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ERROR JURIS: A COMPARATIVE STUDY*

PAUL K. RYU† AND HELEN SILVING††

"Everybody is presumed to know the law except His Majesty's judges,
who have a Court of Appeal set over them to put them right."‡

UNDER THE COMMON LAW, *error juris*—ignorance or mistake of law¹—is no defense to a criminal prosecution. The same rule prevails in most civil law systems. But in ancient law error of law was a defense, and this defense has been revived in several modern legal systems. Grant or denial of that defense, we believe, should be determined not as an independent issue but rather as part of the comprehensive problem of criminal responsibility: Why should a human being be subjected to sanctions when he commits an act proscribed by law? Solution of this problem includes an answer to the question whether or not sanctions should be applied where the act is committed in ignorance or mistake of law. We believe that the traditional approach to the problem of criminal responsibility is wrong. Indeed, most writers have grasped but a partial aspect of that problem. The question as usually posed—"is man responsible?"²—is incomplete. Professor Phillip Frank has suggested that a correct scientific formulation of the statement, "my head is above my feet," would be: "My head is above my feet relative to

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† Professor of Law, Seoul National University, Seoul, Korea.

†† Professor of Law, University of Puerto Rico.

‡ Note 72 *infra*.

¹ Consult Keedy, Ignorance and Mistake in Criminal Law, 22 Harv. L. Rev. 75 (1908).

² The A.L.I. Model Penal Code, Tentative Draft No. 4, at 27 (1955), identifies "criminal responsibility" with mere absence of incapacitating mental disease. We view this term more broadly than absence of any specific incapacities. Consequently, we shall deal only incidentally with error of law induced by mental disease. Consult Hall, Psychiatry and Criminal Responsibility, 65 Yale L. J. 761-85 (1956).

the gravity of my place.”³ Similarly, the question “is man responsible?” should be formulated in relation to the sanction which that responsibility implies and to the “why” of that sanction. This relational meaning of responsibility is the backbone of any solution to the problem of *error juris*.

At one time in Europe the meaning of criminal responsibility was the subject of vigorous philosophical controversy involving a dispute between free will and determinism. The classical school, assuming the existence of free will, identified responsibility with moral “guilt.” Criminological positivism,⁴ on the other hand, denied the existence of free will and its attendant concept of moral guilt, subordinated the individual to society and thought of responsibility in terms of dangerousness to society which warranted the application of social defense measures.⁵ The controversy has since been taken up by American jurists and psychiatrists.⁶ We shall not debate the problem of free will, as conceived in philosophy, because this problem has no operational meaning within the issue of criminal responsibility.⁷ Any legal or social approach to responsibility implicitly shifts that problem to a practical level. However, criminological positivists claim that determinism is not merely a philosophical proposition but a scientifically established fact which disproves the existence of free will. This claim completely confuses the issues involved in the dispute between free will and determinism by identifying “chance” in the natural sciences with “free will” in ethics (non-determinism with free will) and causality with prediction in the natural sciences.⁸ Moreover, the law is neither a

³ Frank, *The Relativity of Truth and the Objectivity of Values*, Third Symposium of the Conference on Science, Philosophy and Religion 12, 14-15 (1945). The rest of the quoted passage reads: “and my feet are above my head relative to the gravity at the place of my antipodes.” *Ibid*.

⁴ Criminological positivism—the theory which assumes that man’s actions are causally determined so that moral condemnation is meaningless—should not be confused with jurisprudential positivism, which denies the existence of natural law. We do not delve into the intricate jurisprudential controversy between the theory of natural law and that of positive law. While elements of this controversy importantly bear on our problem, their thorough analysis is beyond the scope of this article. We shall deal with it only when discussing the subject concerning which the accused has erred.

⁵ Ferri, *Criminal Sociology* 353-54 (Modern Criminal Science Series IX, 1917).

⁶ Consult Weihofen, *Mental Disorder as a Criminal Defense* 483 (1954), where it is said that “[t]oday . . . instead of concentrating on whether the accused had sufficient knowledge or will power to be held ‘responsible,’ or ‘guilty’ the new approach would start with the proposition that the individual’s social dangerousness and not his moral blameworthiness is an essential criterion.”

⁷ What possible functional meaning would it have in the theory or practice of criminal law to argue, for example, whether the concept of free will is a hypothesis or an a priori assumption of ethical science? Moreover, there are areas of criminal law to which the concept of free will cannot be applied, e.g., the growing area of public welfare crimes.

⁸ They overlook the significance of time in physical causation and fail properly to evaluate the fact that prediction even in physical causation can be understood only in terms of probability. For a clear concept of causality see Margenau, *The Nature of Physical Reality* 389-426 (1950); Northrop, *The Logic of the Sciences and the Humanities* 200-234 (1947).

science nor a mere reflection of scientific opinion. Since it sets forth rules of conduct, in order to utilize scientific knowledge it must first transform that knowledge into a social ideology. The latter, in turn, necessarily carries implications which reach far beyond the scientific basis on which it is built. Even if determinism were a scientifically proven fact, that fact alone would not warrant the conclusion drawn from it by criminological positivists that the individual is subordinated to society and that responsibility is determined by the yardstick of social dangerousness.⁹ Belief in the supremacy of society presupposes a political orientation which is to a large extent independent of alleged scientific fact finding. Stress on social purpose, if carried out consistently, leads to a social ideology of totalitarianism and paternalistic absorption of the individual by the state.¹⁰

We proceed from a different ideology: We believe in a "free society" that recognizes human dignity as an ultimate goal. We do not consider freedom either in the Kantian transcendentalist sense or in the purely semantic version of eighteenth and nineteenth century liberalism, as the "absolute value of the human personality,"¹¹ to be meaningful. Rather, proceeding from the idea of human dignity in a "free society,"¹² we inquire into the meaning and scope of a "responsibility" that might best fit that frame of reference.

The problem of "responsibility" thus conceived calls for answers to two questions: For what is man responsible? What sanctions does responsibility imply in any given case? Answers to these questions afford the resolution of the problems of *error juris*. We shall survey the historical evolution of error of law as a defense, state the contemporary problems of that defense, clarify the points in issue and, finally, present our own position on the theory and policy of criminal responsibility and its corollary, *error juris*.

I. HISTORICAL SURVEY

That which rendered man responsible in early law was disobedience of prevailing religious or social precepts. Where disobedience of law ceases to be

⁹ Even if we could draw such conclusion from the alleged factual absence of free will, we would not thereby exclude legal "responsibility" in the sense of amenability to the state's interference with individual freedom, but merely predicate it upon danger to society rather than upon individual guilt.

¹⁰ Ferri, *op. cit.* supra note 5, at 353-54, says: "It suffices for my purpose to say that the natural and positivist moral sciences coincide in demonstrating that the individual, whatever be his species, does not exist only as such in himself, but rather as a member or element of a society." Ferri claims that his ideology has decisively influenced the Soviet interpretation of criminal law, but this is denied by the Soviets. Consult Berman, *Principles of Soviet Criminal Law*, 56 Yale L. J. 803, 804 n. 9 (1947).

¹¹ Hallowell, *The Decline of Liberalism as an Ideology* 1-12 (1946).

¹² Lasswell, *Power and Personality* 125 (1948). Consult also Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 Yale L. J. 203 (1943); McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 Yale L. J. 915 (1952).

merely a formal inconsistency with such precepts and assumes psychological connotations, it implies an attitude of defiance, disregard or contempt of law. Defiance of law, of course, presupposes awareness of it. Knowledge of law is hence a necessary requisite of legal guilt.

The offender's knowledge of the law is also implicit in any moral value judgment of guilt applied to his act. The criminal is blamed for his act because in it he expressed an attitude of opposition to law, a refusal to accept the moral tenet of the law. The moral right to punish flows from an evaluation of the criminal act as an act by which the offender sets up his own morality—or immorality—against the morality of the punishing social system. Thus, punishment requires that the offender knew and defied the law. Knowledge of law as a moral requisite of crime and punishment is not a peculiarity of early law but is part, theoretically at least, of all law which purports to be identical with, or based upon, morality. While this may be observed most clearly in the modern development of canon and natural law, it is also apparent in the other systems which are discussed below.

The Law of the Bible

The Bible contains only a few references to error or ignorance of law. It occasionally describes lack of intent as a lack of knowledge.¹³ Beyond that, in discussing atonement for sins, it draws a distinction between sins committed erroneously or in ignorance and "high-handed" sins.¹⁴ The person acting in a "high-handed" manner is said to have "despised the word of the Lord." This distinction would seem to indicate that ignorance of "the word" excludes intentional sin. Ignorant or erroneous sinning calls for no punishment except a sacrifice in atonement.

The Law of the Talmud

In the Babylonian Talmud,¹⁵ Seder Nezikin deals with the question of whether or not the children of Noah were bound to observe the law, unless they were previously instructed as to the legal precepts and had accepted them.¹⁶ Warning of the legal consequences of committing an offense is repeatedly stated to be a requisite of punishment. Criminals cannot be executed "unless . . . [they were] cautioned by two who witnessed the crime," and unless "the warners have let them know that they are liable to a death sentence at the hand of the Court."¹⁷ According to R. Judah, the warners must also inform them of the kind of death they would suffer.¹⁸ The Talmud, indeed,

¹³ E.g., Deuteronomy IV, 42; XIX, 4.

¹⁴ Leviticus V, 18; Numbers XV, 22-31.

¹⁵ References to the Babylonian Talmud are to the translation made under the editorship of Rabbi Dr. I. Epstein (Soncino Press, 1936).

¹⁶ 1 *ibid.*, at 384-85.

¹⁷ *Ibid.*, at 38.

¹⁸ *Ibid.*, at 36.

devotes elaborate thought to the question whether "a warning of a greater penalty is *ipso facto* a warning for a smaller one too," and to the question which of two types of execution constitutes a "greater penalty."¹⁹ The requirement of prior warning is not limited to capital crimes, but applies also to other penalties, such as flagellation or imprisonment.²⁰ Since the warning requirement is only part of a general principle that no crime can exist without consciousness of illegality, learned men need not be warned.²¹

Roman Law

The well-known adage, *error juris nocet, error facti non nocet*, is derived from the Digests.²² But, as convincingly shown by Binding,²³ it was never applied by the Romans to the field of criminal law. Linguistic considerations support Binding's view. The term *nocet* (from *nocere*—to damage, to prejudice) is not conventionally used with regard to an accused in a criminal case. When applied to an accused, the adage would have a rather awkward meaning, that is, he is "damaged" by his error. Nor does it seem likely that the Romans would have used, in such context, the ambiguous term *jus* (meaning either law or right) rather than the clearer term *lex*. That *jus* was, in this section of the Digest, intended to mean "right" may be concluded from the fact that the section deals with the impact of error on acquisition and forfeiture of various private rights. Binding, indeed, argues that even within the area of civil law, the rule that ignorance of law constitutes a disadvantage was limited to certain specific situations, all involving private rights. He relies heavily on the fact that in a fragment of the above section, the phrase used is *error juris sui* (error as to his right) rather than *error juris*.²⁴ Equally persuasive is Binding's further argument that the distinction made between error of law and error of fact did not have, in the Digests, the same connotation that is attributed to it today. According to him, error of law meant only error arising from misconception of the particular *lex* or "edict" that granted the right in issue, and error of fact meant any other error, including error as to any other law.

As demonstrated by Binding, the Roman criminal law always regarded knowledge of illegality, indeed, a positive disregard or contempt of the law, as an essential requisite of *dolus malus* (intent) or *culpa lata* (gross negligence).²⁵ Thus Roman law resembles Biblical law. Medieval commentators on

¹⁹ 2 *ibid.*, at 535-36.

²⁰ *Ibid.*, at 540.

²¹ *Ibid.*, at 494; 1 *ibid.*, at 37.

²² Digest 22.6 (De iuris et facti ignorantia).

²³ 3 Binding, *Die Normen und ihre Übertretung* 30-79 (1918).

²⁴ Digest 22.6.3.

