IGNORANCE OR MISTAKE OF THE LAW

I. INTRODUCTION

The law's denial of a defense where the person acting illegally is either ignorant of the law or has a mistaken belief as to its requirements is deeply rooted in our legal system. Courts and legislatures have created exceptions to this general rule when the imposition of criminal liability for acts undertaken in ignorance of the law or with a mistaken belief as to its requirements seemed manifestly unjust, or where whatever justification given for the rule by the jurisdiction was in some way mitigated or negated.

1. This proposition is expressed in a Latin maxim taking several forms including "ignorantia juris non excusat" and "ignorantia juris neminem excusat." The term "ignorantia" encompasses both ignorance and mistake. See Black's Law Dictionary (4th ed. 1951) 881-82.

2. See generally Lambert v. California, 355 U.S. 225, 228 (1957); Shelvin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910). Edwin Keedy found the earliest case treating the problem of ignorantia to have been decided in 1231. Keedy, Ignorance and Mistake in the Criminal Law, 22 Harv. L. Rev. 75, 78 (1908) [hereinafter cited as Keedy]. The origins of the rule are discussed in Hall & Seligman, Mistake of Law and Mens Rea, 8 U. Chi. L. Rev. 641, 643-46 (1941) [hereinafter cited as Hall & Seligman]; Keedy, supra at 78-81; Kohler, Ignorance or Mistake of Law as a Defense in Criminal Cases, 40 Dick. L. Rev. 113, 113-14 (1935) [hereinafter cited as Kohler]; Ryu & Silving, Error Juris: A Comparative Study, 24 U. Chi. L. Rev. 421, 427-29 (1957) [hereinafter cited as Ryu & Silving].

3. Different courts have expressed different degrees of willingness to provide exceptions to this general rule. In State v. Davis, 63 Wis. 2d 75, 216 N.W.2d 31 (1974), the court allowed a mistake of law defense where a defendant relied in good faith upon the opinion of a government counsel authorized by statute to give legal advice. In Hopkins v. State, 193 Md. 489, 69 A.2d 456 (1949), on the other hand, no such defense was allowed despite the fact that the state's attorney had advised the defendant that his actions were legal. Davis might be distinguished from Hopkins in that the state's attorney in Hopkins, unlike the government counsel in Davis, was not authorized by statute to give the advice he gave.

Rollin Perkins points out that certain exceptions to the mistake of law doctrine have evolved, including reliance upon a statute later found unconstitutional or a court opinion subsequently overruled. He states that an ignorance or mistake of law defense is recognized for a specific intent crime where that specific intent is negated by the ignorance, as well as in some cases where some special mental element of the crime other than intent is negated by the ignorance. In addition to these exceptions, he suggests that reliance upon advice of counsel that a course of action is legal should often be allowed as a defense to a criminal prosecution. See R. Perkins, Criminal Law 925-35 (2d ed. 1969) [hereinafter cited as Perkins]. An earlier version of Perkin's chapter on ignorance and mistake was published as Perkins, Ignorance and Mistake in Criminal Law, 88 U. Pa. L. Rev. 35 (1939).


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Despite some attempts to rationalize and redefine the general rule in light of these exceptions and in light of developing concepts of the purpose of criminal punishment, jurists have tended to cling to the existing rule and to proffer justifications for those exceptions to its application that have developed.

The United States Court of Appeals for the District of Columbia heard arguments respecting the legitimacy of an ignorance or mistake of law defense in appeals from the convictions of the Watergate and Ellsberg burglars. The Watergate burglary involved an attempt to wiretap the office of the Chairman of the Democratic National Committee, and the Ellsberg burglary involved an attempt to secure records involving Daniel Ellsberg, the man who released the Pentagon Papers, from the office of his psychiatrist. Both operations were overseen by E. Howard Hunt, a government official with a White House office, and may ultimately have originated with the President of the United States. Basing their defenses upon the apparently lofty positions of their superiors, the actual burglars involved in the two break-ins argued that they should be excused from criminal liability because they had reasonably relied upon the apparent authority of those directing the two operations to authorize their actions.

5. See, e.g., Seney, "When Empty Terrors Overawe" — Our Criminal Law Defenses, 19 WAYNE L. REV. 1359 (1973) [hereinafter cited as Seney].

6. See notes 64 to 94 and accompanying text infra. Courts have sometimes recognized a mistake of law defense where different but analogous mistake of law defenses had previously been allowed, or in situations where the justification for not allowing a defense seemed to fail. In similar situations other courts have imposed criminal liability, simply noting the general rule denying a mistake of law defense and that the given fact situation fit no existing exception to the rule. Compare State v. Davis, 63 Wis. 2d 75, 216 N.W.2d 31 (1974), with Hopkins v. State, 193 Md. 489, 69 A.2d 456 (1949), discussed at note 3 supra.

7. United States v. Barker, 514 F.2d 208 (D.C. Cir. 1975) [hereinafter cited as Barker I] was an appeal by the actual burglars in the Watergate break-in; United States v. Barker, 546 F.2d 940 (D.C. Cir. 1976) [hereinafter cited as Barker II] was an appeal by Bernard L. Barker and Eugenio R. Martinez from convictions that resulted from their participation in the actual break-in into the office of Daniel Ellsberg's psychiatrist.

8. See generally Barker I, 514 F.2d at 217; id. at 240-41 (MacKinnon, J., dissenting); id. at 248 (Wilkey, J., dissenting); Barker II, 546 F.2d at 943-44 (Wilkey, J., concurring); id. at 958-60 (Leventhal, J., dissenting); United States v. Ehrlichman, 546 F.2d 910, 918 (D.C. Cir. 1976).

The majority opinion in Barker I indicates that the defendants sincerely but erroneously believed that the operation to bug Democratic National Headquarters was a "national security" mission, authorized by a "government intelligence agency," to examine alleged financial ties between the Democratic Party and the Castro regime. 514 F.2d at 211-12. The reasonableness of this belief is most strenuously argued in Judge MacKinnon's dissent, id. at 240-41, 244, and is concisely stated by Judge Wilkey in his dissent. The actual burglars were mere "foot soldiers" taking no part in planning the break-in, and were only vaguely informed as to its purpose. Their willing participation in the operation under these conditions was derived primarily from their faith in E. Howard Hunt, a man they knew to be revered in Miami's Cuban-American community for his active participation in the fight to liberate Cuba, and a man who carried high White House and CIA credentials. The defendants had had long experience with the CIA and on secret anti-Castro missions. This background had...
taught them the importance of complete reliance on, and obedience to, their supervisor in clandestine activities. Considering Hunt’s background as known to the defendants, as well as their own involvement in intelligence activities, the defendants had no reason to doubt Hunt’s assertion that he was part of a special intelligence unit, or to question his authority to order clandestine operations for “national security” reasons. The defendants “were accustomed to operate on a ‘need-to-know’ basis. It did not occur to them to second-guess Hunt’s decisions, let alone question his authority.”

The origins of the Ellsberg break-in are detailed in United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976). Publication of the Pentagon Papers spurred President Nixon to form a “special investigations” or “Room 16” unit within the White House to investigate the theft of the papers and to prevent similar security leaks in the future. Ehrlichman exercised general supervision over the unit, and Hunt, a former CIA agent, was made a member. The principal enterprise of this unit seemed to be the acquisition of all files and source material on Daniel Ellsberg, the man who “leaked” the Pentagon Papers. A psychological profile on Ellsberg was requested from the CIA. Because Dr. Fielding, Ellsberg’s psychiatrist, had refused to speak to FBI representatives on this subject due to the confidential nature of the doctor-patient relationship, Hunt suggested a “black bag job” to examine Dr. Fielding’s file on Ellsberg. This was approved, provided it could not be traced back to the White House, and that no one employed by the White House effect the actual entry. Thus, Hunt travelled to Miami in mid-August 1971 to enlist the aid of Barker, a man who had worked under Hunt during the Bay of Pigs invasion. At this time Barker had previously been given an unlisted White House number where he could reach Hunt, had received correspondence from Hunt written on White House stationery, and had met Hunt in the Executive Office Building. Barker agreed to help, and enlisted Felipe de Diego and Martinez, Barker having conveyed to Martinez the information Hunt gave him. At trial both Barker and Martinez testified that the failure of their alleged superior to show his credentials, their failure to receive written orders, and the sparsity of information they received about the project were all in conformity with the practices of the CIA that they had observed in their prior association with that organization. The actual break-in took place on September 2, 1971, under the direction of Hunt and G. Gordon Liddy.

Barker and Martinez were indicted along with Ehrlichman, Liddy, and de Diego on March 7, 1974, under 18 U.S.C. §241 (1970) for conspiring to violate Dr. Fielding’s fourth amendment rights. They proposed a defense of absence of mens rea due to a mistake of fact mixed with law attributable to their reasonable reliance on Hunt’s authority. This defense was rejected by the district court. On appeal the defendants refined this defense into two separate arguments: either they did not possess the specific intent required to violate §241, or their mistake of fact mixed with law resulted from their reasonable reliance on Hunt’s authority, thereby negating their mens rea. The first argument was rejected. The second, both allowing the defendants to raise a defense based upon Barker’s and Martinez’ reasonable reliance on Hunt’s authority.

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plea bargains into which the defendants had entered were binding and precluded assertion of any defense.\textsuperscript{10} Despite the majority position, one concurrence indicated that, absent the plea bargains, some such defense should be allowed,\textsuperscript{11} while two dissents provided independent justifications for allowing a defense similar to that proposed by the defendants.\textsuperscript{12} In the Ellsberg case, \textit{United States v. Barker}\textsuperscript{13} [hereinafter \textit{Barker II}], the defendants did not enter into plea bargains; nevertheless the district court held in a memorandum opinion that no such defense could be asserted.\textsuperscript{14} The defendants were ultimately convicted and sentenced to three years probation.\textsuperscript{15} The court of appeals reversed this conviction and remanded the case for a new trial.\textsuperscript{16} The court was unable to agree in a signed opinion, announcing its decision \textit{per curiam}.\textsuperscript{17} Judges Wilkey and Merhige filed concurring opinions contending that, under the facts in the instant case, the defendants should have been allowed to present a mistake or ignorance of law defense analogous to existing exceptions to the general rule denying an ignorance or mistake of law defense. Judge Wilkey believed the case analogous to situations where the defense is allowed because reliance on a government official is virtually \textit{per se} reasonable: the mistake of a government agent relying on a magistrate's approval of an invalid search warrant, and the mistake of a person summoned to aid a police officer who is acting illegally.\textsuperscript{18} Judge Merhige, on the other hand, analogized to the defense that Model Penal Code section 2.04(3)(b) allows a person acting in reasonable reliance upon an official statement of the law.\textsuperscript{19} Judge Leventhal dissented strongly, arguing that permitting any defense such as that proposed by the defendants would place the civil rights of all individuals in jeopardy.\textsuperscript{20} Thus, six opinions addressed the issue whether some defense should be allowed in the circumstances of \textit{Barker I} and \textit{Barker II}. Five concluded that

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  \item \textsuperscript{10} \textit{Id.} at 218–27.
  \item \textsuperscript{11} \textit{Id.} at 227–37 (Bazelon, J., concurring). The defense proposed by Judge Bazelon is discussed at notes 97 to 107 and accompanying text \textit{infra}.
  \item \textsuperscript{12} \textit{Id.} at 240–48 (MacKinnon, J., dissenting); \textit{id.} at 263–70 (Wilkey, J., dissenting). The defense proposed by Judge MacKinnon is discussed at notes 108 to 122 and accompanying text \textit{infra}, while that proposed by Judge Wilkey is discussed at notes 123 to 130 and accompanying text \textit{infra}. Prior to their discussions of the defense asserted by the defendants, both Judge MacKinnon and Judge Wilkey argued that the plea bargains entered into by the defendants should be set aside. \textit{Id.} at 237–40 (MacKinnon, J., dissenting); \textit{id.} at 249–63 (Wilkey, J., dissenting).
  \item \textsuperscript{13} 546 F.2d 940 (D.C. Cir. 1976).
  \item \textsuperscript{14} \textit{Barker II}, 546 F.2d at 944 (Wilkey, J., concurring); \textit{United States v. Ehrlichman}, 376 F. Supp. 29, 35 (D.D.C. 1974).
  \item \textsuperscript{15} \textit{Barker II}, 546 F.2d at 972 (Leventhal, J., dissenting).
  \item \textsuperscript{16} \textit{Id.} at 943.
  \item \textsuperscript{17} \textit{Id.} On remand to the U.S. District Court, the charges were dismissed with prejudice at the government's request. \textit{See} \textit{N.Y. Times}, Nov. 12, 1976, \textit{§ I}, at 16, col. 4.
  \item \textsuperscript{18} \textit{Barker II}, 546 F.2d at 947–48 (Wilkey, J., concurring). Judge Wilkey relied upon \textit{MODEL PENAL CODE} \S 3.07(4)(a) (Prop. Off. Draft 1962) to define the defense allowed a person responding to the summons for aid of a police officer acting illegally.
  \item \textsuperscript{19} \textit{Id.} at 955 (Merhige, J., concurring).
  \item \textsuperscript{20} \textit{Id.} at 965–66 (Leventhal, J., dissenting).
\end{itemize}
it should, but the scope and justification to be given this defense differed for each judge. Despite these differences, the analyses developed by the judges who contend that a mistake or ignorance of law defense might be allowed under these circumstances suggest they shared one concern: that a person who reasonably believed his actions were legal should not be punished for acting in what appeared to be a legal fashion. Although each judge expressed this concern by tailoring an exception to the general rule that mistake or ignorance of law does not excuse its violation, such a concern suggests a modification of the general rule rather than the creation of new exceptions to a rule to which exceptions evincing similar concerns already exist.

This Comment will suggest that a person whose ignorance of the law or whose mistaken belief as to what the law prohibits is reasonable should not be subject to criminal punishment. After defining ignorance and mistake of law it will examine the purposes generally served by criminal defenses, then discuss the justifications advanced to support not allowing a mistake or ignorance of law defense. It will conclude that the purposes for allowing defenses are fulfilled, and the justifications for denying an ignorance or mistake of law defense fail, when the ignorance or mistake of law leading to an act ordinarily criminal is reasonable. Finally, the analyses of the circuit judges in Barker I and Barker II will be examined to determine their consistency with this proposition, and in the case of Judge Leventhal’s dissent, to determine whether the proposition can withstand the criticisms he levels at the conclusions of the other judges.

