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Terence Arnold*

State-Induced Error of Law,
Criminal Liability and *Dunn v.*
The Queen: A Recent
Non-Development in Criminal
Law.

I. Introduction

Like other contributors to this Nova Scotia issue of the *Law Journal* I was asked to comment upon any interesting developments, whether in cases or legislation, that had occurred in a particular area of law, in my case criminal law, since the time of the last "round-up".¹ When I began I intended to do as I had been asked; and there were, indeed, a number of matters which I felt to be worthy of comment.² I was waylaid, however. I came across a case in which the Appeal Division of the Nova Scotia Supreme Court took a position which so strongly offended my "sense of injustice" that I abandoned my former efforts and decided to focus on the issues which the Court's position raises. The decision to which I refer is *Dunn v. The Queen*;³ the position which I will analyze concerns mistake of law.⁴

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1. For the earlier discussion of criminal law developments in the province see Ortego and Goode, *Recent Developments in Criminal Law in Nova Scotia* (1976), 2 Dal. L.J. 744.

2. See, for example, *R. v. Stevens* (1976), 18 N.S.R. (2d) 96 (N.S.S.C., A.D.) — "found committing" arrest power; *R. v. Saunders* (1977), 34 C.C.C. (2d) 243; 38 C.R.N.S. 33 (N.S.S.C., A.D.) — obstruction of a constable in the execution of his duty; *R. v. Boutilier and Melnick* (1976), 35 C.C.C. (2d) 555 (N.S.S.C., T.D.) — interception of private communications; *R. v. Bradshaw* (unreported, judgement delivered June 1, 1977; N.S. (Prov. Mag. Ct.) — "half-way house" offence; *R. v. Dalton* (1977), 18 N.S.R. (2d) 555 (N.S.S.C., A.D.) — the granting of discharges; *R. v. Longueay* (1977), 34 C.C.C. (2d) 438 (N.S.S.C., A.D.) — sentencing in trafficking cases. Also, a variety of interesting problems are raised by the use of road-side screening devices in Nova Scotia.

3. (1977), 21 N.S.R. (2d) 334.

4. A number of cases involving issues of mistake or ignorance of law have arisen in Nova Scotia in recent years — see the cases cited in Ortego and Goode, *supra*, note 1 at 776 n. 151 and *R. v. MacLean* (1974), 17 C.C.C. (2d) 84; 27 C.R.N.S. 31 (N.S. Cty. Ct.), which is discussed, *id.* at 776-90 and in Note, *Criminal Law — Defences — Mistake of Law — Bona Fide Diligent Effort to Ascertain and Comply with Law* (1975), 10 U.B.C. L. Rev. 320. See also two related cases, *R. v. McPhee* (1975), 24 C.C.C. (2d) 229 (N.S. Prov. Mag. Ct.); *R. v. Clark Assoc. Ltd.* (1976), 32 C.C.C. (2d) 351 (N.S. Cty. Ct.)

Before I discuss the case, however, I should note that initially I felt some diffidence about the fairness of my analyzing the Court's comments on the mistake of law issue argued in the case; for in the result the Court decided that the facts were not such as actually to raise the issue. The Court's comments, therefore, were based upon a hypothetical state of facts. I ultimately overcame this diffidence, however, and felt that I was justified in so doing, for the following reasons. First, counsel on the appeal strongly urged the mistake of law argument and the Court received supplementary memoranda on the matter. Presumably, then, the Court's comments were made after the benefit of some thought. Second, the Court's view accords with that which has traditionally been taken in the common law and is one for which there is considerable authority, both in Canada and elsewhere.

II. *The Decision in the Dunn Case*

Dunn was charged with an offence against s. 235(2) of the *Criminal Code*⁵ in that he refused without reasonable excuse to comply with a lawful demand for a breath sample. He was convicted before a Judge of the Nova Scotia Provincial Magistrates Court. He then appealed by way of stated case to the Appeal Division of the Nova Scotia Supreme Court. His appeal failed.

One of the arguments which Dunn's counsel raised on appeal, an argument not raised before the trial court, was that Dunn had a reasonable excuse for refusing to accede to the breathalyzer demand as, contrary to s. 2(c) (ii) of the *Canadian Bill of Rights*,⁶ he was not afforded an opportunity to consult his lawyer in private. The "facts" urged in support of this argument were as follows. A police officer made a demand upon Dunn for a sample of his breath. Dunn accompanied the officer to a police station where the test was to be carried out. Once there he requested an opportunity to telephone a lawyer before he responded to the demand. The police acceded to this request. Dunn contacted a lawyer, who, as the argument went, put a number of questions to him and as a result of Dunn's answers concluded that Dunn was not being accorded the degree of privacy necessary for the consultation. He therefore advised Dunn to refuse the demand, which advice Dunn accepted. Thus the charge of

5. R.S.C. 1970, c. C-34.

6. R.S.C. 1970, App. III.

refusal against him. At no point did Dunn ask the police for greater privacy.

At the time the lawyer was alleged to have given this advice to Dunn the law as to the degree of privacy necessary to give effect to the right to counsel was set out in a number of decisions of provincial courts of appeal including a decision of the Appeal Division of the Nova Scotia Supreme Court, *R. v. Doherty*.⁷ The effect of these decisions was to establish that the right to retain and instruct counsel carried with it the right to do so in private. This right to privacy was not dependent upon a request for privacy but was a natural component of the right to counsel; just as the right to counsel could be waived, however, so could the right to privacy. The degree of privacy appropriate to any situation was to depend upon circumstances such as the physical structure of the police station, the availability of telephones and the number of personnel on duty. Unfortunately, prior to Dunn's case coming on for trial the Supreme Court of Canada gave its decision in *Jumaga v. The Queen*.⁸ In that case the Court held that the right to privacy will be treated as being waived if no request for privacy is made. Hence under the case-law as it stood at the time of his refusal Dunn arguably had a "reasonable excuse" for refusing the demand; under the case-law as it stood at the date of trial he had no such "reasonable excuse". Counsel for Dunn suggested that his client should be judged in accordance with the law as it stood when he acted.

Upon a perusal of the transcript of evidence from the trial⁹ the Appeal Division held that, while the matter of privacy had clearly been raised by the lawyer with Dunn, the real reason for the lawyer's advice to Dunn that he should refuse the test was that the lawyer felt that the demand was unlawful because the officer who made it did not have reasonable and probable grounds to believe that

7. (1974), 16 C.C.C. (2d) 494; 25 C.R.N.S. 289. The other relevant court of appeal decisions are *R. v. Penner* (1973), 12 C.C.C. (2d) 468; 22 C.R.N.S. 35 (Man. C.A.); *R. v. Balkan* (1973), 13 C.C.C. (2d) 482; 25 C.R.N.S. 109 (Alta. S.C., A.D.); *R. v. Maksimchuk* (1974), 15 C.C.C. (2d) 208; [1974] 2 W.W.R. 668 (Man. C.A.); *R. v. Walkington* (1974), 17 C.C.C. (2d) 253; [1974] 2 W.W.R. 454 (Man. C.A.); *R. v. Irwin* (1974), 18 C.R.N.S. (2d) 563; 28 C.R.N.S. 23 (Man. C.A.).

8. (1976), 29 C.C.C. (2d) 269; 34 C.R.N.S. 172.

9. The Appeal Division is permitted under R. 66.08 of the Nova Scotia Rules of Civil Procedure to include the transcript of evidence as part of the record in a stated case.

