ignorance with a consequent relaxation of standards.³³ In cases where an accused has taken reasonable steps to ascertain the law, but nevertheless violates it for some reason outside his or her control, there is no purpose

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²⁸ Stuart, supra n 1 at 726.
²⁹ Matthews, supra n 16 at 187. See also Smith, supra n 20 at 17; Williams, supra n 12 at 289, who argues "[t]he rule is a useful weapon where the legislature intends to change social mores, for the most effective way of bringing the new rule to the public notice is by convictions reported in the Press."
³⁰ Matthews, idem.
³¹ Smith, supra n 20 at 17.
³² Stuart, supra n 1 at 276.
³³ See also Houlgate, supra n 16 at 37.
served by insisting on this "educative" justification for the general rule.34

Holmes' argument that public policy and the "general good" trumps the individual's intent is simply a variant on Austin's utilitarian-based theory that the mistake doctrine could be justified on the basis of expediency. It has been observed to be a sort of "social Darwinism"—in other words, the survival of the fittest.35 Thus, in human society the strong majority are entitled to sacrifice the weak in order to achieve their own welfare. As Brett observes, this philosophy scarcely commends itself to modern thought, and it is doubtful whether modern courts would wish to invoke it.36

Holmes also claimed that society "must sacrifice the individual to the public good of avoiding murder and robbery by punishing ignorant as well as knowing and intentional transgressors so that all may know these acts to be illegal."37 But Holmes' choice of examples to demonstrate that crime must be discouraged for the benefit of the community is not persuasive. Ignorance of the criminality of robbery and murder would be virtually impossible.38 In crimes of this nature it is accepted that the individual must, in the generality of cases at least, be sacrificed to wider community interests. Yet what Holmes fails to acknowledge is that ignorance or mistake will be pleaded most often in cases where the offence is not well known—perhaps where it is regulatory in nature. If Holmes' theory is applied to less serious offences a particular problem arises. When a defendant is convicted on a "quasi-criminal" matter there is little or no media attention, unlike such serious offences as murder, robbery, rape and the like. Since ignorance and mistake are far more prevalent in the context of less serious offences, the putative educative function of the mistake of law rule is simply unconvincing in the majority of cases where mistake arises. As Cass puts it, "ignorantia legis sacrifices the individual without educating, and

34 See "Ignorance or Mistake of the Law", supra n 16 at 425.
35 Brett, supra n 13 at 195.
36 Idem. Interestingly, Stuart supra n 1 at 276 notes that on the (rare) occasions on which Canadian judges have considered the rationale for the maxim, the justification by which they have most often been influenced is Holmes. Stuart cites cases in support, Villeneuve (1968) 1 CCC 267 at 276; Flemming (1981) 43 NSR (2d) 249 (Co Ct). Contra Brett, supra n 13 at 194, "American courts and writers have been at great pains to justify their recognition and enforcement of the rule. For the most part they have stated that it is a requirement of public policy."
37 See Cass, supra n 16 at 689.
38 With the exception perhaps of the insane defendant. However, while it would be virtually impossible to be ignorant of the prohibitions against robbery and murder, it may be possible to be mistaken as to the exact ambit of these offences.
hence without deterring the public.”39 Thus the premise of Holmes' argument fails if tested against less serious offences.

There are, then, some fundamental flaws in Holmes' theory. On the surface it may appear an acceptable justification for the mistake maxim. But when it is tested against offences which are not “serious” (in the sense that robbery and murder and so forth are regarded as “serious” or “true crimes”), then the theory lacks depth and loses plausibility.

A third argument for the mistake of law rule is propounded by Hall.40

If that plea [ignorance of law] were valid, the consequence would be: whenever a defendant in a criminal case thought the law was thus and so, he is to be treated as though the law were thus and so, ie the law actually is thus and so. But such a doctrine would contradict the essential requisites of a legal system, the implications of the principle of legality.

Essentially, the argument is that if mistake or ignorance of the law were allowed to excuse it would conflict with the principle of legality. The individual's claim as to his or her perception of the law would effectively become the law. More specifically, Hall's argument divides itself into two related parts. First, to allow a defence of mistake of law would mean that the “authorised officials” (legislatures and courts) would no longer be the sole bodies with authority to declare the “meanings” of laws. Rather, it would become a matter for the private individual to decide. Second, to allow a defence would undermine the “moral” standards of the community at large, to the extent that they are expressed in laws.41 Are these claims justifiable? If, on occasion, a court were to allow a defence based on mistake of law, this would not have the effect of changing the law. Ashworth suggests, “so long as the court stated what the law is, the law's objectivity would remain unimpaired.”42

The same discord occurs in cases where mistake of fact is pleaded. The objective

39 Cass, supra n 16 at 689. Note also that Cass suggests that when less serious offences are at stake, the balance between the community's rights and the individual's rights, ought to be weighed more in favour of the individual.

40 Hall, supra n 1 at 382 ff. See also Bolgar, supra n 16 at 638; Cass, supra n 16 at 684; Fletcher, supra n 16 at 734; Houlgate, supra n 16 at 32; Kastner, supra n 16 at 311; Matthews, supra n 16 at 185; Ryu & Silving, supra n 14 at 433; Smith, supra n 20 at 16; Stuart, supra n 1 at 276.

41 Hall, ibid at 386. See also Houlgate, supra n 16 at 38.

reality of the situation shows what really happened, while the defendant claims a mistaken perception of the situation. If the court exculpates a defendant in such a case—perhaps on the ground that the mistake of fact negated the relevant mens rea, or was a “reasonable” error given the circumstances—it does not mean that the defendant's version of the facts is substituted for what actually happened so as to become the reality.43 Likewise, if a court accepts a plea of ignorance or mistake of the law, the defendant's version of what he or she believed the law to be is not elevated to the position of the law. Rather, on that particular occasion, and with that particular defendant, the court accepts the excuse offered. The rule of law is not altered. Hall tends to confuse two different things: allowing an excuse where the law has been violated with condoning the violation.44 To permit a defence as an exception to an established law does not subvert the law but merely excuses the conduct in the circumstances.45

The same arguments apply when considering Hall's second and related objection—that to allow a defence would undermine the “objective” moral standards of the community as expressed in laws. Again, to allow a defence at a given time and to a certain individual does not derogate such standards any more than it does from the objective existence of the law itself.

Fletcher46 identifies the fundamental problem with Hall's theory as being its “failure to recognise the profound significance of distinguishing between wrongdoing and accountability or culpability.” In making any determination we must distinguish between “justification” and “excuse”. If we say a person's conduct is justified we are acknowledging that there is an exception to the norm. However, if we excuse a person's conduct, all we do is find that in the particular case the individual cannot be held

43 Matthews, supra n 16 at 190 expands on this idea explaining, “[t]he law is what the judge says, the facts are as the judge finds, but their existence is not vitiated by our desire to tailor D's criminal responsibility to what we see as his moral blameworthiness, which (in this instance at least) depends on his perception of the situation.”
44 “Ignorance or Mistake of the Law”, supra n 16 at 421.
45 Admittedly, limits may need to be placed on the recognition of a defence of mistake of law. For example, as Hall notes, supra n 1 at 387, the erroneous advice of lawyers ought not to be allowed to excuse. While allowing a defence based erroneous legal advice may not alter the law, it would nevertheless require the courts to exculpate in circumstances where no law declaring official was privy to the mis-advice. This problem is discussed in detail in chapter 5.
46 Fletcher, supra n 16 at 734.
accountable for his or her wrongdoing. Thus, "mistake of law is an excuse that leaves the norm intact. Its effect it merely to deny the attribution of the wrongdoing to the particular suspect."  

Hall attempts to demonstrate that a number of "exceptions" to the mistake maxim are not exceptions at all but, rather, different problems altogether. He finds that cases involving mistake of law resulting from reliance on law-declaring officials do not fall to be decided on the basis of an exception to the doctrine. Individuals affected by relying on the advice of competent officials can be protected without invoking any "exception" because the advice relied on was actually the law at that time. Yet though he claims that rules of law express objective meanings, his case for a defence in situations of reliance on authorised officials requires that a rule of law can have different meanings at different times among different authorised officials.

The same author also maintains that offences where a non-criminal mistake of law results in the individual lacking the requisite mens rea for the offence should not be treated as an exception to the general exclusionary rule. This is because the objective morality

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47 Fletcher, idem. Fletcher uses insanity as an example to show that recognising a defence of mistake of laws alters the norm no more than does recognising insanity as an excuse (which does not alter the prohibition against the conduct in question). While this seems a satisfactory counter to Hall's theory, it should be recognised that there may be particular instances where Hall's fears are justified. Smith, supra n 20 at 18-19, uses "self-defence" as an example to illustrate this point. If, in self-defence, an individual makes a mistake about how much force he/she is entitled to use, the law deems that he/she may only use so much force as is reasonable. The court determines what is reasonable. Smith states that if an individual were able to claim he/she was entitled to use as much force as he/she himself thought to be reasonable, then the claimant would always be acquitted.

48 Before leaving Hall's theory of justification, it is worth considering his treatment of the "exceptions" which are already recognised to the mistake maxim, supra n 1 at 387 ff. He first, briefly recognises and dismisses of "two proposed exceptions" — advice of counsel cases, and "indefiniteness" cases. In relation to the former, he finds that the reason why advice of counsel will not constitute a defence based on mistake of law is not because the lawyer is incompetent or corrupt, but rather, because "lawyers are not law-declaring officials; it is not their function to interpret law authoritatively." In terms of the second suggested exception, ("indefiniteness" of a penal provision), Hall argues that this issue is dealt with by the doctrine of "due process". He says, "[i]f a criminal statute is ambiguous, its meaning is rendered "sufficiently" precise by excluding the disadvantageous sense of the words. And if a penal statute is vague, it is unconstitutional." (at 388).

49 Hall, ibid at 389. Hall argues that where the validity of statutes or regulations is altered, for example, by being held unconstitutional, and then subsequently overruled by a higher court so that they are constitutional, then no "exception" to the maxim is required. The law relied on (viz, the court's pronouncement of an unconstitutional statute) was, in fact, the law at that time.

50 See, "Ignorance or Mistake of the Law", supra n 16 at 422.

51 Hall, supra n 1 at 393.
of the community, as expressed in the law, is not violated by a person who is mistaken or ignorant as to a non-criminal rather than a criminal law. However this answer is not wholly satisfactory. The individual who makes a mistake about what is essentially a non-criminal law, but succeeds in violating a criminal law, arguably has the same potential for breaking a moral prohibition (and thus being "culpable" or "blameworthy") as the person who, mistaking a criminal law, violates a criminal law.

Hall's analysis further distinguishes between "serious" offences and "petty" offences, and acknowledges that an exception must be made to the mistake maxim when it comes to "petty" offences. However, he argues that "where normal conscience (moral attitudes) and understanding cannot be relied upon to avoid the forbidden conduct, knowledge of the law is essential to culpability", so that the mistake of law rule is not applicable. Archaic, long forgotten offences, new technical, regulatory offences, petty offences (insults, minor assaults) and minor breaches which are not intuitively recognised as immoral, are all given as examples of when the individual may not be placed on notice of the criminality of the conduct. If this is the case then an exception to the rule does arise. This raises some important issues. First, if an individual is not culpable because of lack of notice it may not be just "petty offences" which are relevant. More serious offences could also suffer from the same lack-of-notice condition. Secondly, Hall's examples do not adequately draw a line between what is "petty" and what is "serious". What, for example, constitutes a "minor assault"?

Thirdly, if a utilitarian argument based on expediency (Austin's theory) were to be accepted, then "petty offences" would fall victim to the "weighing of public against private interests". But Hall appears to advocate more court time and taxpayers' funds being spent on an inquiry into the culpability of individuals who have committed "petty offences" due to lack of notice of the law. Admittedly, there is validity in the argument that an exception to the mistake of law rule must be allowed when the individual has not been put on notice of the criminality of the

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52 Ibid at 394.
53 See "Ignorance or Mistake of the Law", supra n 16 at 424. Note also that some criminal offences require a "specific" intention, for example, a fraudulent intention. In such cases the mistake maker may claim absence of mens rea. Would Hall exculpate these individuals also?
54 Hall, supra n 1 at 404.
55 Ibid at 405.
56 "Ignorance or Mistake of the Law", supra n 16 at 424.
conduct. But, contrary to Hall's assertion that this exception can only apply in certain limited circumstances, it ought to be a general exception to the mistake of law rule, applicable whenever the individual has not been given fair warning of the criminality of the conduct.

None of the justifications in support of the mistake of law rule adequately confronts the unavoidable conclusion that in some cases the individual is not to blame for the mistake. The tendency of these policy-based justifications is to counter-attack by arguing, mainly on utilitarian grounds, that it is better to sacrifice the individual for the good of the community. These arguments take no account of principles of fairness to the individual and fail to establish that it is actually wrong to be mistaken about the law.\(^{57}\) If the rule that mistake of law is no excuse is to have credibility it must be justified, not on the ground that it is wrong not to know the law but, rather, on the basis that, as members of society, we have a duty to know the law. Because we are part of a community, restrictions are necessarily placed on our conduct. The criminal law accordingly punishes those who cause harm to other individuals or to the community. Thus, as members of a society, each of us has what may be called "duties of citizenship"\(^{58}\), including the obligation to take reasonable steps to acquaint himself or herself with the criminal law. However, as Ashworth points out, this duty should not be regarded as absolute.\(^{59}\) Rather, if every citizen has a duty to learn the law then there must necessarily be a correlative duty upon the state to ensure that the law is made known and knowable. In this way the "social contract" imposes rights and obligations on the citizen and state alike. The citizen cannot satisfy the duty to learn the law unless the state fulfils its side of the bargain by making the law known. In other words, the individual is entitled to "fair warning" that the intended conduct is prohibited and, without such notice, the individual ought not to be blamed for any subsequent violation of the law. Ashworth suggests:\(^{60}\)

The argument is that respect for the citizen as a rational, autonomous individual and as a person with social and political duties requires that he should have fair warning of the criminal law and no undue difficulty in finding it out. Thus, even within a system which accepts social obligations as part of the criminal law, there is a proper place for a circumscribed defence of ignorance of the law."

\(^{57}\) Ashworth, supra n 42 at 209.
\(^{58}\) Idem.
\(^{59}\) Idem.
\(^{60}\) Ibid at 64.
This argument will be pursued in the following chapters which focus on a number of different types of mistake of law.
IV IMPOSSIBILITY: UNKNOWN AND UNKNOWABLE LAWS

1 INTRODUCTION

At common law impossibility of compliance is recognised as a defence where a person is unable to perform a duty imposed by law. The defence proceeds from the premise that the legislature is not to be assumed to have intended to punish for failure to perform the impossible.

In cases of impossibility of compliance the claim is that there was no reasonable opportunity to comply with a known law. Unavoidable inability or incapacity to obey the law operates as a negation of responsibility for violating the law. Essentially the same issue arises where it is impossible to know the law. If a person is denied the opportunity to know the law and is therefore unable to conform his or her conduct to the law then that person's lack of knowledge ought to exculpate for any breach of the law. Thus, as Hobbes said, "[t]he want of means to know the law, totally excuseth. For the law whereof a man has no means to inform himself is not obligatory."

The paradigm is the case of non-publication where the law which a person is accused of violating was not published at the time of the alleged offence. The argument is that if the State has failed to perform its part of the "social contract", then the individual cannot be expected to satisfy his or her "duty" to know the law. Under the circumstances knowledge of the law can simply not be attained. As will be discussed below, unavoidable or "invincible" lack of knowledge resulting from non-publication has been recognised as an exception to the general rule that ignorance of the law does not excuse.

1 Eg, Tifaga v Department of Labour [1980] 2 NZLR 235; Finau v Department of Labour [1984] 2 NZLR 396.
2 Tifaga, ibid at 245 per Richardson J.
4 Hobbes, Leviathan (1651) 169.
However, beyond the central instance of non-publication there are other situations where a person accused of breaking a published law might reasonably claim to have had no notification or means of learning about that law. For example, it may be inaccessible for some reason, or so obscure that the individual has no reason to be on notice of being affected by the law. Again, the argument in favour of allowing a defence in these cases is premised upon a general principle of fairness. Given the circumstances, the individual cannot fairly be blamed for the lack of knowledge.

The aim of this chapter is to examine the current scope of the exception, with particular reference to recent New Zealand law reform proposals. I will also consider related issues about ignorance resulting from inaccessibility and obscurity which, although not falling within the ambit of non-publication, are nevertheless still under the umbrella of unavoidable ignorance.

2 NON-PUBLICATION

(a) The Common Law

Historically, at common law a law took effect from the time it was signed, and an administrative rule could penalise conduct immediately after it was voted on. There was no obligation on the law-makers to publicise or promulgate the enactments. Therefore the individual's "unavoidable ignorance" of an unpublished enactment afforded no excuse. An early case in point is *Rex v Bishop of Chichester* (1365) where it was held that proclamation was not necessary for a law to become effective.

Prior to 1793 statutes were regarded effective from the first day of the Parliamentary Session in which that statute was enacted. Accordingly, laws could potentially have retroactive effect and catch individuals who had no opportunity of learning of the law. In 1793 Parliament rectified this "great and manifest injustice" by enacting The Acts of


7 (1365) Y B Pasch 7, 39 Edw 3, referred to by Murphy, ibid at 260.

8 Murphy, supra n 6 at 258, 260.
Parliament (Commencement) Act which made the date of enactment the effective date.\(^9\)

How, then, have the courts dealt with cases where there has been no statutory requirement for publication, and an individual has breached a prohibition without knowing of it or having the opportunity to do so? \(\text{Lin Chin Aik v R}\)\(^1\) is one example. In that case the “law” was a Ministerial Order made pursuant to delegated authority. The appellant had been convicted of remaining in Singapore, being a “prohibited person”. A Ministerial Order prohibiting the appellant from remaining in Singapore had been made under section 6(3) of the Immigration Ordinance 1952. There was no provision in the Ordinance for publishing the order or bringing it to the appellant’s attention and he was, in fact, unaware of the order of prohibition against him. The Privy Council allowed the appeal, finding that mens rea was an element of the offence and that there was no evidence that the appellant was aware of the order and therefore could not be said to have knowingly contravened it.\(^12\)

The Crown also argued that ignorance of the law was no defence. The Privy Council, however, would not concede that an order which had not been published or otherwise brought to the attention of the affected party could be a valid exercise of legislative power, such that the law would be binding.\(^13\)

Lord Evershed observed:\(^14\)

It was said on the respondent’s part that the order made by the Minister under the powers conferred by section 9 of the Ordinance was an instance of the exercise of delegated legislation and therefore that the order, once made, became part of the law of Singapore of which ignorance could provide an [sic] excuse upon a charge of contravention of the section. Their Lordships are unable to accept this contention. In their Lordships’ opinion, even if the making of the order by the Minister be regarded as an exercise of the legislative as distinct from the executive or administrative function (as they do

\(^9\) Murphy, supra n 6 at 258, n 16, referring to \(US v Casson\) (1970) 434 F 2d 415, DC Cir at 419.

\(^10\) Stat 33 Geo III c 13.


\(^12\) Ibid at 175.

\(^13\) Ibid at 171.

\(^14\) Idem.
not concede), *the maxim cannot apply to such a case as the present where it appears that there is in the State of Singapore no provision...for the publication in any form of an order of the kind made in the present case or any other provision designed to enable a man by appropriate inquiry to find out what 'the law' is.* (emphasis added)

*Lim Chin Aik* thus stands for the proposition that where there is no provision for publication, and the affected party has not in fact been made aware of “the law”, the rule that ignorance of the law is no excuse has no application.\(^\text{15}\)

In *Johnston v Sargant & Sons*\(^\text{16}\) an order dated one day was published the next. The plaintiffs acted contrary to the order on the day it was dated, that is, the day prior to its publication. The court concluded that delegated legislation does not come into force until it is published. On this view ignorance due to non-publication afforded a defence. Bailhache J held:\(^\text{17}\)

> While I agree that the rule is that a statute takes effect on the earliest moment of the day on which it is declared to come into operation, there is about statutes a publicity even before they come into operation which is absent in the case of many Orders such as that with which we are now dealing; indeed, if certain Orders are to be effective at all, it is essential that they should not be known until they are actually published. In the absence of authority on this point I am unable to hold that this Order comes into operation before it was known, and, as I have said, it was not known until the morning of May 17.

*Johnson* is relevant in two respects. First, the decision arguably does not go as far as *Lim Chin Aik* where the Privy Council declined to concede that an unpublished order could be a valid exercise of legislative power that made a binding law. However, *Johnson* does make it clear that, although valid delegated legislation can be made, it will not be effective and operative until it is published. However Bailhache J does not define what is meant by publication\(^\text{18}\) and the issue has been raised as to whether ignorance

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\(^\text{15}\) It has been suggested that the Privy Council could have achieved the same result by classifying the mistake or ignorance as factual in that the Minister’s exercise of the power to declare the appellant a prohibited person was, as a matter of fact, not known to the appellant: O'Connor & Fairhall, *Criminal Offences* (2nd ed 1988) 62. Matthews, however, argues that this was not a case of mistake of fact. Rather, an appreciation of illegality was necessary to secure a conviction and, “ignorance of the law is (in a clumsy sort of way) an excuse.” Matthews, “Ignorance of the Law is no Excuse” (1983) 3 Legal Stud 174 at 181. See also, Lanham, supra n 6 at 517-519.

\(^\text{16}\) [1918] 1 KB 101.

\(^\text{17}\) Ibid at 103.

\(^\text{18}\) Williams, supra n 6 at 295.
would be a defence where delegated legislation is allowed to go out of print after once being published.19

The second point of relevance is that Bailhache J draws a distinction between statutes and delegated legislation. He doubts that the rule that a statute takes effect on the earliest moment of the day on which it is passed could apply equally to orders (the relevant delegated legislation in the case). The reason given is that there is a certain "publicity" attaching to statutes even before they come into operation which is absent in the case of orders. So, since it is much less likely that citizens will be aware of the making of delegated legislation than of statutes, it is only fair that delegated legislation requires actual publication in order to be said to have come "into operation".20

There is also Canadian authority dealing with the issue of whether unpublished delegated legislation can be enforced against individuals who have had no notice of the "law". In R v Ross21 the appellant had been convicted of hunting without a permit in a prohibited area which had been declared closed by a Ministerial Order. The Order was not published and there was no provision requiring publication in the empowering statute. The appeal was allowed on the basis that the appellant could have had no way of knowing that the area was prohibited. Harrison Co Ct J made the same distinction as Bailhache J in Johnson between statutes and delegated legislation, finding that, since public Acts receive publicity through deliberation at the various bill stages at which both public and press may be present, ignorance of a statute could be an unsuccessful plea.22 However, "an order made by a Minister...is on a different footing than is an Act of the Legislature."23 His Honour drew this conclusion because "[t]he making of such an order is at the discretion of the Minister himself...and is drawn up and signed in his private office or some other private place, as I assume was the case with the order in question."24 He expressly approved Johnson v Sargant & Sons and concluded that it was "hardly compatible with

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19 Idem. See also, Lanham, supra n 6 at 510ff..
20 This is a recurrent theme throughout the case law, which tends to have been mirrored in the legislation adopted by various jurisdictions.
21 [1945] 3 DLR 574 (BC Co Ct).
22 Ibid at 576–577.
23 Idem.
24 Idem.
justice that a person may be convicted and penalized, and perhaps lose his personal liberty by being committed to jail in default of payment of any fine imposed, for the violation of an order of which he had no knowledge or notice at any material time." 25

The same conclusion was reached in Re Michelin Tires Manufacturing (Canada) Ltd. 26 The Nova Scotia Supreme Court held that a Ministerial redefinition of a tax exemption was not effective against the appellant since no efforts had been made to bring the new definition (purportedly made in a departmental memorandum to the Provincial Tax Commissioner) to the attention of those who might be affected by it. MacKeigan CJNS held: 27

\[ \text{[F]or an order or regulation to have the force of law to bind a person or make him open to prosecution for its violation it must be made, i.e., promulgated or publicized in some suitable way. The necessary issuance and publicity is presumed if it is passed by the legislature, or published in the Royal Gazette, or perhaps tabled in the House of Assembly. Where such formal issuance is not required, I would like to think that effective issuance involves some reasonable minimum publication, the nature and degree of which will depend on the kind of order and the person to whom it is directed. I must respectfully question, however, whether the Crown must prove that the person to be bound has actual knowledge or notice of an order, as seems to be suggested by Harrison Co Ct J in R v Ross.} \]

The final Canadian decision is R v Catholique. 28 The appellant had been convicted of being in unlawful possession of liquor in a prohibited area. The relevant Regulations, which operated within a radius of 25 kilometres of the Snowdrift Community Hall, had not been published or otherwise made available to the public 29 and there were no statutory requirements that such regulations be published.

The appeal was allowed on the basis that the appellant could not have known of the regulations. Tallis J held: 30

25 Idem.
26 (1975) 15 NSR (2d) 150 (NSSC).
27 Ibid at 176-177.
28 (1980) 49 CCC (2d) 65 (NWTSC).
29 Ibid at 70. It should be noted that the Snowdrift Settlement Council had posted a copy of the regulations in the council office and another in the co-op store. However the regulations were not published in any newspaper, broadcast on any radio or television, or posted on any public bulletin board.
I am not prepared to hold that the Regulations are a complete nullity. However, under the present circumstances of this case I hold that in order to sustain a conviction for an offence under the Snowdrift Liquor Prohibition Regulations, the prosecution must prove that the accused had *actual knowledge of the existence of the Regulations*. This has not been done in this case. Even if I were to apply a less stringent test in this case, I do not feel that there is sufficient evidence before me to establish that reasonable steps have been taken to bring the purport of the Regulations to the notice of the person charged. (emphasis added)

These conclusions may be read to mean that "constructive notice"—that publication deems or supposes that everyone is aware of the law—would not have been sufficient, but that "actual notice" would have had to be established. This goes further than MacKeigan CJNS was prepared to go in *Re Michelin Tires*, and possibly also exceeds the limits that Bailhache J had in mind in *Johnson v Sargent & Sons*.

Notwithstanding that distinctions may be drawn between these cases, one important point of common ground can be identified. Although the orders and regulations were not invalid for want of publication, they were not legally effective against those accused. While the empowering statutes were silent as to notification or publication requirements, each court nevertheless found that unless there was publication the orders could not be said to have legal effect against the accused. The ignorantia juris rule therefore was of no effect.

There is one New Zealand decision in point. In *Scott v Bank of New South Wales* the Finance Emergency Regulations 1940 were in issue. The Regulations had the effect of rendering the plaintiff's commercial transaction illegal. The question was whether the Regulations were effective from the date on which they were made (10 April 1940) or from the day that they were notified in the Gazette (11 April 1940). Smith J found that:

> Obviously the date at which these regulations (which may override the rest of the legislation governing the people of New Zealand) are

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30 Ibid at 75.
31 Supra n 11 at 171.
32 [1940] NZLR 922 (SC).
33 Ibid at 932–933.
to come into force may be of the gravest importance. Apart from any provision to the contrary, they would come into force on the day they were made under the authority of the statutory provision which gives them the force of law, whether they were gazetted or not.

While *Scott* differs from the preceding cases in that provision was made for publication, it is significant for the findings as to when a regulation becomes effective. It is on this point that *Scott* parts company with the other decisions. Further difficulty is created by the fact that there was a “provision to the contrary”, as referred to by Smith J, which did require that the regulations be notified in the Gazette and that (apparently) the regulations would take effect from that date. Section 8 of the empowering Act (The Emergency Regulations Act 1939) required that “publication in the Gazette...of any emergency regulations...shall for all purposes be deemed to be notice thereof to all persons concerned, and in any prosecution under this Act the liability of the accused shall be determined accordingly.” Nonetheless Smith J circumvented section 8 by finding as follows:

Section 8 of the Emergency Regulations Act 1939, is not directed at the date at which the regulations acquire the force of law. It is directed to the extension of liability under the law in certain circumstances. Ignorance of the law does not excuse, but, on the other hand, knowledge may be material to the question whether there has been a wilful or guilty breach of the regulations. In my opinion, it is the purpose of s 8 to ensure that publication of the regulations in the manner specified shall constitute notice to all persons concerned, whether they have notice in fact or not, and so, where knowledge is material, to affect the determination of liability in both civil and criminal proceedings.

Smith J therefore concluded that the regulations had the force of law from the date they were made (10 April 1940). Smith J's judgment is at odds with *Johnson v Sargant & Sons* and the following Canadian decisions. The reasons for this are obscure. One possible point of distinction is the fact that the regulations in *Scott* were emergency war regulations having, as Smith J noted, the potential to “override the rest of the legislation governing the people of New Zealand.” The judge himself conceded that it would be unreasonable in many cases to bring regulations into force without notice, but that this was

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34 Ibid.
35 However His Honour decided that the transaction between the parties was not in fact concluded until 12 April anyway so that by then the regulations had already been gazetted.
36 See, eg, Lanham, supra n 6 at 513.
not such a case, as the Governor General in Council apparently considered that they had to be brought into force without notice.\(^{37}\) Therefore *Scott* stands as an exception to the weight of authority which requires that a law be published before it can have effect against the person accused of its violation.

It can be concluded that in the case of delegated legislation, the legislature (the delegator) can be assumed to have intended such delegated acts to be operative only when they are published or notified. This may be related back to the assumption made by Richardson J in *Tifaga*\(^ {38}\) that the legislature is not to be assumed to have intended to punish for failure to perform the impossible. As will be discussed next, this “impossibility” exception recognised at common law is now less important than previously because many jurisdictions have introduced legislation requiring the publication and notification of delegated legislation. But the modern publication requirements do not necessarily cover all delegated legislation\(^ {39}\) so the possibility remains for there being an unpublished order or the like which is not subject to the formal publication rules.

**(b) The Statutory Requirements**

Most common law jurisdictions now have legislation prescribing publication requirements for delegated legislation. Before considering the details of these requirements it must be noted that there is an identifiable distinction between two different sorts of legislative provision. The first type simply sets out the formal publication requirements. On the other hand, some jurisdictions have gone further by providing an exemption or defence for the individual who breaches a law that has not satisfied the formal publication requirements. These two different regimes will be considered separately.

\(^{37}\) Supra n 32 at 934.

\(^{38}\) Supra n 1

\(^{39}\) Eg, it is common to omit from the definition of “regulation” such instruments as local authority by-laws, and so forth.
(i) **Formal publication requirements**

The most common form of publication is the *Gazette* which has the advantage of providing a single source by which citizens can keep up with new laws. However most jurisdictions only require publication of notice of the new law (delegated legislation) together with such information as where copies may be purchased. Moreover, the Gazette is unlikely to have the same “broadcasting” effect as other forms of publication such as newspaper, radio, and television.

The Statutory Instruments Act 1946 (UK) requires that “statutory instruments” be printed, numbered, published and sold.

Canadian legislation, both federal and provincial, provides for the publication of delegated legislation. The federal legislation requires that “statutory instruments” be registered and that they are not to come into force earlier than the day on which they are registered unless an intention to the contrary is expressed. Publication in the *Canada Gazette* is required within twenty-three days of registration. Each province requires publication in the *Gazette* of either notice of the delegated legislation, or publication in full. The time at which the law will come into force varies between the provinces.

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40 Murphy, supra n 6 at 279, n 167–169.
41 Murphy, idem.
42 Section 1 defines “statutory instrument”. The definition does not include sub-delegated legislation or local authority by-laws.
43 See s 2(1). However no express indication is given as to whether an instrument is effective from when it is made or when it is published. If the Act is taken to embody the common law approach as expressed by *Johnson v Sargant & Sons*, supra n 16 then it may be implied that publication is the relevant date. But see *Sheer Metalcraft Ltd* [1954] 1 QB 586 where it was held that a statutory instrument was effective before printing and issue. See *Lanham*, supra n 6 at 512, 521. See also *Defiant Cycle Co Ltd and Others v Newell* [1953] 2 All ER 38, where the appeal was allowed against conviction on a charge of selling iron and steel in excess of prices permitted by the Iron and Steel Prices Order 1951. A copy of the order was sent by an assistant secretary in the Ministry of Supply to the editor of statutory instruments at the stationery office together with a letter stating that "the deposited schedules have been certified under reg 7 [of the Statutory Instruments Regulations, 1947] to be exempted from printing and sale as part of the copies of the instrument." The Queens Bench Division held that the letter did not constitute a certificate within the meaning of reg 7 and deposited schedules are required by s 2(1) of the Act of 1946. Moreover, the Crown had not proved that reasonable steps had been taken to bring the purport of the deposited schedules to the notice of the persons mentioned in s 3(2) of the Act.
45 Section 9.
46 Section 11(1). See infra chapter IV 2(b)(ii) for an examination of the “defence” provision, s 11(1).
Commonwealth legislation in Australia requires that all regulations be notified in the 
*Gazette* and that they will take effect from the date of notification. In the states, 
subordinate legislation becomes operative when published or notified in the *Gazette* unless 
a contrary intention is expressed in the legislation. Some states require publication of the 
regulations in full in the *Gazette* whereas others require mere notification.

Similarly, the United States has legislation at both federal and state levels requiring 
the publication of delegated legislation.

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47 (i) Alberta, Regulations Act RSA 1980. Section 2(2) provides that a regulation comes into force 
on the day it is filed with the Registrar. Section 3(1) requires regulations to be published in the 
Alberta Gazette within one month of being filed. “Regulation” is defined in s 1(1)(f). (ii) British Columbia, Regulations Act RSBC 1979 c 361, s 2(2), provides that a regulation comes into force 
the day after it is filed and, by s 2(3), a regulation that is not filed has no effect. Section 3(1) 
requires that the registrar publish the regulations, or notice of the regulation, in the Gazette within 
one month of filing. (iii) “Regulation” is defined in s 1, Manitoba Regulations Act 1988. 
Section 3 provides that a regulation comes into force on the date of registration. Section 6(1) 
provides that publication in the Gazette of a regulation or a notice under s 5 is notice of the 
regulation to all persons. (iv) “Regulation” is defined in s 1, Ontario Regulations Act RSO 
1980, c 446. By s 3 regulations come into force and effect only after they are filed, and by s 4 
regulations that are not filed are ineffective. Section 5(1) requires that regulations be published in 
the Ontario Gazette within one month of filing. “Regulation” is defined in s 1(d). (v) See also 
New Brunswick Regulations Act 1973, c 48; Newfoundland Regulations Act 1977, c 108; Nova 

48 Acts Interpretation Act 1901, s 48(1). See also Statutory Rules Publication Act 1903, s 5(3). 
In *Watson v Lee* (1979) 144 CLR 374, the majority of the High Court held that “notification” 
as required by s 5(3) would be satisfied only if the regulations were actually obtainable at the 
specified place on the date of notification. Note that the SRP Act was subsequently amended and 
new provisions inserted to deal with the issue raised up *Watson v Lee*. Now, by s 5(3A), 
“where a notice of statutory rules having been made is published in accordance with subsection (3), 
copies of the statutory rules shall, at the time of publication of the notice or as soon as practicable 
thereafter, be made available for purchase at that place...specified in the notice.” For further 
discussion of Commonwealth legislation, see Review of Commonwealth Criminal Law, 
“Principles of Criminal Responsibility and Other Matters”, Interim Report (1990). See also 
chapter 2.

49 New South Wales, Interpretation Act 1897, s 4(1), requires that the regulations be published in 
full. Queensland, Acts Interpretation Act 1954, s 28A(1), requires that all regulations be 
published in full in the Gazette and shall take effect from the date of publication. Tasmania, 
Rules Publication Act 1953, s 5(2), requires that statutory rules be published or notified in the 
Gazette together with information as to where copies may be obtained, and the notice must also 
include a statement indicating the general purport or effect of the rules. See *Evans v Donaldson* 
(1977) Tas SR (Pt 2) 104. Victoria, Subordinate Legislation Act 1962, s 3(1), provides that a 
statutory rule comes into operation at the beginning of the day on which it is made. Section 4(2) 
requires that a notice of the making of the rule and of the place where copies can be obtained and of 
the date on which the rule was first obtainable shall be published in the *Government Gazette* as 
soon as is practicable after the making of the statutory rule. Western Australia, Interpretation Act 
1918, s 36, and Interpretation Act 1984, s 41, require that regulations be published in the Gazette 
and come into operation on the day of publication. For further discussion see O’Connor & 
Fairhall, supra n 15 at 62–63.

50 For a full discussion see Murphy, supra n 6 at 273 ff.
In New Zealand, legislation imposes a duty to publish delegated legislation. The Acts and Regulations Publication Act 1989 contains the relevant provisions which are set out as follows.

By section 4(1) "The Chief Parliamentary Counsel shall...arrange for the printing and publication of—(b) copies of all regulations made after the commencement of this section."

The publication requirement itself is set out in section 13 which provides that "where any regulations are required by any Act to be published or notified in the gazette, the publication in the gazette of a notice under section 12 of this Act which relates to those regulations shall be sufficient compliance with that requirement."\(^{51}\)

Section 12 details what information must be printed in the Gazette:

The Chief Parliamentary Counsel shall, on each occasion on which copies of regulations are printed and published under section 4 of this Act, arrange for the publication in the Gazette of a notice showing—

(a) The title of the regulations:

(b) The date on which the regulations were made:

(c) The Act or authority pursuant to which the regulations were made:\(^{52}\)

(d) The number allocated to the regulations under section 11 of this Act:

(e) A place at which copies of the regulations may be purchased:\(^{53}\)

(f) Such other information as The Chief Parliamentary Counsel considers appropriate.

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\(^{51}\) Cf Regulations Act 1936, s 6: Where any regulations are required by any Act to be published or notified in the Gazette a notice in the Gazette of the regulations having been made and of the place where copies of them can be purchased shall be sufficient compliance with that requirement.

\(^{52}\) See s 8.

\(^{53}\) See ss 9 and 10.
“Regulation” is defined in section 2 as having the same meaning as that set out in section 2 of the Regulations (Disallowance) Act 1989. Section 2 of that Act provides:

s 2 “Regulations” means—

(a) Regulations, Rules, or by laws made under the authority of any Act—

(i) By the Governor General in Council, or

(ii) By any Minister of the Crown:

(b) Instruments, other than Acts of Parliament which revoke regulations:

(c) Orders in Council, Proclamations, notices, warrants and other instruments of authority made under any Act by the Governor General in Council or by any Minister of the Crown which extend or vary the scope or provisions of any Act:

(d) Orders in Council bringing into force, or repealing, or suspending any Act or any provisions of any Act:

(e) Rules or regulations made under any Imperial Act or under the prerogative rights of the Crown and having force in New Zealand:

(f) Instruments deemed by any Act to be regulations for the purposes of the Regulations Act 1936 or this Act.

A number of observations can be made about these provisions. First, section 4 is mandatory: all regulations made after 19 December 1989 must be printed and published. Under the Regulation Act 1936 (now repealed) section 3 was substantially the same as section 4 of the Acts and Regulations Publication Act 1989, except that it contained a proviso to the effect that the Attorney-General had the discretion to exempt any specified regulations from publication and printing if in his opinion it was unnecessary or undesirable that they should be printed. That proviso has not been retained.
Where a regulation has been made prior to the commencement of the 1989 Act (19 December) the Attorney-General has the discretion under section 6 of that Act to direct that copies of the regulations made earlier be printed and published. So, although all regulations made after 19 December 1989 must be printed and published, the risk remains that regulations made prior to that date may, at the discretion of the Attorney-General, be excluded from printing as there was no absolute requirement that either the regulation or a notification of the making should appear in the Gazette.

Secondly, while section 2 gives a wide definition of “regulation” some instruments may still not be covered, for example, instruments made in pursuance of sub-delegated powers, local authority by-laws, delegated legislation not made by the Governor General in Council or a Minister of the Crown, and departmental announcements.

If some forms of delegated legislation fall through the net provided by section 2 then, in the absence of any statutory defence, the common law principles will necessarily apply.

The 1986 Report of the Regulations Review Committee, recommended the inclusion in the definition of “regulation”, a provision by which any other instrument could be

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54 The Regulations Review Committee Report (1986), paragraph 20.1, notes that the s 3(1) proviso was frequently used between 1936–1950 and exempted regulations were listed each year in Statutory Regulations. The last list, in 1950, contained 179 exempted items. Since 1950 there have been some exemptions but as s 3(1) was considered directory and not mandatory the exemptions were not made under that section. See also paragraph 20.2–20.4.

55 Eg, departmental directives such as those made by the Department of Immigration. The Immigration Act 1987, s 13A (as inserted by Immigration Amendment Act 1991, s 7) provides:

13A. Government immigration policy generally—(1) The Minister shall from time to time publish the policy of the Government relating to the rules and criteria under which eligibility for the issue or grant of visas and permits is to be determined.

(2) Publication for the purposes of this section shall include, but is not restricted to, the insertion of that policy in the departmental manual of immigration instructions and the making available of that manual to the public, and the Minister shall ensure that copies of the manual are available or readily obtainable for inspection, free of charge, at—

(a) Offices of the Department of Labour; and

(b) New Zealand government offices overseas—

that deal with immigration matters.

Thus, although “publication” is provided for, it is not publication in the Gazette. Note however, that s 13A(2) is expressed to be inclusive only, and not restricted to the forms of publication set out thereafter.

The Fisheries Act 1986, s 66 provides that the Director General stipulate the “requirements” for the keeping of records and accounts, does not expressly require publication.

See Report of the Regulations Review Committee (1986), paragraphs 21.1–22.5, for a discussion of the printing of instruments that are not “regulations” within the definition of Regulations Act 1936, s 2(1).
deemed a regulation by the empowering Act. The Committee envisaged that such a provision could be used to clarify the status of new instruments made under the existing Act or to bring sub-delegated legislation within the definition of “regulations”. That recommendation was implemented by section 2(f).

The Report also recognised the difficulty in defining “regulations” with any precision but noted that some Acts now specifically provide for this. For example, section 92A of the Fisheries Act 1983 (as amended by section 26 of the Fisheries Amendment Act 1986, provides that “[e]xcept as provided in subsection (2) of this section, every notice given under this Act and required to be published in the Gazette is hereby deemed for the purposes of the Acts Interpretation Act 1924 and the Regulations Act 1936 to be a regulation.”

Thirdly, even if the delegated legislation is of the type covered by the definition of “regulation”, or is deemed to be a regulation under section 2(f), one problem remains. It is significant that section 12 of the Acts and Regulations Publication Act does not require publication in the Gazette of the actual regulation, but only a notice of the regulation. Thus, no information relating to the content of the regulation need be supplied, although such information is clearly within the scope of section 12(f) which authorises the publication of “such other information as The Chief Parliamentary Counsel considers appropriate.” In general terms, section 12 is a formal publication requirement that, in practice, may give no real indication of a regulation's substantive purport. Thus “publication” of new laws may have little or no relevance to the average citizen. Even if a person is industrious enough to check the Gazette, the title of the “regulation” may give little or no warning as to the content.

Support for the argument that sections 12 and 13 do not provide sufficiently for information on the content of a regulation may be derived from the 1986 Report of the

56 Paragraph 13.
57 Other Acts also bringing instruments not defined as “regulations” under s 2 within its purport include, Higher Salaries Commission Act 1977 ss 12A, 16, 17(3); Forest and Rural Fires Act 1977 s 67; Industrial Training Levies Act 1978 s 67; State Owned Enterprises Act 1986 s 32(4).
58 People engaged in specialised activities or particular employment ought necessarily to be more aware of the importance of changes to the law, and consequently take greater precautions to keep up with changes than the person who is not engaged in any specialised activity or the like.
Regulations Review Committee which has criticised the publication requirements. Paragraph 28(3) observes that “publication of a notice in the Gazette cannot be regarded as adequate notice of the purport of the regulation.”

In conclusion, the New Zealand approach is simply one of recording the making of a regulation. It makes no provision for a defence to a criminal prosecution where the regulation offended against was not published at the time of the commission of the offence. Such a provision was, however, recommended by the 1974 Report of the Public and Administrative Law Committee. The 1986 Report of the Regulations Review Committee similarly favoured the inclusion of an exemption provision and recommended the following as a draft:

Paragraph 44:11
A person shall not—
(a) be convicted of an offence consisting of a contravention of any regulation; or
(b) be prejudicially affected or made subject to any liability by any regulation—
where it is proved that the regulation had not been printed in the Statutory Regulations series and made available for sale by the Government Printer at the relevant time unless it is proved that at that time reasonable steps had been taken for the purpose of bringing the purport of the regulation to the notice of the public, or of persons likely to be affected by it, or of the person charged.

The question that must be asked is why this proposal was not adopted in the 1989

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59 Paragraph 33(8).
60 See also paragraph 28. Para 28.1 recognises the problem which could arise if regulations were to come into force on the date of being made. Ought the mistake of law rule apply where a defendant is charged with an offence under a regulation that has not been “published” at the time of the alleged offence? The Report also recognises the meaning of “publish” can cause problems although in New Zealand it is usually identified with the fact that a regulation has been printed in the SR series and is available for sale. Para 28.2 refers to the Public and Administrative Law Committee 1974 Report (para 33(8)). That report thought citizens should be protected from prosecution for breach of an unpublished regulation. It suggested the enactment of a provision giving a defence of non-publication at the time of the commission of the offence. The 1986 Report recommended the introduction of a proposal along the lines of the 1974 proposal.
Act. Perhaps it was regarded as more appropriate to leave the issue to be dealt with in the revision of the Crimes Act 1961. Other jurisdictions, however, have not been constrained by such considerations.

(ii) Statutory defences

As discussed above, unlike many other jurisdictions New Zealand provides no statutory defence or exemption for the situation where the individual has breached an unpublished law. The recommendation made in the 1986 Report was framed in terms of an exemption from criminal liability dependent on proof of non-publication and non-availability for public purchase. Such a defence would therefore not be available where, at the time of the alleged contravention, “reasonable steps” had been taken to bring the regulation to the notice of the public or of persons likely to be affected by it, or of the person charged. The 1986 draft proposal was in all material respects identical to the defence available in England under section 3(2) of the Statutory Instruments Act 1946.61

While the English provision therefore affords a basis of avoiding criminal liability in cases of non-publication or non-notification, Smith argues that it “has about it more the air

61 The Statutory Instruments Act (UK) 1946, s 3(2) provides that:
In any proceedings against any person for an offence consisting of a contravention of any “statutory instrument”, it shall be a defence to prove that the instrument had not been issued by Her Majesty’s Stationery Office at the date of the alleged contravention unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged.
But see Sheer Metalcraft Ltd [1954] All ER 542, where it was held that the onus of proving that reasonable steps have been taken lies with the prosecution. “Issue” was held to mean an act by the Queen’s Printer of Acts of Parliament which follows the printing of the instrument (at 589). The Court held that a statutory instrument is effective before printing and issue, notwithstanding that the provisions of the Statutory Instruments Act 1946 had not been complied with. Streetfield J (at 590) held:
It seems to follow from the wording of this subsection [s 3(2)] that the making of an instrument is one thing and the issue of it is another. If it is made it can be contravened; if it has not been issued then that provides a defence to a person charged with its contravention. It is then upon the Crown to prove that, although it has not been issued, reasonable steps have been taken for the purpose of bringing the instrument to the notice of the public or persons likely to be affected by it... In my judgment the making of an instrument is complete when it is first of all made by the Minister concerned and after it has been laid before Parliament. When that has been done it then becomes a valid statutory instrument, totally made under the provisions of the Act.

This decision appears to conflict with the pre-Act decision in Johnson v Sargent & Sons, supra n 16. See Lanham, supra n 6. See also Defiant Cycles Co Ltd v Newell, supra n 43, where it was held that the onus was on the Crown to prove that reasonable steps had been taken to bring relevant schedules to the notice of the persons mentioned in s 3(2) of the Act.
of an improvised postwar emergency measure than a calculated attempt to eradicate injustices."\(^62\) Since the provision applies only to "statutory instruments" just as the 1986 New Zealand proposal applies solely to "regulations",\(^63\) certain types of subordinate legislation may not be covered.

Some Australian jurisdictions have legislation which provides an exemption in cases where the regulation has not been published. The Queensland Criminal Code (as amended by section 10 Regulatory Offences Act 1985) and the Northern Territory Code offer yet another variation.\(^64\) These Codes appear to provide a straight-out exemption as opposed to the formal "defence" as proposed in the Interim Report of the Commonwealth Review Committee (1990), which by section 3K(1) recommended a defence where the person proves the statutory instrument was not published or otherwise reasonably made available to the public or persons likely to be affected by it.

In practical terms, however, the formulation of the Queensland and Northern Territory Codes will operate like section 11(2) of the Statutory Instruments Act (Canada) since proof of publication or notification by the prosecution will exclude the operation of the exemption.\(^65\)


\(^{63}\) Statutory Instruments Act 1946 (UK) defines a "statutory instrument" so as to exclude local authority by-laws, sub-delegated legislation and so forth.

\(^{64}\) The Queensland Criminal Code provides:

s 22(3) A person is not criminally responsible of an act or omission done or made in contravention of an act or omission done or made in contravention of a statutory instrument if, at the time of doing or making it, the statutory instrument was not known to him and had not been published or otherwise reasonably made available or known to the public or those likely to be affected by it.

(4) For the purposes of subsection (3)—"statutory instrument" means any Order in Council, order, rule, regulation, by-law or other instrument made pursuant to any Act; "published" means published in the Government Gazette or notified in the Government Gazette as having been made.

See also s 22 Northern Territory Criminal Code which has incorporated an identical provision. Western Australia has not enacted this defence. See Herlihy, "Ignorance of Law: Claim of Right Under the Criminal Codes of Queensland, Western Australia and Northern Territory" (1988) 9 QL 31 at 36, who makes the point that the Queensland and Northern Territory provisions cover unknowable sub-delegated legislation.

\(^{65}\) Section 11(2) places no onus on the defendant. The prosecution must show reasonable steps were taken to give notice. See, eg, Hogan v Sawyer [1992] 1 Qd R 35, where the appellant, an inmate at a correctional centre, was acquitted of having a prohibited article in his possession (money), contrary to s 93(1)(c) Corrective Services Act 1988, r 14. The Commission's Rules were required to be brought to the notice of the persons to whom they applied. The rules were not published in the Government Gazette, and there was evidence suggesting that they were not generally available to the public, nor generally distributed to prisoners. But there was also evidence that it was "common knowledge" among prisoners that they should not keep money while in prison. They could request a copy of the Act or Regulations at any time. There was
Canadian provincial legislation effectively enacts the common law approach taken in \textit{Johnson v Sargent \\& Sons}. Thus, the regulation is not “valid”, “enforceable”, or “effective” against a person who has not had “actual notice” or, in some cases, constructive “notice” of it. British Columbia is an exception, having a structurally similar provision to that used at federal law.

In summary, then, all the exemption or defence provisions examined above tend to fall short, in one way or another, of providing a complete defence. In particular, they are confined to certain types of delegated legislation (“statutory instruments” or “regulations” and so forth). The effect of this is that the courts are left to deal with the issue of non-publication and non-notification in the cases where the delegated legislation does not fall within the definition provided.

Finally, New Zealand would seem to be lagging behind the other jurisdictions considered here. At present New Zealand provides no exemption or defence for unpublished regulations. The 1986 draft proposal was not adopted in the subsequent legislation. However the New Zealand Crimes Bill 1989 specifically provides for a mistake of law exception where there has been no publication or notification. Clause 26(3) provides that:

\begin{quote}
A person is not criminally responsible for any offence against any instrument made under the authority of any Act if, at the time of
\end{quote}

\begin{enumerate}
\item evidence however, that while the appellant was aware in a general way that he was not supposed to have money, he did not know that possession of money would constitute a criminal offence as distinct from a disciplinary breach. The court held that the requirements of s 22(3) of the Criminal Code meant that the appellant must know the substance of the prohibition in r 14. Since this was not the case, he was acquitted.
\item Alberta, Regulations Act RSA 1980 s 3(5): “Unless expressly provided to the contrary in another Act, and subject to subsection (3), any regulation that is not published is not valid as against a person who has not had notice of it.”
\item Manitoba, Regulations Act RSM 1988 s6(2): “Unless otherwise provided in an Act…until a regulation is published, it is not enforceable against a person who does not have actual notice of it.”
\item Ontario, Regulations Act, RSO 1980 c 446 s 5(3): “A regulation which is not published is not effective against a person who has not had actual notice of it.”
\item British Columbia Regulations Act RSBS c 36, s 3(2): “No person shall be convicted of an offence against an unpublished regulation unless it is shown that, at the time of the offence, reasonable steps had been taken to bring the substance of the regulation to the notice of the public or the persons likely to be affected by it.”
\end{enumerate}
the act or omission,—

(a) The instrument had not been published or otherwise reasonably made known to the public or persons likely to be affected by it;

and

(b) The person did not know of the instrument.

In its favour clause 26(3) places no onus of proof on the defendant. It also covers all instruments made pursuant to delegated legislation. However the question again arises as to what meaning is to be attributed to “instrument”. Should it be given the same meaning as “regulation” in the Acts and Regulations Publication Act 1989? If so, such “instruments” as sub-delegated legislation and local authority by-laws would not be covered. A further problem arises over the meaning of “published or otherwise made reasonably known”. Should the meaning of “publish” in section 13 of the Acts and Regulation Publication Act 1989 apply? In other words, ought it to be sufficient compliance with the publication requirement that the regulation is noted in the Gazette? Clause 26(3)(a) provides a defence if the instrument has not been published or otherwise reasonably made known to the public or persons likely to be affected by it. Under what circumstances would the instrument be “reasonably made known to the public or person likely to be affected by it?” This may include media publicity, circulars put out by the relevant government department or authority, notices in newspapers or, more specifically, circulars to trades, professions or persons likely to be affected by the law change.

Cameron⁶⁹ notes that:

Subclause 3 introduces a wholly new defence of excusable ignorance of unpublished subordinate legislation. It is not available where, although unpublished, the instrument has been ‘reasonably made known to the public or persons likely to be affected by it’. On the surface this seems a little too restricted. A statement detailing an unpublished regulation by the relevant Minister which is printed only in an Auckland newspaper has presumably been ‘made known to the public’. Should an inhabitant of Dunedin, who has no good reason to be on the alert for such a regulation, nevertheless be convicted? Or is the ‘public’ to be interpreted as ‘the relevant public’? Surely the object of this clause would be achieved by reasonable ignorance and limited to cases where there has been no

formal publication. There is no good reason why it should not be redrafted to achieve this.

Clause 26(3)(b) must not be overlooked. The effect of this provision is that even if the instrument was neither published nor brought to the attention of the public or interested persons, there will be no defence if the individual nevertheless learnt of the instrument by some other means.

The Report of the Crimes Consultative Committee 1991 recommended that the reference to “instruments” be replaced by “regulations.” By clause 26(3) the Committee required that “regulations” was to have the same meaning as that assigned to it in section 2 of the Regulations (Disallowance) Act 1989. This will, in part, clear up the difficulties associated with the term “instruments.” However, as already discussed, the definition of “regulations” in the 1989 Act may not cover all forms of delegated legislation.

A final point common to all the legislation and legislative proposals examined so far is that they apply only to delegated legislation. None extends to statutes. Section 17 of the Acts and Regulations Publication Act provides that “it shall not be necessary to gazette Acts of Parliament.” The distinction drawn between statutes and delegated legislation has been questioned by Stuart:

One wonders if it is sound. It is true that sometimes there are full public debates about new legislation in Parliament and sometimes they are adequately reported. But it is also true that much legislation is passed without debate and without comment in the media. A crude rule that a statute is deemed to be known by all upon promulgation also dodges all questions of blameworthiness.

Colvin similarly argues that even if statutes are always published there is “no good rationale for excluding statutes from the purview of the general principle.” Rather, the

70 The common law cases such as Johnson v Sergeant & Son make the same distinction.
71 Section 15 Acts Interpretation Act 1924 contains a comparable provision. Although long since repealed, publication of all enactments of the General Assembly in the Government Gazette was once a constitutional obligation under the New Zealand Constitution Act 1852. See also, Wild CJ in VUWSA v Government Printer [1973] 2 NZLR 21 at 23. There still remains a duty, however, to make all Acts available for public purchase: Acts Interpretation Act 1924 s 13.
72 Canadian Criminal Law (2nd ed 1987) 284.
73 Colvin, Principles of Criminal Law (1986) 211.
fact that statutes usually receive more publicity would be a factor to consider when looking
at the practical likelihood of the defence succeeding rather than to the availability of the
defence in law. Morgan echoes the concerns of the other writers:74

However, the argument that 'the existence of an Act is sufficiently
made known to the public by the passage of the Bill through the
Parliament' [para 6.19] will strike many as quixotic given the
volume of complex modern legislation in which the 'criminal law
applies in surprising ways to otherwise ordinary behaviour.' In
practice, problems of accessibility are unlikely to arise with statutes,
but there is no good reason in principle for their exceptional status.
The fact that statutes are always published would mean that their inclusion within a non-
publishation exception may be of little practical use. But the point made by these
commentators is valid: why should statutes be excluded from a defence? It is not
impossible to envisage situations where a statute might come up against the same non-
publishation complaint as delegated legislation. One possible situation would be where an
industrial strike causes a delay in the publication of penal legislation.75

More generally, the sheer volume of modern statutes—parallel in some cases to the
flood of delegated legislation—admits the possibility of an oversight or delay in
publication. So, while statutes are always published, it may sometimes be a case of later
rather than sooner. Thus, better that the non-publishcation provision is benignly inclusive
(of statutes) than narrowly restricted (to delegated legislation).