II. IGNORANCE OR MISTAKE OF LAW

Any attempt to determine those circumstances under which a person accused of a crime should be allowed to assert the defense of ignorance or mistake of law faces the initial problem of determining what constitutes ignorance or mistake of law. This inquiry is complicated by a lack of analytic rigor in the case law. Courts rarely, for example, distinguish between mistake of law and ignorance of law despite the fact that mistake and ignorance are distinct concepts that may be approached differently.21 In other cases courts have blurred the distinction between ignorance or mistake of law and ignorance or mistake of fact, a blurring of crucial importance because mistakes of fact are ordinarily recognized as defenses to criminal prosecutions.22 In his dissent in Barker I, for example, Judge MacKinnon contended that the defendants had made only a mistake of fact, that fact being an erroneous conclusion that E. Howard Hunt had the authority to approve their actions.23 This blurring is not particularly surprising, for the

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21. PERKINS, supra note 3, at 919. For examples of analytical approaches distinguishing ignorance and mistake, see Keedy, supra note 2, at 90–96; Seney, supra note 5, at 1361–1402.

22. See, e.g., PERKINS, supra note 3, at 919, 939. The mistake of fact must be such that the conduct would have been legal had the facts been as the defendant believed them to be. Courts differ as to whether the mistake need be reasonable. Id. at 939–40.

distinction between law and fact is arbitrary in that every mistake of law necessarily involves a mistake of fact, that fact being the person's misperception of the state of the law at the time he committed a criminal act.

If the distinction between mistakes of law and mistakes of fact is for some reason to be maintained,\textsuperscript{24} classifying the mistake of the Watergate burglars as one of fact is improper. An error concerning Hunt's authority might have been based on one of two misconceptions. The defendants might have believed that Hunt's official position was such that he would know the law and that his character was such that he would not order them to act illegally. If this was the defendants' error it was no different from any error as to the nature of the law based upon reliance on someone who ought to know the law. While such a defense has been recognized occasionally, it has been recognized as an exception to the mistake of law rule rather than as a mistake of fact.\textsuperscript{25} If the defendants' mistake was instead a belief that Hunt could authorize, or in effect legalize, their actions, then their mistake was one relating to the law defining the scope of Hunt's authority.

Commentators have confused things further by their varying approaches to this definitional problem. Some have ignored it. Another, Jerome Hall, redefined ignorance and mistake of law to exclude certain errors ordinarily considered ignorance or mistakes of law from his conception of the term.\textsuperscript{26} Finally, at least one commentator has indicated that the only mistakes of law that cannot be excused are mistakes of criminal law.\textsuperscript{27} Each of these approaches is flawed. Ignoring the question what constitutes ignorance or mistake of law merely avoids it; Hall's redefinition of mistake and ignorance of law to avoid analytic problems not only ignores the fact that those situations defined out of mistake and ignorance of law have traditionally been placed within that category, but

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\item \textsuperscript{24} The most likely reason for wishing to maintain this distinction is the nature of the law. Since law provides the rules within which the members of a state or society are to operate, the state or society arguably has a stronger interest in discouraging ignorance or mistakes about these rules than it has in discouraging ignorance or mistakes about other facts that may lead to violation of these rules.
\item \textsuperscript{25} See G. Williams, Criminal Law — The General Part 293–304 (2d ed. 1961) [hereinafter cited as Williams]; Hall & Seligman, supra 2, at 654–83; Kohler, supra note 2, at 122. Two cases allowing a mistake of law defense where the defendant had relied upon a person in a position to know the law are State v. Davis, 63 Wis. 2d 75, 216 N.W.2d 31 (1974), discussed at notes 3 and 6 supra, and Long v. State, 44 Del. 262, 65 A.2d 489 (1949), where the defendant had remarried after consulting with and relying on counsel with respect to the legality of a prior divorce.
\item \textsuperscript{26} For an argument that many exceptions to the denial of a defense based on mistake of law are outside of the ignorantia juris doctrine, see J. Hall, General Principles of Criminal Law 389–402 (2d ed. 1960) [hereinafter cited as Hall]. Hall's discussion of ignorantia juris was previously published as Hall, Ignorance and Mistake in Criminal Law, 33 Ind. L.J. 1 (1957). Hall's analysis is treated in notes 71 to 90 and accompanying text infra.
\item \textsuperscript{27} See generally Barker I, 514 F.2d at 233–34 n.34.
\end{itemize}
also poses certain new analytic problems. Stating that only mistakes or ignorance of criminal law are not excused also seems unjustified. Mistakes of non-criminal law leading to criminal liability are infrequent. This infrequency does not appear to be because courts recognize an exception to the general rule that ignorance or mistake of law is not excusing, but because in the vast majority of instances where ignorance or mistake of non-criminal law leads to a criminal act some reason for not applying the doctrine that ignorance or mistake of law is not excusing already exists for reasons unrelated to the criminal or non-criminal nature of the law respecting which the error was made. A person who takes another's property not having made a mistake as to the property's identity, and believing that the property belongs to him rather than the other, for example, has made a mistake of property law, for he must believe that the law defining ownership of that property vests some legal interest in him. The putative thief is excused from criminal liability not because his mistake was one of non-criminal law, but because he does not have the mens rea necessary for larceny. Larceny requires a specific intent to deprive another of his property permanently, and this intent cannot be formed when the putative thief believes the property belongs to him.

This Comment does not pretend to develop some radically new definition of ignorance or mistake of law, but rather than accept any of the redefinitions of mistake or ignorance of law postulated above, this Comment will utilize a broad definition of the phrase. For its purposes, ignorance or mistake of law exists when: (1) some fact that is either not perceived by the actor or is misperceived by him is based upon a legal determination, and (2) the actor is either ignorant of or mistaken as to the requirements of this law. For our purposes a third requirement exists: (3) the act undertaken is criminal. The Barker cases exemplify this: (1) Hunt's authority was based upon law defining the scope of his authority; (2) the burglars either did not know this law or were wrong about its nature; and (3) their actions in reliance on this nonexistent authority were illegal.

III. Function Of A Defense

The justifications for allowing a defense to an offense otherwise punishable must be examined before resolving the question whether a defense should be allowed under some circumstances for ignorance or mistake of law. These justifications are closely related to the purposes for establishing a criminal punishment system. In each case three interrelated considerations arise. First, if any purpose is ordinarily fulfilled by invoking criminal

28. See notes 71 to 90 and accompanying text, infra.
29. See PERKINS, supra note 3, at 265–66.
30. Other discussions of the nature of the distinction between fact and law may be found in WILLIAMS, supra note 25, at 287; Kohler, supra note 2, at 113.
31. For an excellent discussion of the problems treated in this section, see H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968) [hereinafter cited as PACKER]. Chapters 3 to 6 (pp. 35-135) are particularly pertinent.
sanctions it must be determined whether that purpose is still fulfilled when allegedly excusing conditions arise.\textsuperscript{32} Second, if this purpose continues to be fulfilled when the allegedly excusing conditions exist, some societal interest other than those served by criminal law may still militate against imposing criminal sanctions. Finally, even if the purposes of criminal punishment are not fulfilled or other societal interests militate against punishing a person when certain excusing conditions exist, criminal punishment might still be imposed where the practical problems involved in distinguishing those who ought to be punished from those who should be exculpated are so severe that the attempt to distinguish them undermines the criminal justice system.

A. Justifications for Criminal Punishment

Justifications for the imposition of criminal liability tend to fall into one of three classes.\textsuperscript{33} The oldest of these is the retributive theory of punishment: a culpable or blameworthy individual must be punished before either society or God.\textsuperscript{34} Retribution is usually justified on one of two bases: either the criminal must expiate his "sin" through punishment, or he must suffer in order to satiate society's sense of outrage that might otherwise take more reprehensible forms.\textsuperscript{35}

With the advent of utilitarianism developed the theory that deterrence of crime is the primary justification for criminal punishment.\textsuperscript{36} The deterrent effect of imposing criminal sanctions can take one of two forms: it can deter

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  \item[32.] This would not apply where a defense, such as the exclusionary rule or alibi, bears no relationship to excusing conditions.
  \item[34.] The concept of retribution is found in the Lex Talionis of the Old Testament: "And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe." Exodus 21: 23-25 (King James ed.). Other statements of this law are found in Leviticus 24: 19-20 and Deuteronomy 19: 19-21.
  \item[35.] See Packer, supra note 31, at 37-39.
  \item[36.] Interestingly, some sense of the deterrent value of punishment may have underlain the Lex Talionis. The version of this law found in Deuteronomy, a version bearing on the problem of the false witness, stated that the perjurer should have done to him that which he had thought to have done to the person against whom he bore false witness. Deuteronomy 19: 16-19. "And those which remain shall hear, and fear, and shall henceforth commit no more any such evil among you. And thine eye shall
the convicted individual from repeating his sanctioned behavior by incarcerating or intimidating him, or it can deter others from acting in a similarly unacceptable fashion. Although deterrence had originally been thought to encourage individuals to consciously balance the harms and benefits of acting criminally, the development of more sophisticated models of human behavior led to the recognition that punishment might deter criminal behavior more successfully by inhibiting, through threats and socialization, improper behavior and immorality to the point where individuals would not even consciously consider acting in the prohibited manner.

Rehabilitation of the criminal, the third purpose advanced for imposing criminal punishment, by itself seems an inadequate justification for a system of criminal punishment separate from programs designed to benefit non-criminals. Rehabilitation is directed toward improving the individual rather than protecting the interests of society. Were this the primary purpose of criminal law no reason would exist for distinguishing criminal from civil commitment proceedings, for in each case the aim of the proceeding would be to isolate a person presently incapable of living with others in an attempt to reintegrate him into society. Whether or not such a distinction is proper, the distinction is made. Thus, to the extent that criminal as opposed to purely civil law is justified it must draw its justification from some other theory.

Accepting retribution and deterrence as justifications for having a criminal law system still leaves the problem of determining under what circumstances retribution should be exacted and in what situations punishment actually deters. One condition under which a person should be excused from criminal liability if the retributive theory is accepted is obvious: a person should not be held liable for his actions if he is not blameworthy. Since culpability is normally associated with the combination of an action and a mental state, blame does not attach when this requisite mental state is absent.

Requiring blameworthiness when deterrence is advanced as the justification for punishment is a less obvious need, for the primary limitation upon criminal sanctions under such a system would be the failure of the sanction to deter or the absence of a desire to deter certain forms of behavior. As with retribution, however, non-criminal law appears to serve this deterrent function as well as criminal law unless conviction of a crime is considered qualitatively different from a determination of civil liability, for making whole the victim at the expense of the tortfeasor certainly discourages the tortfeasor from repeating his actions. The nature and degree not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot." Id. at 20–21 (emphasis added in first sentence; in original translation in second sentence).

of injury a person sustains as a result of civil versus criminal liability does not sufficiently distinguish the two, for a severe civil judgment can be far more damaging than a light criminal penalty. The primary distinction between criminal and civil sanctions under a deterrent theory appears to be an additional factor going beyond the infliction of sanctions or the degree of those sanctions: the determination that the sanctioned person is guilty, with the societal condemnation that this determination entails. If the criminal system punishes people who are not considered guilty it not only destroys the justification for its independent existence, but also jeopardizes one of its major functions. If people feel that innocent, non-blameworthy individuals are being punished by the criminal law, the stigma attached to a finding of criminal liability will be weakened or destroyed, thereby wiping out one, if not the major, deterrent of criminal law.

With the exception of certain modern "absolute liability" offenses, blameworthiness or criminality has been found to exist when an individual

40. See Hart, The Aims of the Criminal Law, 23 LAW & CONTEMP. PROB. 401, 404-405 (1958) [hereinafter cited as Hart, Aims of the Criminal Law]. Cf. Packer, supra note 31, at 62-70 (arguing that the concept of culpability or blameworthiness places limits upon the scope of behavior that should be punished in order to deter others).

The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such regulation dispenses with the conventional requirement for criminal conduct — awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.

Thus an offense of this kind, sometimes known as a public welfare offense, requires no blameworthiness on the part of the defendant. The Court has indicated in the above excerpt a second distinguishing feature of these offenses: their purpose differs from the purpose of other crimes in that they regulate some danger for the public's benefit rather than fulfill one of the more traditional goals of criminal punishment. This difference in purpose has resulted in attempts to distinguish public welfare offenses from other crimes. See Sayre, Public Welfare Offenses, 33 COLUM. L. REV. 55 (1933). Legislation creating such offenses has been criticized as imposing criminal sanctions where criminal punishment is improper. See Hart, Aims of the Criminal Law, supra note 40, at 121-31. Perhaps because of the different justifications for public welfare offenses and other crimes, the Supreme Court has avoided finding that statutory crimes resembling traditional crimes were absolute liability offenses even where they appeared not to require any awareness of wrongdoing by their terms. In Morissette v. United States, 342 U.S. 246, 260-63 (1952), for example, the Court found that a statutory theft offense included a mental element despite the fact that the statutory definition of the crime included no such element because of the close relationship of the statutory offense to certain common law crimes.

Even when offenses lacking a mental element have been found to exist the Court has indicated that notice as to potential illegality may be required for the statute to be validly applied. See Lambert v. California, 355 U.S. 225 (1959). Cf. United States v. International Min'ls Corp., 402 U.S. 558, 563-64 (1971); United States v. Freed, 401 U.S. 601, 609 (1971) (in both cases the Court indicated that the convicted individual should not have been surprised to learn that his behavior was regulated and that he had committed an illegal act). This knowledge, if it actually should have existed, arguably justifies calling the defendant's behavior blameworthy.
acts in a proscribed fashion (*actus reus*) with a particular state of mind (*mens rea*). This state of mind has normally been defined as an intent to perform the elements of the crime rather than an intent to act illegally. Thus ignorance or a mistaken belief that an act was legal would not preclude liability unless the knowledge of illegality itself was included as one of the elements of the offense. Most crimes, however, are not defined in this fashion. The fact that crimes so defined are the exception, combined with the antiquity of the denial of an excuse for criminal acts where ignorance or mistake of law is asserted as the reason for the illegal act, suggests that lack of knowledge of the law may be irrelevant to blameworthiness.

Three responses to this suggestion can be made. Most obviously, what is relevant or irrelevant to blameworthiness may change over time. Acts once prohibited are now considered legal, and no reason exists for believing that similar changes cannot take place with regard to general concepts of blameworthiness. Such changes are attitudinal rather than analytical, and the possibility of such change should be recognized.

The absence of a defense for ignorance or mistake of law, moreover, may be an historic aberration. The concept of *mens rea* (or a culpable mental state) and the refusal to provide any excuse for a criminal act caused by mistake or ignorance of law seem to have evolved at about the same time. Significantly, the justification given for not allowing a mistake of law defense seems to have been that a man was presumed to know the law, and, in fact, had an obligation to know the law. The absurdity of this

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42. This discussion gives a simplified formulation of the concepts of *mens rea* and blameworthiness, for *mens rea* may be characterized as merely the mental state necessary for a crime. *Mens rea* and blameworthiness or culpability might be viewed as two separate characteristics, with *mens rea* being merely one of those factors whose absence might negate blameworthiness or culpability. *See generally* Packer, *supra* note 31, at 104-06; Hall & Seligman, *supra* note 2, at 641-43; Sayre, *Mens Rea*, 45 Harv. L. Rev. 974 (1932) [hereinafter cited as Sayre]. Sayre details the development of *mens rea* from an emphasis on general blameworthiness to more specific mental elements for specific crimes. *Id.* at 994-1004. He indicates, however, that various defenses developed from this general conception of blameworthiness in that “[t]he conception of moral blameworthiness or moral guilt is necessarily based upon a free mind voluntarily choosing evil rather than good; there can be no criminality in the sense of moral shortcomings if there is no freedom of choice or normality of will capable of exercising a free choice.” *Id.* at 1004. This view raises questions concerning the relationship of morals and law beyond the scope of this Comment. Compare Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958) with Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958).