Dunn was committing an offence against either section 234 or section 236 of the *Code*.¹⁰ The facts, therefore, did not support counsel's argument. However, the Court went on to say that even if the facts had supported counsel's argument Dunn would have had no defence. Mr. Justice Macdonald, delivering a judgement concurred in by MacKeigan C.J.N.S. and Coffin J.A., said:

The law in relation to privacy in this type of case as enunciated by the Supreme Court of Canada in *Jumaga* states the law not only as of the date of such judgment but defines what it has always been. Consequently, even if the appellant had been advised by [his lawyer] to refuse to provide a sample of his breath on the ground that he was not afforded the *Doherty* kind of privacy in making the telephone call, such would have been a mistake of law on the part of [the lawyer] and would not afford a defence to the charge at trial after the judgment in *Jumaga* was pronounced.¹¹

The learned judge referred to s. 19 of the *Criminal Code*¹² and *R. v. Campbell and Mlynarchuk*¹³ as providing authority for this.

In the remainder of this comment I wish to examine two issues arising from this statement. The first concerns the declaratory theory of law and the second concerns "state-induced"¹⁴ mistakes of law.

III. *Judicial decision-making and the declaratory theory*

In order to find that Dunn's lawyer, and therefore Dunn, had made a mistake of law the Appeal Division had somehow to show that the authorities upon which the lawyer relied did not, at the time he relied upon them, accurately state the law. In effect, then, the Court

10. *Dunn v. The Queen*, *supra*, note 3 at 340-1.

11. *Id.* at 341. For the purposes of the following discussion I will treat the hypothetical state of facts as the real one.

12. S.19 of the *Code* provides as follows:

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

The section does not expressly refer to *mistake* of law and clear distinctions can be drawn between mistake and ignorance — see, for example, the discussion in Keedy, *Ignorance and Mistake in the Criminal Law* (1908), 22 Harv. L. Rev. 73 at 76 and O'Connor, *Mistake and Ignorance in Criminal Cases* (1976), 39 M.L.R. 644 at 652-3. However, the courts do not generally utilize these potential distinctions and treat the terms as synonymous. For the purpose of referring to the doctrine set out in s. 19 I will do likewise.

13. (1972), 10 C.C.C. (2d) 26; 21 C.R.N.S. 273 (Alta. D.C.).

14. I adapted this term from Silving and Ryu, *Error Juris: A Comparative Study* (1957), 24 U. Chi. L. Rev. 421 at 436.

had to give retrospective application to *Jumaga*. This the Court was able to do by relying upon one of the important theoretical traditions of the common law, namely the declaratory theory of judicial decision-making. While I do not intend to undertake an extensive examination of the theory I do wish to put it in its original context so as to provide an adequate background for a consideration of its use by the Court in the *Dunn* case.

It is convenient to take as an illustration of the declaratory theory in its original form, and the view of law from which it sprang, Blackstone's analysis in *Commentaries on the Laws of England*; for although most elements of Blackstone's perspective can be found in the works of earlier writers such as Hale and Coke it was Blackstone who first attempted to develop a coherent theory of the common law and the judge's role in respect to that law.

Stated briefly,¹⁵ it was Blackstone's view that the common law was made up of the customs both of the English people as a whole and of particular classes and groups of Englishmen, these customs having existed through the ages. Such customs in the main reflected the precepts of natural law. The common law was, as a general rule, certain and capable of being understood by "every person of discretion". It was made known principally through the efforts of those "depositories of the law", those "living oracles", the judges. Judges, Blackstone argued, did not make law, they simply declared it; their decisions were not "law", nor were they the sources of law — rather they were evidence of what the law was. Judges were bound to follow prior decisions, however, unless they were "contrary to reason" or to "divine law". Thus where a judge did reject a prior decision he was not creating new law but simply "vindicating the old one from misrepresentation". I should emphasize that Blackstone did not include statute law within this analysis. Such law he dealt with separately.¹⁶

Blackstone's views have been subject to extensive criticism and, often, ridicule.¹⁷ Lifted from their historical, social and cultural

15. This account is taken in the main from 1 Blackstone, *Commentaries on the Laws of England*, ed. W. D. Lewis (Philadelphia: Rees Welsh & Coy., 1898) at *67-*71. One commentator has said of Blackstone's views that they are "for the most part incomprehensible to the twentieth-century mind." Gilmore, *The Ages of American Law* (New Haven: Yale Univ. Press, 1977) at 5 fn. 4. I now have considerable sympathy with this view.

16. *Commentaries*, *supra*, note 15 at *85-*91.

17. Bentham and Austin, for example, bitterly attacked Blackstone's views — see, as an illustration, Bentham, *A Comment on the Commentaries* ed. C. W. Everett

background they do seem to be vulnerable. However, I wish here simply to make a number of comments on two central elements of Blackstone's theory which are of significance for our analysis.¹⁸ The first is the notion that answers to all legal problems can be derived from a body of pre-existing law. The second is the consequential idea that judges simply declare the law.

First, if the law is to be seen as pre-existing (i.e. antedating particular, apparently creative, decisions) it must have some source or fountainhead. Blackstone identified the source as custom. Historically, Blackstone's point may have some validity. The nature of early legal proceedings was such that custom must inevitably have played an important part in judicial decision-making.¹⁹ Judges in more recent times have clearly been influenced by usage.²⁰ However, to acknowledge the historical significance of custom in the development of the common law and to recognize that even today there are points of contact between custom and law formulation is not to accept that the common law can now, or could even in the time of Blackstone, be accurately described simply as popular or particular customs.²¹ It is not clear, assuming that the

(Oxford: Clarendon Press, 1928). The notion that judges simply declare the law has been subject to particular attack and this attack was generally thought to have been effective — see, for example, Goodhart, *Case Law — A Short Replication* (1934), 50 L.Q.R. 196 at 197:

Austin and Gray have done their work too well; they have killed this childish but highly convenient fiction insofar as modern law is concerned.

Apparently their work is not yet complete for stubborn adherents remain. In fairness I should perhaps point out that Blackstone and the declaratory theory have their champions — see, for example, 12 Holdsworth, *A History of English Law* (London: Methuen & Co., 1938) at 717-737 and, by the same author, *Case Law* (1934), 50 L.Q.R. 180 at 184-5.

18. Several of these comments are based principally upon the brief analyses of Blackstone's views given in Dias, *Jurisprudence* (4th ed. London: Butterworths, 1976) at 204-5 and Cross, *Precedent in English Law* (2nd ed. Oxford: Clarendon Press, 1968) at 23-9.

19. Thus writes Greer, *Custom in English Law* (1893), 9 L.Q.R. 153 at 157-8:

... the proposition [that custom was the source of the common law] ... affords the only rational explanation of the genesis and early development of the Common Law, and is abundantly supported by the evidence of the old writs and the records of the Year Books.

20. Lord Mansfield is perhaps the best known example of a judge who took great care to give legal recognition to custom. He went so far as to consult on a regular basis a jury of businessmen to learn from them the customs and usages of the commercial world — see, for example 12 Holdsworth, *supra*, note 17 at 526-8.

21. For a critical analysis of the notion that the common law is simply custom see

Court advanced the declaratory theory as a description of reality, what the Appeal Division perceives to be the source of the pre-existing law “declared” by the Supreme Court in *Jumaga*.

Second, the notion that judges simply apply pre-existing law contains characteristics that are useful both from a political and from a practical perspective. For example, from a political perspective it is much easier for the judiciary to justify withstanding the power or wishes of the executive by appealing to some law that is above both than it is by openly asserting its own view against that of the executive. “Higher law” provides a tool whereby the courts can challenge and restrain the executive.²² Furthermore, acceptance of the theory permits one to hold literally to the doctrine of the separation of powers and so deny that the courts ever encroach upon the legislative function. From a practical perspective the theory can be used to deny, at least in large measure, the apparently retrospective nature of some judicial activity. Moreover, it permits judges to retain a considerable degree of flexibility within an apparently rigid system of precedent. Again, it provides a shield for the judiciary against resentment caused by unpopular decisions; for judges are seen simply as the mouthpieces, not the creators, of the law. Perhaps it is these factors of convenience that account for the resilience of the declaratory theory.