²⁵ 1 Binding, *op. cit. supra* note 23, at 56. It has been frequently noted that in Roman law certain classes of persons, that is, minors, women, peasants and soldiers could rely on error of law. But, as shown by Binding, *ibid.*, at 61, such persons received no exceptional treatment in criminal law. Whatever exceptions applied in their case were limited to civil law.

the Roman law interpreted that law as excluding *dolus* in the absence of knowledge of law but admitting *culpa lata* in case the error was inexcusable.²⁶ Nor did they ever admit any general presumption of *dolus* but conceded merely that in certain situations the error is more credible than in others.²⁷

Since the Roman law of civil error—though in a grossly misconceived form—largely determined all later developments, it is proper to add a few words on two aspects, reflected in the later development of the division of error of law and error of fact and in the distinction between innocent and guilty error.

Digest 22.6 seems to contain the roots from which the later division of error into error of law and error of fact, excusable and inexcusable, vincible and invincible error, evolved. It has been suggested that the Digest's reason for distinguishing error of law from error of fact (the former allegedly inexcusable, the latter excusable) was that "the law is certain and capable of being ascertained, while the construction of facts is difficult for even the most circumspect."²⁸ But the Digest fragment²⁹ which allegedly so holds, contains no such sweeping statement. Rather, it seems to suggest that "to the extent that the law is, can be and should be, fixed," error as to it should not be treated "in all respects" like an error of fact, as to which even the most circumspect can err. Another fragment³⁰ contains the terms, *supina ignorantia* and *negligentia crassa*, which acquired decisive significance in the canon-law theory of error. This fragment, in stating that neither supine ignorance nor crass negligence, even as to facts, is excused,³¹ merely suggests a proper standard of care in seeking knowledge.

When read together, these passages obviously do not suggest that error of

²⁶ *Ibid.*, at 57.

²⁷ Binding concluded that application of the civil law theory of error of law to the field of criminal law was entirely the product of advanced German doctrine. In his view, it was that doctrine which also originated the idea of a presumption of intent, including the presumption of knowledge of law. He attributes this to the growing disregard of the person of the accused following the rise of absolute state power. 3 *ibid.*, at 70-71, 78-79. While it is true that the doctrine of *error juris nocet* assumed its rather dogmatic character in the atmosphere of absolute state power, that doctrine was certainly known prior to the rise of that power in Europe.

²⁸ Keedy, *Ignorance and Mistake in Criminal Law*, 22 Harv. L. Rev. 75, 78 (1908).

²⁹ Digest 22.6.2.

³⁰ *Ibid.*, at fragment 6.

³¹ *Ibid.* Fragments 7 and 8, suggest that ignorance of law and of fact are treated differently depending on whether such ignorance arises in the context of acquisition or in the context of forfeiture of rights, of making a profit or of preserving an existing right. Then follows the famous fragment 9, containing the *regula*. That passage simply states, citing examples, that no one may derive an advantage from ignorance of the law and that ignorance of fact does not prejudice anyone. In section 3 the passage reports an opinion of Labeo to the effect that the rule excluding advantage based on legal error applies only to a person who can secure the advice of juriconsults or who is in possession of sufficient self-enlightenment.

fact is equated with excusable and error of law with inexcusable error. Excusable error was viewed rather as a product of two elements: the difficulty presented by the object of knowledge and the effort exerted in the process of cognition. With regard to the object, the Romans seemed to believe that law can and should be fixed, whereas facts tend to be more elusive. Owing to the greater elusiveness of facts, error as to them should be excused more readily so that only supine ignorance or crass negligence should bar excuse.³² That the Romans never thought in terms of a rigid demarcation line between error of law and error of fact, is suggested by phrases such as *in facto magis, quam in jure errat* (he erred more as to fact than as to law),³³ indicating a difference in degree rather than in kind. A misconception of this Roman doctrine of error later led to the assumption of a rigid division into error of fact and error of law.³⁴

Canon Law

While repeating the spurious Roman law principle that ignorance of law constitutes no excuse, the canon law early provided that general censures imposed by the ordinaries did not bind those who were unaware of them, unless the ignorance stemmed from laziness or gross negligence.³⁵ Canonist doctrine, which had been concerned with the question of error of law since the fourteenth century, extended this specific provision to all criminal law, invoking, as subsidiary ground of the extension, the doctrine that no one could be punished unless "guilty." The old law, reading "ignorance of the fact excuses, ignorance of the law does not excuse,"³⁶ is now interpreted restrictively as merely invalidating or disqualifying law; the present Canon 16, Section 1, providing that ignorance of such law does not excuse non-observance, implies merely that an act performed contrary to such law is invalid regardless of ignorance or error.³⁷ But with regard to crime, the canon law follows the teaching of Aquinas that a precept does not oblige "unless the command reaches him who is commanded; it thus reaches him however through knowl-

³² The required standard of care lies between excessive indifference and the curiosity (inquisitiveness) of a spy or an informer. Digest 22.6.6.

³³ *Ibid.*, at 22.6.1.2.

³⁴ The *Lex Visigothorum* and the *Lex Burgundionum* contain interesting provisions dealing with the responsibility of judges who, owing to error of law, incorrectly decide a case. Consult 3 Binding, *op. cit. supra* note 23, at 23 et seq. Binding also cites a number of thirteenth to fifteenth century German folk laws and city ordinances which contain special rules for aliens, who cannot be expected to know local laws. *Ibid.*

³⁵ Consult generally 5 Hinschius, *System des katholischen Kirchenrechts mit besonderer Rücksicht auf Deutschland* 921-30 (1895).

³⁶ 6 *Regulae Iuris* 13 (1890).

³⁷ Cicognani, *Canon Law* 590-97 (2d rev. ed., 1934).

edge. Therefore no one is bound by any precept unless through the medium of the knowledge of that precept."³⁸

Under the canon law, knowledge of the law is considered part of the intent or evil will (*dolus*).³⁹ Ignorance and error of law, unless culpable, render the violation involuntary.⁴⁰

This formulation of the problem of error raises two questions: When is ignorance culpable? What must the violator know in order to be liable as one actually aware of the law?

Ignorance of law is non-culpable, because invincible, when a person is unable to rid himself of it, notwithstanding the employment of moral diligence.⁴¹ Where, on the other hand, knowledge may be acquired, the culpability of ignorance varies in degree with the effort exerted to dispel it. Thus, ignorance may be crass or supine⁴² when because of heedlessness and laziness practically no effort is made to secure knowledge, or may be merely vincible when the effort made is but insufficient.

With regard to the scope of required knowledge, the prevailing principle is that ignorance merely of the penalty does not excuse from liability.⁴³ Nor is it required that the actor have actual knowledge of the provision of criminal law, provided that he knows that the act is prohibited by Divine Law.⁴⁴ But, in spite of the general terms of the pertinent Canon,⁴⁵ the limitation of required knowledge to knowledge of the prohibition alone does not apply to two situations: (1) offenses "combined with obstinacy"⁴⁶ where, in order to be

³⁸ Aquinas, De Veritate q. 17, a. 5. The rules regarding ignorance of law in criminal cases are contained in Canons 2199, 2202 and 2229, which in language as well as ideas show decisive marks of Roman influence combined with Christian philosophy.

³⁹ This conclusion is reached by reading Canon 2199 in conjunction with Canon 2207. Canon 2199 states: "The imputability of an offense depends on the evil will (*dolus*) of the delinquent, or on the extent to which his ignorance of the violated law or his omission of proper diligence was culpable. Wherefore, all causes which increase, diminish or destroy the evil will or culpability, automatically increase, diminish or destroy the imputability of the offense." Canon 2202 provides: "The violation of a law of which one was ignorant is entirely non-imputable, if the ignorance was inculpable; if it was culpable, the liability varies in proportion of the culpability of the ignorance. Ignorance of the penalty only does not destroy liability, but it mitigates it somewhat. What is said of ignorance, applies also to inadvertence and error." Translated in Woywood, A Practical Commentary on the Code of Canon Law 450-51 (Smith rev., 1952). According to canon-law doctrine: "There can be no evil will or malice in acting against the law, unless a person knows the law, or is in culpable ignorance of the law, and has the use of his free will to obey or disobey the law." *Ibid.*, at 450.

⁴⁰ Cicognani, *op. cit. supra* note 37, at 595.

⁴¹ *Ibid.*, at 590-91.

⁴² "Supine" as used here means stupid or reckless. Consult *ibid.*, at 591. The terms *crass* or *supine* are derived from Digest 22.6.6.

⁴³ Canon 2202.

⁴⁴ Consult Hinschius, *op. cit. supra* note 35, at 922.

⁴⁵ Canon 2202.

⁴⁶ Canon 2242, § 1.

"obstinate" the actor must be aware both of the criminal provision and the sanction imposed,⁴⁷ and (2) where the law indicates, by use of appropriate words (e.g., *scienter*), that full knowledge of both the prohibition and the punishment is required. In the latter case, as opposed to the former, crass and supine ignorance may not substitute for actual knowledge.⁴⁸

Natural Law

The natural-law belief that the function of law is to operate upon the minds of men as a causal, motivating, deterrent factor was developed in the writings of Hobbes,⁴⁹ accepted by Puffendorf,⁵⁰ and led, in Feuerbach's works,⁵¹ to formulation of the "doctrine of psychological compulsion." According to this doctrine, in order to produce the desired deterrent effect upon the potential criminal in his process—believed to be perfectly rational—of weighing the pain of threatened punishment against the pleasure of crime, the law must be known to him. Such knowledge, indeed, must include acquaintance with the degree of punishment imposed by the specific criminal statute. Feuerbach met the difficulties involved in complying with such an unrealistic goal by first introducing a presumption of intent⁵² and later replacing it by a "legal presumption of imputability."⁵³ He eventually redefined the scope of excusable error.⁵⁴ The most significant aspect of his theory in the present context, however, is its foundation upon a doctrine of conscious guilt and its connection with the principle of *nulla poena sine lege*. In his view, as there can be no punishment

⁴⁷ Consult Hinschius, *op. cit.* supra note 35, at 922–23.

⁴⁸ Canon 2229, § 2. The Code speaks only of excuses from penalties *latae sententiae*, because in the case of penalties *ferendae sententiae* which do not take effect against the offender unless the ecclesiastical judge or superior declares sentence, the law leaves to the discretion and conscience of the judge or superior the consideration of mitigating circumstances. Woywood, *op. cit.* supra note 39, at 468.

⁴⁹ Hobbes, *Philosophical Elements of a True Citizen, Philosophical Rudiments Concerning Government and Society*, 2 *The English Works of Thomas Hobbes* 180 (Molesworth ed., 1841); Hobbes, *Leviathan*, 3 *ibid.*, at 257 et seq., 279 et seq.

⁵⁰ Puffendorf, *De Jure Naturae et Gentium, Libri Octo Lib I, Cap. 6 Sec. 14* (ed. of 1688).

⁵¹ Feuerbach's contribution was first developed in 2 *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts* 66 (1880), and later expanded and modified in numerous editions of the *Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts*.

⁵² Feuerbach, *Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts* § 60 (2d ed., 1803).

⁵³ Feuerbach, *Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts* § 87 (9th ed., 1825).

⁵⁴ Feuerbach somewhat modified his absurd assumption that it is "legally certain that every person endowed with reason is acquainted with criminal statutes," *Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts* § 86 (11th ed., 1831), by occasionally treating "ignorance concerning illegality" and "ignorance concerning dangerousness of the act" as interchangeable and by introducing the distinctions of admissible and inadmissible and of vincible and invincible error. *Ibid.*, at § 90.

without a criminal statute, so there can be no crime without conscious violation of that statute, essentially consciousness of guilt.

