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MISTAKE OF LAW

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MISTAKE OF LAW

I. HISTORICAL PERSPECTIVE

*Ignorantia juris quod quisque tenetur scire, neminem excusat*¹

Despite the Latin words of this maxim, some legal historians have placed the origins of this ancient common law principle in the pre-Norman or Norman era.² It is interesting to note that even in Roman law, imposition of liability upon one who did not know the law was not absolute.

It is noted that in Roman law the harshness of the rule was tempered. Ignorance of the customary law (*jus gentium*) was never excused since this reflected the moral law which was knowable (*naturali ratione*). On the other hand, ignorance of the more vast and less knowable local law (*jus civile*) was available as a defence to women, anyone under 25 years of age, soldiers, peasants, persons of low intelligence, and also generally to those who had not had an opportunity of consulting counsel.³

A similar maxim of Roman origin is *ignorantia facti excusat, ignorantia juris no excusat*. That is, ignorance of the fact excuses; ignorance of the law excuses not. This doctrine initially applied solely to civil actions in English law. The earliest reported case in which it was considered is *Hilary Term, 1231*.⁴ By the 16th Century, the doctrine was being applied to both civil and criminal cases.

As will be discussed, these doctrines have been the subject of much interpretation and debate.

A. English Approach

In 1680, English Jurist Sir Mathew Hale articulated the doctrine that ignorance of the law is no excuse:

Every person of the age of discretion and *compos mentis* is bound to know the law, and is presumed to do so.⁵

Another classic formulation of this common law principle, in the context of the criminal law, was stated by Blackstone in 1772:

1 Ignorance of the law, which everyone is bound to know, excuses no man.
2 Don Stuart, *Canadian Criminal Law, a Treatise*, 2nd Ed., 1987, Carswell @ p.274.
3 Ibid
4 *Bractons' Note Book*, Maitland's Ed., Pl.496.
5 Sir Mathew Hale, *Pleas of the Crown*, 1680, p.42.

A mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law, as it was of the Roman.⁶

In early caselaw, the English applied the rule that ignorance of the law is no excuse most rigidly. In *Rex v. Bailey*, (1800) Russ & Ry, 168 E.R. 651, a seaman was found guilty of an offence despite the fact that the law at issue had been passed while he was at sea, so that he had no means of finding out about it. It appears that the rationale behind the rule was not that all people should know all laws, but rather that such a defence must be precluded on grounds of public policy. As early as 1846, the English courts had acknowledged that the entirety of the law could not be known by all people. As per Maule, J. in *Martindale v. Faulkner*, (1846) 2 C.B.706, @ 719:

There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so.

The public policy concern was that the floodgates would be opened if ignorance of the law were permitted to be a defence:

Ignorance of the law excuses no man; not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to refute him.⁷

The traditional English approach is seen in *R. v. Esop*, (1836) 173 E.R. 203. In that case, it was held that when a foreigner who was ignorant of Canadian law committed an offence in Canada, ignorance of the law would not be a defence. This was so even where his conduct did not constitute an offence in his home country.

Today, the English courts continue to hold firmly to the view that ignorance of the law is no defence. The Law Commission in the United Kingdom has summarized the present position of the English courts as follows:⁸

Ignorance of the law is no defence. There is abundant authority that the accused's ignorance of the offence he is alleged to have committed,⁹ or his mistake as to its application¹⁰ will not relieve him of liability. This principle appears to be an absolute one.¹¹

The case of *Surrey County Council v. Battersby*, [1965] 2 QB 194, is an example of the approach taken by the English courts, in circumstances where an obvious injustice would have resulted had the accused been convicted, despite

6 Blackstone, *Commentaries*, 1772, Vol. IV, p.27.

7 Selden, J., *Table Talk*, (1689) from *Bartlett's Familiar Quotations*, 15th Ed., (Toronto: Little, Brown and Company) 1980, p.263.

8 *A Criminal Code for England and Wales - Commentary on Draft Bill*, Vol. 2, p.196.

9 *R. v. Bailey*, supra; *R. v. Esop*, supra; *Barronet and Allain*, (1852) 169 E.R. 633; *Grant v. Borg*, [1982] 1 W.L.R. 638

10 *Johnson v. Youden*, [1950] K.B. 544.

11 *Surrey County Council v. Battersby*, [1965] 2 Q.B. 194 @ 203.

his or her ignorance of the law. In that case, the accused had relied upon a public official's incorrect statement of the law. Despite this, the court maintained that ignorance of the law was no excuse. However, it was acknowledged that this was "very strong mitigation".

Note that English law does provide an exception to the rule in a case where an accused was ignorant of subordinate legislation because it had not been published. As per Glanville Williams:¹²

Further rules apply to subordinate legislation. The more important legislative product of Government Departments (Government orders) are "statutory instruments", and in proceedings for an offence under a statutory instrument it is a statutory defence to prove that the instrument had not been issued by Her Majesty's Stationary Office, unless reasonable steps had been taken to bring its purport to the notice of those effected.¹³

This provision does not apply to sub-delegated legislation or to local authorities by-laws, or even (presumably) to statutory instruments that are allowed to go out of print after being issued, although in these cases the common law may have something to say. Bailhach, J. held that no delegated legislation comes into force until it published, so that ignorance due to non-publication is a defence.¹⁴ Also the Judicial Committee of the Privy Council has held that when a Government order is made *in respect of a particular person*, and no provision is made for acquainting him of it, he cannot be convicted of an offence under it committed at a time when he did not know that it had been made.¹⁵

As well, English law recognizes a further limited exception which relates to private rights:

English text writers¹⁶ refer to two categories in which the concept of *mens rea* is said to recognize mistake of law as a defence; mistake as to legal concept (probably of the civil law) contained in the definition of the [criminal] offence and mistakes involving "color of right" (again probably involving only mistakes as to civil law).¹⁷

The rationale underlying this exception is as follows:

Property rights are considered to be matters of private law and it appears that in England a defence of lack of *mens rea* is ordinarily permitted for mistakes of private law, whatever the level of generality of the mistake. Glanville Williams¹⁸ explains this leniency as an accommodation to the limited capacity of the human mind: "there is a limit to the amount of law that the citizen can be expected to know and the law of property falls beyond that limit."¹⁹

12 Glanville Williams, *Textbook of Criminal Law*, 2nd Ed., 183 @ pp.453-54.

13 *Statutory Instruments Act*, 1946, s.3(2).

14 *Johnson v. Sargant & Sons*, [1918] 1 K.B. 101.

15 *Lim Chin Aik*, [1963] A.C. 160.

16 Glanville Williams, Smith and Hogan.

17 Stuart, op. cit.n.2 @ p.285.

18 Williams, *Textbook of Criminal Law*, 2nd, (1983) pp.456-58.

19 Eric Colvin, *Principles of Criminal Law*, 2nd Ed., (1991), Carswell, @ p.168.

B. Canadian Approach

1. The Criminal Code²⁰

In 1892, when criminal law was first codified in Canada, mistake of law was included as s.14, which provided that:

The fact that an offender is ignorant of the law is not an excuse for any offence committed by him.²¹

This rule is now contained in s.19 of the Criminal Code which provides that:

Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

Note that s.19 of the Criminal Code prohibits "ignorance" of the law as an excuse for committing an offence. There is no explicit provision regarding "mistake" of law resulting in an offence. Lamer, J. for the Supreme Court of Canada in *R v. Molis* (1980) 55 C.C.C. (2d) 558 (S.C.C.), looked at the wording of s.19 and refused to make a distinction between ignorance and mistake insofar as either related to a question of law. This has been interpreted to mean that:

Section 19 of the Criminal Code specifically excludes a defence to a charge where the accused is ignorant of the existence of the law, and implicitly excludes a defence where the accused is mistaken as to the meaning, scope or application of a law.²²

Note that the Law Reform Commission of Canada²³ has recommended explicit codification of a rule based on "Mistake or Ignorance of Law".

2. Judicial Application of Section 19

In keeping with the strict English tradition, Canadian courts, until most recently, applied the rule in s.19 most rigidly. Presently, however, certain exceptions to the ignorance of law principle have begun to emerge. The following overview will serve to illustrate Canadian judicial adherence to the traditionally strict approach and will outline the emerging exceptions.

a. Traditional Approach

(i) Reliance on Lawyers' Opinions

In *R. v. Brinkley*, (1907) 12 C.C. 454, O.L.R. 534 (C.A.), the accused's mistake as to the legality of his act did not afford him a defence, regardless of the fact that he acted in good faith on the mistaken advice of his lawyer. The overwhelming trend in recent cases

²⁰ R.S.C., 1985, c. C-46.(hereafter the Criminal Code).

²¹ Criminal Code of Canada, SC 1892, (55-56 Vict.), c.29.

²² Ewaschuk, *Criminal Pleadings and Practice*, 2nd. ed., 1987 @ p.21-46.