Third, the idea that judges simply declare pre-existing law may be accurate to describe the routine work of the courts, particularly those lower in the hierarchy. Most cases in the lower courts present factual, not legal, disputes. However, the theory does not accurately portray,²³ or, at least, offer a useful picture of, some of the work of

Dickinson, *The Law Behind Law* (1929), 29 Col. L. Rev. 113, 285 at 125-41. For further enlightenment on the whole matter see Simpson, *The Common Law and Legal Theory* in A. W. B. Simpson, ed., *Oxford Essays on Jurisprudence* (Second Series. Oxford: Clarendon Press, 1973) at 77. Simpson gives “custom” a different meaning and concludes (at 94) that:

. . . the common law system is properly located as a customary system of law in this sense, that it consists of a body of practices observed and ideas perceived by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, and in other contexts.

22. Dickinson, *supra*, note 21 at 117-8.

23. One commentator argues that it cannot be proved that judges do make law and hence the declaratory theory cannot be effectively disproved — see Snyder, *Retrospective Operation of Overruling Decisions* (1940-41), 35 Ill. L. Rev. 121 at 125-7. However, at the very least one might argue that the theory is not a particularly useful analysis to adopt.

the courts, especially of the higher courts. There are many judicial decisions which can only be described as creative, even though judges may attempt in the content and structure of their judgements to disguise this.²⁴ Acceptance of this point does not force one to equate judicial law creation with legislative law creation, however, or to see judicial creativity as essentially arbitrary. Pre-existing law clearly does provide an important backdrop for judicial decision-making. As Jerome Hall writes:

Law does pre-exist, but not in the degree of specificity required for all subsequent adjudications. It pre-exists "sufficiently" to bar arbitrariness and to limit the scope of judicial legislation, but judicial decision plays an essential role in its development.²⁵

Fourth, it seems to me that those who talk in terms of the declaratory theory today are not usually espousing the Blackstonian theory of the common law but are advocating a philosophy of judicial decision-making. They are not urging the declaratory theory as a literal description of judicial conduct which has significant practical consequences for the application of particular principles or doctrines of law, such as the rule concerning mistake of law, but rather are identifying a general approach towards the judicial function and its relationship to the legislative function. An illustration of this is to be found in the speech of Viscount Dilhorne in *Broome v. Cassell & Co.*²⁶ There the learned Law Lord commented on statements of Lord Devlin in *Rookes v. Barnard*²⁷ which, in his view, were clearly inconsistent with an earlier decision of the House of Lords, *Ley v. Hamilton*.²⁸ In discussing what he saw as Lord Devlin's obvious departure from precedent Viscount Dilhorne said:

As I understand the judicial functions of this House, although they involve applying well established principles to new situations, they do not involve adjusting the common law to what are thought to be the social norms of the time. They do not include bowing to the winds of change. We have to declare what the law

24. Obvious examples of judicial decisions which should be described as creative (although "based" on earlier decisions) are *Donoghue v. Stevenson*, [1932] A.C. 562; *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 and *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465.

25. Jerome Hall, *General Principles of Criminal Law* (2nd ed. Indianapolis: Bobbs Merrill, 1960) at 390.

26. [1972] A.C. 1027 at 1100-11.

27. [1964] A.C. 1129 at 1221-33.

28. (1935), 153 L.T. 384.

is, not what we think it should be.²⁹

In contexts such as this the language of the declaratory theory is used to deny the propriety of the courts' departing from positions clearly adopted in earlier cases and to suggest that where new problems do arise the courts should fashion solutions, not *ab initio* but in terms of the pre-existing law by a process of reasoning by analogy. Radical and far-reaching decisions must come from the legislature. While some may find the declaratory theory taken in this sense to be unpalatable most would concede that it does represent a defensible position. One cannot, in my view, say as much for the theory if it is given a literal meaning.

Finally, it may be that the declaratory theory should not be taken as a literal description of the judicial process but rather as an appropriate working assumption concerning that process. The making of such an assumption would presumably be justified in terms of necessity or public policy. The theory, then, is what is delicately described as a "legal fiction". The difficulty with this, of course, is that it is not clear why it is necessary, apart from considerations of convenience such as those outlined above, to adopt the theory as a working assumption.

What, then, does the declaratory theory have to do with the doctrine that mistake of law cannot afford a defence to a criminal charge? If one takes the theory as simply outlining a general approach to judicial decision-making it surely has nothing to do with the doctrine — it is a guiding principle for judicial action and no more. If, however, one accepts the declaratory theory as an accurate, literal description of the judicial process then one may see some valid connection between the theory and the doctrine. The connection will be at its most compelling if one accepts the other important elements of Blackstone's views. For example, James C. Carter writes:

. . . if law be . . . the mere jural form of the habits, usages and thoughts of a people, the maxim that all are presumed to know it does not express a false assumption but a manifest truth. In the great game of society as in the little one of ball, all the players are justly presumed to be familiar with the usages, that is, with the rules.³⁰

29. *Supra*, note 26 at 1107.

30. Carter, *The Ideal and the Actual in the Law* (1890), 24 Am. L. Rev. 752 at 761.

If it were true that the law was based upon the customs of the people in some direct fashion there might be some justification for attaching people with the knowledge of those customs. However, it seems absurd to apply this sort of analysis to Canada which, like many other modern states, has suffered a "law explosion". The scope of law has broadened considerably and more and more law is set out in statutes.³¹ The conditions giving rise to this enormous expansion of law, together with the fact that such expansion has occurred, point to a decreasing connection between law and custom and render Carter's game analogy quite inapt. Finally, if one accepts the declaratory theory as a legal fiction, a working assumption of the law, one can readily enough apply it in the context of the mistake of law doctrine. However, that so important and difficult an issue as the appropriate relationship between individual culpability and state interest in the area of mistake of law should be resolved in so artificial a fashion is to me indefensible. It is simply not clear whether the Appeal Division in *Dunn* adopted the declaratory theory as a literal description of the judicial process or simply as a working assumption in respect to that process. Whichever the Court intended, however, is perhaps irrelevant as both positions are quite inappropriate.

In summary, then, the declaratory theory of judicial decision-making constituted one element of a view of the common law given prominence by Blackstone, a man of conservative outlook writing in a time of great social change. Considering the fact that times *have* changed — the context from which Blackstone's view arose no longer exists, the perspective has suffered extensive and effective criticism, the law has moved from a common law base to a statutory base and so on — it is surprising that the Appeal Division was prepared to apply the theory as though its validity was beyond dispute.