43. Perhaps the most obvious change of this sort in recent times is the repeal of prohibition. *See* U.S. Const. amends. XVIII & XXI. On the other hand, behavior once legal is now considered reprehensible. *Cf.* U.S. Const. amend. XIII (prohibition of slavery).

44. *See* Sayre, *supra* note 42; texts cited at note 2 *supra*.

45. *E.g.*, 4 W. Blackstone, *Commentaries* 27 (1772): “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 defense. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law, as it was of the Roman.” *See* Hall & Seligman, *supra* note 2, at 645-46.
justification was pointed out at an early date by Judge Maule: "Everybody is presumed to know the law except His Majesty's Judges, who have a Court of Appeal set over them to put them right." Such a justification seems even more tenuous in a modern world where complex regulation permeates every level of government. At an earlier time when the law was less complex and an individual's legal obligations were more congruent with his moral and religious duties, however, the presumption that a man knew the law was more realistic. Thus, at the time the doctrine of mens rea was evolving it was probably thought unnecessary to require knowledge of legality, for if a person knowingly acted in the proscribed manner he either knew or should have known that his acts were illegal.

If this congruence between intent to fulfill the elements of an offense and knowledge of illegality actually existed, then it was reasonable to exclude from mens rea a requirement that an individual know, or should know, of the illegality of an act, and to enforce a rule preventing assertion of ignorance or mistake of law as a defense. When law becomes so complex that the congruence no longer exists, however, a recognition that mistake or ignorance of the law precludes blameworthiness is more reasonable. Finally, excepting absolute liability offenses, some mental state such as knowledge, recklessness, or negligence is required to fulfill the elements of an offense in order for the conduct to be punished as a crime. No reason seems to exist for distinguishing between the blameworthiness of fulfilling the elements of an offense and not knowing of or being mistaken as to the nature of the offense. In the absence of some justification for continuing the rule other than an historical one, the denial of a defense, at least under circumstances where a reasonable person could believe his actions legal, seems an anachronism continued through blind application of the principle of stare decisis.

46. See Williams, supra note 25, at 290. Williams also refers to Lord Mansfield's comment on this question: "[I]t would be very hard upon the profession, if the law was so certain, that everybody knew it." Jones v. Randall, 1 Cowp. 37, 40, 98 Eng. Rep. 954, 956 (1774).

47. The presumption that everyone knows the law may explain the distinction historically drawn between mistakes of law and fact. If a person were ignorant of or mistaken about some fact that made his action illegal, then it would be impossible for that person to have intended to fulfill the elements of an offense unless the fact he misperceived would have also led to illegal action. At the time mens rea was evolving legal duties may have been thought so clear and so tied to existing moral standards that it would be impossible to be mistaken as to their nature, or that any such mistake implied moral blameworthiness. If so, there would be no point in permitting an individual to raise the defense. Where the law had become so complex that a person might be unclear as to his rights and obligations, a court might be persuaded to modify or create an exception to the general rule. Since such exceptions would only arise in actual cases, however, the traditionally conservative judiciary would tend to redefine the offense so as to require a knowledge of the complex law as a prerequisite to conviction. An example of this situation might be found in the development of the crime of larceny. If property law were complex, a person who took property believing it his would not be liable for larceny because of his ignorance that the law actually vested the property's possession in another.

48. Whether the people who were the actual Watergate and Ellsberg burglars were acting in a context where a reasonable person might conclude his actions legal is not
B. Freedom of Choice

Under most conditions the failure to hold someone criminally liable can be explained by showing that that person was not blameworthy. In some cases, however, persons are not held criminally liable even where it seems that public morality has clearly been outraged by behavior that would popularly be considered blameworthy. Unless the failure to punish these persons is considered an aberration of the criminal justice system, the definition of crimes and existence of defenses for blameworthy persons must be the product of policies or purposes outside the general societal interest in punishing blameworthy individuals. Many such policies exist, and one that appears to underlie our theory of government is the maximization of individual freedom. This freedom consists of the ability of the individual to choose the way he will conduct his life. Although the existence of society requires that constraints be placed on the options open to the individual, this emphasis on choice indicates that a person should not be punished blindly for violating society's dictates. His capacity or opportunity to comply with these dictates should be evaluated both subjectively and objectively.

If a person is not to be punished unless he has chosen to act in a proscribed manner, he must at a minimum have the capacity to choose to act in a permitted or approved fashion. If he is mentally or physically incapable of complying with the law, then no punishment should be.

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49. See, e.g., Bazely's Case, 168 Eng. Rep. 517 (1799). See generally Packer, supra note 31, at 80-85. It is represented by the maxim "nullum crimen sine lege" (no crime without law). The argument that freedom of choice is a policy consideration independent of blameworthiness is an uncertain proposition, for freedom of choice can be viewed as a prerequisite to being morally blameworthy. See note 42 supra. Rather than delve deeply into this question, this Comment postulates a somewhat artificial distinction between these questions of blameworthiness and freedom of choice. It assumes that blameworthiness reflects the moral judgment of the community, and that in a particular case this may not be congruent with the question of whether a person had the ability to choose or not to choose to act in a certain fashion. Instead it holds up this freedom of choice as an independent factor in our form of government, limiting punishment regardless of the outrage that certain types of behavior might engender. An example of this is the prohibition against ex post facto laws. No matter how blameworthy a person might seem, no matter how morally repugnant his choice to act in a certain fashion, he will not be criminally punished if his behavior was prohibited only after he acted, for he was incapable of determining how blameworthy his actions were in the eyes of society until society prohibited that form of conduct.

50. The fourth amendment and exclusionary rules derived therefrom, as well as the defense of entrapment, for example, seem to reflect a policy that it is unfair for the government to use oppressive methods against an individual.

51. See, e.g., U. S. Const. amend. I-X, XIII-XV, XIX.

52. See generally Hart, Aims of the Criminal Law, supra note 40, at 412-13.
inflicted. Thus the insane individual who is incapable of comprehending the
impropriety of his conduct or the person who acts out of necessity or under
duress is normally excused from criminal liability. The excuse allowed a
person who performs a criminal act because of ignorance or mistaken belief
as to some fact seems to fit within this category as well, for unless an
individual perceived the fact that makes his action illegal he has not made a
choice to act in an illegal fashion.

The fact that certain behavior is blameworthy in the eyes of society does
not provide an adequate guide for people attempting to make a choice
between acting in conformity with, or in opposition to, the mores of society,
for different times and different individuals in the same time consider
different acts and mental states blameworthy. Certain forms of behavior
might be so blatantly improper that a person who considers acting in such a
fashion should be aware that his conduct is blameworthy. But because such
behavior shades into other, less improper actions, which shade into proper
conduct, predicting when such situations will occur appears to be an
impossible task.\(^5\) Thus, rather than risk punishing those who might have
chosen to conform to societal standards had those standards been defined
adequately, the state in our society chooses not to hold criminally
responsible individuals whose behavior and mental state are not proscribed
by the criminal law with some degree of clarity, even though they might
have deliberately chosen to act in a blameworthy fashion.\(^5\)

A necessary corollary to this requirement that prohibited behavior be
defined is the principle that a person must be able to discover from the law
whether his behavior is prohibited. Thus, \textit{ex post facto} laws are prohibited
because it is fundamentally unfair to prosecute a person who could not
foresee that his actions would be declared criminal in the future. Similarly,
courts have refused to impose criminal liability where it was impossible or
nearly impossible for the defendant to determine the content of the law or
ordinance supporting prosecution.\(^5\) Because the meaning of words is
inexact, it is impossible to define any crime in a fashion that definitively
states whether a particular form of behavior comes within its terms.
Consequently, courts have tended to construe criminal statutes narrowly in
order to exclude from criminal liability those who may not have been put on
sufficient notice of the criminality of their actions.\(^5\) In fact, where the
statute was so unclear that a person could not determine whether he was

\(^5\) This is not to say that a person could not be on notice as to the possibility, or
even the probability, that certain conduct is culpable in the absence of a statute. If
society's aim is to maximize individual choice, however, some objective standard must
exist against which a person can measure the probability that he will be found
culpable by society. Otherwise that person may be dissuaded from acting by the fear
that behavior he considers innocent will be condemned by others.

[hereinafter cited as Austin]; Holmes, supra note 33, at 41.

\(^5\) See Lambert v. California, 355 U.S. 225 (1957); Perkins, supra note 3, at
928–29; Hall & Seligman, supra note 2, at 654–75; Kohler, supra note 2, at 116–17.

criminally liable, common law courts tended to find a mistake of law excusing. The constitutional due process doctrine that a vague statute be held void continues this traditional judicial intercession between the individual and unclear societal dictates.

Persons generally are not punished unless they have chosen to act in a prohibited fashion. If it is this choice to act illegally that forms the basis for criminal punishment, then no reason exists for not treating ignorance or mistake of law as a factor making it impossible to choose between acting in accordance with society's determination of what is permitted and what is prohibited behavior. Allowing a defense in all circumstances where a person is ignorant of or mistaken as to the meaning of the law on the ground that such a person does not have the capacity to choose to act in accordance with the law, however, still leaves a definitional problem, for lack of capacity can mean one of two things. It can be viewed in purely subjective terms: did the alleged criminal, given his total mental state, have the ability to make a choice to act legally? Accepting this definition may create analytic problems for, as Jerome Hall points out, the ultimate meaning of the law is inherently unknowable in that it is declared only when an authorized law-declaring official speaks on a particular case. Alternatively a more objective approach can be taken. If a reasonable person given the information this individual had would not have concluded that his acts had the potential of being illegal, then that individual arguably did not have the capacity to choose to act in a lawful fashion, for the information available to him when viewed as a whole did not put him on notice of the potential of illegality. In effect this would impose a negligence standard on a person asserting a mistake or ignorance of law defense, for punishment would be justified when a reasonable person should have been put on notice that his

57. See Kohler, supra note 2, at 118. Contra, Hall & Seligman, supra note 2, at 666.

58. See generally Hall & Seligman, supra note 2, at 666-67. Although indicating that the void-for-vagueness doctrine serves a broader range of policies than simply nullifying vague statutes, one student commentator indicates that this function is served as well. Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 85-87 (1960).

59. Debate exists over whether criminal punishment should also be imposed on an individual who had the capacity to choose to act legally but failed to exercise that capacity and acted in a proscribed fashion. See generally Wasserstrom, H. L. A. Hart and the Doctrines of Mens Rea and Criminal Responsibility, 35 U. Chi. L. Rev. 92 (1967); Note, Negligence and the General Problem of Criminal Responsibility, 81 Yale L. J. 949 (1972).

60. The fact that individuals should not be punished under this analysis does not necessarily mean that they will escape punishment if some "policy reason" requires that they not be distinguished from culpable individuals. See notes 31 & 32 and accompanying text supra. Nor does it mean that they should necessarily escape all liability for their actions. Violation of a law implies some sort of harm to another or to society in general, and liability for this injury might be required in some instances to compensate for this harm. It is questionable, however, whether this liability should be criminal.

61. Hall, supra note 25, at 388. For a discussion of Hall's analysis, see notes 71 to 90 and accompanying text infra.
actions might be criminal and, although he could have done so, did not act to ascertain whether his actions were in fact criminal.  

Assuming that a person has been put on notice that a course of conduct may be criminal, his investigation may yield one of three results: it may allay the fear that the conduct is criminal; it may leave open the possibility of criminality; or it may confirm that the action is illegal. If it confirms illegality no ignorance or mistake of law defense remains available. If the person is still aware that there is a possibility his behavior may be criminal, then he is still on notice that his behavior may be criminal, and is under a continuing obligation to determine the legality of his conduct and may not raise ignorance or mistake of law as a defense. Finally, investigation may lead a person to the conclusion that his proposed action is legal, a conclusion that may or may not be reasonable. If a person reasonably, but wrongly, concludes after investigation that his action is not prohibited, then he is in the same position as the person who had no reason to believe his action was criminal and is consequently no longer on notice that his acts might be illegal. Without this notice the legality of conduct may be assumed, and thus the necessity of choosing between acting legally or illegally has been eliminated. On the other hand, if he unreasonably concludes that his action is not prohibited, he nevertheless still has information placing him on notice that his action might be illegal, but has not acted on that information. A reasonable person would have known the possibility of illegality still existed. Implicitly the capacity to choose to act legally also continued to exist, and criminal liability might be justified.

Maximizing individual freedom is a general principle underlying our theory of government; from the individual's point of view this freedom consists of an ability to make his own choices. Yet, society's need to regulate or prohibit certain forms of behavior necessarily limits this freedom. Since freedom to choose is a fundamental principle of this society, it should be reluctant to impose punishment on a person who acts either without knowing that his behavior is prohibited or who, after an investigation to determine whether what he wants to do is legal, acts in the reasonable belief that it is permitted. Either punishment should be inflicted only after it has been determined that a knowing, deliberate choice to violate the law was made, or it also can be legitimately inflicted in situations where a person has the capacity to choose to act legally, but in effect negligently fails to make this choice.

Ignorance or mistake of law is a factor that can lead either to an absence of knowledge of an act's illegality, or to reasonable ignorance or mistake as to its legality. In either situation the capacity to choose has been negated. If no other considerations require that a person who is at least reasonably ignorant or mistaken about the law be punished, a defense of some sort should be allowed.

62. Even if the law is ultimately unknowable, it is still possible to determine the likelihood of criminality to a high probability. A person would still be obligated to inquire into the legality of his actions.