²³ Report 31, *Recodifying Criminal Law*, 1987, p.34.

continues to be to disallow such a defence, even where reliance on the lawyer's mistaken advice was reasonable.²⁴ Note that "[i]n some Canadian decisions²⁵ the courts have been able to characterize a mistake made partly as a result of bad advice from a lawyer as one of fact and have, on this somewhat devious basis, allowed the defence"²⁶

(ii) Defence of "Custom"

Canadian courts have been equally strict in applying s.19 with regard to a defence of "custom". For example, in *R. v. England*, (1925) 43 C.C.C. 11, the accused's belief that local custom permitted him to act unlawfully was no defence where it resulted in a mistake of law. The same view was taken in *Andsten and Petrie*, (1960) 128 CCC 311 (B.C.C.A.) leave to appeal to S.C.C. refused October 4, 1960. In that case, private detectives were of the view that "from the custom long followed by private detectives that they had the right to enter private property and remain thereon in order to carry out a lawful investigation". This was held to be a mistake of law, and no defence was available to them on a charge of loitering contrary to the Criminal Code.

(iii) Reliance on Judicial Decisions

It has been suggested that the case of *R. v. Campbell*, (1973) 10 C.C.C. (2d) 26 (Alta Dist.Ct.), "...vividly demonstrates why a rigid adherence to the ignorance of law principle is so wrong."²⁷ In that case, the accused was a stripper, charged with taking part in an immoral performance, contrary to s.163 of the Criminal Code. Her defence was that she had removed her clothing, relying on her manager's statement that a Supreme Court judge in Calgary²⁸ had ruled that such a performance was lawful. The problem was that the Calgary decision had been reversed on appeal by the time of her trial.

The trial judge determined that her reliance upon a subsequently overruled judicial decision was a mistake of law which did not excuse (even though her state of mind was not blameworthy). An absolute discharge was given, however, due to this mitigating factor. Kerans, D.C.J. seemed to recognize that the result was "anomalous and ironic".²⁹ At page 32 he stated that:

24 Stuart, op. cit. n.2 @ 297
Irwin v. Dalley, (1957) 118 C.C.C. 116 (Ont.C.A.); *Burkinsaw; Zora*, (1973) 12 C.C.C. (2d) 479 (Alta C.A.); *R. v. Jiroux*, (1981) 63 C.C.C. (2d) 555 (Que.CA) leave to appeal to S.C.C. refused C.C.C. *Loc sit* 40 N.R. 142n. (Note that this has been the overwhelming trend in the U.S. as well).

25 *R v. Woolridge*, (1979) 49 C.C.C. 2nd300 (Sask. Prov. Ct).

26 Stuart, op. cit. n.2 @ 297

27 *Ibid.*

28 In *Johnson* (No. 1) (1972) 6 C.C.C. (2d) 462 (Alta.T.D.).

29 Stuart, op. cit. n 2 @ p.279.

People in society are expected to have a more profound knowledge of the law than are judges. I am not the first person to have made that comment about the law, and while it is all very amusing, it is really to no point.

The rationale behind this decision is seen at page 31:

It is not a defence, I think, because the first requirement of any system of justice, is that it work efficiently and effectively. If the state of understanding of the law of an accused person is ever to be relevant in criminal proceedings, we would have an absurd proceeding. The issue in a criminal trial would then not be what the accused did, but whether or not the accused had a sufficiently sophisticated understanding of the law to appreciate that what he did offended against the law. There would be a premium, therefore, placed upon ignorance of the law.

Ironically, the decision upon which the stripper had relied was later appealed to, and overturned by, the Supreme Court of Canada. Thus, in the end, there was no actual mistake of law.

More recent decisions have continued to uphold the view that reliance upon subsequently overruled judgments will not excuse ignorance of the law.³⁰ Note, however, that the Law Reform Commission of Canada³¹ has recently recommended adding an exception to s.19 in the case of a mistake "reasonably resulting from...reliance on a decision of a court of appeal in the province having jurisdiction over the crime charged..."

(iv) Due Diligence as a Defence

In *R.v.Molis, supra*, the accused drug manufacturer was charged with trafficking in a restricted drug, contrary to the *Food and Drug Act*, R.S.C. 1970, c.C-34, s.19. When the defendant had started manufacturing the drug, it had not yet been listed as a restricted drug.³² His defence was that he was unaware that the drug had become illegal and that he had exercised "due diligence" in attempting to determine the state of the law. The court held that the accused's attempt to use the due diligence defence (as outlined in *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299), was misconceived and that s.19 therefore applied. As per Lamer, J. at page 364:

It is clear to me that we are dealing here with an offence that is not to be considered as one of absolute liability and, hence, a defence of due diligence is available to an accused. But I hasten to add that the defence of due diligence that was referred to in *Sault Ste. Marie* is that of due

30 *Currie, Davies and Lukas*, (1975) 26 C.C.C. (2d) 161 @ pp.179-80 (Ont.CA); *R. v. Dunn*, (1977) 21 N.S.R. (2d) 334 (S.C.App.Div..)

31 Report 31, *Recodifying Criminal Law*, 1987, p.34.

32 Note that, as per s.15 of the Criminal Code, no person can be convicted of an offence where he or she obeyed the law which was in force at the time of his or her act or omission. Thus, retrospective legislation is prohibited from criminalizing acts or omissions expressly authorized at the time by statute.

diligence in relation to the fulfillment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation.

(v) Ignorance of the Law by a Foreigner

The traditional English view, as expounded in *R. v. Esop, supra*, has been upheld in Canadian law with respect to ignorance of law by a foreigner. That is, a foreigner that is ignorant of Canadian law, and who commits an offence in Canada that would not be illegal in his homeland, is nonetheless bound by the rule in s.19.³³

(vi) Mistake Based on Public Law

A mistake based on the operation of a public law, especially a law criminal in nature, will generally *not* provide a defence to an accused charged with a criminal offence.³⁴

An example of such a mistake is found in the case of *R. v. Aryeh*, (1971) 6 CCC (2d) 171. In that case, the mistake of the accused was based on the application of a public law, being the *Federal Customs Act*, R.S.C. 1952, c.58. The accused was charged with possession of gems, unlawfully imported into Canada. His mistaken belief that he did not have to declare the gems or pay duty on them was held not to be a defence.³⁵

b. Emerging Exceptions

Because the traditional approach to the mistake of law rule has been so rigid, a variety of exceptions have arisen in Canada. Many judges have been unsatisfied with finding an accused guilty where he or she had no blameworthy state of mind during the commission of the offence. One result was that judges began to characterize a mistake as one of fact, rather than as a mistake of law, in order to avoid the harshness of the rule. In so doing, a defence of lack of *mens rea* with respect to the mistake would be open to the accused. (This issue is discussed in detail at pp. 16-19) Clearly, this kind of characterization cannot be viewed as an actual exception to the mistake of law rule, but rather as a way of getting around it. Such forced or artificial characterizations have contributed to a certain amount of confusion within the case law.

Another notoriously confused area with respect to mistake of law is the defence of lack of *mens rea*, which is arguably available for some criminal offences which include legal circumstances in their material specifications. (This issue is discussed in detail on pp. 19-21)

33 *R. v. Kear and Johnson*, (1989) 51 C.C.C. (3d) 574 (Ont.CA).

34 Ewaschuk, op. cit. n.22@ p.21-47.

35 See also *R. v. Riddell, et al*, (1973) 11 C.C.C. (2d) 493; and *R. v. Walker and Somma*, (1980) 51 C.C.C. (2d) 423 @ p.428-29 (Ont.CA).

Other more clearly delineated exceptions have recently emerged in the case law as well. However, these exceptions are extremely restricted. It has been suggested that the cause of this restriction relates back to the wording of s.19:

Even though the statement of the rule that ignorance cannot excuse has not been read as an absolute injunction, [the words of s. 19 are] sufficient to allow no more than severely limited exceptions.³⁶

(i) Officially Induced Error

"Officially induced error" has been recognized in Canada as a valid common law defence. Where a mistake of law has arisen because of an accused's reliance on a statement made to him by a relevant official, mistake of law may operate as a defence.

This was not always the case in Canada. In *R. v. MacPhee*, (1975) 24 C.C.C. (2d) 229 (N.S. Prov. Mag. Ct.), the accused was charged with unlawful possession of a restricted weapon, contrary to s.94 of the Criminal Code. Evidence was that he was unaware that his gun was restricted, having relied on the mistaken advice of an R.C.M.P. constable. The court resolved the matter by characterizing the mistake as one of fact, and acquitted on this basis.

In *R. v. Potter*, (1978) 39 C.C.C. (2d) 538, the accused was charged with knowingly keeping a gambling device contrary to s.186(1)(b) of the Criminal Code. His defence was that he did not know the gambling device was illegal, having relied on the mistaken advice of a customs official. In this case, the court did characterize the mistake as one of law. However, McQuaid, J. held that although the mistake was not culpable, ignorance of the law was no excuse. Potter's ignorance of the law was considered a mitigating factor, however, and he was given an absolute discharge.

In *R. v. Flemming*, (1981) 43 N.S.R. (2d) 249 (N.S. Co. Ct.), O'Hearn, Co. Ct. J. opened the door to recognition of a defence of "officially induced error". In that case, the accused had relied on mistaken advice of Motor Vehicle Branch inspectors. It was held that "officially induced error" was a defence at common law and that the defence had been established. In addressing the underlying rationale for allowing such a defence, O'Hearn, CO. CT. J. stated that:

If a person does his best to conform to the conduct of the law but is misled by officials charged with the administration of the law, he is not doing anything at odds with the purpose of the maxim.... The mischief which the policy is aiming at has not occurred.