IV. *State-induced error of law*

The principle espoused in s. 19 of the *Code* — that ignorance of the law is no defence to a criminal charge — is, as is so often the case,

31. Studies prepared for the Law Reform Commission of Canada suggest that there are, besides those offences set out in the Criminal Code, some 20,000 regulatory offences at the Federal level and a similar number in most of the provinces — see Fitzgerald and Elton, *The Size of the Problem* in L.R.C.C., *Studies on Strict Liability* (Ottawa, 1974) 42 at 56.

subject to exceptions. For example, it is frequently said that a mistake of law which negatives a specific intent will form the basis of a valid defence or, more accurately, denial of an essential element of the Crown's case.³² However, in Canada, there is no generally recognized exception based on the notion that the mistake made was brought about by some authority or official held out or recognized by the state as having particular expertise in the matter. Errors arguably included within this category are those resulting from reliance or judicial decisions which are subsequently reversed or overruled, from reliance upon the advice of government officials or from reliance upon the advice of lawyers.³³ Dunn, of course, might bring himself under this heading in two ways. First, he relied upon the advice of his lawyer and second, through his lawyer, he relied upon valid judicial decisions which were somewhat modified by the later decision of a higher court. I propose to consider whether the law ought to recognize "exceptions" to the mistake of law doctrine in either of these two situations.³⁴

Before I commence this discussion, however, I should identify

32. See, for example, *Dunn v. The Queen*, *supra*, note 3 at 344. I am suspicious of the use of the term "specific intent" in this context, particularly in light of its analysis by the Supreme Court of Canada in *R. v. George*, [1960] S.C.R. 871; 128 C.C.C. 289. The term confuses rather than elucidates. I prefer the analysis of Williams, *The Criminal Law: The General Part* (2nd ed. London: Stevens and Sons, 1961) at 304-45 and Smith and Hogan, *Criminal Law* (3rd ed. London: Butterworths, 1973) at 56-8, who suggest that mistake of law will afford a defence where

- (i) a legal concept (probably one of civil law) is embodied in the definition of the offence and a mistake is made with respect to that legal concept; or
- (ii) the mistake gives rise to a "colour of right" claim.

33. Lawyers are included within this category as they are "authorized" by the state to give legal advice. There are, of course, other errors which may come under the heading of state induced error, for example, those resulting from poorly drafted or inadequately publicized legislation — see Ryu and Silving, *supra*, note 14 at 436.

34. The traditional position concerning mistakes of law brought about by erroneous advice from governmental officials is of course that they afford no defence; but for a decision where such reliance was accepted as indicating that the defendants were without *mens rea* see *R. v. Seemar Mines Ltd.* (1974), 23 C.C.C. (2d) 54. For a recent discussion of this position see Ashworth, *Excusable Mistake of Law*, [1974] Crim. L. Rev. 652 at 657-61. Some American courts have given effect to such reliance — see for example, the authorities discussed in Hall and Seligman, *Mistake of Law and Mens Rea* (1941), 8 U. Chi. L. Rev. 641 at 675-83. See also the discussion in Comment, *Applying Estoppel Principles in Criminal Cases* (1969), 78 Yale L.J. 1046. One way to avoid this position is to classify such mistakes as mistakes of fact — see, for example, *R. v. McPhee*, *supra*, note 4.

some of the assumptions about the criminal law which underlie the comments which follow.³⁵ First, the criminal law has no common fundamental characteristic. Rather, crime is diverse. Some crimes offend moral values, others do not — they are simply regulatory or administrative in nature. Those forms of criminal behavior which do offend moral norms may offend norms accepted by a majority of the population or may offend norms accepted simply by segments of the population — “moral entrepreneurs” or other special interest groups who have the power to enshrine their moral values in the law.³⁶ Doctrines or principles which do not reflect, or do not reflect adequately, the diversity of criminal law are likely at some point to cause injustice. Second, while there is often disagreement as to what the criminal law should do there is, I feel some uniformity of opinion amongst people as to what it should not do. The legal solutions to particular cases may significantly offend the collective sense of injustice. For example, people tend to react to harm that is deliberately or recklessly caused quite differently from the way in which they react to harm that is accidentally caused. If the criminal law were to draw no distinction between harms accidentally caused and those intentionally caused it would, I think, appear unfair to

35. I state these assumptions in very general terms, cognizant of the fact that in doing so I have ignored serious difficulties with them. I also state them without acknowledgement of sources as they are, I believe, common-place. Indeed, to a considerable extent it is their general acceptability that led me to adopt them as a framework.

36. This position does not require a commitment to either side in the continuing debate between the consensus and conflict theorists of social organization (see, for example, Chambliss, *Functional and Conflict Theories of Crime* in Chambliss and Mankoff, eds., *Whose Law? What Order?* (New York: John Wiley & Sons, 1976) for a useful summary of the debate). Rather it accepts elements of both views. Surely there would be little disagreement that killing and coerced sexual intercourse should be the subjects of criminal prohibitions, although there might be disagreement as to the precise scope and structure of the respective prohibitions. On other matters, however, the criminal law does seem to reflect simply the concerns of the powerful. Perhaps the hate propaganda provisions of the *Code* (ss. 281.1-281.3) are an example. It may be unrealistic to suggest that the law could ever take account of this type of factor; for to do so would be to acknowledge an inherent defect in itself. However, it is simply suggested that the moral values protected in the criminal law vary in nature and force and that the law ought in some contexts to respond to this. The other alternative, of course, is to remove those provisions from the criminal law which enforce a moral value that is not generally held. This would leave within the ambit of the criminal law some (perhaps all) conduct which offended generally accepted, fundamental moral values and conduct which, although not immoral, was clearly disruptive of the general requirements of orderliness within a complex society. See Wexler, *The Intersection of Law and Morals* (1976), 54 Can. B. Rev. 351.

most people, at least in the context of particular cases. As the criminal law ultimately depends for its effectiveness upon public acceptance (or, at least, tolerance) it should not too frequently compel solutions which may undermine that acceptance. The criminal law should only adopt positions which the public will perceive as unfair where such action is *clearly* demonstrated to be necessary. Third, the notion of individual culpability is a crucial philosophical underpinning of the criminal law and its sanctioning process. This ought to be reflected in the substantive principles of the criminal law. As a basic premise, penal liability should attach only to a person who, on what must be a crude assessment, has consciously or recklessly violated the law or some fundamental moral value protected by the law; for it is a violation of this sort which is seen as providing the justification for the imposition of a criminal sanction.³⁷ However, the state of mind of the accused, viewed subjectively, is not the only legitimate consideration upon which decisions as to penal liability can be made — public policy or the social interest also has a valid role. Hence it is proper for the criminal law to adopt a position which gives precedence to public policy over the subjective attitude of an accused, to formulate a rule which is intended to achieve a desirable social end or enforce a social judgement albeit at the expense of an accused person's subjective mental state. Thus, for example, the law may be formulated so as to deny the availability of the defence of duress to a charge of murder. Again, however, before this type of action is taken those who formulate the law must have some clearly defined and readily attainable objective in mind. It is within this framework that the following comments are made.

1. *Reliance upon valid judicial decisions*

The Court in *Dunn* referred to and adopted the decision of Kerans

37. This notion of individual responsibility is an unrealistically egalitarian one. The criminal law takes very limited account of the factors which relate to an individual's ability to make law-abiding choices. Defences such as insanity are available but, at the point of imposing liability, no consideration is given to the fact that the chief targets of the criminal justice system — the young, the poor, the uneducated and the unskilled — do not have the range of choices available to those from other parts of the social structure. Arguably, if the criminal law is prepared to excuse some of those who act under mental handicaps it ought also to give some recognition to social handicaps. For a preliminary discussion of this see Kerans, *Distributive and Retributive Justice in Canada* (1977), 4 Dal. L.J. 76.

D.C.J. in *R. v. Campbell and Mlynarchuk*.³⁸ In that case a young woman was charged with giving an immoral performance contrary to s. 163(2) of the *Code*. (She had apparently performed a somewhat vigorous go-go dance during which she had removed her clothing, such as it was.) She gave this performance only after learning from a friend that a trial judge of the Supreme Court of Alberta had acquitted a woman of a similar charge on similar facts (*R. v. Johnson* (No. 1)³⁹). Unfortunately after her performance but before her trial the Appellate Division reversed the trial judge in *Johnson*, and convicted the woman.⁴⁰ What then was the position of Campbell? Kerans D.C.J. held that he was bound by the decision of the Appellate Division in *Johnson* and that Campbell in relying upon the decision of the trial judge in that case had made an error of law which would afford her no defence.⁴¹ He therefore found Campbell guilty but, in light of the circumstances, entered an absolute discharge instead of a conviction.