63. Awareness is used in the sense that an ordinary person would not have had his fears allayed.
C. Effect on the Criminal Justice System

One additional consideration does exist. Commentators have argued that allowing a mistake or ignorance of law defense would impair the operation of a system of criminal law. An early justification for the rule disallowing the defense was offered by John Selden: "Ignorance of the law excuses no man; not that all men know the law, but because it is an excuse every man will plead, and no man can tell how to confute him."64 Austin elaborated this argument in his Lectures on Jurisprudence,65 claiming that for a court to determine whether a person was truly ignorant or mistaken as to the law would require two factual determinations: was the party ignorant of the law at the time of the alleged wrong, and, if so, was the ignorance inevitable; or were the party's circumstances such that he might have known the law had he tried? After posing these questions Austin deemed them nearly insoluble:

Whether the party was really ignorant of the law, and was so ignorant of the law that he had no surmise of its provisions, could scarcely be determined by any evidence accessible to others. And for the purpose of determining the cause of his ignorance (its reality being ascertained), it were incumbent upon the tribunal to unravel its previous history, and to search his whole life for the elements of a just solution.66

A pragmatic reply to this argument is that triers of fact continually make equally hard decisions.67 Virtually all crimes, for example, include a mens rea element requiring that the state of mind of an accused be probed to some extent. Since the state of mind of a person may be characterized as the product of his past, investigation of personal history is justified nearly every time an accused is tried. Austin argues that any inquiry into the circumstances surrounding a mistake of law would be interminable.68 He failed to recognize that equally interminable questions are successfully treated by triers of fact. Another example of this failure is Austin's distinction between mistakes of law and mistakes of fact. He states that "[t]he inquiry [into a mistake of fact] is limited to a given incident, and to the circumstances attending that incident, and is, therefore, not interminable."69 One of the circumstances attending a mistake of fact, however, is the ignorant or mistaken person's state of mind. It would seem that the same

64. J. Selden, Table Talk-Law 61 (3d ed. 1716).
65. Austin, supra note 54, at 171-77.
66. Id. at 172.
67. Holmes pointed out that parties to a case were once unable to testify. With parties able to testify he doubted whether a person's knowledge of law would be any harder to investigate than many questions treated by courts. He felt that any difficulty with problems of proof that might continue to exist could be met by throwing the burden of proving ignorance on the defendant. Holmes, supra note 33, at 41. The problem could be met by throwing only the burden of production on the defendant, for the trier of fact has the option of disbelieving the defendant's evidence. 68. See note 65 and accompanying text supra.
69. Austin, supra note 54, at 172 (note at bottom of page).
measures used by courts to limit inquiry into the state of mind of a person raising a mistake of fact defense could be applied when ignorance or mistake of law is claimed as a defense. Finally, certain crimes require that mistake of law questions be passed upon. For example, inquiry into the accused's ignorance or knowledge of property law is necessary when he asserts he believed the property he took to be his and he has not made a mistake as to the identity of the property. This inquiry has not proved to be interminable.

Austin argued that it is impossible to determine absolutely whether a person was ignorant or mistaken as to the law or whether he was negligent in his ignorance of the law. This is correct, but it is equally true that nothing can be proven to the point of certainty, and all questions are therefore necessarily interminable. The need to accept an approximation of certainty is illustrated by the standard of proof required to sustain a criminal conviction: a jury must be convinced beyond a reasonable doubt, rather than to an absolute certainty, of criminal guilt. A tribunal rarely has all the facts necessary for a perfectly just determination of a case, for some facts are never presented and others are excluded. This does not prevent courts from reaching conclusions. Austin's objections are essentially evidentiary. Instead of treating evidence of mistake or ignorance of law in the same manner as evidence of other matters equally difficult of proof, however, he argues that the defense should not be allowed. Instead of leading to his ideal "just solution," denying the defense precludes the possibility of a more just solution based upon all available evidence.

Jerome Hall's objection to allowing a defense based upon either mistake or ignorance of law is more fundamental than mere problems of proof. Hall initially posits that law is based upon what he refers to as three "principles of legality":

1. That rules of law express objective meanings;
2. That certain [authorized officials] . . . shall . . . declare what those meanings are . . .; and
3. That these, and only these interpretations are binding, i.e. only these meanings of the rules are the law.

He claims that permitting an ignorance or mistake of law defense would undermine these principles; in his opinion allowing the defense in effect substitutes the defendant's interpretation of the law for that of the judge. In turn, this substitution destroys objectivity, substitutes private for official interpretation, and renders the official interpretation meaningless in that it no longer binds individuals.

Hall's argument confuses allowing an excuse where the law has been violated with condoning the violation. Permitting a defense of mistake or ignorance does not result in subjective rules of law, for the official

70. See note 3 supra.
71. HALL, supra note 25, at 376-414.
72. Id. at 383.
interpretation of the law is not denounced or no longer applied. An exception to its application has merely been created. Nor does it elevate unauthorized declarations of the law to the level of being the law: one person's mistake cannot be asserted as an excuse for another's violation. Nor does it dilute the binding effect of interpretations by authorized officials, for in fact the conditions under which this exception could be applied would necessarily be determined by these same authorized officials. Rather, it excuses the violation in spite of its lack of congruence with the ordinarily binding, objective interpretation of the law. In like manner the violation of the community's values is excused without being condoned.

Since the moral values of the community are expressed in the law, Hall also felt ignorance of the law could not be countenanced in that it undermined maintenance of the community's objective morality. Thus, Hall's theory poses a second, related objection to allowing an ignorance or mistake of law defense: that this defense would allow an excuse for behavior condemned by the moral standards of the community as expressed in the community's laws. Whether emphasis is placed on the substitution of the defendant's belief as to the law for the actual law or this moral basis of the law, no reason exists under Hall's theory for not allowing an ignorance or mistake of law defense whenever the mistake or ignorance was such that a reasonable member of the community would not have felt his actions morally reprehensible, or at least would not have been on notice that the community would find his actions reprehensible. Judging the defendant by this objective standard would by definition neither substitute the defendant's view of the law or the defendant's morality for that of the community, for the defendant's beliefs would be judged against those of a hypothetical person by the community's standards. Even an acquittal under this standard would not condone the defendant's behavior. It would merely excuse the behavior because no reasonable member of the community could have been expected to conform with the community's standard of behavior under the same circumstances.

Hall attempts to demonstrate the propriety of denying the mistake or ignorance of law defense by arguing that the few recognized exceptions to the general rule denying the defense are not truly exceptions but are rather independent excuses. Specifically, Hall extracts two classes of cases ordinarily classified as mistake or ignorance of law exceptions and treats them as independent excuses not constituting ignorance or mistakes of law. The first class consists of cases involving "mistakes" that result from reliance on authorized authority. Where a statute is declared unconstitutional after having been previously found constitutional, or a lower court's holding upon which a person relied is overruled by a higher court, or some authorized interpretive authority is overturned, Hall argues that no ignorance or mistake problem exists because the law relied on was actually

73. Id.
74. HALL, supra note 25, at 389-92.
75. Id.
the law of that time.\textsuperscript{76} This, however, conflicts with Hall's first principle of legality, that "rules of law express objective meanings." Hall's argument postulates that the same rule of law can vary in meaning both over time\textsuperscript{77} and among interpretive authorities.\textsuperscript{78} That such conflicts exist seems incompatible with the attempt to assign an objective meaning to the law.\textsuperscript{79} In any case, only the ultimate authority for interpreting the law can assign such an "objective meaning" to the law.\textsuperscript{80} Thus reliance on mistaken authorities other than the ultimate tribunal would still seem to constitute a mistake of law.

The second class of cases that Hall defines out of the mistake of law area are those crimes in which a mistake of non-criminal law negatives \textit{mens rea}.\textsuperscript{81} He seems to argue that the moral value represented by creating such crimes is not violated by a person who was ignorant or mistaken as to the relevant non-criminal law.\textsuperscript{82} But, as Hall himself points out, a violation of non-criminal law, as well as a violation of criminal law, can indicate moral blameworthiness.\textsuperscript{83} Saying that blameworthiness is negated by this mistake or ignorance gives no means for determining what non-criminal law does not denote blameworthiness and what non-criminal (and criminal) law does.\textsuperscript{84} Hall illustrates his argument by claiming that ignorance or mistake

\textsuperscript{76} Id.


\textsuperscript{78} Compare Fisher v. United States, 500 F.2d 683 (3d Cir. 1974), \textit{aff'd}, 425 U.S. 391 (1976) (holding that tax documents held by an accountant, then transferred to the criminal defendant, then transferred to the defendant's attorney were not privileged and could be subpoenaed) \textit{with} Kasmir v. United States, 499 F.2d 444 (5th Cir. 1974), \textit{rev'd}, 425 U.S. 391 (1976) (holding that substantially identical documents were privileged and quashing a subpoena for their production).

\textsuperscript{79} \textit{See text accompanying note 72 supra.}

\textsuperscript{80} \textit{See generally} Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

Were it not true that only the ultimate authority could assign "objective" meaning to the law reversal on appeal could not take place, for the objective meaning of the law would have previously been determined.

\textsuperscript{81} \textit{HALL, supra} note 25, at 389-92.

\textsuperscript{82} \textit{See id.} at 393. Hall later speaks of certain types of crimes where knowledge of illegality is necessary for a defendant to be culpable, \textit{id.} at 395-401, but provides no real test for distinguishing such offenses from others where knowledge of illegality is not necessary for a person to be culpable.

\textsuperscript{83} \textit{See id.} at 394.

\textsuperscript{84} This argument of Hall's appears to parallel that in \textit{WILLIAMS, supra} note 25, at 304-45. Williams suggested that a "claim of right" (i.e. a belief by the defendant that he had a right to act as he did) would negate culpability. As has been stated above, Hall gives no indication of when he would allow his defense. A more rational approach than categorizing those crimes where a defense should be allowed would be to examine the evidence presented to prove ignorance or mistake of law in all cases to determine the reasonableness of any alleged error.
of property law that leads a person to believe that something is his does not conflict with the ethical principle that a person should not take another's property. However, a person who takes the property of another through ignorance or mistake of law has acted against society's determination of what belongs to him as reflected in the law. Acting in a way contrary to this determination seems to have the same potential for being culpable as shooting a person in the mistaken belief that a right existed to shoot him. Culpability is a legitimate prerequisite for inflicting criminal punishment, but if no clear line can be drawn between culpable and non-culpable civil law violations the negation of mens rea by ignorance or mistake of law should be considered an exception to the rule of ignorantia juris rather than outside it.

In addition to attempting to place these two types of exceptions outside the rule denying a defense, Hall carves a limited exception from the ignorantia juris doctrine: "As regards certain petty offenses, where normal conscience (moral attitudes) and understanding cannot be relied upon to avoid the forbidden conduct, knowledge of the law is essential to culpability; hence the doctrine of ignorantia juris should not be applied there." This exception also suffers from the weakness inherent in distinguishing law-breaking conduct which demonstrates culpability from that which does not. In effect, Hall is creating an exception to the general rule regarding ignorance and mistake of law for a class of crimes where a reasonable person would not ordinarily be placed on notice of the potential criminality of his actions. If this lack of notice negatives culpability, however, no reason seems to exist for the additional requirement that the defense be limited to "certain petty offenses." Even where the nature of the offense puts the defendant on notice of its criminal nature, allowing a defense is justifiable where a lack of notice exists for some other reason. In the Barker cases, for example, the crimes were so close to burglary that a person of normal conscience and understanding would have been on notice to avoid the proscribed behavior. The fact that Hunt was a former CIA agent, that the burglars had worked for him, that they were assured that the break-ins were related to national security, and that Hunt was apparently a public official and had an office in the White House may, however, have been enough to convince the burglars that Hunt had the authority to approve their actions. If so, then the notice of criminality they would ordinarily have had from the nature of their actions might arguably have been negated by this additional information.

85. See HALL, supra note 25, at 393-94.
86. It is also worth noting that Hall's "principles of legality" should be the same for civil and criminal law. By allowing a defense where a mistake of civil law negates mens rea, the defendant's belief as to the nature of the civil law supplants the actual law for the purposes of that criminal action as much as any mistake of criminal law. 87. HALL, supra note 25, at 404. See generally id. at 404-08.
88. See generally note 8 supra.
89. Determining whether this notice of criminality existed or was negated by other facts seems a question of fact that could be determined by a jury in the same fashion that a jury makes other determinations of fact.
Hall has attempted to narrow *ignorantia juris* by eliminating two classes ordinarily treated as exceptions to the rule by arguing that they are not truly cases of *ignorantia juris*, and by creating his own limited exception to the rule. His attempt respecting all three suffers from the same objections he raised against allowing an *ignorantia juris* defense, that law is to have an objective meaning. He also avoids the question of societal condemnation of certain types of acts by stating that the notion of culpability does not apply to two of his classes. The three classes of cases categorized by Hall as exceptions to the general rule, or outside of mistake and ignorance of law, instead establish a minimal framework for allowing a defense in the situation where no reasonable person would have been placed on notice of the potential culpability of his act, or else that notice was negated by reasonable reliance on some authority or other additional information.90

In *The Common Law*,91 Oliver Wendell Holmes suggested a more pragmatic basis for the traditional rule:

Public policy sacrifices the individual to the general good . . . . 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.92

Holmes, more than the other major commentators refusing any defense discussed above, creates a test that weighs the preservation of the criminal justice system against the interests of the individual. He concludes that the interests of society must predominate because permitting an excuse would encourage ignorance of the law. Two analytic flaws undermine the breadth of this conclusion. Holmes indicates that individual and societal interests must be balanced in determining whether a mistake or ignorance of law defense should be allowed, but gives no reason for concluding that this balance must be struck in a fashion precluding a defense. He fails to

90. Those crimes with a *mens rea* allowing a defense where the accused claims he was ignorant or mistaken as to the law irrespective of the reasonableness of the ignorance or mistake may indicate a justification for a broader defense. Hall allows a mistake of law defense to be asserted in these three classes of cases despite the fact that the law in each is ultimately no more or less "unknowable" than the law in other cases where no defense is allowed. Thus, Hall implicitly recognizes that the law may not be predicted by a rational person under some circumstances. By recognizing that a defense may exist in such circumstances Hall indicates that the weakness in Austin's argument inheres in his own argument as well. The law may be ultimately unknowable, and yet a person may still be on notice that his actions may be criminal, thereby being obligated to attempt to determine the legality of his proposed behavior before acting. When nothing indicates illegality, or the possibility of illegality is negated for a reasonable person, however, arguments that the law is ultimately unknowable do not preclude the possibility of a workable defense.

92. *Id.* at 41.
recognize, moreover, that in our society certain interests of the individual have been adopted as societal interests. Viewing these interests as societal as well as individual shifts the balance more favorably towards allowance of the defense. The societal interest in discouraging ignorance or mistake of law is largely satisfied when this ignorance or mistake is measured against an objective standard.

The danger that proscribed behavior may increase arises any time a defense is allowed, for the availability of a defense decreases the likelihood that the prohibited behavior will be punished, thereby decreasing the deterrent effect of such punishment. Certain defenses are not allowed when the dangers of certain forms of prohibited behavior are too great to tolerate. This increased danger, however, justifies only a limitation upon the circumstances in which an excuse normally allowed can be asserted rather than a general rule barring the excusing condition. Were this not so most defenses would not be allowed.

Holmes admits that an ignorance or mistake of law defense is often justifiable. This conclusion seems correct, for the person who is either ignorant or mistaken as to the law can be viewed as either not blameworthy or as having had no choice between acting in conformity with or violating the law. Both these justifications underlie a great number of defenses ordinarily permitted, and accepting Holmes' conclusion that no mistake or ignorance of law defense should be allowed appears to militate against allowing any of these defenses. This is particularly true when the defense of mistake of fact is asserted, for a person interested in avoiding punishment would be as encouraged to avoid learning facts that might indicate that his actions are illegal as he would be to avoid learning the law making his actions illegal. Mistake of fact defenses, as well as other defenses, are allowed despite this danger, and the system of criminal justice does not appear to have been damaged by allowing it. Even if the potential for such damage exists in allowing a mistake or ignorance of law defense, limiting its application in those situations where the danger seems to exist appears more rational than prohibiting its assertion under all circumstances.