There has been a tentative recognition of the benefits of including statutes within a
non-publishcation defence. The Law Reform Commission of Canada recommends the
introduction of such a defence. Clause 3(7) provides that "No one is liable for a crime
committed by reason of mistake or ignorance of law ... (b) reasonably resulting from...(i)
non-publishcation of the law in question". The Commission envisages that its
recommendation will widen the already existing exception to cover the non-publishcation of
any law.76

75 See English Law Commission (Law Com No 143), "Codification of the Criminal Law" (1985)
para 13.71.
76 Report No 31, "Recodifying Criminal Law" (1987) 34-35. Stuart, supra n 72 at 284 has
welcomed the recommendation but cautions that the adoption of a wide definition of "law" will be
needed.
The English Law Commission has also taken the view that, in principle, no one should be punished for breaking a “law” which had not been published or otherwise been made available. However no recommendation was made to extend a defence such as that found in section 3(2) Statutory Instruments Act 1946 to non-publication of statutes. Instead, the commission thought that “problems arising from the non-publication of statutes are best dealt with by discretion in prosecution.” No mention of this point is made in the more recent Report of 1989.

The Model Penal Code of the American Law Institute in the United States provides a general non-publication defence. Section 2.04(3) provides that:

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

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

However, under section 2.04(4) the onus is on the defendant to establish a defence by a “preponderance of evidence”.

One final proposal to alter New Zealand law should be mentioned. The New Zealand Law Commission Report No 17 deals with recommendations for a new Acts Interpretation Act. One provision of relevance in the present context is clause 4 of the draft Interpretation Act which provides, “(1) An enactment comes into force 28 days after the day on which, in the case of an Act, it is assented to, or, in the case of regulations, it is made.”

The Report explains:

78 Law Com No 177, “A Criminal Code for England and Wales” (1989). Note however that the commission did recommend that a defence like that in s 3(2) of the 1946 Act should be included in the proposed Criminal Code, paras 12:42-12:43, and clause 46.
79 Paragraph 267.
We propose, in cl 4, that the usual date of commencement should be 28 days after the date of assent or making. Basic principle provides the main reason for that delay. In our Report on the Statutory Publications Bill we quoted Sir Richard Wild CJ: ‘People must be told what Parliament is doing and must be able to read the letter of the law,’ *Victoria University of Wellington Students’ Association v Shearer* [1973] 2 NZLR 21. The Commission went on to say that ‘we cannot have a moral obligation to obey a law which is actually withheld or kept secret from us. The State must make the law available.’ (NZLC 11 1989 para 7.)

Should clause 4 be enacted it may have an impact on the Crimes Bill defence of non-publication (if that too were enacted). The 28 day delay between the making of a regulation and its coming into force would, in practical terms, give a greater number of people a greater chance to learn of the making of the instrument. The Report further finds that:

An important practical element of that obligation [that the State must make the law available] is often the allowing of sufficient time for the knowledge of the new law and of its actual text to spread throughout New Zealand—especially to those most affected. It is submitted that the enactment of the 28 day rule would be beneficial and would assist rather than hinder clause 26(3) of the Crimes Bill (if also enacted). Twenty-eight days “grace” would give the instrument making authority the opportunity to publish the instrument or at least make its existence known to the public or affected persons. This may limit the situations in which a clause 26(3) defence could be pleaded.

This delay period is used in other jurisdictions. A number of states in the United States use “fixed-wait” provisions. Even so, such a provision also has limitations:

The fixed wait concept has great value, but does not completely resolve the promulgation question. In fact, it is not, strictly speaking, a promulgation requirement: it facilitates promulgation but does not ensure that a law will be available or findable. Nor

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80 The chance is always present that even if an instrument is “published” (noted in the Gazette), and information is supplied as to where copies are to be made available, that the regulation may not actually be printed and available for sale on that particular day.

81 Para 268.

82 The recently enacted Victorian and Western Australian Interpretation statutes also contain the 28 day rule.

83 See Murphy, supra n 6 at 273–275 for examples.

84 Ibid at 275.
does the fixed wait requirement provide any incentive to publish a law and educate the public about its provisions. Thus, while the providing of time to learn of the law is valuable, the fixed wait approach does nothing to put the public on notice of the law or to ensure its accessibility.

While these comments are valid, a fixed-wait provision enacted in tandem with a specific non-publication defence would at least provide greater protection than the procedures currently applicable in New Zealand.

3 INACCESSIBILITY

(a) General

The model of ignorance resulting from non-publication of a law shades into another general area where the claim is that a published law was inaccessible or unavailable to the person accused of its violation. By contrast with the non-publication cases where ignorance is truly unavoidable or invincible, the inaccessibility cases span the distinction between avoidable and unavoidable ignorance. At one end of this span the courts have usually rejected claims based on lack of knowledge of a law validly enacted and published shortly before the violation. Since the law was available and knowable in advance of the criminal act, ignorance of the law was avoidable. A similar result has followed where the person charged with violating a published law is a stranger to the jurisdiction and claims in defence that the act in question was not an offence under the law of that person's home jurisdiction. Here again the courts have been unwilling to recognise exceptions to the ignorance of law rule.

But there are other cases at the further end of the avoidable/unavoidable span of ignorance where a defendant can establish that the law in question was completely beyond his or her means of knowledge. Such cases impel the conclusion that the defendant's ignorance of the law was unavoidable and therefore excusable. Intuitively, any objective

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85 See, Hall & Seligman, “Mistake of Law and Mens Rea” (1941) 8 U Chi L Rev 641 at 656, n 62 for relevant USA authorities.
86 Eg, R v Esop (1836) 7 C & P 456, 173 ER 203. See also Hall & Seligman, ibid at 66 for further case references.
impossibility of knowing the law ought to avoid liability whether it results from non-publication of the law or lack of any means of discovering what the published law is. However, as the following cases illustrate, the courts are generally reluctant to excuse under these circumstances too.

(b) The Nineteenth Century Cases

The first of the early cases on inaccessibility or unavailability is *R v Bailey*. The defendant, the captain of a ship, was charged with firing at another ship while at sea. This was prohibited by a statute (39 Geo III c 37) passed six weeks earlier. The defendant was already at sea when the royal assent was given and therefore could not have known of the prohibition. He was convicted but subsequently pardoned.

Lord Eldon told the jury that he was of the opinion that [the prisoner] was, in strict law, guilty within the statutes, taken together, if the fact laid were proved, though he could not then know that the Act of the 39 Geo III c 37 had passed, and that his ignorance of that fact could in no otherwise affect the case, than that it might be the means of recommending him to a merciful consideration elsewhere should he be found guilty... [The Court was] of the opinion that it would be proper to apply for a pardon, on the ground, that the fact having been committed so short a time after the Act 39 Geo III c 37 was passed, that the prisoner could not have known of it.

One possible *ratio decidendi* for *Bailey* is that ignorance of the law does not excuse—even a person who had no means of knowing the law. Other more restrictive interpretations have also been suggested. On one view the decision may stand for the proposition that conduct known to be wrongful—*Bailey* might well have been guilty of an assault even if the relevant statute had not been enacted—will not be excused merely because an accused did not know and could not have known which particular offence was being committed. But apart from being purely speculative, this interpretation

87 (1800) 168 ER 651, Russ & Ry 1.
88 Ibid at 652-653.
89 Law Com No 143 (1985) at 73, para 9.2 cites *Bailey, Esop and R v Barronet & Allain* (1852) Dears CC 51; 169 ER 633 for the proposition that “There is abundant authority that as a general rule the accused's ignorance of the offence he is alleged to have committed, or his mistake as to its application, will not relieve him of liability.” Note also Law Com No 177, vol 2, at 196, para 8.24 which repeats the proposition and cites in addition *Grant v Borg* [1982] 2 All ER 257 per Lord Bridge.
90 Colvin, supra n 73 at 211.
simply begs the question as to the relevance of ignorance of the particular law under which the defendant was charged. It does not meet the objection that the defendant in Bailey ought not to have been held formally liable for violation of a law that, in the circumstances, was unknowable.92

Another possible interpretation is that since recommending a pardon was, at that time, the only means of correcting a legally erroneous conviction,93 Bailey arguably does recognise invincible ignorance of the existence of the law as an excuse. Thus as Matthews points out, “it must at least be arguable that in Bailey D’s invincible ignorance of the passing of the statute was an excuse, and that Bailey is really no authority for the proposition for which it is usually cited.”94 However, this argument may be overstated because although the judges, sitting as an informal appellate court, recommended a pardon, the decision in “strict law” was that the defendant’s ignorance “could in no otherwise affect the case”. While the harshness of this rigid adherence to the ignorance of law rule was avoided by an act of forgiveness, judicial concern with “merciful considerations” might more properly have been focused on recognition of an exception to the general rule.

The decision in Bailey can be contrasted with the result in The Cotton Planter (1810).95 This case involved a prosecution for the forfeiture of the ship The Cotton Planter for violation of a shipment embargo. The Act imposing the embargo was passed on 9 January 1808 but was unknown in St Mary’s, Georgia, when the defendant sailed on 18 January from the port.96 The Act did not indicate the date on which it was to become effective. The case is distinguishable from Bailey, where the statute was clearly in effect, on the ground that the relevant law became operative only when it was received at the place where the alleged offence had occurred.97 Hall and Seligman suggest that even if the

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91 There is no evidence of this matter having been taken into account by the judges when recommending the pardon.
92 Colvin, supra n 73 at 211.
93 Matthews, supra n 15 at 180; Brett, “Mistake of Law as a Criminal Defence” (1966) 5 Melb Univ L Rev 179 at 187.
94 Ibid at 181.
95 (1810) 6 F Cas 620, referred to by Cass, “Ignorance of the Law: A Maxim Re-examined” 17 Wm & Mary L Rev 671 at 688; Hall & Seligman, supra n 85 at 657–658; Murphy, supra n 6 at 259–260.
96 Hall & Seligman, idem.
97 The Cotton Planter, supra n 95 at 261 per Livingston J, “such laws should begin to operate in the different districts only from the times they are respectively received.”
court had been forced to accept that the law was effective from the date it was passed, the
strong language used by the court and the policy underlying the court's decision would
indicate that a defence based on ignorance of the law would nonetheless have been
given.98

In contrast, the contemporaneous circuit court decision in The Ann (1812)99 held
that the same law came into effect immediately on enactment and therefore applied to the
ship's operators even though they were ignorant of it.100

However, in Burns v Nowell,101 a civil action for damages, the English Court of
Appeal recognised an important qualification to the ignorance of law rule. The plaintiff
vessel left port before the passing of the Kidnapping Act 1872 which required ships to have
licences to carry "native labourers" of the South Sea Islands. The first that the plaintiff
learned of this law was from the defendant vessel in August 1873 while still at sea, and
with "native labourers" on board. The court found that the Act did not apply to the
plaintiff vessel. Although holding that ignorance of the law was no excuse, the court
added the following rider to the general rule:102

[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 [an individual] 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 has elapsed without its being
discontinued.

98 Hall & Seligman, supra n 85 at 658, and n 74.
99 (1812) 1 F Cas 926.
100 Note that the decision The Ann made no reference to The Cotton Planter. Hall & Seligman,
supra n 85 at 658 suggest that while the decision as to the effective date of the statute is sound, it
would have been better policy to allow mistake of law as a defence, "enforcement of the statute
against those too far off to have heard of it as truly ex post facto in substance as to enforce it
retroactively."
101 (1880) 5 QBD 444 (CA).
102 Ibid at 454.
Other Cases and Problems

This qualification in *Burns v Nowell* provides a solution couched in terms of reasonableness for “continuous proceedings” and resultant problems of unavoidable ignorance of post-commencement law.

Given modern communication systems it is less likely, although not impossible, that the *Burns*-type situation would arise today. A possible example may be found where a hunter enters the bush for a certain time during which no communication is possible with the outside world. Upon leaving “civilisation” the hunter is aware of the laws that govern what species he may hunt and kill and what species he is prohibited from hunting and killing. However, while still “incommunicado”, the law is changed so as to include within its prohibitions a bird or animal which the hunter believes he is free to hunt and kill. If, in fact, he does shoot such an animal ought he to be prosecuted on his return to the outside world? The situation is surely analogous to *Burns* so that “a reasonable time must be allowed...for...the discontinuance [of an act].”

*Burns v Nowell* and related cases can also be largely cured by the “fixed-wait” provisions which require the lapse of a defined period of time before a law takes effect. However, neither the exception in favour of continuous proceedings nor the legislative palliative of a fixed-wait provision ensures that the law is accessible and findable. Take, for example, cases such as *Lim Chin Aik* where the prohibition order had been made solely to prohibit the appellant but had not been published or otherwise brought to his attention. In this context the relevance of the Privy Council’s judgment is to be found in the conclusion that the ignorance of law rule cannot apply where there is no

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103 Situations such as the hypothetical one mentioned in the text may have the potential to arise under legislation such as the Wildlife Act 1953. See ss 5, 8 and the Second Schedule.

104 Supra n 101. See also Murphy, supra n 6 at 273–275.

105 The Report on Regulation Making Powers in Legislation (1986) AJHR, 1.16A, at 17, notes the requirement in the Cabinet Office Manual that “as a matter of general practice” there should be a period of “at least 14 days” between the probable date of the notification in the *Gazette* of the making of a regulation and the date on which it comes into force. The Committee recommended that this period of at least 14 days should be increased to at least 28 days. (See para 28.1, Report of the Regulations Review Committee 1980.) See also Law Commission Preliminary Paper No 1 (1987) *Legislation and Its Interpretation* at para 22, which states that it has been practice in New Zealand since 1980 that, in general, regulations are to have effect two weeks after they are made. The Acts and Regulations Publication Act 1989 has not enacted any “fixed-wait” provisions.

106 Supra n 11 already discussed in relation to “impossibility”.
means of enabling a person by appropriate inquiry to discover what the law is.107

A problematic New Zealand decision is Police v Harkness108 where the defendant was convicted of being found unlawfully on a racecourse contrary to section 101(5) Racing Act 1971. The New Zealand Trotting Conference, pursuant to the empowering provisions of section 101, had made rules expressly excluding certain classes of persons from racecourses during race meetings. These rules were published in the Gazette on 8 June 1978. Rule 3(c) provided that persons convicted of certain offences, including assault, were to be excluded from race meetings.109 The defendant had been convicted of assault in April 1982 and was found and removed from a racecourse in September of the same year. He claimed he did not know he was a person excluded by the rules from being present at the race meeting. Bradford DCJ distinguished Lim Chin Aik on the basis that the order in that case was directed solely at the appellant and that since it had not been published there was no way he could have learned of its existence. However in the present case:110

[Section] 101, did provide for publication of the rules made by the Trotting Conference in the Gazette, and also required the Minister of Internal Affairs to give his approval to the rules so made. In my view, publication of the rules in the Gazette is notice to the world, and in particular to the defendant... That being so, the maxim, “ignorance of the law is no excuse”, applies and the defendant is caught by the provisions of s 25 of the Crimes Act 1961. The defendant in this case therefore is presumed to know the law contained in s 101 of the Racing Act 1971, and by virtue of publication of the rules of the New Zealand Trotting Conference in the Gazette he is fixed with knowledge of those rules and the necessary mens rea is imputed to him.

Bradford DCJ therefore saw no injustice in convicting the defendant because the rules had been duly made and published. Even so, Harkness is a distinct example of how even published laws may not come to the attention of the particular wrongdoer. This raises the question of whether there ought to be a defence available in certain circumstances, even

107 Idem.
109 Section 101(5) provided that any person in breach of the rules could be removed from the racecourse and would be liable on summary conviction to a fine not exceeding $100.
110 Supra n 108 at 202.
where the law has been published.

The decision in *Harkness* may in turn be contrasted with two United States cases, *Mullane v Central Hanover Bank & Trust Co*,,111 and *Lambert v California*.112 In the first, *Mullane*, a civil proceeding, the only notice given was by way of publication in a local newspaper. The Supreme Court found that notice of an adjudication must reasonably be calculated to inform interested parties of the proceeding and give them an opportunity to be heard113 and, in the absence of such a method designed to inform interested parties, the court found that the method must not be "substantially less likely to bring home notice than other of the feasible and customary substitutes."114 In *Mullane* itself it was held that the notice was inadequate since it was "not reasonably calculated to reach those who could easily be informed by other means at hand."115

In *Lambert*116 a municipal ordinance made it an offence for a convicted person to remain in Los Angeles for more than five days without registering with the Chief of Police. Lambert, a convicted person, had lived in the municipality for seven years without registering and without any knowledge of the requirement to do so. A divided Supreme Court reversed the conviction with Justice Douglas for the majority finding that, while ignorance of the law is no excuse:117

We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand.... Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.

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113 Murphy, supra n 6 at 263–264.
114 *Mullane* supra n 111 at 315.
115 Ibid at 319.
116 Supra n 112.
117 Ibid at 229.
In Lambert, like Harkness, the ordinance was directed at a class of persons and not just an individual as in Lim Chin Aik. Whereas Lambert was required to do something (register), Harkness was required not to do something (to attend race meetings). In both cases the law, although originally published (albeit some years earlier) and therefore providing the “wrongdoers” with at least the opportunity to learn the law, nevertheless seemed quite beyond the knowledge of the ordinary person. While the majority in Lambert affirmed the general rule that ignorance of the law does not excuse, the ordinance was held unconstitutional for violating the due process clause of the United States Constitution. The reason for this was that the defendant had no notice of the ordinance. As Justice Douglas said, “ingrained in our concept of due process is the requirement of notice.” So the defendant was not liable in the absence of actual knowledge, or proof of the probability of such knowledge, of the registration requirement. The harshness of punishing for breach of such a law is starkly illustrated by the comment of Justice Douglas that, “[w]ere it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.” Thus, by the means of due process, unavoidable ignorance did in fact excuse in Lambert.

In Harkness the defendant was presumed to know the law and Bradford DCJ found him to be fixed with knowledge of the rule by virtue of publication. Therefore the court can be seen to have found constructive notice upon publication. Arguably the same result would follow under clause 26(3) of the Crimes Bill 1989 since, in terms of clause 26(3)(a), it is enough if the “instrument” has been published. The second limb of that provision relating to making an instrument known appears intended to come into play only on non-publication. Consequently, assuming that “publish” is satisfied by notification in the

118 Lambert, supra n 112 at 228.
119 Ibid at 229. See also Screws v United States (1945) 325 US 91 at 96 where the Supreme Court, in assessing a vagueness challenge, stated that to impose criminal liability for violation of a statute that did not adequately define the conduct it prohibited “would be like sanctioning the practice of Caligula who published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.” For further discussion see Cass, supra n 95 at 688.
120 In the later case of United States v International Minerals & Chem Corp (1971) 402 US 558, Justice Douglas held that ignorance of the law was no defence to a charge that the defendant had “knowingly violated” a regulation relating to shipments interstate. See Cass, supra n 95 at 682 n 78.
121 Supra n 108 at 202.
122 See also, Report of the Crimes Consultative Committee (1991) which recommends that “instruments” be replaced with “regulations.”
Realistically an authority such as the Trotting Conference cannot be expected to bear the burden of informing every person affected by its rules that they are prohibited from attending race meetings. No legal system could operate on the basis of individual notification, but it is equally unusual for individuals to ascertain the lawfulness or otherwise of each and every activity they engage in. As Gross puts it, the legal system works on the "presumption that a person either is informed about the law because the matter is sufficiently well-known, or that he is prompted to inform himself when the activity at hand is notoriously of the sort that falls within the general concerns of the law." The rule that ignorance of the law is no excuse is coherent and explicable in such cases. Theft, assault, culpable homicide and so forth are clear instances of sufficiently well known matters governed by the law. In these offences the law reflects standards of conventional morality and it is fair to presume knowledge by all or, to put it another way, it is fair to impose upon the individual a "duty" to know the law in these circumstances.

There is another type of case where the nature of the activity should also alert us to the fact of legal regulation. These are the typically regulatory offences such as drunk driving, traffic regulation, food and health offences and so forth. As with the first type of case, it is again reasonable to presume knowledge of the law or to impose upon the individual a "duty" to know the law. Ashworth explains this idea as the "thin-ice" policy in the sense that those citizens who know their conduct is on the borderline of illegality take the risk that their conduct will breach the law.

However, Gross's point is that not all conduct falls within the two categories described above. In other words, not all conduct is the subject of legal restriction—we have the liberty to do all kinds of things that the law does not regulate. This is what Gross terms the "model of prior privilege". In this area there must be a reason for the
individual to seek to inform himself or herself about the law. To return to Harkness, for the moment, if a rule-making body such as the Trotting Conference makes a rule which curtails a “prior privilege”—the liberty to attend race meetings—then people like Harkness, who violate the rule without knowing it, ought to be excused. While publication would otherwise be adequate to fix people with knowledge in the two obvious categories mentioned above, it is insufficient here. Gross explains it in this way:127

Notification of those who may be affected is required in order for these somewhat eccentric legislative specimens to have the force of law in curtailing the prior of privilege of those affected, since nothing about the activity restricted in such a case would prompt inquiry.

This supplies the conceptual framework upon which to build a general defence of impossibility or unavoidable ignorance of the law. If the particular law is, as Gross puts it, “eccentric”, or, as if “written in print too fine to read or in a language foreign to the community”,128 people like Harkness have been denied a fair opportunity to conform their conduct to the law.

(d) Conclusions

A progression may be traced in the examples of “impossibility” examined in this chapter. The paradigm or model of non-publication and strict impossibility of knowledge was considered. Judicial strategies avoided punishment of the truly innocent in such cases as Johnson v Sargant & Sons, Lim Chin Aik, and the Canadian decisions. From there the statutory requirements for publication were considered. But these promulgation requirements are really only technical rules dealing with the date at which laws become operative and effective; they do not resolve the wider problems of unavoidable ignorance of formally published laws. Recent legislative proposals to create limited exceptions to the ignorance of law rule, such as the Crimes Bill 1989 and the Australian Commonwealth proposal, are similarly limited to non-publication. Yet they do embody the rudiments of a wider approach in their references to laws not “reasonably made available to the public or to those persons likely to be affected.” At present the requirement of making the law

127 Ibid at 275.
128 Lambert, supra n 112 at 229 per Justice Douglas.
available appears intended only to come into operation on non-publication. But as can be seen from cases like *Harkness* a general impossibility exception is needed.129

Whether the law under scrutiny in any given case had or had not been published or made available would be an important factor in determining whether an accused's ignorance was unavoidable. Other important factors would be the nature of the law and the activity it regulated and so forth. There may well be arguments that the provision of a general defence would be too vague and open to abuse by claims that were not deserving. However, the counter-argument to this is that judgments about impossibility of compliance, necessity, mistake of fact and the like are made in other areas of the law without any apparent difficulties.130

Admittedly, some limitations should be placed upon a general defence of impossibility or unavoidable ignorance. One important qualification would be to impose a requirement of reasonableness so as to avoid self-induced or pseudo-ignorance. This by itself may not be enough, however, to avoid a flood of unmeritorious claims. To appease objections based upon this ground the answer may be to reverse the onus of proof as proposed in the Interim Report of the Australian Commonwealth Review Committee (1990) so that the defendant seeking to plead a defence of unavoidable ignorance would bear the persuasive or probative burden of proving that such ignorance was reasonably unavoidable in the circumstances.

129 Stuart, supra n 72 at 280, says that "courts faced by impossibility in any circumstances must be prepared to recognize a common law exception to section 19." (emphasis added)

V OFFICIALLY INDUCED ERROR

1 INTRODUCTION

In the preceding chapter the cases dealing with non-publication and inaccessibility raised the issue of fairness in circumstances where an individual is unavoidably ignorant of the law. The term "fairness" expresses both a requirement of individual justice and a general concern for fair play in imposing the criminal sanction. These two dimensions of fairness are brought into further relief where the state makes the law known but induces an individual into error of law by reliance on an authoritative statement by one of its officials as to what the law provides. Such a case may arise where a public official or agency, with the responsibility for interpreting, administering or enforcing a particular law, supplies incorrect or misleading advice or information to an individual inquiring about an aspect of that law. The inquirer consequently commits an offence against that law, acting in good faith and in reliance on the advice or information supplied.¹

This problem may be defined in terms of the reciprocal duties of the state and individual, outlined in the preceding chapter. In the present context it may be seen that the state has, this time, fulfilled its duty to the extent that it has made the law known by means of publication. However, the individual has also performed his or her part of the social bargain by dutifully trying to discover what the law provides. As a matter of individual fairness it would therefore seem unduly harsh for the state then to hold that person to account for the mistake of law induced by the state's officials. This conclusion may be defended by a broader understanding of what it means to make an unavoidable mistake. In contrast to the non-publication and inaccessibility cases, the issue is now not whether the mistake was unavoidable in a strict physical sense, but rather whether it was unavoidable in a normative sense.² Therefore, just as physical and practical impossibility are the

¹ It is worth noting the ignorance/mistake distinction in this context. Whereas, in cases of non-publication and inaccessibility the person is ignorant of the law, in cases where the person is misled by relying on the erroneous advice of a state official or agency the person is mistaken in law.

² See Fletcher, Rethinking Criminal Law (1978) 744.
touchstones of unavoidability in the non-publication and inaccessibility cases, here the assessment would depend upon whether the individual could fairly and reasonably be expected to have been more conscientious or dutiful. Such an assessment would reflect the normative standpoint that the individual ought not to be blamed for making a good-faith mistake in reliance on the pronouncements of those whom the state has permitted to speak on its behalf.

Aside from being unfair to the individual, to deny the excusatory effect of a mistake in such a case would also run counter to the general expectation that the criminal law is based on an “incontrovertible minimum of political decency”.3 In relation to cases of non-publication and inaccessibility this minimum requires that the state should clearly inform its citizens before imposing criminal blame and that it ought not to punish those individuals who have not had a reasonable opportunity to ascertain what the law provides. Likewise, in the present context, political decency demands that when the state chooses to advise its citizens about the law, it should do so accurately. Therefore, in terms of fair play, the state’s duty extends beyond the formality of publishing the law to responsibility for the authoritative pronouncement of its agencies and officials. Viewed practically, to deny responsibility for such pronouncements would also undermine social confidence in the authority of those whom the state has designated to speak for it, and whose pronouncements it must wish to be respected. The risk is that “the law abiding attitude of the good citizen would weaken as the notion of settled law upon which his attitude depends is eroded.”4

These considerations of individual justice and fair play suggest a further exception to the criminal law’s general embargo on mistake of law. This exception, usually described as “officially induced error”, has been legislatively and judicially recognized in Canada and the United States though it has been “steadfastly rejected in the birthplace of the common law.”5 It has yet to find a place in New Zealand law. Neither the Crimes Act 1961 nor

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4 Gross, A Theory of Criminal Justice (1979) 272. Gross goes so far as to suggest that “there could never be reliance on the law at any time and speculations as to what the law might be in the future would then supplant the present state of the law as a guide to conduct.”
the proposed provision on ignorance or mistake in the Crimes Bill 1989 recognises the exception, although it has recently received attention from New Zealand courts.

This chapter will develop a case for the recognition of a defence of officially induced error in New Zealand. First, the present state of the law in New Zealand and related jurisdictions will be examined, followed by a review of the treatment of officially induced error in North America. The inquiry will cover a range of important issues concerning the rationale and scope of any exception in favour of officially induced error. Taking the standard case of error of law induced by an "official", is the defence to be confined to officials *stricto sensu* (ie with actual authority to speak), or is it available in cases of apparent or ostensible authority where there is reliance on the advice of an official of state whose actual authority does not extend to making pronouncements on the law in question? Relatedly, what is the underlying rationale of officially induced error? If the basic principle of the defence is that the state should be estopped from denying the advice of those permitted to speak for it, then the element of permission must be determined by identifying the authoritative status of the agency or person giving the advice. But if the starting point for the defence is the *reasonableness* of an individual’s reliance in the circumstances of the particular case, “it will matter less that the source of advice is not a state agency but some otherwise reliable agent”. 6 Further questions also arise where an individual relies not on the advice of an official, but on the advice of a lawyer, a decision of a court, or an ambiguous statutory provision.

2 THE ORTHODOX ANALYSIS OF RELIANCE CASES

People who act in reliance on incorrect or misleading official legal advice usually do so under mistake of law. If officially induced error is not available as a recognised excuse - a "true defence" 7 - generally such people will have no answer to an accusation that they

7 See, eg, Ward, “Officially Induced Error of Law” (1988) 52 Sask L Rev 89 at 103 for a discussion of this term. See also Smith, supra n 6 at 16. In essence, a "true defence" is a claim, not that either the actus reus or mens rea of the offence has not been established by the prosecution, but
breached the law. Since the mistake is typically one of law, the exclusionary rule in section 25 of the Crimes Act will deny such a person a defence based on lack of knowledge that what was done amounted to an offence. But if the mistake is one of fact, and the offence requires a mental element or admits a defence based on absence of fault, a defence of mistake operates "within the interstices of the offence [to] negative [that] element." Yet whether the mistake is one of law or of fact may seem largely incidental to the crucial issue that the mistake was made in reliance on official but erroneous advice. Even so, most although not all of the reliance cases that have come before New Zealand courts reveal judicial insensitivity to this issue. For the most part, the courts have not recognised a defence of reliance on the advice of an official to temper the harshness of the ignorance of law rule codified in section 25. However, some of the recent decisions do point to a growing awareness by the judiciary of the concerns raised by accused who have been supplied with erroneous information. While the focus in this section is on the New Zealand case law, the English and Australian cases have been even more unreceptive to recognition of officially induced error and shed little light beyond the New Zealand decisions.

In Labour Department v Green the appellant was charged with being a prohibited immigrant, contrary to section 4(1)(c) of the Immigration Act 1964. He had been convicted and imprisoned for various offences in the 1950s in England. In 1970 he made

rather, that a matter external to the elements of the offence has caused the mistake. In other words, a "true defence" is an excuse, rather than a claim that an element of the offence itself can be negated.

While the mistake of law rule excludes errors in reliance on official advice, typically, in offences requiring a mental element or where absence of fault is a defence, courts have also held that a mistake of law will not provide a defence where the statute provides a defence of "lawful excuse". Only mistake of fact will qualify as a lawful excuse. See, eg, Cambridgeshire & Isle of Ely v Rust [1972] 2 QB 426.


[1973] 1 NZLR 412, McMullin J.
inquiries at New Zealand House in London as to emigration restrictions to New Zealand. He was provided with a pamphlet stating that immigrants must be “of good health and character” and hold a British passport. No specific reference was made to restrictions on persons with previous convictions for which they had served terms of imprisonment. The appellant also consulted an employee at New Zealand House who told him no more than was contained in the pamphlet. On arrival in New Zealand the appellant was charged with being a prohibited immigrant.

At first instance it was argued that he lacked the mens rea to commit the offence. That argument was rejected. Similarly on appeal it was argued that the absence of mens rea constituted a defence as the appellant had done all he could to ascertain the requirements from the authorities and, “that short of reading the Immigration Act 1964 he could not have known that he was a prohibited immigrant.” However McMullin J found that:

Even if the offence be one to which an absence of mens rea is a defence, the result would be no different. The appellant's argument amounts to an assertion that, because he was a prohibited immigrant and did not intend to commit a breach of the law, he had no guilty mind and therefore no criminal liability. This argument treats morality of motive and lack of knowledge of illegality as equivalent to a lack of mens rea. With respect, this is an incorrect approach. It is not necessary in demonstrating whether an accused person has mens rea to show that he knew that what he was doing was immoral or contrary to the law, nor is it any defence for him to show that his motives in doing a particular act might have been entirely laudable. Nor does it matter that the accused may have thought that his act was legal because, both at common law and under the Crimes Act 1961, save in a very few exceptional cases, ignorance of the law is no defence.

McMullin J concluded the appellant was a prohibited immigrant and dismissed the appeal.

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12 The general reference that immigrants be of good character was the only indication that prospective immigrants would need to have clean criminal records.
13 Supra n 11 at 413.
14 Idem. That argument of course begs the question whether it would have been too onerous a requirement to have expected the appellant to have read the relevant legislation. This would be arguable, considering that the appellant was in England and the relevant legislation was a New Zealand statute. Not having been given any information to put him on notice that he may be a prohibited immigrant, may suggest that reading the Act would have been an unreasonable requirement.
15 Ibid at 414.
against conviction. He intended to land in New Zealand and the landing in New Zealand of such a person was intended by the legislature to constitute an offence: 16

It is no answer...to say that the appellant did not intend to break the law or that he had no ready means of discovering the law. That is no more than a plea of ignorance of the law which is no excuse.

Although officially induced error was not raised as a defence, the facts indicate that the appellant was misled - at least to some extent - by both the employee at Government House and the pamphlet. 17 If it can be assumed that the information from these sources individually or jointly qualified as “official” advice, the appellant was arguably induced into error of law by an omission to provide critical information. Against that, however, must be weighed the fact that the appellant did not volunteer the important information that he had criminal convictions. Had he done so, the official would have been in a better position to advise the appellant as to his true legal status. Yet, were officially induced error accepted as a defence, the relevance of the appellant’s own failure to disclose his criminal history might have been appropriately analysed in determining whether he had acted reasonably in reliance on official advice. 18

Significantly, the court in Green expressed some sympathy for the plight of the appellant, though it had no discretion to reflect this in penalty. The dismissal of the appeal resulted in mandatory deportation for the appellant. 19 McMullin J noted that: 20

It is not for the Court but for the Executive to exercise that prerogative as it sees fit, but I record that, had there been any discretion or prerogative vested in me, in the present case, I would have exercised it in favour of the appellant.

In cases where a discretion as to sentence has been vested in the courts, the fact that the mistake has been officially induced has been reflected in reduced penalties rather than by the recognition of a discrete defence that will effect justice through the judicial process. 21

16 Ibid at 415.
17 No evidence is recorded which states what position was held by the employee. The pamphlet was presumably printed by the Immigration Department on behalf of the New Zealand Government.
18 See Smith v MOT (1989) 2 CRNZ 412, infra at n 29, on the question of reliance.
19 Though s 40 of the Act preserved the Crown’s prerogative of mercy.
20 Supra n 11 at 416.
21 Smith, supra n 6 at 15. See, eg, Surrey County Council v Battersby supra n 10 (reliance on advice of local government official); R v Arrowsmith supra n 10 (reliance on information from
The use of the sentencing process to mitigate punishment in reliance cases is a palliative for the symptoms rather than a cure for the illness. Rather than beginning from a concept of culpability and reasoning towards criteria for excusing conduct that is prima facie violative of the criminal law, the courts have generally tended to find criminal guilt by mechanical application of the mistake of law rule. By making up for that outcome at the sentencing stage a pall of doubt remains over the critical attribution of blameworthiness. 

Green may be contrasted with Kumar v Immigration Department where the mistake was classified as one of fact rather than law. The appellant's wife became ill in New Zealand while she and her husband were on a cruise. At Auckland they were issued with “pass-out" cards by immigration officials and allowed ashore, their passports being kept aboard ship. The practice of issuing pass-out cards was made on a regular basis for passengers on overseas ship wishing to go ashore for the day. Due to the wife's illness the couple were forced to spend the night in Auckland and the ship left port. The appellant travelled to Wellington and was subsequently charged with entering New Zealand without holding a permit, contrary to section 15(5) of the Immigration Act 1964. At the hearing it was argued the appellant had made an honest and reasonable mistake that he had a permit to enter New Zealand—namely the pass-out card. Nonetheless he was convicted, the magistrate holding that there was no evidence of an honest belief when the emergency arose. He had not approached the Immigration Department to explain his situation and so there was no evidence before the court that he held an honest belief that he was entitled to be in New Zealand. The appeal to the Supreme Court was dismissed by Wild CJ who

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22 Fletcher, supra n 2 at 755.
23 However, even where officially induced error is accepted as a defence, mitigation of penalty may be quite an appropriate way of reflecting culpability, for example, where there is some question as to the reasonableness of the defendant’s reliance. See, eg, R v Jacey Ltd, supra n 10 . See also Smith’s comment regarding the lack of reasonable grounds for believing it was lawful to show the film. See also Harding v Police [1981] 2 NZLR 462, where the High Court found there was no basis for a reasonable belief.
24 [1978] 2 NZLR 553 (CA).
25 Ibid at 554.
held that mens rea (intention to enter New Zealand without a permit) was an ingredient of the offence with the burden resting on the defendant to point to evidence negativing mens rea. The appellant argued that the focus of inquiry ought to be on only the state of mind at the time of entry and not, as the magistrate had done, by placing importance on what later took place. Wild CJ found that the emphasis placed by the magistrate on what happened subsequently was done only to determine what was in the appellant's mind at the time of entering New Zealand.26

The Court of Appeal set aside the conviction. Richardson J found that as the charge was one of “entering” New Zealand rather than “remaining” in New Zealand, the state of mind at the time of entry was critical:27

We cannot believe that it was ever the intention of the legislature that an innocent visitor, who enters New Zealand relying on an assurance from a departmental officer that he had permission to do so, should suffer from the stigma of conviction followed by a deportation order, if it is subsequently found that a permit satisfying the statutory requirement has not, in fact, been granted.(emphasis added)

Measured against the result in Green, the decision in Kumar reveals at least the potential for unfairness resulting from the different treatment of mistake of law and mistake of fact. Green's mistake of law did not count in denying the relevant mental element whereas Kumar's mistake of fact was enough to displace mens rea. Of course, it must be conceded that had Green disclosed his criminal convictions and, in light of that disclosure, had not been officially advised that he was a prohibited immigrant, his mistake may have been materially indistinguishable from Kumar's in that he would honestly but mistakenly have believed that he was entitled to emigrate to New Zealand.28 But to accept that

26 Ibid at 554-555.
27 Ibid at 556.
28 It is also worth noting that the Court of Appeal in Kumar, contrasted Green as a case relating to ignorance, not mistake. Richardson J found: (at 557) 
[T]his is not a case where the statute forbids the doing of an act and the attempted defence is that defendant did not know what he was doing was prohibited - a defence of ignorance of the law (Labour Department v Green). The
conclusion is to confine the defendant in a reliance case to a narrow ground of exculpation based on an intractable and formalistic distinction between law and fact. In terms of both individual fairness and policy, the exculpatory effect of mistake in reliance cases would be more justly rationalised by shifting the focus from the object of the mistake to the blameworthiness of the defendant’s conduct. And, in this respect, the paramount question should be whether the defendant acted reasonably in reliance on official information about the legality of his or her proposed conduct.

Another instance of purported reliance upon official advice is to be found in Smith v MOT.29 The appellant had been convicted in the District Court of driving with an excess blood alcohol level under section 58(1)(d) of the Transport Act 1962. He argued that he believed he was under the permissible limit as he had followed Ministry guidelines regarding the amount of alcohol it was safe to consume. The Ministry had issued a pamphlet on drinking guidelines which contained a chart showing how much persons of various weights could safely drink while remaining under the limit. While the appellant conceded that he had never actually seen the pamphlet he had seen charts displayed in hotel bars on various occasions. In evidence he maintained he always kept under the “two bottle guide” which was depicted on the chart as nearing the danger limit. Anderson J in the High Court found that:30

[I]t must be taken for the purposes of the present case that the appellant deliberately confined his alcohol consumption to less than two standard bottles of beer to ensure that his blood/alcohol level remained within the legal limit and that his belief that such consumption would keep him within the legal limit was founded on erroneous information promulgated or adopted by the Ministry of Transport.

Expert evidence showed that the guidelines were “erroneous and misleading”.31

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30 Ibid at 413.  
31 Idem. The Ministry subsequently withdrew the pamphlet from circulation.
Anderson J dealt with the appeal on two bases. First, since driving with excess blood alcohol was a public welfare offence, the appellant had failed to discharge the burden of proving absence of fault as a defence. He had consumed just under the two bottle limit which placed him in the danger zone. Secordly, Anderson J rejected the argument that the Ministry of Transport had “promulgated or espoused information which was erroneous and which induced the appellant's mistake”:33

[T]he appellant did not suggest that he was misled by the pamphlet, not having seen the same before the offence occurred and which pamphlet amounted to evidence that the appellant and the Ministry of Transport shared the same mistake. This is different from a valid assertion that the Ministry of Transport induced the appellant’s mistake.... Alternatively, it was submitted, the dissemination of misinformation by the Ministry of Transport ought to induce the Court as a matter of discretion to exclude the evidence founding the offence on the broad but long established basis that a Court has an overriding discretion to exclude evidence which would operate unfairly against the accused.

Apart from the fact that to uphold such a submission would produce a lottery in this area of offending in that criminal responsibility would depend upon the employer of the informant, I do not accept that there is a relevant aspect of unfairness in circumstances where the appellant's error was merely consistent with and not induced by error on the part of the informant's employer.

The basis of Anderson J’s decision was therefore that there was no inducement by the Ministry of Transport and, presumably, no reliance by the appellant. Since the appellant had not actually seen the pamphlet he could not claim inducement or, for that matter, reliance. Such an outcome has the potential to be hard on people claiming officially induced error. There could easily be situations where a person relies on word of mouth from another who has received erroneous advice from an official. If the information is correctly conveyed to the next person, because that person has not directly obtained the advice first hand from the official, a defence would not be available on the analysis in Smith. Should it be crucial that he had not actually seen the pamphlet? He had not

32 Ibid at 416.
33 Idem.
misinterpreted the information but rather was “correct” in his reliance on the two-bottle-guide. Nonetheless, Anderson J’s strict approach may be justified on the ground that, were it otherwise, a defence might be available where the inducement was by “proxy”, with incorrect information being passed from one person to another until it reached the claimant.

It is difficult to gauge the wider implications of Smith. Anderson J treated the appellant’s mistake as one of fact. But under class two of Civil Aviation Department v MacKenzie34 (public welfare offences of strict liability) reasonable mistake of fact is one of the variants of the no fault defence. His Honour could, therefore, have analysed the appellant’s argument in general terms - that is, whether the mistake was reasonable in the circumstances. This is implicit in the decision. But interestingly, Anderson J approached the issue in terms of officially induced error of fact whereas the defence operates, where it is recognised, in cases of mistake of law. Possibly his references to inducement were meant to be understood broadly in the context of the no fault defence and not specifically in relation to officially induced error. Arguably therefore because the mistake was one of fact, Smith really has no wider implications for the recognition of officially induced error as a defence to mistake of law.

Cardin Laurant Ltd v Commerce Commission35 involved a statutory defence providing an excuse based upon reasonable reliance on information supplied by another person. The appellant was a clothing retailer selling children’s nightwear. A Commerce Commission officer, after inspecting the shop, had the fabric of a child’s nightdress tested. It failed to meet the particular New Zealand Standard Specification relating to safety standards for children’s night clothing as the fabric fell outside classes 1 and 2 of the standard specification. The company and its sole director, Knight, were convicted of supplying goods which failed to comply with a prescribed product safety standard, under section 29(4) and section 40 of the Fair Trading Act 1986. Both appealed on the ground (inter alia) that there was a positive statutory defence available under section 44 of the Fair

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34 [1983] NZLR 78.
35 [1990] 3 NZLR 563.
Trading Act which provides:

(1) Subject to this section it is a defence to a prosecution for an offence against section 40 of this Act if the defendant proves
(a) That the contravention was due to a reasonable mistake; or
(b) That the contravention was due to reasonable reliance on information supplied by another person....36

Knight claimed he had twice telephoned the Department of Trade and Industry and both times had been led to understand by unnamed departmental employees that if the garments were not labelled as falling within classes 1 or 2 of the Standard Specification they could be sold in New Zealand.37

The defence claimed under section 44(1)(a) was that Knight was operating under a reasonable mistake. Alternatively, it was argued that section 44(1)(b) applied in that Knight and the company had placed reasonable reliance on information supplied by another person (the advice given by the Department of Trade and Industry officers over the telephone).38 Fisher J was prepared to assume in the appellant's favour that the alleged advice had in fact been given, and also that Knight did rely, at least in part, on the advice. His Honour identified the crucial issue as being whether the reliance was "reasonable" for the purposes of section 44(1)(a) and (b). This required an assessment of the circumstances in which Knight received the advice.39 The judge then proceeded to consider in detail a number of factors which showed that, in the circumstances, the reliance was not reasonable.40

Firstly the explanations were apparently given on an impromptu

36 Section 40 carries severe penalties. Under s 40(1)(a), for persons other than a body corporate, a fine not exceeding $30,000. Under s 40(1)(b), for bodies corporate, a fine not exceeding $100,000. The severity of the penalty may be further reason to provide a statutory defence.


38 Section 44(3) requires a defendant who purports to rely on the defence under s 44(1)(b) to "not later than 7 days before the date on which the hearing of the proceeding commences, [serve] on the informant a notice in writing identifying that person." Knight was unable to supply the names of positions held by the persons in the Department to whom he had spoken. ([1990] 3 DCR 97, at 110–111). In the High Court, Fisher J doubted whether the notice fell within s 44(3). However, s 44(3) enables a defendant to rely on the defence with the leave of the District Court. While express leave had not been given in the lower court the judgment itself seems to proceed on the basis that the defence was an operative issue. Fisher J was therefore prepared to assume that leave had been tacitly given.

39 Supra n 35 at 571.

40 Idem.
basis. The Department representatives concerned were patently not taking time to go away in response to the inquiry and consult others or consult the law or departmental circulars on the subject.

Secondly, the advice was given orally. It must have been apparent to Mr Knight that if the advice had been reduced to a written form on the letterhead of the Department or the Commerce Commission that stamp of authority would have meant that the responsibility for it would have been taken more seriously by those involved.

Thirdly, it appears that Mr Knight had no knowledge as to the standing of the departmental representatives concerned...there is no suggestion that the representatives concerned had any particular degree of experience or official status or seniority within the Department.

Fourthly, Mr Knight is unable to give the names of the persons involved. That anonymity seems to reduce the degree of responsibility one could properly expect in those circumstances.

Fifthly, the matter on which Mr Knight was making his inquiries involved a question of law. It was not a question of fact or departmental policy. The primary source for advice on questions of law is one's own legal adviser....on a question of law it seems irresponsible to rely upon the advice of an anonymous layman.

Sixthly, Mr Knight was a professional businessman dealing with this product in bulk on a continuous basis. Contemplating a course of conduct of that nature, and with his experience in the trade, I think he was called upon to go into the matter rather more carefully than would be the case with an individual consumer contemplating a one-off transaction in a non-professional situation.

Seventhly, ...the explanations which Mr Knight received constituted a direct about-face in a long-standing law.... The obvious object of the specifications and associated statute and regulations on this topic was to reduce the risk of fire accidents flowing from inflammable children's night clothes.

Had Mr Knight stood back from the situation he might have properly asked himself whether the Government and legislature would have gone to this trouble of setting up a legal provision on one matter only to then give free rein to clothes which in no way complied.
While the appellant was inquiring about matters of law, Fisher J left open the question whether the statutory defence applied to mistakes of law. Yet surely it must. As section 44(1) is structured, paragraph (a) might be confined to "reasonable mistakes of fact." But paragraph (b) is broad enough to cover the ground of officially induced error of law — "information" is a very wide term. Secondly, although on the facts the appellant was found not to have acted in a reasonable reliance, some of Fisher J's general comments about reasonableness are questionable. In particular, he emphasised the fact that the explanations were given orally and on an impromptu basis. The first matter is essentially evidentiary — a letter is probative whereas a telephone conversation is more difficult to establish. But, aside from that, should it matter whether the advice was oral or written? In addition, an inquirer receiving immediate advice is not to know that it is impromptu in the sense of being off-hand or unprepared. Added to that is Fisher J's apparent requirement that an inquirer know the standing of the official. But if the official is ostensibly or apparently authorised to speak, surely that is enough. Fisher J's fourth and sixth considerations have some substance. An anonymous official will be difficult to identify at a later stage. Similarly, the appellant's business experience in the industry would suggest he would take greater care in ascertaining the legal position than one who had no experience in the area. But Fisher J's fifth suggestion that the primary source of advice on questions of law is one's own legal adviser is questionable. When concerned about a matter within the jurisdiction of the Department of Trade and Industry, one should surely consult that department.

Fisher J's decision bears out Dean's observation that "...few prosecutions so far have been defended and fewer still defended successfully", under section 44 of the Act. And "[t]he few defended cases to date clearly show (as has been the Australian experience) that avoiding conviction based on a defence of reasonable mistake or reliance etc is not easy." 43

41 Idem.
43 Ibid at 6.
There are, however, two decisions in New Zealand that have apparently accepted officially induced error as defence. In *Department of Internal Affairs v Nicholls* a District Court decision, the defendant was charged under section 63(b) of the Wildlife Act 1953 with having protected wildlife (some stuffed birds) in his possession without lawful authority. He argued that he had relied on advice given to him by wildlife officers of the Department of Conservation that he could lawfully possess certain protected species. This advice was wrong as the officers had overlooked some other relevant legislation. Bradford DCJ said:

> Now ignorance of law is no excuse but a mistake of law, reasonably held, is a defence and in my view of the matter the defendant, as a result of the correspondence he entered into with the Department, and the advice he got, finished up with a situation where he was mistaken as to the law and its fairly Draconian provisions as to what a person can or cannot do with absolutely protected wildlife, and for those reasons he had a reasonable belief and a mistaken view of the law and I cannot find the charges proved against him.

His Honour distinguished between ignorance and mistake of law, being of the opinion that only the latter is excusable. This is correct in the context of the decision, although the distinction will not always be sustainable because, as discussed in the preceding chapter, there are situations where being ignorant of the law is equally as blameless as being mistaken as to the law. Further, while section 25 of the Crimes Act refers only to ignorance, it is generally accepted that it applies to mistake also. But if Bradford DCJ’s comment is taken in narrower context just to cover officially induced error, then it does make sense because officially induced error does of course require a conscious advertance to the legal problem and is hence a true mistake rather than ignorance. Otherwise Bradford DCJ’s reasoning is sound. It was reasonable for the defendant to rely on the advice supplied by the Conservation Department officers. If the officers did not fully understand the relevant laws it would be unrealistic to expect the defendant in isolation

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45 Idem.
46 Eg, cases of non-publication, and inaccessible or unknowable laws.
to interpret them correctly. In the absence of any evidence to the contrary, the officers were the correct officials to contact and were competent to give the advice requested. The decision is a fair one which takes into account the defendant’s lack of blameworthiness in the circumstances.47

The most recent New Zealand decision to consider officially induced error is *Tipple v Police*48 Interestingly, while Holland J concluded that, because of the availability of other remedies, a separate defence of officially induced error was unnecessary in New Zealand, his decision considers the defence in considerable detail.

The appellants, Tipple (the managing director of Gun City Limited) and Gun City Limited appealed against convictions on various charges under the Arms Act 1983 relating to the sale of semi-automatic rifles and pistols to unauthorised persons, namely, Russian seamen. Tipple, a licensed arms dealer, was convicted of selling two semi-automatic rifles to an unlicensed person contrary to section 43(1)(a) of the Act. The sale was made at Lyttleton wharf by Tipple to a seaman, and the firearms were delivered there. Gun City Limited was convicted on six charges under section 44(1)(b) of selling pistols to unauthorised persons. The sales were made on the shop premises and the firearms were delivered to the ship. On appeal, both appellants argued that the doctrine of officially induced error, as recognised in Canada, ought to be applied in New Zealand. Evidence established that, although contrary to the Act, the police had condoned sales of firearms to overseas persons provided that sales were carried out at the dealer’s premises with later delivery to the ship.49 It appears that the police changed their minds on discovering that

47 But see s 63 which provides “Every person commits an offence...who without lawful authority (proof of which shall be on the person charged).” It is possible that Bradford DCJ relied on the “lawful authority” defence to acquit the accused. If so, the wildlife officers would be unlikely to have the power to give him “lawful authority” to possess a protected species. See, eg, *Police v Mareikeira* [1990] DCR 1 at 9, “the only lawful authority in the Act, is when authorised by the Director-General.” See also *Cambridgeshire & Isle of Ely County Council v Rust* supra n 8 at 434, where the defendant was charged with pitching a stall on a highway without lawful authority or excuse, contrary to s 127 of the Highways Act (UK). The appeal by the council was allowed, with Lord Widgery holding that “in order for the defendant to have a lawful excuse for what he did, he must honestly believe on reasonable grounds that the facts are of a certain order when, if they were of that order, he would have an answer to the charge, and indeed his conduct would be lawful and not contrary to the law. I do not believe that one can have lawful excuse for conduct because one is mistaken as to the law; everyone is supposed to know the law, but a mistake of fact of the kind which I have described seems to me to amount to a lawful excuse.”

48 Unreported, HC, Christchurch Registry, AP 199/93, 3 December 1993, Holland J.
the appellants were selling firearms to Russian seamen.\textsuperscript{50}

Holland J compared section 25 of the Crimes Act and section 19 of the Canadian Criminal Code and found that there were no material differences. He then considered the Supreme Court decision of \textit{R v MacDougall}\textsuperscript{51} where it was observed that officially induced error may, in appropriate circumstances, provide a defence to a criminal charge, and concluded that "[i]n deciding whether a person has acted criminally justice may require the application of such a principle if there is no other satisfactory way of achieving justice."\textsuperscript{52} Holland J decided that there was no need to introduce the defence in New Zealand, because section 19 of the Criminal Justice Act 1985 gives the court the discretion, where an offender is found guilty or pleads guilty, to "discharge the offender without conviction unless by any enactment applicable to the offence a minimum penalty is expressly provided for."\textsuperscript{53} Thus, while "no fetters are attached by the statute to the discretion given to the Court it is obvious that that discretion must be exercised judicially and not according to the whim of the particular court."\textsuperscript{54}

In assessing the requirements to be taken into account in applying the section 19 discretion, Holland J referred to \textit{Fisheries Inspector v Turner}\textsuperscript{55} where Richardson J had noted that "[i]n considering the exercise of the discretion under [section 19] the Court is required to balance all the relevant public interest considerations as they apply in the particular case." And, ultimately, "if the direct and indirect consequences of a conviction are... out of all proportion to the gravity of the offence, it is proper for a discharge to be given under [section 19]."\textsuperscript{56}

The Court of Appeal in \textit{Police v Roberts}\textsuperscript{57} approved of \textit{Turner} and elaborated on

\textsuperscript{49} Ibid at 4.
\textsuperscript{50} Idem.
\textsuperscript{51} Infra at n 91.
\textsuperscript{52} Supra n 48 at 7.
\textsuperscript{53} Idem.
\textsuperscript{54} Idem.
\textsuperscript{55} [1978] 2 NZLR 233.
\textsuperscript{56} Idem.
those requirements, finding that "[t]he public interest may require a conviction to be entered because of the nature of the offence and the particular occupation or proposed occupation of the offender."

However, the overriding consideration is whether a conviction would be out of all proportion to the gravity of the offence.

Applying those criteria to the facts before him, Holland J found:

In a case in New Zealand of 'officially induced error' resulting from a person committing a crime believing it on that ground to be law I have little difficulty in finding that it is in the public interest as well as being just, that a person or a company should not be held criminally liable for acting in accord with practices specifically approved by the Police.

He therefore concluded that the trial judges had erred in declining to exercise the jurisdiction given to them by section 19, and allowed the appeals, and discharged the appellants without conviction. Because Holland J used section 19 to discharge the appellants, he did not find it necessary to determine whether the offences would be classified as class one mens rea, or class two regulatory offences. He did however believe that on the facts there would have been a defence of total absence of fault. Interestingly, however, he observed that while the doctrine of officially induced error had been applied in Canada only in relation to cases of strict liability, he could see no "logical basis for restricting the application of the doctrine merely to that category of offences."

It will be seen when the Canadian decisions are examined, that Holland J's obiter observations go further than those made by the Canadian courts.

Obviously feeling constrained by section 25 of the Crimes Act, Holland J was unwilling to recognise a defence of officially induced error. Nevertheless he accepted the relevance of officially induced error of law in discharging the appellant without conviction

58 Idem.
59 Supra n 48 at 8. See also at 11.
60 Supra n 48 at 9.
61 Idem.
62 Indeed, he acknowledges that the appellant Gun City would not have been able to rely on absence of mens rea in category one, because it quite deliberately intended to sell firearms to persons without the necessary permits. Nor, on the facts could a defence of total absence of fault made out.
under section 19. Although by that means he was able to accommodate the public interest and individual justice, such an approach will not always be available.