As well as dealing with the problem of errors brought about by reliance upon valid judicial decisions the judgement of Kerans D.C.J. outlines the traditional justifications for the general mistake of law doctrine.⁴² These are such as to merit, I think, some slight digression. In talking of the doctrine the learned judge said:

There will also be cases, not so complicated as this, where honest and reasonable mistakes as to the state of the law will be the explanation of the conduct of an accused. In such a circumstance, one cannot help but have sympathy for the accused. But this situation, traditionally, is not a defence. It is not a defence, I think, because the first requirement of any system of justice, is

38. *Supra*, note 13.

39. [1972] 3 W.W.R. 226; 6 C.C.C. (2d) 462.

40. *R. v. Johnson* (No. 1), [1972] 5 W.W.R. 638; 8 C.C.C. (2d) 1. The Supreme Court of Canada reversed this decision and acquitted Johnson — see *Johnson v. The Queen* (1973), 13 C.C.C. (2d) 402; 23 C.R.N.S. 273. At the time he made his decision in *Campbell and Mlynarchuk* Kerans D.C.J. knew that *Johnson* was before the Supreme Court but decided not to await the Court's decision.

41. The learned judge seems to have thought that Campbell made two mistakes of law. The first was that she thought her conduct did not contravene the law, the second was that she misunderstood the effect of a low level judicial decision in assuming that it correctly stated the law. He also rejected the possibility that Campbell could claim protection under s. 15 of the *Code* on the basis that she acted in obedience with *de facto* authority — see *R. v. Campbell and Mlynarchuk*, *supra*, note 13 at 34-35.

42. For discussions of the historical background of the doctrine see Keedy, *supra*, note 12 at 77-81; Hall and Seligman, *supra*, note 34 at 643-6; O'Connor, *supra*, note 12 at 644-7; Ryu and Silving, *supra*, note 14 at 423-430.

that it works 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.⁴³

Thus, in the matter of mistake of law we abandon the requirement of individual culpability which is generally assumed to underlie the criminal law; and this we do essentially for reasons of "efficiency" and "effectiveness". Presumably in using these two terms Kerans D.C.J. was making short-hand reference to the two arguments commonly suggested in support of the mistake of law doctrine. "Efficiency", it is often argued, demands the rule because to permit a defendant to throw into dispute his knowledge of the law would be to place insuperable difficulties in the path of the prosecution.⁴⁴ This, then, is a justification of "practical necessity". "Effectiveness" requires the rule because by taking such a position the legal system can enforce a social policy of requiring people to know the law.⁴⁵ Here, then, is a justification of achieving a desirable social end.

The learned judge's statement, like so many others made by judges, rests upon unexamined assumptions about reality; and, to my mind, such unthinking and uncritical acceptance of fundamental assumptions is one of the worst defects of judicial decision-making in many common law jurisdictions.⁴⁶ Does the Crown's position

43. *Supra*, note 13 at 31.

44. Austin is commonly cited as adhering to this view. He suggests that a person's knowledge of the law is not an issue capable of resolution — see 1 Austin, *Lectures on Jurisprudence* ed. Campbell (5th ed. London: John Murray, 1885) at 482-3.

45. The most frequently cited adherent to this view is Oliver Wendell Holmes, Jr. — see Holmes, *The Common Law* (Boston: Little, Brown & Co., 1909) at 48. Brett, *Mistake of Law as a Criminal Defence* (1966), 5 Melb. Univ. L. Rev. 179 at 195 writes of this view:

This argument reflects Holmes's philosophy of 'social Darwinism' — the view that in human societies the fittest only ought to survive and that the strong majority are entitled to sacrifice the weak in order to achieve their own welfare. It is not a philosophy which commends itself to modern thought, and it may be doubted whether courts today would wish to invoke it.

46. This may be overly harsh on the learned judge as he is simply reiterating received judicial wisdom. However judges, like other law formulators, tend to make decisions based upon assumptions about the way things are or ought to be. The difficulty is that these assumptions are rarely identified, much less examined in

become impossible in those situations in which a defendant is now entitled to raise a mistake of law defence? Are the criminal justice systems of other jurisdictions which do permit wider mistake of law defences thereby rendered inefficient and ineffective? For my part I doubt the validity of the traditional assumptions. The law permits a defendant to raise mistake of fact, even an unreasonable one, as a defence. So far as I can tell this has not been responsible for reducing the administration of justice to an absurdity. Some see a dramatic difference between mistake of fact and mistake of law as far as proof goes.⁴⁷ Others, however, do not. Thus Houlgate writes:

... if the courts harbor few doubts about proving or disproving the honesty of a defendant who pleads ignorance of fact, then there are no independent reasons to fear the stigma of dishonesty when the plea is one of ignorance of law. If *C* fires at *D* at point-blank range, then his defense that he did not know that *D* was standing in front of him would be received with incredulity, and so would a defense that he did not know murder to be a crime. On the other hand, if *C* shoots *D* when hunting at dusk, his defense that he did not intend to kill *D* might be believed; and, in the same way, his belief that he is entitled by law to shoot a would-be thief might be believed, whether it represents the true legal position or not.⁴⁸

Furthermore, is it necessary to have so crude and harsh a rule as the common law rule in order effectively to promote as social policy the idea that people ought to make some effort to find out what the law is? It might well be argued that a rule which punishes not only the negligent but also the careful is, from a social policy perspective, unnecessary and, worse, counter-productive: for rather than rewarding, or at least protecting, the careful it punishes them — and where is the incentive to know the law in that?

I, like the learned judge, may be criticized for having done little more than speculate in the comments which I have just made. Perhaps it is inevitable that speculation form the basis for the law's position on mistake of law, at least for the moment.⁴⁹ If, however,

the light of empirical data that social scientists can provide. There are, however, exceptions to this, most notably the decision of the United States Supreme Court in *In Re Gault* (1967), 387 U.S. 1; 87 S. Ct. 1428.

47. See, for example, Hall and Seligman, *supra*, note 34 at 651.

48. Houlgate, *Ignorantia Juris: A Plea for Justice* (1967-8), 78 *Ethics* 32 at 37-38. The point was earlier made, in almost identical terms, in Williams, *Criminal Law: The General Part* (2nd ed. London: Stevens & Sons, 1961) at 291.

49. It may be that the assumptions about reality which underlie certain legal doctrines or principles are simply incapable of empirical assessment. The

speculation is to provide the foundation for this or any other legal rule perhaps speculation that permits results that accord with some fundamental sense of fairness should be recognized above speculation that produces, at least occasionally, results that are clearly harsh.

One other major justification for the mistake of law doctrine has been advanced and it is, perhaps, hinted at by Kerans D.C.J. in the above quoted statement. It is a justification urged by Jerome Hall.⁵⁰ He argues that “knowledge” in the context of law is quite different from “knowledge” the context of facts. Where knowledge of facts is concerned there is the possibility of certainty; where knowledge of law is concerned there is not. By “knowledge” in the context of law, Hall argues, we really mean “an interpretation of law which coincides with the later relevant interpretation by the relevant officials.”⁵¹ To permit a defendant to plead mistake of law is to permit him to advance his interpretation over that of authorized law-declaring officials. This contradicts the principle of legality. Legal order, Hall writes:

. . . opposes objectivity to subjectivity, judicial process to individual opinion, official to lay, and authoritative to non-authoritative declarations of what the law is.⁵²

Furthermore, he argues, the criminal law, if it is soundly based, will reflect moral judgements of the community; individual moral judgements should not be permitted to override those objective moral judgements.⁵³ These arguments, although interesting, are flawed. Houlgate, for example, suggests that in arguing that to permit a person to raise mistake of law as a defence is to infringe the principle of legality Hall confuses the notions of *legality* and *culpability*.⁵⁴ In recognizing such a defence, he says, the law would not be forced to a conclusion that an accused acted legally, but it would rather be taking the view that the accused should not be held culpable for his illegal act. Similarly, recognition of such a defence does not mean that the defendant’s actions are morally proper — it

assumptions underlying the mistake of law doctrine may, I suppose, fall into this category.