A person who is on notice of his act's potential criminality has a strong disincentive to finding out his legal responsibilities, and arguably no

93. A necessity defense is not permitted for particularly heinous crimes. See Perkins, supra note 3, at 957-61.

94. In Hall & Seligman, supra note 2, at 648, the authors suggest that extending Holmes' theory to cover not only specific deterrence of the convicted individual but also deterrence of a generalized ignorance of law throughout society would justify denying a mistake or ignorance of law defense. One weakness afflicts this position: knowledge of law, or at least general impressions of what is and is not permitted by society, is built up by the accretion of decisions rather than by single cases. If a case is so attention-grabbing that most members of society are aware of its consequences, then they will be aware of the relevant behavior and its illegality. If, on the other hand, an ignorance or mistake of law defense is allowed in an ordinary case, it will not destroy the ultimate effect of this accretion of cases on the public's behavior, for the defense will not be raised in all cases, and will not be accepted in all of those cases in which it is raised. At most it will have a miniscule delaying effect on the development of public attitudes toward certain forms of behavior.
Ignorance of the Law

Defense should be allowed when this notice exists. Where no reasonable person in the same position would be on notice of possible criminal liability, however, Holmes' assertion that allowing a defense would encourage ignorance of the law is not valid. A reasonable man standard would require that a person consider all the information available to him, and that he come to the same conclusion with respect to the potential illegality in his intended actions that a rational person with this information would reach. If a rational man with access to this same information would conclude that no potential illegality existed, then ignorance of the law would be neither encouraged nor discouraged, for information indicating the need to investigate the state of the law would not exist. If notice of potential illegality did exist but an investigation was made that would satisfy a reasonable man that this potential did not truly exist, then the possibility of acting illegally has again disappeared from the person's mind, and no further investigation would appear necessary. In any case, the danger that encouraging ignorance of the law will result from allowing a defense has been defeated, for the person has already diligently investigated the state of the law.

IV. Barker I and Barker II

The judges advocating allowing a defense in Barker I and Barker II all attempted to show that a mistake based upon reasonable or actual reliance on a person in a position of apparent authority is so analogous to some existing exception to the general rule (that no defense should be allowed) that the justifications for those exceptions apply to the situations in Barker I and Barker II as well. No judge examined the justifications given for not allowing a defense and attempted to determine whether they were valid, or whether denying a defense in the Barker situations supported those justifications deemed legitimate. Even Judge Bazelon, who discussed the various justifications given for not allowing a mistake of law defense, framed the issue when a mistake of law defense should be allowed in terms of whether an exception to the general rule might be analogized to the case of the Watergate burglars. He expressly rejected a solution based upon an examination of the justifications given for not allowing a defense. In order to determine whether a defense should be allowed, however, an inquiry should have been made into whether the defense is legitimate. In the Barker cases a more detailed examination by the judges of the justifications for the exceptions to the general rule denying a defense might have led them to recognize a defense similar to that proposed in this Comment.

A. Opinions Favoring a Defense

1. Judge Bazelon's Opinion

In Barker I, after his discussion of the justifications for not allowing an ignorance or mistake of law defense, Judge Bazelon compared the reason for

96. Id. at 233.
allowing a mistake of law defense under the circumstances of that case to the justification advanced for permitting a mistake of fact defense. He distinguished mistakes of fact and law by advancing a traditional explanation that mistakes of fact are peculiar to a particular incident and often cannot be foreseen and prevented through the exercise of reasonable diligence. Without examining the validity of this position with respect to a person’s ignorance of the existence of a particular law, he contended that this distinction is weakened when “applied to reasonable mistakes in the application of legal principles to a particular factual situation.”

Judge Bazelon is correct in his initial contention that the distinction between mistakes of fact and mistakes in the application of legal principles to a particular factual situation is weak, but the new distinction this analogy implicitly creates between ignorance of law and the application of law to a particular factual situation is equally artificial. Neither reasonable ignorance of a law nor reasonable misapplication of this law in a particular situation by definition can be prevented through the exercise of reasonable diligence. Judge Bazelon’s second reason for analogizing mistakes of fact and mistakes in the application of law to a factual situation — the fact that both such mistakes are peculiar to a particular incident — creates a legitimate reason for distinguishing mistakes in applying the law from ignorance of the law only if this limitation avoids problems of proof. When a mistake of fact defense is raised, however, the jury is required to determine whether or not the defendant actually perceived the facts in the mistaken way he claims. As discussed previously, determining the defendant’s actual perception of these particular facts at the time of his illegal act is as indeterminate a question as if his error were purely some ignorance or mistake of law. Attempting to determine why the mistake of fact was made could involve exploring the mistaken person’s background in an attempt to explain why he made his mistake to the same extent as if his mistake were one of law. The only legitimate distinction between mistakes of law and fact appears to be one based upon the unique character of law rather than a distinction based upon the degree of difficulty in proving the mistake.

Using this discussion of the similarity of mistakes of fact and mistakes in the application of law to a factual situation as background, Judge Bazelon then analogized the situation of the defendants in Barker I to that of the defendants in People v. Weiss. The defendants in Weiss were asked by a man who claimed to be a detective and who produced bogus evidence of his authority to help him arrest a man he claimed was the kidnapper of the Lindbergh baby. The man was not a detective, and the good samaritans who aided him were convicted of kidnapping. On appeal the majority of the New York Court of Appeals interpreted New York’s kidnapping statute to include as an element of the offense that the defendants not believe they had the

97. Id.
98. Id. (emphasis in original).
legal authority to act as they did. Although Judge Bazelon recognized that Weiss might be distinguished as a judicial construction of a statute rather than the New York Court of Appeals' own determination of the policies and justifications for allowing a defense, he pointed out that the New York legislature's "recognition" of such a defense was a statement reflecting such policies, and was as much a legitimate source of law as any case law. Both because the Barker I defense was factually indistinguishable from that in Weiss and because it involved a situation where distinctions between fact and law were more "nice than obvious" in that the defense depended on the authority of one who could reasonably be viewed as a government agent, Judge Bazelon concluded that a defense should be allowed.

The rationale underlying a legislative enactment may well provide as legitimate a source of law as the rationale underlying a case. If the rationale is to be used as a source of law beyond the scope of the statute, however, no reason exists for artificially limiting its application to one class of cases and not extending it to another. Weiss makes no mention of any distinction

100. Id.
101. 514 F.2d at 234 (Bazelon, C. J., concurring).
102. Id. at 235. All three judges in Barker I used Weiss in an attempt to buttress their arguments. Chief Judge Bazelon used it to blur the distinction between fact and law. Id. at 234-35. Judge MacKinnon claimed that Weiss is solid authority for his argument that the mistake in Barker I was one of fact. Id. at 242-43 (MacKinnon, J., dissenting). The court in Weiss made no attempt to characterize the mistake of the defendants, who believed a bogus detective who asked them to help him arrest a person he claimed was the Lindbergh kidnapper, as a mistake of fact. Instead, it found that the mental element required by the kidnapping statute required that the defendants not believe they had authority of law to act. 276 N.Y. at 389, 12 N.E.2d at 515.

Judge Wilkey agreed that Weiss could be used as authority in this case despite the fact that the mental elements of the crimes charged in Barker I were fulfilled. 514 F.2d at 265-68. He argued that the reason for allowing the defense was that people should not be discouraged from aiding public officials. Id. at 267-68. However, no mention of this purpose was made in Weiss. If Weiss involves anything more than the interpretation of a statute, the opinion seems to reflect a feeling that the defendants might really have believed the bogus detective's story, and thus not be truly blameworthy:

No matter how doubtful the credibility of these defendants may be or how suspicious the circumstances may appear, we cannot say as matter of law [sic] that, even in so strong a case as this for the prosecution, the jury was not entitled to consider the question whether defendants in good faith believed that they were acting with authority of law.

276 N.Y. at 389-90, 12 N.E.2d at 515-16. See generally id. at 386-87, 12 N.E.2d at 515. This view seems to reflect the general approach to crimes with a "wilful" or other mental element. Perkins determined that these elements were negated where a mistake of law led to commission of a malum prohibitum offense. Perkins, supra note 3, at 780-81. In fact, this determination seems to reflect a court's opinion as to the likelihood that a person in a particular situation should have been aware that he was breaking the law. If valid, this defense should not be restricted to crimes requiring a wilful element, but should reach the jury when evidence has been advanced that a person was not on notice of the potential illegality of his actions, or that this notice had been destroyed by additional information he had received.
between different types of mistakes of law. The Weiss Court based the defense it “found” in the statute upon the defendants’ belief in his authority to act as he did.103 Although the opinion in Weiss no more discusses the reasonableness of the defendants’ beliefs than the nature of the mistake made, a more probable basis for the legislature’s, or the court’s, conclusion would be the fact that a reasonable person might well believe that a person with the indicia of public authority was requesting him to act in a lawful fashion, and the trier of fact should be allowed to consider this possibility in determining guilt or innocence. Rather than attempting to classify the mistake as one of fact, or law, or a mixed mistake of fact and law, this rationale goes to the reasonableness of the mistake, and favors extending a defense whenever the ignorance or mistake was reasonable.

Judge Bazelon limits the scope of the defense he advocates both by blurring the distinction between the mistake of law in Barker I and a mistake of fact and by limiting the application of the rationale for the result in Weiss to that case’s facts. Judge Bazelon pointed out that distinctions between law and fact may be more “‘nice than obvious,’”104 but the source of this language was a case in which the United States Supreme Court found itself compelled to draw such a line.105 If mistakes of fact and law are distinguished because of policies relating to the nature of law, as contended by Holmes,106 rather than because of problems of proof,107 then drawing this line is necessary whether or not the mistake is the application of the law to a factual situation, for the state wishes to ensure that the law will be properly applied. Rather than creating nice distinctions between mistakes of fact and law, a more pertinent inquiry with respect to the nature of mistakes of law would be the extent to which society’s interest in having the law obeyed precludes allowing a defense. Nor should Weiss be limited to its facts; the case should be examined for its underlying justification. Both these inquiries lead to an examination of the reasonableness of the mistake of law made by the defendants — a reasonableness determined by whether Hunt’s assurances were sufficient to negate the burglars’ notice that their actions might be criminal.

2. Judge MacKinnon’s Dissent

Judge MacKinnon went farther than Judge Bazelon in Barker I, arguing that “[i]t is possible to characterize appellants’ mistake as a

103. 276 N.Y. at 386-87, 12 N.E.2d at 514.
104. 514 F.2d at 235 (Bazelon, C. J., concurring).
106. See note 92 and accompanying text supra.
107. As discussed above, one factor peculiar to a mistake of fact situation is the perception of the mistaken individual. Any attempt to determine the merits of a mistake of fact defense may involve exploring the allegedly mistaken person’s background to the same extent as would be required if the mistake were one of law. See note 70 and accompanying text supra.
mistake of fact — i.e., a mistake as to the fact that all necessary authorization for their activities had been obtained." The same arguments against Judge Bazelon's attempt to analogize mixed mistakes of law and fact to mistakes of fact apply even more strongly to an attempt to classify such a mistake as one of fact.

Judge MacKinnon argued alternatively that the mistake in Barker I might fit into either of two of the several exceptions to the general rule denying a defense for a mistake of law. According to Judge MacKinnon, either the crimes for which the Watergate burglars were charged required a special intent negatived by their mistake of law, or the rule did not apply because the law respecting the situation in which the burglars found themselves was unsettled, obscure, or susceptible of more than one reasonable construction. Analogizing the situation of the Watergate burglars to either of these exceptions may have some merit, but the legitimacy of placing them within the exceptions is questionable. Barker and his cohorts were charged with seven counts: two for second degree burglary; two for endeavoring to intercept oral and wire communications; two for willful, unlawful possession of bugs and wiretaps; and one for conspiracy to commit all the above offenses. The mens rea necessary for second degree burglary or for endeavoring to intercept communications would not appear to require that the defendants know they were acting illegally, for in both cases the crime is defined in a fashion indicating that the normal requirement for mens rea — an intent to commit the criminal act irrespective of knowledge of its legality — is the only mental element required for conviction. Nor does the mental element required for

108. 514 F.2d at 241 (MacKinnon, J., dissenting).
109. The defendants were charged with
   Count 2: Burglary, consisting of entry into the DNC to steal property of another, a violation of 22 D.C. Code § 1801(b) (1973).
   Count 5: Endeavoring to intercept wire communications within the DNC, a violation of 18 U.S.C. § 2511.
   Count 7: Unlawful possession of device for intercepting wire communications, a violation of 23 D.C. Code § 543(a).
514 F.2d at 212 n.5 (majority opinion).
110. Id. at 243-44 (MacKinnon, J., dissenting).
111. See note 109 supra.
112. See 22 D.C. Code § 1801(b) (Supp. 1970) (defining second degree burglary as entry into an area "with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense"); 18 U.S.C. § 2511 (1970) (defining the crime of "endeavoring to intercept oral communications"),
conspiracy require knowledge of illegality: a criminal conspiracy may exist where there is an agreement to do an act that, unknown to the parties, is a crime.\textsuperscript{113} A stronger case can be made for contending that the \textit{mens rea} necessary to wilfully possess a wiretap device does not exist where a person believes he acted legally. Perkins, for example, has concluded that "wilfulness" can in some cases be interpreted to permit a defense based upon a misconception of the law.\textsuperscript{114} The varying interpretations that have been given "wilful," however, as well as the nature of the wiretapping offenses, make it difficult to determine whether this offense fits into this category.\textsuperscript{115}

Judge MacKinnon illustrated the second mistake of law exception he believed applicable — the obscurity and uncertainty surrounding the question when a wiretap was legal at the time of the Watergate break-in — by pointing out that the executive branch of the federal government had consistently argued that warrantless electronic surveillance in furtherance of domestic as well as foreign national security was constitutional.\textsuperscript{116} He indicated that it was only after the Watergate break-in that the Supreme Court rejected this argument.\textsuperscript{117}

Support for Judge MacKinnon's contention that the law must give sufficient notice that the allegedly criminal conduct is illegal may be found not only in the common law exception to the denial of a defense for ignorance or mistake of law where the law is unsettled, obscure, or susceptible to more than one reasonable interpretation,\textsuperscript{118} but also in constitutional due process requirements. Not only does the "void for vagueness" doctrine require that a criminal statute give sufficient notice of the behavior it prohibits,\textsuperscript{119} but the Supreme Court has held that due process even prohibits the application of court defined doctrines where insufficient notice of their application existed at the time of the alleged crime. In \textit{Marks v. United States},\textsuperscript{120} the Supreme Court held that the more stringent obscenity standard adopted by the Court could not be utilized to determine Marks' criminal liability for actions performed prior to the adoption of that test:

The Ex Post Facto Clause is a limitation upon the powers of the legislature . . . and does not of its own force apply to the judicial branch of the government . . . . But the principle on which the clause is based

\begin{footnotes}
\item\textsuperscript{113} See 514 F.2d at 266 (Wilkey, J., dissenting); WILLIAMS, supra note 25, at 678.
\item\textsuperscript{114} PERKINS, supra note 3, at 933--34.
\item\textsuperscript{115} See 514 F.2d at 266 n.70 (Wilkey, J., dissenting).
\item\textsuperscript{116} See 514 F.2d at 243, 244 (MacKinnon, J., dissenting).
\item\textsuperscript{117} See United States v. United States District Court, 407 U.S. 297 (1972). Judge MacKinnon noted that this opinion limited itself to domestic aspects of national security surveillance. 514 F.2d at 243 n.15 (MacKinnon, J., dissenting).
\item\textsuperscript{118} See, \textit{e.g.}, James v. United States, 366 U.S. 213, 221--22 (1961) (Warren, C. J., concurring) (refusal to allow a conviction under a statute where case law had placed a gloss on the statute indicating an element of the crime that was later determined not to exist).
\item\textsuperscript{119} See note 58 and accompanying text supra.
\item\textsuperscript{120} 430 U.S. 188 (1977).
\end{footnotes}
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— the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties — is fundamental to our concept of constitutional liberty. . . . As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment.121

A lack of definition of the law relating to the legality of wire-tapping should arguably lead to the same result.