Section 19 of the Criminal Justice Act cannot be used where the penalty provision relating to the offence requires a minimum penalty. Thus, in *Green* where McMullin J expressed concern that he was unable to mitigate the appellant’s punishment since convictions resulted in mandatory deportation, section 19 could not apply.64

3 THE NORTH AMERICAN TREATMENT OF RELIANCE CASES

(a) Canada

In Canada the excusatory effect of officially induced error has recently received judicial, legislative and academic attention. Although Canada (as noted by Holland J in *Tipple v Police*) begins on the same footing as New Zealand in that section 19 of the Code mirrors section 25 of the Crimes Act 1961,65 more attention has been paid in Canada to the “relevance” of section 19 and whether it should apply to all cases of ignorance and mistake of law. Even so, Canadian developments in this area are still “at a formative stage”.66

Until officially induced error began to be recognised as a defence, “courts anxious to avoid convicting such persons, were...obliged to perform logical contortions in order to achieve that end.”67 One such contortion was to treat mistakes of law engendered by official advice as mistakes of fact. *R v MacPhee* is an example.68 The accused was

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63 Supra n 11.
64 See also the Transport Act 1962 for mandatory disqualification provisions.
65 Section 19 states that “Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.”
66 Ward, supra n 7 at 90.
67 Ibid at 92.
charged with unlawfully possessing a restricted weapon (a carbine rifle) contrary to section 94(b) of the Criminal Code. He took the rifle to the police where a constable advised him that it was not a restricted weapon, that he should register the rifle, and “if there was anything unusual about the gun no doubt Ottawa would advise.” The Federal Government issued the accused with a firearm’s certificate. However, he was later charged with unlawful possession of the rifle. He was acquitted for the reason that he did not know the weapon was restricted, with the judge treating the mistake as one of fact. But strictly speaking this was not the case. The defendant’s mistake was to believe that the rifle did not fall within the definition of “restricted weapon” in section 82(1) of the Code. He was not mistaken as to the characteristics of the rifle (for example, that it was in fact a carbine rifle). Thus his mistake, though judicially designated as one of fact, was really a mistake of law.69

As in New Zealand and England, the Canadian courts have also used the sentencing process to circumvent the harshness of section 19 of the Code, imposing lighter sentences because of the “mitigating circumstance” of reliance on incorrect advice.70 The courts’ use of mitigation of penalty to lessen the rigidity of section 19 of the Code has been examined by one writer who argues that “this solution undermines the law ostensibly acknowledged by the court, without achieving justice; for a conviction, even when it results in an absolute discharge, can never be equivalent to an acquittal.”71

The first seeds of change were planted in the mid 1970s.72 Since then the courts in some cases have been prepared to recognise the defence of officially induced error, although the justifications for accepting the defence have, to some extent, been difficult to

69 See Ward, “Officially Induced Error of Law” (1988) 52 Sask L Rev 89 at 92. Stuart, Canadian Criminal Law (2nd ed 1987) 283-284 also discusses MacPhee and suggests that the case failed to take the opportunity to develop officially induced error by resorting to what he describes as a “devious...device of classifying the mistake made as one of mistake of fact rather than law.”

70 See Ward supra n 7 at 92-93, who describes this as “manipulation of the sentencing process”. See, eg, R v Potter (1978) 3 CR (3d) 154 (PEISC); R v Wilson 12 WCB 471 (Ont Prov Ct); R v Bather (1950) 94 SJ 582 (CCA).

71 Ward, supra n 7 at 93.

72 Despite the two techniques of “bypassing” s19 as described above, it would be wrong to think that all decisions had one of these two outcomes. Rather, the usual approach was simply to apply s19 of the Code. R v Gallinger (1980) 5 WCB 14 (Sask Prov CA) is an example. There the accused was convicted of driving while disqualified notwithstanding that a traffic official had advised him that the disqualification did not extend to cover riding a motor cycle. See Ward, supra n 7 at 93-94 for a discussion of Gallinger.
rationalise. *R v Maclean*73 the first case to recognise officially induced error as a defence, illustrates the difficulty. The accused, who was employed by the Department of Transport at Halifax airport, had had his driver's licence automatically revoked under provincial legislation for refusing to take a breathalyser test. He was aware of the disqualification. He was subsequently involved in a motor vehicle accident at the airport and charged with driving while disqualified. In defence he argued that, since his licence had been revoked, he had not driven on highways and that he had the permission of his supervisor and the RCMP to drive on airport property. He had telephoned the office of the Registrar of Motor Vehicles and was advised that he did not need a licence to drive on government property and that the permission of his supervisor would be sufficient. The defendant was acquitted and the Attorney-General appealed. O’Hearn J dismissed the appeal. The central issue was whether the respondent’s ignorance/mistake of law (that federal regulations required that drivers hold drivers’ licences when driving on airport property) could operate as an excuse. O’Hearn J found that it did and drew upon several sources to support his conclusion. First, he noted that the Ontario Court of Appeal had recently revived the defence of “colour of right” in relation to a mistake of law, showing that section 19 of the Code was not absolute in its effect.74

O’Hearn J next distinguished *R v Villeneuve*75 where he himself had held that under the same automatic revocation of licence provision mistake of law was no excuse. In that case the defendant knew he had been convicted of a driving offence but was unaware that the effect was automatic revocation of his driver’s licence. In *Maclean* O’Hearn J identified the distinguishing factor to be that, although the accused was aware that his licence had been revoked, he had relied on incorrect official advice that he could continue to

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73 (1974) 47 CRNS 31; (1974) 17 CCC (2d) 84, (NS Co Ct), O’Hearn Co Ct J.
74 (1974) 47 CRNS 31 at 47. The case O’Hearn J referred to was *R v De Marco* (1973) 22 CRNS 258; 13 CCC (2d) 369. O’Hearn J at 47-48 found: “[t]he significance of this case as well as of the many exceptions noted in Williams’ work is that Code s 19 is not absolute and cannot be applied without reserve to every situation where the essential mistake is one of law.” O’Hearn J went on to discuss two “exceptions” of interest in the present case. First, “when the conduct is not generally realized to be wrongdoing because people do not categorize it as immoral, or because knowledge of the applicable law is generally confined to a small and special circle to which the accused does not belong.” Secondly, O’Hearn J referred to a further type of exception noted by Williams, that is, where “the principle of German jurisprudence could be adopted, that the defendant is required to have exerted his conscience properly, making enquiry as to the law where a conscientious person would have done so.”
75 2 CRNS 301; (1968) 1 CCC 267 (NS).
drive on airport property. He said:

More to the point, however, is the ignorance not only of the defendant but of his superiors.... The defendant made a conscientious effort to find out what the legal situation was: he applied for information to the Motor Vehicle Department and was told that there was no need of a licence in the circumstance.... This, I think, is a very different situation from that of the defendant in Villeneuve as far as the justness of holding him to a knowledge of the law is concerned.

O'Hearn J then drew a line between ignorance or mistake regarding statutes and ignorance or mistake as to subordinate legislation:

I think some distinction can be made between statutes, especially those of general application, and Regulations such as are incidentally yet essentially in issue here; that is, the defendant's guilt turns not on his ignorance of the Code but of these Regulations. There is a distinction between statutes and Regulations of a general nature, in that the public is generally more aware of statutory law than of Regulations, statutory law is easier to find than Regulations...and promulgation is generally more effective with respect to statutes than with respect to Regulations.

While this distinction is somewhat artificial, O'Hearn J obviously regarded it as essential because of his strict approach in Villeneuve.

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76 (1974) 47 CRNS 31 at 49.
77 Ibid.
78 See Stuart supra n 69 at 291. Edinger, Note (1975-1976) 10 UBCL Rev 320 at 326, argues: "[t]he availability of such a defence should not depend on the chance factor of whether the applicable law consists of statutes or regulations (probably an almost meaningless distinction to the average citizen anyway.)"
Ward supra n 7 at 96 says "it appears that the learned judge was motivated by a desire to avoid the implications of his earlier decision in R v Villeneuve. The 'inadequate promulgation' of delegated legislation provides a means of distinguishing Villeneuve, but at the cost of reducing the principle of Long v State from a general defence to one of limited application. In the result, the mistake of law defence endorsed by Maclean was at the same time both wider and narrower than would be a general defence of misleading official advice: wider in that there was no requirement that the advice must emanate from an official source, and narrower in that the defence was available only in relation to offences under: delegated legislation."
In any event Villeneuve was later overruled by the Supreme Court in R v Prue and Baril [1979] 4 WWR 554; (1979) 46 CCC (2d) 257. By a majority, the court held that mens rea was an essential ingredient of offences in the Federal Code, so that, as the accused had not been told that their licences had been automatically suspended, they did not know that they were driving while disqualified. The accused in Prue and Baril had made no inquiries of officials so the issue of officially induced error did not arise, but the case involved s 238(3) of the Code, the same provision as was in issue in Maclean.
Laskin CJC at 557, found that "for the purposes of the Criminal Code, whether there has been an effective suspension is simply a question of fact. In my opinion, therefore, R v Villeneuve...was wrongly decided."
In dissent, Ritchie J at 361 said "the respondent's lack of knowledge of the suspension of their licences was not occasioned by any mistake of fact, but rather by ignorance of the suspension....
To support his approach O’Hearn J further relied on a decision of the Delaware Supreme Court, *Long v State*, where a defence of mistake of law to a charge of bigamy was allowed after the accused’s solicitor had given incorrect legal advice. O’Hearn J quoted from *Long*, relying on the court’s opinion that there seemed no reason to disallow a plea of mistake of law to a defendant who “before engaging in conduct ... made a bona fide, diligent effort, adopting a course and resorting to sources and means at least as appropriate as any afforded under our legal system, to ascertain and abide by the law... and where he acted in good faith reliance upon the results of such error.” O’Hearn J found that the defendant had made the sorts of inquiries that people would ordinarily make in order to obtain information about drivers’ licences. However, he persisted with his prior notion by finding the principle in *Long* applicable only in respect of mistakes of law about delegated legislation, and not statutes.

The next important development was in *R v Flemming* where O’Hearn J had yet another opportunity to consider officially induced error. The charge of driving while disqualified was the same as in *Maclean*. The defendant was advised by inspectors at the Motor Vehicle Department that he did not need a driver’s licence to steer a car which was to be towed. His plea of officially induced error was successful. O’Hearn J referred to his

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79 (1949) 65 A 2d 489.
80 Although the advice was given by a solicitor and not, therefore, strictly an “official” source.
81 *Maclean* supra n 73 at 54, quoting from *Long*, supra n 79 at 497.
82 Supra n 73 at 54.
83 Idem. See also Ward supra n 7 at 95–96. Though, as already discussed, the Supreme Court in *Prue and Baril* had overruled *Villeneuve*.

Not all the judiciary were as ready as O’Hearn J to attempt to accommodate the defence. In *R v Potter* (1978) 3 CR (3d) 154 (PEISC) a customs official failed to positively advise the defendant whether the importation of certain items was illegal. McQuaid J at 165 held officially induced error to be no excuse, finding that the defence should not be applied until “tested in the crucible of higher scrutiny and acceptance”. Other examples of refusal to accept the defence include *R v Wilson* (1984) 12 WCB 471 (Ont Prov Ct); *R v Pollock* (1980) 5 WCB 102 (BC Co Ct); *R v Dowler* (1980) 5 WCB 32 (BC Co Ct). In contrast, other courts accepted the possibility of the defence given the right circumstances. In *R v Walker & Somma* (1980) 51 CCC (2d) 423 (Ont CA) for example, Martin J at 429, held that “I would not wish to be taken to assent to the proposition that if a public official charged with responsibility in the matter led a defendant to believe that the act intended to be done was lawful, the defendant would not have a defence if he were subsequently charged under a regulatory statute with unlawfully doing that act.” In that case however, there was no issue as the defendants had not been advised by officials, but were simply themselves unclear as to the law.

84 (1981) 43 NSR (2d) 249 (NS Co Ct). See also Ward, supra n 7 at 96–97.
earlier decision in *Maclean* and sought to distinguish: (1) a defence of due diligence (in the sense of ascertaining whether particular activities constituted offences under delegated legislation), and (2) a defence of officially induced error. He was obliged to take that course because of the decision of the Supreme Court in *Molis v R*\(^\text{85}\) where the Supreme Court of Canada had held that exercising due diligence, or taking all reasonable care in attempting to ascertain the law, was no defence to a mistake of law. At face value that pronouncement would impliedly have overruled the decision in *Maclean*. So, to avoid that conclusion, O'Hearn J found that although the defence of due diligence in respect of offences under subordinate legislation could not provide a defence subsequent to *Molis*, there was nevertheless a distinct defence of officially induced error which survived that decision. As Ward observes, "the mistake of law defence first sanctioned in *Maclean* became at once both inextricably tied to official advice, and available regardless of whether the offence charged was contained in primary or secondary legislation."\(^\text{86}\) But O'Hearn J did offer some convincing arguments when seeking to reconcile the defence of officially induced error with the blanket rule embodied in section 19 of the Code. He argued that section 19 is not immutable or absolute, but should be regarded as a rule directed at ensuring compliance with the law. While the rule is used so as to place recognition of uniformity ahead of the right of the individual to justice, O'Hearn J claimed that it would be unfair for an individual to be prosecuted when a government department had already advised that there was no offence. In order to circumvent this unfairness, his Honour argued that section 19 should be interpreted as excluding situations of officially induced error from its ambit or jurisdiction. In his opinion this would not affect the general policy of section 19 (uniformity of the law) because the individual would already have made an attempt to comply with the law, but, in the event, would have been prevented from so complying as a result of incorrect advice from an official.\(^\text{87}\)


\(^{86}\) Supra n 7 at 97.

\(^{87}\) See *Flemming*, supra n 84 at 272–274. Ward supra n 7 at 101–102, discusses the case and argues that the reasoning used by O'Hearn J demonstrated "an ingenious use for the techniques of purposive construction, but it is in large measure convincing." He goes on to suggest that O'Hearn J's reasoning can be supported by "the Charter guarantee of the right not to be deprived of life, liberty and security except in accordance with the principles of fundamental justice." However, Ward further observes that it would nevertheless be difficult to justify a defence of officially induced error solely by reference to s7 of the Charter, since the result would be to limit the scope of the defence to cases where the defendant was threatened with deprivation of life, liberty or security of person. See also Kastner, "Mistake of Law and the Defence of Officially Induced
For present purposes the essence of *Molis* for the defence of officially induced error can be found in Lamer J’s conclusion that the “defence of due diligence that was referred to in *Sault Ste Marie* is that of due diligence in relation to the fulfilment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation.” \(^{88}\) This could be interpreted as ruling out any chance of a defence of officially induced error because, according to Lamer J, the person who is duly diligent, but nevertheless does not succeed in ascertaining the correct state of the law, cannot rely on a defence of mistake of law.

However, doubt has been expressed in some quarters that *Molis* has such an all-encompassing effect. Kastner, for example, argues that *Molis* “cannot be taken as a bar to the defence of officially induced error.” \(^{89}\) The writer argues that *Molis* was ignorant of the introduction of the newly published drug schedule, *not* mistaken as to the schedule because of any erroneous advice. Rather “the fact that *Molis* was indulging in an activity requiring special knowledge [affected] the bona fides of an assertion that he lacked knowledge.” \(^{90}\)

Secondly, Kastner questions the effect of *Molis* as a bar to a defence of officially induced error in the light of *R v MacDougall*, \(^{91}\) a decision of the Supreme Court of Canada some two years after *Molis*, though no reference was made to that decision. In *MacDougall* the respondent had been convicted of failing to stop at the scene of an accident, with the result that his driver's licence was revoked. He appealed the conviction and was sent a notice of reinstatement of his driving privileges pending a decision on his appeal. He was advised by his solicitor that the appeal was dismissed. When he was subsequently stopped while driving it was discovered that he was driving while his licence

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88 Error” (1986) 28 Crim LQ 308 at 317 ff.
(1980) 55 CCC (2d) 558 at 564.
89 Supra n 87 at 319. See also Stuart supra n 69 at 284–285, who takes the implications of *Molis* a step further by arguing that the defence of officially induced error cannot now be linked to the *Sault Ste Marie* ruling.
90 Idem.
was cancelled. However it was not until later on the same day that he received the actual written notification that his appeal had been dismissed, along with an order of revocation of licence. His argument was that he believed he could legally drive until he actually received the notice that he could not. The issue for the Supreme Court was to determine:

[T]he status of such a driver after he has asserted an appeal from his conviction and this involves a close consideration of s 250(3), which provides that when a person who has been convicted under s 233 of the Criminal Code appeals against that conviction he “shall be deemed not to be convicted for the purpose of [ss(1) of s 250] until the appeal has been heard...and dismissed” and the driver’s license or the privilege of obtaining a driver’s license shall be thereupon and hereby revoked and shall remain revoked.

In the Nova Scotia Supreme Court, Appeal Division, Sullivan J had affirmed the trial judge’s finding that the mistake was excusable:

On the particular facts of this case...I am not convinced that the mistake of the respondent as to the effective date or time of revocation of his licence was purely one of law. It was a reasonable mistake based on certain acts of the Registrar and may be but an error of fact or a mix of both fact and law.

Assuming however that the error of the respondent as to revocation was one of law I am prepared to say that the facts as found by the trial Judge give rise to a defence of justification based upon reliance by the respondent on a previous course of conduct on the part of the Registrar. This defence might be classified as officially induced error or perhaps as a form of colour of right.

The Supreme Court of Canada, however, did not agree with the Court of Appeal. Ritchie J found the mistake was an inexcusable mistake of law. But the crucial part of the judgment for present purposes was Ritchie J’s obiter comment that:

It is not difficult to envisage a situation in which an offence could be committed under 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 it might well be  

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92 Ibid at 221.
93 60CCC (2d) 127 at 158.
94 Supra n 91 at 222.
95 Idem.
an appropriate vehicle for applying the reasoning adopted by Mr Justice Macdonald. In the present case, however, there is no evidence that the accused was misled by an error on the part of the registrar.  

The effect of MacDougall was to leave the door open for officially induced error to be applied, given the appropriate situation. Since MacDougall, officially induced has been pleaded in a number of cases. In R v Moise the defendant's plea was successful. He had been charged with unlawfully hunting without a licence. However, he had relied on the advice of an employee of the Department of Parks and Renewable Resources that he did not need a licence to hunt duck. Citing MacDougall Fafard J found officially induced error established on the facts.

Similarly in R v Ross the defence was allowed where the defendant was charged with obstructing a police officer in the execution of his duty. The defendant had been stopped while driving his truck and was told he did not have the appropriate class of licence. Since he had earlier received advice from a Government employee that he could drive the truck, he ignored the traffic officer's warnings. Ferris J found that a case for officially induced error was made out, the earlier advice that he could drive the truck having been reinforced by the fact his licence had been inspected at weigh scales on many previous occasions without comment.

Although some provincial courts continued to reject the defence, officially induced error.  

Ritchie J's reference to Macdonald J's reasoning comes from Macdonald J's judgment in the Nova Scotia Court of Appeal where he recognised officially induced error in the following way: (1981) 60 CCC (2d) 137 at 160.)

The defence of officially induced error has not been sanctioned to my knowledge, by any appellate Court in this country. The law, however, is everchanging and ideally adapts to meet the changing mores and needs of society. In this day of internal involvement in a complex society by all levels of Government, there is, in my opinion, a place and need for the defence of officially induced error, at least so long as a mistake of law, regardless how reasonable, cannot be raised as a defence to a criminal charge.

Ward supra n 7 at 98-99.

[1984] 2 CNLR 149 (Sask Prov Ct), referred to by Ward supra n 7 at 99.

(1985) 14 WCB 436 (Sask Prov Ct), referred to by Ward supra n 7 at 99.

Ward supra n 7 at 99.

Eg, R v Wilson (1984) 12 WCB 472 (Ont Prov Ct) referred to by Kastner supra n 87 at 329, where the Court found the defendant guilty of obtaining a firearm without the appropriate licence, but accepted that the advice give by the police could mitigate punishment to the extent of an
error has received varying judicial recognition in a number of cases.\textsuperscript{102} Of these, the most important decision is \textit{R v Cancoil Thermal Corporation and Parkinson}\textsuperscript{103} which was an appeal by the Crown against the acquittal of Cancoil and Parkinson. Cancoil Corporation, an electrical components manufacturer, acquired a metal shearing machine equipped with a guard to prevent access to the blade area by the machine operator. Cancoil’s foreman and general manager concluded that the guard in fact created a hazard by making it hard to clear away scrap metal, and so removed the guard. An inspector from the Ministry of Labour examined the machine which was given a demonstration run. He found that it was safe to remove the guard as long as the machine was operated according to instructions. Furthermore, he was “satisfied apparently that no provision of the Act or regulations was being contravened....”\textsuperscript{104} About two months’ later an inexperienced worker severed the tips of six fingers by accidentally putting his hands under the blade to clear away scrap metal. The Ministry of Labour inspector then ordered the machine not be used until the guard was replaced. Cancoil was charged under the Occupational Health and Safety Act, RSO 1980 with failing to ensure that a protective device (the guard) was in place. Both Cancoil and the foreman, Parkinson, were charged with failing to ensure that an employee worked with adequate protective devices.\textsuperscript{105}

The trial judge interpreted the regulation so that “guard or other device that prevents access to the moving part” could include the foot pedal on the machine which the operator manually depressed to make the blade move. Both Cancoil and the foreman were acquitted. However, the Ontario Court of Appeal rejected this interpretation, because the

\begin{itemize}
\item \textsuperscript{102} See also \textit{R v Sangha} (1984) 29 MVR 28 (BC Co Ct).
\item Eg, \textit{R v Gruber} [1982] 1 WWR 197 (YTTC); \textit{R v Robertson} (1984) 43 CR (3d) 39 (Ont Prov Ct); \textit{R v Cancoil Thermal Corp} (1986) 27 CCC (3d) 295 (Ont CA); \textit{R v Foster} (1992) 70 CCC (3d) 59 (SCC).
\item \textit{In Robertson} Langdon J found officially induced error was not available as the defence could only apply where the mistake of law rule was still a common law rule and not where that rule had been codified. But see \textit{Ward}, supra n 7 at 100; \textit{Kastner}, supra n 87 at 330.
\item \textit{Ibid} at 302.
\item \textit{Cancoil} was alone charged under s14(1)(a) and (c), while Cancoil and Parkinson were together charged under s 16(1) (a). The general penalty provision, s37(1), provided that, “[e]very person who contravenes or fails to comply with, (a) a provision of this Act or the regulations; ...is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than twelve months, or to both.”
\end{itemize}
foot pedal could not “prevent access to the moving part”. The acquittals were set aside and a new trial ordered.106

The Court of Appeal next considered whether officially induced error could operate as a defence, and found that:107

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[1] It is clear that the inspector was an official of the Occupational Health and Safety Division of the Ministry of Labour, appointed for the purpose of inspection and examination of the workplace and that he was clothed with wide powers to enforce compliance with the Act and its regulations.

After reviewing the authorities in the support of a defence of officially induced error108 the Court of Appeal concluded:109

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The defence of officially induced error is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied on the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.

The court also considered that while officially induced error could sometimes overlap with the due diligence defence, it was a separate excuse,110 and it would be up to the accused to establish by a preponderance of evidence that they had been misled by the inspector's advice (the inspector being an official competent to administer the law).111

106 The Court found that the offences were strict liability. The Act provided a statutory equivalent of the due diligence defence (s37(2)) but it did not apply to s14(1)(a), one of the provisions under which Cancoil was charged. However, the Court found that “if s 14(1)(a) were treated as creating an absolute liability offence it would offend section 7 of the Canadian Charter of Rights and Freedoms, the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” A violation of s14(1)(a) could be penalised by a term of imprisonment under s37(1). Thus, the Court treated s14(1)(a) as a strict liability offence in order to avoid violating s7 of the Charter.

107 Supra n 103 at 302ff. This part of the judgment is essentially obiter since the acquittals were set aside and new trial ordered on the points already discussed.


109 Ibid at 303.

110 Ibid at 304.
The comments made by Lacourciere JA in the Ontario Court of Appeal are the clearest statement available on the defence in Canada. A number of his findings are worth examination. Firstly, the defence is apparently available only where the mistake of law has been made about a regulatory offence. This effectively limits the defence to offences of strict liability. While mistakes of law are most likely to be made in the area of quasi-criminal or regulatory offending where the activity in question may not appear overtly "wrong" or "against the law" (and where the proliferation of new offences has occurred so rapidly that it would be easy to imagine incorrect advice being dispensed) it is difficult to see why the defence should be limited to this category of offending. Indeed, in Tipple, Holland J could see no logical basis for restricting the doctrine to class two offences. One reason for doubt on this point is the subjectivity and unpredictability of the categorisation of offences. It is not always an easy task to determine into which category any given offence will fall. Some offences which, on the surface, appear to be regulatory, may ultimately be classified within category one so as to require a mental element because the penalty is seen by the court as too severe to be placed in category two, or because, for example, the court decides the offence is not really directed towards "public welfare". In Tipple, Holland J declined to rule on whether the offences fell into class one or two, although he inclined to the view that the nature of the penalties in relation to some of the charged suggested class one.

Another objection is that to provide a defence of officially induced error only for regulatory offences is to leave persons charged with offences of a more serious nature

111 Idem.
112 Supra n 103 at 303.
113 Supra n 48 at 9.
114 See, eg, Millar v Ministry of Transport [1986] 1 NZLR 660 (though not a case of officially induced error) where the Court of Appeal held that driving while disqualified was an offence requiring proof of mens rea (knowledge of being disqualified as it related to the enforcement of a court order rather than the protection of public welfare.) Contra R v MacDougall supra n 91. Stuart, supra n 69 at 295 is also of this opinion arguing that "the defence should also be available to ignorance of criminal law. In some cases, as in MacPhee and Potter, the law would appear to be just as technical and obscure...the announced contours of the defence in Cancoil seem unduly restricted and it is to be hoped that they will later be reconsidered."
115 Supra n 48 at 9.
without any defence in such circumstances. Such a person would be left to the mercies of prosecutorial discretion or judicial mitigation of penalty. It therefore seems indefensible to rule out the defence where the offence is not of a regulatory nature. While conceding that the bulk of cases where incorrect advice is given will involve the more obscure regulatory-type offences, that in itself is no reason to exclude more serious offending from the defence.

Officially induced error is normally pleaded as an excuse. The defendant does not usually deny committing the actus reus with the necessary mens rea, but instead pleads that a factor external to the elements of the offence was the true cause of the mistake. In cases of officially induced error the “excuse” is one of erroneous advice supplied by an official. Given this, whether the offence can be categorised as one of mens rea or strict liability is a separate issue and ought not to be confused with a defence of officially induced error.

A further aspect of Lacourciere JA’s ruling is that the accused must “reasonably rely upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law.” This imposes two restrictions on the defence. First, the reliance must be “reasonable”. This will depend on a number of indicia—for example, a consideration of the efforts the accused made to find the correct law, the degree of complexity or obscurity of the law, the status of the official and the nature of the advice given (whether it was clear, definitive and reasonable). The requirement of “reasonableness” may be seen as a corollary of the requirement of “due diligence” in category two strict liability offences, though in the case of mens rea offences it would operate as a separate objective limitation on officially induced error as an excuse. Whether or not this is the case, the “reasonableness” requirement is a necessary restriction. As a matter of policy, there needs to be an objective aspect in the assessment of the defence. Unreasonable claims of reliance ought not to be accepted because it would make it too easy for defendants to escape liability by claiming reliance on advice given casually or in circumstances where it was clearly not meant to be relied on. If the essence of the

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116 Supra n 103 at 303.
117 Idem.
recognition of a defence of officially induced error is that it would be unfair to hold the
defendant liable, then it is right to require that the error itself was not culpable, and thus test
it by a standard of reasonableness.

Secondly, there must be a reasonable reliance on the advice or opinion of an official
who is responsible for the administration or enforcement of the particular law. It is
possible that this restriction could operate harshly against a defendant, as cases considered
from other jurisdictions have already indicated. From a defendant’s point of view it
could be impossible to ascertain in advance whether the official was in fact empowered to
administer or enforce the law in question. In Cancoil Lacourciere JA does add a rider to
the effect that one of the factors that would help determine reasonableness would be the
position held by the official who gives the advice. To require that the advice-dispensing official must always be competent to give the advice simply introduces another
element of chance against which the accused may often have no recourse. It should be
sufficient that the official reasonably appears, at least to the person seeking the advice, to
have the authority to give the advice. Naturally, there will be cases where because the
official will clearly not have the authority to give the advice it will not be reasonable to rely
on the advice. The issue of ostensible authority therefore overlaps with the general
requirement of reasonableness. The requirement should be, not simply that the defendant
has reasonably relied on the advice of a competent official, but whether a reasonable person
in the defendant’s position would have regarded the official as having authoritative status.
The question of whether the official held himself/herself out as having authority will also be
relevant.

In summary, Cancoil is evidence that in Canada, especially at the appellate level, the
courts are prepared to recognise officially induced error as a defence in cases of mistake of
law. However, the approach adopted in Cancoil is restricted in two main ways: (i) the
defence seems limited to regulatory offences, and (ii) the official whose advice is relied on

118 See, eg, Rust, supra n 8.
119 Supra n 103 at 304, where “the inspector was an official involved in the administration of the
relevant law, presumably familiar with the Act and regulations and having the expertise to
determine whether a machine was equipped with the prescribed safety devices.”
must be one responsible for the administration or enforcement of the particular law.

In *R v Laniel Canada Inc.*, a decision of the Quebec Court of Appeal, the appellant had been convicted of keeping devices for gambling, contrary to section 186(1)(b) (now section 202) of the Criminal Code. On appeal the appellant based its argument:

> [O]n para (e) of s 190(1) then in force which provided that it was legal, under the authority of a licence issued by the province, to conduct and manage a lottery scheme (lottery here including gambling in a public place of amusement). According to the appellant, it had obtained from the Régie des loteries et courses du Québec (The Quebec Lottery and Races Board) a “business” licence... which authorized it specifically to “carry on the business of amusement machines”, in conformity with the regulations for the period mentioned in the information laid. it [sic] was therefore “led into error by an official”, which would give rise to the defence of error of law.

The Quebec Court of Appeal found that the business had obtained a licence concerning amusement machines and not gambling machines (although the court said that this did not exclude the possibility, as in the present case, that an amusement machine may also be a gambling machine). The court concluded:

> [T]he appellant can therefore not argue that he was “led into error by an official” who only gave him a licence for an amusement machine. The provincial statute and relevant regulation in the present case cannot be interpreted as permitting the licensee to carry on the business of amusement machines to successfully argue that he was led into error by a civil servant who acted under a statute whose area of concern is clearly distinguishable from that of the criminal law....

It can therefore be taken that the official did not in this case cause the mistake of law. In any event, the court did not expressly consider whether officially induced error was a recognised and acceptable defence. However, it does seem implicit from the court's discussion that, in appropriate circumstances, officially induced error would excuse. On the facts itself, however, the official had not caused the mistake.

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120 (1991) 63 CCC (3d) 574.
121 Ibid at 576.
122 Idem.
The most recent discussion of officially induced error by the Supreme Court of Canada is to be found in *R v Forster.* Although the case was decided on another issue, officially induced error was raised as a defence at trial. However, while not ruling out “the possibility that in an appropriate case, an officially induced error as to the state of the law might constitute a defence”, Lamer C J C was satisfied with the judge advocate’s conclusion “that there was no evidence to support such a defence, even if it existed.”

This cautious statement by the Supreme Court of Canada does little to advance the cause of the defence of officially induced error. Moreover, it does not reflect the stance adopted by the Law Reform Commission of Canada. The Commission has recently recommended the introduction of a defence of officially induced error as follows:

3(7) Mistake or Ignorance of Law. No one is liable for a crime committed by reason of mistake or ignorance of law:...
(b) reasonably resulting from...
(ii) reliance on a decision of a court of appeal in the province having jurisdiction over the crime charged, or
(iii) reliance on competent administrative authority.

The comment which accompanies the draft is unilluminating, merely noting that officially induced error is one example where a person cannot fairly be punished for breaking a law, and that the mistake must be reasonable. Yet no explanation is offered as to why the clause was included, or the reasons for the particular wording. Ward observes that while the provision is concise, “its brevity is purchased at the expense of complete clarity.” He questions the use of the expression “competent administrative authority” which is a deviation from what he describes as the phrase “official involved in the administration of the law”, so far favoured by the courts. In his view, while the Commission intended the clause to codify the elements of the defence as expressed in the case law, he doubts that the resulting clause 3(7)(b)(iii) actually achieves this because the cases display many differing opinions.

124 Ibid at 174.
126 Report No 30 at 32; Report No 31 at 34.
127 Supra n 7 at 111.
128 Idem.
The danger is that these differences may be perpetuated, if the clause is enacted as it stands, in decisions on the interpretation of the revised Code. In other words, the draft clause may move matters no farther forward. What is required is a more detailed formulation of the defence which, by avoiding obscurity and brevity, limits the opportunities for dispute.

This is correct as far as it goes, but the more important question is whether the limitation of reliance on *competent administrative authority* is even desirable or necessary. If the aim of including a defence of officially induced error is to excuse those not fairly to blame, then some innocent individuals will still be bereft of an excuse if the official was not authorised to give the advice. The emphasis should be less on who is or is not "competent" and rather more on the reasonableness of the reliance in the circumstances.

In summary, Canadian law, while proceeding from the same statutory basis as New Zealand, has to an extent freed itself from the shackles of the ignorance of law rule and recognised that officially induced error may excuse. While more remains to be done in order to frame a satisfactory defence, Canada is nevertheless far ahead of New Zealand in developing this form of excuse.

(b) **United States**

By comparison with Canada, the United States is more advanced in its development of a defence of officially induced error. Section 2.04(3) of the Model Penal Code provides a defence to certain types of mistake of law, including officially induced error in the following terms:

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

(b) [the defendant] acts in reasonable reliance upon an official statement on the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a 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 offense.

129 Idem.
The defendant must prove a defense arising under Subsection (3) of this Section by a preponderance of evidence. Subparagraphs (iii) and (iv) are of most relevance in the present context. Section 2.04(3)(b) has been substantially followed in the Criminal Codes in many states.

Despite the fact that some courts have rejected officially induced error, there are nevertheless many more examples of the defence having been accepted in the United States than in any of the other jurisdictions discussed here. This is in part due to the powers of judicial review in the United States where the courts are able to declare a statute or its provisions to be unconstitutional. A further and related reason for the development of the defence may also be that the judiciary are more experimental and prepared to consider “novel” arguments from counsel.

The defence of officially induced error was recognised well before its inclusion in the Model Penal Code. In People v Ferguson, decided two decades before the first draft of the Model Penal Code was completed, the Court of Appeal of California held that it was a defence that the respondent, Ferguson, had been advised by state officials (the Corporation Commissioner and deputies) that he did not require a permit for selling certain share issues. The court accepted that the general rule that “ignorance of the law excuses no man” still stood, but noted that the rule was not untouched by exceptions.

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130 The general requirements of culpability are set out in s2.02 which provides “(a) Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such an offense, unless the definition of the offense or the Code so provides.” Section 2.04(3) establishes an exception to the rule set out in s 2.02(9).

131 See infra chapter V (5) and (6), for discussion of s 2.04(3)(b)(i) and (ii).

132 See American Law Institute, Model Penal Code and Commentaries (1985) Part I at 279 and footnote 33, for a list of the states which incorporate s 2.04(3)(b). See also footnote 33 of the commentary for a list of states which have not included a provision corresponding to s 2.04(3)(b)(iii). See also Smith, supra n 6 at footnote 13.

133 Smith, supra n 6 at 14. In the United Kingdom where the doctrine of Parliamentary sovereignty prevails, no such power is available although here is a power available to the courts to declare delegated legislation ultra vires.

134 This in itself is bound up with the rights laid out in the Constitution. See Smith, supra n 6 at 5, 14 where the differences between the United States and the United Kingdom are discussed.

135 For a good discussion of some of the early decisions see Hall & Seligman, “Mistake of Law and Mens Rea” (1941) 8 U Chi L Rev 641 at 675-682. For a summary of cases to the late 1960s, see Note: “Applying Estoppel Principles in Criminal Law Cases” (1969) 78 Yale LJ 1046 and footnotes 11 and 20.

136 (1933) 24 P (2d) 965.
It is true generally that where the act is knowingly and wilfully done the act imports the intent.... However, it occurs to us that a different situation is here presented. The regulation which has not been complied with is malum prohibitum and not malum in se. It covers one of the most complicated phases of modern commercial life.... If the appellant early in his real estate career found himself in honest doubt, notwithstanding his high education and legal accomplishments, went to the fountainhead itself [the Commissioner] for information and was there advised that such organizations were not under the department's jurisdiction, and if after he had this identical organization ready to launch, he went to the corporation commissioner himself and was advised in the same manner, we cannot believe the law so inexorable as to require the brand of felon upon him for following the advice obtained.

The court therefore did not feel constrained to confine itself to the mistake of law rule.

By contrast, the Court of Appeals of Maryland in *Hopkins v State*\(^{138}\) rejected a plea of officially induced error where the defendant had relied on the state attorney's advice that it was legal to put up a sign to advertise his services as a clergyman. The court found:\(^{139}\)

> It is generally held that the advice of counsel, even though followed in good faith, furnishes no excuse to a person for violating the law and cannot be relied upon as a defense in a criminal action.... Moreover, advice given by a public official, even a State's Attorney, that a contemplated act is not criminal will not excuse an offender if, as a matter of law, the act performed did amount to a violation of the law.... These rules are founded upon the maxim that ignorance of the law will not excuse its violation. If an accused could be exempted from punishment for crime by reason of the advice of counsel, such advice would become paramount to the law.

That reasoning is akin to Jerome Hall's argument that the mistake of law rule can be justified because otherwise an individual’s own interpretation of the law would usurp that set out by the legislature.\(^{140}\) However, as argued earlier, this reasoning does not withstand close inspection. The advice does not in fact usurp the objectivity or generality of the law—the court is merely being asked to excuse *that* defendant on *that* occasion because he or she relied on incorrect advice. In the same vein La Fave argues that the

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137 Ibid at 970.
138 (1950) 69 A (2d) 456.
139 Supra n 138 at 460.
140 See chapter III.
Hopkins decision is "ill-founded, for the law would still be paramount; the advice would establish a defense of good faith only for the individual who received it and only so long as that individual was not authoritatively advised to the contrary." The same commentator also maintains that, on the basis of the decision of the Supreme Court in Cox v Louisiana, Hopkins may be contrary to due process. Cox, a civil rights leader, was convicted of picketing "near" a courthouse, after having been told by the Chief of Police that he and other demonstrators could picket 101 feet from the courthouse steps. The Supreme Court of Louisiana affirmed the conviction. On appeal the United States Supreme Court reversed the conviction, the majority finding that the "highest police officials of the city" told the demonstrators that they could meet 101 feet from the courthouse. Thus the appellant was effectively advised that such a demonstration would, for the purposes of the statute, not be "near" the courthouse. The court referred to an earlier Supreme Court decision, Raley v Ohio where it was held that the Due Process clause prevented conviction of persons for refusing to answer questions of a state investigating commission when they had relied on the commission's assurances that they had the privilege to refuse to answer when this was not in fact available. The Supreme Court in Cox found Raley to be authoritative, and the facts analogous to the instant case:

As in Raley, under all the circumstances of this case, after the public officials acted as they did, to sustain appellant's later conviction for demonstrating where they told him he could "would be to sanction an indefensible sort of entrapment by the State convicting a person for exercising a privilege which the State had clearly told him was available to him." [emphasis added] Id. 360 US at 426, 3L ed 2d at 1348. The Due Process clause does not permit convictions to be obtained under such circumstances.

The Supreme Court invoked the constitutional requirement of due process to avoid the rigours of the mistake of law rule. La Fave argues that Hopkins could be contrary to due process if the reasoning in Cox is applied, as the State Attorney there assured the

142 Idem.
143 (1965) 379 US 559.
144 Supra n 143 at 571.
145 (1959) 360 US 423.
146 Supra n 143 at 571.
147 Supra n 141 at 368.
accused that his proposed actions were legal.148

The use of the term “entrapment” in Raley, as quoted in Cox, is an interesting choice because entrapment normally denotes an undercover agent (for example, a police officer) who deliberately entraps or encourages a person (for example, a known or suspected offender) into committing a criminal act. The official in an official reliance situation, however, provides the information relied upon in good faith, with the intention of assisting the individual seeking the advice to keep within the law.149 But use of terminology aside, the court in Cox did not really try to justify its departure from the mistake of law rule.150 There is a tacit assumption in the case that the rule is not absolute but can be circumvented when the need arises. No doubt the extra dimension afforded by the constitution is in part responsible for this.

Doubt has been placed on Hopkins by State v Davis.151 There, the defendant was convicted of accepting the job of airport manager of the Central Wisconsin Regional Airport at a time when he was also a member of the Marathon County Board. On appeal the issue was “whether the good faith advice of governmental counsel when said counsel is authorized or required to give said legal opinion is a defence to a criminal action resulting from the defendant's good faith reliance thereupon”.152 The conviction was overturned by the Supreme Court of Wisconsin on the basis that all the parties had relied in good faith on the opinions of the county corporation counsel and the district attorney to the effect that the appointment of an existing member of the county board as manager of the airport was legal.153

148 See also Note: “Applying Estoppel Principles in Criminal Cases” (1969) 78 Yale LJ 1046 for an extensive consideration of the methods used in Raley and Cox to provide a defence. The note examines the advantages and disadvantages of these methods.
149 Ibid at 1046–1048 for a discussion of the differences between the entrapment and officially induced error.
150 Ibid at 1050–1051.
151 (1974) 63 Wis 216; NW (2d) 31.
152 Ibid at 32.
153 Davis is also relevant in the area of solicitor's advice. Note also that the corporation counsel for the county was statutorily required to give legal opinions to the county board regarding the powers of the board (Ibid at 32–33). Similarly the district attorney was required to advise the board where there was no corporation counsel or counsel was proscribed from acting (Ibid at 33).
The court considered *Hopkins*, but observed that although the general rule enunciated in that case (that ignorance or mistake of the law is no defence) should normally apply:154

> It is our opinion that a blind application of such a rule would violate the principle of "fundamental justice" implicit in our jurisprudence system. The prosecution of an individual who relies on the legal opinion of a governmental official who is statutorily required to so opine would, in our opinion, impose an unconscionable rigidity in the law.

On the facts the court concluded that since the advice had been given in good faith by government counsel and relied upon in good faith, a defence was available.155 Abuse of the defence was, in the court's opinion, eliminated by the requirement that the advice be given in good faith by an official whose duties included giving the information to specific individuals or groups who, in turn, must rely in good faith on that information. No requirement of reasonableness was included, though this in part may have been rendered unnecessary by the qualification that the official must be one whose duties included dispensing the advice.

The boundaries of the officially induced error defence were challenged and ultimately extended in *US v Barker*156 to cover reliance on *apparent* authority, as opposed to reliance on competent authority. The defence was also widened in the sense that the individuals relying on advice were "employed" by the advice-givers rather than being mere laypersons. This apparent widening of the defence has been criticised for straying beyond the previous boundary which was set at allowing officially induced error to excuse only when the official had the authority to interpret, administer or enforce the law at issue.157

The defendants, Barker and Martinez, were charged with conspiracy to violate the Fourth Amendment rights of a citizen by unlawfully entering and searching his offices

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154 Ibid at 34.
155 Idem.
156 (1976) 546 F (2d) 940.
157 See, eg, Kristovich, "United States v Barker: Misapplication of the Reliance on an Official Interpretation of the Law Defense" (1978) 66 Calif I.R 809; White, "Reliance on Apparent Authority as a Defense to Criminal Prosecution" (1977) Colum I.R 775. See also Note: "Ignorance or Mistake of the Law" (1977) 37 Maryland I.R 404; Smith, supra n 6 at 8.
where he ran a psychiatric medical practice. In 1971 President Nixon established a group called “Special Investigations” to investigate the theft of the Pentagon Papers which had been publicised by one Ellsberg. The group was headed by Ehrlichman and included Hunt, a former CIA agent. When Dr Fielding, Ellsberg's psychiatrist, declined to answer questions regarding the investigation of his patient, the Special Investigations group decided to search his office and obtain Ellsberg's records. Hunt contacted Barker, a former CIA agent who had previously worked under Hunt's supervision, and told him that he was working for an organisation established in the White House but above the FBI and the CIA as “the FBI was tied by Supreme Court decisions...and the Central Intelligence Agency didn't have jurisdiction in certain matters.”

Hunt asked Barker to help gain entry to the office to gather national security information on “a traitor to this country who was passing...classified information to the Soviet Embassy.” Barker agreed to become “operational” again and recruited Martinez (who was on a CIA retainer) to assist. Barker received no further information which might have suggested the plan was legal or illegal.

When Ellsberg's office was broken into, the file was not found. At the trial the defendants pleaded that they had reasonably and in good faith relied upon Hunt's apparent authority to sanction their actions and that this was a mistake of fact which negated the specific intent required for a conviction on the conspiracy charge. The trial court judge declined to put this defence to the jury and the defendants were convicted. Their convictions were reversed on appeal by the majority of the District of Columbia Circuit Court. The reasoning of the two majority opinions differs in several important respects. Wilkey J justified his acceptance of a defence of apparent authority by relying on a rationale based upon civic duty, that is:

\[\text{The public policy of encouraging citizens to respond ungrudgingly to the request of officials for help in the performance of their}\]

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158 Supra n 156 at 959, per Leventhal J.
159 Ibid at 943, per Wilkey J.
160 See White, supra n 157 at 777.
161 See Kristovich, supra n 157 at 812.
162 Wilkey J and Merhige J, Leventhal J dissenting.
163 Supra n 156 at 948.
duties...

He drew an analogy between the case before him and two other situations where exceptions to the mistake of law rule had already been recognised:164 (i) the "call-to-aid" exception where a police officer requests help from a private citizen to make an arrest (section 3.07(4)(a)) and the arrest turns out to be unlawful; and (ii) the exception of reliance on invalid judicial warrants where an officer acts on a warrant which turns out to be invalid.165 He reasoned that a defence of mistake could logically be extended to cover the present situation.166 He found that a mistake as to the legality of an unlawful search would be no excuse "if and only if Barker and Martinez could not show both (1) facts, justifying their reasonable reliance on Hunt's apparent authority and (2) a legal theory on which to base a reasonable belief that Hunt possessed such authority."167 Wilkey J decided that the appellants satisfied both limbs of his test. There was ample evidence to suggest "the jury could have found that the defendants honestly and reasonably believed they were engaged in a top-secret national security operation lawfully authorized by a government intelligence agency."168 Secondly he found that the appellants met his "legal theory" test. While he did not try to assert that the President actually did confer the authority on Ehrlichman (and thus also Hunt), he contended that it was "by no means inconceivable as a matter of law" that the President might have such authority.169 As to the "reasonableness" of the legal theory, Wilkey J concluded that "two laymen cannot be faulted for acting on a known and represented fact situation."170

Merhije J concurred in the result but differed in his reasoning, preferring to approach the issue of whether apparent authority should excuse by drawing an analogy with section 2.04(3)(b) of the Model Penal Code:171

[T]he defense is available if, and only if, an individual (1)

164 Supra n 156 at 948-949. See also Kristovich, supra n 157 at 821-822.
165 See also, White, supra n 157 at 780; Smith, supra n 6 at 8.
166 For a close analysis and criticism of Wilkey J's judgment see, White, idem, and Kristovich, supra n 157.
167 Supra n 156 at 948-949.
168 Idem.
169 Supra n 156 at 952.
170 Idem. Barker and Martinez were not strictly "laymen" in this matter, although would presumably have accepted what they were told without question.
171 Ibid at 955.
reasonably, on the basis of an objective standard, (2) relies on a (3) conclusion or statement of law (4) issued by an official charged with interpretation, administration and/or enforcement responsibilities in the relevant legal field. The first three issues are of course of a factual nature that may be submitted to a jury; the fourth is a question of law as it deals with interpretations of parameters of legal authority.

On that basis he found that the trial judge should have put the issue to the jury to decide whether the defendants' claims of reliance on Hunt's authority and their assertion of belief in the lawfulness of their actions satisfied the defence.172

By contrast, Leventhal J gave a strong dissenting judgment, finding the appellants' mistake of law as to Hunt's apparent authority to be no excuse. He did not agree that the defence of apparent authority was analogous to the "call-to-aid" defence, nor to section 204(3)(b) of the Model Penal Code.173 In his view:

To stretch the official misstatement of law exception for the facts of this case is to undercut the entire rationale for its recognition as an exception. The Model Penal Code hedges in the defense to permit reliance only on an "official interpretation of the public officer...charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.".... Certainly Hunt cannot sensibly be described as having been charged by law with responsibility for interpreting or enforcing either § 241, or the Constitution from which the violations of § 241 in this case sprang. Nor can it be said... that he had the power to provide an official interpretation of the law.

While Leventhal J agreed that section 2.04(3)(b) is a valuable defence, he rejected the suggestion that it could be extended to cover reliance on apparent authority.175 At most, a mistake as to apparent authority might provide "a reason for clemency on the ground that the strict rules of law bind too tight for overall public good."176

172 See also supra n 156 at 955-956 where Merhige J considers in some detail the policy reasons normally put forward to justify refusing a defence, and argues that allowing a mistake of law defence would not encourage ignorance as the defence actually requires evidence that the defendant has sought out or been aware of the official statement on which he or she seeks to rely.
173 Supra n 156 at 968-969.
174 Idem.
175 Ibid for a full discussion.
176 Ibid at 972.
Nonetheless he concluded: 177

[The] defendants here must be held to a responsibility to conform their conduct to the law's requirements. To hold otherwise would be to ease the path of the minority of government officials who choose, without regard to the law's requirements, to do things their way, and to provide absolution at large for private adventurers recruited by them.

Clearly this argument runs counter to the majority view that it is expedient to encourage obedience to officials. However, it does not provide a satisfactory solution. Either a defendant is culpable, or is not culpable.

_Barker_ has been criticised for extending the mistake of law defence beyond the pre-existing limited, but necessary, exceptions to cover situations where the actors are still, in one way or another, blameworthy. 178 Admittedly the case fell outside the usual type of “reliance” case. Barker and Martinez did not request advice but simply assumed, pursuant to a request for assistance from one purportedly authorised to carry out the operation, that authority had been given sanctioning proceedings. Since they did not ask Hunt if the burglary would be legal, it was therefore a case of failing to inquire (ignorance) rather than inquiring and receiving the wrong advice (mistake). Barker already knew Hunt so it was not a case of a “stranger” receiving advice from another “stranger”, where there could be more room for an objective appraisal of the information supplied, and so on. But notwithstanding these unusual features, the majority's application of the defence was justifiable. The appellants' reliance on Hunt could easily have appeared reasonable to the court. Barker had worked for Hunt in the past and the facts demonstrated that he trusted Hunt's judgment. Merhije J's analogy with section 2.04(3)(b) is tenable, although there is no avoiding the fact that Hunt was ultimately not an authorised official. However, this should not be the main focus of attention anyway. Who is, and who is not authorised could be a problem in many different situations. The main issue should be to determine whether the individual's reliance was reasonable in all the circumstances. Only then will a true evaluation of blameworthiness, and hence culpability, be possible. One of the

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177 Ibid at 965–966.
178 See White supra n 157; and Kristovich supra n 157. Kristovich argues that _Barker_ paves the way for official misconduct.
difficulties with Barker was that the offence was of a serious nature, involving interference with another's civil rights, whereas most officially induced error cases involve offences of a regulatory nature. But, on the other hand, perhaps Barker provides a good example that officially induced error or some variant of the defence can indeed apply across the spectrum of offending and should not just be limited to regulatory offences.179

4 RELIANCE ON THE ADVICE OF LEGAL COUNSEL

(a) General

By extension of the notion of officially induced error, the question arises as to whether a defendant who relies on the incorrect advice of a lawyer in private practice should also be allowed as a defence. The issue is of considerable practical significance because by the nature of their profession, lawyers - more than any other group - are regularly consulted by individuals seeking legal advice. A defendant induced into making a mistake of law because of incorrect official advice may rightly claim that when the state chooses to advise its citizens about the law it should do so accurately. If the state does not do so, then it has failed to observe the minimum standard of political decency owed to its citizens and ought to be estopped from denying its mistake. However, when a defendant relies on incorrect legal advice from a lawyer in private practice, the relationship alters from the political bond between individual and state to a private transaction between professional adviser and client. Thus, unless the lawyer is acting in some capacity on behalf of the state, the relationship is no longer between state and individual. From that perspective it is difficult to defend an argument that a defendant is nevertheless entitled to rely on incorrect

179 See also United States v Ehrlichman 376 F Supp 29 (1974), US District Court of Columbia. Ehrlichman and four others were also charged with conspiring to injure Dr Fielding's enjoyment of his Fourth Amendment Rights by entering his offices without a warrant. They argued that despite the fact that the Fourth Amendment would usually prevent such break-ins, the president had the authority to suspend its requirements, and that they therefore acted in reliance on this. (at 33). Although they did not seek to claim they had actually been given approval to break in. The court rejected the argument, finding that: (at 34)

[T]he President not only lacked the authority to authorize the Fielding break-in but also...he did not in fact give any specific directive permitting national security break-ins, let alone this particular intrusion.

So, while the "footsoldiers" were excused, the "master minds" of the operation were convicted. The US Court of Appeals affirmed the conviction: (1976) 546 F2d 910. See 917–923 for a discussion.
legal advice as an excuse. Furthermore, there is little evidence of judicial recognition of a
defence based solely on reliance on the advice of private legal counsel.

(b) New Zealand And Related Jurisdictions

In New Zealand and other Commonwealth jurisdictions there is no authority directly
supporting a defence of mistake of law based on the advice of private legal counsel. Those
cases that might appear to allow a defence are all explicable on other bases.

In Cooper v Simmons180 an apprentice was bound by indenture to the respondent's
husband to serve him and his executors upon death. The master died and the apprentice
continued to work for the widow (the respondent and executrix) for ten months before
leaving and finding other work. The indenture was for seven years and was not fully
served when the apprentice left. The Court of Exchequer found he was bound to serve the
widow as executrix. The apprentice argued that he had sought the advice of an attorney
who had told him that the apprenticeship terminated on the death of the master, and that he
had acted in the bona fide belief that this advice was correct. Pollock CB found:

\[ \text{The next question is, is the advice of the attorney any answer to the complaint. A mistake in point of fact might be an answer to the complaint; but everyone is bound to know the law, and the case cannot be put higher than if the apprentice had bona fide believed, from what he had read in a book, that he had a right to leave. But is it any answer to a complaint for misconduct, that the offender thought he was not guilty of misconduct? It would be dangerous if we were to substitute the opinion of a person charged with a breach of the law for the law itself. The question is, was the apprentice justified in doing what he did? I think he was not. I will assume for a moment that he thought he had a right to leave; but the question is, had he in point of law a right? Taking all the circumstances into consideration, it appears to me that the decision of the magistrates was correct; and that the points of law which have been raised furnish no answer to the case on the part of the executrix who makes the complaint.} \]

180 (1862) 7 H & N 707, 158 ER 654.
Pollock CB's fear was that it would be dangerous to substitute the opinion of a person charged for the law itself.\(^{181}\)

By contrast, in the earlier case of *R v Dodsworth* (1837)\(^{182}\) the defendant was acquitted on a charge of falsely stating electoral qualifications. He had acted on the advice of an electoral committee, members of which were lawyers.\(^{183}\) The court held:\(^{184}\)

> I do not think you ought to convict a person of a misdemeanour who possessed property equal in value to that which he held at the time of the registration, if he has acted bona fide, and has been guided in his conduct in a matter of law by persons who are conversant with law, and who have told him that he possessed the same qualification to vote for which his name was originally inserted in the register of voters.

While *Dodsworth* appears to be directly at odds with *Cooper v Simmons*, it can be distinguished on the basis that since the offence in *Dodsworth* involved “giving a false answer at the time of voting for members of parliament”,\(^{185}\) a particular state of mind was required to establish the offence. Thus, as the defendant honestly but mistakenly believed that he was still entitled to vote, he could not be said to have *falsely* stated electoral qualifications. *Dodsworth* may therefore support the proposition that reliance on legal advice can provide evidence of absence of mens rea in crimes requiring a specific or particular state of mind.\(^{186}\) It was also significant that, formally, the advice emanated from an electoral committee which happened to be composed in part by lawyers, the implication being that the advice given was not, *stricto sensu*, private legal advice, but that of some official body.

181 See Hall, *General Principles of Criminal Law* (2nd ed 1960) 383, who argues that if a lawyer's advice were to excuse mistakes of law, then the law would no longer be what the legislature and courts declared it to be.

182 (1837) 8 Car & P 218; 173 ER 467.

183 173 ER 467 at 469.

184 Idem.

185 Supra n 182 at 468.

186 O'Connor & Fairhall, supra n 10 at 60. See also *R v Wheat & Stocks* [1921] 2 KB 119 where the appellant, Wheat, was convicted of bigamy, and Stocks, of aiding and abetting him. Wheat had brought divorce proceedings against his wife, and his solicitors, through various correspondence, led him to believe that he was free to remarry when in fact he was not. The appellants argued that, in good faith and on reasonable grounds, they believed Wheat was divorced when he went through the form of marriage with Stocks. The Court of Appeal were of the opinion that there was no evidence of this and the appeal was dismissed. However, *Wheat* was subsequently distinguished in *R v King* [1964] 1 QB 285, and then overruled in *R v Gould* [1968] 2 QB 65. See Smith supra n 6 at 11 and footnotes 53 and 54.
Similarly, the Australian jurisdictions do not admit legal advice as an excuse. The Supreme Court of Victoria held this to be the case in *Crichton v Victorian Dairies Ltd.*\(^{187}\) The respondent, Victorian Dairies Ltd, was charged with failing at its Annual General Meeting to appoint a person or persons as auditor(s) of the company. The company had decided not to re-elect its auditors and no new appointment was made. Section 165(2) of the Companies Act 1961 required companies to appoint auditors, and section 379 made it an offence not to do so. At first instance the magistrate held that section 165 required mens rea. A director of the company had received a legal opinion from a solicitor, and the shareholders had voted according to the information therein, as told to them by the director. The magistrate found that the shareholders consequently believed their actions to be legal, and that there was no mens rea. On appeal the Supreme Court of Victoria found that mens rea was not an element of the offence,\(^ {188}\) and treated the issue of counsel’s advice as subsidiary:\(^ {189}\)

They were informed, and no doubt believed, that advice had been received to the effect that they were not legally bound to appoint an auditor. But obviously, if this represented a mistaken view of the law, their belief to the contrary is not sufficient to afford a defence. They merely shared a misapprehension as to the law.