50. *Supra*, note 25 at 382-7.

51. *Id.* at 409.

52. *Id.* at 383.

53. Hall suggests that where criminal laws do not reflect a current moral consensus different rules concerning mistake should prevail — *id.* at 402-8.

54. Houlgate, *supra*, note 48 at 39-40.

simply indicates that he will not be held morally responsible for his immoral act. The distinction here, then, is that between *justification* and *excuse*.⁵⁵ Houlgate's criticisms of Hall's rationale are convincing. If the law is inherently uncertain, at least at its edges, such uncertainty should, fairness suggests, work to the disadvantage of the law formulator, the state, rather than to the disadvantage of the law consumer, the individual. Thus can some check be placed upon the considerable advantage held by the state over the individual in criminal matters.⁵⁶

Having advanced the justifications for the mistake of law doctrine Kerans D.C.J. went on to consider whether there was, or should be, any "exception" where the "mistake" came about as a result of reliance upon a valid judicial decision. He said:

There is no question that there is something of an anomaly here. Reliance on a specific order, of a specific Judge, granted at a specific time and place, seems, at first sight, not to be ignorance of the law, but knowledge of the law. If it turns out that that Judge is mistaken, then of course, the reliance on that Judge's judgement is mistaken. The irony is this; people in society are expected to have a more profound knowledge of the law than are the Judges. I am not the first person to have made that comment about the law, and while it is all very amusing, it is really to no point.⁵⁷

Amusing or not, the position outlined above seems unrealistic, unfair and, in the long term, unsatisfactory from the perspective of public policy. Lawyers (and so also the public) routinely accept statements as to the law from all levels of the judicial hierarchy and act upon them. Judicial decisions which bring about changes in the law cannot usually be predicted with assurance. The legal system would surely become much more inefficient if lawyers were to treat judicial decisions as though they were liable to be over-turned at any moment. There is also a rather heavy-handed irony in the position. The doctrine is justified in part as necessary to enforce a social

55. *Id.* at 40. Houlgate argues that mistakes of law which are "reasonable" should be recognized by the law. I should note at this point that the remainder of this comment is written upon the assumption that the basic mistake of law doctrine will be retained.

56. A careful application of the rule that penal statutes should be strictly construed may well meet the concern expressed in the text — see Hall, *supra*, note 25 at 388-9 where he deals with the point in a slightly different context. However, my impression is that this rule of statutory interpretation is being increasingly disregarded by Canadian courts.

57. *R. v. Campbell and Mlynarchuk*, *supra*, note 13 at 32.

policy requiring knowledge of the law. Yet there it can be used to penalize a person such as Dunn who does know the law as well as anyone could. The law should be framed so as to encourage people to find out what the current view of the law is and to act upon it and should protect those who so act. Furthermore, can it not be argued that the legal system, having in effect held out a particular position as being the law, should not penalize someone who acts in reliance upon that position? This “holding out” by the state should be treated as creating a “criminal estoppel”.⁵⁸

There seems to be general agreement on the part of those who perceive a need to retain the mistake of law doctrine that those who act in reliance upon valid judicial decisions should not be penalized if those decisions are subsequently overruled. Many American jurisdictions take this view,⁵⁹ as did the drafters of the *Model Penal Code*⁶⁰ and the proposed *Federal Penal Code*.⁶¹ Most commentators also accept the position.⁶² It seems unlikely that chaos would result were Canadian law to take the same view. If adherence to the fictions that the law contains the answers to all possible legal problems and that judges simply declare, but do not make, law is seen as necessary, persons such as Dunn or Campbell who act in reliance on current judicial decisions should be protected under an exception to the mistake of law rule.⁶³ If, however, these fictions were to be abandoned and the creative potential of judicial decision-making were to be acknowledged no such exception would be needed: for the courts would recognize what is manifestly true,

58. I took this term from Ashworth, *supra*, note 34 at 657.

59. A number of American states have adopted the *Model Penal Code* provision (*infra*, note 60) — see Kadish and Paulsen, *Criminal Law and its Processes* (3rd ed. Boston: Little, Brown & Co., 1975) at 114. Others adopt the position through judicial decisions — see, for example, the authorities cited in Hall and Seligman, *supra*, note 34 at 669-673.

60. American Law Institute, *Model Penal Code* (1962), s. 2.04 (3) (b).

61. See the proposed *Federal Criminal Code*, s. 609(b) in National Commission on Reform of Federal Criminal Laws, *Final Report* (1971). This draft has undergone substantial amendment since it was first proposed but as far as I am aware no change has been made to s. 609.

62. See, for example, Hall and Seligman, *supra*, note 34 at 669-73; Perkins, *Ignorance and Mistake in Criminal Law* (1939), 88 U. Pa. L. Rev. 35 at 44; Ashworth, *supra*, note 34 at 658.

63. The positions of Dunn and Campbell are not identical. Dunn clearly had a much firmer basis for this reliance than did Campbell but I see no basis for the law's differentiating between the two. Furthermore, both Dunn and Campbell relied indirectly upon judicial decisions (Dunn through his lawyer, Campbell through a friend) but this does not seem to me to raise any theoretical difficulty.

namely that at the times when they acted both Campbell and Dunn acted in conformity with the law. This, of course, is Jerome Hall's approach.⁶⁴

If the law were to be changed, should it draw any distinction between decisions from courts at different levels within the judicial hierarchy? For example, should the law protect one who relies upon a decision of the Supreme Court of Canada but not one who relies upon a decision of the Nova Scotia County Court? I think not.⁶⁵ Although a higher court speaks with more authority than a lower court ultimately the policy considerations in respect to either are identical. If the only relevant decisions are those from lower level courts they represent, for the moment, the state's position on the matter. A person who accepts such guidance as the state has offered on the point can justly claim protection.⁶⁶

There is a further matter for consideration. If the law were to be changed should it protect only the person who actually relies upon an earlier decision or should it protect anyone whose conduct conforms to an earlier case whether or not he knows of it? Both Campbell and Dunn clearly knew of and relied upon the earlier decisions; and several commentators take the view that such reliance should be a precondition for protection.⁶⁷ Hall and Seligman, however, state that the cases in the United States do not impose this precondition and express the opinion that such a precondition is not necessary. Rather, they assert, there should be a conclusive presumption of reliance.⁶⁸ The writers give no indication of the reasons for their view. I assume that such a conclusive presumption would be based upon the notion that the state, having held out a position, should be bound by it so long as it is in force whether or not anyone knows of it or is specifically affected by it or,

64. *Supra*, note 25 at 391-2. This position follows logically from Hall's definition of "knowledge" in the context of law.

65. The cases in the United States are apparently not uniform on the point — see, for example, Hall and Seligman, *supra*, note 34 at 671-2.