Two major problems exist with developing this analogy. First, Judge MacKinnon rests his ambiguity argument upon the executive branch’s claims of authority, and reliance upon the pronouncements of executive or administrative officials has been traditionally found not to provide grounds for any defense.122 Additionally, a defense predicated upon the fact that the Supreme Court has not passed upon a particular issue cannot be unlimited, for otherwise a defense would appear to be made out every time the Supreme Court granted certiorari. Since a writ of certiorari is granted only when the Supreme Court finds some important question to decide, one might argue that by definition this means that there is an ambiguity in the law. Under Judge MacKinnon’s analysis this ambiguity would mandate a defense. This result is obviously absurd, and a defense is granted only when notice of an act’s criminality is not given by the law. Judge MacKinnon does not indicate in his analysis when this notice is not given.

Judge MacKinnon’s attempts to fit the Watergate break-in within an exception to the general rule leads to almost arbitrary line drawing between various types of “wilfulness” and between different shades of vagueness. In both instances the more important question seems to be that apparently underlying the Supreme Court’s due process concerns: whether the person was on notice of the potential that his act was criminal. One factor certainly entering into this question is whether the crime is adequately defined, a determination within the province of a judge. Other factors such as surrounding circumstances or societal attitudes as to what is ordinarily considered criminal can prevent the actor from obtaining notice as much as a lack of legal definition. The same considerations of ability to choose to act legally and fairness that militate for allowing a defense that the law does not adequately define certain criminal behavior militate equally for allowing a defense of mistake or ignorance of law due to the absence of notice of criminality whenever circumstances indicate the legitimacy of such a claim. Whether the circumstances of the Watergate break-in were sufficient to fit that case within one of the two exceptions to the mistake of law doctrine advanced by Judge MacKinnon, the policies underlying these exceptions indicate that the trier of fact should have been allowed to consider whether a reasonable person in the position of the burglars would have been ignorant of or mistaken as to the potential criminality of their actions.

121. Id. at 191-92.

3. Judge Wilkey’s Dissent in Barker I

Judge Wilkey stated in Barker I that “if [the defendants] honestly and reasonably believed the operation was lawful, their mistake of law should give them a valid defense in this context.”123 Authority for this position was found in two sources: two cases in which a defense of entrapment was allowed,124 and the analogy to the situation where a person rendered requested aid to a police officer and the aid was later found to be illegal, a situation where a defense has been allowed.125

In Cox v. Louisiana126 and Raley v. Ohio,127 government officials led the defendants to believe they were acting legally. In each case the Supreme Court stated that the government had “entrapped” the defendants, but in neither case did the Court look to the nature of the government action or the predisposition of the defendants to commit the crime — traditional elements of a federal entrapment defense.128 Instead, the Court emphasized the defendants’ right to rely on the assurances of the government officials in the circumstances surrounding each case.

Neither the defense for aiding a policeman acting illegally nor the “entrapment” defense found in Cox and Raley explicitly relies on the reasonableness of reliance on such an authority symbol. However, the reasonableness of reliance where a government official in a position to know the law assured the criminal defendant of the legality of his action provides a strong justification for the defense. When the person providing these assurances is a police officer, an official charged with the enforcement of the law, the likelihood that reliance is reasonable becomes even greater. The fact that Judge Wilkey discussed two factors as making the Watergate burglars’ mistake reasonable — Hunt’s apparent authority and the disputed legality of similar searches engaged in for national security purposes129 — strengthens the inference that the reasonableness of the defendants’ beliefs that they were not acting illegally underlay Judge Wilkey’s analogy of their situation to two other mistake of law situations where a defense is permitted.130 If the underlying justification for allowing a defense is the reasonableness of the legal error, however, the defense should be extended to all situations where the ignorance or mistake of law is reasonable.

123. Barker I, 514 F.2d at 268 (Wilkey, J., dissenting).
124. Id. at 268 n.75.
125. See id. at 267–68 & n.74.
129. 514 F.2d at 268–69 (Wilkey, J., dissenting).
130. Judge Wilkey also used People v. Weiss, 276 N.Y. 384, 12 N.E.2d 514 (1938) to buttress his argument that a defense should be allowed. See note 102 supra. For a discussion of the support Weiss gives to examining the reasonableness of a mistake of law in determining whether a defense should be allowed, see note 103 and accompanying text supra.
4. Judge Wilkey’s Concurrence in Barker II

In Barker II, Judge Wilkey formulated an *ignorantia juris* defense in similar reasonableness terms, but tied his justification more closely to the exception allowed for a police officer accused of false arrest who was acting under an invalid warrant when he made the arrest.\(^1\) He continued to analogize the situation of Barker and his compatriots to that of a person aiding a police officer whose actions are later found to be illegal,\(^2\) broadening this analogy to encompass other officials whom the state wishes obeyed.\(^3\) From these situations he derived a policy reason for allowing a defense to those involved in the actual Ellsberg break-in: under certain circumstances there is a public interest in encouraging obedience to public officials, and this interest is served by permitting a mistake of law defense where the mistake is reasonable.\(^4\)

Judge Wilkey’s emphasis on the importance of encouraging obedience to public authorities obscures the fact that encouraging too ready an obedience to authority can cause its own problems. The interest in individual obedience to government officials must be tempered by consideration of the greater degree of harm a person can inflict when cloaked in a blanket of official authority than when acting in a purely private capacity.\(^5\) Consequently, the interest in obedience seems vitiated where the official authorization appears unreasonable, for society’s interests are not furthered when the behavior sanctioned by the authority is so suspect as to appear illegal despite that sanction. At the same time, society does seem to have an interest in encouraging people to rely on official authority. This interest does not exist simply because an official is a source of authority. Rather, it exists because a person in a position of authority is more likely, within the scope of his authority, to know what behavior is legal and what is illegal. If the reasonableness of the reliance on a public official is the actual justification for allowing a mistake or ignorance of law defense based on this authority, however, no reason exists for allowing the assertion of a defense in this situation and not allowing it in any other situation where some source of information indicates that certain conduct is legal. Perhaps a public official’s statement respecting the legality of a particular course of conduct is more inherently trustworthy than reliance on most other information indicating the legality of certain behavior, but trustworthiness indicates the degree to which a reasonable person would rely on the information rather than some inherent difference in the nature of the information conveyed. No matter what factor indicates that certain conduct is legal or potentially illegal, the test should be whether, in light of this and all other available information, a reasonable person would be on notice as to the potential of illegality in his actions. This determination should be the result of a

\(^{131}\) Barker II, 546 F.2d 940, 949 (D.C. Cir. 1976) (Wilkey, J., concurring).
\(^{132}\) Id. at 948.
\(^{133}\) Id. at 948-49.
\(^{134}\) Id.
\(^{135}\) See id. at 958 (Leventhal, J., dissenting).
weighing of all information by the trier of fact, and the degree of trustworthiness inherent in some particular fact would be one of the factors considered in this weighing.

After stating his justification for a defense, Judge Wilkey proceeded to determine what conditions would support a mistake of law defense:

The trial judge can justify [an instruction not allowing a mistake of law defense] in this context only if there is no legal possibility of equating the reliance of Barker and Martinez on Hunt's apparent authority with the reliance of a police officer on a judicial warrant subsequently held invalid. 136

From the above discussion it would appear that the defense advocated by Judge Wilkey would apply whenever a person reasonably relied on information from an official indicating that certain behavior is legal. Judge Wilkey further indicated that the defendants would be required to 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." 137 He then proceeded to find that both of these conditions had been met. 138 Both facts justifying reliance and the existence of a legal theory, however, are factors going to the reasonableness of a person's belief in the legality of his actions. Either separately or in combination they might indicate a reasonable belief in the legality of one's actions. No reason exists for requiring both as a prerequisite to the existence of a defense. 139 Moreover, Judge Wilkey gave no reason for saying that these two requirements would have to be met either by Barker and Martinez or by a police officer relying upon an invalid warrant. Requiring a police officer to articulate a legal theory beyond a general belief as to the legality of his actions, for example, would virtually negate the function of the judge in issuing the warrant.

Judge Wilkey analogized the Ellsberg break-in to two mistake of law defenses, and provided a policy justification for allowing a defense in these situations. Again, the underlying rationale for the defense appears to be the reasonableness of the mistake made, a justification that would underlie a defense far broader than that advocated by Judge Wilkey.

136. Id. at 949 (Wilkey, J., concurring).
137. Id.
138. Id.
139. The requirement of a legal theory seems particularly weak, for it implies that the defendant consulted the statute or case law before acting. In fact, contacting some figure in authority would be the only action a person would ordinarily take. The existence of a reasonable legal theory might indicate that the mores of society have not yet determined whether certain conduct is prohibited. This would, however, go to the reasonableness of believing the official. It would not constitute an independent element to be shown before an excuse should be recognized.

If the legal theory were sufficiently reasonable, however, the state's failure to sufficiently define the prohibited behavior to enable a person to have the capacity to act in conformity with its dictates might provide an alternate basis for acquittal. See note 55 and accompanying text supra.
5. Judge Merhige’s Concurrence in Barker II

Judge Merhige developed his version of a defense for the Ellsberg burglars by examining first the fear that allowing a mistake of law defense would result in "universal pleas of ignorance of the law that would constantly pose confusing and, to a great extent insolvable issues of fact to juries and judges, and bog down our adjudicative system." Instead of examining the validity of these objections, Judge Merhige went on to state that exceptions to the general rule denying a mistake or ignorance of law defense "have developed in situations where its policy foundations have failed to apply with strength, and alternative policy consideration[s] strongly favor a different result." Finding such a situation embodied in section 2.04(3)(b) of the Model Penal Code, a section granting a defense to criminal prosecution where a person reasonably relied on certain classes of official statements of the law, he reformulated its language to permit a defense

if, and only if, an individual (1) 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 the parameters of legal authority.

Although Judge Merhige recognized the potential applicability of his proposed defense to the Barker II defendants, whether Barker and Martinez could fall within its scope is open to question. Judge Merhige correctly pointed out that the executive branch of the federal government is vested with primary responsibility for national security, and that decisions of its officials on the extent of their legal authority deserve some deference from

140. 546 F.2d at 954 (Merhige, J., concurring). This contention has been treated and its validity questioned in this Comment's discussions of Selden and Austin, see notes 64 to 70 and accompanying text supra, Hall see notes 71 to 90 and accompanying text supra, and Holmes, see notes 91 to 94 and accompanying text supra. In simplistic terms, it can be met by pointing out that questions of ignorance or mistake of law are no more or less indeterminate than other questions of fact faced by juries and judges, and these questions have been solved without destroying our adjudicative system. A defense should be allowed to the extent that the arguments on this point advanced in this Comment are accepted.

141. Barker II, 546 F.2d at 955 (Merhige, J., concurring).

142. A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense 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; (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 responsibility for the interpretation, administration or enforcement of the law defining the offense.


143. 546 F.2d at 955 (Merhige, J., concurring).
Despite the national security element in this case one can argue that the relevant legal field in which the official sanctioning the action taken in this case must have operated would be criminal law enforcement rather than national security. A person charged with intelligence gathering might be expected to be informed of the scope of his authority, and therefore know when he and his subordinates were acting legally. Knowing the scope of his authority does not necessarily mean that he is also charged with the "interpretation, administration, and/or enforcement" of the law relating to defenses that might be raised where his subordinates have violated the law even where these defenses are allegedly related to the scope of his authority. These functions are traditionally performed by the police, the prosecutor, and the judiciary. Judge Merhige himself seems to recognize this by making the question of the scope of the authorizing official's authority a question of law. Moreover, Judge Merhige's formulation of the defense requires that the official have not merely the apparent authority to interpret, administer, and/or enforce the law, but in fact have the actual authority to perform one of these functions.

Even if Hunt was entitled to "interpret, administer, and/or enforce" the law relating to the scope of his authority, nothing indicates that his legal authority extended to authorizing such actions as the Ellsberg or Watergate break-ins.

Even if the circumstances of the Ellsberg defendants would not allow them to assert the defense enunciated by Judge Merhige, the policy justifications Judge Merhige advanced for allowing the defense he proposed would still favor allowing them to assert a mistake of law defense. Three such justifications were presented. First, the defense would not encourage ignorance of the law because it requires an affirmative effort to determine the law as a prerequisite to its assertion. Second, its assertion would be neither so universal nor so abnormally confusing to the fact finder as to discompose the judicial process. Finally, it advances the policy of fostering obedience to the decisions of authority figures in the governing structure.

If Hunt reasonably appeared to the defendants to fall within the class of law-interpreting officials, it is unclear why a defense should be denied them in light of these justifications for a defense even if Hunt lacked actual authority.

A policy is limited by the actual existence of an appropriate "official(s)" and does not support an abrogation of the policies behind the general mistake of law rule if an individual places his or her reliance, though reasonable, in a stranger to public office erroneously believing him to be an official. Similarly, the defense does not extend to reliance on individuals, who although employed in a public capacity, have no interpretative or administrative authority.
reasonable person, vitiating the danger of encouraging ignorance of the law. The scope of inquiry would remain limited, reducing the danger of confusing, open-ended inquiries that might discompose the judicial process. Finally, if a person, either inside or outside the government, reasonably appears to have authority in a field relevant to the behavior he tells the defendant is legal, then the policy of fostering obedience to certain officials is frustrated by not permitting reliance on such a person as much as it is by not permitting reliance on a person actually having such authority. Not allowing a defense in such circumstances places a person in a position where he will be subject to criminal punishment even if he reasonably concludes on the basis of all available information that the person with whom he is dealing has the authority he claims to have. Requiring that the person relied upon actually be an official discourages reliance on true officials for, no matter how apparent that official's authority may be, the person who is asked to rely upon that authority will have to weigh the possibility that the official is an imposter and that his reliance on the official's apparent authority may result in a criminal sentence.