*Crichton* represents the standard approach that reliance on mistaken legal advice is no excuse.\(^ {190}\)

It is unlikely that Australia will allow a defence of reliance on the advice of legal counsel in the near future. The Commonwealth Criminal Law Review Committee considered that there should be no defence allowed when the mistake of law had been caused by incorrect solicitor’s advice on the ground that, “[t]o allow such a defence would make it possible for persons to attempt to obtain immunity from the law by seeking favourable advice and might tend to lead to corruption and malpractice.”\(^ {191}\)

\(^{187}\) [1965] VR 49.

\(^{188}\) Ibid at 51.

\(^{189}\) Supra n 187 at 52.

\(^{190}\) Supra n 10, where the fact that the accused had relied upon a solicitor’s opinion, which was in turn based on a decision of the Full Court which was subsequently overruled, was held to be no excuse.

\(^{191}\) Interim Report, (1990) at 60–61 para 6.25. The Report, at para 6.27 found that reasonable reliance on a legal opinion should be treated as a mitigating factor. See also the 1992 Discussion Draft
There is also evident judicial disinclination in New Zealand to admit any defence of erroneous advice of legal counsel. Indeed, there have been few reported decisions in which the issue has arisen directly. In *Maintenance Officer v Stark* the defendant was advised by his solicitor that when he signed a consent to the adoption of his child by the mother and her new husband, his maintenance obligations ceased. This was incorrect as the maintenance obligations did not cease automatically. The defendant was acquitted on a charge of failing to pay moneys due under a maintenance order as required by section 107(1) of the Domestic Proceedings Act 1968, and the appeal was also subsequently dismissed. Beattie J avoided the seemingly inevitable result that the respondent had made a mistake as to the law by finding that even if the mistake was one of law it was a mistake as to the civil law (regarding his responsibilities under the Domestic Proceedings Act) and accordingly excused him. He held that the respondent had "reasonable cause" under section 107 to believe his obligations were terminated.

The fact that the lawyer was the ultimate source of the wrong advice was not explicitly part of the decision in *Stark*. Although the result in the case clearly reflected a desire to avoid the harshness of the mistake of law rule in section 25, on an orthodox analysis the respondent’s mistake through the agency of his lawyer was a mistake as to the penal law and, as such, was caught by the mistake of law principle.  

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192 [1977] 1 NZLR 78 (S Ct).
193 Ibid at 83.
194 Brookbanks, "Recent Developments In The Doctrine Of Mistake Of Law" (1987) 11 Crim L J 195, has some criticisms to make of *Stark*. He says (at 199):

> [T]hat had the case turned on that point alone [ie, that Stark's mistake was as to the civil law] it would have been wrongly decided. Although it is true that the Domestic Proceedings Act, generally considered, is an aspect of civil law, the respondent's mistake through the agency of his lawyer, related to his obligations under a penal provision of the Act. As such it was a mistake of penal law. Considered in the light of the above analysis such a mistake would clearly have been caught under the ignorantia juris doctrine. The wider implications of the doctrine, however, are not considered by the Court.

Brookbanks is of the view that "there remain sound reasons of policy why reliance upon legal advice should not generally be recognised as a defence to a criminal charge." (Ibid) Rather, when a person has acted in good faith on a solicitor's advice, that fact may be used to mitigate penalty, or even a discharge without conviction.
The orthodox position is also reflected in *De Malmanche v McKenzie*.\(^{195}\) The defendant was convicted of operating three illegal games of chance in the tavern he owned, contrary to section 7(1) of the Gaming and Lotteries Act 1977. In defence he pleaded that although he was aware the games were being played (and that some games would be illegal), he honestly believed these games were not illegal. This belief was based upon an opinion obtained from a barrister.\(^{196}\) Kerr DCJ found the mistake raised a matter of law only. The belief was not in a state of facts but merely as to the application of the law to what he had allowed to occur in the tavern. Accordingly he held:\(^{197}\)

*Just as in Johnson v Youden, a mistake in interpreting the law or failing to read and understand the appropriate law produced no defence, so too a mistaken opinion from a barrister cannot produce a defence either.*

The appeal to the High Court was dismissed by Holland J:\(^{198}\)

*I am satisfied as was the District Court Judge, that the mistake of the defendant in this respect was a mistaken view that the machines after alteration were legal to operate. The machines had been altered. The mistake was as to the effect of the alterations. That was a matter of law. The only mistake of the defendant was his belief that their operation was lawful when in fact it was unlawful. It is common ground that a mistake as to the law is no defence. Although Holland J made no mention that the source of the mistake was the barrister's opinion, it is clear that he regarded this as having no material bearing on the defendant's liability.*

Whereas the advice in *De Malmanche* was sought in good faith, *Harding v Police*\(^{199}\) illustrates the misuse of advice. The appellant had been convicted on 50 charges of sending invoices to overseas businesses in respect of goods and services that had not been ordered, without reasonable cause to believe he had a right to payment, contrary to section 8(1) of the Unsolicited Goods and Services Act 1975. He had shown his lawyer a draft of the document he intended to send and was given a verbal opinion that it did not infringe the Act. Owing to some printing changes the final version was not the same in all

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195 [1989] DCR 567, 6 CRNZ 49 (H C) Holland J.
197 Ibid at 570.
198 6 CRNZ 49 at 56.
respects as the draft. But although the appellant instructed the lawyer to send a letter of complaint to the printers he never actually showed him the final version for his advice as to whether it would infringe the Act.

In the District Court the judge found "that the whole scheme was a deliberate and manipulative deception on the part of the [accused] who had manipulated Mr Tedcastle in order to provide himself with a 'cover' should prosecution ensue."\textsuperscript{200} In his view - shared by Barker J in the High Court - the lawyer had "given his oral opinion on the lack of applicability of the Act fairly and honestly, but wrongly."\textsuperscript{201} According to Barker J on appeal:\textsuperscript{202}

\begin{quote}
[I]f the appellant were really genuine about seeking advice, one would have thought that the actual document sent out might have been shown to Mr Tedcastle; ie in the form that it was to be received by the recipients. The inference that the consultation with the solicitor was a form of "insurance" against possible prosecution was open to the learned District Court Judge on the evidence...I find it difficult to hold other than did the District Judge, namely, that Mr Tedcastle was being used by the appellant as a possible "cover" in the event of subsequent prosecution. The appellant as a shrewd businessman must have had misgivings about the attitude of the law to documents of this nature. Counsel for the appellant tried to argue that mistake of law and erroneous legal advice negated the mental element of the offence. However, Barker J considered it unnecessary to deal with that argument in the light of the findings as to the facts. In any event, Barker J simply stated that section 25 would apply.\textsuperscript{203}
\end{quote}

The facts of this case showed that the appellant had used the solicitor for his own ends to safeguard himself against any possible future legal action. Despite the fact that the solicitor had given wrong advice, it was quite apparent to both the District and High Court Judges that the appellant's actions were not done reasonably and in good faith. Seen in that light, Harding illustrates a general limitation on any defence of reliance. As a matter of reality, manipulative clients or lawyers who do not act in good faith will not succeed in

\begin{flushright}
\textsuperscript{200} Ibid at 467. \\
\textsuperscript{201} Supra n 199 at 467. \\
\textsuperscript{202} Ibid at 469 ff. \\
\textsuperscript{203} Supra n 199 at 470.
\end{flushright}
glibly asserting genuine error. The dishonest or undeserving will usually founder on the evidential issue of credibility.

The question of reliance on incorrect legal advice arose indirectly in *Department of Internal Affairs v The Poverty Bay Club*.\(^{204}\) The defendant was convicted under section 5 of the Antiquities Act 1975 for removing an antiquity (a letter written by Captain Cook) from New Zealand (for sale by Sothebys) without reasonable excuse and without a written certificate of permission from the Secretary of Internal Affairs. The defendant was unaware of the Antiquities Act. Sothebys had advised the defendant by letter that there were no export restrictions in New Zealand for material such as the letter in question. The defendant's other inquiries to the Gisborne Museum and Alexander Turnbull Library related only to the authenticity of the letter and packing arrangements. No legal advice was sought as to whether or not it was lawful to export the letter for sale. Thomas DCJ found the elements of the offence proved, so the only issue that remained was whether the defendant had a "reasonable excuse," as provided by section 5, for removing the letter from New Zealand. The defendant attempted to argue that its discussion with the Alexander Turnbull Library was a case of "ascertaining the legal position by consulting an official agency."\(^{205}\) However, Thomas DCJ found that since the defendant was unaware there were export restrictions, it could hardly have sought advice on this matter.\(^{206}\) But after referring to an academic article\(^{207}\) which suggested the advice of a lawyer or an official should provide a defence, he proceeded to suggest that what was fatal to a defence was that the defendant never obtained a solicitor's advice and relied only on the Alexander Turnbull Library and the Gisborne Museum to warn it of any export restrictions.

In reply to the defendant's argument that the Alexander Turnbull Library was an official agency, Thomas DCJ held that while it was "an authoritative body and obviously Government funded... technically it [was] not the official agency that *administer[ed]* the Antiquities Act.\(^{208}\) (emphasis added) The judge did not accept that the defendant had

\(^{204}\) [1989] DCR 481.
\(^{205}\) Ibid at 494.
\(^{206}\) Supra n 204 at 495.
\(^{207}\) Idem.
\(^{208}\) Supra n 204 at 495.
received erroneous advice but concluded instead that it had received no advice because it did not seek any.\textsuperscript{209} In the result, therefore, the club was unable to rely on an omission as a reasonable excuse.

Beyond the facts of the case, however, Thomas DCJ seems to have accepted that a defence of reasonable excuse may well have been available if the defendant had acted in reasonable reliance on legal advice. Thus Ashworth’s article was described as “most helpful” and quoted, without qualification, for the proposition that such reliance should afford a defence.\textsuperscript{210} Furthermore, in referring to the defendant’s consultation with the Alexander Turnbull Library, the judge described it as “somewhat removed from obtaining a firm statement as to the legality of a course of action.”\textsuperscript{211} Even so, because he expressed no concluded view on the issue of reliance on legal advice, those dicta scarcely advance any claim for a defence to this effect.

So far as Canada is concerned, there is also an “overwhelming trend in the case law…to disallow a defence based entirely on reliance, even if reasonable, on the advice of a lawyer.”\textsuperscript{212} Although there is academic support for recognition of such a defence, the courts are as firmly against it as in the other Commonwealth jurisdictions already considered. In \textit{Dunn v The Queen}\textsuperscript{213} the appellant had been convicted for refusing to supply a breath sample, contrary to section 235(2) of the Code. On appeal, Dunn argued that he had a reasonable excuse for so refusing, namely, that he had not been allowed to consult a lawyer in private. By telephone, he had contacted a lawyer who had advised him to refuse to give a sample because he was not being allowed privacy to consult his lawyer. When he gave that advice the lawyer was relying on an earlier judicial decision which was reversed after the defendant in the instant case was charged, but before his case went to court. The court held that the appellant’s liability must be assessed on the basis of the law at the time of the trial, so the mistake was one of law. While the lawyer was the

\begin{footnotes}
\footnote{209} Ibid at 496.
\footnote{210} Ibid at 494.
\footnote{211} Ibid at 495.
\footnote{212} Stuart, \textit{Canadian Criminal Law} (2nd ed 1987) 297. Although that author also notes that the courts have sometimes avoided this result by categorising the “mistake made partly as a result of bad advice from a lawyer as one of fact and have, on this somewhat devious basis allowed the defence. See, eg, \textit{R v Woolridge} (1979) 49 CCC (2d) 300 (Sask Prov Ct).
\footnote{213} (1977) 21 NSR (2d) 334 (SC App Div).}


intermediary supplying the advice, this was only a collateral point and clearly had no effect on the outcome of the case.

In *R v Giroux*\(^{214}\) the defendant was convicted under the same provision for refusing to supply a breath sample. He had been assessed at the scene of an accident and taken to the police station where he provided a breath sample. The police had refused to let the defendant's lawyer be present at the test or check the results. When a further sample was requested the defendant refused on the advice of his lawyer. The court found the defendant's refusal amounted to a mistake of law and did not provide a reasonable excuse under section 235. The fact the defendant relied on the express advice of his lawyer was no excuse.

In *R v Burkinshaw, R v Zora*\(^{215}\) the directors of a company were acquitted of unlawfully trading in securities, contrary to section 136(3) of the Securities Act 1967. Tavender DCJ held the Crown had failed to prove the necessary mental element. The directors had taken legal advice “from a prominent firm of solicitors” and had acted upon it and therefore did not intend to break the law.\(^{216}\) The decision was subsequently overturned by the Alberta Supreme Court which held that section 136(3) was absolute in its terms and did not require a mental element. The issue of solicitor's advice was not raised again.\(^{217}\) However, the decision of the Alberta District Court at first instance cannot be taken as authority for a defence of reliance on legal advice either, since Tavender DCJ found that the defendants lacked the mens rea necessary to commit the offence. On that view, he did not consider whether legal advice in itself afforded an excuse.

A more recent decision on the issue of solicitor's advice is the decision of the Alberta Court of Appeal in *R v Kotch*.\(^{218}\) Kotch was convicted of wilfully attempting to

\(^{214}\) (1979) 12 CR (3d) 289 (QSC).
\(^{215}\) [1973] 3 WWR (Alta Dist Ct); reversed 12 CCC (2d) 479, [1973] 5 WWR 764 (SC App Div).
\(^{217}\) Idem. See Kastner supra n 87 at 326, footnote 77 for a comprehensive list of decisions rejecting the plea of reliance on lawyer's advice: *R v Brinkley* (1907), 12 CCC 454, 14 OLR 434 (CA); *Katz v Diment* [1951] 1 KB 34; *R ex rel Irwin v Dalley* (1957) 118 CCC 116, 25 CR 269, 8 DLR (2d) 179 (Ont CA); *R v Brown* (1970) 2 CCC (2d) 437, 16 DLR (3d) 350 (BCSC); *R v Slegg & Slegg Forest Products Ltd* (1974) 17 CCC 149, [1974] 4 WWR 402 (BC Prov Ct).
\(^{218}\) (1990) 61 CCC (3d) 132.
obstruct the course of justice under section 139(2) of the Criminal Code. His friend had been charged with shoplifting and Kotch approached an employee of the store involved and offered to pay $20,000 to a charitable donation on behalf of the store if the charge was dropped. He suggested that the store could take advantage of the donation by making it a promotion, but that the offer was not meant to be seen as a bribe. Prior to approaching the store, the appellant had sought legal advice and was told to tape-record the conversations and was advised that no offence would take place provided there was no benefit being conferred upon the store. He omitted to tell the lawyer about his plan to offer the “promotion” or the “charitable donation” to the store.

On appeal it was argued inter alia that he had made a mistake of fact by way of the legal advice he received. The court held that this was not the case. He had failed to tell the lawyer that the proposed charitable donation was to act as a “promotion” for the store, which was a benefit to the store and, as such, contrary to section 139. The legal advice had been given when the lawyer was not in receipt of all the relevant facts and his client’s proposed actions. McClung JA held:

Absent “officially-induced error”, mistaken legal advice does not shield the purposeful doing of an act which may prove contrary to the criminal law... In all, the appellant's mistake...was whether he should be exposed to prosecution for what he was trying to do. He made no mistake about the fact of his attempt to intervene in Harry's prosecution and the inducement he was offering. However camouflaged, Kotch's offer to Superstore fell within the law of obstructing justice and his conviction must be affirmed.

The appellant's mistake was one of law and the Alberta Court of Appeal reiterated the accepted view that mistaken legal advice is no excuse—especially so since the appellant did not give the lawyer all the relevant facts. So, even if erroneous legal advice could be an excuse (and it was not), it would not apply in this situation as the appellant was at fault in failing to disclose the true picture. This is similar to the situation in Harding v Police

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219 The first ground of appeal was that as the charge was one of “wilfully” attempting to obstruct the course of justice there was a specific intent requirement. The appellant neither knew nor intended that his actions should have the effect of obstructing justice. McClung JA (at p 136), however, held that the appellant's conversations with, and offers to, the store made the determination as to specific intent unnecessary. The appellant had intended to make the offer so that the store would drop the charge and in His Honour's opinion that was a "corrupt attempt to obstruct justice".

220 Supra n 218 at 138.

221 Idem.
where the defendant did not submit the final and altered version of the document to his lawyer, preferring instead to continue to rely on the lawyer’s advice relating to an earlier draft of the document. In both cases, therefore, the defendants were automatically disqualified by virtue of their *mala fides*.

The Canadian Law Reform Commission has made no suggestion that reliance on the advice of a solicitor should provide a defence.\(^{223}\)

(c) **United States**

Although courts in the United States have demonstrated a greater readiness to accept some forms of the reliance defence than the other jurisdictions here examined, there has been a similar resistance to the extension of the boundaries of the defence to admit reliance on the advice of a lawyer. For example, in *Hopkins v State*\(^{224}\) the Court of Appeals of Maryland dismissed an appeal against conviction, finding that the appellant (a clergyman)

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\(^{222}\) McClung J A excludes what he terms “officially-induced error” from the mistake of law prohibition, and refers to *Molis* as authority. However, the only exception mentioned in the page reference to *Molis* is the “non-publication” exception (s 11(2) Statutory Instruments Act, 1970–71–72, c 38). Non-publication is not normally seen as a case of officially-induced error—being based on ignorance of the law rather than mistake. However, perhaps McClung JA’s reference adds weight to the argument that non-publication is a particular type of officially induced error.

\(^{223}\) See, eg, Report No 31. But see “Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police” (1981), at 368–369 which discussed the issue of legal advice and concluded:

> In principle, if the mistake of law arises from legal advice which is erroneous or later held by a court to have been erroneous, there is still no defence. The reason, in part, is that it is undesirable to permit the definition of criminal conduct or of conduct giving rise to other offences to be dependent upon whether members of society can successfully shop around for a favourable legal opinion.

> It may be assumed that even legal advice given by the Department of Justice to the RCMP that a practice is not criminal would not be recognized as the basis for a defence to a criminal charge.... We think that the courts should be reluctant to permit such an exception. While the obtaining by the RCMP and the security agency of advice from the Department of Justice should be encouraged and facilitated, we do not think that such advice, if erroneous, should afford a defence to a charge. At most it should be considered as relevant to mitigation of sentence and to the treatment of the offender within government.

> Any other approach would increase the tendency, which we have already observed, to seek an opinion from a higher level of the Department of Justice when the Department of Justice counsel assigned to the RCMP has given an opinion that the practice is unlawful.

\(^{224}\) Supra n 138. *Hopkins* is a case with a “foot in both camps” in that the defendant was advised by a solicitor who also happened to be the State’s Attorney, and hence a government official. Perhaps surprisingly, the defence was still denied notwithstanding the official status of the advice giver.
was not entitled to rely on the State's Attorney's advice that he could legally put up a sign advertising his "business" of performing marriages. In the earlier case of *State v Downs*\(^{225}\) it was held that the fact that the defendant had obtained and relied upon the advice of two attorneys was no excuse, because, "[i]f ignorance of counsel would excuse violations of the criminal law, the more ignorant counsel managed to be, the more valuable, and sought for, in many cases, would be his advice."\(^{226}\)

In *State v Davis*\(^{227}\) the appellant had been convicted of accepting a job as airport manager at a time when he was also a member of the County Board. The Supreme Court of Wisconsin allowed the appeal on the basis that the appellant had been advised by the corporation counsel for the Marathon County, and the Assistant District Attorney for Portage County, that it would be legal to hold both positions. The corporation counsel was statutorily required to give legal opinions to the County Board concerning the powers and duties of the board and its members.\(^{228}\) The court noted that *Hopkins v State* represented the general rule that ignorance of the law is no excuse, but nevertheless concluded that unthinking deference to the rule would violate the principle of "fundamental fairness" inherent in the United States legal system.\(^{229}\) The court concluded that potential abuse of a defence could be avoided by limiting its application to reliance on officials with the statutory authority to provide legal opinions to the public. The restriction may render *Davis* somewhat limited in its effect, allowing the defence only where the legal adviser is a government official statutorily empowered or required to give legal opinions. *Davis* is therefore more appropriately placed within the category of reliance on the advice of "officials" in the sense of state officials. The decision is in consequence not directly in point where the advice has been given by a lawyer in private practice.

\(^{225}\) (1895) 116 NC 1064, 21 SE 689, referred to by Smith, supra n 6 at 7-8, at footnote 35.

\(^{226}\) Idem. There is considerable authority for the proposition that reliance on the erroneous advice of a solicitor will not excuse. See eg, the cases cited 21 Am Jur 2d §145 at 281; Hall & Seligman supra n 135- at 652, footnotes 47–48; Kastner, supra n 87 at 326, footnote 77. In *People v McCalla* (1923) 63 Ca App 783, the court refused to allow the defence on the ground, "that to hold otherwise would be to render such advice paramount to the law." In *Staley v State* (1911) 131 NW 1028, the defendant was convicted of bigamy. He had been advised by three lawyers, all acting separately, that his earlier marriage was incestuous and thus void. He had even been threatened with prosecution by the county attorney if he did not abandon the marriage.

\(^{227}\) (1974) 63 Wis 2d 75, 216 NW 2d 3.

\(^{228}\) Idem.

\(^{229}\) Ibid at 34. See ch V pp 104-105.
On the other hand the decision of *Long v State*\textsuperscript{230} is perhaps distinguishable. The Supreme Court of Delaware quashed a conviction for bigamy where a lawyer had advised the defendant that his divorce would be valid if it was obtained in another state (Arkansas). The defendant duly obtained the divorce and decided to return immediately to Delaware (the state of his domicile) to remarry. He sought the advice of his solicitor as to whether this was legal and was advised that the divorce would still be valid. That was incorrect. The minister who was to perform the second marriage ceremony also made inquiries of the solicitor and was given the same advice.

The court examined the mistake rule in considerable detail, noting that while crimes involving specific intent constituted an exception to the rule,\textsuperscript{231} crimes of general intent did not. Pearson J, for the court, concluded that, "[t]he reasons for disallowing it are practical considerations dictated by deterrent effects upon the administration and enforcement of the criminal law which are deemed likely to result if it were allowed as a general defense."

Thus a defence of ignorance or mistake of law was not available to a defendant:\textsuperscript{232}

\begin{quote}
[W]here his ignorance or mistake consists merely in (1) unawareness that such conduct is or might be within the ambit of any crime; or (2) although aware of the existence of criminal law relating to the subject of such conduct, or to some of its aspects, the defendant erroneously concludes (in good faith) that his particular conduct is for some reason not subject to the operation of any criminal law.
\end{quote}

But the court then proceeded to draw a distinction between those cases and another situation:\textsuperscript{233}

\begin{quote}
[W]here (3) together with the circumstances of the second classification, it appears that before engaging in the conduct, the defendant made a bona fide, diligent effort, adopting a course and resorting to sources and means at least as appropriate as any afforded under our legal system, to ascertain and abide by the law, and where he acted in good faith reliance upon the results of such effort.
\end{quote}

\textsuperscript{230}(1949) 65 A 2d 489.
\textsuperscript{231} Ibid at 497.
\textsuperscript{232} Idem.
\textsuperscript{233} Idem.
This was rationalised on the grounds that “the criminal law consequences of any particular contemplated conduct cannot be determined in advance with certainty”, and that it is only after the event has taken place, and had been adjudicated by the court, that a consequence can be “ascertained”. So, before that time all that can be made are predictions about the potential outcome. Bearing all this in mind the court reasoned that where an individual had done all that was reasonable to ascertain the law, then the conduct should be excused.

The court rejected the reasons regularly put forward to justify the rule that mistake of law is no excuse in the third situation above. It considered that the argument that to allow the defence would encourage ignorance hardly seemed applicable because one of the prerequisites for the third type of mistake was that the defendant must make “a diligent effort, in good faith, by means as appropriate as any available under our legal system, to acquire knowledge of the relevant law.” And likewise, any objection on the basis that there would be difficulties of proof was, in the court’s opinion, overstated because the very requirements of the third type of mistake necessitate evidence that the defendant made a positive “effort to abide by the law, tested by objective standards rather than the defendant’s subjective state of mind.” Finally, the court found that any deleterious effects that allowing a defence may be argued to have upon the administration of the criminal law would be greatly outweighed by considerations which favour allowing it:

To hold a person punishable as a criminal transgressor where the conditions of the third classification are present would be palpably unjust and arbitrary.... 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.... Unless there be aspects of the particular crime involved which give rise to considerations impelling a contrary holding—some special, cogent reasons why justice to the individual is rightly outweighed by the larger interests on the other side of the scales—a mistake of the third classification should be recognized as a defence.

234 Idem.
235 Ibid at 497–498.
236 Idem.
237 Idem.
This defence would not be confined to situations where the defendant has relied on the advice of a lawyer but would also be available in any circumstances where the defendant, prior to engaging in the conduct, made a good faith, diligent effort to abide by the law, using means as appropriate as any available under the legal system.

In order to establish bona fide and diligent efforts “as well designed to accomplish ascertainment of the laws as any available under the legal system”:238

[W]ould require evidence showing that he had made full and bona fide disclosure of the facts to his attorney, on the basis of which he had received advice; and that he had no substantial reason to believe that this advice was ill-founded, such as that the attorney was incompetent to give advice on the matter or had not given the question sufficient consideration, or that the advice was lacking in candour.

As to the suggestion that allowing a defence could open the way for “dishonest practices among attorneys”, the court in Long countered by observing that this could be deterred by recourse to “disciplinary measures for non professional conduct.”239

A final point concerns the court’s attitude to the suggestion that this sort of mistake could be dealt with by giving a more lenient punishment or executive clemency after conviction. In Long this was found unconvincing:240

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. No excuse appears for dealing with it piecemeal. 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.

Rather than confining itself to the blanket rule that mistakes of law afford no excuse, the court looked for ways to avoid this harsh result. By conceptualising mistake in very broad terms rather than straining to compartmentalise it into specific and narrow subcategories, the court came to the conclusion that some mistakes—those called class three mistakes—could excuse. So long as mistakes brought about by incorrect legal advice

238 Idem.
239 Ibid at 499.
240 Ibid at 498.
satisfied the general requirement that the error must result from appropriate bona fide and
diligent efforts to ascertain the law, reliance on a solicitor’s advice was to be treated no
differently than reliance on the advice of an official. In effect, the court simply required an
objective assessment of the measures taken by the individual to comply with the law,
coupled with an examination of the honesty and good faith of the individual.

The court’s opinion that to hold a person who satisfies the class three criteria liable
“would be palpably unjust and arbitrary”241 clearly reflects a judicial intuition that moral or
normative considerations of culpability and blameworthiness should be taken into
account.242

Notwithstanding the general principles asserted in Long, the Model Penal Code
provides no defence of reliance upon the advice of counsel. In the 1970 working papers
of the National Commission on Reform of Federal Criminal Laws it was argued that the
Model Penal Code did not go far enough.243 The authors of the working papers were of
the opinion that the defence of reliance on counsel should be allowed and countered the

241 See People v Ferguson (1933) 24 P 2d 965, a decision of the District Court of Appeal of
California which used similar reasoning. In that case the defendant, himself a solicitor, had been
erroneously advised on this and earlier occasions by the State Corporation Commissioner and
various deputies that he did not require a licence to sell certain securities. Stephens J found: (at
970)

It is no doubt true that advice of counsel will not excuse the offense. It is true
that “ignorance of the law excuses no man”, although we are not prepared to say
that this old maxim stands undefiled by exception. It is true generally that
where the act is knowingly and wilfully done the act imports the intent.
...However, it occurs to us that a different situation is here presented. The
regulation which has not been complied with is malum prohibitum and not
malum in se. It covers one of the most complicated phases of modern
commercial life.... If the appellant early in his real estate career found himself
in honest doubt, notwithstanding his high education and legal accomplishments,
went to the fountainhead itself for information and was there advised that such
organizations were not under the department's jurisdiction, and if after he had
this identical organization ready to launch, he went to the corporation
commissioner himself and was advised in the same manner, we cannot believe
the law so inexorable as to require the brand of felon upon him for following
the advice obtained. The mere statement of the facts demonstrate that such
strict construction would be unconscionable and more calculated to engulf the
innocent law-abiding business man than to punish the guilty or to protect the
security buyer. [emphasis added]

As in Long, the court in Ferguson placed importance on the lack of blameworthiness of the
accused.

242 See Cremer, “The Ironies of Law Reform: A History of Reliance on Officials as a Defense in
American Criminal Law” (1978) 14 Cal WL Rev 48 at 83.

argument that an individual relying on a solicitor's advice could derive an advantage (perhaps by acting only on favourable advice) by requiring proof of good faith and reasonableness on the part of the actor. In the event, these suggestions were never taken any further. However one state has enacted a provision that is broad enough to excuse reliance on the advice of legal counsel. Under the New Jersey Penal Code a defence is available where:

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

This defence places emphasis on the honesty and good faith of the actor, and also on his or her ability to show that the “average” law-abiding citizen would have reached the same conclusion in those circumstances—that is, that the actions were objectively reasonable.

Although a defence of reliance on the advice of legal counsel drawn on broad lines similar to those developed in Long and the New Jersey Penal Code may at first glance appear attractive, it is confounded by both theoretical and practical difficulties. An initial problem is to determine the basis or purpose of the defence of officially induced error. If the defence is to turn upon the fact that the state has misled the accused, then the defence must necessarily be limited to advice given by representatives of the state. But if the focus of the defence is whether the accused acted reasonably in relying on the advice given, then, as Smith has argued, it matters less that the source of the advice is not a state agency but some otherwise reliable agent. As between the two views, the former is the more convincing rationalisation of the defence of officially induced error. Since the state has caused the mistake it would not then be fair for the state to punish a defendant who had relied reasonably and in good faith on that advice. On this view, the defence necessarily

244 Cremer, idem.
245 See Cremer ibid at 82–83, who says that in 1973 two bills were introduced in Congress which provided an organised Federal Criminal Code to replace the piecemeal provisions in federal statutes and case law. Both of these bills really just contained “a tightened formal version of section 2.04 of the Model Penal Code”. Neither bill was taken any further and neither contained any of the suggestions of the authors of the working papers that the reliance defence should be extended to cover reliance on the advice of counsel.
247 Smith, supra n 6 at 9.
precludes reliance on the advice of lawyers in private practice. Furthermore, there are several convincing arguments against extension of the excuse to reliance on private legal advice. While some of these arguments tend to be overstated, they generally outweigh claims for expansion of the defence.

One objection is that to recognise a defence of reliance on the erroneous advice of a private lawyer would corrupt the legal profession. Dishonest lawyers could give their clients immunity from prosecution by deliberately supplying incorrect advice. So, for the right price, an individual could “buy” whatever advice he or she wanted. In particular, large corporate clients might induce or coerce their legal advisers into giving favourable advice.248 From that point of view “[i]t would be unwise social policy to reward the clients of lawyers who gave favourable but unreasonable advice, at the expense of others in the community who were given unfavourable but correct opinions on the law.”249 To do so would be to grant lawyers “the power to grant indulgences, for a fee, in criminal cases.”250 Admittedly, this argument is exaggerated. It discounts the value of a lawyer’s professional reputation,251 and also fails to recognise the prospect of disciplinary measures which could be taken against the provision of deliberately wrong or dubious advice.252 Yet, the fact remains that where a private lawyer is retained by a client to supply advice there is at least the risk that the lawyer will supply the desired advice. In view of that possibility, it is unrealistic to expect the state to provide a defence in circumstances where the state itself is not privy to the relationship between adviser and advised.253

A further and related argument against recognition of a defence is that, were it otherwise, some individuals might sound out a number of lawyers and follow the most favourable advice.254 Clients are free to accept or reject legal advice, and to seek a second

248 See, eg, O’Connor & Fairhall, supra n 10 at 60; Kastner, supra n 87 at 362; Stuart, supra n 212 at 297 ff; Dressler, Understanding Criminal Law (1987) 147.
249 Hall & Seligman, supra n 135 at 652.
250 Idem.
251 Idem. See also Brett, “Mistake of Criminal Law As A Defence” (1966) 5 M U L Rev 179 at 201; Smith, supra n 6 at 8; and Barton, supra n 108 at 332 who suggest that where the lawyer and client have acted honestly the issue should not be so much the source of the advice as whether it was reasonable for the client to rely on it in the circumstances.
252 Except, perhaps, in the sense that lawyers are “officers of the court” and are licensed to practise by the state. See Stuart, supra n 212 at 297 ff.
opinion. A counter-argument may then be that, far from evidencing “shopping” for the most favourable advice, the retention of a second or further legal opinion tends to show a conscientious concern for compliance with the law. Thus it may be unduly cynical to suppose that seeking the advice of another lawyer inevitably marks a predisposition towards non-compliance. Yet the defendant’s conduct in *Harding v Police* 255 is incontrovertible evidence that individuals do indeed take what they want from lawyers’ advice. 256

The denial of a defence of reliance on legal advice is further supported by the claim that law-making and law-declaring are vested in the legislature and courts, and must not be taken to include advice given by a lawyer to a client. In short, if a lawyer’s advice excused mistakes of law then the law would no longer be what the legislature and the courts declared it to be. 257 Again, this arguably overstates the problem since the admissibility of a plea of reliance on legal advice does not necessarily undercut the objectivity and generality of the law. All that is entailed is recognition of an excuse in the particular circumstances of the case. Judged by standards of fairness, it is, on one view, inconsistent to punish those who have acted in reasonable and good faith reliance on the advice of a lawyer while exempting those induced into error by government officials. If the point of distinction is to be moral blameworthiness, no material difference may be discernible between the two cases. The element of unfairness is made more conspicuous if the contrast is drawn with a person who is totally ignorant of the law, 258 in that the person who has sought to replace ignorance with knowledge by seeking professional legal advice is in no better position than the person who remains completely ignorant of his or her legal position. In terms of individual desert, there may well seem to be a difference between the two cases which ought fairly to be reflected in credit for bona fide efforts to ascertain what the law is. Even so, the defendant who has sought the advice of a private lawyer has exercised freedom of

254 Kastner, supra n 87 at 326. See also *State v Downs*, supra n 225.
255 Supra n 199.
256 See also *R v Kotch*, supra n 218; *State v Downs*, supra n 225.
257 Hall, supra n 181 at 383 argues that there is “a basic incompatibility between asserting that the law is what certain officials declare it to be after a prescribed analysis, and asserting, also, that these officials must declare it to be, i.e., that the law is what defendants or their lawyers believed it to be.” See also *Cooper v Simmons*, supra n 180.
258 Stuart, supra n 212 at 298.
choice: the defendant is not obliged to go to the lawyer for the advice or, for that matter, to accept the advice tendered. By contrast, the defendant who seeks advice from a government official cannot exercise the same freedom of choice. One cannot choose the government official he or she desires, and, although there may be some room for refusing to accept the advice given, it is more unlikely that the advice of an official would be rejected.

Finally it must be acknowledged that there is little force in the argument that a defence of reliance on legal advice would result in judicial inquisitions into the quality of legal advice, and consequently, of the legal adviser. This may be a positive rather than a negative step. Lawyers should be held accountable for their professional competence and conduct. Equally, the complaint that lawyers could be called as witnesses to their own incorrect or incompetent advice is for the same reason a weak argument for denying a defence. In practical terms, the only complaint may well be that of the recipient of the advice who must retain another lawyer to plead the excusatory effect of the advice.

However, while the arguments for a defence of reliance on the advice of legal counsel may be persuasive in some respects, in practical terms the line must be drawn somewhere. To require the state to provide a defence where a private lawyer has erroneously advised a defendant is to compel the state to excuse in circumstances where it took no part in the advising process. If a lawyer's erroneous advice were allowed to excuse, the question arises as to exactly where the defence would end. Would advice supplied by other professionals or those expert in their field also have an excusatory effect? It is not difficult to envisage situations where, for example, accountants with particular expertise in taxation, patent attorneys, company share registrars, or advisers in "watchdog" consumer organisations would be appropriate experts from whom to seek legal advice. Ought there to be a defence in these situations also? Potentially, there would be no limit to the circumstances in which individuals could plead a defence of reliance.

259 Barton, supra n 108 at 332.
260 Kastner, supra n 87 at 327.
261 See, eg, Davidson v Director of Public Prosecutions (1988) 19 ATR 1098 (SCWA); R v Kennedy (1923) SASR 183.
262 See, eg, Inspector of Factories v Tarbert Street Food Centre [1989] DCR 471.
It must also be remembered that there will often be other avenues of defence for individuals who have received erroneous legal advice. In *Maintenance Officer v Stark*,\(^{263}\) for example, Beattie J avoided the conclusion that the respondent had made an inexcusable mistake of law by finding that it was a mistake as to the civil law which did provide a defence. In addition, the statute itself provided an escape route for the respondent on the ground of "reasonable cause." Moreover, some of the United States cases make the point that where the "lawyer" is in fact a legal adviser employed by the state in some capacity then a defence is available.\(^{264}\) Thus, lawyers in this context may be regarded as "officials", who are empowered by statute to give legal opinions.

In summary, for reasons of both principle and policy it is difficult to defend recognition of a reliance defence based solely on the incorrect advice of private legal counsel. Bearing in mind the absence of any such defence in the draft law reform proposals of the Commonwealth jurisdictions, or, for that matter, in the United States Model Penal Code, it appears most unlikely that a defence based on erroneous advice of legal counsel will receive statutory recognition in the near future.

### 5 RELIANCE ON A JUDICIAL DECISION

The question for present examination concerns what can be described as judicially induced error. Suppose that a person charged with a criminal offence claims to have relied on a judicial decision that was itself judicially reversed before his or her trial. According to the earlier decision, the conduct in question was not contrary to the criminal law. However, the effect of the later overruling decision was to declare the earlier decision to be an erroneous statement of the law. The issue is whether reliance on the pre-trial state of the law ought to provide a defence to the charge.

By contrast with the cases of officially induced error and reliance on mistaken legal

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\(^{263}\) Supra n 192.

\(^{264}\) Eg, *State v Davis*, supra n 151; cf *Hopkins v State*, supra n 138.
advice, the present situation involves neither ignorance nor mistake. When the conduct alleged to be an offence was committed, the accused person knew the law in the sense that he or she relied on a judicial decision which was then an accurate statement of the law.\textsuperscript{265} Given that circumstance, as well as the avowed purposes of the ignorance / mistake of law rule, it is perhaps surprising that convictions have been routinely entered in such cases. Yet the imposition of criminal liability is justified on the basis that the accused did in fact make a mistake of law. Since the decision relied on was later overruled it did not correctly state the law and the accused was therefore mistaken in taking it to be correct.

Although a defence is usually denied in this type of case by appeal to the mistake of law rule, the courts are also influenced by two systemic characteristics of the common law theory of judicial decision-making. The first is that a decision in a case of first impression, or an overruling decision, is ordinarily taken to be retrospective in effect.\textsuperscript{266} This distinguishes judicial decisions from statutes which generally have no retrospective operation. The concept of retrospectivity has its origins in Blackstone’s declaratory theory which held that a judicial decision is merely evidence of the law and not the law itself. When a decision is overruled, it does not become bad law - it never was the law because the law expressed in the overruling decision had been the law all the time.\textsuperscript{267} The second characteristic is that lower court decisions are known to be subject, as a matter of course, to reversal by higher courts.\textsuperscript{268}

Despite these conceptual and systemic constraints, neither principle nor policy dictates a denial of a defence based on "misleading judicial utterances."\textsuperscript{269} If the general exclusion of mistake of law is justified by the policy of requiring knowledge of the law, then it is fair to recognise an exception to the general rule where a person knows the law as well as anyone could.\textsuperscript{270} In this context at least, fairness would also be served by applying a principle of contemporaneity whereby the legality of an allegedly criminal act should be

\begin{itemize}
  \item [\textsuperscript{265}] Stuart, supra n 212 at 288.
  \item [\textsuperscript{266}] Hall & Seligman, supra n 135 at 668.
  \item [\textsuperscript{267}] I Blackstone's Commentaries 68-71. See also, Note: “The Effect of an Overruling Decision Upon Acts Done in Reliance on the Decision Overruled” (1915) 29 Harv L Rev 80.
  \item [\textsuperscript{268}] Hall & Seligman, supra n 135 at 668.
  \item [\textsuperscript{269}] Idem.
  \item [\textsuperscript{270}] Idem.
\end{itemize}
judged at the time of the act and not the time of the trial. By extension from the argument on officially induced error, there is also the claim that if a legal system has represented a particular position as being the law, it should be estopped from punishing someone who has acted in reliance on that position.

Admittedly, any defence of judicially induced error must be formulated cautiously. In particular, the element of reliance is critical because without it any person convicted in circumstances where the law has been changed by judicial decision might be tempted to take advantage of the change. The element of reliance also raises further questions. Must an individual have direct knowledge of a judicial decision or will indirect or “filtered” information suffice where a person acts on media reports or information relayed by a legal or other adviser? And what judicial decisions count for present purposes - those at all levels of the judicial hierarchy or only those of appellate courts?

New Zealand law is silent on the issue of reliance on a judicial decision. Nor is the matter addressed in the Crimes Bill 1989 or the 1991 Report of the Crimes Consultative Committee. However, both Australia and Canada have proposed certain reforms to the law in this respect, and the Model Penal Code in the United States already incorporates a defence of reliance on a judicial decision, opinion or judgment. The New Zealand position will be re-examined at the end of this section in the light of the case law and law reform proposals in these other jurisdictions.

There is old common law authority which supports, albeit somewhat tenuously, the argument that reliance on judicial decisions should excuse. In *R v Younger* a baker was convicted of baking dinners for customers on Sunday, contrary to the Sunday Observance Act 1677. In allowing the appeal, Lord Kenyon noted that *R v Cox* had held this practice to be lawful. He said:
Thirty-four years have nearly passed since the decision of the case of *R v Cox*, which informed the public that all bakers have a right to do what is imputed to this defendant as an offence. This circumstance alone ought to have some weight in the determination of this case. It would be cruel not only to the defendant, but also to those in a similar situation with him, if we are now to punish him for doing that which this Court publicly declared so many years ago might be done with impunity, and which so many persons have been doing weekly for such a number of years.

It is not apparent from Lord Kenyon’s judgment whether or not the appellant had actually relied upon the decision in *Cox*. It appears implicit, however, that it was enough that the court had publicly declared that the behaviour was lawful. Although that approach may have been appropriate some two centuries ago, today actual reliance on the earlier decision would be required in order to maintain consistency between this and other forms of officially induced error. Before one can successfully argue officially induced error, it must be shown that there was inducement, and the logical corollary is that there must also be reliance.

A modern common law instance of reliance can be found in *C v S*.\(^{277}\) The plaintiff sought injunctions restraining his former girl-friend (the first defendant) from terminating her pregnancy, and preventing the area health authority (the second defendant) from performing the termination. The application was dismissed. On appeal, the second respondents indicated that they would not carry out the operation if there was any question of an appeal to the House of Lords.\(^ {278}\) In delivering the judgment of the Court of Appeal, which ultimately declined to grant the injunctions, Lord Donaldson MR said:\(^ {279}\)

> I am astonished at the attitude of the regional health authority. It is a fact that some 1,000 appeals are heard by this court every year, of which about 50 go to the House of Lords, ...it is a tiny proportion which go to the House of Lords. So in practical terms of the everyday life of this country this court is the final court of appeal and it must always be the final court of appeal in circumstances of real urgency. In those circumstances, no one could be blamed in

\(^{277}\) [1987] 1 All ER 1230.  
\(^{278}\) Ibid at 1242.  
\(^{279}\) Ibid at 1243.
any way, a fortiori could they as a practical matter be prosecuted, for acting on a judgment of this court. If that be wrong, which it is not, the life of the country in many respects would grind to a halt. The purpose of any supreme court, including the House of Lords, is to review historically and on a broad front, it is not to decide matters of great urgency which have to be decided once and for all.

Commenting on the decision Smith asks whether we are “perhaps witnessing here the beginnings of the development of a mistake of law defence, similar to the defence to be found in Article 2.04(3)(b)(ii) of the American Penal Code, which provides that a person does not commit an offence if he acts in reasonable reliance upon an official statement of the law, afterwards determined to be invalid or erroneous contained in a judicial decision?” 280

While this may be so, Lord Donaldson’s comments appear to be confined to cases of “real urgency”, suggesting that it would be prudent to rely on a decision of the Court of Appeal only when time was of the essence and when to await any further decision of the House of Lords would render the proposed action ineffective. If this interpretation is to be adopted, C v S is of limited application. However, if the decision is read in the context of the practical reality that the Court of Appeal is the final appellate body, the case assumes a wider relevance. 281

In addition, Lord Donaldson does not refer to the effect of decisions of courts lower in the hierarchy than the Court of Appeal, seeming rather to imply that the Court of Appeal and the House of Lords are the only tribunals capable of making decisions upon which it is safe to rely. While appropriate in that case, should this always be so? If a decision of any competent court is the final or only word on the matter at the time the accused relies upon it, then arguably that should be sufficient. Although the community at large may be assumed to have at least a rudimentary understanding of the court system, including the fact that decisions of lower courts are subject to appeal, it seems unreasonable to suppose that there

281 Smith, supra n 280 at 138-139, questions whether the law is as clear as Lord Donaldson expressed it to be. He cites Royal College of Nursing v DHSS [1981] AC 800, where, on similar facts, two members of the Court of Appeal (Lord Denning MR and Lord Roskill LJ) declined to give a declaration as to the state of the law, basing that decision on the ground that it would not be binding on the criminal courts. Smith suggests, however, that “in terms of plain common sense, Lord Donaldson’s view is surely the better one, which deserves to be part of our law even if it is not at the present.” (Idem).
is widespread knowledge that only decisions of courts of final appellate authority may safely be relied upon. On that basis reliance on lower court decisions ought to count, subject to the general requirement of the reasonableness of the reliance. For example, the reasonableness of reliance might well be doubted where, at the time of the reliance, the accused knew the decision conflicted with another of equal or higher standing or that it was on appeal.

Notwithstanding these unresolved questions, C v S provides a basis for judicial development of a reliance defence. To this point, however, there have been no legislative proposals for such a defence. While the English Law Commission has admitted some merit in an excuse derived from reliance on a judicial decision, it concluded that it would raise major policy decisions requiring more detailed investigation than the Commission could give.\(^{282}\)

In Australia it has been recognised that reliance on a judicial decision may afford a defence. In the recent decision of *Carter v Ried*\(^ {283}\) the defendant was convicted of driving with excess breath alcohol, contrary to section 49(1)(f) of the Road Safety Act 1986. At first instance the magistrate admitted the breathalyser operator's certificate as conclusive proof of the facts and matters contained in it. Subsequently the Supreme Court of Victoria in *Bracken v O'Sullivan*\(^ {284}\) concluded, on similar facts, that the certificate was not admissible to establish an offence under section 49(1)(f). On learning of this decision Carter appealed against conviction to the Supreme Court. One day after the appeal was commenced the Victorian Parliament passed The Road Safety (Certificate) Act 1990 overruling the result in *Bracken*. Notwithstanding this, the Supreme Court allowed Carter's appeal and followed *Bracken*. In the judgment of the court, the appeal had to be decided "by applying to the circumstances as they exist the law which operated at the time of the original hearing, so as to determine the rights and liabilities of the parties, and not the law at the time when the appeal is dealt with."\(^ {285}\)

\(^{282}\) Law Com no 143, paras 9.4-9.6; Law Com. no 177, para 8.30.
\(^{283}\) [1992] 1 VR 351.
\(^{284}\) [1991] 2 VR 573.
\(^{285}\) Supra n 283 at 363.
The amending Act did not therefore have retrospective operation. Interestingly it was held that the relevant law was that which existed at the time of the hearing. Yet this "relevant law" was not what the magistrate at the hearing had ruled, but rather what the Supreme Court had subsequently declared the law to be in *Bracken*. So although *Bracken* was decided after the magistrate had convicted Carter, on appeal the Supreme Court found the law to be as stated in *Bracken*. The case therefore illustrates the declaratory theory working benevolently so as to give rather than deny a defence.

Australia has considered law reform in this area. The Interim Report of the Commonwealth Review Committee recommends the following defence:

3L It is a defence to a prosecution of a person for an offence against a provision of a law of the Commonwealth if the person proves that:

(a) the person mistakenly believed that the act constituting the offence did not attract criminal liability; and

(b) that belief was formed as a result of reasonable reliance by the person on a decision of:

(i) the High Court or a Justice of the High Court; or

(ii) the Federal Court, the Supreme Court of a State or Territory or the Family Court or a judge of that court; or

(iii) the Administrative Appeals Tribunal; being a decision given as to the effect of that provision.

In its report the Committee said that the excuse ought to be available only where there was actual reliance on a decision, and the reliance was reasonable. Accordingly, the fact that there is an earlier decision on point will be of no assistance unless the accused has actually relied on it. The Committee gave examples of what would constitute unreasonable reliance. This would include relying on a decision, knowing that it was under appeal, or where the decision conflicted with the decision of another competent court. So, for example, the case of *Olsen v The Grain Sorghum Marketing Board* would remain unaffected even had it been decided in the light of clause 3L. There the defendants relied

286 Note, however, that the Model Criminal Code Discussion Draft 1992 is silent on the issue of judicially induced error.

287 Para 6.23.

288 Idem.

on a legal opinion which was in turn based on a decision of the Full Court of Queensland that a proposed transaction was lawful. At the time of the reliance, the earlier decision was on appeal to the High Court, which subsequently reversed the Full Court decision. Morgan suggests that "[s]ome may consider even this limitation [that there is no defence if the decision is on appeal] inappropriate, given the considerable time which may elapse between lodgment of an appeal and judgment."\textsuperscript{290}

The same author also identifies what he sees as "more fundamental difficulties:"\textsuperscript{291}

Suppose that a word or phrase has been given a clear interpretation in a case and that there is neither an appeal in that case nor any "conflicting decision." When could it ever be unreasonable to rely on such an interpretation? Is the jury to be in the impossible position of considering the merits of a previous decision in order to decide the reasonableness issue?

These observations highlight one of the major conceptual difficulties in convicting in these circumstances. When the accused relied on the earlier decision, it was correct - at least as far as anyone could know at the time. Only later was its validity questioned. If the later court decides that the earlier decision was incorrect,\textsuperscript{292} the simplest remedy would be to accept the defendant's reliance and acquit accordingly, while at the same time declaring that prospectively the law will be as stated in the later decision. In these cases it is impossible for the accused to do more than has already been done. If the judiciary itself cannot reach agreement on questions of law, one can not reasonably expect private citizens to do so. In fact such cases can be challenged "on the basis of the impossibility exception, there being no vehicle at the time for the accused to find out accurately what the law was."\textsuperscript{293} The accused is snared by a change in the law over which he or she has no control, and in circumstances where the concepts of moral blame or culpability do not sit comfortably.

A further problem in clause 3L is that the reliance must be placed on a decision given as to the effect of a "provision" of Commonwealth law for which the defendant is

\textsuperscript{290} Idem.\textsuperscript{291} Morgan, supra n 289 at 133.\textsuperscript{292} Adherents to Blackstone's declaratory theory would say the earlier decision was not "incorrect" but rather, that it was never the law since "the law" has always been as expressed in the later decision. A judicial decision is merely evidence of the law, not the law itself.\textsuperscript{293} Stuart supra n 212 at 289.
prosecuted. Although not defined in the draft, in other Acts "provision" had been defined to mean "a section or a subsection of a section."294 This could have a limiting effect on clause 3L, with much depending on the context in which the "provision" falls to be interpreted and, "it seems clear that it will be no defence to rely on the decision of a relevant court as to the effect of the same word or phrase appearing in a different section of the same Act; and it may well be no defence to have relied on an interpretation of a different subsection."295 However if a defence of reasonable reliance is to be regarded as desirable in principle, then this interpretation may prove too restrictive. Matters could possibly be simplified by referring to reliance on a decision, rather than reliance on a decision given as to the effect of a provision.

This leads to a further question about the meaning to be attributed to "decision." This term can be narrowly confined to the specific "reasons for decision" or broadly taken to refer to any statement made, even if obiter, in a decision.296 While the first interpretation is probably too restrictive, the latter may also be doubted;297

How would the jury be directed on the distinction between ratio and dicta or on the varying weight to be attached to dicta in different circumstances? How will reasonableness be resolved in cases of reliance on an appellate case where there is agreement on the result of a case but no majority in favour of a particular ratio? It surely cannot be intended that the jury should be called upon to consider the relative strength of Justice X's arguments as opposed to those of Justice Y.

However, these concerns may be overstated. It must surely mean a "statement of law" in a "decision."298 This, after all, is the crux of the defendant's plea. Presumably that would include considered obiter dicta as opposed to purely passing or casual comments.

The Committee's prescription of which courts may be relied on is also problematic.

294 Morgan, supra n 289 at 134.
295 Idem.
296 Morgan, supra n 289 at 134-135.
297 Idem.
298 The United States Model Penal Code, s 2.04(3) (b) (ii) refers to "an official statement of law".
The Committee considered the Canadian reform proposal where reliance on a decision of a provincial court of appeal would excuse, but concluded that this was too stringent. On the other hand, the Committee thought that it would be going too far to permit reliance on a decision of any tribunal. But in the result it failed to explain or justify its final choice of courts. The exclusion of courts lower in the hierarchy may well be explained on the ground that their decisions are often appealed or overturned at a later date. While this cannot be denied, the practical point remains that at the time that these decisions are given, they represent "the law" for the time being. For example, when a regulatory offence not previously ruled on is interpreted by a lower court judge, it must subsequently be reasonable for affected individuals to conform their conduct according to that decision.

Clause 3L(b) requires that the "belief [be] formed as a result of reasonable reliance by the person." As it stands, this is not necessarily limited to a belief derived from first-hand knowledge of a judicial decision. The belief must follow reasonable reliance and, in that respect, it may well have been reasonable to rely on information supplied by another person, press reports or other media. Assuming the belief to have been honestly held, the central question will therefore be whether it was formed or informed as a result of reasonable reliance.

While Canadian case law has rejected a defence of reliance on a judicial decision, the Law Reform Commission recommends a limited defence. The cases provide harsh examples of the morally blameless being punished for honestly but mistakenly following the law. Not surprisingly, these decisions have attracted some trenchant criticism.

In *R v Campbell* for example, the appellant had been convicted of unlawfully taking part as a performer in an immoral performance at a night club, contrary to s 163(2) of the Criminal Code. She had stripped during a dance having earlier been told by a friend that a Supreme Court Judge had acquitted a woman on a similar charge and "[r]uled that we

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299 Para 6.23 at 60.
300 Idem.
301 See, eg, Arnold, supra 272 n at 571-579; Barton, supra n 108 at 323-324; Kastner, supra n 87 at 327-329; Stuart, supra n 212 at 288-290.
could go ahead with bottomless dancing. It appears that the friend had in turn been so informed by the manager of the club where the performance leading to the earlier charge had occurred.

That information was correct at the time it was imparted. But before Campbell went to trial, the Alberta Supreme Court Appellate Division reversed its earlier decision. Campbell was convicted at first instance and appealed on the ground of reliance on the decision that had been subsequently overruled.

Kerans D C J dismissed Campbell's appeal. First, he found that her mistake was not one as to fact but as to law:

It is a mistake of law to misunderstand the significance of the decision of a judge, or of his reasons. *It is also a mistake of law to conclude that the decision of any particular judge correctly states the law, unless that judge speaks on behalf of the court of ultimate appeal.* (emphasis added)

Secondly he considered the mistake of law rule in section 19 of the Criminal Code and concluded as follows:

[T]he section removing ignorance of the law as a defence in criminal matters, is not a matter of justice, but a matter of policy. There will always be cases, not so complicated as this where honest and reasonable mistakes as to the state of the law will be the explanation of the conduct of an accused. In such a circumstance one cannot but have sympathy for the accused. But that situation, traditionally, is not a defence. It is not a defence, I think, because the first requirement of any system of justice is that it work efficiently and effectively. If the state of understanding of the laws of an accused person is ever to be relevant in criminal proceedings, we would have an absurd proceeding. The issue in a criminal trial would then not be what the accused did, but whether or not the accused had a sufficiently sophisticated understanding of the law to appreciate that what he did offended against the law. There would be a premium, therefore placed upon ignorance of the law.

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303 *R v Johnson [1972] 3 WWR 226; (1972) 6 CCC (2d) 464 (Alta S Ct).*
304 *R v Johnson [1972] 5 WWR 638, (1972) 8 CCC (2d) 1 (Alta CA)*
305 *Campbell*, supra n 302 at 250.
306 Ibid at 251.
Thirdly, after examining the justifications for the mistake of law rule, Kerans DCJ proceeded to consider whether the appellant’s excuse that she had relied on a judicial decision should be regarded as an exception to the rule. He concluded that although the “unique circumstances” of the case created something of an anomaly, they did not constitute an exception to the general rule:

Reliance on a specific order, of a specific judge, granted at a specific time and place, seems, at first sight, not to be ignorance of the law, but knowledge of the law. If it turns out that that judge is mistaken, then, of course, the reliance on that judge's judgment is mistaken. The irony is this: people in society are expected to have a more profound knowledge of the law than are the judges. I am not the first person to have made that comment about the law, and while it is all very amusing, it is really to no point.

In the result Kerans DCJ dismissed the appeal though in light of the unusual circumstances he granted an absolute discharge, so that “the scales of justice [would be] balanced.”

The final and most disconcerting point of all arose later. It transpired that the appellant Campbell had not made a mistake of law after all because the decision on which she relied (and which was overruled before her trial) was itself subsequently reinstated by the Supreme Court.