66. Difficult problems may arise where there are conflicting decisions in several provinces. For example, should a person in Nova Scotia accept a statement of law given in a decision of the Nova Scotia County Court even though it conflicts with a position clearly adopted by several courts of appeal in other provinces? The basic rule should be, I think, that a person ought to accept the guidance given in his own jurisdiction; however, the courts should be willing to depart from this rule if the circumstances seem to demand it.

67. See, for example, Brett, *supra*, note 45 at 186; Ashworth, *supra*, note 34 at 658.

68. *Supra*, note 34 at 671. See also Perkins, *supra*, note 62 at 44 fn. 84.

alternatively, upon the notion that “ . . . reliance is hard to prove effectively for it is a mental state and the defendant [should be] given the benefit of any doubt as to his actual reliance”.⁶⁹ However, the effect of creating such a presumption is to protect the person who has no regard for the legality of his conduct as well as the person who is concerned with it and takes steps to clarify his position. Both from the perspective of public policy (acknowledging and rewarding good citizenship) and from that of subjective culpability (protecting only the person who honestly believes that his actions are innocent) one might challenge this view. As Brett points out:

The man who does not bother about the legality of his conduct is poles apart from the man who makes an honest effort to behave in conformity to the law but is mistaken or misled.⁷⁰

Thus, assuming that the basic rule concerning mistake of law is to be retained, I suggest that the law should be changed so as to protect one who acts in reliance upon a valid judicial decision either on the basis that he has made no mistake as to the law or, less satisfactorily, upon the basis that his case constitutes an exception to the mistake of law rule. A defendant should be permitted to raise this argument in respect to a judicial decision from any level in the judicial hierarchy (provided, of course, that at the time there was no decision from a higher court within the jurisdiction dealing with the matter) and would have to adduce evidence indicating that he had acted in reliance on the decision. None of this should affect the normal rules concerning the legal or persuasive burden of proof.⁷¹

2. *Reliance upon a lawyer's advice*

The common law has long taken the position that reliance upon the advice of a lawyer that particular conduct is not criminal is no defence to a criminal charge should that advice turn out to be erroneous. This position has been explicitly established in

69. Note, *Retroactive Effect of Judicial Change of Existing Law in Criminal Proceedings* (1928), 28 Col. L. Rev. 963 at 966.

70. Brett, *supra*, note 45 at 186.

71. It is quite frequently stated that if a defence such as that suggested in the text were to be recognized the legal burden of proof in respect to that defence should rest upon the accused. However, I do not see any justification for that.

England,⁷² in Canada,⁷³ in the United States⁷⁴ and in Australia.⁷⁵ From time to time judges have attempted to offer a defence in this type of situation, however. A Canadian example is to be found in the judgement of Tavender D.C.J. in *R. v. Burkinshaw and Zora*.⁷⁶ In that case the accused, directors of a company that had been convicted of unlawfully trading in securities contrary to the *Alberta Securities Act*,⁷⁷ were charged with "authorizing, permitting or acquiescing in" the company's offence.⁷⁸ At trial Tavender D.C.J. acquitted the accused on the basis that the relevant section required a general mental element and the accused lacked such mental element. He said:

I am satisfied on the evidence that these two accused had no *mens rea*. They and the company all acted on legal advice obtained from a prominent firm of solicitors. They were told that their actions were legal. I think that on this basis it cannot be suggested that they had any guilty mind.⁷⁹

The approach of the learned trial judge is similar to that of the Supreme Court of Delaware in the well-known case of *Long v. State*.⁸⁰ The defendant in that case was charged with bigamy, having remarried on the basis of what proved to be erroneous legal advice as to the effect of an out-of-state divorce. He attempted to introduce evidence at his trial to show that he honestly believed his divorce was valid and that he had some basis for that belief. The trial judge refused to admit this evidence, holding that it was irrelevant as it related to a mistake of law which could afford no

72. See, for example, *Cooper v. Simmons* (1862), 7 H & N 707; 158 E.R. 654; *Davis* (1928), 20 Crim. App. Rep. 166.

73. See, for example, *R. v. Brinkley* (1907), 12 C.C.C. (2d) 454; (Ont. C.A.); *R. ex rel. Irwin v. Daley* (1957), 118 C.C.C. 116; 25 C.R. 269 (Ont. C.A.); *R. v. Slegg and Slegg Forest Products Ltd.* (1974), 17 C.C.C. (2d) 149 (B.C. Prov. Ct.).

74. See, for example, the authorities cited in Note, *Reliance on the Advice of Counsel* (1961), 70 Yale L.J. 978 at 991-2.

75. *Crichton v. Victorian Dairies Ltd.*, [1965] V.R. 49, which is discussed in Brett, *supra*, note 45 at 181-3.

76. [1973] 3 W.W.R. 150.

77. S.A. 1967, c. 76, s. 35 (1).

78. *Id.*, s. 136(3).

79. *R. v. Burkinshaw and Zora*, *supra*, note 76 at 153-4. This case is of little authority as it was reversed on appeal to the Alberta Supreme Court, Appellate Division on the basis that the offence was not one requiring *mens rea* — see *R. v. Burkinshaw and Zora*, [1973] 5 W.W.R. 764. The Court made no comment with respect to Tavender D.C.J.'s statements on the matter of the effect of the defendants' relying upon legal advice.

80. (1949), 65 A. 2d 489.

defence, and so the defendant was convicted. He appealed to the Supreme Court of Delaware which overturned his conviction and ordered a new trial. Pearson J., speaking for the Court, stated that a mistake of law defence could be recognized in this case because

. . . before engaging in the conduct, the defendant made a bona fide, diligent effort, adopting a course and resorting to sources and means at least as appropriate as any afforded under our legal system, to ascertain and abide by the law, and . . . he acted in good faith reliance upon the result of such effort⁸¹

The learned judge went on to say:

To hold a person punishable as a criminal transgressor [in a case such as this] would be palpably unjust and arbitrary.⁸²

These cases are, however, exceptional.

Unlike the case of reliance upon judicial decisions there is little feeling that defendants who act upon the advice of lawyers should be protected from criminal liability. For example, the drafters of the *Model Penal Code* rejected such reliance as constituting a defence,⁸³ as did the drafters of the proposed *Federal Penal Code*.⁸⁴ The principal reason suggested for this view is that, if such a defence were to be recognized, lawyers could too easily manipulate it to their own advantage. Hence Hall and Seligman write:

It would be unwise social policy to reward the clients of lawyers who gave favorable but unreasonable advice, at the expense of others in the community who were given unfavourable but correct opinions on the law. Lawyers are under enough temptations toward dishonesty already, without giving them the power to grant indulgences, for a fee, in criminal cases.⁸⁵

Apart from the fact that it embodies a somewhat pessimistic view of the integrity of lawyers, the statement presents a number of difficulties. It is neither fair nor necessary to use unsuspecting clients to deal with unscrupulous or potentially unscrupulous lawyers. It is not fair because it means that a defendant is convicted not on the basis of his own culpability but on the basis of the actions of someone else whom he is forced to trust.⁸⁶ It is not necessary

81. *Id.* at 497.

82. *Id.* at 498.

83. A.L.I., *Model Penal Code* (1962), ss. 2.03(9) and 2.04(3).

84. Proposed *Federal Criminal Code*, ss. 302(5) and 609.

85. *Supra*, note 34 at 652.