...Here we have something more than mere "ignorance"; misinformation coming from an official source has elements analogous to, although distinct from, entrapment and necessity... moreover, most people would consider it radically unjust for the same government to prosecute an individual for an

36 Colvin, op. cit. n. 19 @ p. 262..

offence that it had already assured him was not an offence, through one of its bureaux.³⁷

R. v. McDougall, (1981) 60 C.C.C. (2d) 137 (NSCA), was also one of the first decisions to accept a defence of "officially induced error". In that case, the accused claimed he had relied on the mistaken advice of an official at the Registrar of Motor Vehicles. As a result, he was charged with the offence of driving with a cancelled licence, contrary to s.258(2). The Nova Scotia Court of Appeal held that a defence of "officially induced error" was available to him:

The defence of officially induced error has not been sanctioned, to my knowledge, by an appellate court in this country. The law, however, is ever-changing and ideally adapts to meet the changing mores and needs of society. In this day of intense involvement in a complex society by all levels of Government with a corresponding reliance by people on officials of such Government, there is, in my opinion, a place and need for the defence of officially induced error, at least so long as a mistake of law, regardless how reasonable, cannot be raised as a defence to a criminal charge.³⁸

This decision was appealed to the Supreme Court of Canada. The appeal was allowed and a conviction was entered on the basis that the accused had in fact not been misled by the official. However, the Supreme Court of Canada did, *in obiter*, give approval to the defence of "officially induced error".

It is not difficult to envisage a situation in which an offence could be committed under a mistake of law arising because of, and therefore induced by, "officially induced error" and if there was evidence in the present case to support such a situation existing it might well be an appropriate vehicle for applying the reasoning adopted by MacDonald, J.A. In the present case, however, there is no evidence that the accused was misled by an error on the part of the Registrar.³⁹

In *R. v. Cancoil Thermal Corp.*, (1986) 52 C.R. (3d) 1988, the Ontario Court of Appeal recognized the defence of "officially induced error" in the context of regulatory offences. On the issue of a "separate and distinct" defence of "officially induced error", Lacourcier, J.A. concluded that:

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

37 *R. v. Fleming*, *supra*, @ pp.272-74.

38 *R. v. McDougall*, *supra*, @ p.160.

39 *ibid*

obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.⁴⁰

Stuart notes that:⁴¹

The Ontario Court of Appeal (in *R. v. Cancoil, supra*) speaks only of the defence in the context of regulatory offences. The defence should also be available to ignorance of criminal law.

Subsequent courts have been divided on the scope of this defence. For example, in *R. v. Johnson and Wilson*, (1987) 78 N.B.R. (2d) 411 (Prov.Ct.), the defence of "officially induced error" was held to be available in Criminal Cases. The court adopted and applied the following test, as had been put forward in *R. v. Robertson*, (1984) 43 CR (3d) 39:

- i) The actor must have adverted to his legal position;
- ii) The actor must seek advice from an official;
- iii) That official must be one who is involved with the administration of the law in question
- iv) The official must give erroneous advice;
- v) The erroneous advice must be apparently reasonable;
- vi) The error of law must arise because of this erroneous advice;
- vii) The actor must be innocently misled by the erroneous advice, ie. he must act on good faith and without reason to believe that the advice is indeed erroneous.

In contrast, in *R. v. Murphy*, [1988] A.J. No. 617 (July 5, 1988) per Marshall, Prov.Ct.J., the court declined to apply the defence of "officially induced error" as outlined in *R. v. Cancoil, supra*, in the case of a trial under the Criminal Code. It has been suggested that the "contours of the defence in *Cancoil, supra*, seem unduly restrictive..."⁴² and :

The recognition of a common law defence of reliance on advice as to the law is a very healthy development in our criminal law and substantially ameliorates the harsh ignorance of the law rule. It is vastly preferable to the devious *MacPhee* device of classifying the mistake as one of mistake of fact rather than law.⁴³

Note that the Law Reform Commission of Canada⁴⁴ has recommended codifying the rule that "[n]o one is liable for a crime committed by reason of mistake or ignorance of law...reasonably resulting from...reliance on competent administrative authority."

40 *R. v. Cancoil, supra*, @ p.199.

41 Stuart, *op. cit.* n.2 @ p.295.

42 *Ibid.*

43 *Ibid.*

44 Report 31, *Recodifying Criminal Law*, 1987, @ p.34.

(ii) Non-Publication of Law

As discussed, the traditional English position has been that ignorance of the law is no excuse, even where it was virtually impossible for the accused to know the law⁴⁵, although some exception has been made in the case of unpublished subordinate legislation and unavailable government orders. (See p.3)

Similar defences exist in Canada as well, with respect to unpublished law:

(a) Statutory Provisions

Section 11(2) of the *Federal Statutory Instruments Act*, S.C. 1970-71-72, c.38 provides a defence for those charged under non-published Federal regulations where there was a requirement that the regulation be published.

11(2) No regulation is invalid by reason only that it was not published in the *Canada Gazette*, but no person shall be convicted of an offence consisting of a contravention of any regulation that at the time of the alleged contravention was not published in the *Canada Gazette* in both official languages unless

- (a) the regulation was exempted...or the regulation expressly provides that it shall apply according to its terms before it is published in the *Canada Gazette*, and
- (b) it is provided that at the date of the alleged contravention reasonable steps had been taken to bring the purport of the regulation to the notice of those persons likely to be effected by it.

Some provinces have similar statutory provisions dealing with unpublished provincial regulations.⁴⁶

Note that in *R. v. Tenale et al*, (1982) 3 C.C.C. (3d) 254, it was held that an accused is not guilty under s.19 even where the provincial Gazette has published a federal regulation. Such publication does not satisfy s.11(2) of the *Federal Statutory Instruments Act*.

⁴⁵ ie., *Rex v. Baily* (1800) 168 E.R. 651, Russ & Ry. 1, as discussed on page 2.

⁴⁶ For example, *Alberta Regulations Act*, R.S.A. 1970, c.R-13, s.3; *B.C. Regulations Act*, S.B.C. 1983, c.10, s.7; *Ontario Regulations Act*, R.S.O. 1980, c.446, s.5; *Saskatchewan Regulations Act*, R.S.S. 1965, c.420, s.14.

(b) Non Publication of Subordinate Legislation where there is no Requirement of Publication

Our courts have been prepared to take into account one special type of impossibility: where subordinate legislation has not been published although there is no requirement of publication in a Gazette.⁴⁷

In *Ross* (1944) 84 CCC 107 (B.C.Co.Ct.), the accused's conviction was overturned where the unpublished subordinate legislation in question could not have been known to the accused. Note that the court distinguished this subordinate legislation from public legislation which was given a "certain measure of publicity" by the public press, who were invited to deliberations in the legislative assembly.

In *R. v. Michelin Tires Manufacturing (Canada) Ltd.* (1975) 15 N.S.R. (2d) 150 at page 109, a tax rule was contained in an internal letter to a government tax official, but had not been published. It was held that the tax rule was therefore not effective against the tax payer. The court indicated that an order or regulation must be made or "executed with due authority" and issued or "promulgated or publicized in some suitable way".⁴⁸

In *R. v. Catholique*, (1980) 49 C.C.C. (2d) 65 (N.W.T.S.C.), an ignorance of the law defence was allowed, where the accused did not know of the regulation at issue which had not been published or posted, and which was not required to be published by law. In reaching this determination, the court held that the accused must have had no actual notice of the subordinate regulation (as opposed to no reasonable opportunity of finding out about it) for the defence to be available.

It should be noted that all of the above-mentioned cases dealt with subordinate legislation or regulations. Stuart has raised the issue as to whether the same reasoning should apply in the case of a statutory provision.⁴⁹ He points out that in *R. v. MacLean*, (1974) 17 CCC (2d) 84, O'Hearn, Co.Ct.J., drew this distinction and noted that it is generally much more likely for the public to know about statutes given their "discoverability and availability".⁵⁰ Stuart questions the validity of such a distinction, and sites E. Edinger⁵¹ on this point.

The availability of such a defence should not depend on the chance factor of whether the applicable law consists of statutes or regulations

47 Stuart op. cit n.@ p.281.
48 Re *Michelin Tires Manufacturing*, supra, @ p.176.
49 Stuart, op. cit. n.2 @ p.291.
50 *R. v. MacLean*, supra, @ p.107.
51 E. Edinger, "Note", (1975-76), U.B.C.L.Rev. 320 @ 324.

.(probably an almost meaningless distinction to the average citizen anyway).

Note that the Law Reform Commission of Canada⁵² has recommended codification of this defence where ignorance of the law reasonably resulted from "...non publication of the law in question...". No distinction is drawn between statute and regulation.

(iii) Mistake Based on Private Rights or Civil Law

(a) Civil Law and Custody Cases

Canadian courts are divided as to whether a mistaken belief with respect to the effect of civil law relating to a custody order can negative the requisite *mens rea* of an offence.

In *R. v. Ilczyszyn*, (1988) 45 C.C.C. (3d) 91 (Ont.C.A.), the accused was under a mistaken belief that a custody order was no longer valid. This was held to be a mistake of civil law and was sufficient to negative the necessary *mens rea* of the offence under s.250 of the criminal code.

Conversely, in *R. v. Cook*, (1984) 12 C.C.C. (3d) 471 (N.S.C.A.), the court held that mistaken belief as to the status of a custody order was not sufficient to negative the requisite *mens rea*.