Apart from its unusual epilogue, the appellate decision in Campbell illustrates uncritical acceptance of the traditional justification for the mistake of law rule. Deference to social utility - the efficiency and effectiveness of the system of criminal justice - eclipsed individual fairness - justice to the individual in the case. While noting the

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307 Kerans DCJ also refused to accept the relevance of a Quebec case, and some American authorities, at 252 ff.
308 Ibid at 253.
309 Ibid at 255.
310 Johnston (1973) 23 CRNS 273 (SCC). See Barton supra n 108 at 323; Stuart supra n 212 at 280; Kastner supra n 87 at 328. Kastner also gives other examples of cases in the Ontario Court of Appeal where the defence has been denied; R v Currie, Davis & Lukas (1975) 26 CC (2d) 161, 30 CRNS 28 (Ont CA), R v Stadey (1984) 13 WCB 26 (Ont CA).
311 Arnold, supra n 272 at 573.
312 Idem.
irony that individuals in society are expected to have a more profound knowledge of the law than the judges, Kerans DCJ’s best answer was to regard it as “really to no point.”313 Yet if the mistake of law doctrine codified by section 19 reflects a policy that people should know the law, then it is pointless in penalising a person who knows the law as well as anyone could.314 To accept otherwise raises an alarming spectre: individuals cannot rely on the judges because the judges cannot be relied on to state the law correctly.

_Campbell_ was followed in the later decision of _Dunn_, which has already been referred to in the context of reliance on the advice of legal counsel.315 The appellant had been convicted of failing, without reasonable excuse, to provide a breath sample, contrary to section 235(2) of the Criminal Code. On appeal it was argued that Dunn had a defence of reasonable excuse available to him in that it was reasonable to refuse to take the test because he had been denied the right to consult a lawyer in private, contrary to section 2(c)(ii) Canadian Bill of Rights. Once at the police station, Dunn had telephoned a solicitor, who advised him not to agree to take the test because the solicitor was of the opinion that Dunn was not being given enough privacy for the discussion.316 The solicitor based this advice on an appellate decision which held that the right to consult with counsel could only be fully exercised if done in private.317 That decision was overruled by the Supreme Court of Canada in _Jumaga v R_318 before Dunn came to trial. _Jumaga_ held by a majority of five to four that unless privacy has been requested, it will be deemed to have been waived. While the court decided on other grounds that Dunn had no defence,319 it held that in any event the reliance defence was unavailable because “the law...as enunciated by the Supreme Court of Canada in _Jumaga_ states the law not only as of the date of such judgment but defines what it has always been.”320 Thus, the lawyer (and hence Dunn)

313 Supra n 302 at 253.
314 Arnold, supra n 272 at 576-577.
315 Supra n 213.
316 Apparently, Dunn never asked the police for greater privacy. See Arnold, supra n 272 at 561; Stuart, supra n 212 at 288.
318 (1976) 29 CCC (2d) 269 (SCC).
319 Although the lawyer had spoken to Dunn about the privacy question, the factor that really influenced the lawyer to advise Dunn in the way he did was that he believed the police officer had not had reasonable and probable grounds for believing Dunn had been committing an offence contrary to ss234 or 236 of the Code. See, eg, Arnold, supra n 272 at 561-562.
320 Supra n at 341.
made a mistake of law in relying on the earlier (incorrect) decision because the law had always been as it was subsequently declared to be by the Supreme Court in *Jumaga*. In essence, this is the same reasoning as adopted in *Campbell*. If the judge was "wrong" in law, then those relying on that decision were also wrong in law.321

In another decision, *R v MacIntyre*,322 the accused was acquitted on a charge of refusing to provide breath samples contrary to the Criminal Code. His defence at trial was that he refused to provide the samples because he had read newspaper reports of a provincial court decision which had ruled that the breathalyser provisions of the Criminal Code were unconstitutional.323 That decision was overruled in another case before the accused went to trial324 and was itself later reversed on appeal.325 Notwithstanding the fact that the earlier decision had already been overruled, the trial judge held that the accused's reliance on the earlier decision was a "reasonable excuse" for refusing to give the samples. After an unsuccessful appeal to the County Court, the Crown succeeded on appeal to the Ontario Court of Appeal. Zuber J.A. found:326

A motorist's mistaken belief that a police officer has no right to require a sample of his breath is not a reasonable excuse for not providing a sample.... Nor does the fact that the mistaken belief is based upon an erroneous judgment of a Provincial Court Judge make the excuse reasonable.

The decisions in *Campbell, Dunn* and *MacIntyre* have been criticised as amounting to an "unthinking pandering to the ignorance of the law rule."327 The Canadian Law Reform Commission has moved to remedy this situation. By clause 3(7) of its Draft Code, "No one is liable for a crime committed by reason of mistake or ignorance of law: ... (b) reasonably resulting from ... (ii) reliance on a decision of a court of appeal in the province

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321 See Arnold, supra n 272 at 562-568 for a critical discussion of judicial decision-making and the declaratory theory. See also Barton who says that the *Dunn* case is an example of the "declaratory" theory of the common law, supra n 108 at 334.
322 (1983) 24 MVR 67 (Ont CA). See, Comment (1983) 26 CLQ 400. See also Stuart, supra n 212 at 289.
323 Idem. The case relied upon was *R v MacDonald* (1982) 39 DR (2d) 753, 16 MVR 101 (Ont Prov Ct).
324 *R v Altsheimer* (1982) 1 CCC (3d) 7, 142 DLR (3d) 246 (Ont. CA).
325 (1982) 1 CCC (3d) 385.
326 Supra n 322 at 73.
327 Stuart, supra n 212 at 289.
having jurisdiction over the crime charged.”  

The accompanying comment offers no explanation of the reasons for the formulation in clause 3(7)(b)(ii). The provision raises questions similar to those considered earlier in relation to the Australian law reform proposal. The reliance must not only be reasonable, but must also be a decision of a court of appeal for the province. This is a rigorous requirement, which, if applied to the accused in Campbell and MacIntyre would still leave them bereft of any defence since they had not relied on the decision of a provincial court of appeal.  

Clearly, therefore, clause 3(7)(b)(ii) will be of limited application. Though there is no discernible difference in moral blameworthiness between those who rely on lower courts and those who rely on decisions of higher courts, only the latter have a defence. The arbitrary nature of this threshold requirement is further compounded when one considers that the status of the decision relied on may be completely fortuitous. What if the only decision as to a particular law is that of a lower court? Surely, that ought not to mean that the individual who proposes to rely on that ruling must postpone all activity in the hope that a higher court will pass on the relevant matter. Such a conclusion would have the effect of keeping a great number of laws (not to mention individuals hoping to regulate their conduct accordingly) in a literal state of suspension, awaiting word from a provincial court of appeal.

The United States Model Penal Code provides a broader defence than either of those proposed in Canada or Australia. Section 2.04(3) provides that “[a] belief that conduct does not legally constitute an offence is a defence to a prosecution for that offence based upon such conduct when...(b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in...(ii) a judicial decision, opinion or judgment.” A number of state codes have adopted this provision, although some have chosen a narrower version by limiting the courts which may be relied upon.  

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328 Report No.31 at 34.
329 Eg, Dunn, having relied on a decision of the Nova Scotia Court of Appeal, would have been entitled to a defence, although it may have been unsuccessful anyway because his solicitor directly advised him.
330 See the American Law Institute Model Penal Code and Commentaries (1985) Pt 1 at 279, and footnote 33. Note the reference in section 2.04(3)(b)(ii) to reliance on a “judicial decision, opinion or judgment.” Clause 3L(b) of the Interim Report of the Commonwealth Review Committee 1990 limits the reliance to “decisions”. It is arguable that the Model Penal Code, by referring to “judicial ... opinion” anticipates a wider protection. For example, reliance on elements of a case which are merely obiter and not ratio may be covered. The reference to "judgment" is similarly
Judicial decisions, both before and after the adoption of the Model Penal Code, reflect shifting opinions. The majority view would seem to be that reasonable reliance on a decision of a lower court is a defence, although in the case of lower court decisions the issue of the reasonableness of the reliance is more likely to arise. For example, reliance should not be a defence when it is known that the decision of the lower court is on appeal.

*State v O'Neil* represents the majority approach. The defendant, a "druggist" was charged with shipping liquor into Iowa in 1908. In doing so, he had relied on a decision of the Supreme Court of Iowa which had declared the law regarding such shipments as unconstitutional, because it was a burden on interstate commerce. In 1909 the same court altered its view in the light of a decision of the United States Supreme Court which held that the provision was not unconstitutional in respect of interstate shipments. O'Neil was subsequently charged and convicted for the 1908 transaction. The Supreme Court of Iowa reversed the conviction, holding that to apply the later decision would be "manifestly unjust". However, the court was careful to limit the decision to "an act not otherwise wrongful or immoral." So, although the statute had never been unconstitutional, O'Neil nevertheless had a defence to a prosecution for a judicially recognised crime, since his conduct was not otherwise wrongful.

By contrast, *State v Striggles* illustrates the alternative approach that the decision of a lower court does not bind a higher court. The defendant had installed a machine in his

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332 Idem. See also Hall & Seligman, supra n 315 at 672.
333 (1910) 147 Iowa 513, 126 NW 454.
334 (1902) *State v Hanaphy* 117 Iowa 15, 19 NW 601.
335 (1909) *McCollum v McConaughy* 141 Iowa 172, 119 NW 539.
336 See Note "Retroactive Effect of Judicial Change of Existing Law in Criminal Proceedings" (1928) Colum L. Rev 963 at 964. See also, *State v Longino* (1915) 109 Miss 125, 67 SO 902.
337 More recently, *O'Neil* has been distinguished, and the general rule of retrospection reaffirmed, *State of Iowa v Knox* (1971) 186 NW 2d 641. The defendant was unable to bring himself within the O'Neil exception to retrospection. He could not contend as O'Neil did, that his conduct was otherwise rightful because his act constituted an offence under another provision in any event.
338 (1926) 202 Iowa 1318, 210 NW 137.
premises, acting in reliance on the decision of a lower court which had held that such a machine was not a gambling device within the terms of a statute. He was charged with having a gambling device on the premises and in his defence, claimed reliance on the earlier decision. Overruling the earlier decision, the court held Strictures' defence to be invalid, and restricted O'Neil to cases where reliance was placed on a decision of the highest court of the State.339

6 RELIANCE ON A STATUTE

The final type of mistake to be discussed is "legislatively induced error" where reliance is placed upon a statutory provision, the meaning of which is uncertain or indefinite. Some situations will not fall within the reliance framework at all. For example, where a statute is passed that prohibits certain behaviour, but only after the individual has acted, there is no question of reliance because at the time the individual acted there was no relevant prohibitory law. Such a case would be covered by the general principle *nulla poena sine lege*, that there is no criminal liability in respect of an act that was not

339 Smith, supra n 6 at 7.

See also, the rather different problem which arose in *US v Mancuso* (1943) 139 F. 2d 90, where the defendant had been convicted of failing to present himself for induction into the United States Army on order of his local draft board. The steps taken by the lower court Judge had been erroneous, and the defendant had acted in reliance on the Judge's orders.

On appeal it was held that: (at 92)

We think the defendant cannot be convicted for failing to obey an order, issuance of which is forbidden by the court's injunction. While it is true that men are, in general, held responsible for violations of the law, whether they know it or not, we do not think the layman participating in a law suit is required to know more law than the judge. If the litigant does something, or fails to do something, while under the protection of a court order he should not, therefore, be subject to criminal penalties for that act or omission.

The result indicated above, we believe, is bottomed on sound considerations of public policy. The process of litigation is provided by organized society as a peaceful and orderly method of setting disputes. If the defendant claimed his legal rights were adversely affected by what the Local Board had done with regard to him he was privileged to appeal to the courts for such belief as he was entitled to under the law. As it turned out, the court before whom his proceedings first came gave him for a time more than the full measure of his legal rights. But until the order of March 5 was vacated, either by the Judge who entered it or in some other fashion, it stood and the litigant can hardly be asked to determine at his peril the correctness of the court's decision. Appellate courts are provided for that purpose and the rule is well established that an initial decision stands until reversed or until vacated by supersedeas at the time of appeal.
prohibited when committed. Clearly, therefore, no question of ignorance or mistake of the law would arise. Where, on the other hand, legislation has been enacted prohibiting the relevant conduct but, for reasons of non-publication or unavailability, the defendant is blamelessly unaware of it, then there ought to be a defence to contravention of an unknown or unknowable law. Here again, the case is one of excusable ingorance rather than mistaken reliance on a published and accessible statute.

In addition, the fact that a person makes a mistake as to the meaning of a provision which is uncertain or indefinite does not in itself provide a defence. On the orthodox common law approach, the problem is usually dealt with by resort to the principle of strict construction. In the event of ambiguity, the meaning more favourable to the individual is adopted. Thus interpreted the meaning is cured of uncertainty or ambiguity. If that meaning coincides with the defendant’s interpretation, no question of mistake arises. But if it does not so coincide the mistake of law rule applies to deny any defence. In addition, section 6 of the New Zealand Bill of Rights Act 1990 directs that “[w]henever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”

The traditional justifications for upholding the mistake of law rule apply more convincingly here than in any of the other reliance circumstances. One danger in allowing a defence in this type of reliance situation would be that defendants could claim that any given statutory provision was ambiguous. It is also doubtful whether a mistake defence is the appropriate means of redress in cases of statutory ambiguity since “any attempt to apply the defence of mistake of law for indefiniteness of a statute ... would involve the courts in so perplexing a question of degree as to be unenforceable as a matter of sound judicial administration.”

340 See, eg, Hall & Seligman, supra n 135 at 655.

341 See chapter IV. See also Hall & Seligman, supra n 135 at 656 who suggest that no defence should be available to foreigners entering jurisdictions where certain conduct is prohibited, even if, in their own place of domicile the conduct would not have been criminal.

342 See Hall, supra n 181 at 388.

343 See, eg, *Sweet v Parsley* [1970] AC 132 (HL); *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA); *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA), described in those cases as a “first” or “universal” principle, although in the context of categorisation. But see Cooke P’s dictum in *Millar* that any ambiguity must be “reasonably” open to prevent an overweighighting in favour of the accused. (at 668.)
However, in those jurisdictions where the courts are empowered to rule on the constitutionality or validity of statutory provisions - the United States and Canada - a defence is available where a person relies on a statute which is later declared void.  

However, by section 4 of the New Zealand Bill of Rights Act 1990:  
- no court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), -  
(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or  
(b) Decline to apply any provision of the enactment - by reason only that the provision is inconsistent with any provision of the Bill of Rights.  

This provision confirms the constitutional distinction between New Zealand and jurisdictions such as the United States and Canada where courts are empowered, in certain circumstances, to declare statutes invalid. Thus the Bill of Rights has been described as an "ordinary statute requiring no special procedure for repeal or amendment", and section 4 has been explained as expressly confirming the Act's susceptibility to be overridden or impliedly repealed by inconsistent statutes whether earlier or later than the Bill of Rights. By contrast, the "Canadian Charter and the US Bill of Rights are each examples of constitutional bills of rights, the key feature of which is that they impose limits on 

344 Hall & Seligman, supra n 135 at 668.  
345 See Hall & Seligman, supra n 135 at 662ff for a comprehensive examination.  
346 See Hastings, "The New Zealand Bill of Rights and Censorship" [1990] N Z L Rev 384, who says that the Bill of Rights cannot be used by the Courts to strike down legislation. See also Joseph, Constitutional and Administrative Law In New Zealand (1993) chs 14,26; Adams On Criminal Law (Robertson ed, 1992) vol 2, ch 10. But see Paciocco, "The New Zealand Bill of Rights Act" [1990] NZ Recent Law Review 353 at 355-356, who suggests that the Bill of Rights may have some effect on other enactments. For example, s7 may have an effect at a political level, requiring the Attorney General to bring to the attention of the House of Representatives any provision of any proposed legislation that appears to be inconsistent with any rights and freedoms contained in the Bill. See also, Smith, supra n 6 at 14, where the valid point is made that in England, (and, by extension, in New Zealand) "there is a power to declare subordinate legislation ultra vires and void, in which case one would expect the principles expressed in the [Model] Penal Code to apply."  

347 Adams, ibid at ch 10.1.03.
legislative power and allow courts to declare legislation null and void. Constitutional bills of rights also control executive and judicial power. An ordinary statute bill of rights such as our own controls executive and judicial power but not legislative power. 348

In Canada, section 15 of the Criminal Code provides that “[n]o person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in de facto possession of the sovereign power in and over the place where the act or omission occurs.” Section 15 will therefore provide a limited defence in the situation where an individual relies on a statutory provision which is either declared void by reason of invalidity or unconstitutionality before he or she comes to trial, or declared to be of no force and effect because it contradicts the Canadian Charter of Rights and Freedoms. 349

The United States Model Penal Code, section 2.04(3) provides that:

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

(b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in

(i) a statute or other enactment.

Thus, if an individual reasonably relies on a statute or other enactment which is subsequently declared to be invalid a defence is available on the basis that the individual could not be expected to assess whether or not a State legislature has overstepped its constitutional powers. 350

348 Idem.
349 See Stuart, supra n 212 at 290. Section 15 is declaratory of the common law as expressed in Kokoliades v Kennedy (1911) 18 CCC (2d) 524, (Sask CA) which considers the situations in which s15 could provide a defence.
350 See Smith, supra n 6 at 7. A number of State legislatures have followed the Model Penal Code: see American Law Institute, Model Penal Code and Commentaries, (1985) pt 1 at 279. The defence available under New York Penal Law is somewhat broader, with s 15.20(2) providing that:

A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offence, unless such a mistaken belief is founded upon an official statement of the law contained in (a) a statute or other enactment.

The New York provision does not require an objective belief, “reasonableness” having been omitted from the wording. Also, the State law does not require the official statement of the law to
While the United States does, then, provide a defence of mistaken reliance on a statute, the uncertainty or ambiguity of that statute is not, by itself, enough to sustain the defence. The statute must also be subsequently declared unconstitutional before the defence will become relevant.

Because no equivalent constitutional measures apply in New Zealand, any defence would necessarily be framed solely upon the ambiguity or indefiniteness of the statute. Not surprisingly, the Crimes Bill 1989 is silent as regards a defence of legislatively induced error. The real danger in recognising such a defence would be the threat to the inviolability and objectivity of statutes.

7 CONCLUSION

For reasons of both principle and policy New Zealand should recognise a defence of officially induced error in certain circumstances. Pivotal to the recognition of a defence is the relationship between the private citizen and the state. While the citizen has a duty to ascertain the law, there is a corresponding requirement that the state ensures that the law is capable of ascertainment. As outlined in the preceding chapter, the state has a duty to publish its laws and make them accessible. But as explained in this chapter, the state must also ensure that when it chooses to advise its citizens about the law, it should do so accurately. Thus, not only must the state make the law available, but it must also make the correct law available. It is unfair, therefore, for the state to deny responsibility in situations where there is a failure to meet these minimum standards. If the citizen has performed his or her part of the "social bargain" by attempting to ascertain the law, but nevertheless unwittingly violates a criminal law, the state ought to be prevented from denying the citizen a defence based on mistake of law.

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be subsequently determined as invalid or erroneous. However, in People v Marrero (1987) 507 NE 2d 1068, the Court of Appeals for New York held by a majority that a defence should only be recognised in exceptional circumstances, thus negating the apparent broad application of 215. 20(2). See also, De Gregorio, "People v Marrero and Mistake of Law" (1988) 54 Brooklyn L Rev 229.
There are, however, two situations in which it would promote neither principle nor policy to admit a defence. The first is where the defendant has relied on the legal advice of private counsel. While a defence is perhaps arguable on the basis that it is not fair to punish an individual who has acted in honest and reasonable reliance on the advice of a lawyer, two factors suggest that the defence should not be expanded to cover this situation. In the first place, the advice does not emanate from a relationship between private individual and state. Thus if the state was not party to the advice supplied, then it is not realistic to suppose that the state should excuse a defendant who has exercised freedom of choice by accepting the advice of private counsel. The same freedom of choice is not open to the individual who seeks the advice of a government official, or where the individual relies upon the decision of a court. Moreover, to allow a defence of reliance on the advice of private legal counsel has the potential to extend to the advice of other professionals and so forth. There is a risk that this would open the floodgates to claims of reliance.

The second situation in which a defence should not be recognised is where reliance is placed upon a statutory provision, the meaning of which is uncertain or ambiguous. Although there is a relationship between the private citizen and the state in its legislative capacity in this instance, as previously discussed a defence of mistaken reliance necessarily fails on other grounds. Given the constitutional context of New Zealand, it is simply not practical to advocate such a defence.

By way of contrast, in circumstances where an accused has been misled by the erroneous legal advice of a government official, or where an accused has relied on a judicial decision which is subsequently overruled, a mistake of law defence should be recognised. The pivotal element of a defence in these two situations is the reasonableness of the reliance.

In respect of a defence of reliance on a government official a requirement that the reliance is reasonable should displace specific preconditions such as the actual or ostensible status of the official. As long as a defendant acts in reasonable reliance on an official with the ostensible authority to give the advice, a defence should be available.
Equally, subject to a requirement of reasonableness there is no compelling reason to limit a reliance defence to decisions of appellate courts. Any honest belief formed in reasonable reliance on any judicial decision should be sufficient, whether the source of the information about that decision is direct or indirect. As for what is comprehended by a “decision”, any statement of law made by a court should qualify without regard for technical and formalistic distinctions whose significance has no meaning to non-lawyers. If difficulties arise they can be adequately resolved within the general assessment of reasonableness.

A further limitation which would safeguard against undeserving claims, and would ensure that the prosecution was not put to the additional time and expense of disproving the defendant’s claim, would be to reverse the onus of proof. The defendant would be required to prove, to the standard of the balance of probabilities, reasonable reliance on the erroneous advice of an official. The implications of reversing the onus of proof will be considered in detail in the final chapter.
VI MISTAKE OF LAW AND ABSENCE OF MENS REA

1 INTRODUCTION

The previous chapters have considered several exceptions to the general rule that ignorance or mistake as to the existence or application of the criminal law does not affect liability for committing an offence. In those exceptional cases of non-publication, inaccessibility and officially induced error, mistake has the characteristics of an excuse.\(^1\) The mistaken actor does not usually deny that the actus reus was committed with any necessary mens rea but claims that some extrinsic factor or event was the true cause of the mistake. Thus, while acknowledging that the act was wrongful, the actor claims that he or she cannot fairly be blamed for it.\(^2\)

The mistakes of law to be examined in this chapter entail an analytically different claim. The exculpatory effect of these mistakes is based, not on the presence of some special excuse external to the elements of the offence, but on the absence of a fault element prescribed for the offence itself. Since the central instance of fault is a subjective form of mens rea such as intention or knowledge, the mistake is material in determining whether the mistaken actor had the required state of mind. If the claim is accepted, the mistake of law functions as a “logical negation” of an essential ingredient of liability.\(^3\)

A claim of absence of mens rea based on a mistake of law is therefore theoretically distinct from a claim of excusable mistake of law. A mistake of law negating mens rea shares the quality of a mistake of fact with the same effect. In both cases the mistake affords a “failure of proof” argument against an allegation of criminal wrongdoing.\(^4\)

This view of the effect of mistake of law effectively leaves no room for the application of the ignorance of law rule in section 25 of the Crimes Act. If “excuse” in that provision is interpreted so as to accord with its contemporary meaning, the general effect of

\(^2\) Smith, idem.
\(^3\) Fletcher, Rethinking Criminal Law (1978) 690.
\(^4\) See Orchard, Crimes Update, New Zealand Law Society Seminar (September - October 1990) 25 and n 157, referring to lanella v French (1968) 119 CLR 84 at 97, per Barwick CJ.
the rule is to exclude reliance on any claim that an actor did not know that his or her conduct was prohibited by the criminal law. Only exceptionally would a special excusing defence be available to meet cases of non-publication, inaccessibility and officially induced error. But the rule in section 25 need not be interpreted so as to exclude a denial of liability derived from a mistake of law in negation of an element of an offence. By its terms section 25 excludes ignorance of the law as an excuse for any “offence committed.” The rule would consequently not take effect until all the elements of the offence are present, and would not apply if a prescribed mens rea ingredient could not be proved. In this way a mistake of law that negatives mens rea ingredient challenges the predicate of section 25 by denying that an “offence” was “committed.”

However, there is little evidence of judicial sensitivity to the distinction between the excusing and denying effects of mistake of law. Frequently, the ignorance of law rule is broadly applied in a manner that excludes any “defence” of mistake of law, whether it operates formally as an excuse or as a denial. This broad approach is easier to explain in relation to the common law rule than its statutory versions. The breadth of the common law exclusion enables the rule to be stretched so as to dismiss as irrelevant any claim based on mistake of law.

Nevertheless, it is possible to identify several broad areas in which the courts have recognised the relevance of mistake of law in denying mens rea. Mistake may negative mens rea where it relates to a matter of civil law included within the definition of an offence. An honest belief that an act is justifiable, based on ignorance or mistake of law, may also negate mens rea where it constitutes a “claim/colour of right.” The notion of “colour of right”, as defined in both the Crimes Act 1961 and Summary Offences Act 1981, has been expressly included in the definitions of several offences against property such as theft and related crimes. Additionally, statutory terms such as “knowingly”, “wilfully”, “fraudulently” and “dishonestly” have been interpreted, though far from consistently, as requiring awareness that the relevant act was prohibited by law. Lastly, particular statutory provisions admitting an exception in favour of “reasonable excuse” or

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6 Colvin, ibid at 127-128.
7 Colvin, idem.
8 For examples of this broad approach see Smith & Hogan, Criminal Law (7th ed, 1992) 80; Law Com No 177 (1989) vol 2 at 196, para 8.29.
the like have also been construed to allow the exculpatory effect of mistake of law.

Overshadowing the relationship between mistake of law and mens rea is the distinction between mistake of fact and mistake of law. Since a relevant mistake of fact will normally negate mens rea while a mistake of law will do so only exceptionally, the availability of a defence may depend on how a mistake is characterised. The first part of this chapter will examine the fact/law distinction, and will be followed by a consideration of the cases in which mistake of law has been accepted as negating mens rea.

2 MISTAKES OF FACT AND MISTAKES OF LAW

(a) The General Distinction

In the abstract, the distinction between fact and law can be stated with some degree of certainty. Facts, generally speaking, are things "perceptible by the senses."\(^9\) Law, on the other hand, is "an idea in the minds of men."\(^10\) It is expressed in distinctive propositions - mainly encoded in statutes and judicial decisions - which give particular meaning to facts. These propositions are not directly sensed by perception but are "understood in the process of cognition."\(^11\)

Mistakes about facts are therefore misperceptions about the real world and involve empirical judgments derived from those misperceptions.\(^12\) A person is mistaken in this sense when he or she wrongly believes that a fact exists when it does not. But to make a mistake of law is to entertain an incorrect belief (or in the case of ignorance to have no knowledge whatever) about the legal relevance, consequence or significance of facts.\(^13\) One method of testing whether a mistake is one of fact or law may be described as a variant

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9 Williams, *Criminal Law, the General Part* (2nd ed 1963) 287.
10 Williams, idem.
12 Fletcher, supra n 3 at 686; Simons, "Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay" (1990) 81 J Crim & Criminology 447 at 469.
13 See Hall, supra n 11 at 376: Stuart, *Canadian Criminal Law* 704.
of the "counterfactual" approach sometimes used to test impossible attempts. In the context of mistake its relevance is to enable us to gain a clearer idea of the nature of a mistake by hypothesising different sets of circumstances in any particular case - hence such cases are approached "counterfactually". First, if it is assumed that the defendant knows all the relevant facts but is still mistaken as to whether his or her conduct is contrary to the law, then the mistake is one of law. The question to be asked is "would it have made any difference if the defendant had known all the relevant facts?" If the answer would be "no", the mistake is one of law. Second, if it is assumed that the defendant knew all the relevant law, but on a particular occasion is mistaken about whether his or her conduct violates the law, then the mistake is one of fact.

However, despite the apparent certainty of the general distinction and the attraction of the counterfactual test, there are a number of reasons which make it difficult to maintain a strict dichotomy between mistakes of fact and mistakes of law. Firstly, mistakes of law are really mistakes about particular kinds of facts - "legal facts". Since law gives distinctive meaning to facts, all mistakes of law can be expressed in terms of fact. Thus unless we can segregate the facts that constitute the law and its meaning and application from "other" facts, criteria such as the counterfactual test are of limited use except, perhaps, in the least problematic cases. Secondly, in practice the ultimate characterisation of the nature of a mistake may depend on how the mistake is described. Furthermore, mistakes of law and mistakes of fact may occur in contingent causal relationships. A mistake of law may result from a mistake of fact, and vice versa. While it may be possible to isolate the components of the mistake and identify its underlying cause, this may not always be so. Occasionally fact and law may interweave to such an extent that the elements of the mistake cannot be unravelled. In such cases the judicial solution is to regard the mistake as a compound or mixed error of both fact and law which is to be characterised overall as a mistake of fact.

14 See Simons, supra n 12 at 469-470; Alexander, "Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Mike Bayles" (1993) 33 Law & Phil 33 at 57-58.
15 Colvin, supra n 5 at 127.
16 Alexander, supra n 14 at 58.
17 Gillies, Criminal Law 280-281.
18 Colvin, supra n 5 at 128.
There are also a number of other factors - usually hidden beneath the formal processes of judicial ratiocination - which seem to account for different outcomes in mistake cases. In particular, judicial inclination either to admit or exclude mistake will inevitably colour the characterisation of any particular mistake. Accordingly, decisions in which judges disagree on the nature of a mistake appear to be explicable as much in terms of different intuitive responses to the amount of law which a person should be expected to know as in terms of different approaches to the orthodox fact/law distinction.\(^19\) Though not often expressly stated, these differences seem to reflect variant perceptions of blameworthiness on the part of mistaken defendants. A judge inclined to admit the relevance of what appears to be a mistake of law might (i) characterise it as a mistake of fact, or (ii) classify it as a mixed mistake of fact and law with the same effect as in (i), or (iii) characterise it as a mistake of law though not so as to exclude a defence.\(^20\)

(b) The Distinction Applied

The question of the nature of a mistake and its relevance to criminal liability has arisen conspicuously in the context of drug, immigration and driving offences. Typically, the defendant claims an honest belief that his or her conduct was “innocent” because he or she did not know that a substance was a controlled drug, that he or she was not permitted to enter New Zealand, or that he or she was disqualified from driving or subject to some other legal restriction on his or her authority to drive. Since mens rea is an essential element of these offences, the issue is whether the defendant’s mistaken belief is admissible in negating mens rea.

(i) Illustrative cases and subtle distinctions

In several cases involving the cultivation or supply of a controlled substance a mistake about the nature or character of a controlled substance has been regarded as a mistake of fact. In \(R v Strawbridge\)\(^{21}\) the appellant was charged with cultivating a

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\(^{19}\) Ibid at 131.

\(^{20}\) Colvin, ibid at 129.

\(^{21}\) [1970] NZLR 919 (CA).
prohibited plant, namely, cannabis sativa. She successfully claimed that she honestly believed the seeds that she had planted and cultivated were mustard and not cannabis seeds. Again in *R v Wood* the appellant's defence to a charge of cultivating cannabis was that she mistakenly believed that the seeds from which the cannabis plants had been grown were, in fact, "supertom" tomato seeds.

A more complicated case was considered in *R v Metuariki*. The accused was charged with supplying a Class A controlled drug, psilocybine, contrary to the Misuse of Drugs Act 1975. He had picked "magic mushrooms" containing psilocybine which were growing at a public beach and sold some to an undercover police officer. While he knew that he could get "high" on the mushrooms and that they contained something that gave that effect, he denied any knowledge that the mushrooms contained a controlled drug, or that it was unlawful to gather, consume or sell them. So, whereas in *Strawbridge* and *Wood* the accused had been mistaken as to the identity of the plants they cultivated, believing they were something else, in *Metuariki* the accused knew that they were mushrooms and were capable of producing hallucinatory effects when ingested. Nonetheless, the Court of Appeal held that the mistake in *Metuariki* was essentially the same at that in *Strawbridge*. Accordingly, since knowledge that the substance was a controlled drug was an essential element of liability for the offence, his mistake related to fact and was admissible in denying mens rea.

The Court of Appeal in *Metuariki* also identified cases where a claim of "innocent" conduct would be immaterial to liability. Thus, "[a]n accused who admits he was aware the substance he had was psilocybine but seeks to assert that he did not know psilocybine was a controlled drug or that it was unlawful to supply psilocybine is barred from making that assertion by s25." Equally, an accused could not claim that he or she mistakenly believed that he or she was supplying a particular controlled drug when in fact it was another controlled drug. Section 29 of the Misuse of Drugs Act 1975 deals with this type of case, providing that a mistake as to the identity of a drug, known to be proscribed, is no
defence. So also, if an accused knows that a substance is a controlled drug but is ignorant of its true identity or statutory description, his or her ignorance will be immaterial. Awareness of the legal fact of criminal proscription will be enough to constitute knowledge of the essential circumstances of the relevant offences.

Perhaps the most problematic instance of ignorance of law arises where a person knows the nature of a particular substance but does not know that the substance contains an ingredient which is legally proscribed or controlled. In *Police v Taggart* the defendant obtained some tablets, labelled “miumbin”, which he knew were designed to stimulate sexual activity. However, he was not aware that the tablets contained a substance that was an alkaloid of yohimba, or that yohimba was a scheduled poison. His appeal against conviction for selling a scheduled poison without a licence was dismissed on the basis that his lack of knowledge that yohimba was a statutory poison amounted to ignorance of the law. Moreover, his ignorance of the fact that the tablets contained yohimba was also treated as ignorance of the law. Woodhouse J concluded that since the appellant had dealt with yohimba thinking of it as miumbin, and since he understood the nature and characteristics of the substance “[h]e was far from labouring under any mistake of fact concerning the drug.”

In *Metuariki* the Court of Appeal regarded the facts of the case before it as analogous to *Strawbridge* and distinguishable from *Taggart*, which Richardson J described as being “on the other side of the line.” According to Richardson J, Taggart “[c]ould not plead an honest but mistaken belief [of fact] because he supplied what he intended to supply and what he believed, if true, did not make his act innocent.” In each of the three judgments the material point of distinction between Metuariki’s mistake and Taggart’s mistake appears to be that Taggart not only knew the “nature” and “characteristics” of the substance but
also knew it by a name (miumbin) even though that name differed from the statutory designation (yohimba).\textsuperscript{31}

By applying \textit{Strawbridge} and distinguishing \textit{Taggart} the Court of Appeal in \textit{Metuariki} effectively drew a line between two different situations: (i) the case of mistake of fact where a person knows that a substance produces particular effects but does not know what the substance is or that it is legally proscribed (\textit{Metuariki}); and (ii) the case of mistake of law where a person knows that a substance produces particular effects and that it is a drug, but does not know that it is legally proscribed (\textit{Taggart}). Yet it is questionable whether there is really any material distinction between the cases.\textsuperscript{32} Although Taggart knew that he had obtained a drug labelled miumbin in prepared tablet form from a chemist, the crucial factor was that he did not know of the fact that the tablets contained the ingredient yohimba, a scheduled poison. His ignorance that the tablets contained a scheduled poison therefore derived from his ignorance of fact and would seem materially indistinguishable from Metuariki’s ignorance that the mushrooms contained psilocybine, or Strawbridge’s mistaken belief that the seeds she cultivated were mustard seeds. In each case the underlying cause of the mistake was a mistake of fact, and ignorance of law was merely incidental to that mistake.

On one view, then, \textit{Taggart} may be regarded as wrongly decided. But even if it is accepted that there is a valid distinction between \textit{Metuariki} and \textit{Taggart}, there is nevertheless good reason for thinking that the drawing of such a line between mistakes of fact and mistakes of law is “unhelpful” in this context.\textsuperscript{33} If a “good faith mistake as to an element in the definition of an offence”\textsuperscript{34} negatives mens rea, then Taggart’s ignorance of the true nature of the substance and that it was legally proscribed should have been sufficient to exculpate. Two reasons can be advanced in defence of this conclusion. First, the complicated nature of many of the substances listed in the schedules of the drug legislation, and the fact that these schedules are not in line with the common understanding of the extent of statutory control, suggest that the deciding factor for culpability should be

\begin{itemize}
\item \textsuperscript{31} Ibid at 491 per Richardson J, at 493 per McMullin J, at 497 per Casey J.
\item \textsuperscript{32} See Mathias “Mens rea: Stare decisis v statutory interpretation”[1987] NZLJ 112 at 116.
\item \textsuperscript{33} Idem.
\item \textsuperscript{34} \textit{Metuariki}, supra n 23 at 492 per Richardson J.
\end{itemize}
absence of an honest belief that a substance is not a controlled drug.\textsuperscript{35} Secondly, there is a risk inherent in drawing over-subtle distinctions between mistakes of fact and mistakes of law in that some mistakes of law which are really consequential on mistakes of fact will be excluded as immaterial. The result may be to constrict the relevance of mens rea, as a concept of blame, for offences in which claims of “innocence” are often based on contingently linked mistakes of fact and law. The contrast between \textit{Metuariki} and \textit{Taggart} may therefore suggest that the strict distinction between mistakes of fact and mistakes of law needs to be moderated by a consideration of its effects on central concepts of culpability.

Similarly, two cases involving immigration offences illustrate the subjectivity of the characterisation of a mistake as one of fact or law and emphasise the way in which a court’s interpretation of an offence affects the relevance of mistake.

\textbf{In} \textit{Labour Department v Green}\textsuperscript{36} the appellant had been convicted of criminal offences in England. He made inquiries at New Zealand House in London as to whether there were any restrictions on emigration to New Zealand but was not told that previous criminal convictions would make him a prohibited immigrant under section 4(1)(c) of the Immigration Act 1964. On his arrival in New Zealand he was charged and subsequently convicted of being a prohibited immigrant who had unlawfully landed in New Zealand, under section 5(1)(a) of the Act. On appeal, he denied that he had the mens rea for the offence on the ground that he did not know that because of his previous convictions for which he had served terms of imprisonment, he was a “prohibited immigrant”. While the status of being a prohibited immigrant involved both fact and law,\textsuperscript{37} McMullin J excluded his claim as “no more than a plea of ignorance of the law.”\textsuperscript{38} In \textit{Kumar v Immigration Department}\textsuperscript{39} the appellant also claimed that he lacked mens rea because he honestly believed that he had permission to enter New Zealand. He had arrived in Auckland on a cruise ship, was issued with a “pass-out” card, and allowed ashore, although his passport

\textsuperscript{35} Mathias, supra n 32 at 116.
\textsuperscript{36} [1973] 1 NZLR 412 (HC).
\textsuperscript{37} Orchard, supra n 26 at 28
\textsuperscript{38} \textit{Green} supra n 36 at 415.
\textsuperscript{39} [1978] 2 NZLR 553 (CA).
was kept on board ship. He failed to return to the ship and was subsequently charged and convicted of entering New Zealand without holding a permit, contrary to section 15(5) of the Immigration Act 1964. The Court of Appeal accepted his claim as negating the mens rea of the offence, and distinguished Green as a case "[w]here the statute forbids the doing of an act and the attempted defence is that the defendant did not know what he was doing was prohibited - a defence of ignorance of the law."\(^{40}\)

The characterisation of the mistake of fact in Kumar has been explained on the basis that while the appellant was apparently unfamiliar with the requirements of the immigration legislation "he believed that whatever the law required to be done had been done, so that he believed his act was lawful."\(^{41}\) So the cause of his belief was a "mistaken belief (or assumption) about facts or events, albeit he was unaware of what the details of those facts or events might be."\(^{42}\) This explanation may be equally applicable to the facts of Green. There also, the appellant believed that whatever the law required to be done had been done, so that he believed his act was lawful. In addition, the cause of his belief was a mistaken belief about facts or events (that there were certain requirements about nationality, good health and character but without any specific reference to the absence of previous convictions). If the distinction between the two cases is taken to be that in Green the appellant was mistaken as to the legal significance of facts (his previous convictions), the mistake in Kumar can also be expressed in such a way as to involve mistake of law: having been given a pass-out card and allowed ashore, the appellant at that stage was mistaken as to the legal significance of facts (that the grant of a pass-out card constituted permission to enter New Zealand).\(^{43}\)

It is possible therefore to collapse the distinction between the two cases by reformulating the respective mistakes in the two cases. It has recently been suggested that had the Court of Appeal in Kumar disentangled the various components of the appellant's

\(^{40}\) Ibid at 557.

\(^{41}\) Orchard, supra n 26 at 29.

\(^{42}\) Idem.

\(^{43}\) A possible point of distinction between the two cases is that Green did know facts (that he had prior convictions and had served a term of imprisonment) from which certain legal consequences (which he did not know) flowed, whereas Kumar did not know the equivalent from which the legal consequences followed.
mistake, it may have reached the conclusion that the mistake really stemmed from ignorance of the law rather than from any independent factual error. However, it is evident from the judgment in Kumar that the court was disinclined to deny a defence to an “innocent visitor” lulled into believing that he was permitted to enter New Zealand by immigration officials and then singled out for prosecution. In those circumstances the court refused to accept that the legislature could have intended to subject a person to the stigma of conviction and the sanction of a deportation order.

The different outcomes in Green and Kumar also reflect different interpretative approaches to the relevant offences. In each case the elements of the offence were structurally and substantively similar: the actus reus required the doing of some act with or without a specified status. In Green the offence was unlawfully landing while being a prohibited immigrant; in Kumar it was entering without a permit to enter. But more importantly, the mens rea requirements were interpreted quite differently in the two cases. On the basis of common law authority, McMullin J in Green found that the commission of the act - landing - “constituted the mens rea” of the offence. Therefore, mens rea did not include the appellant’s knowledge of his prohibited status. The appellant’s claim was accordingly not regarded as a denial of mens rea but rather as an “excuse” or “defence” and dismissed as irrelevant due to the exclusionary rule in section 25 of the Crimes Act. On the other hand, the Court of Appeal in Kumar expressly declined to limit the mens rea to the act of entering the country, and applied it “in [a] wider sense” to the element of permission as well. Once that view of mens rea was adopted, the appellant’s “mistaken belief in a state of facts which if they existed would have made his act innocent negated an ingredient of the offence.”

What the two cases tend to show is that differing interpretative approaches influence the admissibility of mistakes. If the mistake is regarded as extraneous to the elements of liability it is easier to reach a conclusion that it is irrelevant in determining criminal guilt.

44 Ministry of Transport v Wilke [1992] DCR 104 at 112, Green DCJ.
45 Kumar, supra n 39 at 556, 558.
46 Ibid at 556.
47 Supra n 36 at 415.
48 Supra n 39 at 555.
For example, would it have affected the outcome in Green if the appellant had made a clear mistake of fact in respect of his prohibited status when the court interpreted the offence as requiring mens rea only in relation to the landing in New Zealand?

(ii) The distinction obscured

A number of problematic cases have recently arisen in the area of disqualified driving and related transport offences. Although several of the cases to be examined below are lower court decisions and therefore of no authoritative significance, they serve further to illustrate the fragility of the fact/law distinction.

The dominating authority in this area is Millar v Ministry of Transport. The appellant was charged with driving while disqualified contrary to section 35 of the Transport Act 1962 and subsequently convicted. The events surrounding the conviction were complicated owing to the appellant’s previous convictions and periods of disqualification. On 29 April 1982 the appellant was convicted on two separate driving charges and disqualified for twelve and six months respectively. The disqualifications were to run concurrently. Then on 18 August 1982 on another disqualified driving conviction he was disqualified for a further twelve months from 29 April 1983; and on the same day, on a breath alcohol conviction, he was disqualified for two years from 29 April 1984. So Millar was effectively disqualified until 29 April 1986. On 3 June 1985 he was again charged with driving while disqualified. He claimed that he had misunderstood what the District Court judge had said on 18 August 1982 and thought that the total disqualification period of three years ran retrospectively from 29 April 1982. He was convicted in the District Court, and after his appeal to the High Court was dismissed, appealed successfully to the Court of Appeal. The Court of Appeal categorised the offence as one in which mens rea is an ingredient of liability. On proof that the appellant drove while disqualified it would be assumed that he knew he was disqualified. However if there

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49 [1986] 1 NZLR (CA).
50 Subsequent amendments to s31 would now preclude a mistaken belief such as Millar’s from amounting to a mistake of fact. By s31(3) a disqualification period which is already subject to a disqualification order now commences at the expiration of any existing order of disqualification, whereas at the time Millar was decided it was open to the judge to impose a retrospective disqualification - as indeed Millar believed was the case.
was evidence raising a reasonable doubt as to his knowledge of the fact of disqualification he was entitled to an acquittal. Since the appellant claimed that he had misunderstood what the District Court judge had said in relation to the orders made in open court on 18 August 1982, his mistake was one of fact. He had simply been mistaken as to the date on which the relevant disqualification expired. In view of that mistake he lacked knowledge of a fact relevant to the offence and was accordingly entitled to an acquittal.

If Millar is an uncontroversial example of a mistake of fact, Breen v Police\(^5^1\) just as clearly involved a mistake of law. The appellant had been convicted on two charges: (i) driving an 80cc motorcycle without holding the appropriate licence, contrary to section 37(1) of the Transport (Vehicle and Driver Registration and Licensing) Act 1986; and (ii) driving an 80cc motorcycle with an excess breath/alcohol level while not holding a licence entitling him to drive such a vehicle, contrary to section 58(1)(a) of the Transport Act 1962. In his defence the appellant claimed he honestly believed his standard motor car licence entitled him to drive the motorcycle. In fact it did not and he was convicted on both charges, the District Court judge ruling that his mistake was one of law.

On appeal against conviction to the High Court, Williamson J followed Millar and held that the offence under section 37(1) required mens rea. However, he rejected the appellant's argument that by reason of his mistake he lacked the necessary mens rea.\(^5^2\)

In this case the lack of knowledge claimed by the appellant and found by the District Court Judge related to the terms of the appellant's licence. Counsel for the appellant submitted that it resulted from an honest mistake as to the size of the motorcycle. I have already referred to the passages in the District Court Judge’s decision containing his findings about this matter. It seems clear that they relate to an honest belief by the appellant that his licence covered this particular vehicle. It was not an honest belief that the vehicle was of a different type from what he thought it was. I agree with the District Court Judge that the claim by the appellant was in the nature of a claim of ignorance of the law, namely an ignorance or honest mistake as to the ambit of the legal authority to drive granted by his licence. It is not a mistake as to facts. Under the provisions of s23 [sic] Crimes Act 1961 which apply to summary offences,

\(^5^1\) (1989) 5 CRNZ 238.
\(^5^2\) Ibid at 242.
such ignorance of law is no defence.

In relation to the second offence against section 58(1)(a) Williamson J interpreted the provision as imposing strict liability. But he then went on to analyse the appellant’s mistake as to his entitlement to drive in terms of the defence of absence of fault. The result was that Williamson J really treated the appellant’s mistake in relation to the excess breath/alcohol charge as one of fact. Yet, because the mistake as to the entitlement to drive remained the same for both offences, and because each offence included the common element of unlicensed driving, the logical extension of his earlier conclusion would have been to hold that the mistake remained immaterial to the appellant’s liability for the second offence.\(^{53}\) Nonetheless, on his preferred approach, Williamson J also dismissed the appeal in relation to section 58(1)(a):\(^{54}\)

My view is that a person exercising reasonable care in the circumstances in which the appellant was would have checked the terms of his licence before driving a vehicle of a type which was new to him. It is not reasonable in my opinion for him to have assumed that a motor car licence will include all various types of low powered motorcycles. Certainly for him not to give any thought to the matter, or to make any inquiry concerning it, is not the conduct of a person exercising reasonable care.

Leaving aside Williamson J’s apparently inconsistent analysis of the same mistake, the decision on the first charge represents the orthodox approach to mistakes of law. While mens rea was identified as an element of liability, it applied only to the factual and not the legal components of the offence. Breen’s mistake related to the scope or ambit of his legal entitlement to drive under a general licensing enactment, and was therefore an instance of ignorance of the law and excluded as a “defence” by section 25 of the Crimes Act. However, had Breen mistakenly believed that the vehicle he drove was not an 80cc motorcycle but one of, say, 50cc (which his motor car licence permitted him to drive), then he would have had a defence of absence of knowledge of a factual element of the offence.

\(^{53}\) See Waaka v Police \([1987] 1\) NZLR 754 at 759 where Cooke P for the Court of Appeal held that “[t]he defence of total absence of fault cannot extend to pure mistakes of law.” Section 58(1)(a) might also have been regarded as a “hybrid” offence as in Police v Starkey \([1989] 2\) NZLR 373, with mens rea requiring for the element of unlicensed driving and absence of fault a defence to driving with an excess breath/alcohol concentration.

\(^{54}\) Supra n 51 at 244.
Ministry of Transport v George\textsuperscript{55} appears to have involved a similar mistake of law. The defendant was charged with: (i) driving a motor vehicle while not holding any class of driver’s licence, contrary to section 37 of the Transport (Vehicle and Driver Registration and Licensing) Act 1986; and (ii) driving a motor vehicle with an excess blood/alcohol level while not holding a driver’s licence entitling him to drive a vehicle of that class, contrary to section 58(1)(c) of the Transport Act 1962. At the time of the alleged offences on 3 February 1988 the defendant held a current Australian driver’s licence for the class of vehicle he was found to be driving. However, that licence entitled him to drive in New Zealand only until 30 June 1987. Thus on 3 February 1988 he was an unlicensed driver in New Zealand, although he was unaware of that. In his defence he claimed he had an honest and reasonable belief that his Australian licence entitled him to drive in New Zealand during the currency of that licence.

Both the prosecution and the defence agreed that an honest belief on the defendant’s part would give him a defence to the charge of being an unlicensed driver. Graham DCJ accepted this, applied Millar and dismissed the charge. While not specifically analysing the nature of the mistake, describing it simply as an “honest belief”, it is clear from the judgment that the mistake was regarded as of the kind considered in Millar. In other words it was treated as if it were a mistake as to a relevant fact. But surely the mistake was one of law. The defendant was not mistaken about a matter of fact such as the date which determined the period of currency of his Australian licence in New Zealand. Nor did the defendant claim that while being aware of the time limitation on his Australian licence, he misunderstood its application to his particular case. He simply held an incorrect belief about his legal authority to drive in New Zealand on his Australian licence. The ultimate cause of his mistake was that he held an incorrect view of his legal authority to drive in New Zealand. That matter, being governed by the terms of a New Zealand statute, meant that his mistake effectively stemmed from ignorance of the relevant law. George’s mistake may therefore be seen as materially indistinguishable from Breen’s mistake about his legal authority to drive a motorcycle under his standard driver’s licence. Each case involved a mistake as to the licensing regime under the 1986 Act.

Yet the disposition of the mistake in George can be defended on broader grounds.

\textsuperscript{55} [1990] DCR 49.
Whereas Breen was mistaken as to a matter of general legal entitlement and held no licence whatever to drive a motorcycle of the relevant class, George did hold a current Australian licence for the class of vehicle he drove. He was not claiming general ignorance of the law in the sense that he was unaware that he was required to hold a licence in order to drive in New Zealand, or that his Australian licence for restricted classes of vehicle entitled him to drive any class of vehicle in New Zealand. He was mistaken as to the detail of the New Zealand licensing requirements as they affected his current Australian licence. It is at least arguable, therefore, that George’s mistake was no more a threat to the objectivity of the law than an honest mistake as to a matter of fact, such as believing that a licence or endorsement of a licence had been issued when it had not.

George might also be regarded as a further example where it is unhelpful to insist on a distinction between mistakes of fact and mistakes of law. Since unlicensed driving is a mens rea offence, applying the exclusionary rule to mistakes of law in this kind of case may result in reducing the offence to one of absolute liability despite evidence of an honest and understandable mistake. Given that the concept of mens rea expresses a central concept of blameworthiness, any good faith mistake as to an element of the offence ought to be relevant in assessing culpability.

However the decision on the second charge in George is open to criticism. The second charge was brought under a provision of the Transport Act which specifies that the prohibited blood alcohol level for an unlicensed driver is 30 milligrams of alcohol per 100 millilitres of blood. In the case of a licensed driver the prohibited level is 80 milligrams of alcohol per 100 millilitres of blood. Analysis of the blood specimen taken from the defendant showed that he had a level of 66 milligrams of alcohol per 100 millilitres of blood. In view of that fact, the defendant claimed that his honest belief that his Australian licence entitled him to drive also afforded him a defence to the second charge. Since his blood/alcohol level was such that he would not have committed an offence had he been a licensed driver, his mistake as to his licensed status negated the mens rea of the offence.

However, Graham DCJ rejected the submission. Following New Zealand

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56 Mathias, supra n 32.
57 See Metuariki, supra n 23 at 492 per Richardson J.
authorities, he concluded that driving with an excess blood or breath/alcohol level was a public welfare offence of strict liability, giving the defendant a defence of absence of fault. On that view, George’s mistaken belief that he was licensed did not provide a defence because he had voluntarily consumed alcohol and took the risk as to the quantity of alcohol consumed, and to its strength, as well as the risk that the quantity consumed would fall within a category of offences defined by different prohibited levels. In that respect, “[t]he prohibited levels of alcohol, having regard to the licensed or unlicensed status of a driver, merely classify offences and mens rea does not form an element when considering the classification or category in which the offence falls.” The result of that conclusion was to vitiate the requirement of mens rea as it applied to the element of being unlicensed in the offence under section 58(1)(c). Yet consistency of approach would dictate that since mens rea is an ingredient of unlicensed driving simpliciter, it should also be an ingredient of a composite offence of which that element is a constituent part. In other words, the mistake in George as to the status of being unlicensed was as relevant to a part of the second charge as it was to the entire first charge. Assuming for the moment that George’s mistake was one of fact, it ought also to have afforded him a defence to the second charge by negating the mens rea presumptively required for the offence: he honestly but mistakenly believed in the existence of a fact (that he was a licensed driver) which, if true, would have rendered his act innocent (driving with a blood/alcohol level below that prohibited for a licensed driver).

The transparency of the dividing line between mistakes of fact and mistakes of law is also evident in another lower court decision, *Ministry of Transport v Morrell*. The defendant was acquitted on a charge of driving a motor vehicle otherwise than in accordance with the terms of a limited licence, contrary to section 35(1)(b) of the Transport Act 1962. The defendant, a taxi driver, had been convicted and disqualified from driving for twelve months from 18 June 1986. Several days prior to this his taxi, while being driven by another person, was extensively damaged in a road accident. The defendant then borrowed his brother’s car which was of identical make and model, and fitted it out as a taxi. The registered number of that vehicle was JU 111. The defendant subsequently applied for and was granted a limited licence on 25 July 1986. One of the conditions

58 George, supra n 55 at 52.
59 Ibid at 53.
60 (1987) 3 DCR 569.
attached to the licence was that the defendant drive only the vehicle shown on the notice of prosecution, that is, his own damaged car with the registered number JX 9022. On 30 July 1986 he was stopped by a traffic officer who assumed the defendant to be disqualified. The defendant showed the traffic officer the limited licence whereupon the officer pointed out that the registration number of the taxi which the order authorised the defendant to drive was JX 9022 and not JU 111, the registration number of the taxi which the defendant was then driving. The defendant then produced from the boot of the taxi the registration plate JX 9022 and explained the circumstances. He was subsequently charged with driving a motor vehicle otherwise than in accordance with the terms of the limited licence.

When the defendant applied for a limited licence he did not think to advise his solicitor that his own taxi had been damaged or that he intended to use his brother's vehicle as a temporary measure. The application for the licence was therefore made on the assumption that the defendant would be driving his own vehicle as usual, and the order granting the limited licence was expressed accordingly. But, as Keane DCJ observed in his judgment, had the defendant's intention been known a more widely drawn order might have been granted authorising him to drive his brother's car.61

In the result, Keane DCJ accepted the defendant's claim that he lacked the mens rea of the offence by reason of an honest belief that his limited licence entitled him to drive his brother's car.62 On the authority of Millar, the offence required mens rea so that the defendant could escape liability by pointing to evidence raising a reasonable doubt that he lacked the relevant knowledge. According to Keane DCJ there was a basis in the evidence for reasonable doubt. To begin with, the defendant had the opportunity to apply for a more widely drawn order but did not think to do so. Secondly, neither the affidavit sworn by the defendant in support of his application nor the standard instruction sheet given to the defendant by his solicitor after the order was made alerted him to the importance of driving only the vehicle referred to in the order. Finally, the vehicle he drove was an identical substitute for the one which he was permitted to drive. So, although he departed from the terms of his limited licence in one "important respect", he was otherwise adhering to the "logic of the order."63

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61 Ibid at 572.
62 Idem.
63 Idem.
The decision in *Morrell* is open to different interpretations. On the view which would try to fit the case within the conventional confines of the fact/law dichotomy, Morrell made a mistake of fact and not an inadmissible mistake of law. Since he had not been alerted to the relevant restrictive condition in his licence, his state of mind might be described as a mistake as to the fact of the existence of that condition. Nonetheless, that condition was a restrictive specification imposed on him as a matter of law. The licence was granted pursuant to section 38 of the Transport Act 1962, subsection (4) of which requires that the court making the order shall specify the particular vehicle or type of vehicle which may be driven. Where a particular vehicle is so specified, and defined by model and registration number, “the applicant may drive no other, no matter how similar.” So, for Morrell to claim that he was unaware of the restrictive term meant, in essence, that he was ignorant of the law applicable to the facts of his particular case.