In any case, the justifications advanced by Judge Merhige for allowing a defense of limited scope mask the justifications for allowing the broader defense proposed in this Comment. Two of Judge Merhige's justifications for allowing his limited defense are in fact responses to the arguments first advanced by Holmes and Austin against allowing a mistake or ignorance of law defense: encouraging ignorance of the law and problems of proof. The third is the independent policy justification also advanced by Judge Wilkey of encouraging obedience to public officials. Each of these justifications is open to question. Ignorance of the law is not encouraged when some objective standard of care must be met before a defense is allowed, while equally complicated problems of proof are faced and overcome in our criminal justice system at the present time. Finally, any policy of encouraging reliance on public officials is faced by the danger to individual liberty that encouraging such reliance might create. Encouraging reliance on the statements of public officials ultimately appears to rest on the fact that reliance on official statements is ordinarily reasonable because an official's position and knowledge makes his statement likely to be true. If the basis for allowing a defense where a public official has misled a person as to the law is the reasonableness of reliance on official statements, however, the only thing distinguishing it from other factors indicating why a mistake of law was made is the degree to which it indicates the mistake's reasonableness. Weighing the value of evidence in this fashion traditionally falls within the province of the trier of fact. The effect of the defense as formulated by Judge Merhige is to limit the jury's determination of the reasonableness of an individual's belief in the legality of his actions to one situation where the likelihood that the belief was reasonable is particularly high. Unless the issue of reasonableness is beyond the ability of a jury to

responsibilities in the area associated with the legal concepts involved in the mistaken opinion or decision.

Id. at 956 (Merhige, J., concurring).
decide — a conclusion difficult to reach in light of the fact that juries pass upon this issue in every negligence case — no reason appears to exist for preventing a jury from passing upon the question where the reasonableness of the defendant in believing he acted without violating the law is called into question.\textsuperscript{150}

6. Synthesis of Opinions Advocating a Defense

Despite the different approaches taken to a mistake of law defense in the \textit{Barker} cases by Judges Bazelon, MacKinnon, Wilkey, and Merhige, a theme seems to run through all their opinions: if the defendants in the two cases believed their actions were legal, and if this belief was reasonable, a defense should be allowed. Judges argued that the justifications for denying a defense were mitigated or that the alternate policy of encouraging obedience to government officials tipped the balance between allowing and not allowing a defense in favor of recognizing an exception to the general rule denying a defense. In each opinion, however, the weakening of the rationale for not allowing a defense in the situation of the \textit{Barker} defendants and the apparent strength of the alternate policy justification seem to reduce to arguments that equally support allowing a defense in any situation where a defendant's ignorance or mistake of law was reasonable. Some opinions only required actual belief on the part of the defendants that their actions were legal.\textsuperscript{151} Others required that their belief that they acted legally be reasonable.\textsuperscript{152} In both the opinions requiring actual belief and those requiring reasonable belief, however, the potential reasonableness of the defendants' belief was stressed either to show that they actually believed their actions legal, or to show that the belief was reasonable. Some of the judges imposed additional requirements on their defenses. In each case, these additional factors were ones that went to the reasonableness of the defendant's belief that he was acting legally.

This emphasis on reasonableness and factors indicating reasonableness throughout all the opinions advocating some sort of defense indicates that, at a minimum, the judges believed that it would be in some fashion unfair to punish an individual who reasonably concluded his behavior was legal because he relied upon some official authority. Two factors might explain this apparent belief. First, the defendants in \textit{Barker I} and \textit{Barker II} could arguably be considered not blameworthy. They were footsoldiers who acted as they did in obedience to Hunt, a man with White House and intelligence connections of which they were aware, and whom they believed they had good reason to trust.\textsuperscript{153} Further, this information about Hunt arguably

\textsuperscript{150} The same arguments militate against limiting mistake of law defenses to the formulations adopted by the Model Penal Code discussed in notes 18 and 19 and accompanying text supra.

\textsuperscript{151} See \textit{Barker I}, 514 F.2d at 227-48 (Bazelon, C. J., concurring and MacKinnon, J., dissenting).

\textsuperscript{152} See \textit{id.} at 248-70 (Wilkey, J., dissenting); \textit{Barker II}, 546 F.2d at 943-57 (Wilkey and Merhige, JJ., concurring).

\textsuperscript{153} See note 8 supra and cases cited therein.
Ignorance of the Law

vitiated the defendants' suspicions that their behavior might be illegal to the point where a reasonable person with the information they had would conclude that their actions did not have sufficient potential of criminality to warrant further investigation. In fact, further inquiry might be seen by their superiors as a breach of confidence, perhaps even a criminal breach of confidence. This could be found to negate notice of potential illegality, leaving the defendants with no capacity to choose between acting legally and illegally. As discussed previously, both the potential that the behavior of the defendants in the given circumstances might not be found blameworthy and the potential that they might be found without the capacity to choose to act in a lawful manner provide strong justifications for allowing a defense to be asserted. Blameworthiness underlies the very concept of crime, while the capacity to choose how to act underlies our governmental system's concept of the relationship between individual and state. Where two such policies support allowing a reasonable mistake of law defense and the arguments opposing the defense do not appear to justify denying such a defense, the defense should be allowed.

B. Denying a Defense: Judge Leventhal's Dissent in Barker II

Unlike the other judges whose opinions are discussed in this Comment, Judge Leventhal concluded that no defense should be allowed in Barker II. In that part of his opinion discussing the question whether such a defense might be asserted by the defendants Judge Leventhal first examined the general rule denying a defense and concluded that no defense should be allowed unless the defendants fit within some approved exception to the general rule. He then examined various exceptions to the rule proffered as covering situations analogous to that of the defendants. Having concluded that the circumstances of Barker and Martinez did not fit within any of these exceptions, or within any other defense the defendants had proffered, he contended that they should not be allowed any defense.

1. Ignorance or Mistake of Law in General

Judge Leventhal opened his discussion of the general rule that no defense is ordinarily allowed for mistake or ignorance of law by observing that the Supreme Court has long rejected a defense for mistake of law, refusing to recognize a defense even where the mistake reflected no subjective moral blameworthiness on the defendants' parts. He buttressed

154. See notes 40 to 63 and accompanying text supra.
155. See Barker II, 546 F.2d at 957–73 (Leventhal, J., dissenting).
156. See id. at 963–66.
157. See id. at 966–69.
158. See id. at 971–73.
159. Id. at 963–64. Judge Leventhal's sources for these propositions, however, indicate that the Supreme Court may not uphold a conviction where it is convinced that a person is not on notice of the potential that his actions may be blameworthy. In Lambert v. California, 355 U.S. 225 (1959), a woman was convicted under a Los Angeles statute requiring any person convicted of an offense punishable as a felony
this by pointing out that the American Law Institute's Model Penal Code excludes ignorance of law from its definition of culpability unless the offense or the Code explicitly provides otherwise.\textsuperscript{160}

Judge Leventhal is correct in stating that the Supreme Court has used language indicating that it would not recognize a defense where only a mistake of law was asserted. It is interesting to note that the case Judge Leventhal cited for this proposition, \textit{Lambert v. California},\textsuperscript{161} allowed a defense in a situation where the defendant was not put on notice of the potential criminality of her inaction.\textsuperscript{162} The cases cited for the proposition that a mistake or ignorance of law defense has not been recognized even when the mistake refutes any subjective moral blameworthiness in the offender\textsuperscript{163} tend to fall into the category of "public welfare" offenses, statutory crimes having no \textit{mens rea} requirement because of the importance of some public policy those offenses are designed to enhance.\textsuperscript{164} Even so, some of these cases referred to the fact that the defendants should have been on notice as to the possibility that their behavior might be illegal.\textsuperscript{165} Thus, the Supreme Court authority cited by Judge Leventhal would not preclude either the creation or expansion of exceptions to the general rule denying a defense, or the allowance of a mistake and ignorance of law defense utilizing an objective standard to judge the defendant's beliefs and behavior.

Judge Leventhal next discussed the antiquity of the doctrine denying any ignorance or mistake of law defense, pointing out that minds such as Holmes and Austin had grappled with the conflicting interests of the person unjustly convicted because of some mistake of law and the interests of society, and that these minds had concluded that recognizing a mistake of

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  \item in California and who was to be or remain in Los Angeles for more than five days to register with the police. \textit{Id.} at 226. Overturning the conviction, the Court said: circumstances which might move one to inquire as to the necessity of registration are completely lacking. At most the ordinance is but a law enforcement technique designed for the convenience of law enforcement agencies through which a list of the names and addresses of felons then residing in a given community is compiled. The disclosure is merely a compilation of former convictions already publicly recorded in the jurisdiction where obtained. Nevertheless, this appellant on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent. \textit{Id.} at 229. The Court emphasized the fact that Lambert's crime was passive; she had merely failed to register — a criminal act. Nonetheless, the same analysis applies in any case where a person is not on notice as to the potential criminality of his act. \textit{But see} 355 U.S. at 230-32 (Frankfurter, J., dissenting). Existence or absence of knowledge of potential criminality depends on the facts and circumstances of every individual case. Thus, it seems akin to other questions of fact determined by juries.
  \item \textsuperscript{160} 546 F.2d at 964 (Leventhal, J., dissenting).
  \item \textsuperscript{161} 355 U.S. 225 (1959).
  \item \textsuperscript{162} \textit{See} note 159 \textit{supra}.
  \item \textsuperscript{164} \textit{See} Sayre, \textit{Public Welfare Offenses}, 33 \textit{Colum. L. Rev.} 55 (1933); \textit{note} 41 \textit{supra}.
  \item \textsuperscript{165} \textit{See} note 41 \textit{supra}.
\end{itemize}
law defense would both encourage ignorance of the law and interfere with its enforcement because a claim of ignorance could be easily made and would be difficult to prove.\(^6\) His argument appears to be an amalgam of Austin's arguments respecting problems of proof and Holmes' argument that the defense would encourage ignorance of the law. In addition, Judge Leventhal advanced a third argument similar to that of Jerome Hall: that allowing an ignorance or mistake of law defense would leave criminal statutes in suspense where their interpretation has not been authoritatively settled.\(^6\) Each of these arguments has been discussed in detail above.\(^6\)

Problems of proof are not insurmountable, for the courts solve equally open-ended problems, and can in any case be limited by imposing an objective standard on the defense. Ignorance of the law is not encouraged when the ignorance is measured against an objective standard of reasonableness. This same requirement of some indicia of reasonableness would prevent suspension of untested criminal statutes, for so long as a reasonable person recognized the potential of illegality in his actions the defendant would be denied a defense. If the statute would not put a reasonable person on notice of this potential, then it would probably either be found void for vagueness, fall into a traditional mistake of law exception for criminal statutes open to two reasonable constructions, or be construed so as to preclude liability under the rule of statutory construction that criminal statutes are to be construed strictly in any case.

In the final paragraphs of his general discussion of mistake of law, Judge Leventhal states that on balance the interests of society outweigh the hardship to the individual of an unjust conviction, and that such harsh convictions can be ameliorated or avoided by such judicial and prosecutorial tools as light sentencing and the exercise of prosecutorial discretion.\(^6\) In order for this balance to be struck, however, some societal interest must be shown to be violated, and this violation must be so severe as to overcome society's strong interest in acting in a fair and just fashion towards its members. None of the interests emphasized in Judge Leventhal's opinion appear to be adversely affected by permitting a defense where a reasonable person would either not be on notice as to the potential illegality in his actions, or would conclude that no such potential existed. In the absence of some other societal interest, nothing would appear to bar allowing such a defense.

Judge Leventhal suggests such an interest in the last sentence of his general discussion of mistake of law. Judges Wilkey and Merhige discussed

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\(^6\) 546 F.2d at 964-65 (Leventhal, J., dissenting).

\(^6\) Id. at 965.

\(^6\) See notes 64 to 94 supra.

\(^6\) 546 F.2d at 965 (Leventhal, J., dissenting). The possibility that punishment can be mitigated, however, cannot be used as a justification for doing away with any excusing condition. If the primary distinction between criminal and civil penalties is the judgment of guilt, then the possibility of mitigation seems an improper means of avoiding the question whether to convict a person for a crime. The possibility of mitigation should only be considered after it has been determined that a certain condition should not be excusing.
the importance of allowing some reliance on governmental officials. Unlike them, Judge Leventhal emphasized the dangers inherent in allowing a defense of mistake of law based upon reliance on government authority: "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."\(^{170}\)

Allowing a defense in every situation where mistake or ignorance of law based upon reliance on governmental authority is asserted would create the dangers Judge Leventhal fears. At the same time, denying a defense solely because the defendant relied upon an official statement as to the law leads to the equally dangerous result of discouraging people from obeying governmental authorities for fear that their reliance on these officials, no matter how reasonable, might lead to criminal conviction. The point at which these two conflicting interests seem to balance is that of reasonableness: society's interest in having officials obeyed extends only to the point where a reasonable person would believe the official's orders, requests, or statements conformed with the law. The societal interest in people acting in a fashion they reasonably believe conforms with the law, however, extends beyond any interest in having officials obeyed. In fact, the only reason for giving the statements of officials more credence than the statements of others is because it is reasonable to believe that an official will be aware of the law as it relates to his area of authority. This being so, a defense should be allowed in any situation where a reasonable person would either not know his actions were potentially illegal, or would be convinced that no such potential of illegality existed.