Common Law

The common-law doctrine concerning error of law is generally accepted to be of Roman origin. But the formulation of the law of error by Sir Matthew Hale, in his *Pleas of the Crown*, published in 1680, shows clear marks of the influence that canonist doctrine had exercised upon the common law. It is there said that error of law affords no excuse, since everyone is bound and presumed to know the law, but that ignorance of fact excuses "for such an ignorance many times makes the act itself morally involuntary."⁵⁵ On the other hand, as stated in Blackstone's *Commentaries*, the rule may be interpreted to admit of exceptions: "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."⁵⁶ This may very well be read as excluding the defense merely in such cases where the law is so well settled and clear that "every person of discretion may, and is, therefore, bound and presumed to know."⁵⁷ That belief in the essence of law violation being disobedience to known law still influenced legal thought in 1843 in England is evidenced by the ruling in *M'Naghten's Case*,⁵⁸ which apparently held error, whether of law or of fact, to be the ground exempting insane persons from punishment. Such persons, the case suggests, do not deserve punishment because they are incapable of acquiring knowledge of the nature of the act or of its wrongfulness.⁵⁹ In quite recent decisions we still encounter statements such as:

At common law knowledge of the criminality of an act and evil intent in committing it were essential elements of all crimes, and without a showing thereof directly or by facts creating a necessary inference of their existence no conviction could be had.⁶⁰

Throughout history, as we have seen, pervading all law which institutionalizes or incorporates morality, is the profound conviction that crime consists in disobedience to known law, obedience to the law being conceived of as "itself a moral duty."⁶¹

⁵⁵ 1 Hale, *Pleas of the Crown* 42 (1847).

⁵⁶ 4 Blackstone, *Commentaries on the Laws of England* 19 (1854).

⁵⁷ Keedy, *op. cit.* supra note 1, at 78-81, cites cases in which a mistake of law was either excused or pardoned.

⁵⁸ 10 Cl. & Fin. 200 (1843).

⁵⁹ The meaning of law to which the error relates is, of course, hopelessly confused. Consult *People v. Schmidt*, 216 N.Y. 324, 335, 110 N.E. 945, 948 (1915).

⁶⁰ *State v. Dombroski*, 145 Minn. 278, 279, 176 N.W. 985, 985 (1920).

⁶¹ Cardozo, J., in *People v. Schmidt*, 216 N.Y. 324, 340, 110 N.E. 945, 949 (1915).

Reasons for Maintaining the Maxim

While the maxim *error juris non excusat* is historically traceable to a canonist misconception of Roman sources, its persistence in modern law is not explainable solely on historical grounds. The reasons for preserving the maxim are manifold, and they may differ in various legal systems.

Common to all modern systems which preserve the maxim is a procedural consideration. This is best demonstrated by the fact that the maxim has been turned into a procedural presumption, at first a rebuttable presumption and later a conclusive presumption—in effect, a substantive rule. This presumption is not directly related to any particular difficulties of proving knowledge of law, as distinct from any other knowledge.⁶² Rather it is the result of a general aim of facilitating the burden of proof by limiting its scope. As demonstrated by historical experience, increasing stress on proof by the prosecution is usually counterbalanced by a tendency to narrow the scope of that which must be proved. The rise of the presumption of legal knowledge in the history of continental Europe thus was closely connected with the shift of the entire burden of proof to the prosecution in the inquisitorial process.⁶³ Similarly, in Anglo-American law the requirement of proof beyond a reasonable doubt contributed to the preservation of the presumption.

The growth of absolute state power and the rise of the notion of sovereignty also favored development and persistence of the presumption, for it endows the state with a monopoly of law creation and thus supports the state's sovereignty over the individual. In German theory this relation of the doctrine of error of law to political ideology found an interesting expression in the view that the individual need not know the law for the law is not addressed to him at all, but rather is directed to law enforcement agencies.⁶⁴ The function of criminal legislation was said to lie not in giving the individual advance notice of prohibitions so that he might avoid their violation, but rather in limiting the power of certain branches of government against arbitrary exercise of authority. In this view, the principle of *nulla poena sine lege* is oriented to protection of the individual, not to his information. Thus conceived, the principle is not inconsistent with the presumption of legal knowledge. There is, therefore, no anomaly in the fact that in the nineteenth century, under the

⁶² For a contrasting position consult 1 Austin, *Lectures on Jurisprudence* 482–83 (5th ed., Campbell, 1911).

⁶³ The same phenomenon may be observed in the development of theories of natural law. Feuerbach, in attempting to maintain a stringent requirement of legal knowledge, was eventually forced to accept a presumption of such knowledge. Consult discussion at 429 *supra*. On the other hand, Hobbes, whose requirement of legal knowledge was rather moderate, rejected conclusive presumptions generally, observing that judges who refuse to hear proof "refuse to do justice." 3 Hobbes, *Leviathan*, *op. cit. supra* note 49, at 266.

⁶⁴ This view was particularly evident in the *Constitutio Criminalis Carolina* enacted by the German Reichstag in 1532. Consult 1 Binding, *op. cit. supra* note 23, at 91.

rule of the benevolent national state on the European continent, that presumption developed into a substantive rule.

The same presumption, when enunciated in the twentieth century in the United States, is inconsistent with the prevailing political doctrine. This inconsistency is strongly felt in *Horning v. District of Columbia*,⁶⁵ in which the conclusive presumption of legal knowledge is paradoxically combined with an implied denial that the law—even constitutional law—is the Magna Carta of the Criminal.⁶⁶

In countries where the sovereignty of the state took the form of sovereignty of law, attributes developed with regard to the former have often been transferred uncritically to the latter. Such transfer may be observed in the theory, expressed both in the United States⁶⁷ and France,⁶⁸ that legal error affords no defense because *the law must be paramount*.⁶⁹ But this is hardly the true ground on which the maxim is being maintained. In the United States, next to the fact that the presumption operates as a means of narrowing the scope of proof, the foremost realistic ground seems to be distrust of the legal profession. If error of law were admitted as a defense, defendants would try to show that lawyers gave them erroneous advice.

Reasons for holding legal error irrelevant have been expressed at times in

⁶⁵ 254 U.S. 135 (1920). Defendant was charged with doing business as a pawnbroker and charging more than 6 per cent interest, without a license, in violation of an Act of Congress. Anticipating enactment of that law, he had removed his headquarters to a place in Virginia, but continued to keep a storehouse in Washington, D.C., and to manage his business there. His conviction was affirmed by the Supreme Court, Justice Holmes writing the majority opinion. Denying relevancy of defendant's contention that he had believed his conduct to be lawful, Justice Holmes said: "There is no question that the defendant intentionally maintained his storehouse and managed his business in the way described. It may be assumed that he intended not to break the law but only to get as near to the line as he could, which he had a right to do, but if the conduct described crossed the line, the fact that he desired to keep within it will not help him. It means only that he misconceived the law." *Ibid.*, at 137.

⁶⁶ In the same case, over Justice Brandeis' vigorous dissent (*ibid.*, at 140), Justice Holmes commented upon the trial judge's charge, "Of course, gentlemen of the jury, I cannot tell you, in so many words, to find defendant guilty, but what I say amounts to that" (*ibid.*, at 140), as follows: "Perhaps there was a regrettable peremptoriness of tone—but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts—and that is all there was left for them after the defendant and his witnesses took the stand. If the defendant suffered any wrong it was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt." *Ibid.*, at 138–39.

⁶⁷ "To permit an individual to plead successfully that he had a mistaken opinion of the law would imply that the meaning of the law is determined not objectively, but by what an individual understood that law to mean." Hall, *General Principles of Criminal Law* 353 (1947).

⁶⁸ "Application of the law cannot be subordinated to the greater or lesser zeal which those subject to its jurisdiction may exert in order to acquaint themselves with it." Donnedieu de Vabres, *Traité de Droit Criminel et de Législation Pénale Comparée* 86 (3d ed., 1947).

⁶⁹ *People v. McCalla*, 63 Cal. App. 783, 795, 220 Pac. 436, 441 (1923), *aff'd* 267 U.S. 585 (1924).

texts of criminal statutes. Thus, Section 3 of the Austrian Penal Code of 1852 originally provided: "No one can excuse himself by ignorance of the present law concerning felonies, since the wrongfulness of these is unmistakable."⁷⁰

Criticism of the Maxim

Justice Holmes suggested as a remedy for the difficulty of proving knowledge of law that "the burden of proving ignorance" be thrown "on the law-breaker."⁷¹ However, such reversal of the burden of proof can be theoretically justified only upon the assumption that at least a majority of people know the law. A reason for rejecting that assumption is expressed in the classic remark that "everybody is presumed to know the law except His Majesty's judges, who have a Court of Appeal set over them to put them right."⁷² A distinction in treatment of judicial and private error was not always drawn. Indeed, it is fair to assume that appellate review developed from trial of judges accused of adjudicatory error for which, in course of time, they were permitted to set forth justifying defenses. The principle of judicial independence, including non-responsibility for error in judgment, is the product of political evolution. Attack on the prevalent doctrine of private legal error also should be waged in the area of political ideology, as well as in the area of jurisprudential doctrine.

The maxim *error juris non excusat* derives perhaps its strongest support from two jurisprudential propositions both of which are questionable. The first proposition, that the law must be paramount to the individual,⁷³ confuses the subjective value judgment of responsibility, as relating to the particular defendant, with the objective value judgment of illegality. A person's act performed in ignorance of law remains illegal. This does not preclude his being held not responsible for it. The second, Holmesian, proposition, that error of law cannot be admitted as a defense because it is precisely the policy of the law "to make men know and obey,"⁷⁴ is contrary to the basic democratic principle that man should not be used as a means to an end.⁷⁵ It also reflects a

⁷⁰ This sentence is now omitted. Consult Das Oesterreichische Strafgesetz (3d ed., Kaniak, 1953). On the previous version, consult Kadecka, Ist das Unrechtsbewusstsein ein allgemeines Schuldmerkmal? 53 Revue Pénale Suisse 50, 54 (1939). A similar position, that the wrongfulness of certain crimes is self-evident, has apparently been taken by the Japanese Supreme Court. That court has occasionally held that, while no one can excuse himself by ignorance of *mala in se*, he may have a defense where his ignorance pertains to *mala prohibita*. Makino: Keihosoron 324-37 (1951). But in general, the court has followed the traditional maxim. 4 Keizi-Han-Rei-Shu 378 (1925).

⁷¹ Holmes, The Common Law 48 (1923).

⁷² Williams, Criminal Law, The General Part 386 (1953), attributes this observation to Judge Maule.

⁷³ Consult notes 67, 68 and 69 supra.

⁷⁴ Holmes, op. cit. supra note 71.

⁷⁵ Consult Kant, Grundlegung zur Metaphysik der Sitten, in 8 Kant, Gesammelte Werke 57 (Rosenkranz ed., 1838).

mistaken conception of the purpose of criminal law. Justice Holmes' view that "for the most part, the purpose of the criminal law is only to induce external conformity to rule,"⁷⁶ of course, applies not alone to criminal law but to all law. In the area of criminal law, more specifically than in any other law, it is essential to consider in the light of purpose the type of sanction imposed on non-conformity. The purpose of criminal law may be different in the case of crime committed in awareness of the prohibition and in the case of crime committed without such awareness. Its purpose may be, in the former, to produce conformity and in the latter to induce care in securing knowledge. Indeed, the growing group of public welfare offenses, as well as crimes of inadvertent negligence, can be justified only from the standpoint of the latter purpose.

Perhaps the most unexpected political attack on the traditional maxim of legal error comes from Marxist sources. Lenin has described how that maxim was being used by capitalist bureaucracy as an instrument of exploitation of the worker who had neither the opportunity nor the means of acquiring knowledge of the law.⁷⁷ Lenin's interpretation is considered to be a guide to the Soviet administration of justice.⁷⁸

Both in England and on the European continent critical analysis has been applied to the assumption, underlying the distinction between error of fact and error of law, that law and fact are clearly distinguishable.⁷⁹ In Switzerland, moreover, attention has been called to the fact that even if law and fact were thus distinguishable, there would be no justification for treating error of law differently from error of fact. The latter affords an excuse precisely because it is believed to preclude consciousness of the illegality of the act, and this ground applies a fortiori to the former.⁸⁰

⁷⁶ Holmes, *op. cit.* supra note 71, at 49.