On that view, what might be approached initially as a mistake of fact may well be revealed as a mistake of law. Considering the language of the judgment in *Morrell*, there is indeed some basis for thinking that the mistake was so understood by the court. Keane DCJ expressly acknowledged the limiting effect of the restrictive condition on the defendant’s legal permission to drive. He also described the defendant’s mistake as an assumption that he was acting within the law and not “outside the terms” of his licence. Furthermore, he appears to have regarded *Millar* as admitting the general relevance of “honest ignorance”, without express acknowledgment of the distinction between mistake of fact and mistake of law.

*Morrell* may therefore be explained, not so much on the ground that the mistake was one of fact, but rather on the basis that whatever kind of mistake it was it was nonetheless admissible in pleading absence of mens rea. Although the prosecution had proved the bare constitutive elements of the offence, and “blame-worthiness” was presumptively “inferred

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64 Ibid at 571.
65 Ibid at 572.
66 Keane DCJ ibid, referred to pre- *Millar* decisions on driving contrary to the terms of a limited licence, including *Henry v MOT* (unreported, 21 August 1986, Christchurch) where he regarded Cooke J as deciding the case on the basis that a defendant “can scarcely maintain that he is in a state of honest ignorance as to [the] terms” of a limited licence. However, directly after making that observation, Keane DCJ referred to *Graham’s Law of Transportation* TA 35.03, for the broad proposition that “*Millar* is likely to permit the possibility of honest ignorance to be given to whatever merit it has, displacing mens rea if sufficiently credible.” Apparently, that reference was intended to qualify *Henry* and implies that even an honest mistake of law may negate mens rea under *Millar*. 
from the bare facts constituting the offence"\(^\text{67}\), the defendant's honest mistake as to the limiting term of his licence was regarded as negating mens rea.

By contrast, in *Booth v Ministry of Transport*,\(^\text{68}\) Holland J expressly held that a mistake of law does not debar a defence based on absence of mens rea. The appellant had been convicted of driving while disqualified, contrary to section 35(1)(a) Transport Act 1962. He was present in the District Court when the Judge imposed the penalty of six months' disqualification beginning that day. However, upon leaving the courtroom he waited in the court waiting room in the expectation that someone would come and take his licence from him. His later explanation was that he believed the disqualification would commence from the time his licence was taken from him by a traffic officer, or court official, or when he received a letter asking him to surrender his licence. When no one had in fact come to take the licence from him the appellant left the waiting room after half an hour, believing that he could still drive a motor vehicle. He was apprehended while driving two days later and subsequently convicted, Willy DCJ finding (in accordance with *Millar*) that although disqualified driving was an offence requiring proof of mens rea, the defendant's mistake in the instant case was one as to the law, and therefore no excuse. The appeal against conviction was brought by way of case stated. Two questions were put on appeal.\(^\text{69}\) Firstly, was the District Court Judge wrong in determining that the defendant's mistake was one of law? Secondly, if the answer to the first question was affirmative, then was the District Court Judge wrong in determining that the prosecution had established mens rea in relation to the offence charged?

In the result Holland J answered the questions in the case stated as follows.\(^\text{70}\)

1. That although the defendant's mistake might have been one of law or a mixed question of law and fact, it was nevertheless not a mistake of law debarring the defendant from raising by way of defence absence of proof of mens rea.

2. An error was made in determining that the prosecution had established the relevant mens rea in relation to the offence charged on the facts found in the case stated.

\(^\text{67}\) Supra n 60 at 571.

\(^\text{68}\) [1988] 2 NZLR 217.

\(^\text{69}\) Ibid at 219.

\(^\text{70}\) Ibid at 221.
There can be no argument with Holland J’s alternative conclusion in (1) that the mistake was one of law. 71 The appellant was simply mistaken as to the operation of section 36(1) of the Transport Act. His mistaken belief was distinguishable from the mistake of fact made by the appellant in Millar as to the commencement and expiry dates of the disqualification order. In Millar it was open to the sentencing judge to impose a retrospective disqualification order, and the appellant mistakenly believed that such an order had been made. However in Booth, contrary to the appellant’s belief, the commencement date of the order was prescribed by statutory provision. 72 The question in Booth was therefore not the nature of the mistake but, given that it was a mistake of law, whether it “should not be allowed to excuse the appellant from criminal offending.” 73 In concluding that the mistake did not preclude the appellant from raising a “defence”, Holland J relied on a number of authorities. In particular, he sought support from Smith and Hogan for the general view that “in certain circumstances a mistake of law may negate mens rea.” 74 However, in a significant qualification not included in the extract quoted by Holland J, the authors conclude that cases where mistake of law may negate mens rea are probably confined to mistakes as to civil law concepts like the notion of property ownership. For that reason Booth has recently been criticised in a lower court decision as possibly decided per incuriam, 75 and certainly at odds with other High Court judgments where ignorance of the law has been excluded as a defence. 76

In addition, Holland J referred to a number of decisions, both in New Zealand and elsewhere, to support the general proposition extracted from Smith and Hogan. In each case, however, the avowedly relevant decision was simply recited rather than analysed for its bearing on mistake of law. 77 Of all the cases referred to by Holland J, the decision of

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71 See Orchard, Crimes Update supra n 26 at 29.
72 Section 36(1) of the Transport Act provides that “the period of disqualification shall commence on the date of the making of the order.”
73 Supra n 68 at 219.
74 Idem.
75 Ministry of Transport v Wilke [1992] DCR 104 at 112.
77 Holland J relied on Kumar v Immigration Department supra n 39, but as already discussed, that case was decided on the basis of mistake of fact. Holland J also cited Waaka v Police [1987] 1 NZLR 754 on s25 of the Crimes Act, and for the Court of Appeal’s conclusion that a defence of total absence of fault cannot extend to pure mistakes of law. However, he correctly distinguished R v Metuariki, supra n 23 as a mistake of fact. However, he failed to take account of the fact that the Court of Appeal in that case affirmed that ignorance of the law could not negative mens rea by reference to s25 of the Crimes Act.
the Supreme Court of Canada in *R v Prue*\(^7\) seemed most apposite to the mistake in *Booth*. In *Prue* the two accused had been convicted of driving while their driving licences were suspended. The commencement of a suspension was determined differently in Canadian provincial legislation. Whereas in some provinces the suspension came into effect only on the giving of notice or the performance of some administrative or judicial act, under the provincial legislation applicable in *Prue* it took effect automatically by operation of law on conviction for particular kinds of offences. The accused were therefore never notified of their suspensions and were unaware of the fact of suspension when stopped by the police and charged with driving while their licences were suspended contrary to the Canadian Criminal Code. Despite this, they were convicted at first instance. However, their convictions were set aside on appeal on the ground that their lack of knowledge of the automatic suspension of their licences constituted a defence of absence of mens rea. An appeal by the Crown to the British Columbia Court of Appeal was dismissed. On further appeal by the Crown to the Supreme Court of Canada, a majority of the court (4 to 3) held that ignorance of the suspension was a defence and dismissed the appeal.

For the majority Laskin CJC held that the offence of driving with a suspended licence required mens rea, that the existence of a suspension was a question of fact, and that ignorance of that fact accordingly negated mens rea. It made no difference whether the suspension operated automatically or became effective only upon notice or the occurrence of some administrative or other official act. However, Ritchie J in dissent held that the offence imposed strict liability and that the mistake made by the accused excluded the availability of the defence of absence of fault because it was "nothing more than a mistake as to the legal consequences of a conviction ... involving as they do the automatic suspension of the operator's licence."\(^7\) Since the mistake was "founded in ignorance of the law",\(^8\) it was excluded by section 19 of the Canadian Criminal Code which is the equivalent of section 25 of the Crimes Act. At the same time he accepted that a person could be mistaken in fact where the suspension required some administrative act. But while a defence would be available in such a case, any mistake where the suspension was automatic necessarily entailed a mistake of law because ignorance of the fact of suspension would be a direct consequence of the legal effect of conviction.\(^8\) Of the other

\(^7\) (1979) 46 CC (2d) 257.
\(^8\) Idem.
dissentients, Beetz J preferred not to express any final view on the classification of the offence but agreed with Ritchie J that the mistake involved ignorance of the law "which is no excuse and cannot be considered as a defence." 82

The minority approach in \textit{Prue} is echoed in the decision of the Supreme Court of Western Australia in \textit{Wroblewski v Starling}. 83 There the appellant had been charged with driving a motor vehicle without a licence. He had failed to pay a speeding fine, and subsequently received a summons to appear in court. The appellant did not attend, and in his absence he was convicted and fined, and his licence suspended for one month. He was notified of the fine but not of the suspension. He continued to drive, and was subsequently charged with driving without a licence. He was convicted and appealed to the Supreme Court of Western Australia. Rowland J agreed with the magistrate that the appellant’s mistake was one of fact. However, he did not agree that the onus was on the appellant to establish an honest belief on reasonable grounds. Thus, while the magistrate could "rightly criticise the appellant for not checking the outcome of the court hearing, it [was] clear that there [was] no obligation on the appellant to attend the hearing and ... the appellant was not expected to have his licence cancelled." 84

Rowland J refused to accept the argument put by the respondent that the appellant’s mistake was one of law. The respondent relied on an earlier decision of the Supreme Court of Western Australia, \textit{McCaskie v Bagby} 85 where, on similar facts, the mistake was treated as one of law. He distinguished that case, however, on the basis that "a conviction for a traffic offence by the holder of a probationary licence caused a suspension of licence \textit{automatically} by virtue of the provisions of the Act" (emphasis added). 86 The result was that the rule in section 22 of the Criminal Code excluding ignorance of the law as an excuse applied. 87 Rowland J concluded that the decision in \textit{McCaskie} meant "no more than an acceptance that there is no room to apply section 24 where the suspension of licence results

82 Idem.
84 Ibid at 235.
85 Unreported, Supreme Court (WA), App 164 of 1976, 18 April 1975, Wallace J. Discussed ibid at 235.
86 Idem.
87 See also Rowland J’s treatment of \textit{Fletcher v Fowler}, unreported, Full Supreme Court (WA), App 3 of 1985, 25 September 1985. Discussed ibid at 235-236.
from the operation of the Act in the facts or the state of things known to the person concerned.”

Because the suspension of the appellant’s licence was not automatic in Wroblewski, the appellant’s lack of knowledge of the magistrate’s order of suspension negated the mens rea of the offence. However, had the suspension automatically applied, as in McCaskie or indeed Prue, the appellant’s mistake would have been regarded as one of law ie a mistake as to the statute which ordered the suspension. Thus Rowland J drew the same distinction between suspension orders that require notification and those that are automatic as did Ritchie J in Prue.

The majority approach in Prue is arguably distinguishable from a case such as Booth where the appellant knew the essential fact of the existence of the disqualification order which was judicially declared in his presence. Moreover, the majority position in Prue was based on the constitutional premise that a federal statute cannot be governed by a provincial statute in a manner that creates a variable type of federal offence dependent on the terms of the relevant provincial legislation. Laskin J refused to accept that the federal offence of driving while disqualified or suspended was an offence of absolute liability where the provincial suspension of a driving licence was automatic but not if the provincial suspension became operative only upon notice. Thus the majority approach derived essentially from an insistence on mens rea as the “substantive non-geographical” constitutional determinant of liability for a federal offence under the Criminal Code.

The difference in the legislative source of offences helps to explain the contrast between the majority approach in Prue and the later decision in R v MacDougall where an unanimous Supreme Court of Canada held that an identical mistake did not provide a defence to a provincial offence of strict liability. The respondent had been convicted on 6 May 1979 for failing in his duty at the scene of an accident, contrary to section 233(2) of the Criminal Code. On 10 April 1979 he received an order of revocation of his driving licence. He appealed the conviction and on 1 May 1979 received a notice of

88 Supra n 83 at 236. Section 24 deals with mistake of fact.
89 Wilke, supra n 44 at 110.
90 Supra n 78.
reinstatement of his licence. His appeal was dismissed on 21 December 1979 and some time in January 1980 his solicitor told him that the appeal had been dismissed. On the morning of 25 January 1980 the respondent was stopped while driving. Later the same day he received by mail notice of the revocation of his licence. He was charged on 11 March 1980 with driving while his licence was cancelled.

MacDougall was acquitted at trial where his mistake as to his entitlement to drive was accepted as a defence. An appeal by the Crown to the county court was dismissed, as was a further appeal to the Appeal Division of the Supreme Court in Nova Scotia. In the latter court the majority held that the accused was entitled to rely on a defence of mixed mistake of fact and law or, if the mistake were one of law, on a defence of officially induced error. However, the Supreme Court of Canada allowed the Crown’s further appeal and ordered a new trial.

Delivering the judgment of the Supreme Court, Ritchie J held that the accused’s mistake was one of law in relation to his entitlement to drive. By section 250(3) of the Motor Vehicle Act a person who appeals against a conviction for an offence mentioned in subsection (1) shall be deemed not to be convicted “until the appeal is heard, determined and dismissed…” at which stage “the driver’s licence ... shall be ... revoked.” MacDougall was thus mistaken in believing he could continue to drive until he had received formal notification of the dismissal of his appeal. In Ritchie J’s opinion, “[i]t would be difficult to conceive of more clear or imperative language than that contained in s250(3) of the Motor Vehicle Act whereby the driver’s licence shall be automatically ‘revoked and shall remain revoked’ if an appeal is ‘dismissed.’ The failure to appreciate the legal duty imposed by that law is of no solace to the appellant.” Accordingly it was a mistake of law and excluded as a defence by the ignorance of law rule in the Canadian Criminal Code. Almost as an after-thought, Ritchie J distinguished Prue on the short ground that a distinction was to be drawn between enforcement of a driving offence under federal law, as in Prue, and enforcement of an equivalent offence under a provincial enactment, as in the instant case.

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92 60 CCC (2d) 137 at 158 per MacDonald J A.
93 The respondent’s initial conviction under s232(2) of the Canadian Criminal Code, for failing in duty at the scene of an accident was mentioned in s250(1).
94 Supra n 91 at 223-224.
95 Ibid at 224.
It is difficult to see how the legislative source of an offence - federal in *Prue*, provincial in *MacDougall* - could determine different characterisations of what were really identical mistakes. The different approaches in the two cases simply reflect the use of the labels “mistake of fact” and “mistake of law” as conclusory classifications for rationalising decisions based upon constitutional grounds.

The facts of *MacDougall* appear close to those in *Booth*. Both *MacDougall* and *Booth* mistakenly believed that they were entitled to drive until notified to the contrary. But in each case that belief was incorrect since a statutory provision specifically stipulated when the disqualification or revocation took effect. Each mistake therefore necessarily involved a mistake of law and was judicially accepted as such. But whereas in *MacDougall* the mistake was excluded as an excuse, in *Booth* it was admitted as a defence. Thus the distinction between the cases lies not in different judicial approaches to the nature of the mistake but in different conclusions as to the exculpatory effect of the mistake. It is perhaps significant that in *Booth* Holland J did not refer to *MacDougall*, although it had been cited in *Millar* alongside *Prue*. If it is accepted that the mistake of law was properly excluded in *MacDougall*, Holland J’s failure to account for *MacDougall* might add weight to the suggestion that Holland J’s disposition of the equivalent mistake in *Booth* was doubtful. Tested against *MacDougall*, *Booth* can therefore best be explained as a lapse from orthodoxy.

That conclusion is defensible on the conventional view of mistake of law. The starting point is the general exclusionary rule denying the relevance of ignorance of law. The next step is the characterisation of the mistake as one of fact or law. If it is the latter, it is necessary to determine whether it can be fitted into one of the narrow exceptions to the general exclusionary rule. If no relevant exception applies, the mistake is immaterial in determining criminal responsibility. As Fletcher describes this approach in the American context, “[i]nstead of starting from the concept of culpability and reasoning towards the criteria for excusing a wrongful act, [we] begin by identifying the types of [mistakes]... that can generate an acceptable defence.”

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96 Stuart, supra n 13 at 303.
97 See Colvin, supra n 5 at 128.
98 Supra n 3 at 755.
accommodated within the accepted "types", the result of this process is to discount the mistake at having no bearing on culpability. Since the crucial step in the process is the characterisation of the mistake, the determination of this issue tends to skew the outcomes in particular cases. The descriptions "mistake of fact" and "mistake of law" become conclusory labels triggering one result or another. Thus in Prue, what looked suspiciously like a mistake of law was treated, for one purpose, as a mistake of fact while, for another purpose, in MacDougall essentially the same mistake was treated as a mistake of law. However, despite the dissonant characterisations of the mistakes, in each case the result generated by the characteristics was symmetrical with the fact/law distinction: in Prue the mistake of fact was admissible, in MacDougall the mistake of law was inadmissible. By contrast, in Booth there is an asymmetry between the characterisation of the mistake and the result generated: since the mistake was correctly classified as one of law it ought to have been excluded rather than admitted. Equally, if Morrell and George are seen as treating the mistakes, sub silentio, as mistakes of law then the exclusionary rule should have been applied.

The exclusionary rule was applied in another recent driving case, Ministry of Transport v Wilke100 where a lower court expressly declined to follow Booth. The defendant had pleaded guilty to a charge of driving with an excess breath/alcohol level. He was dealt with as a first offender and disqualified from driving for a period of seven months from 23 November 1989. However he had previous convictions including one which, if disclosed to the court on his first appearance, would have required the sentencing judge to impose an indefinite disqualification under section 30A of the Transport Act 1962. When this was discovered the defendant was brought back to court on 29 January 1990 and disqualified for an indefinite period. He was also ordered to attend an assessment centre. On 23 June 1990 he was found driving. Had it remained legally operative, the original seven months' disqualification would have expired two days previously. However the indefinite disqualification under section 30A was in force and remained so for a minimum period of two years until removed by the Secretary for Transport.

The defendant claimed he believed that the section 30A disqualification required (as it did) that he attend an assessment centre (which he did), and that once he had done that his

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99 See Fletcher, ibid at 730.
100 [1992] DCR 104.
disqualification would expire seven months from 23 November 1989. He said that he came to this belief following consultations with his solicitor before his second appearance and as a result of a subsequent letter from the solicitor which stated that the period of his disqualification could not be increased by the court. In addition, after his second appearance the defendant had received a letter from the Ministry of Transport which, while urging him to seek legal advice because of the complexity of his case, did not refer to the minimum period of an indefinite disqualification. On the basis of that evidence the defendant relied on *Millar* and argued that he lacked the mens rea of the offence.

Green DCJ rejected the defendant’s argument and found the charge proved. No matter how genuine, the defendant’s mistake did not afford a defence of absence of mens rea because his mistake was essentially ignorance of the law and thus excluded by section 25 of the Crimes Act. Under section 30A an order of indefinite disqualification was mandatory in the defendant’s case; and section 30C(3) provided that an indefinite disqualification must remain in force for at least two years. Accordingly, the defendant could not “excuse” his driving while disqualified simply because he was unaware of the provisions of section 30C(3) as it affected the section 30A disqualification: “Such a mistake is a mistake of law.”

However, Green DCJ observed that section 30A is “seriously deficient” in a number of practical ways. In particular, the pronouncement of a section 30A disqualification in court did nothing to inform the person disqualified about the minimum period of disqualification. The provision was not drawn in terms requiring a two year disqualification and thereafter until the Secretary for Transport removed the disqualification. If it did so, the person disqualified would at least have some information about the nature of the order. Moreover, the relationship between the indefinite disqualification provision and those requiring the imposition of finite periods of disqualification could create a “potential trap” for defendants, especially where a finite disqualification order was made cumulative on an indefinite disqualification with no fixed expiration date. However, despite this “legislative jungle of intolerable and unnecessary complexity”, the defendant’s understandable error had no bearing on his liability.

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101 Ibid at 109.
102 Ibid at 113.
103 Green DCJ ibid, was at pains to point out that the Judge should not be required to give an explanation, since the Judge’s function was not to give legal advice as to future acts of a defendant.
In Wilke Green DCJ chose not to follow Booth. Yet the mistakes in the two cases were essentially the same in that both Wilke and Booth made mistakes of law. Wilke made a mistake about a minimum period of disqualification, and Booth made a mistake as to the commencement date of the disqualification. Moreover, on Green DCJ’s view of Millar in light of subsequent amendments to the Transport Act 1962, Millar’s mistake would now also be one of law. As the Transport Act stood before Millar, a court had a discretion in imposing a disqualification on an offender already subject to a disqualification order. Since the commencement period of the future disqualification was not prescribed by law, “a misunderstanding as to what a Judge said at sentencing could amount to a mistaken belief in a set of facts which would render the driving innocent.” But subsequent amendments to the Act in 1983 and 1988 now provide that in such a case the disqualification order commences at the expiration of any existing order or orders. The result, as explained by Green DCJ in Wilke, is that, “a present day Mr Millar can no longer say he misunderstood the Judge’s remarks on sentence for this would involve an ignorance of the very clear wording of [the amended provision] and would amount to a mistake of law rather than a mistake of fact.” In other words, a Millar - type mistake would now involve the same kind of mistake as was made in Booth and Wilke itself.

The practical implication of Green DCJ’s observations in Wilke on the amendments to the Transport Act is that mistake of fact is further confined as a ground for denying absence of mens rea. Thus as a result of legislative intervention, what was regarded in its pre-amendment context in Millar as an admissible mistake of fact has now become, in its post-amendment context, an inadmissible mistake of law. But from the mistaken actor’s point of view, the mistake would remain the same.

The question which then arises is whether a defendant like Millar or Wilke could ever have a defence of lack of mens rea based on absence of fault. Could a defendant, already subject to a disqualification order, claim genuine ignorance of a further disqualification

104 Ibid at 114, Green DCJ citing Tipping J in Basick v MOT, unreported, High Court, Christchurch AP 159/90, 10 October 1990.
105 Ibid at 107.
106 Idem.
107 Idem.
imposed by judicial order? On one view, that could be regarded as a mistake of fact.\textsuperscript{108} However, because the Transport Act directs that the further disqualification is mandatory in such a case, a claim of ignorance could equally be said to involve ignorance of the relevant provision. Furthermore, if in this or other cases the legislation were to provide that disqualification took effect automatically, the mistake would even more clearly involve ignorance of the law.\textsuperscript{109} 

The general point to be taken is that which best explains the decision in \textit{Prue}\textsuperscript{110} and which can also be made in defence of \textit{Booth}. It is that ritualistic deference to the rule excluding mistakes of law may effectively divest the requirement of mens rea of any practical significance. As particular kinds of mistakes are excluded because they involve ignorance of complex and changing legislation, the requirement of mens rea is progressively depreciated to the point where an offence is at risk of being converted into one of absolute liability.\textsuperscript{111} In the result, the effect of applying an exclusionary rule based broadly on grounds of expediency and policy is to eclipse a central notion of culpability. In the case of disqualified driving, for example, the mens rea status of the offence has little practical import if a claim in negation of mens rea, based on a mistake as to the central element of disqualification, is dismissed as immaterial to liability. If this is to be avoided, the \textit{effect} of applying the exclusionary rule on the nature of liability for a particular offence ought to weigh as heavily as to the nature of the mistake itself.

\textbf{(iii) Preliminary conclusions}

The cases examined in this section demonstrate that the orthodox division between fact and law can lead to extremely fine distinctions with no necessary correlation to variations in culpability. For example, in both \textit{Strawbridge}\textsuperscript{112} and \textit{Metuariki}\textsuperscript{113} the appellants’ mistakes were held by the Court of Appeal to be mistaken beliefs as to fact. Yet, on analysis, there seems no discernible distinction between those mistakes, and the appellant’s mistake in \textit{Taggart}\textsuperscript{114} which was found to be one of law. 

\textsuperscript{108} See, eg, \textit{Wroblewski v Starling} supra n 83.

\textsuperscript{109} See \textit{MacDougall} supra n 91;\textit{Wroblewski}, supra n 83; contra \textit{Prue}, supra n 78.

\textsuperscript{110} Colvin, supra n 5 at 134.

\textsuperscript{111} Colvin, ibid at 135.

\textsuperscript{112} Supra n 21.

\textsuperscript{113} Supra n 14.

\textsuperscript{114} Supra n 28.
Moreover, there is apparent judicial inconsistency at all levels of judicial decision-making. This is especially so in the District Court where mistakes are ordinarily first tested. Here, consciously or unconsciously, the distinction seems to be frequently overlooked. In Morrell\(^{115}\) and George,\(^{116}\) for example, neither District Court Judge considered whether the respective defendants had made mistakes of fact or law. And even at the appellate level, Booth\(^{117}\) illustrates judicial inclination towards a more liberal view. Although recognising the mistake to be one of law, Holland J nevertheless concluded that it was not of such a nature as to debar a defence.\(^{118}\)

The disposition of a mistake may be determined as much by a court's interpretation of the elements of liability as by the nature of the mistake. Thus, in Green\(^{119}\) McMullin J found that the appellant's very landing in New Zealand constituted the mens rea of the offence, whereas in Kumar\(^{120}\) the Court of Appeal took a wider view of mens rea so that it included not only the act of entering the country, but also the element of permission to enter.\(^{121}\)

The impact of applying the exclusionary rule to the mens rea status of particular offences is also significant. The offence of driving while disqualified highlights the potential effect that denying a defence can have on central elements of liability. In decisions such as MacDougall\(^{122}\) and Wilke,\(^{123}\) the classification of the mistakes as mistakes of law, although strictly correct, resulted in the imposition of a form of absolute liability on what were otherwise mens rea offences.\(^{124}\)

\(^{115}\) Supra n 60.
\(^{116}\) Supra n 35.
\(^{117}\) Supra n 68.
\(^{118}\) But see Barrow v Van den Beld unreported, 14 November 1984 (HC, 83/84), where Holland J was in no doubt that the respondent's belief that it was not illegal to import certain films into New Zealand was an inexcusable mistake of law.
\(^{119}\) Supra n 36.
\(^{120}\) Supra n 39.
\(^{121}\) See also Grant v Borg [1982] 2 All ER 257 (HL). Contra Secretary of State for Trade and Industry v Hart [1982] 1 All ER 817 (QBD).
\(^{122}\) Supra n 91.
\(^{123}\) Supra n 100.
\(^{124}\) Cf Prue, supra n 78; and Booth, supra n 68 (where the categorisation may be challenged, but the results are ultimately fairer).
3 MIXED MISTAKES OF FACT AND LAW

The polarity of the fact/law distinction is further complicated by the existence of so-called “mixed” mistakes as to compound events consisting of law and fact. At first impression, judicial recognition of this intermediate category would seem to be a concession that, at least in some cases of compendious mistakes, it is impossible to draw a bright line between matters of fact and matters of law. Equally, since such a mixed mistake is generally to be treated as one of fact and not law it holds some initial appeal, both in resolving the question of categorisation in difficult cases and in mitigating the strictness of the exclusionary rule in respect of mistakes of law.

On examination, however, the concept of a mixed or compound mistake has not been widely accepted as a useful analytical device. Its authority rests on the judgment of Dixon J in *Thomas v R*. The appellant had married a woman whose previous marriage to another man had been dissolved. The appellant later went through a ceremony of marriage with another woman, and was charged with bigamy. He claimed that at the time of the second ceremony he thought he was unmarried because his first “wife” had never been divorced from her first husband. This was based on the mistaken belief that the decree absolute had never been completed because it had not been entered in the court records. By a majority, the High Court of Australia quashed the conviction. Dixon J found:

He [the appellant] rightly supposed that in point of law her divorce was not effective unless it were made absolute, completed, or, as he called it, ‘entered in the court.’ ... Whether it had been done or not was a matter of fact, not law. *But 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.* This is brought out by an apposite passage in the judgment of Jessel M R in *Eaglesfield v Marquis of Londonderry* (emphasis added).

The authority of Dixon J’s proposition in *Thomas* is significantly reduced when

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125 *Thomas v R* (1937), 59 CLR 279 at 306 per Dixon J.
126 See, eg, Colvin, supra n 5 at 31 who notes that the idea has not been universally adopted.
127 Idem.
128 Ibid at 306.
consideration is given to the overall context of that case. First, *Thomas* was a split decision, and neither of the other two judges in the majority (Latham CJ and Rich J) referred to *Eaglesfield v Marquis of Londonderry* on which Dixon J purported to rely for his proposition as to mixed mistakes. Moreover, the two dissentient judges (Stark and Evart JJ) both found the appellant’s mistake to be one of law.

Secondly, from the passage quoted above, it is apparent that Dixon J himself initially regarded the appellant’s mistake as one of fact alone, and only then went on to refer to *Eaglesfield* and the mixed mistake proposition. Thus, in *R v Gould* the English Court of Appeal approved of *Thomas*, although characterised the mistake as one of fact alone. Additionally, Dixon J’s purported reliance on *Eaglesfield* may have been misplaced since Jessel MR was talking about a “misrepresentation” in the civil law context which is not necessarily the same as a mistake in the criminal context. Moreover, the decision of Jessel MR in *Eaglesfield* that the misrepresentation with which he was concerned was a misrepresentation of fact and not of law was subsequently reversed by the Court of Appeal.

A review of subsequent Australian cases which have considered *Thomas* indicates that there is just as much disagreement about mixed mistakes as there is about the fact/law distinction. *Janella v French* is an example in point. The appellant had been convicted of wilfully demanding rent in excess of that recoverable under the Housing Improvement Act 1940-1965 (SA). He was the owner of a substandard house the maximum rental of which had been fixed under the Act. He mistakenly believed that all rent controls in South Australia including those relating to substandard housing had come to an end on the expiry of another Act. This belief was based on a newspaper article which recorded that rent controls had ended. However, while this was correct in part, the termination of rent controls did not extend to the rents of substandard houses. The rent demanded by the

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129 (1876) 4 Ch D 693.
130 Supra n 127 at 296 per Stark J, 316 per Evart J.
132 *Power v Huffa* (1976) 14 SASR 337 at 345 per Bray CJ. “I do not see that what is or might be true of a misrepresentation would necessarily be true of a mistake. When we are dealing with an alleged misstatement we are concerned with the interpretation of what was said and its objective truth or falsehood, when we are dealing with an alleged mistaken belief we are concerned with the state of a person’s mind.” See also, Orchard, *Crimes Update*, supra n 4 at 28.
133 *Power v Huffa*, Idem per Bray CJ. Taken cumulatively, these factors suggest that Dixon J’s proposition is rather less persuasive when relocated to its immediate context.
134 (1968) 119 CLR 84.
appellant was therefore irrecoverable. While the appeal was decided on another ground, the High Court of Australia considered the appellant’s mistake. Windeyer J referred to mixed mistakes but decided that the case involved a mistake of fact. Barwick CJ also thought it was a mistake of fact. On the other hand, the majority decided the appellant’s mistake was one of law.

Again in Power v Huffa the Supreme Court of South Australia disagreed as to the nature of the mistake. In that case the appellant, an Aboriginal Rights Movement leader, had been convicted of loitering. She had been taking part in a demonstration and ignored police requests to leave the area. On appeal, she claimed that she believed she was acting under the lawful authority of the Federal Minister for Aboriginal Affairs who, during the demonstration, told her to stay where she was. Zelling J considered that the mistake was mixed, whereas Bray CJ split up the mistake into its component parts and found that the vital element in the total belief was a mistake of law. Jacobs J correctly read Thomas as involving only a mistake of fact and thus not an authority for mixed mistakes.

Analytically, the notion of a mixed mistake is not particularly helpful because many mistakes can be described as relating to compound events. This is especially so where the mistake involves some status such as being married, licensed, or perhaps even being disqualified from driving. Since the status itself involves both fact and law, describing the mistake compendiously as a mixed mistake and then characterising it as one of fact is open to the conventional objection that it disembowels the category of mistake of law.

135 Ibid at 115.
136 Ibid at 97: “Whether or not a particular house is rent controlled or not may well be a matter of fact, though to determine it the law may need to be applied.”
137 Ibid at 99 per McTiernan J; at 101 per Taylor J; at 116 per Owen J. See also Fisse, Howard’s Criminal Law 508 who argues that the mistake was one of fact.
138 (1976) 14 SASR 337.
139 Ibid at 355.
140 Ibid at 345.
141 Ibid at 356. See also R v Phillips [1973] 1 NSWLR 275 at 288 per Jacobs J.
142 See Orchard, supra n 4 at 28.
143 Orchard, ibid at 30, “An unqualified assertion that a person is disqualified is no doubt a representation of both fact and law - that an order has been made, and that it operates in law to disqualify. Likewise any mistaken belief that one is not disqualified will involve an erroneous conclusion of both law and fact in that one misunderstands what is one’s legal status. But the cause of such a mistake may be an error of fact, or it may be an error of law, or (unusually) both.”
Relatedly, if a mistake is to be treated as one of fact (or, for that matter, a mixed mistake with the same effect) rather than law merely because the law must be applied to the facts the logical implication is that there are no mistakes of law: whether the requisite elements of an offence are present always depends on the application of the law to the facts.  

From that perspective, the label “mixed mistake” seems more like a rhetorical description invoked to justify a particular outcome.  Booth serves to illustrate this point. Since the relevant mistake was clearly one of law, the alternative classification that it was a “mixed question of fact and law” cannot stand. Given Holland J’s peremptory reference to Thomas and Eaglesfield as supporting his alternative view, the conclusion to be drawn is that this depiction of the mistake served his sense of what the outcome should be. That is to say, the alternative view, unconvincing though it may have been, admitted the relevance of the mistake in negativing mens rea.

By contrast, other courts have preferred to lift the veil from mixed mistakes, emphasising the importance of disentangling the constituent parts of the total belief so that the real cause of the mistake can be identified. Thus in Wilke, Green DCJ acknowledged that while many beliefs formed by individuals are conclusions drawn from compound events which involve both an appreciation of the facts and the law as it relates to those facts, ultimately, where the mistake involves both factual and legal elements, the court is necessarily involved in an “unravelling process”. When subjected to that form of analysis, most mistakes claimed to be mixed will emerge as either mistakes of law or mistakes of fact. As Orchard points out in the context of mistakes about driving disqualifications, only unusually will the cause of the mistake be both error of fact and error of law. Similarly, Simons describes the “mixed mistake” classification as misleading since mistakes can be readily “unmixed”.

A number of conclusions may be drawn about mixed mistakes. First, the label

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144 Fisse, supra n 137 at 508.
145 Supra n 68.
146 Supra n 100, citing Power v Huffa, supra n 138 at 345 per Bray CJ. See also R v Villeneuve [1968] 1 CCC 267 at 270-271, O’Hearn J, cited in dissent by Ritchie J in R v Prue, supra n 78 at 265, for the distinction between independent and interdependent mistakes involving fact and law.
147 Crimes Update, supra n 4 at 30.
"mixed" mistake is as susceptible to subjective judgment as the labels "mistake of fact" and "mistake of law". It very much depends on how the mistake is framed and approached.\textsuperscript{149} Secondly, labelling a mistake as mixed rarely seems to have any determinative significance. Rather than determining the issue, so that the mistake is regarded as one of fact, a mixed mistake really begs the question: what was the underlying cause of or reason for the mistake? In that way the ultimate characterisation of the mistake depends on whether the mistake is to be assigned to fact or law.\textsuperscript{150} By working within the two basic categories of mistake of fact and mistake of law, there is a tendency to force mistakes in the "middle range" into one category or another.\textsuperscript{151} As a result, the catchment of mixed mistakes is extremely limited. Of the cases in which mixed mistake has been recognised, none has actually been decided on the basis of mixed mistake. For example, in \textit{Thomas Dixon} J described the appellant’s mistake as mixed, but the other two judges in the majority were silent on this point. Similarly, in \textit{Power v Huffa} only one judge, Zelling J, considered the mistake to be inextricably mixed.\textsuperscript{152} Of all the authorities it is perhaps Holland J’s alternative classification in \textit{Booth} that the appellant’s mistake was one of mixed fact and law that evidences the strongest support for the concept.

It would seem, therefore, that the notion of mixed mistake has not generally been accepted as a mediating category between mistake of fact and mistake of law. The label "mixed" mistake seems to be more of a guise for masking judicial disposition to admit a mistake that would otherwise be inadmissible.

Finally, the significance of mixed mistakes as a separate category may be further reduced in view of the different descriptive uses of the label "mixed mistake." On the one hand, the description may be used - as in \textit{Booth} - to refer generally to compound errors involving matters of both (criminal) law and fact. Yet, on the other hand, the label "mixed mistake" is sometimes used in a more specific sense to describe particular kinds of mistake as to fact and (civil) law. Thus, as Williams explains, "a mistake as to mixed law and fact is frequently called a mistake as to private right."\textsuperscript{153} When used in this more specific

\textsuperscript{149} Bray CJ in \textit{Power v Huffa}, supra n 138 at 344 suggested that "to some extent perhaps the distinction between mistake of fact and mistake of law depends on how the mistaken belief in question is formulated."

\textsuperscript{150} Eg, \textit{Power v Huffa} \textit{idem}, Wilke, supra n 100.

\textsuperscript{151} Fletcher, supra n 3 at 686.

\textsuperscript{152} See also, Windeyer J’s treatment of mixed mistakes in \textit{lanella v French}, supra n 134 at 115.

\textsuperscript{153} Williams, \textit{The General Part}, supra n 9 at 383.
sense, a mixed mistake refers to a mistake as to a matter of civil law that has implications for a factual matter - for example, in a case of theft or a property offence a mistaken belief as to entitlement to the property at civil law. Such mistakes as to civil law are generally held to fall outside the general exclusionary rule that mistake as to the (criminal) law is no excuse, and constitute a discrete category of exculpatory mistakes. To that extent, therefore, some instances described as mixed mistakes are really subsumed by an independent category restricted to mistakes of civil law.

4 MISTAKES OF LAW THAT NEGATIVE MENS REA

(a) General

Where mens rea is an element of liability, the words that import mens rea do not generally require knowledge that the prohibited conduct was contrary to the criminal law. Guilt will usually be established on proof that the defendant possessed the required mens rea in relation to the actus reus and was aware of any circumstances specified by the definition of the offence.

Exceptionally, however, the courts have interpreted statutory provisions so as to require a particular state of mind not only in relation to the relevant facts but also in relation to the illegality of the prohibited conduct. In this kind of case a claim of ignorance or mistake of law amounts to a denial of mens rea. Rather than operating as a true exception to the general rule excluding ignorance of law, the basis of exculpation really lies in the failure to prove an element of liability. Such offences may therefore overlap those where liability is negated by absence of mens rea resulting from a mistake as to some concept of civil law. Some of these offences are also related to prohibitions incorporating the notion of colour or claim of right. For example, several offences against property in Part X of the Crimes Act 1961 require proof that the defendant acted “fraudulently and without colour of right.” In that context “fraudulently” would seem to express a

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154 See infra at VI (4)(d) for a discussion of this aspect of mistake.
155 See Williams, Text Book of Criminal Law (2nd ed 1983) 458 for the general proposition.
156 Infra at VI (4)(d)(i).
157 Infra at VI (4)(d)(ii).
separate requirement though its meaning overlaps "colour of right." It requires proof that the defendant acted deliberately and with knowledge that the conduct was in breach of a legal obligation.159

Aside from these and cognate offences of acting "dishonestly"160 or "falsely",161 words such as "knowingly" and "wilfully" have also been expansively interpreted to include knowledge of some legal concept or circumstance.162 Similarly, on occasion statutory provisions excluding liability for acts done with "lawful excuse", "lawful authority", "reasonable and lawful excuse", or "reasonable cause" have been held to cover cases where the prohibited act was committed without knowledge of its illegality.

(b) Offences Requiring Knowledge of Illegality

(i) Case Law

The immigration cases, Green163 and Kumar,164 highlight the potential effect that different interpretative approaches have on the admissibility of mistakes in the fact/law context. In Green McMullin J found that the act of "landing" while being a prohibited immigrant constituted the mens rea of the offence, and did not include knowledge of the appellant's prohibited status. By contrast, in Kumar the Court of Appeal declined to limit the mens rea to the bare act of entering New Zealand, but also required proof of mens rea going to the element of permission to enter. Thus, the Court of Appeal concluded that the

158 See, eg, ss217-226, 239. See also s228.
159 See R v Williams [1985] 1 NZLR (CA) 294 at 308, per Greig J, who held that "if, that being established, the accused sets up a claim of honest belief that he was justified in departing from his strict legal obligations, even for some purpose of his own, then his defence must be left to the jury if there is some evidence from which the jury might conclude that his conduct though legally wrong, might nevertheless be regarded as honest. The failure of the prosecution, in the face of that evidence, to prove that he did not have such & belief, must result in an acquittal." See also R v Coombridge [1976] 2 NZLR 381. Note, however, that each case turned on a provision in which "fraudulently" appeared on its own.
161 See Williams, supra n 155 at 460-461.
162 Other expressions of specific mental elements include "maliciously" and "corruptly." See Perkins, "Ignorance or Mistake of Law Revisited" (1980) Utah L Rev 473; Williams, Criminal Law The General Part (2nd ed 1963).
163 Supra n -36.
164 Supra n 39.
appellant’s mistake was one of fact which negated the mental element of the offence. Yet in
*Green*, since the mistake was viewed as extraneous to the elements of liability, McMullin J
had no difficulty in concluding that the mistake was irrelevant to liability.

Such differences in interpretative approach are not confined to the fact/law distinction,
but are also apparent in relation to statutory provisions that specify particular mental states
such as “knowingly” or “wilfully”. These inconsistencies in judicial approach make it very
difficult to assess whether or not a particular mens rea expression will require proof of
knowledge of illegality. The following discussion outlines the divergent outcomes in a
number of judicial decisions.

In *Secretary of State for Trade and Industry v Hart*165 the defendant was acquitted
on a charge of acting as an auditor of a company “at a time when he [knew] he [was]
disqualified for appointment to that office.”166 A further provision stated that an officer of
a company was not qualified for appointment as auditor of that company. The defendant,
being a director of the company was therefore disqualified from acting as auditor. On
appeal by the Secretary of State, a Divisional Court held that to be liable, the respondent
must know of the statutory restrictions of holding office. On the facts of the case Ormrod J
held:167

> [I]nterpreting the language quite simply, it seems to me to indicate
that Mr Hart is not guilty of a criminal offence unless he knew that
his disqualified... If that means 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.

One commentator has suggested that “it is refreshing to find the court on this occasion
asserting roundly that... the word ‘knows’ in the statute had to be read as meaning
‘knows’.”168 Since the offence specifically required knowledge in relation to
disqualification and since disqualification is an exclusively legal matter, excluding
ignorance of the relevant law would have divested the requirement of knowledge of any
practical meaning.169 Given that the legislature had expressly linked knowledge to the

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165 [1982] 1 All ER 817.
166 Section 13(5) Companies Act (UK) 1976.
167 Supra n 165 at 822.
relevant legal matter, the court was simply implementing the legislative purpose. The only reasonable interpretation was that there was no liability in the absence of such knowledge. On this analysis, it is difficult to accept the view that the decision is “heterodox”.170

Grant v Borg171 illustrates a more conservative approach. The appellant, a non-resident with limited leave to remain in the United Kingdom as a visitor, was charged with knowingly remaining in the United Kingdom beyond the time limited by the leave.172 He argued that the knowledge required to establish guilt for the offence was not merely knowledge of the relevant facts which proved the commission of the offence, but also knowledge in law that the offence had been committed.173 The appellant claimed that he had remained in the United Kingdom due to a mistake regarding the relevant provision of the Act. The House of Lords held that the word “knowingly” did not import a requirement that the appellant must know the law. According to Lord Bridge, “the principle that ignorance of the law is no defence in crime is so fundamental that to construe the word ‘knowingly’ in a criminal statute as requiring not merely knowledge of the facts material to the offender’s guilt, but also knowledge of the relevant law, would be revolutionary and... wholly unacceptable”.174 Lord Bridge referred to Hart which had been decided shortly before Grant v Borg, but because at the date the only report available was that in The Times newspaper, and since no argument was heard on the statute at issue in Hart, he determined that it was “wholly inappropriate either to look to that case as establishing any proposition of law relevant to the present appeal or to make any comment on it.”175

While the approach in Grant may be described as “opposite” to that in Hart, ultimately each case turned on its particular statutory context.176 The offence in Grant was structurally different to that in Hart. In Grant knowledge generally prefaced the actus reus and was not so plainly connected to the time of leave. Had the offence in Grant read

169 Idem.
170 Gillies, Criminal Law (2nd ed 1990) 279.
171 [1982] 2 All ER 257 (HL).
172 Section 24(1)(b)(i) Immigration Act (UK) 1971.
173 Supra n 171 at 262 per Lord Bridge.
174 Ibid at 263.
175 Idem.
176 Gillies, supra n 170 at 279.
“remaining in the United Kingdom beyond the time known to be limited by leave” the result may have been different. Thus there were two possible interpretations open: (1) knowledge related solely to the physical act of remaining in the United Kingdom without the need for awareness of the relevant legal provisions determining leave; or (2) knowledge coloured the whole actus reus so that awareness of the time/leave provisions was required. As a matter of interpretation, the court adopted the first option. Ashworth is critical of the inconsistencies in interpretation. He argues that to allow ignorance or mistake of the law to function as a simple negation of mens rea, particularly in offences which include the word “knowingly”, is incompatible with a “general policy of restricting the effect of ignorance or mistake of criminal law to cases in which it is based on reasonable grounds.” Moreover, the inconsistencies appearing in judicial decisions also surface at the legislative level. Thus, “[t]he legislature has not pursued a consistent policy in deciding whether or not ‘knowingly’ should form part of the definitions of offences, and it certainly cannot be assumed that Parliament has considered the conflict between a literal interpretation and the application of the policy against allowing unreasonable ignorance or mistakes of criminal law as a defence.” Ashworth’s solution is for the courts to interpret all statutes in the light of general principles of criminal law.

In the search for a solution to the problem of when mistake should negate mens rea, the temptation, as demonstrated in Hart and Grant, is to rely heavily on statutory form. Yet the value of this exercise is obviously questionable. People v Weiss further illustrates the point. The appellant had been convicted of kidnapping a suspect in the Lindbergh case. The trial judge had rejected his claim that he believed he had the legal authority to arrest the suspect, when in fact he did not. The appeal was allowed by the New York Court of Appeals on the basis that the appellant’s mistaken belief in his authority

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177 But see Smith & Hogan, Criminal Law (7th ed 1992) 85 where, by implication, the authors appear to accept the second option. They say that “leave” looks like a civil law concept but that assumes that “knowingly” applied to leave as well as to remaining.
179 Idem.
180 Idem.
181 Idem. E.g as in cases of insanity and intoxication.
182 Fletcher, Rethinking Criminal Law (1978) 692.
183 (1938) 276 NY 384, 12 NE (2d) 514.
184 Weiss claimed that he believed he derived his authority from a special New Jersey deputy.
to arrest the suspect meant that he did not have the intent to act without authority of the law. This result applied notwithstanding the unreasonableness of the appellant’s belief. The court reached that conclusion by a close analysis of the offence which defined kidnapping as “wilfully seiz[ing]... another, with intent to cause him, without authority of law, to be... confined or imprisoned within this state.” Since the words “without authority of law” appeared after “intent” the court found that the mistake as to authority negated intent.\textsuperscript{185} Thus, as in \textit{Hart}, where knowledge was directly linked to the notion of disqualification, the intent in \textit{Weiss} was also structurally connected to the requirement of absence of legal authority. Yet, had the offence read “seizing another, without authority of law, with the intent to detain him...” presumably the mistake would not have negated the intent,\textsuperscript{186} and the result would have been the same as that reached in \textit{Grant}.

Fletcher has criticized the approach taken in \textit{Weiss}, arguing that while “[t]his kind of formalistic reading of statutes might have enabled the court to muddle through the case at hand, ... one cannot be particularly impressed by a decision holding that anyone who believes that he has legal authority to arrest someone else is exempt from liability for kidnapping and false imprisonment.”\textsuperscript{187} Moreover, “[t]he way in which the components, ‘intent’ and ‘without authority of law,’ happen to fall within the statute hardly warrants the inference that the legislature crafted the statute to produce an acquittal in cases of unreasonable as well as reasonable mistake.”\textsuperscript{188} Therefore, “[i]t is hardly exemplary of the judicial craft to place so much reliance on the fortuities of legal drafting.”\textsuperscript{189}

On the other hand, \textit{Donnelly v Commissioner of Inland Revenue}\textsuperscript{190} provides an instance of a broader approach which does not focus on the order of the words in the statutory provision. Haslam J held that the word “wilfully” required not only a conscious, intentional or deliberate act but also “active dishonesty” which could be negatived by ignorance of the relevant law. The appellant had been convicted under the Land and

\textsuperscript{185} See Fletcher, supra n 182 at 692.
\textsuperscript{186} Fletcher, idem.
\textsuperscript{187} Ibid at 692-693.
\textsuperscript{188} Ibid at 693.
\textsuperscript{190} [1960] NZLR 469.
Income Tax Act 1924 of wilfully making a false return.\textsuperscript{191} Allowing the appeal, Haslam J held that “a false return is wilfully made if it is completed with knowledge of its inaccuracy as a fact affecting the defendant’s liability to taxation. There must be an element of active dishonesty on the defendant’s part as opposed to merely negligent completion of an erroneous return.”\textsuperscript{192} Commenting upon the issue of ignorance of law, the judge observed that “while ignorance of the law does not excuse it is an element which cannot be overlooked in determining whether certain types of mens rea have been established.”\textsuperscript{193} Consequently Haslam J may be taken as accepting that in certain situations mistake of law will negative the mens rea elements of the offence. It is possible, therefore, to draw a distinction in the way that mistake of law operates in different circumstances. While Haslam J rejects the exculpatory effect of ignorance or mistake of law as an “excuse” or a “true defence”, he accepts it as a denial of mens rea as an essential element of liability.\textsuperscript{194}

Barker J adopted a similar approach in \textit{Durey v Police}.\textsuperscript{195} The appellant had been convicted on a charge of wilfully modifying an archaeological site contrary to section 54(1)(b) of the Historic Places Act 1980. The appellant, a salvage operator, had removed a boiler from a vessel commonly accepted to be the wreck of the \textit{SS Taupo} which was covered by the definition of “archaeological site” in the Act. Noting that the word “wilfully” is often interpreted to mean intentional or deliberate and, on occasion, to encompass recklessness, Barker J found that “assuming that recklessness is all that needs to be proved”, if the appellant “believed that the wreck was not an archaeological site, then mens rea would be negatived unless the belief was reckless.”\textsuperscript{196} Significantly, Barker J, like Haslam J in \textit{Donnelly}, identified the importance of distinguishing ignorance or mistake of law as an excuse from a simple denial of mens rea:\textsuperscript{197} Where a person acts under a mistake of law which precludes him from having the requisite mental element for the particular offence,

\begin{itemize}
\item[\textsuperscript{191}] See s228(1)(b).
\item[\textsuperscript{192}] Supra n 190 at 472.
\item[\textsuperscript{193}] Idem.
\item[\textsuperscript{194}] See ibid at 473 where Haslam J refers to \textit{Brend v Wood} (1946) 62 TLR 462, \textit{Younghusband v Luftig} [1949] 2 KB 354, [1949] 2 All ER 72; \textit{Wilson v Inyang} [1951] 2 KB 799, [1951] 2 All ER 237, for the proposition that ignorance or mistake of law may negative mens rea.
\item[\textsuperscript{195}] (1984) 1 CRNZ 392.
\item[\textsuperscript{196}] Ibid at 396.
\item[\textsuperscript{197}] Idem. See Orchard, \textit{Crimes Update} supra n 4 at 25, footnote 158, who argues that \textit{Durey} is a case of simple non-advertence to essential facts.
\end{itemize}
he cannot be guilty of that offence. This is so as long as the mistake was honestly entertained whether or not it was reasonable to have made it.

However, two further High Court decisions adopt a more restrictive approach centred on the distinction between mistake of fact and mistake of law. In *Police v Cunard* the appellant had been convicted under section 3 of the Trespass Act 1968 of wilfully trespassing by refusing to leave a hotel after being warned to leave. The appellant, who was mildly intoxicated, became angry and refused to comply with the hotel manager’s request to leave. After he refused the third request he was arrested and subsequently convicted of wilful trespass. Speight J allowed the appeal on the basis that the appellant honestly believed he ought not to have been asked to leave so that when his licence was revoked he became a trespasser, but not a wilful trespasser. To this point, Speight J’s analysis appears similar to that adopted in *Donnelly* and *Durey*. However, he then went on to qualify his earlier findings by requiring that the mistake be made as to “a developing fact situation.” Since the appellant’s belief was as to the facts - whether he was sufficiently intoxicated to be asked to leave - it negatived the mens rea required for wilful trespass. But had the mistake been one of law, then on Speight J’s analysis, that could not negative the mens rea. On an orthodox fact/law approach, Speight J’s reasoning may have been justifiable. Yet since “trespass” is more a matter of civil than criminal law had the case involved a mistake of law, it would arguably have been decided on the basis that the appellant had made an honest mistake as to his rights as a licensee to remain on the premises.

In *Police v Shadbolt* the appellant had been convicted of wilful trespass after refusing to leave St John Ambulance Headquarters until he was given the names of the driver and nurse on an ambulance that had attended an accident in which his wife had been injured. Wilson J distinguished *Cunard* on the facts, but adopted Speight J’s general

199 Ibid at 515.
200 Ibid at 517.
analysis of wilful trespass, holding that the appellant was mistaken as to his legal right to remain. Consequently, “[h]e was under no genuine mistake about the factual situation, only about his legal rights in that situation.” The trespass was therefore a wilful trespass. Thus, as Wilson J concluded in *Shadbolt*, the distinction drawn in *Cunard* is between a bona fide belief in legal rights based on a mistaken view of the relevant facts and a bona fide belief in legal rights which do not exist, no matter what view of the factual situation is held by the trespasser. By excluding mistake of law, *Cunard* and *Shadbolt* seem to regard it as an inadmissible *excuse* whereas, on principle, any mistake can be claimed to be relevant as to determining the presence or absence of mens rea. At the very least, these two decisions highlight the arbitrariness of the fact/law distinction. Moreover, a mistake as to legal entitlement to enter or remain on premises in terms of trespass is really a mistake as to civil or private law, for which a defendant ought not to be held criminally liable.

The High Court of Australia’s decision in *Ianella v French* is a further example of the divergence of judicial opinion in characterizing mistakes. The court, by a majority of three to two, held that on a charge of “wilfully demanding or wilfully recovering” rent in excess of that permitted, it was unnecessary to prove that the appellant knew he was committing an offence. For the minority, Barwick CJ recognised that:

Mens rea may in some cases... 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.

Windeyer J, also in the minority, referred to Haslam J’s analysis in *Donnelly* and concluded that while ignorance or mistake as to the law was no excuse, that did not preclude a defence on the basis that the appellant, due to a mistake, acted without

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203 Ibid at 411.
204 See infra VI (4)(d).
205 Supra n 134.
206 In the court below in South Australia Bray CJ dissenting construed “wilfully” as requiring proof of illegality: *French v Ianella* [1967] SASR 226 at 240-241. See Gillies, supra n 170 at 705-711 for a discussion of the various meanings attributed to “wilfully”.
207 Idem.
wilfulness. However, since both Barwick CJ and Windeyer J took the view that the appellant’s mistake was one of fact, their comments on mistake of law must be regarded as strictly obiter.

The majority judges (McTiernan J, Taylor and Owen JJ) all concluded that the appellant’s mistake was one of law and therefore excluded by the general rule. Consequently, knowledge of illegality was irrelevant.

More recently, the Supreme Court of Canada has held that the offence of wilfully refusing or failing to comply with the terms of a probation order requires proof that the accused knew that it was illegal. In *R v Docherty* the respondent had pleaded guilty to a charge under section 236 of the Criminal Code of being in control of a vehicle while having an excess blood/alcohol level. At the time of the commission of that offence he was bound by a probation order that required him to “keep the peace and be of good behaviour.” Subsequent to the blood/alcohol conviction, he was charged with wilfully failing or refusing to comply with the order under section 666(1), but was acquitted at trial on the basis that when he committed the alcohol offence he did not know he was breaking the law because the car in which he was found could not be started. The prosecution’s subsequent appeals to the Newfoundland Court of Appeal and Supreme Court of Canada were dismissed. The Supreme Court held that the respondent did not have the necessary mens rea, which was an intention to breach the probation order. His honest belief that he was not committing the offence under section 236 meant that he had not wilfully failed or refused to comply with the probation order. Wilson J for the court held that section 19 of the Code had no application in the circumstances. According to Wilson J, it would have been no defence for the respondent to say that he did not know that having control of a vehicle with excess blood/alcohol was not against the law, or that he did not know that wilful failure to be of good behaviour was a breach of probation. On the facts, however,

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208 Ibid at 115-116.
209 See Fisse, supra n 137 at 505 footnote 80 where it is noted that “[t]here is no unanimity as to whether the word ‘wilfully’ in the definition of a statutory offence admits a defence of mistake or ignorance of law.” See also the accompanying references to judicial decisions on point.
210 (1990) 51 CCC (3d) 1.
211 Section 663(2) sets out the terms of a probation order. The relevant term in the instant case was that the accused shall keep the peace and be of good behaviour.
212 Ibid at 14.
the commission of the offence under section 236 was relied on as the actus reus of the breach of probation, so that knowledge by the respondent that his act was against the law was required to prove wilful failure to comply with the probation order. She concluded:213

An accused cannot have wilfully breached his probation order through the commission of a criminal offence unless he knew that what he did constituted a criminal offence... and s19 of the Code does not preclude the respondent from relying on his honest belief that he was not doing anything wrong to negate its presence. Where knowledge is itself a component of the requisite mens rea, the absence of knowledge provides a good defence. Therefore, lack of knowledge of the commission of a criminal offence was not pleaded as a defence to committing that offence itself, but was a successful defence to the separate and consequential offence of breaching probation. So, while proof of mens rea was not required for the predicate offence, the element of wilfulness in the consequential offence extended to include knowledge of the illegality of the predicate offence. It is open to question whether Docherty will be read as having general application in situations where wilfulness is an element of the offence, or whether it will be restricted to the somewhat unusual circumstances of the case itself.