(b) "Colour of Right"

"Colour of right", also referred to as "claim of right" refers to a claim over property where the "claimant's intention [is] to claim in hostility to the real owner."⁵³ An accused may be acquitted in Canada on the basis of a mistake of law respecting a "colour of right" defence. For example, the defence of "colour of right" will be available to an accused charged with theft who had an honest but mistaken belief that he or she had a right to the property - regardless of the fact that this belief was based on a mistake of law.⁵⁴ A "colour of right" claim requires a prior proprietary interest.

It seems that a "colour of right" defence only applies where the accused is honestly but mistakenly claiming some prior proprietary interest in the item which is allegedly stolen. Hence, a defence of "colour of right" is not available when the accused takes on an item which he mistakenly believes to be abandoned or "ownerless", and which he mistakenly believes he may take as of right.⁵⁵

52 Report 31, *Recodifying Criminal Law*, 1987, p.34.

53 Black's Law Dictionary, 5th Ed., 1979, p.225.

54 *Lilly v. R.*, (1983) 5 C.C.C. (3d) 1; *R. v. Teece*, (1982) 67 C.C.C. (2d) (72).

55 Ewaschuk op cit. n. 22 @ p.21-51, see also *R. v. Shymkovich*, [1954] SCR 606, 110 CCC 97; and *R. v. Moore*, (1981) 61 CCC (2d) 193.

"Colour of right" defences have generally been confined by the courts to the offences specified in various Criminal Code provisions. These provisions are s.39(1) - defence of moveable property; s.42(3) - defence of dwelling - house or real property; s.72(2) - forcible detainer of real property; s.322 - theft; and s.429(2) - mischief, arson and other specified property offences. As per Ewaschuk⁵⁶:

As applied to these offences "colour of right" includes an honest belief in a state of facts which, if it existed, would be a legal justification or excuse.⁵⁷ However, wilful blindness may negative a "colour of right" claim⁵⁸ and a "moral right" does not constitute a colour (claim) or right.⁵⁹

The only extension beyond these codal provisions has been to robbery, where there has first been a finding of theft. There is no colour of right defence available in the case of extortion,⁶⁰ (as there is in England). Note as well that:

It seems that a guilty state of mind does not exist where the accused is mistaken as to a civil legal concept contained in the definition of an offence, provided that the mistake gives rise to a claim or colour of right relating to an item.⁶¹

Note also that the Law Reform Commission of Canada has recommended codifying that:

No one is liable for a crime committed by reason of mistake or ignorance of law...concerning private rights relevant to that crime...⁶²

(iv) Wilful Breach of a Probation Order

In *R. v. Docherty*, [1989] 2 S.C.R. 941, 51 C.C.C. (3d) 1, the accused was charged with wilfully failing to comply with a probation order, contrary to s.740(1) of the Criminal Code. His probation order required that he keep the peace and be of good behaviour. The accused testified that he did not know that sitting in a car while intoxicated was an offence and therefore a breach of his probation order. The court held that this was an exception to the general rule that ignorance of the law is no defence. An accused cannot be found guilty of a wilful breach of a probation order unless he is aware that the underlying offence which he has committed is against the law. As per Wilson, J. at page 960:

56 Ewaschuk, op. cit. n 22 @ p.21-50.

57 *R. v. Creaghan*, (1982) 1 CCC (3d) 449 @ p.453.

58 *R. v. Hollett*, unreported, May 8, 1989 (Alb.Q.B.)

59 *R. v. Cinq-mars*, (1989) 51 CCC (3d) 248.

60 *R. v. Natarelli and Volpe*, [1967] S.C.R. 539.

61 Ewaschuk, op. cit. n22 @ p.21-47.

62 Report 31. *Recodifying Criminal Law*, 1987, @ p.34.

[s.740(1)] Constitutes an exception to the general rule expressed in s.19 in a case where the commission of a criminal offence is relied on as the *actus reus* under this section.

It has been suggested that:

The best rationale for the decision [in *R. v. Docherty*] is that ignorance that an offence was being committed had to provide a defence if the *mens rea* classification of s.740(1) was to have any significant meaning. In such cases, the courts are taking the view that it would be unjust to apply the exclusionary rule where an offence has been designed so that it should import *mens rea* and yet practically permit *mens rea* to be addressed only with respect to a circumstance of law.⁶³

63 Colvin, *op. cit.* n.19 @ p.169-170.

II. NATURE OF MISTAKE OF LAW

A. Mens Rea and Mistake of Law

It is a general fundamental principle of criminal law that a lack of *mens rea* is a defence to a charge of criminal liability.

It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin: *actus non facit reum nisi mens sit rea*.

Re s.94(2) of Motor Vehicle Act R.S.B.C., 1979 c288, (1985) 48 C.R. (3d) 289.

The Supreme Court of Canada recognized the fault requirement as part of the common law in *R. v. City of Sault Ste. Marie*, *supra*, and as part of the constitution under s.7 of the *Canadian Charter of Rights and Freedoms*⁶⁴ in *Reference Re s.94(2) of Motor Vehicle Act*, *supra*. In Wilson, J.'s judgment in *R. v. Tutton*, (1989) 48 C.C.C. (3d) 129 (SCC) at page 147, she stated:

This court made clear in *Sault Ste. Marie*, [*supra*], and other cases that the imposition of criminal liability in the absence of proof of a blameworthy state of mind, either as an inference from the nature of the act committed or by other evidence, is an anomaly which does not sit comfortably with the principles of penal liability and fundamental justice... This is particularly so in the case of offences carrying a substantial term of imprisonment which by their nature, severity and attendant stigma are true criminal offences aimed at punishing culpable behaviour as opposed to securing the public welfare. In the absence of clear statutory language and purpose to the contrary, this court should, in my view, be most reluctant to interpret a serious criminal offence as an absolute liability offence.

s.19 of the Criminal Code is clearly a marked departure from the fundamental principle that a lack of *mens rea* is a defence to a charge of criminal liability. On a strict reading of s.19, the accused may be culpable even where he did not know he was breaking the law, did not intend to break the law, or had no *mens rea* to break the law. This factor therefore supports further development of exceptions to s.19.

Section 7 of the Charter will be used to support exceptions to the rule that ignorance of the law is no excuse, particularly where there was no reasonable opportunity to know the law. It would be a revolutionary change, however if s.7 of the Charter were to put another rule in place of s.19 of the Code.⁶⁵

⁶⁴ Constitution Act, 1982 (U.K.) Sched.B. [also R.S.C. 1985, App. II, No 44, Sched B.] (hereafter the Charter).

⁶⁵ Colvin, *op. cit.* n.19 @ p.262.

B. Distinguishing Mistake of Fact from Mistake of Law

The defence of mistake of fact is integrally related to the concept of *mens rea*. In fact, the defence of mistake of fact may be characterized as a "negation of guilty intention". As per Dickson, J. in *Pappajohn v. R.*, (1980) 52 CCC 481 (SCC) at 494:

Mistake is a defence, then, where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation as a positive defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the *actus reus* of an offence.

John Williams elaborated further on this topic:

The defence of mistake of fact is often misunderstood. Simply stated, it is a positive formulation of a defence of "no *mens rea*". As pointed out above, it is a fundamental principle of our criminal law, that in the absence of contrary language or implication, an accused cannot be convicted of a crime unless it is proven that he has the necessary *mens rea* or guilty mind. Therefore an accused who acted under a mistake which effectively negated the *mens rea* must be acquitted. Defined, mistake of fact occurs for the purpose of criminal law, when an accused holds a positive belief in a fact or state of facts which is untrue, but in furtherance of the mistaken belief commits the *actus reus* of an offence. The accused's ignorance of fact will be a defence if it results in an absence of the *mens rea* which is required by the definition of the offence charged.

It will be seen then, that mistake of fact is not a "defence" in the same sense that provocation, self defence, duress, and necessity are defences. These latter defences *justify* or *excuse*, either partially or totally, what would otherwise be criminal conduct. A mistake of fact which negates the *mens rea* renders the committed act innocent and thus there never arises any question of exonerating criminal conduct.

An accused may thus be acquitted, notwithstanding proof of the commission of the prohibited act, because the Crown failed to provide the mental element of the crime. When a mistake of fact defence is raised, the trier of fact is provided with a *reason why* the accused lacked the necessary *mens rea*.⁶⁶

As discussed on page 1, it is a maxim that *ignorantia facti excusat ignorantia juris non excusat*.⁶⁷ However, as per Mewett:

To state that mistake of law is not a defence but mistake of fact is, puts too simply the end proposition of law... To determine, however, whether one is dealing with a mistake based on fact or a mistake based on law...(or in some instances on something else) is more difficult.⁶⁸

Contrasting the cases of *R. v. Baxter*, (1982) 6 C.C.C. (3d) 447 (Alta.CA) and *R. v. Phillips*, (1978) 44 C.C.C. (2d) 548 (Ont.CA), serves to illustrate the often subtle

⁶⁶ John Williams, (1985) 63 Can.Bar.Rev., 597 @ 604-05.

⁶⁷ Ignorance of the fact excuses, ignorance of the law excuses not.