⁷⁷ "Workers (en masse) usually do not and cannot know the laws, although they are nevertheless being punished for ignorance of the law by the officials and the official courts. If the worker, when an official shows him the law, answers that he did not know of that law, then the official (and the judge) will either laugh or scold him: 'No one has the right to plead ignorance of the law'—that is what the basic Russian law says. Hence, every official and judge assumes that each worker knows the laws. But such assumption is a bourgeois lie, a lie conceived by property owners and capitalists against the have-nots, a lie similar to the assumption that the worker concludes with the master a 'free contract.' In truth, the worker who from early youth goes to the factory, having scarcely learned how to read and write, has no time, no one from whom, and I dare say, no means whereby, to learn the law—because when they change the law, the officials of the bourgeoisie do not ask him. Therefore, the laws will be of little use to the worker." Translated from 4 Lenin, *Ocherekiye Zadachy Sovetskoy Vlasti* 227-28, cited in Kirichenko, *Znachenye Oshybki po-Sovetskому Ugolovnomu Pravu*, *Akademia Nauk USSR, Institut Prava* (1952).

⁷⁸ *Ibid.*

⁷⁹ See *West London Commercial Bank v. Kitson*, 13 Q.B.D. 360, 363 (1884); *Eaglesfield v. Marquis of Londonderry*, 4 Ch. D. 693, 703 (C.A., 1876). For a German criticism, consult 1 Binding, *op. cit.* supra note 23, at 144 et seq.

⁸⁰ Consult 1 Thormann and von Overbeck, *Das Schweizerische Strafgesetzbuch* 107-8 (1940); the authors are, however, opposed to assimilation of the two types of error. Con-

Exceptions to the Maxim

The classical continental and the common-law rules on error of law had a common root in the Roman law of error as interpreted—probably incorrectly—by early canon-law doctrine. Hence there is no wonder that both systems developed the same basic position, best stated in the adage, error of fact excuses, error of law excuses no one. From this point, however, the history of the two systems separates. Notwithstanding mutual independence, they have both evolved by way of judicial legislation rather similar groups of exceptions.

Claim of right.—The principal exception which thus evolved in both legal systems is that a mistake as to a private right is deemed a mistake of fact rather than of law. This rule was laid down in a non-criminal case, which has been subsequently cited in criminal cases,⁸¹ before the House of Lords in which Lord Westbury stated:

It is said, "*Ignorantia juris haud excusat*"; but in that maxim the word "*jus*" is used in the sense of denoting general law,⁸² the ordinary law of the country. But when the word "*jus*" is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law. . . .⁸³

There are also many criminal cases in England⁸⁴ and in America holding a claim of private right to be a defense to a criminal indictment.⁸⁵ Greater weight should be given the view that this rule is of general validity and is not confined to cases arising under statutes that include a particular pass-word.⁸⁶ Claim of right is not confined to a claim of private right but may be a public right as well.⁸⁷ Except in cases in which the authorities themselves are responsible for the accused's error of interpretation, however, the error, to be excusable, must not relate to the specific provision that had been violated,⁸⁸ and indeed, must not relate to penal law in general.⁸⁹

sult also Lerch, *Tatirrtum und Rechtsirrtum im Schweizerischen Strafrecht*, 66 *Schweizerische Zeitschrift für Strafrecht* 158, 166 (1951).

⁸¹ Consult Williams, *op. cit.* supra note 72, at 896-97.

⁸² In Roman law the reverse was true. Consult discussion at 425 *supra*.

⁸³ *Cooper v. Phibbs*, L.R. 2 H.L. 149, 170 (1867).

⁸⁴ Consult Williams, *op. cit.* supra note 72 *passim*.

⁸⁵ The American cases are cited and discussed in Hall and Seligman, *Mistake of Law and Mens Rea*, 8 U. of Chi. L. Rev. 641 (1941); Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. of Pa. L. Rev. 35 (1939); Keedy, *op. cit.* supra note 1.

⁸⁶ Consult Williams, *op. cit.* supra note 72, at 421.

⁸⁷ See *Regina v. Dodsworth*, 8 C.&P. 218, 173 E.R. 467 (1837) (public right to vote); *Lewis v. State*, 124 Tex. Crim. App. 582, 64 S.W.2d 972 (1933) (sheriff's claim for fee from state).

⁸⁸ Perkins, *op. cit.* supra note 85, at 51.

⁸⁹ *Ibid.*, at 52.

Error of private law.—In Germany, application of the maxim was limited at an early date by extension of the scope of error of fact. In an 1880 decision⁹⁰ the Reichsgericht acquitted an accused who, erroneously believing that the products of real property were not included in an attachment of that realty, had sold those products. The decision rested on Section 59 of the Penal Code⁹¹ which affords an excuse in the case of "error as to factual circumstances of the act as defined by statute." The accused's belief in the exclusion of the inventory from the attachment rendered him unaware of the fact, essential under the statute, that the property sold was attached. His error thus was excusable even if it arose from ignorance of a legal rule provided that such rule did not belong to the field of criminal law.

Thus, it appears that in German law, "factual circumstances of the act as defined by statute" are not necessarily "factual" in kind. As in Anglo-American law, so in Germany, not all legal error is a so-called *error juris*. But, as expressly stated by the Reichsgericht,⁹² only an error of non-criminal law could be thus excused as error of fact, whereas error of criminal law was always inexcusable.⁹³ We believe, however, that the distinctive treatment of error of criminal law is based on a misunderstanding of the meaning of *error juris*. *Jus* in this context should mean law in general and not particular law or laws.⁹⁴

Error induced by state.—A number of apparently unrelated exceptions may be categorized under one heading: error induced by some authoritative act or omission. In this description might be included improper or inadequate promulgation or publication, indefiniteness of formulation, erroneous endowment of certain acts with the appearance of jurisdiction, judicial holding that is later reversed, formally authoritative superior order, as well as advice of duly admitted members of the Bar. In all such cases, the government, in a broad sense of the term, does something upon which the accused is entitled to rely in good faith. In fact, in both the continental and the common law, excuses have been granted under some, though not all, of the enumerated grounds. The difference in treatment has been due to a diversity of notions

⁹⁰ 1 RGSt. 368 (1880) (Entscheidungen des Reichsgerichts in Strafsachen [Decisions of the Supreme Court of the Reich, Criminal Matters], henceforth cited as RGSt.).

⁹¹ German Penal Code (1871).

⁹² "Only ignorance of the pertinent criminal statute could not be invoked by the accused." 1 RGSt. 368, 370 (1880).

⁹³ Consult Williams, *op. cit. supra* note 72, at 126 for an application of this classification to the English cases. Compare Perkins, *op. cit. supra* note 85, at 51. For a criticism of the artificiality of the distinction between criminal and civil law, consult Williams, *The Definition of Crime*, 8 *Current Legal Problems* 107-30 (1955).

⁹⁴ Binding states that the Roman *error juris* "is ignorance of the particular legal norm which grants the claimant his right, as a source of his ignorance of such individual right—and such error only." 3 Binding, *op. cit. supra* note 23, at 43.

as to what may be taken as authoritative and as to the requirements of good faith. Some examples follow.

In an English contract case,⁹⁵ the House of Lords rejected Lord Justice Denning's lower court ruling that:

Whenever government officers, in their dealings with a subject, take on themselves to assume authority in a matter with which the subject is concerned, he is entitled to rely on their having the authority which they assume.⁹⁶

No American authority has gone as far as Lord Justice Denning suggested. In *People v. Ferguson*,⁹⁷ the court reversed defendant's conviction of issuing securities without a permit required by the blue sky law, holding erroneous the rejection of accused's offer of proof that the corporation commissioner, authorized to establish "rules and regulations . . . to carry out the purposes . . . of this act,"⁹⁸ had advised him that no permit was necessary for this particular issue. But in *People v. Settles*,⁹⁹ the holding of the *Ferguson* case was confined to the situation where the advice regarding legality of the act charged had been given by "some officer directly charged with the duty of enforcing the law"¹⁰⁰ involved. Thus, reliance on advice given by a government officer having no general jurisdiction over the matter in issue is not protected.

In contrast, an early German case¹⁰¹ held defendants' reliance on a license to transport dynamite, issued by a wrong agency, entitled to protection. The court based the decision on the ground that defendants' error was their incorrect assumption that they were in possession of a proper police permit, the absence of such permit being an essential part of the statutory facts of the crime with which they were charged. Thus, their error concerned "factual circumstances of the act as defined by statute."¹⁰²

Hall and Seligman suggest that "the action of any official who is appointed to represent the state in its dealings with the public in some particular matter, should bind the state to give a defense to criminal prosecution"¹⁰³ but that "where the advice comes from a public official whose position is not connected with the subject matter concerning which the advice was given,"¹⁰⁴ there should be no defense. They do not deal with the frequent situation where the

⁹⁵ *Howell v. Falmouth Boat Construction Ltd.*, [1951] A.C. 837 (H.L.)

⁹⁶ *Falmouth Boat Construction Ltd. v. Howell*, [1950] 1 All E.R. 538, 542.

⁹⁷ 134 Cal.App. 41, 24 P.2d 965 (1933).

⁹⁸ Cal. Stat. (1925) c. 447, § 4, at 966.

⁹⁹ 29 Cal.App.2d 781, 78 P.2d 274 (1938).

¹⁰⁰ *Ibid.*, at 785, 276.

¹⁰¹ 12 RGSt. 431 (1885).

¹⁰² German Penal Code §59 (1871).

¹⁰³ Hall and Seligman, *op. cit.* supra note 85, at 682.

¹⁰⁴ *Ibid.*, at 683.

error concerns jurisdiction of the advising official, a problem which is particularly intricate where jurisdictional limits are tenuous. Nor does their suggestion cover the situation in which the person giving advice does not technically represent the state but is nevertheless, in a sense, authorized by the state to give such advice. For example, an attorney would fall within neither of the categories to which they refer, but he is certainly licensed to give legal advice to the public. Neither in England nor in the United States, however, is advice of counsel generally considered a defense.¹⁰⁵ In Switzerland, the advice of an attorney has been held relevant, at least to the extent it bears on the intent to commit a particular type of crime.¹⁰⁶

A most difficult problem is raised by ambiguity in statutory or other governmental language. The error of law such ambiguity invites is certainly one for which the state rather than the individual should be held responsible. However, in the United States, unless the statute is struck down as a violation of due process, such error can be held excusable only where it is supported by a judicial decision which is later reversed.¹⁰⁷ But in Switzerland, under the federal law in force until 1942, acquittal of an accused could be secured upon a mere showing that the pertinent statutory provision, being ambiguous or vague, had invited error of interpretation.¹⁰⁸

Error excluding required state of mind.—The most comprehensive exception to the maxim is the rule that error of law is a defense if it "negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense. . . ."¹⁰⁹ Although this rule seems to apply only to error of fact or law other than that under which the accused is charged, it may be assumed that it covers ignorance of the particular statute if this intention is indicated by the statute.¹¹⁰ In these cases the defense is misconception of the very criminal statute the violation of which is charged, not any error of fact or other law.¹¹¹

¹⁰⁵ Consult Williams, *op. cit. supra* note 72, at 396; Hall and Seligman, *op. cit. supra* note 85, at 652. But see *Long v. State*, 44 Del. 262, 65 A.2d 489 (1949).

¹⁰⁶ *Matter of Kilchenmann*, [1926] 63 *Zeitschrift des Bernischen Juristenvereins* 265 (1927).

¹⁰⁷ See *United States v. Mancuso*, 139 F.2d 90 (C.A. 3d, 1943); *State v. O'Neil*, 147 Iowa 513, 126 N.W. 454 (1910); consult A.L.I. Model Penal Code, Tentative Draft No. 4, comments, at 139 (1955).

¹⁰⁸ *Staatsanwaltschaft des Kantons Zug gegen Husistein*, BGE 75 IV 26, 29 (1949) (*Entscheidungen des Schweizerischen Bundesgerichts* [Decisions of the Swiss Federal Court], henceforth cited as BGE), and cases there cited. Consult discussion at 441 *infra*.

¹⁰⁹ A.L.I. Model Penal Code, Tentative Draft No. 4, §2.04(1)(a) (1955).

¹¹⁰ It should be noted, however, that error regarding criminal law is specifically excluded from the provisions of error even in such progressive legislation as the Wisconsin Criminal Code (1955). Section 939.43, entitled "Mistake," provides: "(1) An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime."