2. Exceptions to the General Denial of a Defense

Because Judge Leventhal opposed allowing a mistake of law defense under the circumstances of Barker II, he was forced to distinguish the defenses proposed by the Model Penal Code to which Judges Wilkey and Merhige analogized. His criticism of their opinions is most legitimate with respect to the way they developed these analogies. Despite this, an examination of the rationales underlying these defenses supports the conclusion that an ignorance or mistake of law defense utilizing an objective reasonableness standard should be allowed.

a. Good Faith Reliance on an Official's Authority

The Model Penal Code provides defenses for good faith reliance on an official’s authority to a person aiding a police officer making an illegal arrest and to a soldier obeying unlawful military orders.\(^{171}\) Judge Leventhal found a justification for allowing this defense independent of the reasonableness of relying on the official’s apparent authority in these cases; he stated

\(^{170}\) Id. at 965-66.
\(^{171}\) Id. at 966.
that the person asserting the defense in each of these cases was under a duty to act.\textsuperscript{172} Since society has no way to protect a person under a duty to act without allowing a defense even in the absence of any inquiry by the actor into the legality of the requested act, Judge Leventhal stated that a defense must be allowed in the two situations where such a duty exists.\textsuperscript{173} Since the defendants in Barker II were under no duty to aid Hunt, and since there is no compelling social interest in having people obey government officials in extra-legal activities, Judge Leventhal concluded that they should not be allowed a defense for relying on Hunt's authority.\textsuperscript{174} Again he reiterated the dangers of allowing a defense, pointing out that to make the defense a matter of right would enhance the resources available to individual officers planning illegal government activity.\textsuperscript{175}

Although Judge Leventhal appears to be correct in saying that a duty exists to aid a police officer,\textsuperscript{176} and that the justification ordinarily given for allowing a defense to a person summoned to aid an officer is the existence of this duty,\textsuperscript{177} several factors indicate that this does not necessarily undermine its value as an analogic basis for a mistake or ignorance of law defense. First, the importance of the duty as a legal duty\textsuperscript{178} appears to bear a disproportionate relationship to the importance of the defense purportedly based upon this duty. Numerous cases recognize the defense,\textsuperscript{179} but there are few cases in which a person was prosecuted for refusing to aid a peace officer,\textsuperscript{180} and in only one of these was the defendant ultimately held liable.\textsuperscript{181} When imposed by statute, moreover, the penalties for refusing to

\begin{itemize}
  \item \textsuperscript{172} Id.
  \item \textsuperscript{173} Id. at 966-67.
  \item \textsuperscript{174} Id. at 967.
  \item \textsuperscript{175} Id.
  \item \textsuperscript{176} See, e.g., Perkins, supra note 3, at 511; Note, Criminal Law — Requiring Citizens to Aid a Peace Officer, 14 De Paul L. Rev. 159, 159-60 & nn.7 & 8 (1964).\textsuperscript{Contra} Shawano Co. v. Industrial Comm'n, 219 Wis. 513, 263 N.W. 590 (1935). The vast majority of states have statutorily imposed penalties for refusing this aid. See 14 De Paul L. Rev. at 160 & n.7.
  \item \textsuperscript{177} See, e.g., Watson v. State, 83 Ala. 60, 3 So. 441 (1888) (criminal); Kagel v. Brugger, 19 Wis. 2d 1, 119 N.W. 2d 394 (1963) (civil).
  \item \textsuperscript{178} The legal nature of the duty is stressed to distinguish it from the moral obligation to aid a peace officer.
  \item \textsuperscript{179} See, e.g., State v. Parker, 355 Mo. 916, 199 S.W. 2d 338 (1947); Commonwealth v. Martin, 7 Pa. Dist. Ct. 219 (1897); Hooker v. Smith, 19 Vt. (4 Wash.) 149 (1847); cases cited in note 177 supra.
  \item \textsuperscript{181} State v. Ditmore, 177 N.C. 592, 99 S.E. 368 (1919). Other sources indicate the rarity of such prosecutions. 14 De Paul L. Rev. at 162 n.14 indicates that no one in the State's Attorney's office of Cook County, Illinois, could remember such a prosecution in 25 years. The Attorney General of Maryland, a state not imposing a statutory duty, had to be asked whether such a crime existed under Maryland Law, 49 Op. Atty' Gen. 344 (1964) (the Attorney General concluded such a crime existed). The practice commentary to N.Y. Penal Code Ann. § 195-10 (1975) indicates that prosecutions for failing to aid a peace officer are rare.
\end{itemize}
aid a police officer tend to be relatively small. This lack of enforcement, coupled with relatively light penalties, indicates that the legal duty is not considered particularly significant, thereby weakening the defense’s rationale. Despite this, courts are clearly willing to allow a defense. This ready willingness to grant the defense, as well as courts’ willingness to provide compensation for those injured while aiding peace officers, indicates a desire to encourage such behavior for reasons other than the existence of a duty. One such reason would necessarily be the reasonableness of the belief that a police officer would only request lawful aid, for the purpose of having police officers is to uphold the law, and this purpose would be defeated by a defense were there a substantial likelihood that police officers would request assistance in performing illegal acts. The likelihood that justifications for the defense other than the existence of a duty exist is increased by the fact that a statutory crime existed in the four cases where a person was prosecuted for refusing to aid a police officer, and in three of those cases the court found a way to relieve the defendant from criminal liability.

Second, even if the existence of a duty to act is the basis of the defense, whether this ought to be its basis is open to question. The belief that a police officer will request only legal aid from a bystander seems almost per se reasonable, and belief in the legality of the requested action seems a stronger justification than the existence of a legal duty. Even existence of a moral duty is predicated on this reasonableness: a person would not feel morally bound to aid a peace officer whom he believed to be acting illegally. In fact, aiding a police officer in making a potentially illegal arrest might, if anything, be viewed as a situation where a defense should not be allowed because the arrestee is being deprived of liberty, one of the greatest deprivations a government can inflict on its citizens.

Finally, the existence of a duty to aid a peace officer implicitly presupposes that the creator of that duty believed it so reasonable that a peace officer will request only legal aid that it was willing to impose a duty to act, a rarity in the law. As suggested above, the authority of a policeman differs from other indicia of legality only in that a belief that certain behavior is legal is more likely to be reasonable when based upon a policeman’s request to act than when based upon other factors. Such questions of degree are susceptible to solution by triers of fact.

A soldier is under a duty to obey lawful orders, and consequently Judge Leventhal’s justification for a defense in the soldier’s situation appears tenable. Were this the true justification for allowing a defense, however, the defense should be allowed whenever an order is obeyed, for otherwise the soldier would have no protection when he unhesitatingly obeyed an order. In fact a defense for obedience of military orders is allowed only when the

182. See 14 De Paul L. Rev. at 161 & nn.11 to 13.
184. See notes 131 to 35 and accompanying text supra.
belief that the orders were legal was reasonable under the given circum-
stances.185

Rather than being based solely upon a duty to act, allowing a person
aiding an officer making an illegal arrest and a soldier obeying orders
defenses appears to be based upon two additional factors: the reasonableness
of the belief that a police officer’s request for aid in an arrest or a
superior’s orders in the military are lawful, and the fact that neither
situation ordinarily allows the opportunity to question the legality of the
request or order. A person who aids a police officer does not have time to
consider whether he will be liable for making an unlawful arrest, nor does a
soldier have time to consider whether an order he has been given is legal.
The amount of time available to make a decision as to legality, however, can
be considered as merely another factor to be weighed in determining
whether an alleged belief as to the legality of an action was reasonable.186 It
seems likely that the soldier obeying an order or the citizen aiding in an
arrest is given a defense because the apparent authority of the officer,
combined with the short time available to make a determination as to the
potential of illegality in the defendant’s actions, made his reliance on
authority almost per se reasonable under the existing circumstances. The
weighing of such factors being one of the primary functions of a jury, the
assertion of a defense should be allowed any time a jury might conclude that
no reasonable person under the given circumstances would conclude that his
actions were illegal.

b. Official Misstatements of Law

Because Judge Merhige based his concurrence upon the possibility that
the defendants relied on a government official’s assurance of legality, Judge
Leventhal also addressed this exception to the general rule respecting a
mistake of law defense.187 Examining the Model Penal Code section creating
this defense,188 he observed that a defense is allowed only where there is
reasonable reliance upon “an official interpretation of the public officer or

185. See United States v. Calley, 46 CMR 1131, 1182–83 (1973) and United States v.
Calley, 48 CMR 19, 27–29, 22 USCMA 534 (1973). Significantly, this requirement of
reasonableness exists despite the fact that a soldier is truly in a dilemma when his
orders seem illegal, for disobedience may lead to discharge and imprisonment. 48
CMR at 28. Existence of this qualification indicates that obedience to authority is
never a sufficiently strong policy to justify illegal conduct. If not, then an alternate
basis for the excuse must be found.

This basis seems implicit in the wording of the excuse — the mistake as to
illegality must be reasonable under the circumstances. The only thing distinguishing
the military order from other factors indicating legality are the surrounding
circumstances. Little reason exists for letting the military cases reach the trier of fact
with their excuse and denying a similar defense in other cases.

186. This would be analogous to the test applied to a person in emergency
conditions when sued for negligence. See, e.g., Cordas v. Peerless Transportation Co.,
27 N.Y.S.2d 198 (N.Y. City Ct. 1941).

188. See note 142 supra.
body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.\textsuperscript{189} He claimed the defense was framed so as to be consistent with the entire "law abidingness" of the individual and so that the dangers of collusion are minimal.\textsuperscript{190} He found the defense had been deliberately drafted to be a limited defense in order to promote good faith reliance on official pronouncements with objective indicia of their reliability, the indicia being the nature of the official.\textsuperscript{191} Having such indicia, he concluded that such reliance became analogous to reasonable reliance upon a statute, on a judicial decision, or an administrative order, for all of which the Model Penal Code allows a defense.\textsuperscript{192} Since he concluded that (1) any assertion by Hunt was not an official interpretation, (2) that Hunt was not in any case charged by law to make such interpretations, or to administer, or to enforce the law, and (3) that Hunt had no authority respecting the law defining the offense with which the defendants were charged, Judge Leventhal felt that the defendants could not assert a defense of reliance on an official statement of law.\textsuperscript{193}

Both the discussion of Judge Merhige's opinion and the factors cited by Judge Leventhal as justifying a defense where there has been reliance on an official statement as to the legality of certain behavior indicate that the ultimate basis of this defense is the reasonableness of the reliance.\textsuperscript{194} The "law abidingness" of the individual is a question that the jury must ultimately determine, and is indicated by the reasonableness of that individual's conduct and asserted belief. The likelihood of collusion under the given circumstances is one of the factors going to the credibility of the belief, and credibility is a question juries always face. The defense was drafted to promote good faith reliance on official pronouncements with objective indicia of their reliability — the official's authority. In fact, such indicia do nothing more than increase the reasonableness of the reliance on the authority, and consequently the reasonableness of the belief that no law was violated. Again, the familiarity of juries with determining reasonableness in tort cases indicates that they should be able to weigh all of the circumstances surrounding a particular crime and determine the reasonableness of the defendant's belief that he was acting legally. In fact, the jury will

\textsuperscript{189} 546 F.2d at 968 (Leventhal, J., dissenting).
\textsuperscript{190} Id.
\textsuperscript{191} Id. at 968--69.
\textsuperscript{192} Id. at 969.
\textsuperscript{193} Id.
\textsuperscript{194} A question not treated is whether the dangers of behavior authorized by the government are so great that no defense should ever be allowed. Article 8 of the Charter of the International Military Tribunal (the document governing the Nuremberg trials) allowed no such defense, only permitting the order to be considered in mitigation of punishment. 59 Stat. 1555, 1557, E.A.S. No. 472, 82 U.N.T.S. 284 (1945). In actual practice, however, this defense was admitted in some cases. See Williams, supra note 25, at 300. The apparent general acceptance of at least limited defenses for government agents indicates that either the consideration of a need for some obedience to government authority, or considerations of fairness, preclude disallowing any defense.
be required to do this under the Model Penal Code defense in any case, for
the reliance on the official must be "reasonable." No reason exists for not
trusting the jury with this determination where either the authority was
apparent rather than real, or even where no question of official authority
arises at all. Reliance on an official source of authority merely increases the
likelihood that a belief in the legality of an act was reasonable. A jury will
certainly recognize this, and recognize that its absence makes the defense
much harder to prove.

c. Mistakes Not Based Upon Official Interpretations of the Law

Even if Judge Leventhal’s criticism of the analogies utilized by Judges
Wilkey and Merhige is justified, it still does not explain why a defense
should not be allowed where the reasonable ignorance or mistake of law is
not based on the assurances of some government figure. His criticism relates
to the dangers inherent in allowing the government in effect to decriminal-
ize otherwise illegal behavior, and this danger does not exist when the
government does not precipitate the ignorance or mistake.

If this distinction is drawn, however, two anomalies develop. First,
people will be unable to rely upon that source of authority whose
information as to the potential illegality of some action should be most
reliable: the enforcer of the law. Second, at least with regard to civil liability,
government officials are frequently provided with some sort of immunity as
long as they are acting within the scope of their authority. The same
dangers against which Judge Leventhal warned exist in these situations. In
fact, the dangers are greater, for the scope of these privileges requires that
the improper actions be cloaked with some apparent legitimacy in that the
official must be acting within the scope of his authority when the illegal
action occurred. Thus, Judge Leventhal wishes to deny a defense to ordinary
citizens relying upon the word of a government official where courts have
held that that official, the true source of danger, may even be immune from
civil liability for his actions. Both of these anomalies indicate that the
distinction between ignorance or mistake based upon some official
interpretation of the law and ignorance or mistake of law derived from some
other source should not be distinguished, and that a defense should be
allowed in both cases.

V. Summary

This Comment has examined from three perspectives the question
whether an ignorance or mistake of law defense should be allowed. Initially
it asked whether such a defense could be justified and concluded that, at a
minimum, a defense could be justified where an individual lacked the
capacity to act lawfully, and that this capacity did not exist when no
reasonable person would be put on notice of the potential criminality of his
actions, or where this notice was negated by investigation proving to a
reasonable person’s satisfaction that his actions were legal. The Comment
next treated the justifications for not allowing a defense. Problems of proof
asserted by Selden and Austin were found not insuperable. Hall’s justification for disallowing a defense was likewise found inadequate. His analysis tended to avoid difficult problems by either excluding certain mistake of law situations from the class of mistakes of law or by carving exceptions from the rule in some cases where the ignorance or mistake was reasonable. Holmes’ objection to a defense was found to be valid only where the mistake or ignorance was unreasonable. Finally, analysis of the opinions in the Barker cases led to the conclusion that the limited defenses suggested in the opinions were merely examples of mistakes or ignorance of law where the likelihood of a reasonable mistake was extremely high. Since determining the reasonableness of conduct is ordinarily a function of the trier of fact it concluded that this determination should be unfettered in the absence of some evidence that the capacity of the trier of fact to weigh the evidence is in some way impaired. No such impairment appearing to exist, it concluded that a defense should be allowed whenever a reasonable person would not be on notice of the potential illegality of his action, or having been put on notice of this potential, and investigated the legality of his intended action, a reasonable person would conclude that there was no potential that he would be acting illegally.

VI. CONCLUSION

Reformulating a rule as ancient as the rule denying a defense for either ignorance or mistake of law is a task that should be undertaken with caution, and it is understandable that the judges in the Barker cases limited the defenses they formulated. Yet, as has been shown, the bases of the rule are suspect, and inertia should not preserve a rule in a form that has become archaic. Instead, the defense should be reformulated in terms reflecting modern concepts of the nature of criminal punishment and of those conditions actually necessary for the criminal justice system to function.  

195. An error of law defense has apparently been accepted in West Germany. See Ryu & Silving, supra note 2, at 450–59. The emphasis, however, seems to be more on the guilt of the individual than on the individual’s intent. Swiss law apparently required consciousness of illegality for conviction from 1853 to 1937. Id. at 441. The position presently adopted by Swiss law bears some resemblance to the position suggested by this Comment. See id. at 444–48, 459–61.