⁶⁸ Mewett, Criminal Law, 2nd ed., 1985, Butterworths @p.322-323.

nature of the distinction. In *R. v Baxter, supra*, the accused was charged with possession of a prohibited weapon, contrary to s.90(1) of the Criminal Code. Although the accused was aware of the material characteristics of his knife, he did not know that such material characteristics were prohibited by s.90(1). It was held that this was a mistake of law, and that this was no defence to the charge. In *R. v Phillips, supra*, the accused did not know that his knife had the material characteristics which were prohibited under the Criminal Code. This was held to be a mistake of fact, so that a defence of lack of *mens rea* was open to him.⁶⁹

Sometimes the task of distinguishing between mistake of fact and law is most difficult:

...at the border line the distinction becomes tenuous. A mistake of fact is said to occur when the accused is mistaken in his belief that facts exist when they do not, or that they do not exist when they do. On the other hand, a mistake of law is said to occur when the mistake is not as to the actual facts but rather as to their legal relevance, consequence or significance. Williams⁷⁰ says that generally a fact is something "perceptible by the senses" which can be photographed whereas a law is "an idea in the minds of men" These definitions may well suffice in the majority of cases, easily distinguishing a mistake as to whether a gun was loaded (mistake of fact) from a mistake that pointing a loaded gun is not an offence (mistake of law). However, they by no means resolve the difficult cases, however intricate the attempt to qualify them.⁷¹

One explanation as to why this distinction is so problematic is as follows:

Propositions of law can always be expressed in the language of "fact", in terms of what has or has not been done. Thus a mistake of law respecting whether or not it is an indictable offence is also a mistake of fact respecting whether or not legislators have taken the action which would make it an indictable offence. Similarly a mistake of law respecting whether or not a drug is a narcotic within the meaning of the *Narcotic Control Act* is also a mistake of fact respecting whether or not the Governor and Council has taken action to designate it a narcotic. Mistakes of law are not different in kind from mistakes of fact. They are, rather, a special category of mistakes of fact. They are mistakes of *legal fact*, and can therefore be meaningfully characterized as pertaining to either "law" or "fact". Certain linguistic conventions may guide the terminology which is used. Yet since the availability of a defence may depend on how the mistake is characterized, the court's sense of what would be the appropriate result may also influence its choice of label... The labels "mistake of fact" and "mistake of law" appear to have been used primarily as devices for rationalizing decisions which were taken on other grounds.⁷²

⁶⁹ See also *R. v Prue and Baril*, [1979] 2 SCR 547.

⁷⁰ Glanville Williams, *General Part*, pp.287-289.

⁷¹ Stuart, *op. cit.* n. 2 @p.299.

Note that *R. v Prue and Baril, supra*, departs from this classic distinction that a mistake of fact relates to a mistaken perception of a physical, concrete thing or offence whereas a mistake of law relates to a mistaken interpretation or application of an abstract idea found in writing or oral form - see Ewaschuk @ pp.21-46 to 21-47.

⁷² Colvin, *op. cit.* n.19 @ pp.160-61.

It has been suggested that, in some areas, courts are "bending over backwards to characterize a mistake as one of fact to avoid the harsh ignorance of the law is no excuse rule".⁷³ As discussed by the Review Committee of the Australian *Crimes Act* (1990),⁷⁴ there are no easy solutions to this problem:

It is in some cases difficult to distinguish between a mistake of fact and a mistake of law but the Review Committee agrees with Professor Howard⁷⁵ that in most circumstances the distinction causes little or no difficulty. Any such difficulty that does occur may be regarded as unavoidable; at least it is not easy to suggest a means of avoiding it.

C. Criminal Offences Which Include Legal Circumstances

A problematic and often confused aspect of the mistake of law rule relates to offences in the Criminal Code which include circumstances of law in their material specifications. The law is unclear, in such cases, as to whether a mistake regarding these legal circumstances may operate as a defence of lack of *mens rea*. For example, "breaking and entering" contrary to s.348 of the Code requires that the accused "breaks and enters a place with the intent to commit an indictable offence therein". It may happen that an accused did not know that his conduct fell within an indictable offence, although he or she did commit the *actus reas* of "breaking and entering". The requirement that the accused have had the *mens rea* with respect to knowledge of the law clashes with the general principle that ignorance of the law is no excuse. These types of offences have therefore given rise to much confusion in the cases - this being compounded by the inherent difficulty in distinguishing between mistake of fact and mistake of law:

The conceptual and causal relationships between mistakes of fact and law, coupled with the ambiguous language of s.19 of the Code, have produced an area of confusion within the law of *mens rea*. Where the material specifications of a *mens rea* offence happen to include circumstances of law, the court appears to have three possible options for handling a mistake respecting such circumstances:

- (i) characterize the mistake as one of law and apply the rule that ignorance is no excuse so as to deny a defence of a lack of *mens rea*
- (ii) characterize the mistake as one of law but nevertheless permit the defence;
- (iii) characterize the mistake as one of fact and again permit the defence.

Few clear rules dictate the choice to be made between these alternatives. Nevertheless, certain rough patterns are discernable in the cases.⁷⁶

⁷³ Stuart, op. cit. n.2 @ p.289.

⁷⁴ Interim report, *Review of Commonwealth Criminal Law*, July 1990, @ p.50.

⁷⁵ Howard, *Criminal Law*, 5th Ed., @ pp.506-09.

⁷⁶ Colvin, op. cit. n.19 @ p.163.

Colvin has outlined three factors which case law has indicated will impact upon the availability of a defence of lack of *mens rea* in such circumstances (where excusing defences are not available⁷⁷):

1 The Generality of the Mistake

Colvin's conclusion regarding this factor, is that:

A factor which can bear heavily on the outcome [as to whether a defence of lack of *mens rea* will be available] is the generality of the mistake. The exclusionary rule [s.19], appears to be applied more often where there has been a mistake about a matter of general law than where the mistake has concerned the application of general law to a specific situation. This is illustrated by the contrast between *Baxter*, supra, and *Phillips*, supra.⁷⁸ The exclusionary rule was applied to a general mistake about whether a type of knife was "prohibited" but not to a mistake about whether a particular weapon had the characteristics which brought it within a "prohibited category".⁷⁹

The defence of lack of *mens rea* is therefore more likely to be available where the mistake concerned the application of general law to a specific situation.

2. The Field of Law

A number of cases suggest that the field of law which is in issue is a factor which will impact upon the availability of a defence of lack of *mens rea*. For example, Canadian courts have permitted a mistake of law to negative *mens rea* where proprietary rights or "colour of right" are in issue.

3. The Impact of Applying s.19 on the Character of the Offence

As per Colvin, in some *mens rea* offences, a legal circumstance is so central to an element that to exclude the defence of mistake with respect to it would be to remove the *mens rea* status of the offence. An example of such a case is *R. v. Docherty*, supra (see page 14-15).

77 As per Colvin, at p. 159, there are two exceptions to s.19 which may be characterized as "excusing defences". They are:(i) officially induced error"; and (ii) "non publication of law". The distinction between these excusing defences and an ordinary defence of lack of *mens rea*, with respect to mistake of law, may be explained as follows. With an excusing defence, it is acknowledged that the accused was ignorant or mistaken as to the law and that all of the material specifications of the offence have been met. The excusing defence acknowledges that, while the accused's conduct was wrong, punishment would be inappropriate. This view is based on the idea that the accused has acted in the way an ordinary person in similar circumstances would have acted and that it would be unduly harsh for society to expect more from him or her than from any other citizen. This approach is quite different from an ordinary defence of lack of *mens rea* which, as will be discussed, operates to exculpate the accused. There is no need for an excuse where the accused is blameless.

78 See pp.17-18.

79 Colvin , op. cit. n.19 @ p.163.

III. CODIFICATION

A. Canada - Draft Criminal Code (1987)

Provision 3(7), as found in Report 31, *Recodifying Criminal Law*, is as follows:

3(7) Mistake or Ignorance of Law. No one is liable for a crime committed by reason of mistake or ignorance of law:

- (a) Concerning private rights relevant to that crime; or
- (b) reasonably resulting from
 - (i) non publication of the law in question,
 - (ii) reliance on a decision of a court of appeal in the province having jurisdiction over the crime charged, or
 - (iii) reliance on competent administrative authority.

Commentary on Provision 3(7), as found in Report 31, is as follows:

Comment

Mistake of law in general is no defence. This is the position at common law, under s.19 of the *Criminal Code* and under clause 3(7) of this Code. It is up to the citizen to find out what the law is and comply with it.

On the other hand no one can fairly be punished for breaking a law which he has no reasonable chance of ascertaining. For this reason present law has created two exceptions to the general rule. Ignorance of law owing to non publication of regulations is a defence.⁸⁰ Mistake of law resulting from officially induced error may also be a defence.⁸¹

Clause 3(7)(d) codifies these two exceptions, extending one of them and adding another. It extends the first exception to non publication of any law. It adds an exception in the case of mistake resulting from reliance on the law as stated by the court of appeal in the province where the charge is tried. No one can reasonably be expected to be wiser than the highest court in his jurisdiction; rather he is entitled to assume the law is what the court says it is until the Supreme Court of Canada states otherwise.

In addition there are certain crimes, such as theft and fraud where honest but erroneous belief in a claim of right negatives criminal liability. Insofar as such belief is based on error of law, mistake of law will operate as a defence. This is the position under present law and also under clause 3(7)(a) of this Code.

Clause 3(7)(b) then provides three exceptions to the general rule, but all three relate solely to mistakes *reasonably* resulting from the factors specified.