¹¹¹ See *Ocean Accident and Guarantee Corporation v. Cole*, [1932] 2 K.B. 100. Consult Williams, *op. cit. supra* note 72, at 411. The Cole case involved a charge of violating a

In Germany, the Reichsgericht generally held, even in those cases where the criminal statute used the term "illegally," that consciousness of illegality was required only with regard to law other than criminal.¹¹² In some cases, it specifically held that the term did not imply a requirement of knowledge of any criminal provision enacted in the public interest.¹¹³ But in Switzerland, use of the specific term *illegal* to describe "intent" in Article 11 of the Federal Criminal Law of 1853, actually introduced error of law as a general defense¹¹⁴ in the entire area of federal criminal law.¹¹⁵ This Swiss doctrine, although abandoned by the Federal Criminal Code of 1937, constituted a decisive historical phase in the development of error of law as a defense. Indeed, with this doctrine a new chapter of the history of *error juris* was opened.¹¹⁶

statute which made it an offense for an insurance company to issue a certificate of insurance that was "false to the knowledge" of the company. The company, on payment of a premium, issued a retrospective certificate which was held to be false within the meaning of the statute because it purported to cover a period in which the insured was not in fact covered. But the defendant company was held not to have knowingly issued a false certificate since, although it knew that the insurance was not operative during the time purportedly covered, it was not aware of the fact that this made it false within the statute.

¹¹² German Penal Code § 123 (Trespass), 19 RGSt. 298 (1889); German Penal Code § 303 (Damage to Things), 19 RGSt. 209 (1889).

¹¹³ German Penal Code § 246 (Embezzlement), § 350 (Embezzlement in Office), 61 RGSt. 207 (1927).

¹¹⁴ Since the general provision of Article 11 was not only applicable to that act itself but also was usually incorporated by reference in other federal enactments, consciousness of illegality was consistently held to be part of criminal intent in federal crime.

¹¹⁵ Ritter gegen Statthalteramt Zürich, BGE 60 I 412 (1934); Schmitt gegen Basel-Stadt, Staatsanwaltschaft, BGE 66 I 107 (1940); Briggmann gegen Aargau, Staatsanwaltschaft, BGE 62 I 46 (1936).

¹¹⁶ Exceptions to the maxim have also been occasionally made in cases of acts done pursuant to an order of a superior, and in cases of statutes expressly adopting the defense of legal error. The former exception was adopted in *Regina v. James*, 8 C.&P. 131, 173 E.R. 429 (1837), where Lord Abinger, C.B., laid down the rule that where defendants "acted bona fide in obedience to the orders of a superior, conceiving that he had the right which he claimed" (*ibid.*, at 132, 430), they were not guilty of a felony when they obstructed the airduct of a mine. It should be noted that in this case the right disputed between the defendants' master and the owner of an adjoining colliery was a private right to the passageway, but that by obstructing the airway of the mine, they may have jeopardized the life of workers. However, in English law, the mistaken belief of an accused that it was his duty to obey the order of a superior usually affords no excuse even where the order is that of a military superior. Consult authorities cited and discussed in Williams, *op. cit. supra* note 72, at 391-93. In France, some authorities believe that a soldier owes his superior only "reasonable" obedience, whereas others favor a "passive" obedience. Consult Garraud and Laborde-Lacoste, *Exposé Méthodique de Droit Pénal* 76 (4th ed., 1942). Garraud suggests as a common sense rule that the soldier has a right to disobey an order where its illegality is obvious, and that he be accorded, in any event, the privilege of relying on the excuse of coercion or even of the lack of intention.

Error of law is a defense for children and the insane in all criminal law systems. Moreover, the defense is granted in certain special situations. For example, in France a specific provision allows a plea of ignorance where the offense was committed within three days of promulgation of the substantive prohibition. *Ibid.*, at 117. In Germany, the defense of error

II. CONTEMPORARY PROBLEM OF ERROR JURIS AS A DEFENSE

Error of law as a general defense to a charge of crime may be based either on a psychological or a normative theory of guilt. The former view is often called the "theory of intent," the latter the "theory of guilt." While both theories oppose the maxim *error juris non excusat*, it is the former which has led the struggle for its repeal. For this reason, and because it is the more conventional, it will be discussed first.

The Psychological Theory of Guilt

Throughout history, until amendment of the Swiss federal law in 1937, wherever error of law has been admitted as a general defense, it has been so admitted on a theory of intent. This was the doctrine underlying the law of the Bible and the Talmud, the Roman, Roman-German and canon law. *Dolus malus*, *Zemama*, *böser Wille*, wicked mind and *mens rea* all convey the idea of intent directed to law violation or wrong doing, implying knowledge that what is being done is wrong. To have an evil intent, a man must know the "nature and quality of the act," and originally this probably included knowledge that the act was "wrong," for nature and morality were not separated.¹¹⁷ Lack of such knowledge negated intent with the result that the actor could not be punished for intentional (as opposed to negligent) crime, even though he purposefully brought about the illegal result.

According to the conventional psychological theory, guilt is either intent or negligence, depending upon whether the crime is one of intent or one of negligence. Intent requires consciousness of illegality; such consciousness is a natural part of intent. Indeed, some authors simply define intent as consciousness of wrongdoing.¹¹⁸ It has even been contended that negligence requires possibility of knowledge of illegality.¹¹⁹ In any event, in intentional crime, consciousness of illegality is essential to intent, and the latter constitutes guilt. Punishment of an act committed without such consciousness is punishment "for the consequences of the act" without guilt and thus is a

of law was first introduced in certain special statutes; this legislation constituted a preliminary step leading to adoption of error of law as a general defense. Consult Dalcke, *Strafrecht und Strafverfahren*, Comment to Section 59, Penal Code, at 60 (36th ed., 1955).

¹¹⁷ It is rather likely that the M'Naghten rules—which stress the element of error as to the wrongfulness of the act—were derived from what at an earlier stage was but one test. It may well be that lack of knowledge as to the wrong was not a defense reserved for the insane, but merely was easier to prove in their case.

¹¹⁸ Consult Fitting, *Intention Dolosive et Erreur de Droit*, 101 *Journal des Tribunaux* IV 2 (1953), where it is said that in Swiss law prior to the Penal Code of 1937 "simple or general *dolus* [was] summarily defined as consciousness of acting wrongfully (*la conscience de mal agir*)."

¹¹⁹ Consult Kirichenko, *op. cit. supra* note 77, at 27, with regard to Soviet law.

violation of the principle *nulla poena sine culpa* (no punishment without guilt).¹²⁰

Swiss law of 1853.—The doctrine of intent has been best represented in modern legislation by Article 11 of the Swiss Federal Criminal Law of 1853.¹²¹ In this article, intent was described as illegal intent. The Swiss Federal Tribunal held illegal to mean in consciousness of illegality, so that it was not necessary for the Tribunal to decide whether in the absence of that term such consciousness would have been required.¹²² However that may be, under Article 11, the Federal Tribunal¹²³ as well as other courts¹²⁴ consistently held consciousness of illegality to be essential to intentional guilt. This position was vigorously opposed by traditional law, which did not regard error of law as a defense. Agitation favoring the traditional view finally resulted in the compromise solution adopted in the Penal Code of 1937.

United States law.—In the United States, as in England, it is a truism that an error of law affords no defense. However, the Supreme Court of Delaware has suggested that “a mistake of law, where not a defense, may nevertheless negative a general criminal intent as effectively as would an exculpatory mistake of fact.”¹²⁵ The court thought this position inferable from the admissibility of the defense of mistake of law where it negatives a specific intent.

Polish law.—The Polish Penal Code of July 11, 1932, provides that “a justified unconsciousness of illegality may be considered by the court as a ground for extraordinary mitigation of punishment.”¹²⁶ The Supreme Court of Poland has interpreted this provision to exclude error of law, whether civil or criminal, as a “defense.”¹²⁷ But since the Code states that “an intentional

¹²⁰ M. E. Mayer, *Der allgemeine Teil des Deutschen Strafrechts* 316 (1923), states: “The doctrine of error is . . . not but a consequence to be derived from the doctrine of guilt; it is the doctrine of guilt itself. . . .”

¹²¹ III Amtliche Sammlung der Bundesgesetze und Verordnungen der schweizerischen Eidgenossenschaft 404 (1853).

¹²² *Ritter gegen Statthalteramt Zürich*, BGE 60 I 412 (1934). The tribunal said that “the very wording of . . . [Article 11] indicates that only a person who consciously (meaning, with consciousness of illegality) violates the law is subject to punishment.” *Ibid.*, at 418.

¹²³ Consult cases cited in note 115 *supra*.

¹²⁴ E.g., *Matter of Flühmann*, 63 *Zeitschrift des Bernischen Juristenvereins* 266 (App. Ct. Bern, 1926) (error induced by misleading proclamation).

¹²⁵ *Long v. State*, 44 Del. 262, 278, 65 A.2d 489, 497 (1949). The error was one of “subsumption” of a factual situation under an abstract law, known to the accused. The opinion is perhaps the most convincing argument in favor of admitting error of law as a defense in this country. It shows that the distinction drawn between error of fact and error of law is particularly dubious under the prevailing jurisprudential view that “law” is prediction of what courts will do in the future. In this view, rules of law are not in essence distinguishable from laws of nature. Error as to the latter is traditionally considered an excusable error of fact.

¹²⁶ Polish Penal Code (July 11, 1932) Art. 20, § 2.

¹²⁷ Decision of April 21, 1934, Nr. 102/34, cited in Śliwiński, *Prawo Karne* 241 n. 2 (1946).

criminal act" is present where the actor "wants to commit it" or where "he foresees the possibility of a criminal consequence or of the criminal character of his act and consents to it,"¹²⁸ authoritative legal writers have concluded that awareness of illegality is an essential part of intent.¹²⁹

Soviet law.—While the test of illegality in Soviet law is believed to be of Italian origin, the Soviet theory of error of law is derived largely from German jurisprudence, particularly the German-Swiss conception of a criminal law based on guilt, as distinguished from criminal law based on consequences of the act.¹³⁰ The RSFSR Penal Code¹³¹ provides that improvement measures of social defense may be applied to intentional acts where the actor has foreseen the social dangerousness of the consequences of his act. In legal literature, Isaev, Herzenson and Kirichenko, among others, believe that consciousness of illegality, in the sense of social dangerousness, is essential to constitute intent.¹³²

Normative Theory of Guilt

According to conventional doctrine, as has been seen, guilt is the actor's psychological state of mind with regard to the act, that is, either in intent or in negligence. No evaluation of such state of mind, beyond that implicit in the distinctive treatment of intent and negligence, is believed necessary. But beginning with Rheinhard Frank, German writers have questioned the sufficiency of that psychological test as a test of guilt. In Frank's view, guilt presupposes, in addition to the psychological element of intent or negligence, a normative element, namely, "blameworthiness" of the conduct. He states:

Of two acts, both committed with equal intent and directed at the same interest, one may be more guilty and more severely punishable than the other, because it was committed with greater freedom (of will). Therefore, the concept of guilt must be so formulated as to admit degrees.¹³³

¹²⁸ Polish Penal Code (July 11, 1932) Art. 14, § 1.

¹²⁹ Makarewicz, *Błąd co do przestępności działania* 1 *Ruch prawniczy, ekonomiczny i socjologiczny* 33 (1936).

¹³⁰ Kirichenko, *op. cit. supra* note 77, at 18, states that "[t]his follows from the truly democratic character of Soviet law which does not recognize crimes qualified by consequences beyond the limits of guilt."

¹³¹ Criminal Code of the Russian Socialist Federative Soviet Republic (Nov. 22, 1926) Art. 10 (Laws No. 80, p. 600). There are corresponding provisions in the laws of other Soviet Republics.

¹³² Consult Kirichenko, *op. cit. supra* note 77, at 20-34, for a comprehensive discussion of Soviet decisions and legal literature. In contrast to the sweeping assertions of some Soviet writers, the Soviet decisions admitting error of law as a defense are rather moderate. Most of them involve laws the knowledge of which was not accessible to the accused.