If nothing more, these decisions show is that there is a division of judicial opinion as to whether specific mens rea expressions such as “knowingly” and “wilfully” ought to require proof of knowledge of illegality. It is often difficult to isolate the reasoning behind these decisions. For example, Hart and Weiss may be explained on the basis that the placement of the specific mens rea word in the statutory provision begged the conclusion that the prosecution must prove knowledge of illegality. Equally, the reverse could also be said of Grant v Borg. Yet, as Fletcher has cautioned, it may be shortsighted to rely on the fortuities of legal drafting at the expense of broader theoretical issues.214

In Cunard and Shadbolt the distinction was drawn at the fact/law level, so that a mistake of law could not negative the mens rea for wilful trespass. In one context then, these two decisions link back to the earlier discussion of the intractability of the distinction between mistakes of fact and mistakes of law. However, on the other side of the line are the decisions in Donnelly, Durey and Docherty, where there was a clear acceptance that

213 Ibid at 15.
214 Supra n 182 at 739.
mistake of law may negate wilfulness. As Haslam J explained in Donnelly, in some cases mistake of law may indeed negative the mens rea required for an offence, and yet leave the general principle that ignorance or mistake as to the law does not excuse intact. Thus, the general principle, for certain purposes, is restricted to cases where mistake of law is pleaded as a true defence or excuse, and does not subsume cases where mistake of law negates the mental element of the offence. These comments must, however, be read in context in that mistake of law will realistically only negate mens rea when it is expressed in a specific manner such as "knowingly" or "wilfully." As the law currently stands, there is no generally accepted principle that mistake of law will negative mens rea in statutory provisions requiring a particular mental state.

(ii) Law Reform Proposals

The Crimes Bill 1989 does not contemplate a defence of mistake of law based on the absence of a specific mental element. However, the English and Australian proposals, and the Model Penal Code provide that ignorance or mistake of law will exculpate if it negatives a fault element of the offence.215

Clause 21(b) of the Draft Code (UK) proposes that "[i]gnorance or mistake as to a matter of law does not affect liability to conviction for an offence expect - (b) where it negatives a fault element of the offence."

Clause 6(1) defines "fault element" in general terms as meaning "any element of an offence consisting (a) of a state of mind with which a person acts". Similarly, section 3J of the Commonwealth Interim Report provides that "[i]gnorance of, or a mistake as to, a law of the Commonwealth, does not relieve a person from criminal liability for an act that contravenes that law unless: - (b) that ignorance or mistake would negate any requisite fault."217 The Model Criminal Code (1992) provides

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215 Robinson & Grall, "Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond" (1983) 35 Stan L Rev 681 at 726, say that strictly, such provisions are unnecessary because if ignorance or mistake makes proof of the fault element impossible, the prosecution will fail for want of proof. See also Robinson, "Criminal Defences: A Systematic Analysis" (1982) 82 Colum L Rev 199.

216 Law Com No 177 (1989). See also Commentary vol 2 at 196, para 8.32, which cites Smith [1974] QB 354 in support of the proposition that a mistake of law can be the reason why a person is not at fault in the way prescribed for an offence.

217 Commonwealth Interim Report (1990). Th Report at 50, para 6.5 notes that ignorance or mistake of law may negate the existence of knowledge, intention or recklessness when those are
that “[i]gnorance or mistake about the existence or content of statute law does not affect a
person’s liability for an offence”, but it further provides that “[t]his section does not apply
if the ignorance or mistake would negate a fault element of the offence.”

The English and Australian proposals are elliptical in that they do not elaborate on
what is a “fault element of the offence”, save for the brief treatment given in clause 6 of the
English Draft. One the other hand, the Model Penal Code is more specific, section 2.04
providing that “[i]gnorance or mistake as to a matter of fact or law is a defence if (a) the
ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence
required to establish a mental element of the offence.” The accompanying explanatory
note says that the principle is “a function of the culpability otherwise required for
commission of the offense. Such ignorance or mistake is a defense to the extent that it
negates a required level of culpability.” The Comment to the Model Penal Code further
explains that ignorance or mistake is of evidential import only; it is significant whenever it
is logically relevant, and it may be logically relevant to negate the required mode of
culpability. Thus, “[t]he critical legislative decisions... relate to the establishment of the
culpability for specific offences”, that is, in relation to their material elements. If culpability
is required for a material element, then “[t]here is no defensible basis for a distinction
between mistakes of fact and law in this context... and indeed the point is often recognized
in the cases by assimilating legal errors on collateral matters to mistake of fact, or by
treating such errors as exceptions to the ignorantia juris concept.” The appropriate
inquiry is, therefore, simply one of logical relevance to culpability rather than the “legal” or
“factual” nature of the mistake.

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218 Model Criminal Code, Discussion Draft (1992) 307.2. The Commentary at 51 states that 307.2
adopts the general principles of s21 of the English Draft and s3J of the Gibbs Committee’s Draft
Bill.
220 Ibid at 268.
221 Ibid at 269.
222 Ibid at 270, n2.
(1990) 81 J Crim L & Criminology 447 at 449, notes that under the Model Penal Code all
mistake are just a matter of logical relevance - exculpating if and only if they negate the required
mens rea (except in cases of non-publication etc).
However, section 2.02(a), dealing with general principles of culpability, further provides that "[n]either knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such an offense, unless the definition of the offense or the Code so provides." (emphasis added) This establishes the basic proposition that knowledge of the law defining the offence is not an element of the offence, and states the "conventional position", but the exclusionary rule does not apply "when the circumstances made material by the definition of the offence includes a legal element" for example, claim of right to property in theft. There, "[t]he law involved is not the law defining the offence; it is some other legal rule that characterises the attendant circumstances that are material to the offence".

Since awareness as to whether conduct constitutes an offence or as to the existence, meaning or application of the law determining the elements of an offence is not itself a material element, mistake of law will only exculpate where the circumstances made material by the definition of the offence include a legal element. Therefore, the "exception" to the general principle set out in section 2.04(1)(a) must be read restrictively, in the light of section 2.02(a).

Section 2.02(a) draws a distinction between mistakes as to the existence, meaning or application of the law determining the elements of an offence. Ignorance or mistake as to the existence of a law would seem to be non-problematic. Thus, an accused would not be heard to say "I did not know that driving while disqualified had ever been an offence", or "I thought that driving while disqualified was no longer an offence". It is rather less clear, however, what is meant by the "meaning or application", "content" or "definition" of

224 Commentary, supra n 219 at 228-229.
225 Ibid at 250.
226 Idem. The Commentary idem, continues, noting that "[t]he proper arena for the principle that ignorance or mistake of law does not afford an excuse is thus with respect to the particular law that sets forth the definition of the crime in question. It is knowledge of that law that is normally not a part of the crime, and it is ignorance or mistake as to that law that is denied defensive significance... by the traditional common law approach to the issue."
227 See also Model Criminal Code, supra n 219, where 307.2 refers to "The existence or content of statute law".
other matters of criminal law. Thus, while the English and Australian proposals, and the Model Penal Code indicate that a line must be drawn between those mistakes that negative knowledge, recklessness and the like, and those that do not, none tells us where exactly, to draw that line. From the case law already examined, it seems that only some mistakes of law as to an element of an offence are relevant.228 In each case, the crucial question is “what is the mens rea required by the crime?”229 A mistake that negatives mens rea as to an element in the actus reus will be no defence if the law does not require mens rea as to that element.230 At present, courts deal with this issue on a case by case basis, but, as Fletcher puts the problem, it is disconcerting to think that liability can depend on how much emphasis a court places on the “fortuities of legal drafting.”231

(c) Statutory Exceptions

Statutory provisions sometimes expressly require that the criminal act be committed without “lawful justification or excuse” or “lawful authority” or some similar phrase.232 The issue of whether a “lawful excuse” is to be regarded as an element of the offence which must be proven by the prosecution, or whether it creates a specific statutory defence external to the elements of the offence, which must be affirmatively established by the accused, is determined in part by statute. Section 67(8) of the Summary Proceedings Act 1957 places the onus on the accused to prove the statutory defence.233 However, there is no corresponding statutory provision in relation to indictable offences.234 The Court of Appeal has recently dealt with this issue in R v Rangi. Casey J for the Court concluded that “in an indictable prosecution the Crown carries the onus of proof.”235 Thus, “if there

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228 See, eg, Smith & Hogan, supra n 8 at 84 for a discussion.
229 Smith & Hogan, idem.
230 Idem.
231 Fletcher, supra n 189 at 1297.
232 Adams On Criminal Law (Robertson ed, 1992) Vol 2, ch 2.1.05. Gillies, supra n 170 at 206 notes that the various expressions “are prima facie synonymous, although it is always open to the courts to ascribe a particular meaning to any such expression, in the context of a particular provision. For examples contained in the Crimes Act 1961 see: ss 107, 124, 151,152, 153, 155, 156, 157, 160, 197, 291, 294, 211, 216, 249, 274, 275, 283, 291, 307. Adams, ibid, provides a commentary on each provision.
233 Section 67(8) describes this as “any exception, exemption, proviso, excuse or qualification.” See Te Weehi v Regional Fisheries Officer (1986) 6 NZAR 114; R v Rangi [1992] 1 NZLR 385 (CA) at 387.
234 Adams, supra n 232 at ch 2.1.05.
235 Supra n 233 at 389. But see Adams, supra n 232 at ch 2.1.05-06 for the potential application of
is raised on the evidence an issue about the existence of such authority or excuse, the Crown must prove beyond reasonable doubt that it did not exist.\footnote{236}

The important issue in the present context is whether a mistake of law will provide an accused with a statutory defence. As is the case with statutory expressions such as "knowingly", there is a similar absence of judicial consistency in determining the effect of a claim of mistake of law on phrases such as "lawful excuse." While some decisions have held that mistake of law will provide a lawful excuse, others have confined the defence to situations where the accused is mistaken as to the facts. Yet, the very fact that a defence of mistake of law has been admitted, albeit not consistently, points to a further restriction on the general principle that ignorance or mistake of law is no excuse.

In \textit{Maintenance Officer v Stark}\footnote{237} the respondent had been acquitted at trial on a charge of defaulting under a maintenance order for support of his child "without reasonable cause, proof of which shall lie on him", contrary to section 107(1) of the Domestic Proceedings Act 1968. He had been advised by his solicitor that his legal obligation to support the child ended when he signed a consent to the adoption of the child by the natural mother and her husband. This advice was incorrect because the obligation to support expired only upon making a successful application to the court for the cancellation of the maintenance order.\footnote{238}

At first instance, the magistrate decided that the issue before him was one of pure fact and that the defendant had reasonable cause for his default in payment.\footnote{239} On appeal, Beattie J noted the difficulty in distinguishing between mistake of fact and mistake law.\footnote{240} After reviewing various academic and judicial authorities on the issue, he concluded that even if the respondent’s mistake was one of law, it was a mistake "as to the civil law,

\begin{itemize}
\item \textit{R v Hunt} [1987] AC 352 (HL) in New Zealand
\item Idem.
\item \textit{Idem.} [1977] 1 NZLR 78.
\item See Chapter 5 for a discussion of officially induced error. Williams, \textit{Text Book of Criminal Law} (1983) 459 argues that an accused ought to be provided with a defence of reasonable excuse if he or she has relied upon an official statement of the law.
\item Ibid at 82. Note also that proof of "reasonable cause" lies on the respondent but it is proof on the balance of probabilities.
\item Ibid at 83.
\end{itemize}
namely, his responsibilities under the Domestic Proceedings Act”, and could accordingly provide an excuse.\textsuperscript{241} Thus, “the mistaken belief on the part of the respondent that the consent to the adoption terminated the obligation did constitute sufficient reasonable cause to justify the dismissal of the information.”\textsuperscript{242}

Beattie J’s decision invites the conclusion that it was the particular nature of the mistake that ultimately excused the respondent. There is little doubt that the mistake was one of law - the respondent was mistaken as to his legal obligation to continue to pay maintenance. However, as Beattie J pointed out, that was a mistake as to a matter of private or civil law, and not a matter of criminal law. As mistakes of civil law are generally regarded as falling outside the ambit of the general principle, the respondent’s mistake could then be regarded as a “reasonable cause”.\textsuperscript{243}

By contrast, in \textit{R v Reid}\textsuperscript{244} the English Court of Appeal held that a mistaken belief that a police officer had no authority in the circumstances to require a breath specimen was not a “reasonable excuse” for not providing the specimen.\textsuperscript{245} In that case the mistake was one as to the criminal law - the powers of the police constable - and not as to the civil law as in \textit{Stark}.\textsuperscript{246}

However, in \textit{Cambridgeshire and Isle of Ely County Council v Rus}\textsuperscript{247} the issue was more blurred. In that case the respondent had been acquitted at first instance of pitching a stall on a highway without lawful authority or excuse contrary to section 127 of the Highways Act (UK) 1959. Before pitching the stall he had sought the approval of various authorities but was given no definite answer as to the legality of his proposed actions. The justices dismissed the charge, finding that his inquiries established that he had

\textsuperscript{241} Idem.
\textsuperscript{242} Ibid at 84.
\textsuperscript{243} See also \textit{Bacon} \[1977\] 2 NSWLR 507 (Court of Criminal Appeal) where Street CJ (Ash J concurring) stated that an accused person may be viewed as having acted with reasonable cause where his or her conduct has proceeded from “a bona fide mistake of fact or law based on reasonable grounds.” (at 512).
\textsuperscript{244} [1973] 3 All ER 1020.
\textsuperscript{245} See Gillies, supra n 170 at 207.
\textsuperscript{247} [1972] 2 QB 426.
acted with "lawful excuse." However, The Queens Bench Division allowed the Council’s appeal, finding that the respondent’s mistake was one of law since there was no local authority with the power to grant him the licence to set up the stall. Lord Widgery CJ was of the opinion that a mistake as to the facts would have provided the respondent with a lawful excuse, but a mistake as to the law did not.248 Thus, if the local authority in fact had the power to grant a licence, it would have been a lawful excuse had the respondent mistakenly believed the local authority had granted him a licence when in fact it had not.249 The reasoning applied in this decision is yet another example of the orthodox fact/law analysis. However, it is questionable whether the respondent’s mistake was one as to the civil law - his entitlement to go onto and remain on certain land. If this is the case, the court may have been entitled to adopt an approach similar to that in Stark. Yet, the decision seems closer to the decision in Cunard250 which also adopted a restrictive fact/law approach without consideration of the additional civil/criminal law distinction.

Ashworth has suggested that the wording of the statutory defence in Rust may have influenced the outcome. Thus, “the decision might have been different if the statutory condition had been ‘without lawful justification or reasonable excuse.’”251 The “conduct of an individual who takes the trouble to ascertain the legal position by consulting an official agency is certainly ‘reasonable’.”252 It may not be without significance that Beattie J in Stark noted the distinction made by Ashworth between “lawful excuse” and “reasonable excuse.”253 Since the statutory defence in Stark was “reasonable cause”, Beattie J may have felt justified in departing from the reasoning in Rust.

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248 Ibid at 434.
250 Supra n 198.
251 Supra n 249 at 660. See also O’Connor & Fairhall, Criminal Defences, 58.
252 Idem.
253 Supra n 237 at 83. See Adams, supra n 232 at ch 2.1.05 where it is noted that the various expressions “are prima facie synonymous, although it is always open to the courts to ascribe a particular meaning to any such expression in the context of a particular provision.” See also Orchard, Crimes Update supra n 4 at 25, footnote 159 for the proposition that “lawful excuse” is narrower than “reasonable excuse.”
The Ontario Court of Appeal in *R v Walker and Somma*²⁵⁴ also made the distinction between mistakes as to civil law and mistakes as to criminal law in the context of a statutory defence provision. In that case, the court held that a mistaken belief as to a law did not constitute a "lawful excuse" or evidence of absence of mens rea on a charge of unlawfully importing goods into Canada. According to Martin JA:²⁵⁵

[T]he respondents'... belief that in the circumstances they were not required to declare and make entry of the diamond was a mistake of law. Although mistake or ignorance with respect to a rule of the civil law may negative the mental element required by the definition of a particular crime, such as theft, mistake or ignorance with respect to the scope and application of the relevant penal law does not, as a general rule, ... constitute a defence... Consequently, where conduct is made an offence in the absence of a 'lawful excuse', ignorance of the law breached does not constitute 'a lawful excuse.'

Accordingly, because the respondents were mistaken as to the laws regarding importation - a matter of criminal law - no excuse was open to them.

In summary, it would seem that where mistake of law has operated to provide a statutory defence, it has done so on the parallel basis that the mistake was one as to the civil law. The courts have consequently adopted what may be regarded as a restrictive approach to statutory defences. It is at least open to argument that, by providing statutory defences to some offences, legislature envisaged not only mistakes of fact but also mistakes of law as excusing otherwise criminal conduct.

(d) Mistake Of Civil Law

(i) General

Another important limitation to the *ignorantia juris* rule is that mistakes of civil law are often excluded from its ambit. Although the rule is generally expressed in terms that mistake of law is no excuse, this is really a shorthand term for the narrower rule that mistake of the *criminal law* is no excuse.²⁵⁶ This limitation on the rule is not new. In

²⁵⁴ (1980) 51 CCC (2d) 423.
²⁵⁵ Ibid at 428.
Cooper v Phibbs, Lord Westbury explained that the word “jus” in the maxim “is used in the sense of denoting general law, the ordinary law of the country. But when the word ‘jus’ is cited in the sense of denoting a private right, the maxim has no application.”

The application of criminal law may depend on circumstances of private law. Where the actus reus of an offence relates solely to a concept of criminal law, the ignorantia juris rule applies since there can be no defence when “the law fixes a standard which is different from that in which D believes.” But where the actus reus of an offence relates to a concept concerned with a private right, then a mistake as to that right may provide a defence, for example, a criminal charge of bigamy may result from the accused’s mistaken understanding of the law of divorce, which is a matter of private law. Or, a charge of theft may result from the accused’s mistaken belief that he has transacted a legal sale of the goods with the vendor. The exculpatory effect of mistake of civil law has been justified on the basis that there is a limit to the amount of law that the citizen can be expected to know. While it is reasonable to expect citizens to know the criminal law, it is unfair to hold them accountable for knowing the penal implications of all private transactions or dealings.

In essence, a mistake of civil law is (or results in) a mistake of fact. For example, while it would be no defence to plead an honest belief that it is no offence to take property belonging to another (that is simply a mistake as to the criminal law which prohibits theft), if a person took an item of property mistakenly believing that a legal sale had taken place so that the property now belonged to the person taking it, it is a mistake as to a private right. The claim is now one of an honest belief that ownership of the property

257 (1876) LR 2 HL 149 at 170. See also Lansdown v Lansdown (1730) Moseley 364 at 365, where Lord King held that “The maxim of law... was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases.” See generally Winfield, “Mistake of Law” (1943) 59 LQ Rev 327 at 328, and n 4. Mistake of civil law may also be explained in terms of the division between public and private law. Public law “can be regarded as that part of law which is designed primarily to regulate the relationships between citizen and state... and private law can be regarded as that part of law which is designed primarily to regulate the relationship between citizens.” Colvin, supra n 5 at 133-134.

258 Colvin, ibid at 134.


260 Williams, supra n 256 at 457.

261 Clarkson & Keeting, Criminal Law (2nd ed, 1984) 269.
has passed, and the accused would lack the intention to appropriate property *belonging to another*,\(^\text{262}\) which is treated as a mistake of fact.

By negating the mens rea element of an offence, and operating in the same way as a mistake of fact, the boundaries of mistake of civil law are consequently unclear. Mistake of civil law often overlaps with other exceptions to the general mistake of law rule, and Ashworth warns that "it would be unsafe to state the rule by reference to a distinction between matters of civil law and criminal law, because offences are often defined in such a way as to blur the two."\(^\text{263}\) Thus, "[w]hether goods are classified as 'stolen' for the purposes of the offence of handling stolen property seems to be a question of criminal law, so if D knows all the facts but misunderstands their legal effect this is irrelevant."\(^\text{264}\) Although issues of civil law pervade a large number of criminal offences, and a defence of civil law therefore has the potential to place significant limits on the *ignorantia juris* rule, the exculpatory effect of mistake of civil law is not uniformly accepted. Indeed, "[t]he courts have not... gone so far as to say that a mistake of civil law can in general be pleaded in order to negative the prosecution case regarding mens rea. They have affirmed that such evidence may be relied on in a number of specific cases... but they have not established this as a general principle."\(^\text{265}\)

The measure of uncertainty may be demonstrated by examining some decisions in which the relevant offences appear to have contained issues relating to civil law. In *Maintenance Officer v Stark*\(^\text{266}\) Beattie J determined that the respondent's mistake as to his legal obligation to pay child support under the Domestic Proceedings Act 1968 was a mistake as to the civil law. That, in turn, provided the respondent with a statutory defence of "reasonable cause" under section 107(1) of the Act. The same reasoning could have been used in *Cunard*\(^\text{267}\) and *Shadbolt*.\(^\text{268}\) In those cases the charges of wilful trespass

\(^{262}\) See Clarkson & Keeting, idem. Section 220 Crimes Act 1961 sets out the elements of theft.


\(^{264}\) Ashowrth, idem.


\(^{266}\) Supra n 237.

\(^{267}\) Supra n 198.

\(^{268}\) Supra n 202.
could, arguably, have been challenged on the basis that each defendant's entitlement to be on the premises was a matter relating to private property rights. Thus, each defendant’s mistaken belief as to his entitlement may have negated the element of wilfulness, irrespective of whether the mistake in issue was one of fact or law. Yet the cases did not proceed on that reasoning. Rather, both courts adopted a strict fact/law analysis, so that while the defendant’s mistake of fact in *Cunard* did negative the mens rea, the defendant’s mistake of law in *Shadbolt* did not (though it was no less reasonable, and perhaps more so).\(^{269}\) The disparity of results in these cases, while explicable in terms of the orthodox fact/law analysis, highlights the overriding problem of how fairly to attribute blame based on the moral culpability of the accused. In these cases, recognition that mistake as to civil law may negative mens rea could have resulted in the acquittal of both defendants instead of only *Cunard*.

The overlap between mistake of civil law and other exceptions to the general principle is further emphasized by *Secretary of State for Trade and Industry v Hart*.\(^{270}\) In that case, the court construed the term “knowingly” to require knowledge of the illegality of the actus reus. Since the defendant did not know he was disqualified to act as company auditor he was acquitted. Yet, the result is equally explicable on the basis that the defendant made a mistake as to an issue of private company law, which would also have negated the particular mens rea term “knowingly.”\(^{271}\) In *Grant v Borg*\(^{272}\) the House of Lords held that it was no defence to a charge of knowingly remaining without leave in the United Kingdom that the appellant was mistaken as to when his leave expired. Yet, it has been suggested that this too was a mistake as to the civil law.\(^{273}\) These inconsistencies in the application of mistake of civil law can accordingly lead to unfair results.

\(^{269}\) Brookbanks, supra n 201 at 204, suggests that the real basis for the decision in *Shadbolt* was “an issue of public policy based upon evidence that the appellant had been making a nuisance of himself and interfering with the smooth conduct of the St John’s Ambulance Association.”

\(^{270}\) Supra n 165.

\(^{271}\) See Smith & Hogan, *Criminal Law* (6th ed, 1988) 84; Ashworth, supra n 178 at 208. Orchard, *Crimes Update*, supra n 4 at 25 warns that not all cases involving offences with specific mental elements are capable of rationalisation also on the basis of mistake of civil law. He cites *Donnelly v CIR*, supra n 190, as an example.

\(^{272}\) Supra n 171.

\(^{273}\) Smith & Hogan, ibid. See also Clarkson and Keeting, supra n 261 at 269-270.
The absence of clear boundaries is further compounded when consideration is given to the category of mixed mistakes of fact and law as propounded by Dixon J in the High Court of Australia decision in *Thomas*.\textsuperscript{274} It is unclear whether mixed mistake exists as an independent notion, although the absence of judicial support for Dixon J's reasoning in *Thomas* suggests that it is not. But quite apart from that, since the charge in *Thomas* was one of bigamy, the case could equally have been decided on the alternative basis that the mistake was as to a matter of private divorce law. While the appellant could not have claimed that he did not know bigamy was an offence, he could have successfully claimed that he mistakenly believed that he was free to remarry because his first "wife" had never obtained a divorce from her first husband, with the result that the appellant believed that he had never been legally married. Since the law of divorce is a matter of civil law, the appellant's mistaken belief negatived the mens rea of the offence.\textsuperscript{275} Therefore, the mixed mistake category may effectively be subsumed by mistake of civil law. However, this does not explain Holland J's reasoning in *Booth*\textsuperscript{276} which suggested that the mistake was one of mixed fact and law. But, as discussed earlier,\textsuperscript{277} the appellant's mistake as to his entitlement to drive was surely a clear mistake as to the criminal law. That being the case, then, strictly speaking, the *ignorantia juris* rule ought to have been applied.

Although the majority of cases in which a defence of mistake of civil law has been recognised involve offences against property,\textsuperscript{278} the defence is not limited to offences against property only,\textsuperscript{279} as decisions such as *Maintenance Officer v Stark* demonstrate. Equally, bigamy cases such as *Thomas* are capable of being explained as involving issues of private law, although most have been determined on a fact/law analysis without reference to mistake of civil law.\textsuperscript{280}

\textsuperscript{274} Supra n 127.
\textsuperscript{275} Williams, supra n 256 at 457.
\textsuperscript{276} Supra n 68.
\textsuperscript{277} Idem.
\textsuperscript{278} See infra where the statutory defence of colour or claim of right is considered.
\textsuperscript{279} Williams, supra n 256 at 457.
\textsuperscript{280} See, eg, *Adams* (1892) 18 VLR 566; *Kennedy* [1923] SASR 183; *Tolson* (1889) 23 QBD 168, discussed by Fisse, *Howard's Criminal Law* (5th ed, 1990) 506. See also *Hart*, supra n 165; *Roberts v Inverness Local Authority* 1889, 27 SLR 198; *National Coal Board v Gamble*
However, given that mistake of civil law most commonly provides a defence where the mistake relates to a matter of property law, the following discussion will focus on property offences, where, in a number of situations, a specific defence is recognised.

(ii) Colour of Right

Part X of the Crimes Act 1961 deals specifically with crimes against rights of property. A number of these offences provide a defence of "colour of right." For example, section 220(1) defines theft as "the act of fraudulently and without colour of right taking... anything capable of being stolen." Similarly, section 293(2) provides a defence to a number of forms of criminal damage: "[n]othingshallbeanoffenceagainstanyofthe provisions of those sections unless it is done without lawful justification or excuse, and without colour of right."[281]

Colour of right is defined by section 2 to mean "an honest belief that an act is justifiable, although that belief may be based on ignorance or mistake of fact or any matter of law other than the enactment against which the offence is alleged to have been committed." (emphasis added)[282]

Colour of right may be regarded, therefore, as a statutory "concession to those defendants who, committing an apparently criminal act, have been motivated by an
erroneous or mistaken view of the substance of non-penal law, such that their actions are inconsistent with a dishonest purpose.”

As in the general context of mistakes of civil law, the justification for allowing colour of right to negative mens rea, even when the mistake is one of law, is absence of moral blameworthiness. In *Brown and Edney v Police* Henry J recognised this requirement: “[t]he defence of colour of right is an express recognition of the need for true moral blameworthiness if an act is to be criminal.” Brookbanks has reasoned that it is because the civil law is in some cases clearly the more appropriate forum for dispute resolution between parties that the courts are sometimes reluctant to impose criminal liability. Indeed, in *Brown and Edney* a charge of wilful damage under section 11 of the Summary Offences Act 1981 arose because of the complainant’s failure to pay the accused in full for concrete and paving work carried out by the accused. Instead of taking a civil action for payment in full against the complainant, the accused removed a portion of the paving equivalent to the sum of money outstanding. At trial the issue was whether the accused had a colour of right, believing (mistakenly) that property in the concrete did not pass to the complainant until payment in full. The accused were convicted on the ground that they were reckless and that recklessness negated colour of right. Henry J allowed the appeal on the ground that the “District Court Judge erred in failing to recognise that the actions of the appellants could be reckless but could nevertheless still be carried out under an honest belief of justification.” Thus, to plead colour of right, an individual’s belief may be unreasonable and unfounded in law but it may nevertheless be an honest belief. The test for colour of right is one of honesty of purpose, and is determined subjectively.

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283 Brookbanks, supra n 282 at 164.
284 (1984) 1 CRNZ 576 at 578.
285 Supra n 282 at 163-164.
286 Section 11(2) of the Summary Offences Act 1981 provides that “for the purposes of subsection (1) ... a person does an act intentionally if he does it intentionally or recklessly, and without lawful justification or excuse or colour of right.”
287 Supra n 284 at 578.
288 See Orchard, supra n 4 at 31. See also *Murphy v Gregory* [1959] NZLR 868 at 872 where Henry J held that: The essence of the defence of colour of right is honesty of purpose. Where an accused person really believes he has the right asserted, it is a good defence if he is mistaken both in fact and in law... it is for the prosecution to prove there was no colour of right. If a prisoner puts forward, however wrongheadedly, an honest claim of right, he ought to be acquitted. *Murphy* was recently approved in *Samson v Police*, unreported, High Court, Hamilton
The defence of colour of right requires that the accused believe that "the act" was justifiable. Section 2 further defines "justified" as meaning "not guilty of an offence and not liable to any civil proceedings." Thus, "a mere belief in moral justification will not suffice (though it may negate mere dishonesty if that is also required)." 289

Notwithstanding the statutory definition of colour of right, the scope of the defence is not entirely clear. While the defence is expressly mentioned in a number of property related offences, one issue is whether it is also available where the offence is silent. It is open to question whether a common law defence of colour or claim of right exists in New Zealand 290 under section 20(1) of the Crimes Act 1961 which preserves common law defences insofar as they are not altered or inconsistent with any statutory provision. 291 Arguably, since a common law defence of colour of right is effectively a claim of mistake of civil or private law, it would be a matter for the court, in each case, to consider whether a defence of mistake of civil law was available.

The defence will be available where absence of colour or right is an element in other offences involving, for example, theft or an intent to steal, such as robbery, or demanding with menaces. Thus in R v Heard 292 colour of right was held to be a defence to a charge of demanding money with menaces with intent to steal, contrary to section 239 of the Crimes Act. While that section makes no express mention of colour of right, it requires that the person demand "anything capable of being stolen, with intent to steal it." Thus theft, which does require proof of absence of colour of right, has to be established. Similarly, robbery by implication involves absence of colour of right. 293 In R v Skivington 294 the appellant used a knife to compel his wife's employer to hand over

289  Orchard, supra n 4 at 31. See R v Heard (1985) 1 CRNZ 474 at 481; R v Hemmerly (1976) 30 CCC (2d) 141.
290  Adams, supra n 232, CA 2.06.06.
291  Idem. At common law, a defence of "claim of right" was recognised in relation to certain offences against property where the accused honestly believed he or she was entitled to act in particular manner in respect of the property. See Brookbanks, supra n 282, for an historical analysis of the development of the doctrine of claim of right.
292  (1985) 1 CRNZ 474.
293  Section 234(1).
wages owing to her. He claimed that he believed she was entitled to the money (which was correct) although he accepted that he was not entitled to act in the way he did to get the money. The trial judge directed the jury that to constitute a defence to robbery the accused must honestly believe that he is entitled to extract the money due to him in the way in which he did. The accused was convicted but the Court of Appeal quashed the conviction, finding that claim of right was a defence to robbery or any aggravated form of robbery, and that it was unnecessary to show that the accused had an honest belief that he was entitled to take the money in the way he did.295

However, "a belief that one is entitled to one thing does not provide a colour of right in taking or retaining another to get it, if there is no belief in entitlement to the thing taken or retained."296 In *Wicks v Police*297 the appellant had been convicted of stealing a file valued at less than $10 from a solicitor who had previously acted for the appellant. The file, which was unrelated to the appellant's case, was inadvertently sent to him together with his own files. Believing the solicitor to be at fault in the amount of the award that he had received in his civil action, the appellant kept the file mistakenly sent to him, to use as a "bargaining tool" for seeking further reimbursement from the solicitor. He was convicted of theft, and his appeal was dismissed. O'Regan J held that the appellant could not claim a colour of right in the circumstances:298

> It is implicit in the advancing of these matters that they encompass mistakes of law on the appellant's part. That apart, such mistakes on the appellant's part have no nexus with the conversion of the file and do not found a base for a belief that his actions in converting and retaining it were justifiable.

It is unclear whether colour of right can be extended beyond offences which impliedly import the defence. In *R v Leary*299 section 238(1) of the Crimes Act (extortion by

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294 1 QB 166.
296 Orchard, supra n 4 at 31.
299 Unreported, Supreme Court, Auckland Registry, 15 March 1972, McMullin J, discussed by Brookbanks, supra n 282 at 162.
threats) neither expressly nor impliedly provided a colour of right defence. However, the court accepted that the applicant's honest belief that he was entitled to the vehicles he demanded from the complainants took him outside the words of section 238(1) "with intent to extort or gain", and therefore constituted a claim of right. This case suggests that the defence does extend beyond those offences which either expressly or impliedly recognise absence of colour of right.

A recent decision of the British Columbia court of Appeal emphasises the absence of any clear line between colour of right and a defence of mistake of civil law. Rather, the decision suggests that it is necessary to identify a more general defence for those situations in which mistake negatives mens rea. In \textit{R v Hammerbeck}\textsuperscript{301} the appellant had been convicted of taking a child under the age of 14 years, in contravention of the provisions of a custody order, with intent to deprive the other parent of the child's possession contrary to section 282 of the Criminal Code. When the child's mother had refused to give the appellant access to the child in accordance with the custody order, the appellant took a copy of the order to the RCMP detachment where where he was told that the police would not enforce Provincial Court orders but only Supreme Court orders. When the appellant subsequently gained access he took the child to California and failed to return her to her mother in accordance with the terms set out in the custody order. He was subsequently convicted but his appeal to the British Columbia Court of Appeal was allowed on the ground that the trial judge was in error in directing the jury that the belief must be on reasonable grounds.

Although section 282 of the Criminal Code did not specifically refer to colour of right, Southin JA considered that the provision "appear[ed] to be applicable to those who have what might be called a colour of right to the child."\textsuperscript{303} He concluded that the appellant knew there was an order which had not been set aside and could not have been

\textsuperscript{300} Brookbanks, idem.

\textsuperscript{301} \textit{R v \textit{Hammerbeck}}

\textsuperscript{302} Locke JA, \textit{ibid} at 165 notes that earlier versions of the provision in the Code recognised a defence to abduction for a person claiming in good faith a right to possession of a child. Locke JA explained the exclusion of the defence in s282 on the ground that judges had declined to convict an abducting parent who believed that he/she was equally entitled to the possession of the child.

\textsuperscript{303} \textit{ibid} at 178.
under any misapprehension as to his arrangement for the return of the child.\textsuperscript{304} However, there was some basis for concluding that the appellant believed that, as a matter of law, a custody order which the police would not enforce was meaningless.\textsuperscript{305} Locke JA noted that the appellant had raised a number of grounds in his defence including “colour of right, mistake of law, mistake of fact, lack of fraudulent intent, and bona fide belief, all being headings which he retrieved out of various law books.”\textsuperscript{306} He considered that “[a]ll these defences have to do with the defence advanced at the trial that the appellant believed that the orders were invalid and, therefore, he could not have had the necessary mens rea.”\textsuperscript{307} Thus, in Locke JA’s opinion “they are all subsumed under the defence of honest belief and mistake.”\textsuperscript{308} As Locke JA correctly concluded, whether a defence is classified as colour of right, or mistake of civil law, the issue inevitably reduces to whether or not the mens rea required for the offence has been established by the prosecution. Judicial recognition of this common denominator is an important step towards a defence of “non-criminal” mistake of law based on absence of mens rea. Such a defence would also include those offences requiring a specific mens rea element going to knowledge or awareness of the illegality of the conduct. Similarly, it may also include some of the “statutory defence” provisions discussed earlier. However, while Locke JA recognised the need for an umbrella defence of honest belief and mistake for “non-criminal” mistakes of law, this does not resolve the central problem of determining with any precision when such a defence will arise. As the decisions relating to specific mental element provisions and mistakes of civil law have shown, judicial opinion varies from case to case. Law reform proposals indicate a similar variance of opinion.

(c) Law Reform Proposals

The Crimes Bill 1989 proposes the inclusion of a defence of colour of right in clause 26(2) which provides that “[a] person is not criminally responsible for an act or omission that the person believes to be justified if that belief is based on ignorance of, or mistake as

\textsuperscript{304} Ibid at 180 per Southin JA.
\textsuperscript{305} Idem.
\textsuperscript{306} Ibid at 172.
\textsuperscript{307} Idem.
\textsuperscript{308} Idem.
to, a matter of law other than the appropriate enactment.” While that provision makes no express reference to colour of right, the explanatory note to the Crimes Bill says that clause 26(2) “replaces” the present notion of colour of right and “whereas [colour of right] seemed to include some element of moral justification, this provision is limited to legal justification.” 309 However, the text of clause 26(2) does not indicate that difference, the main change being the omission of any reference to mistake of fact. Thus, the change is achieved simply by not using the term “colour of right” with its morally justificatory connotations.310

The Report of the Crimes Consultative Committee expressed some concern as to whether there was any need to include a defence of colour of right in clause 26. The Report concluded that because of other proposed changes - namely, the inclusion of a definition of the term “dishonesty”311 - “the preferable course [was] to focus on that definition and on particular offences to which a mistake of law provision should properly apply.” 312 Moreover, because the Report recommended “that a number of offences ought to include a ‘claim of right’ element (a better term in our view, than ‘colour of right’) ... subclause (2) could be safely deleted from clause 26.” 313 To this end the Report proposed an amendment to the Crimes Bill by defining “‘claim of right’ in the interpretation section: ‘‘claim of right’, in relation to any act, means a belief that the act is lawful, but does not include a belief based on ignorance or mistake in respect of the enactment against which an offence is alleged to have been committed.” Like section 2(1) of the Crimes Act, the definition refers only to acts and not to omissions. However, reference to the belief that the act is justifiable is replaced by the requirement that the belief be that the act is lawful. Presumably, this belief may be premised on mistake or ignorance of either fact or law. The mistaken belief must not be about the enactment against which an offence is alleged to have been committed. This clarifies the requirement that the mistake must not be one

310 Another change made by clause 26(2) is that whereas in section 2 “colour of right” is defined as “any act”, the Crimes Bill proposes that the definition be extended to “any act or omission.”
311 See clause 178 Crimes Bill 1989 for the definition. The Casey Report recommended that the definition be replaced: see clause 176 Report of the Crimes Consultative Committee (1991). See also clause 179 (amended by the Crimes Consultative Committee).
313 Idem. These comments suggest that the defence would be available only where specifically referred to by the provision.
relating to a matter dealt with solely by the charging enactment, but rather, must relate to some other matter or law.

Whereas the Crimes Consultative Committee recommends deleting a “claim of right” defence from the general provision on ignorance or mistake of law, several overseas proposals include such a notion within the general provision. Clause 3(7) of the Canadian Draft Code provides that “no one is liable for a crime committed by reason of mistake or ignorance of law: (a) concerning private rights relevant to that crime.” The Report does not make it clear whether clause 3(7)(a) is simply declaratory of the present law or whether it has a wider import beyond offences such as theft. However, on its face it seems to be rather wider.

Clause 21 of the Draft Code (UK) proposes the following defence: “[i]gnorance or mistake as to a matter of law does not affect liability to conviction for an offence expect

(a) where so provided; or (b) where it negatives a fault element of the offence.” The accompanying commentary makes it clear that clause 21 is intended to stop the courts developing exceptions to the general exclusionary rule by using clause 45(c) under which common law defences can be developed if not inconsistent with other code provisions. The only illustrations of clause 21(b) are Smith, where the defendant was not liable for intentionally or recklessly damaging property belonging to another because his mistaken belief was that the property was his own, and Hart, which has already been discussed. Consequently, the scope of the draft provision appears to be somewhat restrictive. On the other hand, by linking mistake of law to the negation of “fault”, the draft provision could arguably be read more widely in the sense that particular mistakes do not have to be “pigeon-holed” into one category or another such as colour/claim of right, or mistake as to civil law.

315 See accompanying comment to clause 3(7)(a), Report No 31 at 35.
316 Report No 177. See also Law Commission (UK) No 143 clause 25(1),(2).
317 Ibid at 196, para 8.29.
319 Supra n 165.
Section 3J of the Australian Interim Report\(^{320}\) substantially adopts the Draft Code (UK), providing that “ignorance of, or mistake as to a law of the Commonwealth does not relieve a person from criminal liability for an act that contravenes that law unless... (b) that ignorance or mistake would negate any requisite fault.” The accompanying commentary explains that the bona fide claim of right does not receive express mention in the Bill because such a claim is said to negative fault and will therefore fall under the generally worded exception contained in section 3J(b).\(^{321}\) The Review Committee considered that if section 3J made it clear that mistake of law can be the reason why the accused is not at fault it was unnecessary to provide an express provision dealing with claims of right.\(^{322}\)

By contrast, the later Discussion Draft (1992)\(^{323}\) recommends a specific provision for “claim of right”, restricted to a “proprietary or possessory right.” The reason given is that claim of right normally negatives a fault element but does not necessarily do so, “and the Code should reflect that state of the law.”\(^{324}\)

While these proposals recognise the need for a defence of claim or colour of right, the continuing difficulty is that it is not clear when fault or mens rea will be required for all the elements of the offence. The same difficulty applies in respect of mistakes of civil law in general, and also where the statutory provision purportedly requires a specific mental element. While the reader is told that mistakes of law may indeed provide an excuse by negating the “fault element” required for the offence, no provision is made for a further test to see what types of mistakes do, in fact, negative the “fault element.” The case law in this area indicates widely divergent judicial opinion.


\(^{321}\) Ibid at para 6.28.

\(^{322}\) Ibid at para 6.29.


\(^{324}\) Idem. This may not be confined to Australia. See, eg, the definition of theft in s220 - The act of “fraudulently and without colour of right” taking etc. Given the wide meaning attributed to “fraudulently” in \(R v\) Coombridge [1976] 2 NZLR 381 (CA) and \(R v\) Williams [1985] 1 NZLR 294 (that it must be shown that the accused acted deliberately and with knowledge that she was in breach of his/her legal obligations), would a person with a claim of right always lack the required fault element? See, eg, ss222 and 224 which make no reference to “colour of right”. Alternatively, the Coombridge definition of fraudulently recognises the exculpatory effect of an honest claim of right, without restricting it to ignorance or mistake “of any matter of law other than the enactment against which the offence is alleged to have been committed.” Arguably, there is a two-tired approach to claims of right: (1) within the statutory definition of “colour of right”; and (2) within the meaning of fraudulently.
The following section will critically examine some of the theories offered for resolving the problem of when mistake of law ought to negative mens rea.

5 STRATEGIES FOR DETERMINING WHEN MISTAKE WILL NEGATIVE MENS REA

On occasion, a mistake as to the law will negative the mens rea required for an offence, as evidenced by those decisions that recognise mistake of civil law or require a statutory provision to be read as importing an element of knowledge of illegality. Moreover, legislative recognition of a statutory defence of colour or claim of right to a number of property-related offences further indicates that the ignorantia juris rule is not as watertight as at first glance. However the boundaries of this concessionary category are unclear, the overriding difficulty being that, although we know a line must be drawn, we do not know where, exactly, to draw it. It is all very well to say that mistake of law may negative the mens rea element of the offence, but what is really needed is a method for deciding in which cases mens rea is required to go to the legal elements and not just the factual elements of the offence. Although recognition of a defence of mistake of civil law and the like go part of the way, the currently recognised "exceptions" to the general exclusionary rule do not provide a comprehensive test. In this section, a number or recent attempts by commentators to draw a workable distinction between those situations where mistake of law will negative mens rea and those where it will not, will be critically examined.

Some theories are really no more than a recognition of the distinction between mistake of criminal and mistake of civil law, albeit by other names. Dressler distinguishes between "same law" mistakes which hardly ever provide a defence, and "different law" mistakes which can provide a defence.\(^{325}\) A "same law" mistake occurs when the defendant alleges a mistake regarding the criminal law under which he or she is being prosecuted. A "different law" mistake, on the other hand, is one where the defendant may concede

\(^{325}\) *Understanding Criminal Law* (1987) 144.
knowledge and understanding of the criminal law for which he or she is being prosecuted, but instead asserts a mistake about a different, usually civil law. Dressler’s approach assumes that we can successfully draw a distinction between “same laws” and “different laws” and that we can individuate laws. But this may not always be the case. For example, is the law of property different from the law of theft or criminal damage, or the law of dissolution of marriage separable from the law of bigamy? The distinction may, arguably, be collapsed. The offence of receiving for example, is a creation of the criminal law and ostensibly, therefore, a mistake that one has “received” goods appears to be a “same law” mistake. Yet, the definition of receiving requires that the property be “stolen” which refers to the law of theft, which in turn provides a defence of colour of right. Is that a “same law” mistake, a “different law” mistake, or a combination of both?

This attempted distinction adds little, therefore, to the more generally accepted criminal/civil law distinction, and fails to solve the real issue of when mens rea is required for all the elements of the offence.

Simons offers an alternative solution. He suggests that the crucial distinction is to be made between mistakes as to governing law (legal mistake/GL), and mistakes as to a legal element (legal mistake/E). So, for example, it would be no defence mistakenly to believe that it was not a crime to knowingly receive stolen property. That is a mistake as to governing law (the criminal law) and the “legality principle trumps ... [the] legal mistake.” On the other hand, a defendant who, being aware of the prohibition against receiving stolen property, received property mistakenly but honesty believing it not to be

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326 Ibid at 144, 150. Dressler explains that the first step in deciding whether a “different law” mistake negates the mens rea of a criminal offence is to determine whether the offence is one of specific or general intent, or strict liability. Dressler uses bigamy and theft as illustrations. A mistake regarding a “different law” may be a defence to a specific intent crime, and, under the Model Penal Code, a general intent crime may also provide a defence.


328 Ibid, idem.

329 Alexander, idem.

330 See Crimes Act 1961, s258.


331 Ibid at 455-456.
stolen, would have made a mistake as to a legal element of the offence which could negative the mens rea. According to Simons, these two expressions distinguish the nature of the mistake (legal or factual) from the object of the mistake (governing law or element). Yet the distinction seems to contain little to set it apart from Dressler’s same law/different law dichotomy. Simons acknowledges that “in most cases, when the criminal law under which the defendant is charged requires legal culpability as to an element, the element will refer to civil law or some other criminal law.” However, he refutes the notion of a direct parallel either between his and Dressler’s theories, or between his theory and the basic criminal law/civil law distinction. What sets Simons’ distinction apart is that “the mistake can be a matter of criminal law as well, so long as it is only a legal mistake as to an element of the crime.” Thus, “if it is a crime to possess a concealable firearm knowing that one is a felon, then a mistake about whether one is a felon may exculpate, even though it is a mistake of criminal law.”

But, while a mistake as to an element of an offence is treated like a factual mistake, and not like a mistake as to governing law, the distinction between elements and governing law is more difficult to draw than the basic distinction between fact and law. In the first place, some offences do require mens rea as to governing law. Simons notes that federal statutes that require a “wilful” violation are often interpreted to require knowledge that one is violating the governing law and not simply a subsidiary legal element of the crime. Secondly and relatedly, however, Simons concedes that the distinction between governing law mistakes and elements mistakes can be very fine. It is doubtful whether such a distinction can be maintained coherently, since it “requires that we be able to distinguish between the meaning of a criminal law and the meaning of its elements.” This difficulty

332 Ibid at 456.
333 Ibid at 459. Simons uses the offences of bigamy and theft as illustrations of which a mistake as to an element of the offence will negative mens rea.
334 Ibid at 458-459.
335 Ibid at 458.
336 Ibid at 458 and n30 accompanying text.
337 Ibid at 492.
338 Idem. See also n140 accompanying text.
339 Idem.
340 Alexander, supra n 327 at 39.
may be demonstrated by re-examining some of the cases already considered in this chapter in the context of Simon’s analysis.341

In *Labour Department v Green*,342 the appellant’s belief that he was not a “prohibited immigrant” was held to be a mistake of criminal law. While that result may be explicable on the orthodox fact/law analysis,343 it is difficult to determine whether the mistake was one of governing law or elements. In other words, in not realising that he was a prohibited immigrant, did Green make a mistake regarding an element of the offence of entering New Zealand being a prohibited immigrant, or was he mistaken as to the meaning of the offence itself? If he made a mistake of governing law that would accord with McMullin J’s conclusion that the mistake of law did not negate the mens rea of the offence. When the appellant had inquired at New Zealand House in London about restrictions on emigration, he had not revealed the fact that he had previous convictions. As a consequence, he was not specifically advised on the restrictions on immigrants with criminal records. Thus, as McMullin J expressed the issue, the appellant was no more than ignorant of the law.344 On the other hand, it could be argued that he knew there was a prohibition on the entry of certain immigrants, but simply did not know how that prohibition applied in his case. On that analysis, the appellant may have been mistaken as to an element of the offence with the result that his mistake would have negated mens rea as was the case in *Kumar v Immigration Department*345 where the appellant’s mistaken belief that he had permission to enter New Zealand was treated as a mistake of fact. Thus, just as different interpretative approaches affect the fact/law analysis, so too can they determine whether a mistake of law is treated as a mistake going to an element of the offence, or about the governing law itself.

The fragility of Simon’s analysis is further illustrated when tested against the decisions dealing with driving while disqualified and related transport offences considered earlier in this chapter.

341 See also Alexander, ibid at 39-40 for a consideration of Simons’ distinction.
342 Supra n 36 .
343 Although, when compared with *Kumar v Immigration Department* supra n 39 , where the Court of Appeal determined the appellant’s mistake was one of fact, the result is harder to justify.
344 Supra n 36 at 415.
345 Supra n 39 .
In *Breen v Police*\(^{346}\) the appellant believed that his motor car licence entitled him to drive an 80cc motorcycle. The governing law/elements distinction appears relatively simple to untangle in this case. Breen’s mistake related to the ambit of his legal entitlement to drive under a general licensing enactment. His mistake was not as to the effect of the law in the light of any special circumstances relating to his case. Therefore, it could be said that he was mistaken as to the governing law, and Williamson J was correct in concluding that mens rea went only to the factual and not the legal components of the offence.

However, the circumstances surrounding *Ministry of Transport v George*\(^{347}\) were rather more complicated. There, the defendant mistakenly believed his Australian driving licence entitled him to drive in New Zealand during the currency of that licence. The mistake was similar, therefore, to that made by the appellant in *Breen*. Yet Graham DCJ dismissed the charge against the defendant. Can that result be explained in the light of the governing law/elements analysis? To justify the dismissal of the charge, the mistake would effectively need to be one as to an element of the offence. But surely there is a strong argument that the defendant was not mistaken as to the application of the law to his particular case, but rather, merely as to his legal authority to drive in New Zealand on his Australian licence - a matter governed by the Transport (Vehicle and Driver Regulation and Licensing) Act 1986. Alternatively, the defendant was not claiming that he did not know he needed a licence to drive in New Zealand. He was mistaken as to a detail of the licensing requirements as they affected his current Australian licence. Therefore, Graham DCJ’s dismissal of the charge is perhaps explicable on the basis that the defendant made a mistake about an element of the offence, although it may be equally interpreted as an outright mistake as to governing law.

The same difficulties arise in *Ministry of Transport v Morrell*.\(^{348}\) There the defendant mistakenly believed that his limited licence entitled him to drive his brother’s car when in fact the licence allowed him to drive only his own car. However, the charge of

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\(^{346}\) Supra n 51.  
\(^{347}\) Supra n 55.  
\(^{348}\) Supra n 60.
driving otherwise than in accordance with the terms of a limited licence was dismissed. As discussed earlier, the defendant’s mistake ultimately reduced to one of law in that, being unaware of a restrictive term of the licence granted pursuant to section 38 of the Transport Act 1962, he was ignorant of the law applicable to the facts of his particular case. But the facts of this case more closely resemble an exculpatory mistake as to the elements of the offence than those in George. In Morrell the defendant was mistaken as to a particular limiting term contained in his limited licence. Thus, he was not mistaken as to the governing law and Keane DCJ was entitled to regard the defendant’s mistake as negating mens rea.

In Booth v Ministry of Transport application of the governing law/elements distinction as a device for determining liability would probably have resulted in the appellant’s conviction. The appellant’s mistake that his disqualification did not begin until his licence had been taken from him was clearly one of law. Holland J, however, concluded that if it was a mistake of law, it was not such a mistake of law as would debar a defence based on absence of mens rea. Despite that conclusion, the mistake is reminiscent of a mistake of governing law. Admittedly, the appellant did not claim that he did not believe it to be an offence to drive after being disqualified, but his mistake was nevertheless a relatively straightforward misunderstanding of the law - with no bearing on the particular facts of his case. If that analysis is correct, then there is an asymmetry between the characterisation of the mistake as one of governing law and the result generated - that the mistake negatived mens rea.

The effect of Simons’ test is to shift attention from determining whether the mistake is one of fact or law to deciding whether the mistake is one of governing law or elements, and, as he points out, that distinction can be very fine. While the author argues that legal mistakes as to elements and factual mistakes should not be treated the same, the ultimate effect of allowing a mistake as to an element to negative mens rea is inevitably the same as that achieved when a mistake is classified as one of fact. However, one important

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349 Supra n 68.
350 The same conclusions may be drawn in relation to George and Morrell if the mistakes in those cases were mistakes of governing law.
351 Supra n at 497-498.
qualification to Simons’ argument that legal mistakes as to elements may negative mens rea ought not to be overlooked. Whereas any mistake of fact can normally negative mens rea, he argues that only reasonable mistakes as to legal elements will negative mens rea.\footnote{352} This is because the requirement of reasonableness is easier to administer in cases of mistake of law since the mistakes are more likely to fall into predictable patterns, whereas mistakes of fact tend to be situation-specific, often revealing either unique external circumstances or the actor’s own perceptual and judgmental inadequacies and distortions.\footnote{353} Additionally, Simons argues that actors who make legal mistakes are not suffering from inattention, perceptual weakness or gullibility, so that it is often easier for such people to avoid error, and accordingly fairer to expect reasonable conduct from them.\footnote{354}

Although the requirement that the mistake must be reasonable is a valid precautionary measure, to require an investigation in each case as to whether the mistake is about governing law or elements unnecessarily complicates matters. An assessment of whether the mistake is reasonable ought surely to be enough in itself: a straightforward mistake as to governing law will usually be unreasonable anyway. Simons’ analysis requires that we categorise or pigeon-hole mistakes in yet another, and perhaps no more satisfactory way. As the orthodox fact/law distinction demonstrates, adherence to rigid categorisation can achieve unfair results which bear little resemblance to the normative question of whether the defendant acted in a way that was blameworthy and deserving of punishment.

Alexander is similarly critical of the governing law/elements approach propounded by Simons. He argues that Simons’ approach, like the fact/law approach, “requires that lines be drawn, though this time between two types of mistakes of law rather than between mistakes of law and mistakes of fact.”\footnote{355} Alexander’s concern is that because that line does not track any divide between defendants who are culpable and dangerous and defendants who are not, like the line between law and fact, it will be impossible to draw in any nonarbitrary way.\footnote{356}
Colvin, while not going so far as to propound a definitive theory for distinguishing between mistakes of law that negate mens rea from those that do not, suggests that, by reference to case law, a factor which can bear heavily upon the outcome is the generality of the mistake.\footnote{357} Thus, “the exclusionary rule appears to be applied more often where there has been a mistake about a matter of general law than where the mistake has concerned the application of general law to a specific situation.”\footnote{358}

This theory, like Simons’ governing law/elements analysis, may be tested against decided cases to determine its workability. Again, Breen serves as a useful point of reference. There, the appellant made a non-exculpatory mistake about the ambit of the general law: he believed that his motor car licence entitled him to drive an 80cc motorcycle when it did not. Beyond that point, however, the general/particular analysis suggested by Colvin suffers from the same lack of certainty as Simons’ governing law/elements analysis. For example, did the defendant in George make a mistake about the general law, or about the application of that general law to his specific situation? The defendant mistakenly believed he was entitled to drive in New Zealand during the currency of his Australian licence. Arguably, he was simply mistaken about the ambit of the general law and therefore, ought to have been in no better position than the appellant in Breen. As already discussed, however, there is room for argument the other way in that George was mistaken as to a particular detail of the New Zealand licensing requirements as they affected his Australian licence. A stronger argument that the defendant made a mistake about the application of the general law to his particular situation is available in Morrell. The defendant knew that he required a limited licence, which was granted, but was mistaken about the specific requirements set out in the licence.