⁸⁰ *Statutory Instruments Act*, SC 1970-71-72, c.38, s.11(2).

⁸¹ *R v. McDougall*, *supra*.

Observations

1. The explicit articulation and expansion of existing exceptions is a marked departure from the traditionally strict approach.
2. The Law Reform Commission has recommended codifying a rule based on "Mistake or Ignorance of Law". Section 19 of the Criminal Code refers only to "Mistake" of law. This new recommendation would codify the Supreme Court's interpretation of s.19 in *R. v. Molis, supra*, where it was determined that there should be no distinction between "Mistake" and "Ignorance" insofar as either related to a question of law.
3. Provision 3(7)(b)(i) relating to "non publication" articulates the present law and purposely extends it as well. The wording is somewhat open-ended. The scope of the words "publication" and "law" are not defined and no distinction is made between regulations and statutes, so that all "law" would be encompassed by this provision. Also, the requirement or effect of actual notice on the accused has not been indicated.
4. Provision 3(7)(b)(ii) relating to reliance on judicial decisions is a marked departure from the present law.
5. Provision 3(7)(b)(iii) codifies the emerging exception of "officially induced error" (resolving the issue of its availability in a criminal context).
6. All exceptions in provision 3(7)(b) must have "reasonably" resulted. This may address the fact that the exceptions are broadly defined.
7. No provision has been made regarding offences which include legal circumstances in their material specifications.
8. It is not the stated intention of the Law Reform Commission to create new law through the wording of 3(7)(a). However, because the wording is so broad, new law may result. Presently, a mistaken belief as to private rights, based on a mistake of law, can negative the requisite *mens rea* only in certain limited circumstances (see pp. 13-14).

[The] new provision [s.3(7)(a)] speaks of "private rights" While this does certainly include theft and fraud and other property offences, the broad scope of the words leave the defence open to wide application. There is also the predictable, and valid argument that the new wording of the law must be read remedially and therefore to increase the ambit of the applicability. The types of offences which might be included under this wording include anywhere "private rights" are affected. So instead of the defence applicable to fraud and theft, it is now available to any offence in Part IX of the Code. Criminal interest rates (s.347), unlawful presence in a dwelling house (s.349), selling auto master keys (s.353) are just some of the offences which could be argued to fall under the new wording if the broad "private rights" is retained. ⁸²

⁸² Steven Bilodeau, *A New Criminal Law Defence, Mistake of Law and Officially Induced Error*, (1989), unpublished, Law Faculty.

9. The issue of difficulty in distinguishing between mistake of fact and mistake of law is not addressed.
10. There is no provision regarding criminal offences which include legal circumstances in their material specifications.
11. There are no provisions for exceptions regarding reliance on a lawyer's advice, or ignorance of law by a foreigner, or a defence of due diligence in attempting to ascertain the law.

B. Other Anglo American jurisdictions

1. United Kingdom

In keeping with the traditional English approach, the Code Team in the United Kingdom recommended codifying a very restrictive rule. The intention was to discourage the judiciary from expanding existing exceptions. Arguments for recognizing the doctrine of "officially induced error" and reliance on court rulings were considered with some sympathy by the Code Team. However, they declined to introduce these exceptions, because this would be a "major law reform exercise", beyond the scope of their present project. Clause 21(b) appears to codify existing exceptions relating to private or civil law, and may relate to a situation where there has been a mistake as to a legal concept contained within the definition of the offence.⁸³ Clause 21(a) allows for the possibility that specific defences might be expressly provided for. Note that the Code Team has recommended that a defence relating to non publication of subordinate legislation be included in the Code, at clause 46 of the draft Code. Also, the rule applies explicitly to both ignorance and mistake of law. The clauses reads as follows:

21-Ignorance or mistake as to a matter of law does not affect liability to conviction of an offence except-

- (a) where so provided; or
- (b) where it negatives a fault element of the offence.

46- (1) A person is not guilty of an offence consisting of a contravention of a statutory instrument if-

- (a) at the time of his act the instrument has not been issued by her majesty's stationary office; and
- (b) by the time reasonable steps have not been taken to bring the purport of the public or of persons likely to be affected by it, or of that person.

Commentary on clause 21 of the Draft Bill is found in Volume II of the draft Code and is as follows:

Clause 21: Ignorance or mistake of law

⁸³ see commentary below at 8.32, see also pp.19-20

8.29 *Ignorance of the law is no defence.* There is abundant authority that the accused's ignorance of the offence he is alleged to have committed, or his mistake as to its application, will not relieve him of liability. This principle appears to be an absolute one. So it seems appropriate to make explicit in the Code one of the best known maxims of the common law. The effect will be to preclude any attempt to stimulate judicial recognition of exceptions to the general rule by reliance on clause 45(c), under which common law defences can be developed, but only if they are not inconsistent with other Code provisions.

8.30 The Code team in their Report drew attention to the case for the recognition of a defence of excusable mistake of law, particularly where the act that constitutes an offence has been done in reliance upon a statement of law made by a competent court or a responsible official. Such a defence, as the team acknowledged, could only be introduced in the light of a major law reform exercise involving detailed consideration and extensive consultation. We have not been able to undertake such an exercise in the context of the present project.

8.31 *Express defence of ignorance or mistake of law.* Paragraph (a) contemplates the possibility that such a defence might be provided in relation to a particular offence. Examples are likely to be rare.

8.32 *Ignorance or mistake negating a fault element.* "Ignorance of the law is no defence" is a popular aphorism with a good deal of power to mislead. It therefore seems worthwhile to state, in paragraph (b), the truth that a mistake as to the law, equally with one as to fact, can be the reason why a person is not at fault in the way prescribed for an offence. A simple example occurs where a person destroys property in the mistaken belief that it is his own to do with as he wishes. He does not intentionally or recklessly destroy property belonging to another within the meaning of clause 180.

2. United States

The Model Penal code has provided for mistake of law at s.2.04, under the heading "Ignorance or Mistake". Section 3(a) and (b) narrow the circumstances where a mistake of law will be a defence. The exceptions outlined relate to any non publication of a "statute" or "enactment" which is not reasonably available and to a broad range of "officially induced errors", including various types of judicial and administrative pronouncements. The provision reads as follows:

Section 2.04. Ignorance or Mistake.

- (1) Ignorance or mistake as to a matter of fact or law is a defense if:
 - (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or
 - (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.
- (2) Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the

defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

- (3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:
- (a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or
 - (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.
- (4) The defendant must prove a defense arising under Subsection (3) of this Section by a preponderance of evidence.

Commentary as found in the Model Penal Code is as follows:

Subsection (1) states the general principle governing whether and when ignorance or mistake of fact or law will afford a defense to a criminal charge. The matter is conceived as a function of the culpability otherwise required for commission of the offense. Such ignorance or mistake is a defense to the extent that it negatives a required level of culpability or establishes a state of mind that the law provides is a defense. The effect of this section therefore turns upon the culpability level for each element of the offense, established according to its definition and the general principles set forth in Section 2.02.

Subsection (2) deals with a special kind of case, one where the actor raises a particular belief as a defense to the offense with which he is charged, but where he would be guilty of another offense had the situation been as he supposed. In this event, the defense that would otherwise be available under Subsection (1) is denied. The defendant, however, cannot be convicted of a grade or degree of offense higher than the offense of which he could have been convicted had the situation been as he supposed.

Subsection (3) establishes a limited exception to the principle of Section 2.02(9) that culpability is not generally required as to the illegality of the actor's conduct. Under the circumstances outlined in Subsection (3), the actor may raise his belief in the legality of his conduct as a defense to a criminal charge. The instances in which this is permitted are narrowly drawn so as to induce fair results without undue risk of spurious litigation. Subsection (4) places the burden of persuasion on the defendant to establish a defense under Subsection (3) by a preponderance of the evidence.

3. Australia

The Review Committee of the Australia *Crimes Act* (1990) has proposed codification of a number of exceptions which are defined in detail. A "non-publication" exception is available with respect to any "statutory instrument" that was unpublished or not reasonably made available to the public, or to those likely to be affected by it. "Statutory instrument" is specifically defined. Similarly, the "reliance on judicial authority" exception is precisely defined. Interestingly, no exception is provided for with respect to the mistaken advice of an administrative authority or a lawyer. As in Canada, the United Kingdom, the United States, and New Zealand, the rule explicitly applies to both ignorance and mistake of law. Clause 3J.(b) recognizes that "ignorance or mistake may negate the existence of knowledge, intention or recklessness when those are elements of the offence." ⁸⁴ No "color of right" defence is recommended. The proposed Consolidating Law is as follows:

"Mistake or ignorance of law no excuse

3J. Subject to sections 3K and 3L, ignorance of, or mistake as to, a law of the Commonwealth does not relieve a person from criminal liability for an act that contravenes that law unless:

- (a) that law provides that ignorance or mistake as an excuse; or
- (b) that ignorance or mistake would negate any requisite fault.

Defence where statutory instrument not published etc.

3K. (i) It is a defence to a prosecution of a person for an offence consisting of an act done in contravention of a provision of a statutory instrument if the person provides that, at the time the act was done:

- (a) the person did not know that the act constituted an offence; and
- (b) copies of the instrument had not been published or otherwise reasonably made available to the public or to those persons likely to be affected by it; and
- (c) the effect of the provision had not otherwise been reasonably made known to the public or to those persons likely to be affected by it.