¹³³ Frank, *Das Strafgesetzbuch für das Deutsche Reich* 137 (18th rev. ed., 1929-30). Frank first introduced the normative theory of guilt in 1907 (*Über den Aufbau des Schuld begriffes*). Freedom, according to Frank, may be affected by either absence of knowledge or of the possibility of knowledge or by circumstances, such as external pressure (coercion,

As viewed by the school of thought initiated by Frank, guilt is the blame attaching to an act, which varies in degree depending on the actor's freedom, under the circumstances of the case, to forego action. Since a person who enjoys greater freedom can be more readily expected to forego committing the crime, his crime deserves higher moral censure. Later writers have completely "de-psychologized" guilt and identified it with mere blameworthiness.¹³⁴

Views on error of law diverge as protagonists adhere either to the psychological or normative theory of guilt. Some authors hold knowledge of illegality to be part of intent (psychological guilt), while others believe that knowledge to be essential to blameworthiness (normative guilt). The conception of intent under the former view, since it includes knowledge of illegality, is quite different from that of the common law. Intent under the latter view, however, is to the extent that it does not require such knowledge, similar to intent under the common law. Under the normative theory, knowledge of illegality becomes relevant as part of the freedom with which a person acts in any particular case, freedom being essential to blameworthiness of the act.

The practical implications of adhering to either of these two theories are very far-reaching. If knowledge of illegality is part of "intent," it is for the prosecution to prove it; in the absence of such knowledge there can be no conviction of intentional crime. No distinction can be drawn between complete lack of knowledge and mistaken knowledge. Nor is there any difference, so far as intentional crime is concerned, between the situation where the error itself is due to the accused's own fault or negligence and the situation where such error is wholly imputable to the state. In the former situation, the accused can be convicted at best of negligent crime, assuming that such crime is punishable under the statute. Thus, the rule implicit in this theory is parallel to that applicable to error of fact. If, on the other hand, knowledge of illegality is a requirement of guilt in a normative sense, there may be a broader discretion in judging crime committed in error of law. For such guilt admits of degrees according to the extent of the actor's blameworthiness. Of course, if his error is not due to any fault on his part, he must be acquitted. But if he is himself at fault in not having acquired the necessary knowledge, he should be convicted according to the degree of such fault. The degree of his fault or blameworthiness is determined by the judge in the exercise of his reasonable discretion. In the event of such fault, since an error of law does not necessarily exclude intent, the actor may be convicted not merely of

necessity) or mental defects (including incapacity), which deprive the actor of his freedom of choice and thus of control over his actions. Frank's theory afforded the basis, for example, for the view that a person who commits a proscribed act in a state of necessity, acts illegally but is exempt from the "blame of guilt," because he enjoys no freedom. Consult Maurach, *Deutsches Strafrecht, allgemeiner Teil* 315-16 (1954).

¹³⁴ Consult discussion at 448-49 *infra*.

negligent but indeed of "intentional" crime. Additionally, crime committed because of ignorance may be distinguished from that caused by mistake. Theoretically, within this view, there is no objection to reversing the burden of proof.

The normative theory as the result of compromise (Swiss Penal Code of 1937).—Switzerland, in her Penal Code of 1937, was first to give legal expression to the new normative theory. This development did not result from dogmatic adherence to that theory but rather from a practical compromise between the traditional view, which rejected error of law as a defense, and the psychological theory expressed in Article 11 of the Federal Criminal Law of 1853.¹³⁵ It will be remembered that Article 11 stated that the acts and omissions proscribed by the Code should be punishable only if committed "with illegal intent." Since "with illegal intent" was understood to mean "with knowledge of illegality," no separate provision on error of law was deemed necessary. The Code of 1937 omits the adjective "illegal" in describing "intent." To be punishable, an act now need be committed only intentionally, meaning with knowledge and will.¹³⁶ This has been interpreted to mean that consciousness that the act is illegal or contrary to duty is no longer part of intent.¹³⁷ Abandonment of the 1853 version conformed to demands of those who adhered to the maxim *error juris non excusat*, which was deeply imbedded in Swiss cantonal tradition.¹³⁸

However, this traditional view, allegedly supported by popular opinion,¹³⁹

¹³⁵ Consult note 121 *supra*.

¹³⁶ Swiss Penal Code (1937) Art. 18.

¹³⁷ It is said in the leading case of Görner gegen Statthalteramt Luzern-Stadt, BGE 70 IV 97, 99-100 (1944), that "the appellant is not punishable unless he committed the violation intentionally (Arts. 102, 18, Penal Code). A person acts intentionally, if he commits the act with knowledge and will (Art. 18, § 2, Penal Code). As may be seen from the very wording of this provision, which—in contrast to Article 11, Federal Criminal Law—does not speak of an *illegal* intent, consciousness that the act is illegal or contrary to duty is not a part of intent."

¹³⁸ *Error juris non excusat* was expressly proclaimed in older cantonal statutes. Consult Hafter, *Lehrbuch des Schweizerischen Strafrechts, allgemeiner Teil* 187 (2d rev. ed., 1946). The view adopted by the 1853 Code was also opposed by writers who assumed intent to be "ethically and legally colorless." Stoos, *Vorsatz und Bewusstsein der Rechtswidrigkeit*, 12 *Schweizerische Zeitschrift für Strafrecht* (1899). Stoos, however, later apparently abandoned this view in favor of the idea that there is no need to stress consciousness of illegality since it is implied in every criminal act. In his words, "every criminal, who is not mentally ill, feels, to a larger or smaller extent, the immorality of his act, and it is hence unnecessary to stress this ethical side of intent. . . ." Quoted in Fitting, *op. cit. supra* note 118, at 5.

¹³⁹ In the Second Commission of Experts, Planta observed that popular opinion would oppose granting immunity in certain cases. Examples of such cases are those in which an Italian homosexual believed that sodomy with a minor is not illegal in Switzerland (example used by Thormann), or that of a car driver from another canton who, due to ignorance, violated the traffic laws of Graubünden. Legislative history is to be found in Görner gegen

was vigorously opposed by the weight of juristic authority, which in Switzerland adhered to the German doctrine of intent. Concessions were made slowly. In the first drafts of the new Code, which were greatly influenced by the traditional view, judges were given only discretionary power to mitigate punishment.¹⁴⁰ Later they were given the power to forego punishment entirely, in cases where the actor believed that he had a right to act as he did. The version which finally became law (Article 20), while granting that concession, is otherwise more limited than the original drafts. Article 20 provides that: "Where the actor assumed, on adequate grounds, that he had a right to act, the judge may, in his discretion, mitigate or entirely forego punishment." While the scope of this article is extremely narrow, it is not restricted to cases involving a claim of right based on belief that the situation qualifies within one of the justification grounds enumerated in other articles of the Code.¹⁴¹ It has been suggested¹⁴² that Article 20 is available only where the accused had an erroneous conception of law, for it applies only where he believed he had a right to act as he did. Thus the defense does not seem to be available where the actor had no conception of the law at all, as where it never occurred to him that his conduct might be prohibited. The Federal Tribunal has repeatedly emphasized that mistake of law no longer automatically leads to acquittal but merely affords a basis for exercise of judicial discretion to mitigate or forego punishment.¹⁴³

Nor does Article 20 afford a broad discretion for mitigating or foregoing punishment in the event of error. To be entitled to consideration at all, the error must be based on adequate grounds. Thus, the previous rule that error of law was a defense to a charge of intentional crime, whether or not the accused's error was the result of his own fault, is replaced by the rule that negligent error does not entitle the accused to the benefit of Article 20. This qualification is illustrated by a case in which the defendant was charged with

Statthalteramt Luzern-Stadt, BGE 70 IV 97, 99-100 (1944); Lerch, *Tatirrtum und Rechtsirrtum im Schweizerischen Strafrecht*, 66 *Schweizerische Zeitschrift für Strafrecht* 158, 172-74 (1951).

¹⁴⁰ Preliminary Draft of 1908. Consult Görner gegen Statthalteramt Luzern-Stadt, BGE 70 IV 97 (1944). In 1918 the Draft still provided only that "[t]he punishment of a person who commits a crime in the belief that he has a right to act may be mitigated." Consult Lerch, *op. cit. supra* note 139, at 173-74.

¹⁴¹ Germann, *Das Verbrechen in neuen Strafrecht* 185 et seq. (1942), takes an opposite view. In Görner gegen Statthalteramt Luzern-Stadt, BGE 70 IV 97, 98-99 (1944), the court rejects Germann's position, pointing out that the Italian ("*che l'atto fosse lecito*") and French ("*de se croire en droit d'agir*") versions do not support the restrictive interpretation.

¹⁴² Consult Lerch, *op. cit. supra* note 139, at 174, 175.

¹⁴³ Görner gegen Statthalteramt Luzern-Stadt, BGE 70 IV 97 (1944); Staatsanwaltschaft des Kantons Zug gegen Husistein, BGE 75 IV 26 (1949); Eidgenössisches Volkswirtschaftsdepartement gegen Schluép, BGE 75 IV 37 (1949); Procureur général du Canton de Neuchâtel contre Strautmann, BGE 69 IV 178 (1943).

carnal knowledge of a girl under the age of sixteen.¹⁴⁴ Defendant contended that while he knew that the girl was under sixteen and was instinctively aware of the prohibition against sexual intercourse with children, he assumed, the girl appearing to be mature, that the prohibition did not apply. The Federal Tribunal, reversing the judgment below, stated that Article 20 was not applicable because the error was not based on "adequate grounds." It said that "[a] ground is adequate where the actor cannot be blamed for his legal error, because that error is based on circumstances which would have misled a conscientious man."¹⁴⁵

The Federal Tribunal has only rarely found the error of law not a result of the accused's fault. It did so find in the rather obvious situation where the accused had been misled by the terms of a license where the applicable law was so difficult of deduction that even competent authorities disagreed as to the proper interpretation.¹⁴⁶ But even where the traffic law and regulation violated by the accused were not generally known, the court held that he was at fault for he should have known that driving as he did was dangerous.¹⁴⁷ Indeed, in one case¹⁴⁸ the accused's error was held not to be based on "adequate grounds" although it was shared by the prosecutor. In another case, error¹⁴⁹ was held inexcusable although shared by the court below. A further limitation results from the fact that "adequacy of grounds" is related to the scope of knowledge required for conviction which, as will be more fully shown later, is extremely narrow.¹⁵⁰

Judicial discretion in applying Article 20 has been further limited by a

¹⁴⁴ Staatsanwaltschaft des Kantons Basel-Land gegen L., BGE 75 IV 150 (1949).

¹⁴⁵ Thus an objective standard was adopted. The court, in holding the belief not based on adequate grounds, suggested that the defendant "knowing of a potential prohibition of sex intercourse with school girls . . . should have, in conversations with other persons, inquired whether sex intercourse with physically mature but still youthful female persons is subject to punishment." *Ibid.*, at 153.

¹⁴⁶ Staatsanwaltschaft des Kantons Zürich gegen Werdenberg, BGE 68 IV 21 (1942). The court added: "That the accused desired to have the decisive legal question determined by the judge and therefore did not submit to the fine, does not carry the inference that he had a consciousness of illegality." *Ibid.*, at 30.

¹⁴⁷ Baumann gegen Staatsanwaltschaft des Kantons Aargau, BGE 75 IV 131 (1949).

¹⁴⁸ Müller gegen General-prokurator des Kantons Bern, BGE 75 IV 33 (1949).

¹⁴⁹ Gesundheitsbehörde Meilen gegen Ellenberger, BGE 75 IV 76 (1949).