While the general/particular distinction may have relevance in a number of cases, it is doubtful that it could be adopted as a universal approach. Indeed, Colvin notes that it is only one of the factors underlying the variable application of the ignorantia juris rule.\footnote{359} Rather than searching for a rigid classification for determining the relevance of mistake of

\footnotesize{\textsuperscript{357} Colvin, Principles of Criminal Law (1986) 129. \textsuperscript{358} Idem. \textsuperscript{359} Ibid at 133. See also at 132 for examples that suggest the distinction is not watertight.}
law to mens rea, we should focus more attention on establishing a general rule which can take account of the blameworthiness of the accused. The theories put forward in this section tend to ignore the significance of the moral culpability of the accused and, like the orthodox fact/law analysis would lead to unfair results.
VII CONCLUSIONS

The rule that ignorance or mistake as to the law is no excuse for any offence committed by an accused is firmly entrenched in our criminal law. Yet judicial decisions dealing with claims of mistake of law demonstrate that the rule can sometimes be arbitrary and operate unfairly against the accused.

In this final chapter I will review the jurisprudential and practical problems raised by the exclusionary rule. Following this summary, I will consider alternative ways in which we could deal with the difficulties currently created by rigid adherence to the mistake of law rule, beginning with an examination of the experience of legal systems outside the common law sphere. Finally, I will offer a fresh approach for a defence of mistake of law in New Zealand.

1 SUMMARY OF FINDINGS

Mistakes affecting criminal liability can occur in different ways and for different reasons. The criminal law has developed strategies that reflect the differences in the nature and object of mistakes. Generally the law divides mistakes into two broad categories: mistake of fact and mistake of law. While mistake of fact is regarded as a means of negating the mental element of an offence, mistake of law, subject to very few exceptions, is no answer to an accusation of criminal conduct. Arguably, however, the person who has made a mistake about the law may be no more nor less morally blameworthy than the person who has made a mistake of fact.

Historically, the rule that ignorance or mistake as to the law is no excuse has been justified by appeal to fiction, morality and utilitarianism. The assertion made by Hale and Blackstone that every person of age and sound mind is presumed to know the law\(^1\) is, for the greater part, a patent fiction in the legislative climate of the late twentieth century. Admittedly, it may be reasonable to presume that we “know” those laws that reflect moral

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\(^1\) See chapter III at 16.
as well as legal wrongs such as homicide, robbery, theft, assault, rape and so forth. But at the other end of the scale of offending it is hardly realistic to suppose that we all "know" the ever increasing number of quasi-criminal or regulatory offences.

The fiction has a certain utility in that the conclusive presumption that everyone knows the law is intended to escape the assumed moral principle that it is unjust to impose criminal liability on an individual who does not know that law. The presumption is, therefore, an "apologetic or merciful" fiction in that it apologises for the necessity in which the law finds itself of attributing to people legal consequences which they could not even remotely have anticipated. Thus, the fiction is simply another "way of obscuring the unpleasant truth that this [knowledge of the law] cannot be the case." Since then nineteenth century there has been a growing awareness that it is unrealistic to rationalise the mistake of law rule as a conclusive presumption of knowledge of the law. Yet, the rationales which have supplanted that presumption are themselves based on unsound reasoning.

Austin's argument is based on the utilitarian reasoning that claims of ignorance or mistake of law would be impossible to disprove. But it is insufficient to attempt to justify the rule by appeal to purely pragmatic considerations. That is no answer to the spectre of morally blameless individuals who must carry the stigma of a criminal record. Moreover, problems of proof have not disinclined courts from investigating claims of mistake of fact.

Holmes' claim that to admit an excuse would encourage ignorance is equally unsatisfactory. Realistically, the situation may arise where a person has done all that he or she can to reasonably conform to the law. Even a utilitarian approach might admit a defence where an accused can establish that all reasonable steps were taken to ensure conformity with the law. If the criminal sanction is to be used as an educative device, it should at least not be at the expense of the blameless accused who has made every effort to

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2 See Chapter III at 17. Fuller, Legal Fictions (1967) 84.
3 Idem.
4 See chapter III at 19.
5 See chapter III at 22.
learn the law.

Hall's contention that to allow mistake of law to excuse would conflict with the principle of legality because the individual's claim as to his or her perception of the law would effectively become the law is also doubtful. When a court decides to excuse an accused, that person's version of what he or she believed the law to be is not elevated to the position of law itself. Rather, on that particular occasion and having assessed the claim of that particular accused the court is simply convinced by the explanation advanced to excuse the criminal conduct.

None of these justifications traditionally used to support the mistake of law rule adequately confronts the conclusion that, in some cases, the individual is simply not to blame for the mistake. No account is taken of principles of fairness to the accused. These justifications fail to establish that it is wrong to be mistaken about the law. If the mistake of law rule is to retain any semblance of credibility, it needs to be justified on some ground other than that it is wrong not to know the law.

One alternative basis of justification may be found in the argument that, as members of society, we are necessarily subject to restrictions imposed by laws. We owe a duty to the community to ensure that we know or acquaint ourselves with these laws. Thus, as members of society we have what may be called "duties of citizenship" which include taking reasonable steps to acquaint ourselves with the law. However, this cannot be an absolute justification. It is necessarily qualified in the sense that, although citizens are under a duty to learn the law, there is a correlative duty on the state to ensure that the laws it has imposed are capable of being ascertained. The "social contract" therefore imposes rights and duties upon both the individual and the state. One consequence of this formulation is that the individual cannot be expected to fulfil the duty to know the law unless the state also satisfies its side of the bargain by ensuring that the law is knowable. The situations considered in chapters IV and V illustrate the reciprocity of this relationship.

The cases in chapter IV, dealing with laws that are unpublished, inaccessible or otherwise unknowable, raise the issue of fairness in circumstances where an individual is

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6 See chapter III at 25.
unavoidably ignorant as to the law. In this context the term “fairness” expresses both a requirement of individual justice and a general concern for fair play in imposing the criminal sanction. At the level of individual fairness, the common law recognises a defence of impossibility of compliance where an accused does not have a reasonable opportunity to comply with a known law. The accused’s unavoidable failure to comply operates as a negation of responsibility for violating the law. The same issue effectively arises where it is impossible to know the law. The standard example of a law that is “impossible” to know occurs in the case of non-publication. Thus, if the state has failed to perform its part in the social contract, then the individual cannot be expected to comply with his or her duty to know the law.

A number of jurisdictions have either enacted legislation or currently have draft proposals under consideration, to provide a defence where the individual has breached an unpublished law. Clause 26(3) of the Crimes Bill 1989 recommends the inclusion of a defence of non-publication of delegated legislation. Yet, these measures may not go far enough. While instances of non-publication may be the standard example of non-culpable ignorance of the law, it is arguable that other forms of ignorance also come within the ambit of what may reasonably be excused. In some circumstances even a law that is published may nevertheless be inaccessible or unavailable to the accused. In situations where the law is published shortly before the violation and the defendant has the opportunity to know the law, or where the accused is a foreigner to the jurisdiction, and claims that the conduct was not an offence in his or her home jurisdiction courts have understandably been unwilling to recognise exceptions to the mistake of law rule. But where, for example, the accused can establish that the law was completely beyond his or her means of knowledge, the compelling conclusion is that the accused’s ignorance of the law was unavoidable and therefore excusable. With some exceptions, the case law again illustrates a reluctance to excuse under these circumstances also. Moreover, there have been no legislative initiatives to redress the unfairness created by a rigid adherence to the exclusionary rule in these situations.

8 See, eg, Tifaga v Department of Labour [1980] 2 NZLR 235.
9 See chapter IV.
10 See chapter IV.
11 See chapter IV.
At the furthest edge of the avoidable/unavoidable span are cases such as Police v Harkness\textsuperscript{12} where the law, although published and also accessible to the accused in the strict physical sense, is nevertheless unknowable in that the prohibition is so obscure that no-one could reasonably be expected to know of it. Normally, publication is adequate to fix people with knowledge where laws reflect standards of conventional morality. The legal system thus operates on the “presumption that a person either is informed about the law because the matter is sufficiently well-known, or that he is prompted to inform himself when the activity at hand is notoriously of the sort that falls within the general concerns of the law.”\textsuperscript{13} But, as the facts of Harkness suggest, not all prohibited conduct falls within these boundaries. In those circumstances where there is no reason for the individual to suppose that his or her conduct is in breach of the law, publication may be an insufficient justification on which to base conviction. Arguably, if nothing about the prohibited conduct or restricted activity would prompt inquiry then the individual ought to be excused because he or she has been denied a fair opportunity to conform his or her conduct to the law. Again, however, neither case law nor legislative proposals have advocated excusing accused in these circumstances.\textsuperscript{14}

Whereas chapter IV dealt with the issue of fairness in circumstances where an accused is unavoidably ignorant of the law, chapter V considered the related concept of officially induced error. In this instance the paradigm example is where the state although making the law known, induces the accused into error of law by reliance on an authoritative statement by one of its officials. The issue also arises in situations where the individual relies on the advice of a lawyer, a decision of a court which is later overruled, or on an ambiguous statutory provision.\textsuperscript{15} As in the previous chapter, the relationship between the private citizen and the state is pivotal to the recognition of a defence. Where an accused has made a positive effort to ascertain the law, but has been misinformed by the state, it is unfair to punish the accused when the state has failed to perform its part in the social contract by ensuring that the correct law is made known. The focus is placed upon whether the accused could fairly and reasonably be expected to have been more conscientious or dutiful. Political decency demands that when the state chooses to advise

\begin{itemize}
  \item \textsuperscript{12} (1983) 2 DCR 198.
  \item \textsuperscript{13} Gross, A Theory of Criminal Justice (1979) 274.
  \item \textsuperscript{14} But see Lambert v California (1957) 355 US 225.
  \item \textsuperscript{15} For the reasons outlined at the conclusion of chapter V it is doubtful whether reliance on a lawyer or on an ambiguous statutory provision should excuse
\end{itemize}
its citizens about the law it should do so accurately.

Legislative and judicial recognition of officially induced error as a defence varies. The Model Penal Code has formulated a defence which has been adopted in a number of states. The Law Reform Commission of Canada has recommended the inclusion of a defence within its Criminal Code, and a number of judicial decisions have indicated that, given the appropriate circumstances, officially induced error would be accepted as a defence to the violation of a criminal prohibition. Whereas the Crimes Bill 1989 does not propose such a defence, there is some indication from the courts that officially induced error may have a place in our law.16

While the mistakes considered in chapters IV and V bore the characteristics of an excuse, the mistakes examined in chapter VI entailed an analytically different claim. These mistakes do not depend upon the presence of an excuse external to the elements of the offence, but rather on the absence of a fault element prescribed for the offence. In the sense that these mistakes negate the mens rea or fault elements required to prove the offence, they would seem to fall outside the exclusionary rule in section 25 of the Crimes Act which prevents mistake of law from excusing criminal conduct. However, the mistake of law rule is often applied broadly to exclude any defence of mistake irrespective of whether it operates as an excuse or a denial. But notwithstanding this judicial insensitivity to the excuse/denial distinction, there has been recognition of a number of overlapping areas where mistake of law may negate mens rea. Thus, mistakes of civil law have been said to fall outside the general exclusionary rule, as have, albeit very occasionally, offences requiring proof of a specific mental element such as knowledge or wilfulness. Similarly, there has been statutory recognition of the defence of colour or claim of right, primarily relating to mistakes of private or civil law within the area of property offences. In addition, there are also other heterodox cases such as Booth v Ministry of Transport17 where Holland J described the mistake of law as one which did not preclude a defence, and Ministry of Transport v George18 and Ministry of Transport v Morrell19 where the courts, either consciously or unconsciously, avoided determining

16 Eg Department of Internal Affairs v Nicholls, unreported, 20 May, Bradford DCJ; Tipple v Police, unreported, HC, Christchurch, AP 199/93, 3 December 1993, Holland J.
18 [1990] DCR 49.
19 (1987) 3 DCR 569.
whether the mistakes were founded in fact or law.

The result of the acceptance of these ad hoc "exceptions" is to leave the law in a somewhat fragmented state. Yet the theories for solving the uncertainties which have been suggested by Dressler, Simons and Colvin bring us no closer to isolating a discrete test for determining when mistake of law will negative a fault element. Legislative proposals in the United Kingdom and Australia, as well as the Model Penal Code suggest a defence be made available where the mistake negatives a "fault element" of the offence. Again however, the effect of these proposals is limited by the fact that knowledge of the law defining an offence is not generally regarded as an element of the offence. Thus, since awareness of whether or not conduct constitutes an offence is not itself a material element, mistake of law will only exculpate where the circumstance made material by the definition of the offence is a legal element.

In summary, the main objection to the mistake of law rule is that it indiscriminately excludes any chance of a defence irrespective of the moral blameworthiness of the accused. While New Zealand courts have generally been content to apply the rule as embodied in section 25 of the Crimes Act, there is a growing number of cases in which accused have been exculpated - essentially because of making a mistake as to the law. Explicitly or implicitly, some courts have been prepared to circumvent section 25, apparently proceeding on the unarticulated assumption that the accused was not to blame for a mistake of law.

Rather than relying on judicial conscience to avoid the harsh results consequent on an unbending adherence to the exclusionary rule, we ought to look for ways to develop a statutory defence of mistake of law to correct the imbalances of the present system. While clause 26 of the Crimes Bill goes some way towards redressing the current problems, it does not go far enough.

2 ALTERNATIVES TO THE EXCLUSIONARY RULE

A comparison of the orthodox common law approach with civil law jurisdictions reveals significant doctrinal differences towards the exculpatory relevance of mistake of
law. Fletcher is critical of the over-specificity of the Anglo-American approach, which has a tendency to identify narrow categories of excusatory mistakes of law by way of exception to the general exclusionary rule. The common law approach currently offers no general solution, but channels its energies into categorising mistakes in a variety of different ways. This predilection for categorisation diverts attention away from the crucial issue of whether or not it is a mistake for which the accused should be blamed and punished accordingly.

A number of jurisdictions outside the common law sphere have discarded the rule that ignorance or mistake as to the law is no excuse. The German law relating to mistake provides a useful counterbalance to the common law strict exclusionary rule. Other jurisdictions which have enacted similar defences to that in Germany include Switzerland, Austria, Poland, Costa Rica, Korea and Japan.

German law recognises a general defence of mistake premised on a normative theory of culpability. The genesis of the defence provides a stark contrast to the persistent adherence to the exclusionary rule at common law. While the rule that ignorance or mistake as to the law is no excuse was historically regarded as the general rule in German legal theory, by the beginning of the twentieth century there was a well established distinction between mistakes as to criminal law on the one hand, and mistakes of civil and other non-criminal laws on the other. The latter mistakes were regarded as negating the intention required to establish the offence. However that distinction caused difficulties in that the courts found it impossible to draw lines between mistakes of criminal law and mistakes of other types of law, and also between factual and legal mistakes. In that respect, there is a correlation between German and common law experience. However, while the common law jurisdictions continued to struggle with these problematic classifications, German law began to develop measures designed to simplify the process of

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21 Ryu & Silving, “Comment on Error Juris” (1976) 24 Am J Comp Law 689 discuss the law relating to mistake in a number of non-common law jurisdictions. See also Artz, “Ignorance or Mistake of Law” (1976) 24 Am J Comp Law 646. See also Andenaes, Essays in Criminal Science 217 for a survey of the Scandinavian law on mistake.
22 Fletcher, supra n 20 at 755.
23 Artz, supra n 21 at 647, notes that this was the case when the German Penal Code of 1871 was enacted. Section 59 of that code provided a defence of mistake of fact but was silent on the issue of mistake of law.
24 Artz, ibid at 648.
deciding when to excuse accused who were mistaken as to the law. The first step was taken by the German courts in the early decades of the twentieth century. In response to the increasing number of social or public welfare offences, - which ordinary citizens could not reasonably be supposed to know - the courts took the step of limiting the mistake rule to traditional criminal offences.\(^\text{25}\) Thus, quasi-criminal public welfare offences fell outside the scope of the exclusionary rule. By contrast, though the common law jurisdictions experienced a similar increase in public welfare offences, they dealt with mistakes of law in relation to those offences in a wholly different manner. While the German system recognised that the increase in quasi-criminal offences would mean a corresponding increase in the incidence of non-culpable mistakes of law in relation to those offences, the common law reaction was to impose absolute liability so as to “exclude not only mistake of law but even mistake of fact as a defence.”\(^\text{26}\) Although more recent developments in the field of strict liability in New Zealand and other common law jurisdictions have shown judicial acceptance of a no-fault defence in respect of a defendant’s claim of honest and reasonable mistake of fact, the resolve to exclude mistake of law remained as strong as ever.

Notwithstanding the steps taken by the German courts to restrict the mistake of law rule to traditional criminal offences, German theorists were not content with a halfway house solution. They propounded a theory of culpability\(^\text{27}\) based on a normative assessment of the defendant’s wrongful conduct. Thus, whether the mistake was about traditional criminal law or public welfare law was irrelevant except insofar as that may, in itself, have had a bearing on blameworthiness. Rather, the theory of culpability distinguished between acting intentionally and acting culpably. Fletcher explains the theory as proceeding from the basis that there is no conceptual difficulty in finding an actor guilty of committing an offence intentionally, even though he or she is ignorant of the wrongful nature of the conduct.\(^\text{28}\) Not all mistakes should excuse wrongful conduct, but only those that were free from fault.\(^\text{29}\) The standard for determining whether the mistake was free from culpability was whether it was “invincible” or “unavoidable” - not so much in the physical sense (although that could be the case in a situation of an unpublished or inaccessible law) -

\(^{25}\) Artz, ibid at 650.
\(^{26}\) Artz, ibid at 651.
\(^{27}\) Fletcher, supra n 20 at 743.
\(^{28}\) Idem.
\(^{29}\) Idem.
but rather, whether in the circumstances the defendant ought to have been more careful before embarking on the conduct that turned out to be illegal. The theory further advocated that while negligent mistakes could not preclude liability per se, they could affect the gravity of the punishment.

The theory of culpability was accepted and applied by the German Supreme Court in 1952 in what has been described as a "path-breaking decision." The court recognised a defence of mistake of law in relation to the traditional criminal offence of extortion, thus departing from the previously held rule that a defence was available only in relation to public welfare offences. The Supreme Court concluded that in order to be liable and therefore to incur punishment, the actor must be blameworthy: Punishment presupposes guilt. Guilt is blameworthiness. In the negative value judgment of guilt the actor is being blamed for not having conducted himself in accordance with law, for having decided to do wrong although he could have conducted himself in accordance with law or decided in favour of the law. The ground upon which the guilt censure is based lies in the fact that man has the disposition towards free, responsible, ethical self-determination and is, therefore, able to decide in favour of the law (right) and against the wrong. A pre-requisite of man's free, responsible, ethical self-determination in favour of the law and against the wrong is knowledge of right and wrong... In some cases even a person who possesses mental capacity may possess no consciousness of wrongdoing, because he is ignorant or misconceives the prohibition of the law. In such a case (also) the actor is not in a position to decide against the wrong.

The actor's acquittal or conviction would turn upon the absence or presence of guilt in not acquiring the necessary knowledge of the law. Thus, "the actor must be acquitted if, notwithstanding proper exertion of conscience, he did not realize the wrongfulness of his conduct." If an actor fell short of this test, "he must be convicted according to the degree to which he failed to exert, as required under the circumstances, his conscience."
The theory of culpability and the 1952 decision of the Supreme Court provided the basis for a mistake defence in the new Criminal Code which replaced the distinction between mistake of fact and mistake of law with a new distinction.\textsuperscript{38} In the first place "standard mistake" (Tatbestandsirrtum)\textsuperscript{39} operates as a defence by excluding intention where the actor is mistaken regarding an element of the definition of the offence. Thus, while this will most often occur when the mistake is as to a factual element, it will also encompass mistakes as to matters of civil law and so forth. Secondly, mistake of law (Verbotsirrtum), while not excluding intent, is regarded as a separate defence.\textsuperscript{40} Section 17 of the Code provides a defence "[i]f in the commission of the [criminal] act, the actor fails to perceive that he is doing wrong and if he could not have avoided this mistake ..." If these requirements are satisfied, the actor is said to lack culpability. If the actor could have avoided the mistake ie if the actor was negligent, his or her punishment may be mitigated.\textsuperscript{41}

Despite this doctrinal change, in practice there has been a strong tendency for the courts to return, within the technical framework of the new doctrine, to the old fact/law distinction, even though this was previously almost impossible to maintain.\textsuperscript{42} Thus, while the new law "may have banished the old categories of fact and law, the ancien regime... reigns from the grave."\textsuperscript{43} The German solution, like the common law approach, is therefore not free from difficulties. It seems that whatever approach is adopted, practical problems will arise.

While there are important differences between German and New Zealand criminal law\textsuperscript{44} the essence of the German mistake defence (despite the problems in practice)

\begin{enumerate}
\item \textsuperscript{37} Idem. See also at 452-458 for an examination of decisions following that of 1952.
\item \textsuperscript{38} See St GB SS 16, 17.
\item \textsuperscript{39} See Artz "The Problem of Mistake of Law" (1986) BYUL Rev 711 at 714. Section 16 St GB.
\item \textsuperscript{40} Artz, idem.
\item \textsuperscript{41} See s 49(1).
\item \textsuperscript{42} Artz, supra n 21 at 662-666 discusses cases in which this trend has been apparent.
\item \textsuperscript{43} Fletcher, supra n 20 at 753. Artz, ibid at 662 notes that the new defence has had less impact than anticipated since "the archetypal error iuris defense - simple failure to know the prohibition - hardly occurs at all in traditional criminal law." Although the defence has also been applied infrequently in practice in relation to public welfare offences, it does arise with respect to reliance on erroneous official advice and reliance on legal provisions of another jurisdiction. See Artz, ibid at 671 ff.
\item \textsuperscript{44} Eg. Artz, supra n 39 at 714 notes that "[i]n German criminal law the concept of strict liability has become extinct... crimes of negligence... are, in theory, the exception." (s 15). If New Zealand law
\end{enumerate}
nevertheless supplies the basis for argument in favour of a similar defence of mistake of law in New Zealand. The German model demonstrates that it is possible to provide a mistake defence, the success of which is determined by the defendant’s moral or normative culpability in any given case. On this approach, the type of mistake made by the defendant, which is a primary consideration under the present common law practice of classifying mistakes, becomes secondary to the issue of whether or not the mistake was unavoidable in the circumstances. The type of mistake made is relevant insofar as it may have a bearing on the fault or blameworthiness to be attributed to the defendant but does not itself decide the issue whether or not there is any defence available.

Yet we must consider whether a defence such as that provided at German law could practicably fit within our existing system. While the German defence may seem to be commendable in locating liability in fault, there would arguably be insurmountable historical, doctrinal and practical difficulties in enacting such a model in New Zealand. Firstly, New Zealand would have to enact any proposal similar to the German defence against a very different legislative and judicial history. The civil law and the common law derive from quite different sources. In Romano-Germanic jurisdictions legal science has developed on the basis of the Roman *ius civile* and “the rules of law are conceived as rules of conduct intimately linked to ideas of justice and morality.”45 By contrast, the common law “was formed primarily by judges who had to resolve specific disputes...” with the result that the “common law legal rule is one which seeks to provide the solution to a trial rather than to formulate a general rule of conduct for the future.”46 As a consequence, common law is much less abstract than the characteristic rule of the civil law.47

There are also fundamental doctrinal differences between the common law and civil law traditions. The common law is instrumentalist in its approach.48 Under the influence of analytical positivism it determines responsibility rather more formally than civilian jurisdictions. Whereas civil law systems tend to incorporate a normative concept of blame into the assessment of liability - as illustrated by the 1952 decision of the German Supreme

46 Idem.
47 Idem.
48 Fletcher, supra n 20 at 755.
Court - at common law criminal liability is more an analytical equation requiring proof of actus reus plus mens rea, if required. For the most part, fault or mens rea concepts such as intention, recklessness and knowledge are interpreted and applied descriptively rather than normatively. Normative considerations of blameworthiness are not integrated into the minimum conditions of liability as they are in the civil law tradition which proceeds from a general concept of blame and then develops normative criteria for excusing conduct in prima facie breach of the criminal law. For present purposes, the point of contrast is that courts in Anglo-American jurisdictions typically approach the rule about mistake of law as a general exclusionary proposition that forecloses any broader normative appraisal of the blameworthiness of ignorance or mistake.

Quite apart from these historical and doctrinal differences, there are further practical difficulties in adopting the normative approach represented by the German model. To begin with, any proposal for a general mistake of law defence would plainly require an exception in respect of the most serious offences such as the prohibitions on culpable homicide, robbery, theft, sexual violation and so on. Whatever else may be said against the traditional justifications deployed in support of the mistake of law rule, we cannot deny the force of the argument that we are presumed to know the central prohibitions which coincide with fundamental moral dictates. The exclusion of such offences then begs the question whether other kinds of offences should also be segregated from a general excuse of mistake of law. If an equivalence is drawn in terms of penalty between the central criminal prohibitions, which correspond with standards of critical morality, and prohibitions that reflect prevailing conventional morality, then the list of exceptions expands to exclude, for example, fraud, drug offences, environmental offences and offences related to public safety and welfare. Since any list of exclusions is also likely to be cautiously overdrawn, the point could quickly be reached where the whole of any new excuse of mistake would be rather less than the sum of all its exceptions.49

There is also an important systemic matter to be taken into account in assessing any proposal for an excuse of mistake of law, whether by way of a general defence or a more specific exception to the current exclusionary rule. Mistakes of law are most conspicuous in the area of regulatory or “quasi-criminal” offences. Under the categorisation of offences adopted in New Zealand there is already a defence of absence of fault to regulatory offences

49 Artz, supra n 21 at 662.
of strict liability. Subject to proof on the balance of probabilities, this defence is available where a person made an honest and reasonable mistake of fact which, if true, would have rendered the act innocent, or where that person took all reasonable care to avoid the occurrence of the prohibited act or omission. It could be seen as consistent with that defence to recognise a broader basis of exculpation for “faultless” mistakes of law, as, for example, an excuse of officially induced error of law or even a wider catchment of mistake of law.

Accepting that for the moment, it would then seem anomalous to recognise the excusatory effect of mistake of law for offences of strict liability without doing the same for mens rea offences which often attract higher maximum penalties. One solution would be to apply any new defence of mistake of law to both mens rea and strict liability offences in categories one and two of Mackenzie/Millar. This could be achieved without disturbing the different theoretical bases underlying mistake of fact as a “defence” to mens rea and strict liability offences. In category one mens rea offences mistake of fact operates internally as a denial of an element of liability. It functions as a logical negation of an element of the offence and clearly does not entail any reversal of the normal burden of proof. Since mistake negatives the mens rea of the offence, and mens rea is conventionally a subjective concept, it follows that the mistake itself is to be assessed on a purely subjective basis. Thus it will be enough that the defendant made an “honest” mistake, without any separate substantive requirement that the mistake was also “reasonable.”

But by contrast, mistake of fact in strict liability offences in category two functions as an excuse external to the elements of liability. Since the predicate of the general defence in category two is the absence of fault, any mistake of fact must be tested by the objective standard of reasonableness. Thus the question is whether the mistake was honest and reasonable.

51 Eg, Tipple v Police supra n 9; R v MacDougall (1982) 142 DLR (3d) 216; R v Cancoil Thermal Corp v Parkinson (1986) 27 CCC (3d) 295.
52 In Tipple, idem, Holland J was critical of the approach taken in Cancoil, where the Ontario Court of Appeal observed that a defence of officially induced error of law should only be available in respect of category two public welfare offences. Rather, Holland J questions why a defence should not also be available to category one mens rea offences.
53 Supra n 59.
54 Although the reasonableness of the mistake will act as an index of honesty and credibility. See, eg, Millar supra n 50 at 673 per McMullin J.
Any defence of mistake of law to mens rea or strict liability offences would have the characteristics of an excuse as opposed to a denial of an element of liability. In terms of the excuse/denial distinction, mistake of law would therefore operate quite independently of mistake of fact in category one offences of mens rea. Whereas mistake of fact exculpates where it is “honest”, mistake of law would provide an excuse where it is “honest and reasonable.” In relation to category two offences of strict liability, mistake of law would be symmetrical with the existing excuse of mistake of fact: in each case the test would be whether the mistake was “honest and reasonable.” The issue of the reversal of the burden of proof of mistakes of law in category one will be considered below.

In summary, the question reduces to whether a general or qualified excuse of mistake of law would actually be achievable in the historical and doctrinal context of the common law tradition and against the matrix of existing law. Realistically, any proposal to introduce a general excuse of mistake of law is unlikely to be attainable, at least in the foreseeable future. In the following section I will therefore focus on a strategy that is both achievable and desirable.

3 A SUGGESTED STRATEGY FOR NEW ZEALAND

Short of a radical doctrinal reversal, the most realistic prospect for change is the provision of an excuse of mistake of law to accommodate specific and recurrent problems. The basis for change lies in enlarging the modest and mainly declaratory proposals set out in the Crimes Bill 1989 and the Report of the Crimes Consultative Committee 1991. What I envisage as achievable in New Zealand also goes beyond the recent recommendations made by the United Kingdom and Australia, and most closely approximates to the formulation approved by the American Law Institute’s Model Penal Code.55

The following discussion will focus on a number of issues. Firstly, I will consider the best way for New Zealand to go about introducing specific exceptions to the exclusionary rule as embodied in section 25 of the Crimes Act 1961. This will include an examination of what sorts of mistakes ought reasonably to be excusable, as well as the

implications for the incidence of the burden of proof that follow from acceptance of the excusatory effect of such mistakes. I will then consider whether there are any further strategies which could be adopted by the legislature to ensure wider recognition of a mistake of law defence. In that respect I suggest a prospective legislative agenda that is more receptive to the excusatory effect of mistake of law.


In chapters IV and V certain provisional conclusions were reached in respect of the need for the law to recognise mistake as a defence in the areas of non-publication, inaccessibility and officially induced error. An initial procedural issue which arises in relation to providing defences in these situations is one of the appropriate burden and standard of proof. The issue of reversing the burden of proof has been considered in some detail in several prominent Canadian decisions as well as by a number of commentators. It is worth considering the arguments for and against reversing the burden, since the issues raised in the Canadian context also have relevance in New Zealand.

Proponents of the view that the prosecution should be required to disprove beyond reasonable doubt a defence of mistake of law base their claim on section 11(d) of the Canadian Charter of Rights and Freedoms. Section 11(d) provides that any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. In *R v Oakes* the majority of the Supreme Court of Canada held that a statutory reverse onus provision under the Narcotic Control Act which required the accused to disprove on the balance of probabilities the existence of a presumed fact which was an important element of the offence in question violated the presumption of innocence in section 11(d). By analogy, Ward argues that the interpretation of section 11(d) in *Oakes* "strongly supports the argument that it should be for the prosecution to negative the defence of [mistake of law]

56 (1986) 26 DLR (4d) 200 (SCC).
57 See also *R v Vaillancourt* (1987) 39 CCC (3d) 118 where a majority of the Supreme Court of Canada held that any provision creating an offence which permitted the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element, infringes ss 7 and 11(d) of the Charter. See Tuck-Jackson, "The Defence of Due Diligence and the Presumption of Innocence", (1990-91) 33 Crim L Q 11 at 35.
The Supreme Court of Canada has recently had occasion to re-examine section 11(d) in relation to the defence of “due diligence” as it applies to strict liability offences. In *R v Wholesale Travel Group Inc*59 the accused corporation was charged with several counts of false or misleading advertising contrary to the Competition Act, the relevant provisions of which created a statutory due diligence defence. The Supreme Court of Canada allowed the Crown’s appeal against the accused’s acquittal by a majority of five to four. Three of the majority (Iacobucci, Gonthier and Stevenson JJ) held that while the requirement to prove absence of fault did infringe the presumption of innocence it was nevertheless a “reasonable limit” under section 1 of the Charter.60 The other two majority judges (Cory and L’Heureux-Dube JJ) held that the requirement to prove absence of fault did not infringe the presumption of innocence, but that if it had it would not have been justified under section 1.61 The majority gave a number of reasons for concluding that the reverse onus provision should stand. These included the distinction between regulatory offences and true crimes, and the difficulty the prosecution would have in affirmatively proving the defendant’s negligence when the relevant facts would be within the knowledge only of the defendant.62

In New Zealand section 25(c) of the Bill of Rights Act enacts a provision similar to section 11(d) of the Charter. Section 25(c) provides that everyone who is charged with an offence has the right to be presumed innocent until proved guilty according to the law. To reverse the burden of proof in relation to a defence of mistake of law may be contrary to section 25(c), and therefore amenable to challenge as in *Oakes.*63 However, it has been suggested that many statutory reverse onus provisions “will abridge the right to be

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58 Ward, “Officially Induced Error of Law” (1988) 52 Sask L Rev 89 at 113. Tuck-Jackson ibid at 38, suggests two streams of thought are emerging from the Supreme Court of Canada pertaining to the scope of the presumption of innocence in s 11(d). One is that the Crown must prove only the essential elements of the offence, whereas the second is that the Crown prove the essential elements and must disprove any affirmative defence put in issue by the defendant.

59 (1991) 84 DLR (4d) 161.

60 Section 1 provides that “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

61 The minority held that s 11(d) was contravened and was not justified under s 1.

62 For a summary, see *Adams*, ch 10.16.11.

63 Note however, the constitutional differences between the Canadian Charter and the New Zealand Bill of Rights Act. Where as the Charter is a constitutional document, the Bill of Rights is “an ordinary (unentrenched) statute: *Adams*, ibid at ch 10.16.04.
presumed innocent in a manner which is reasonable and demonstrably justified in a free and
democratic society” under section 5 of the Bill of Rights Act, which is the equivalent of
section 1 of the Canadian Charter. Thus, an approach similar to that taken by the
majority in Wholesale Travel Group Inc could be adopted. In R v Phillips the
Court of Appeal held that a statutory reverse onus provision was not contrary to section
25(c). In that case the appellant claimed that the provision was contrary to the presumption
of innocence and was therefore also contrary to section 6 of the Bill of Rights. The Court
of Appeal concluded, however, that section 6 was of no application unless the enactment in
question could be given a meaning consistent with the rights and freedoms contained in the
Bill of Rights.

Notwithstanding the presumption of innocence affirmed in section 25(c), there are
several reasons why it seems more appropriate to require the defendant to bear the burden
of proof in relation to a mistake of law defence. First, it is appropriate that the defendant
bear the burden of proving inaccessibility or officially induced error since the relevant facts
relating to the defence will be particularly within the knowledge of the defendant rather than
the prosecution. In this sense, a defence of mistake is the same as a defence of absence
of fault in relation to strict liability regulatory offences. In neither situation is the
prosecution in a position to affirmatively prove that the defendant did know the correct law,
or that the defendant was at fault. It has been argued that to place the legal burden on
the defendant by drawing an analogy between officially induced error and the absence of
fault defence is “strained and contentious.” Thus, “it is far from clear why, simply
because the matter is particularly within the knowledge of the defendant, she should be
deprived of the benefit of the doubt.” In other situations in which the defendant’s

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64 Adams, ibid at ch 10.16.05. See Ministry of Transport v Noort [1992] 3 NZLR 260 (CA) for a
discussion of section 5.
65 Supra n 59.
66 See Adams, ibid at ch 10.16.06 for a discussion of the potential application of s 25(c).
67 [1991] 3 NZLR 175.
68 See R v Wholesale Travel Group Inc, supra n 59. In the interests of consistency, it is further
suggested that in cases of non-publication the burden should also be reversed. While the prosecution
ought, arguably, prove actual publication, it would unnecessarily complicate matters to have variable
defences available depending on the type of mistake pleaded.
69 See R v Sault Ste Marie (1978) 85 DLR (3d) 161 (SCC); Civil Aviation Department v
70 Ward, supra n 58 at 113.
71 Ibid at 113-114.
knowledge is crucial, the courts show no lack of confidence in the ability of the trier of fact to reach a correct decision - for example, where mens rea is in issue. These arguments fail, however, to take into account the realities of placing the burden on the prosecution of proving that the defendant was aware of the correct law. In particular, the appeal to principle must be balanced against the comparative advantage to be gained in terms of effort and resources in not placing the burden on the prosecution. Though not conclusive in itself, this utilitarian argument cannot be discounted as a relevant matter in determining the question of proof in offences daily before the courts.

Stuart argues in favour of limiting the scope of reverse onus provisions. According to him, the defence of absence of fault was a special compromise to create a defence for offences which had previously been regarded as absolute liability. He argues that Sault St Marie wrongly shifted the persuasive onus of proof to the accused, and that we ought not to repeat the error in a different context. Yet, this criticism surely yields the answer: if the absence of fault defence provides a defence where none had previously existed, it is a wholly reasonable compromise if, now having a defence, the defendant must nevertheless bear the burden of proof. To quote from the joint judgment of Cooke P and Richardson J in Millar v Ministry of Transport, “[t]he compromise solution [is] a way of softening the rigours of [the absolute liability] doctrine, in the interests of fairness to defendants, without unduly handicapping prosecutions brought to protect the interests of the public.”

The reverse onus provision could be included as a separate sub-section in a mistake of law defence provision, in much the same way as section 2.04(4) of the Model Penal Code. Adapting that provision to the terminology of the Crimes Bill, it could be required:

For the purposes of subsections - of this section the burden of proving that a person is not criminally responsible for an offence shall be on that person.

If it can be accepted that the burden of proof in respect of an honest mistake ought to be placed on the defendant, the next issue is to define the substantive limits of the proposed excusatory exceptions to section 25 of the Crimes Act.

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72 Ibid at 114.
73 Stuart, Canadian Criminal Law 296.
74 Supra n 69.
(i) **Unknown and Unknowable Laws**

In chapter IV I argued that in cases of non-publication, inaccessibility and other situations of general unknowability, a defence of mistake of law ought to be available provided the defendant could prove he or she honestly believed on reasonable grounds that the conduct was not contrary to the law.

In relation to non-publication, clause 26(3) of the Crimes Bill 1989 recommends the inclusion of a defence where the instrument had not been published or otherwise reasonably made known to the public or persons likely to be affected by it, and the person did not know of the instrument. As discussed in chapter IV, the reference to the term “instrument” is problematic. The Crimes Consultative Committee 1991 recommended the term be replaced by “regulations” as defined in section 2 of the Regulations (Disallowance) Act 1989. However, as also discussed in chapter IV, that definition does not entirely clarify the status of sub-delegated provisions, local authority by-laws, departmental guidelines and the like, although section 2(f) which includes as regulations “instruments deemed by any Act to be regulations for the purposes of... this Act” may avoid difficulty in some cases. The Canadian proposal recommends a defence where the accused was ignorant of any unpublished “law.” While this would afford a defence where a statute, for some unforeseen reason, had not been published, it is again questionable whether it would apply to departmental guidelines and so forth. The Model Penal Code provides a broad defence where the “statute or other enactment” has not been published.

By combining these various options, and by removing the reference in clause 26 to an instrument “made under the authority of any Act”, New Zealand could provide an inclusive defence where the “statute, regulation or other instrument” had not been published.

Presumably clause 26(3) would cover cases of failure to publish such as *Lim Chin Aik v R*76 where the prohibition order was made solely against the appellant and had not been published or otherwise made known to him. It would also provide a defence in cases such as *Johnson v Sargant & Sons*,77 *R v Ross*78 *Re Michelin Tires*,79 and *R v*

Catholique\textsuperscript{80} where there was no way for the defendants to learn of the unpublished laws. However, there is little argument that in such situations the defendant is entitled to be excused. The testing cases arise where the law has actually been published but is nevertheless unknowable for some reason other than the fact of non-publication. Neither the Crimes Bill nor the law reform proposals of the other jurisdictions provide a defence of unavailability. However, the terminology of clause 26(3) does indicate the possibility of a wider approach in its reference to laws not “reasonably made known [or available] to the public or to those persons likely to be affected.” Although at the present the requirement of making the laws available is intended to come into operation only in the event of non-publication, a defence could be provided where the statute, regulation or other instrument, although published, is nevertheless unavailable for some excusable reason. The existing clause 26(3) could be extended to cover these situations as follows:

Subject to a subsection - of this section, a person is not criminally responsible for any offence against any statute, regulation or other instrument if, at the time of the act or omission, -

(a) The statute, regulation or other instrument had not been published or otherwise reasonably made known to the public or persons likely to be affected by it, and the person did not know of the statute, regulation or other instrument; or

(b) The statute, regulation or other instrument was not reasonably available to any person or persons likely to be affected by it, and the person did not know of the statute, regulation or other instrument.

The defence would be subject to the general reverse onus clause discussed earlier. The accused would be required to prove the defence. Paragraph (a) preserves the existing wording of clause 26(3)(a) and (b), simply compacting the requirements into one paragraph although expanding the defence to cover statutes and regulations as well as instruments. On the other hand, paragraph (b) extends the defence to cover situations such as those in \textit{R v Bailey},\textsuperscript{81} and the hypothetical case of the hunter who has no means of communication with the outside world. Thus, if recently enacted legislation was physically inaccessible or

\begin{itemize}
\item \textsuperscript{77} [1918] 1 KB 101.
\item \textsuperscript{78} [1945] 3 DLR 574.
\item \textsuperscript{79} (1975) 15 NSR (2d) 250.
\item \textsuperscript{80} (1980) 49 CCC (2d) 65.
\item \textsuperscript{81} (1800) 5 QBD 444.
\end{itemize}
unavailable to the defendant, a defence would be available if the defendant can prove the reasonableness of his or her ignorance in the circumstances.

Paragraph (b) would also provide a defence in situations where, rather than being inaccessible in a strictly physical sense, the prohibition is unavailable because it is, for example, so obscure that no one could reasonably be expected to have put his or her mind to the possibility of the conduct being prohibited. Thus, in Police v Harkness\(^\text{82}\) the rule prohibiting the defendant from being on the racetrack was so obscure as to raise the issue of whether he would have had a fair chance of being aware of the prohibition against him. So, although published, the rule was arguably still not “reasonably” knowable. Lambert v California\(^\text{83}\) raises a similar issue. Again, while not physically inaccessible, the municipal ordinance requiring Lambert to register with the Chief of Police of Los Angeles failed to put her on “fair notice”, thereby making her ignorance unavoidable.

The reference in paragraph (b) to “person or persons” covers cases such as Lim Chin Aik where the Ministerial Order was made solely to prohibit the defendant from remaining in Singapore, as well as situations such as Harkness and Lambert where the prohibition is directed at particular classes of persons.

While paragraph (b) is a significant extension of the defence currently recommended by clause 26(3) of the Crimes Bill, it would not threaten the objectivity of the law. The fear that a general defence of mistake of law would endanger the principle of legality by giving precedence to what the defendant believed is unpersuasive in this context where the mistake is excused and not justified. Moreover, punishing in circumstances where the accused had no means of access to the law serves no educative purpose. A defendant seeking to plead inaccessibility could do so only once in respect of any given law. Fears that unmeritorious claims of inaccessibility or unavailability may be accepted by the courts are unlikely to eventuate. Firstly, the defendant carries the burden of proving that the ignorance was reasonable. Secondly, decisions relating to claims of total absence of fault in respect of class two public welfare offences suggest that courts do not accept an excuse lightly. As Cooke P and Richardson J noted in Millar v Ministry of Transport, the defence of total absence of fault is a “quite narrow escape route.”\(^\text{84}\)

\(^\text{82}\) (1983) 2 DCR 198.
\(^\text{83}\) (1957) 355 US 225.
(ii) **Officially Induced Error**

In chapter V I concluded that a defence of officially induced error should be available in two situations. Where the defendant has relied on the erroneous advice of a public official, he or she ought to be excused provided that the reliance was reasonable in the circumstances. Whether the official has the actual authority to provide the advice ought not determine the success of the defendant's claim. Such a defence should be available where there was reliance on the advice of an official with apparent, though not actual, authority. The requirement that the defendant prove the reasonableness of the mistake should safeguard against unmeritorious claims.

The second situation in which a defence should be provided is where the defendant has relied on a decision of a court which is subsequently overruled. Again, subject to a requirement of reasonableness, there is no compelling reason to limit a defence to reliance on decisions of appellate courts, as has been recommended by clause 3L of the Interim Report of the Commonwealth Review Committee (Australia) and by clause 3(7)(b)(ii) of the Canadian Draft Code. Any honest belief formed in reasonable reliance on any judicial decision should be sufficient, as long as the defendant is unaware of matters which may affect his or her reliance such as a pending appeal, or contrary decisions of higher (or perhaps equal) authority. Section 2.04(3)(b) of the Model Penal Code which provides a broad defence of reasonable reliance on a judicial decision, opinion or judgment afterwards determined to be invalid or erroneous, is a more appropriate model than either the Australian or Canadian proposals. On that basis a defence of officially induced error could provide as follows:

Subject to subsection - of this section, a person is not criminally responsible for any offence resulting from reasonable reliance by that person on -

(a) A decision of a court or tribunal of New Zealand; or
(b) An interpretation of the law by an official or body having or reasonably appearing to have responsibility for the interpretation, administration or enforcement of that law.

This formulation, which is derived from section 2.04(3)(b)(ii) and (iv) of the Model Penal Code, would be subject to the general reverse onus clause discussed previously.

84 Supra n 75 at 669.
The defence of reliance on an interpretation of the law by an official would avail individuals such as the defendant in *Department of Internal Affairs v Nicholls* 85 who relied on the advice of wildlife officers that he was legally entitled to possess certain species of protected bird when in fact he was not. Similarly, the defence would also apply in the kinds of situations illustrated by the Canadian cases of *R v Maclean*, 86 *R v Moise*, 87 *R v Ross*, 88 and *R v Cancoil Thermas Corporation and Parkinson*. 89

On the other hand, several of the cases considered in chapter V would probably fall outside the defence. Since the defence would be limited to reliance on official advice, it would not apply in cases such as *Department Of Internal Affairs v The Poverty Bay Club*. 90 Again, in *Labour Department v Green*, 91 for example, it is questionable whether the defendant’s reliance was reasonable given that he failed to volunteer the important information that he had criminal convictions. Had he done so, the official at New Zealand House would have been in a better position to advise him of his true legal status. The recent decision in *Tipple v Police* 92 also illustrates the limiting effect of the requirement of reasonableness. The defendant apparently relied on the advice of the police that they would condone the sale of firearms to overseas visitors provided that the sales were carried out at the dealer’s premises with later delivery to the ship. However, counsel for the prosecution raised the issue whether, because of the defendant’s experience and expertise in relation to firearms laws, he could reasonably rely on the advice that he may well have known was clearly contrary to the law. While the judge declined to pursue this issue for lack of evidence, defendants who obtain favourable advice while either knowing or suspecting the erroneous nature of that advice can scarcely shelter behind a defence of reliance. To do so is neither honest nor reasonable.

The defence of reliance on a judicial decision would deal with cases such as *R v...
Campbell where the defendant had engaged in conduct following advice that a recent judicial decision (correct at the time) had ruled the conduct was not contrary to the law. The reliance was reasonable in the circumstances and there was no indication that the decision would be overturned.

The defence is cast broadly, covering reliance on a judicial decision of any court or tribunal of New Zealand. As discussed in chapter V, to draw the line at decisions of appellate courts can have unfair consequences. Rather, reasonable reliance on the decision of any competent court should be sufficient to establish a defence. Since judges are public officials, reliance on a judicial decision is simply a species of officially induced error. In terms of the hierarchical structure of official authority, the typical cases of officially induced error involve public officials at the lower levels as, for example, the wildlife officers in Nicholls. By extension, there seems no compelling reason to exclude public officials with formal powers of decision on regulatory tribunals or review or appeal authorities, still less District Court judges.

(b) Legislative Recognition Of Particular Or General Mistake Of Law Defences

The proposals just outlined represent a significant advance on clause 26 of the Crimes Bill, as it now stands, and are intended to protect those who fall prey to unpublished or unavailable laws or to officially induced error. The exclusionary effect of the present mistake of law rule can also be limited by the recognition of a mistake of law defence in regulatory statutes. The progressive introduction of such a defence could be achieved within the ongoing processes of amendment and revision of existing legislation and by the inclusion of provisions to that effect in new regulatory legislation. Prospectively, therefore, the very source of most of the problems concerning mistake of law - complex regulatory legislation - could itself moderate the harshness of the present general rule by the provision of standardised or particularised mistake of law defences. Such a practice is not without precedent. For example, section 44 of the Fair Trading Act 1986 affords defences of reasonable mistake and reasonable reliance on information supplied by another. If the provision of such defences reflects a degree of legislative

sensitivity to the plight of the blameless but mistaken in one particular context, there is no reason to deny the availability of an equivalent excuse to others under different regulatory regimes.

To provide a defence to mistakes such as that made in Police v Taggart, for example, would hardly undermine the regime of the Poisons Act 1960. While the defendant in that case was aware of the effects of the tablets he had procured, he was unaware that they contained a substance which was a scheduled poison. Nonetheless he was held to have made an inexcusable mistake of law despite the complicated nature of many of the scheduled substances and the fact that the schedules did not coincide with common understanding of the extent of statutory control. A statutory defence of mistake of law would at least provide an opportunity to avoid liability in cases like Taggart. The same argument may be applied to the Transport Act 1962 and related regulatory legislation in order to meet such cases as Booth v Ministry of Transport and what could appear to have been mistakes of law in Ministry of Transport v George, Ministry of Transport v Morrell and Ministry of Transport v Wiike. Since the mistakes in these cases were no more or less blameworthy than the mistake of fact in Millar v Ministry of Transport it seems arbitrary to impose a form of absolute liability in respect of the one but not the other. Where a mistake of law is arguably tainted with blame, as in Breen v Police, a statutory defence of mistake of law requiring proof that the mistake was reasonable would militate against undeserving reliance on error of law as an excuse for conduct in breach of the law.

These proposals would also seem to accord with judicial intuitions about blameworthiness in a number of recent mistake cases. Thus in Booth Holland J was not inclined to deny the exculpatory effect of a mistake of law; in both George and Morrell the mistakes (of law) were treated sub silentio as, or as if they were, mistakes of fact; and in Tipple v Police the discretion under section 19 of the Criminal Justice Act 1985 was
exercised to discharge the defendant without conviction. Explicitly or implicitly, therefore, the full rigour of the current exclusionary rule is often tempered by manipulation of the fact/law distinction or by mitigation of penalty. If the ordinariness and reasonableness of the mistake primes the judicial impulse not to blame in some cases, then the development of general or particular statutory defences applicable to all cases is justifiable on the grounds of fairness and equal treatment.

(c) Other Species Of Mistake Of Law

It remains to consider legislative proposals concerning the notion of “colour of right”, mistakes as to civil law and the rather amorphous category of mistakes that negative mens rea.

At present the Crimes Act 1961 contains a definition of “colour of right” as it applies to several offences against property. Clause 26(2) of the Crimes Bill 1989 originally proposed a provision which would replace that definition with a new notion of colour of right whereby a person would not be criminally responsible for any act or omission believed to be justified “if that belief is based on ignorance of, or mistake as to, any matter of law other than the appropriate enactment.” As discussed in chapter VI, the Crimes Consultative Committee considered that this draft definition was too broad and uncertain in its potential application. Accordingly, the Committee recommended that clause 26(2) be abandoned, preferring to include “claim of right” as an element in the definition of offences of dishonesty. Under the Committee’s definition “claim of right” would mean, in relation to any act “a belief that the act is lawful, but does not include a belief based on ignorance or mistake in respect of the enactment against which an offence is alleged to have been committed.”

The retention of the existing notion of “colour of right” or the adoption of the Crimes Consultative Committee’s concept of “claim of right” would constitute a partial exemption from criminal responsibility in respect of claims of right based on error of law. However, the exculpatory effect of the exemption would be confined to proprietary and/or

101 Supra n 91.
103 Chapter VI at 219.
possessory claims of right in relation to just a few offences against property. The exclusion of criminal responsibility would have no wider application to other mistakes as to civil or private law. That raises the question whether a general exception ought to be admitted for mistakes as to private law. Such a provision has been proposed by the Law Reform Commission of Canada in its Draft Criminal Code, clause 3(7)(a) of which provides that:

No one is liable for a crime committed by reason of mistake or ignorance of law... concerning private rights relevant to that crime.

Although the Canadian proposal is not in terms limited to "claims of right", the provision was evidently intended to be declaratory of existing law which recognises that an honest but mistaken belief in a "claim of right" negates liability for offences of theft and fraud. To that extent, it would cover much the same ground as the notion of "colour/claim of right." In addition, while recent Australian proposals include draft provisions on "claim of right", no wider exception is made for mistakes as to private law. 104

Rather than creating a general exemption in favour of mistakes as to private law, the preferable strategy may be to incorporate a provision recognising that a mistake of law - whether as to civil or criminal law - may negative the fault element of an offence. Such a provision would have two general advantages. First, so long as the mistake related to a fault element of the offence, it would be unnecessary to determine whether it was about a matter of civil law or of criminal law. Secondly, a general mistake of law exception would subsume relevant mistakes of civil law while also providing a basis of exculpation for equivalent mistakes of criminal law.

Recent law reform proposals in Australia and the United Kingdom have recommended such a general reservation to the embargo on mistakes of law. 105 Thus ignorance or mistake as to a matter of law excludes criminal responsibility not only where so provided but also where it negatives a "fault element" of the offence. 106 Similarly, the American Law Institute's Model Penal Code also provides that ignorance or mistake as to a matter of law is a "defence" if it negates the mental or fault element required to establish a "material element" of an offence. 107 However no equivalent provision appears in the

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104 Gibbs Report, Model Criminal Code. See also, the Model Penal Code which does not include a general mistake of private law exemption.
105 See ch VI at 201.
106 Idem.
Crimes Bill 1989 though it does include a clause codifying the truism that mistake as to a relevant fact or circumstance exempts the mistaken actor from criminal responsibility. While the Crimes Consultative Committee was not inclined to make any strong recommendation for or against codifying the mistake of fact proposition, it nevertheless prepared a fresh draft of the provision "[i]n the event that a version of clause 25 is favoured." Rather curiously, therefore, the Bill would affirm the mistake of fact axiom while saying nothing about its corollary that mistake of law may also negative a fault requirement.

Whether or not the mistake of fact truism remains, any revision of the Crimes Act should include a provision making it plain that a mistake of law can negate the fault element of an offence. In that respect, both the American Model Penal Code and the recent Australian Model Criminal Code discussion draft are instructive. In each case the provision about ignorance or mistake of law negating a mental or fault element appears alongside more specific grounds of exculpation based on non-publication, officially induced error or claim of right. Such a general provision could also be included in the general part on criminal responsibility in the Crimes Bill by incorporating the notion of "fault element" as defined in the United Kingdom and Australian proposals and making such consequential amendments as are necessary to the references to intention, knowledge, recklessness and negligence as currently defined in the report of the Crimes Consultative Committee.

Admittedly, any general provision to this effect will not eliminate the problem of determining whether a particular mistake of law has exculpatory effect. As several of the decisions reviewed earlier show, a mistake of law claimed to negative a fault element such as knowledge has no relevance if the offence does not require knowledge as to the matter of law in issue. Thus the significance of a mistake of law may well hinge on the fortuities of legal drafting. But even so, there are good reasons for including a general provision, as outlined above, in the Crimes Bill. In particular, as the English Law

\[107\] Ibid at 202.
\[108\] Clause 25.
\[110\] Supra n 104.
\[111\] Eg, Secretary of State for Trade and Industry v Hart [1982] 1 All ER; Grant v Borg [1982] 2 All ER 257.
Commission records in its commentary on this question, the rule that ignorance or mistake of law is no defence is an aphorism "with a good deal of power to mislead" and needs to be balanced against "the truth that a mistake of law, equally with one as to fact, can be the reason why a person is not at fault in the way prescribed for an offence."112

In the context of the Crimes Bill it would seem incongruous to codify one truth (the mistake of fact proposition) but not the other (the mistake of law proposition). Apart from stating a truth, codification of the mistake of law proposition may also reduce the inhibiting effect of the exclusionary rule now found in section 25 of the Crimes Act. At the very least, it will alert courts to be more attentive to the relationship between mistakes of law and the elements of liability in evaluating claims of denial of fault based on error of law.

I would therefore propose the inclusion of the following provision in the Crimes Bill:

Ignorance or mistake as to a matter of law does not affect criminal responsibility for any offence except-
(a) where so provided; or
(b) where it negatives a fault element of the offence.

(d) Summary Of Legislative Recommendations

Taking the last proposal as the predicate provision for ignorance or mistake of law, I recommend the substitution of the following for the present clause 26 in the Crimes Bill 1989:

26 Ignorance Or Mistake Of Law -
Subject to section 26A, ignorance or mistake as to a matter of law does not affect criminal responsibility for any offence except -
(a) where so provided; or
(b) where it negatives a fault element of the offence.

26A (1) Subject to subsection (3) of this section, a person is not criminally responsible for any offence against any statute, regulation or other instrument if, at the time of the act or

112 Law Com No 177, 1989, vol 2 at 196, para 8.32.
omission -
(a) the statute, regulation or other instrument had not
been published or otherwise reasonably made known
to the public or persons likely to be affected by it,
and the person did not know of the statute, regulation
or other instrument; or
(b) the statute, regulation or other instrument was not
reasonably available to any person or persons likely
to be affected by it, and the person did not know of
the statute, regulation or other instrument.

(2) Subject to subsection (3) of this section, a person is not
criminally responsible for any offence resulting from
reasonable reliance by that person on -
(a) a decision of a court or tribunal of New Zealand; or
(b) an interpretation of the law by an official or body
having or reasonably appearing to have responsibility
for the interpretation, administration or enforcement
of that law.

(3) For the purposes of subsections (1) and (2) of this section
the burden of proving that a person is not criminally
responsible for an offence shall be on that person.
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