(2) in subsection (1): "statutory instrument" means any regulation, order, bylaw, rule or other instrument made under an Act.

(3) Without limiting the effect of paragraph (1)(b) in relation to an offence:

- (a) statutory instruments that are required to be laid before each House of the Parliament are taken to be reasonably made available or known to the public at the time when they are laid before a House of the Parliament; and

⁸⁴ *Interim Report, Review of Commonwealth Criminal Law, (1990,)* Australia at p. 50.

- (b) a statutory instrument (whether required to be laid before a House of the Parliament or not) is taken to be reasonably made available or known to the public if copies of the instrument are available for purchase in at least one place in the state or territory where the offence is alleged to have been committed.

Defence where reasonable reliance on judgement etc.

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

- (a) the person mistakenly believed that the act constituted in the offence did not attract criminal liability; and
- (b) that belief was formed as a result of reasonable reliance by the person on a decision of:
 - (i) the High Court or a Justice of the High Court; or
 - (ii) the Federal Court, the Supreme Court of a State or Territory or the Family Court or a judge of that court; or
 - (iii) the Administrative Appeals Tribunal;
being a decision given as to the effect of that provision."

Commentary on the Proposed Consolidating Law (in part) is as follows:

"6.30 The Review Committee recommends that:

- (d) no provision should be made for an excuse where a mistake of law was occasioned by reliance on the advice of an administrative authority or a lawyer; and
- (e) it is unnecessary to legislate specifically to make a claim of right and excuse since the general provision that mistake of law may negative knowledge, state of mind or fault should cover that situation

4. New Zealand

The New Zealand Draft Crimes Bill is quite restrictive. The non-publication rule is limited to regulations only. There are no exceptions relating to "officially induced error," judicial pronouncements or reliance on other authorities such as lawyers. The rule does explicitly apply to both ignorance and mistake. Provision 26(2) was designed to replace the New Zealand notion of "color of right," however, it seems that its scope may actually be broader than intended. The provision is as follows:

"26. Ignorance or mistake of law - (1) Subject to subsection (2) of this section, a person is criminally responsible for any act done or omitted to be done whether or not that person knows that the act or omission constitutes an offence.

- (2) A person is not criminally responsible for any act or omission that the person believes to be justified if that belief is based on ignorance of, or mistake as to, any matter of law other than the appropriate enactment.

- (3) A person is not criminally responsible for any offence against any instrument made under the authority of any Act if, at the time of the act or omission, -
- (a) The instrument had not been published or otherwise reasonably made known to the public or persons likely to be affected by it; and
 - (b) The person did not know of the instrument.

Commentary found under the explanatory note is as follows:

Clause 26 relates to ignorance or mistake of law.

Subclause (1) repeats, in different form, Section 25 of the present act.

Subclause (2) is new. In essence it replaces the present notion of "color of right." However, whereas that notion seemed to include some element of moral justification, this provision is limited to legal justification. It does not, of course extend to the enactment by which the offense is constituted.

Subclause (3) is also new. It arises out of the report of the Regulations Review Committee of the House. It excuses a person from criminal responsibility for an offence against regulations, etc, made under an Act if the regulations had not, at the time of the offence, been published or otherwise been made reasonably known to the public, and that person did not know of them.

III. ISSUES FOR CONSIDERATION

A. Should s 19 of the Criminal Code be abolished?

It has been argued that s 19 should be abolished because:

1 It is inconsistent with the general fundamental principle of criminal law that lack of *mens rea* is a defence to a charge of criminal liability.

2. As per the Supreme Court of Canada in *Saulte St. Marie, supra*, and *R.v. Tutton, supra*, imposition of criminal liability in the absence of proof of *mens rea* is an anomaly which does not sit comfortably with the principles of penal liability and fundamental justice - especially with respect to offences carrying long terms of imprisonment (see p.16).

There are a variety of arguments which pertain to both the position that s. 19 should be abolished, and also to the less drastic position that the rule in section 19 should be relaxed (through the recognition and expansion of existing exceptions and/or the creation of new exceptions) These arguments are discussed on p.32 under the heading "pros and cons".

B. Should s.19 of the Criminal Code be replaced with a general defence of mistake of law?

Colvin has suggested that such a general defence could be based on the concept of "reasonableness". In his view, while highly unlikely;

"it is conceivable that [section 7 of the Charter] could be taken to demand a general defence of reasonable mistake of law. Yet in view of the historical reluctance of the common law to admit defences based on normative ignorance, it is expected that the courts will proceed cautiously.... A more likely possibility is that "section 7 of the charter will be used to support exceptions to the rule that ignorance of the law is no excuse, particularly where there was no reasonable opportunity to know the law.⁸⁵

According to this view the general defence of reasonable mistake of law is inconsistent with the present wording of s.19, which, as presently formulated, can only accommodate very limited and strictly defined exceptions :

The general rule that ignorance of the law is no excuse is subject to several exceptions, as a matter of either common law or constitutional law, where there was no reasonable opportunity to know the law or where an error was "officially induced". The common element in these exceptions is that the mistake was reasonable. The limits of the exceptions should, however be emphasized. There is no hint of the emergence of any general doctrine that a mistake of law which is made on reasonable grounds can provide an excusing defence. Moreover, the words of s.19 of the Criminal Code should preclude any such development as a matter of common law. Even though the statement of the rule that ignorance cannot excuse has been

85 Colvin, op. cit. n.19 @ p.262.

read as an absolute injunction, it is sufficiently firm to allow no more than severely limited exceptions.⁸⁶

With regard to developing a general mistake of law defence, Stewart suggests two possible alternatives:⁸⁷

1. Formulate an exception comparable to mistake of fact:

Mistake of law can be placed on the same footing as mistake of fact: they would excuse to the extent that they negated proof of any fault requirement. This solution has recently been adopted by South African courts⁸⁸.

Note that Snyman ⁸⁹ argues that the South African court went too far and advocates a reasonableness limit.

2. Another possibility would be to allow a subjective inquiry into the state of mind of the accused for a mistake of fact defence, while an objective defence only would be used for a general mistake of law defence. The rationale behind this approach is that "it is one thing to argue that the law should be based on criteria that make a compassionate allowance for individual perceptions.[With respect to mistakes of fact]...the subjective approach should normally be asserted. However, it is altogether different to so easily absolve an individual for misperceiving the law itself."⁹⁰As per Hall,⁹¹ "to permit an individual to plead successfully that he had a different opinion or interpretation of the law would contradict the postulates of a legal order."

3. If section 19 of the Criminal Code should not be abolished or replaced with a general defence of mistake of law, should it be made less harsh?

There are a variety of arguments in support of relaxing the rule in s.19 through the recognition and expansion of existing exceptions and/or the creation of new exceptions to s.19 (note these arguments relate not only to the debate over relaxing s.19, but also to the debate over abolishing s.19).

Ibid.

Stewart, op. cit. n.2 @ p.278.

DeBlom [1977] 3SA 313 (AD)

Snyman, *Criminal Law*, (1983) pp. 177-180

Stewart, op. cit. n.2 @ p.278

Jerome Hall *General Principles of Law* 2nd ed. (1960) page 383

. Pros and Cons ⁹²

. Allowing a defence of ignorance of the law would involve the courts in insuperable evidential problems.⁹³

Austin was a proponent of the view that

"if ignorance of the law were admitted as grounds of exemption, the courts would be involved in questions which were scarcely possible to solve, and which would render the administration of justice next to impracticable"⁹⁴

Others, such as Holmes⁹⁵ and Houlgate⁹⁶ were of the view that any evidential difficulties were not significant from those faced in the context of mistake of fact. Stewart comments:

"We have seen that the argument of expediency is a familiar one in the debate and noted that the Supreme Court of Canada finds it most unconvincing⁹⁷ even if there are evidential difficulties, this argument of expediency would be an inadequate rationale. It could well be that the argument is a relic of the period in the nineteenth century when the accused could not testify. ⁹⁸

c. It would encourage ignorance where knowledge is socially desirable. ⁹⁹

This public policy argument was adopted by O'Hearne County Court Judge as well in *Flemming, supra*, at p.262, who held that "the rule is based not on justice but on a public policy favoring the largest possible conformity with the law."

Opponents of this view have argued that:

"Subjection of man to sanctions under a law which is unknown and unknowable to him and which he has no opportunity to accept or reject expresses the view that he is a mere object of the law."¹⁰⁰

A related argument is that:

92 Note that propositions a. through d. are, considered to be the four major arguments advanced for the exclusion of mistake of law as a defence to a criminal charge. as per Stuart, op. cit. n.2. @p. 274

93 Ibid.

94 Austin, *Jurisprudence*, 1869, @ p.498

95 Holmes, *The Common Law* 1881 @ p.48

96 "Ignorantia Juris: A Plea for Justice, (1967-68) 78 *ethics* 32 @ p.37-38.