¹⁵⁰ Thus, Weyeneth und Flückiger gegen Staatsanwaltschaft des Kantons Basel-Stadt, BGE 80 IV 15 (1954), affirmed defendant's conviction of usury by exploiting the corporate victim's state of necessity. The Federal Tribunal there stated that it was not necessary, as assumed by the court below, that the defendants recognize the relationship of the mutual obligations of the parties as "obviously disproportionate for the simple reason that appellants could not rely on any adequate ground that might have retracted from the feeling that such unscrupulous exploitation of the state of necessity of a corporation violates at least in some way that which is right." *Ibid.*, at 21. Cf. Statthalteramt Zürich gegen Hodel, BGE 81 IV 191 (1955).

holding that "adequacy of grounds" is not a pure matter of fact on which the trial judge can pass with finality. In the carnal knowledge case mentioned previously¹⁵¹ the Federal Tribunal held the question of the defendant's knowledge to be an unreviewable question of fact. At the same time, it held the question of whether the accused's error in knowledge was based on adequate grounds within the meaning of Article 20 to be a reviewable question of law.¹⁵²

The compromise solution of Article 20 has been severely criticized by Swiss writers, most of whom adhere to the view that consciousness of illegality is a natural part of intent and that departure from this position constitutes abandonment of "criminal law based on guilt" in favor of "criminal law based on consequences of the act."¹⁵³ The Federal Tribunal itself indicated preference for the doctrine of intent by suggesting¹⁵⁴ that the alternative of granting immunity to the accused who acted in ignorance of the legal prohibition is preferable to a mere reduction of punishment, for it accords with the principle, "no punishment without guilt," incorporated in other provisions of the Code. On the other hand, the pressure of the old tradition of *error juris nocet* has inhibited judges in the use of their power to forego or even to mitigate punishment,¹⁵⁵ as is evidenced by the numerous cases in which Article 20 has been held inapplicable.¹⁵⁶

The present rule is also being criticized on the ground that there is no logical basis for distinguishing between error of law and error of fact, the latter being relevant only because it excludes consciousness of the illegality of the act.¹⁵⁷ The realization is growing that the sole reason for excluding or

¹⁵¹ Discussed in text at note 144 supra.

¹⁵² This decision is consistent with *Ritter gegen Statthalteramt Zürich*, BGE 60 I 412 (1934), which was decided under the 1853 Code.

¹⁵³ Consult Hafter, *op. cit. supra* note 138, at 125 ("The judge should be allowed to convict of *intentional* commission of a crime only where this consciousness of illegality [violation of duty] is present."); Germann, *op. cit. supra* note 141, at 186 ("[C]onsciousness of illegality is the very first requisite of the *dolus malus*."); Schwander, *Das Schweizerische Strafgesetzbuch* 84 (1952) ("The rule of Article 20 is inconsistent with the *principle of guilt*.").

¹⁵⁴ In *Görner gegen Statthalteramt Luzern-Stadt*, BGE 70 IV 97 (1944), the court said that "it must be taken into consideration that . . . [acquittal] accords with the principle 'No punishment without guilt,' dominant in the Penal Code, and that, therefore, it merits, as a rule, preference over [mere mitigation]. . . ."

¹⁵⁵ Hafter, *op. cit. supra* note 138, at 189.

¹⁵⁶ Consult cases cited in notes 144, 147-49 supra.

¹⁵⁷ The *rapporteur*, Seiler, in discussing error of fact in the House of Representatives, stated: "Theoretically, the person acting in error concerning the factual situation does not act 'knowingly.' Error of fact excludes consciousness of illegality and thus excludes intent." Quoted by Lerch, *op. cit. supra* note 139, at 166. Thormann and von Overbeck, 1 *Das Schweizerische Strafgesetzbuch* 107-8 (1940), state that "in the last analysis, every relevant error, even the purest 'error of fact,' results in the erroneous assumption that the actor is permitted to act as he does. . . ."

limiting the defense of error of law lies in the alleged difficulty of proof.¹⁵⁸ That this assumption is unwarranted in the light of the scope of knowledge of law required under Swiss law can be better shown after a later discussion of that problem.¹⁵⁹

Rationalized approach to the normative theory (German development).—In Germany, in contrast to Switzerland, struggles over the rule on error of law appear on a doctrinal level, being waged primarily between adherents of the theory of intent and those of the theory of guilt. This controversy is highlighted by the dramatic dispute between Mezger, representing a modified doctrine of intent, and Welzel, introducing a novel, extreme theory of guilt. The dispute is strongly colored by opposing theoretical views concerning the tenuous dividing lines between the three traditionally accepted elements of crime: (1) Accordance of the facts of a crime charged with the facts as defined by statute (denoted as *Tatbestand*, referred to hereafter, colloquially, as *actus reus*¹⁶⁰); (2) Illegality, meaning absence of justifying grounds that exclude criminality of conduct notwithstanding the fact that such conduct may otherwise constitute an *actus reus*¹⁶¹; and (3) Guilt or responsibility. As has been seen, Frank has defined guilt as comprising, besides intent or negligence, the normative element of blameworthiness. But Welzel has overhauled the entire tripartite division, assigning to each of the three elements functions that deviate considerably from those traditionally assigned. From a doctrinal point of view, his principal innovation pertains to the demarcation line between *actus reus* and guilt. His conception of the proper dividing line between *actus reus* and illegality bears on incidental problems such as the proper place and treatment of error regarding justification grounds.

According to Welzel, intent and negligence are not part of guilt at all, but rather belong to the *actus reus*. His theory proceeds from a critique of the established concept of the *actus reus* and a revolutionary notion of "action" as the basis of the theory of crime. He claims that the traditional theory of the *actus reus*, as separate from the mental attitude of the actor toward external facts, is a product of the mechanistic philosophy of past ages which assumed that the content of will is merely the actor's subjective image of external events. That traditional doctrine, which Welzel calls the "causal action doctrine," is, in his opinion, traceable to the naturalistic view classically presented in Franz Liszt's well-known statement that a defamation is but excitement of air movements and nerve stimuli.¹⁶² Against the background

¹⁵⁸ Consult Thormann and von Overbeck, *op. cit. supra* note 157, at 107.

¹⁵⁹ Consult discussion at 459 *infra*.

¹⁶⁰ The term *actus reus* is used here to include both the act and all the circumstances of the act, as described in a statute.

¹⁶¹ The meaning and scope of illegality, as well as that of the *actus reus* and guilt, are controversial.

¹⁶² Cited by Welzel, *Das neue Bild des Strafrechtssystems* 12, 13 (1952).

of this critique, directed particularly at Mezger, Welzel presents his theory. Under this theory, which he calls the "teleological action doctrine," every action is directed toward a goal. The aim, an essential part of the act, is included in the *actus reus*. Intent that sets the aim is thus a constituent element of the *actus reus* and not a part of guilt.¹⁶³ Guilt is but the blameworthiness of the act. Welzel thus abandons all vestiges of the psychological theory of guilt.

A philosophical consideration underlies Welzel's approach to the problem of separating *actus reus* from guilt and illegality,¹⁶⁴ and thus from intent and consciousness of illegality. According to him, the conventional doctrine which views intent as separate from the *actus reus* is based on the so-called "ethics of attitude," as distinguished from "ethics of responsibility." The former demands merely man's subjective purity of intention, regardless of the objective characteristics of his act. So long as his intention is pure he cannot be held responsible, however reprehensible or outrageous his action may be. The latter demands, in addition to purity of intention

consciousness of the duty to *ascertain* the true obligation, the struggle for the *right* decision. Purity of attitude, acting in accordance with the consciousness of duty is but one side of the ethical value of an act; the other, *primary*, side is responsibility for the *substantively* correct decision *within the framework of individual ethical capacity of realization*. Concern with the correct decision is the element that endows the subjectively moral act with full earnestness and existential weight. It imposes upon the person responsibility not only for the purity of his attitude but also for the ethical correctness of his act.¹⁶⁵

These words are extremely significant, for they summarize the philosophic point of departure from which the Bundesgerichtshof¹⁶⁶ proceeded in adopting the normative theory. Guilt, as will be seen, is assumed not only where the

¹⁶³ Welzel, *Das Deutsche Strafrecht* 28-36 (5th ed., 1954). Welzel originally faced considerable difficulty in attempting to integrate negligent acts into his doctrine, for in them the aim is absent. He finally defined those actions as omissive acts, namely, acts characterized by a failure to apply the required "finality" or teleology. *Ibid.*, at 103-4.

¹⁶⁴ Consult Welzel, *Aktuelle Strafrechtsprobleme im Rahmen der finalen Handlungslehre*, *Juristische Studiengesellschaft Karlsruhe* 15, 16 (1953).

¹⁶⁵ *Ibid.*, at 15, 16. Welzel's distinction between "ethics of attitude" and "ethics of responsibility" is derived largely from the social philosophy of Max Weber, who has stated that "there is a most profound distinction between acting in accordance with the tenets of ethics of attitude—speaking in religious terms, 'the Christian does right and leaves the result up to God,' and acting in accordance with ethics of responsibility, whereby man is liable for the [foreseeable] effects of his actions." Weber, *Politik als Beruf, geistige Arbeit als Beruf* 54 (1919). Weber, expressing the view that ethics of attitude are essentially absolute and not concerned with results, says that such an ethics "is not a carriage which you can stop in order to enter or leave according to whim. Rather all or nothing . . . one must be a saint in *all*, at least in intention, must live as did Jesus, the Apostles, St. Francis and the like of him: *then* this ethics is meaningful and expresses dignity. *Not otherwise.*" *Ibid.*, at 54, 55.

¹⁶⁶ The highest court of the Federal Republic of Germany in civil and criminal matters.

actor is aware of the illegality of his act, but also where he wrongfully fails to exert his conscience in order to ascertain whether or not the act he is about to perform is legal.

Welzel's theory sheds light upon the responsibility not only of an actor who, on the basis of a nonconforming personal ethical, religious, or political conviction, regards the legal prohibition as actually "illegal" or immoral, but also of one who, owing to his criminal background, has reached a mental state which renders him incapable of realizing illegality. A logical consequence of the theory of intent would be immunity of such persons, for their intent is obviously not directed to law-violation. In order to subject them to legal sanctions, that theory must treat their acts as constituting an exception. Welzel's position, on the other hand, provides a basis for their punishment by rendering them responsible for the wrongfulness of their choice.

Welzel's theory also bears importantly on error regarding justification grounds. According to conventional doctrine, the presence of justification grounds excludes the *actus reus* and erroneous belief in their presence excludes intent. Welzel assumes that such grounds exclude illegality rather than the *actus reus* and that error as to them may, but need not necessarily, exclude guilt, depending on whether or not it is based on the actor's fault in not recognizing his duty. The Bundesgerichtshof refused to follow Welzel's view on this matter.

In Germany, despite the clear wording of Section 59 of the Penal Code, dealing exclusively with error of fact, error of law has been accepted, by judicial legislation, as a general defense to a charge of crime. This decisive step was taken by the Great Senate for Criminal Matters of the Bundesgerichtshof on March 18, 1952.¹⁶⁷ An attorney, convicted of the crime of "coercion" under Section 240 of the Penal Code for having forced a client to make certain payments of fees by threatening to cease representing her, appealed on the ground that he believed himself entitled to act as he did. The court below held this belief to be an irrelevant error of criminal law. The following questions were submitted to the Great Senate:¹⁶⁸

- (1) Does guilt require not only knowledge of the factual circumstances of Section 240, subdiv. 2, but also consciousness that the act is illegal?
- (2) If this question is answered in the affirmative, is the actor also guilty if he lacked consciousness of illegality, where this was due to negligence?¹⁶⁹

After disposing of the preliminary question of the significance of the term "illegal" in Section 240 by pointing out that it does not belong to the factual

¹⁶⁷ 2 BGHSt. 194 (1952).

¹⁶⁸ These questions were limited to interpretation of Section 240, Penal Code, which provides: "(1) A person who illegally, by force or threat of substantial harm, compels an act, sufferance or omission of another shall be punished for coercion by imprisonment or fine. . . . (2) The act is illegal if the use of force or the threat of harm for the purpose intended is to be deemed blameworthy. (3) The attempt is punishable."