86. The criminal law does, of course, utilize the principle of vicarious liability in a

because there are alternative devices for dealing with incompetent or unscrupulous lawyers, for example, the disciplinary processes of the Barristers' Society. Furthermore, the fear is exaggerated. A client who is frequently in trouble with governmental officials as a result of the erroneous advice of his lawyer, whether or not he is convicted of any offence, should begin to doubt the ability of the lawyer to handle his affairs and to look to other lawyers for advice. In most cases, a client who did not take such action could fairly be regarded as having acted unreasonably or in bad faith. If a defence of reliance upon the advice of a lawyer were to be recognized it could be structured so as to deny protection in situations such as this where there is the likelihood of abuse. The picture of the shifty-eyed lawyer granting indulgences for a living is surely overdrawn. Second, Jerome Hall, in keeping with his arguments on mistake of law generally, argues that to permit such a defence is, in effect, to permit the individual and his lawyer to act governmentally — to create law for their own situation, law which is contrary to that established by the organs of the state; and this, of course, is contrary to public policy.⁸⁷ In his view, a distinction can be drawn between the actions of judges and governmental officials and those of lawyers as the former are law-declaring officials whereas the latter are not. The criticisms of Hall's position which were outlined earlier are of equal significance in this context. Hall's view, characterized by Ashworth as "unduly dramatic",⁸⁸ is certainly commendable from a governmental perspective, but from the perspective of the misled defendant it is equally certainly unsatisfactory. Hall's distinction between law-declaring officials and lawyers is, it seems to me, a distinction for lawyers, not for ordinary people. The layman who seeks assistance with a legal problem may, depending upon the nature of the problem, seek guidance from one or more of several sources. In some situations he may be able to go to a government department, in others he may have no alternative but to go to a lawyer. He is unlikely, I think, to treat the advice which he obtains from a government clerk with greater reverence than that which he obtains from a lawyer. Why, then, should the law distinguish between the sources of advice? While lawyers are not in

variety of situations but there seems to be little justification for applying it in this context.

87. *Supra*, note 25 at 387-8.

88. *Supra*, note 34 at 661.

exactly the same position as governmental officials they do, as Ashworth points out,⁸⁹ have a public element to their duties — they are officers of the court and they are, in essence, licensed by the state to practice law and are given a monopoly in that enterprise. If the *only* state-sanctioned source of legal advice in many cases is the lawyer the state arguably has some responsibility to uphold the integrity of its processes and protect one who utilizes the appropriate source. Rather than drawing valid but technical distinctions between the sources of advice the law should focus upon the defendant's justifiable reliance upon the advice of the expert, in this situation his lawyer, thus recognizing that a person's seeking legal advice "before embarking on a course of conduct is both reasonable and socially desirable."⁹⁰ In short, the approach of the Court in *Long v. State*⁹¹ has much to commend it.

If a defence of reliance upon the advice of a lawyer were to be recognized it should require that the reliance be honest and reasonable. The requirement of honest reliance follows from the fact that the defence operates to protect a person from criminal liability for his actions on the basis that he is not, from a subjective perspective, blameworthy or culpable. If there is no honest reliance, there is no strong reason for denying culpability. The requirement of reasonable reliance can arguably be imposed to prevent abuse of the defence.⁹² In some situations the state interest may demand that the defence not be recognized, for example, where the advice relied upon *obviously* contravenes some fundamental moral principle protected in the criminal law⁹³ or where the client has continued to

89. *Id.*

90. *Id.*

91. *Supra*, note 80.

92. I have no strong commitment to the position that the reliance must be reasonable as I am not sure that it is of great practical consequence. If the law required only that the reliance be honest and the reasonableness of that reliance was treated as simply an evidentiary factor relevant to the issue of honesty, claims of reliance in contexts that were clearly unreasonable would generally be disbelieved. In those situations (probably very few) where a court concluded that an individual's reliance, although unreasonable, was honest I have no great objection to the court's affording the individual protection.

93. Thus the defence would not be recognized in a situation where a person murdered an acquaintance who owed him money as a result of being told by a lawyer that such a drastic "self-help" remedy was legally permissible. A more difficult case is where a critically injured person who has suffered "brain death" is removed from life support systems, and so "dies", by a family member who has received legal advice to the effect that such action is not illegal. Arguably the

rely on the advice of a lawyer who has clearly shown that he is not to be trusted.⁹⁴

V. Conclusion

Common law jurisdictions have long drawn a distinction between errors of law and errors of fact. Canada continues in that tradition. Honest mistakes of fact, even though unreasonable, afford a defence; honest mistakes of law, even though reasonable, do not.⁹⁵ This position is to be contrasted with that adopted in jurisdictions such as Germany which draw no distinction between the subject matter of the error but rather draw a distinction between errors that are forgivable and those that are not.⁹⁶

The principle that ignorance or mistake of law constitutes no defence is treated by many as expressing a proposition of self-evident utility and necessity. So simple and absolute a rule may have been appropriate at a time when the criminal law was narrow in scope and therefore fundamental in nature. It is not appropriate in a modern legal context, however. In recognition of this many courts and legislatures have reassessed the doctrine, retaining it in respect to certain offences or situations, modifying in respect to others. My criticism of the Court in the *Dunn* case is not that they accept the basic mistake of law doctrine — s. 19 of the *Code* compels them to do that. It is, rather, that the Court shows no sensitivity to the fact

reliance should be recognized here as there is no *obvious* contravention of a moral principle.

94. Again, before the reliance is disregarded, the situation ought to be a clear-cut one.

95. This creates considerable difficulties as to whether particular mistakes should be classified as “legal” or “factual” and may provide a convenient means for the courts to escape the rigors of the mistake of law doctrine — see, for example, *R. v. McPhee*, *supra*, note 4 where what seems to be a mistake of law is categorized as a mistake of fact.

96. German law draws a distinction between “vincible” and “invincible” errors. The former do not provide a defence as they could have been overcome by ordinary diligence; they may, nevertheless, lead to mitigation of the penalty. The latter do afford a defence because they are errors which could not be overcome by diligent effort. See generally Ryu and Silving, *supra*, note 14 and Arzt, *Ignorance or Mistake of Law* (1976), 24 Am. J. of Comp. L. 646 (part of a symposium on the new German Penal Code). Interestingly, although German law theoretically gives much wider scope to mistake of law defences than does the common law, German practice is not so generous. Arzt, *id.* at 678, writes:

. . . full recognition of [the mistake of law] defence in German law has done more for the good conscience of the legal profession than it has helped defendants in fact (footnote omitted).

that doctrine's applicability in some situations requires reconsideration. Furthermore, in order to apply the doctrine to the fact situation urged in *Dunn* the Court had to apply a legal theory, long since abandoned by legal analysts, which has no connection with reality, does not achieve individual justice and cannot be justified on public policy grounds.

The Court's view, and indeed the mistake of law doctrine generally, offers an obvious example of what Edmond Cahn has identified as the Imperial Perspective.⁹⁷ This perspective "has been largely determined by the dominant interests of rulers, governors and other officials."⁹⁸ It is reflected in a variety of phrases and catch-cries which appear repeatedly in judgements⁹⁹ and gives overwhelming emphasis to values such as "governmental efficiency, public order, respect for authority and national security."¹⁰⁰ Extreme emphasis is given to these values at the expense of the interests of consumers of the law. Cahn argues that there is, or ought to be, emerging a Consumer Perspective which gives less emphasis to governmental interests and is concerned to ensure that the application of legal principles in the context of particular fact situations does not arouse a sense of injustice. The mistake of law doctrine in Canada, at least so far as it is applied to convict defendants who have taken legal advice or relied upon valid judicial decisions, requires re-appraisal in the light of the Consumer Perspective.

97. Cahn, *Law in the Consumer Perspective* (1963), 112 U. Pa. L. Rev. 1.

98. *Id.* at 4.

99. Obvious examples are found in the courts' frequent refusals to reach particular conclusions because of the danger of opening the floodgates or because matters are classified as "administrative" and the expertise of administrators must be respected — *id.* at 6.

100. *Id.* at 13.

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