97 Chopin (1979) 45 C.C.C. seconds 333 (S.C.C.)

98 Stewart, op. cit. n.2 @ p.275

99 *Perkins on Criminal Law* 2nd ed. (1969) p.925, see also Holmes, *Of The Common Law*, (1881) p.41

100 *Error Juris: A Comparative Study* (1957), 24 *Chicago Law Review* 421 at page 471

"if the criminal sanction is being used as an educative device, it should not be at the expense of the blameless accused ... furthermore, a rule that ignorance of the law will excuse would also encourage our lawmakers to educate the public, foreigners and immigrants."¹⁰¹

c. Otherwise every person would be a law unto himself, infringing the principle of legality and contradicting the moral principles underlying the law¹⁰²

The counter argument to this view is that;

"Hall's proposition concerning morality requires one to accept the validity of a universal notion of shared morality and also that all criminal laws reflect this exactly. The latter is not true of our present over-inclusive Criminal Code, let alone regulatory offences, federal or provincial."¹⁰³

d. Ignorance of the law is blameworthy in itself ¹⁰⁴

There are numerous criticisms of this view:

"It is difficult to deport this rationale, which dates to some remote era when penal law reflected morality."¹⁰⁵

In a modern administrative state with its proliferation of technical and poorly-publicized regulations, the balance may well have shifted sufficiently to warrant reexamination of the doctrine ...¹⁰⁶

Can one really expect Canadian citizens to know the general import of the Criminal Code where a few lawyers, even those practising exclusively criminal law, claim to know the law."¹⁰⁷

D. Should "mistake" in section 19 be expanded to explicitly include both "mistake" and "ignorance?"

This has been referred to as a "sound approach":

[Section 19] speaks of ignorance and does not expressly refer to mistake. The courts have not recognized that this is significant. In *Molis* (1980) *supra*, the Supreme Court of Canada expressly held that s.19 refers to ignorance of the existence of law and also mistake as to its meaning, scope or application. This is a sound approach. The attempted distinction between ignorance and mistake often turns out to be one of

¹⁰¹ Stewart , op. cit. n.2 @ 276

¹⁰² Jerome Hall at page 382-386

¹⁰³ "Stewart , op. cit. n. 2 @ 276

¹⁰⁴ Cass, *Ignorance of the Law: A Maxim Reexamined* (1976), 17 Will and Mary Law Review 671

¹⁰⁵ Stewart, op. cit. n. 2 @ p.277

¹⁰⁶ P. Weiler, *The Supreme Court of Canada and the Doctrine of Mens Rea*(1971) 49 Canadian Bar Review 281 at 317

¹⁰⁷ Stewart, op. cit. n.2@ p.276

'pure sophistry',¹⁰⁸ an empty game of terminological gymnastics. If A smokes marijuana without any thought as to whether the act is criminal, he is clearly ignorant of the law. If B is smoking marijuana on the wrong assumption that its possession has been decriminalized, he has indeed acted under a mistaken impression of the law but he is also ignorant of the correct law.¹⁰⁹

If exceptions to section 19 are to be recognized, which ones should they be?

Non-Publication: Is the expansion of the "non-publication" exception as articulated in section 3(7)(b)(i) a desirable aim? If so, should the scope of "publication" be more precisely defined? Also, should the effect or requirement of actual notice on the accused be specifically addressed? (see pp. 11-12).

Reliance on Judicial Decisions: Is the exception with respect to section 3(7)(b)(ii) (which is a marked departure from present law) relating to judicial decisions desirable? If so should the clause be more clearly defined and narrowed?. It has been suggested¹¹⁰ that s.3(7)(b)(ii) is a "curiously pragmatic compromise, but there is United States precedent".¹¹¹

The following criticism of the provision has also been offered:

The LRC has ignored the maxim, "no two cases are the same". They are telling the citizen that it is alright to assume that every incident is the same, without indicating the part that defences and mitigating circumstances, as well as pure fate, play in any criminal trial. They ignore the source issue entirely, although the requirement for a "reasonable reliance" may take this into account. The Working Group's¹¹² concerns are centered around the Charter, specifically the equality provisions. Conflicting appellate court decisions may prove to be contentious to those accused who see a decision in their favour in a province other than their own. As well, they raise the question of an accused using appellate decisions from a province other than his own where there is no decision on the point in his province. The provision is acceptable but only in theory. It would need much more revision, defining and narrowing before it would be a useable piece of criminal legislation.¹¹³

3. Officially Induced Error: ..Should section 3(7)(b)(iii), which codifies the emerging exception of "officially induced error" be included? If so, should "authority" and "administrative" be more precisely defined? The following criticisms of this exception have been offered:

8 E.R. Keedy, *Ignorance and Mistake in the Criminal Law*, 1908, 22 Harvard Law Review 75, @ p.76, 90-95.

9 Stuart, op. cit. n 2 @ pp.272-73.

10 Stuart, op. cit. n.2 @ p.290.

11 *State v. V.F.W.*, Post No. 3722, 527 P (2d) 1020 (1974).

12 Report of the Working Group of the Law reform Commission of Canada.

13 Steven Bilodeau, *A New Criminal Law Defence, Mistake of Law and Officially Induced Error*, (1989), unpublished, U.B.C. Law Faculty, p. 27

The clause is deficient in several areas. First it is too vague in its definition of "authority". The LRC clause could equally apply to a desk clerk at any post or tax office as it would to the Minister himself. It does not address the issue raised by Stuart of the broadening range of people whom the public go to for legal information. Second, "administrative" authority does not include "enforcing" authority. Consequently, the accused who directs his query at the official whom he guessed to be most aware of the prohibited areas of the law would not be protected.¹¹⁴

4. Legal Circumstances: Should there be a provision regarding offences which include legal circumstances in their material specifications? (see page ..).

5. Private Rights: Should the wording of section 3(7)(a) be more clearly equipped with a definition clause (defining "private rights") so as to limit the scope of its application? (see pp. 13-14). It has been suggested that:

 this provision must be either dropped or equipped with a definition clause to limit the ambit.¹¹⁵

6. Lawyer's Mistaken Advice: Should an exception be codified regarding reliance on lawyers' advice? It has been suggested by Stuart that an accused should not be penalized for the mistake or fault of his or her lawyer:¹¹⁶

Various reasons have been offered to support the position that lawyers' advice should not count at all. Some argue¹¹⁷ that there would be a danger of corrupt lawyers deliberately giving immunity to their clients by offering erroneous advice. This danger is overestimated. criminal responsibility should not rest on an individual for the sins of his lawyer and the courts can determine whether there has been some collaboration to assert this defence. A second argument¹¹⁸ is that law would no longer be what the courts and legislatures declared it to be but rather subject to lawyers' whims. This is based on the discredited declaratory theory of law and involves the untenable proposition that the courts cannot attempt to declare the law and at the same time excuse an accused who made an honest and reasonable effort to find out what the law was, but was misled by a lawyer. Even on the narrow view that the defence should be reserved for instances where there is reliance on official advice, modern commentators are agreed¹¹⁹ that lawyers, as officers of the court, are in a sense public officials. After all it is the state who licenses them to practice. In conclusion, it seems very unfair to penalize one who has, in contrast to one who is totally ignorant of the law, acted in reasonable reliance on the advice of a lawyer who should know or only advise as to what he does know.¹²⁰

114 Ibid @p.29

115 Steven Bilodeau, *A New Criminal Law Defence, Mistake of Law and Officially Induced Error*, (1989), unpublished, Law Faculty.

116 Stuart, op cit n.2 @ p.297.

117 L. Hall & S. Seligman, *Mistake of Law and Mens Rea*, (1941) 8 U Chic. L. Rev. 641-650. See also *The MacDonald Commission, Second Report: Freedom and Security Under the Law* (1981), p. 368.

118 Hall, op cit p. 118 @ pp. 387-88

119 But see Mewett and Manning, op. cit. n.67 @ p. 322

120 Stuart, op cit n.2 @p. 297.

A counter-argument is as follows:

[Kastner]¹²¹ notes firstly the views of Stuart who submits that the client/accused should not be penalized for the fault of his lawyer. As for the assertion that this would result in collusion between clients and shady lawyers to deflect liability, Stuart responds that the courts can determine whether that has occurred on a case by case basis. Kastner indicates the drawbacks of such an extension to the defence. One is "the specter of lawyers being made witnesses, and their professional competence being closely scrutinized in public." Here, the realities of the Stuart proposal are hauntingly plain. While it may be argued that this would only enhance the professionalism of the Bar, Kastner also indicates the practical difficulties facing an accused who must hire another lawyer to show the incompetence of his first.¹²²

7. Mistake of Law or Fact: Should the difficulty in distinguishing between mistake of law and mistake of fact be specifically addressed? As discussed on p. 19., the Review Committee of the Australian *Crimes Act* (1990), has concluded that there are no easy solutions to this problem and "Any such difficulty that does occur may be regarded as unavoidable; at least it is not easy to suggest a means of avoiding it"¹²³
8. Reasonableness: Is the use of the term "reasonably" in provision 3(7)(b) sufficient to encompass all eventualities, or should each exception be more specifically defined?
9. Legal Circumstances: Should a provision be codified regarding criminal offences which include legal circumstances in their material specifications?
10. Further exceptions: Should further exceptions be recognized, such as reliance on custom, ignorance of law by a foreigner and due diligence?

121 Nancy Kastner, *Mistake of Law and the Defence of Officially Induced Error*, 1985-1986, 28 C.L.Q. 308 @ 329.

122 Steven Bilodeau, *A New Criminal Law Defence, Mistake of Law and Officially Induced Error*, (1989), unpublished, Law Faculty 2 p. 27.

123 Interim report, *Review of Commonwealth Criminal Law*, July 1990, @ p.50.