¹⁶⁹ 2 BGHSt. 194 (1952).

circumstances of the crime as defined by the statute and thus has no bearing on the actor's intent,¹⁷⁰ the court proceeded to discuss the problem of whether or not, apart from that term, the actor, in order to be punishable, must have been aware of the illegality of his conduct. It considered at length the theory of the Reichsgericht that ignorance or error concerning the criminal law constitutes no defense, and considered briefly the critique of this theory in German doctrine and its abandonment in the Reform Drafts, beginning with the Counter-Draft of 1911. It further noted that special statutes, such as the Tax Law, the Foreign Exchange Law and the Economic Crimes Act, have departed from the traditional view and accepted error of law as a defense. The court, in reversing the Reichsgericht, finally made the following statement, which marked the beginning of a new era of German jurisprudence:

Punishment presupposes guilt. Guilt is blameworthiness. In the negative value judgment of guilt the actor is being blamed for not having conducted himself in accordance with law, for having decided to do wrong although he could have conducted himself in accordance with law or decided in favor of the law. The [inner] ground upon which the guilt censure is based lies in the fact that man has the disposition toward free, responsible, ethical self-determination and is, therefore, able to decide in favor of the law (right) and against the wrong. A prerequisite of man's free, responsible, ethical self-determination in favor of the law and against the wrong is knowledge of right and wrong (law and wrong). . . . In some cases even a person who possesses mental capacity may possess no consciousness of wrongdoing, because he ignores or misconceives the prohibition of the law. In such case (also) the actor is not in a position to decide against the wrong.¹⁷¹

From this basic position of guilt, in the sense of blameworthiness, being the true ground of punishment—a position first suggested by Frank and elaborated by Welzel—the court drew its further important conclusion that error of law does not automatically result in immunity. For, in the opinion of Frank, guilt admits of degrees, and in Welzel's view, man is responsible beyond purity of intention. The actor's acquittal or conviction will turn upon the absence or presence of guilt in not acquiring the necessary knowledge of law. If convicted he must be punished more or less severely according to the degree of his guilt:

[Man] does not conform to . . . [the required duty of right conduct] by merely not doing that which clearly appears to him to be wrong. He must rather, in everything he is about to undertake, call to his consciousness whether it agrees with the dictates of the legal ought. He must dispel doubts by thought and inquiry. This requires an exertion of conscience; the degree [of exertion] is determined by the circumstances of the case and by the life environment and occupation of the individual. If, notwithstanding exertion of conscience as thus expected, he could not acquire the insight into the wrongfulness of his conduct, the error was invincible and the act unavoidable

¹⁷⁰ The court stated that Section 240 defines "coercion" widely, and that the term *illegal* has the function of narrowing the scope of the crime. *Ibid.*, at 195-96.

¹⁷¹ *Ibid.*, at 200-201.

[by him]. In this case, no blame of guilt can be raised against him. If, per contra, the actor could have realized the wrongfulness of his conduct had he properly exerted his conscience, error of law does not exclude guilt. But, depending on the measure to which the actor had failed properly to exert his conscience, the blame of guilt is correspondingly reduced.¹⁷²

In other words, the actor must be acquitted if, notwithstanding proper exertion of conscience, he did not realize the wrongfulness of his conduct. If he falls short of this test, he must be convicted according to the degree to which he failed to exert, as required under the circumstances, his conscience. In such a case he must be convicted of the intentional crime as charged and not of its negligent variant, if any.

In separate chapters, the court analyzed the theory underlying this ruling from the point of view of criminal law doctrine. It stated that it had chosen the theory of guilt in preference to the theory of intent and elaborately justified the choice thus made on grounds of legal policy. It pointed out that while the theory of intent afforded the advantage of enabling courts to disregard the distinction between error of law and error of fact, it carried the weighty disadvantage of compelling acquittal in the absence of legal knowledge even where the actor's error was due to his own fault.¹⁷³ The court also thought the theory of intent incapable of resolving the intricate problems of legal error by a person whose crime is based on an inner religious, ethical, or political conviction or on a total lack of legal sensitivity.¹⁷⁴

The problems raised by this leading case have been further elaborated and resolved by numerous other decisions of the Bundesgerichtshof. We shall discuss these problems, beginning with those resolved in a manner which appears open to criticism.

While the Bundesgerichtshof's treatment of error and guilt no longer neces-

¹⁷² *Ibid.*, at 201-2.

¹⁷³ The theory of intent, said the court, "can arrive at punishment of an act as intentional only if the actor, at the time of the act, possessed a consciousness of wrongdoing. But, as everybody knows, this is frequently not the case. Many, and particularly grave, criminal acts are being committed in strong emotional excitement, in the heat of passion or on the spur of the moment. In this mental state, the actor, though acquainted with the prohibition, often does not become conscious of it; nor is he able, under certain circumstances, to deliberate about the question of whether his conduct is wrong. The guilt blame is, nevertheless, justified, because he has omitted the expected exertion of conscience that would have brought to his consciousness the wrongfulness of the act before he decided to commit it. . . ." *Ibid.*, at 206.

¹⁷⁴ The court also dealt with the problem of judicial discretion in meting out punishment in cases where the accused failed to exert his conscience. It ruled that the extent to which such exertion may be expected is a reviewable question of law so far as it involves "the content and scope of a legal duty." *Ibid.*, at 209. Determining to what extent an error of law based on fault, which may but need not always result in mitigation of punishment, actually justifies such mitigation was held a question of fact for the trial judge. In this matter the judge is not bound by the minimum punishment provided for the crime in issue, but may reduce the punishment down to the lowest penalty provided for attempt.

sitates differentiation between error of criminal law and error of civil law, it requires the more difficult differentiation between error of fact and error of law. In the leading case, the Bundesgerichtshof admitted that the necessity of maintaining this distinction was a significant disadvantage of the theory of guilt. But the First Criminal Senate of that court soon considered it appropriate to justify the differential treatment of error of law and error of fact. In a decision rendered on June 6, 1952,¹⁷⁵ it said:

The person acting under a mistake regarding actual facts is in principle [*an sich*] law-abiding; he wishes to conform to the dictates of the law and fails to do so solely owing to error concerning the factual situation that gives rise to his act. This error prevents him, as a rule, from recognizing the very possibility that he might be violating the law. To him applies, therefore, the idea of Section 59, Penal Code, that he should be held responsible as if—provided that this is more advantageous to him—the factual circumstances were not as they actually were but as he imagined them to be. . . .

The person acting under a mistake of law too misses the right way, but he does so owing to an error of cognition in the area of the legal ought. In this instance it is generally easier to recognize the law violation than in the case of a mistake of fact. Both types of mistake may, in a concrete case, be equally avoidable, equally more or less negligent and more or less reprehensible. Nevertheless, the person acting under a mistake of fact, as a rule, deserves a lesser blame. Such mistake is generally stronger and more direct and constitutes a stronger stimulus of action. It does not place the actor, as a mistake of law mostly does, in a dilemma—obstructing action—between that which he wants to do and that which he is allowed to do—a dilemma that he must overcome—, but urges him to act or, at any rate, permits him to act without legal qualms and ethical inhibitions.¹⁷⁶

Such was the apparent answer to the principal objection raised against the distinctive treatment of the two types of error—an objection frequently discussed by Swiss writers—that an error of fact, in the last analysis, is admitted as a defense solely on the ground that such error leads to the mistaken view that the action is lawful and that this ground equally applies to an error of law. But the rationalization advanced by the Bundesgerichtshof is not convincing, even theoretically. Since the distinction between the two types of error is frequently very tenuous, its practical value appears questionable.¹⁷⁷

¹⁷⁵ 3 BGHSt. 105 (1952). Defendants, managers and educators in an institution which handled difficult educational cases, were convicted of the crimes of bodily injury, dangerous bodily injury, and maltreatment of children. They had punished the children partly without reason and partly in excess of their legal right to punish. In reversing, the Bundesgerichtshof stated it to be an error of fact when defendants mistakenly assumed the existence of an objective reason to punish, but an error of law when the objective reason actually existed and defendants misconceived the scope of the right to punish.

¹⁷⁶ *Ibid.*, at 107.

¹⁷⁷ Thus, 3 BGHSt. 82 (1952), reversed the conviction of an officer of a municipality for the crime of removing documents in office. The accused, who refused to deliver to the mayor records of a meeting, alleged that he did not know that these records were "documents"

Under the Bundesgerichtshof's theory it becomes extremely important to determine the exact scope of the *actus reus*. This is necessary because, under that theory, intent comprises all elements of the *actus reus* but does not comprise the illegality of the conduct (the latter being the subject of consciousness of illegality that constitutes guilt), and because lack of intent is treated differently from lack of consciousness of illegality. In this context, the most significant question concerns the correct classification of the so-called justification grounds, for on it depends the answer to the crucial question of whether error concerning the existence of such ground is an error of fact or an error of law. This problem was discussed in great detail in the proceedings of the Fourth Session of the Great Criminal Law Commission, which met February 1-4, 1955.¹⁷⁸ Conventional doctrine regards justification grounds as "negative factual circumstances" of the crime and thus as negatively included in the *actus reus*. Where they are present, they negative the *actus reus*. This view, now represented by Mezger, is opposed by Welzel, who contends that justification grounds bear on illegality rather than on the *actus reus*. Hence, according to Welzel, belief in their presence bears on guilt or consciousness of illegality rather than on the *actus reus* and thus on intent. Welzel criticizes the doctrine of negative factual circumstances by pointing out that according to this doctrine killing a man in self-defense cannot be distinguished from killing a mosquito, since neither act constitutes an *actus reus*. Dreher adds the observation that the doctrine also leads to difficulties in the field of complicity in crime committed in error as to justification grounds: A man who, well knowing that no justification ground exists, aids another who believes that he is acting in self-defense could not be punished because of the absence of an *actus reus*. Notwithstanding the forcefulness of these arguments and its general adherence to Welzel's conception of guilt, the Bundesgerichtshof assumed justification grounds to be a negative part of the *actus reus*.

This position was expressed when the court held that teachers who erroneously assumed that there was an objective reason for their exercise of the right to punish pupils acted under a mistake of fact, observing that a person thus acting was "in principle, law-abiding."¹⁷⁹ The same view was expressed in

within the meaning of the law or that he had a duty to deliver them. It was held that, a document being characterized at law by its "destiny" as proof, it was sufficient to constitute intent that the defendant knew that the records had such "destiny." His belief that they were not documents therefore was not an "error concerning the notion of a document." The court thought defendant's failure to be aware of his duty to deliver the documents was an error of fact rather than of law, for the violation charged consisted of a failure to act rather than of a positive act. This implies that the omission violated a duty, the existence of which thus constitutes an essential part of the *actus reus*; the intent, therefore, must be directed to that duty.

¹⁷⁸ Consult Dreher, Die vierte Arbeitstagung der grossen Strafrechtskommission, Probleme der Strafrechtsreform (Folge 4) Beilage zum Bundesanzeiger Nr. 76 (April 21, 1955).

¹⁷⁹ 3 BGHSt. 105 (1952).

another decision,¹⁸⁰ which held that accused's belief that she had a claim to the money she extorted, and was thus justified in acting as she did, was an error of fact rather than of law.

The practical consequences of adhering to either the position that justification grounds are negative factual circumstances excluding the *actus reus* or the view that they are grounds excluding illegality depend to a large extent on the type of crime that is involved. Only certain acts of negligence enumerated in the special part of the Penal Code are subject to punishment. It follows that if belief that a justification ground exists excludes intent, the act could be punishable only if negligent commission falls within one of these enumerated crimes of negligence; otherwise the actor must go completely free. On the other hand, if such belief merely bears on guilt, the actor would go free only if that belief was not itself based on fault. The situations dealt with by the Bundesgerichtshof afford illuminating examples of the operation of the theory of negative factual circumstances, to which that tribunal adheres. The educators who punished pupils believing that there was a justification for their acting as they did would still be punished for negligent bodily injury if their belief was itself negligent.¹⁸¹ The extortionist, who believed that she had a claim upon the victim would go completely free, for the Penal Code contains no provision for the punishment of negligent extortion.¹⁸²

It appears that the Bundesgerichtshof was on better grounds when it followed Welzel in determining the treatment of an accused who, with full knowledge of the law, rejects it on conscientious grounds. The Great Senate had mentioned this case as affording perhaps the most important reason for adopting the normative theory.¹⁸³ The Bundesgerichtshof later applied the view expressed by the Great Senate to the case of defendants who, on conscientious grounds, had violated a Hamburg Police Regulation prohibiting promotion of a referendum against the remilitarization of Germany.¹⁸⁴ The

¹⁸⁰ 4 BGHSt. 105 (1953). Accused, a prostitute, believed she had a claim against B for services rendered and that she had a right to prevent him from leaving until he paid. She called her husband who, by use of threats, caused B to deliver to him 1 Deutsche Mark. The lower court, holding accused guilty of extortion, thought that the guilt might be diminished because of accused's erroneous assumption that the act was justified. The Bundesgerichtshof reversed, holding accused's belief that she was entitled to payment, though erroneous under civil law, to be an adequate defense to the charge of extortion (that crime being predicated on the fact that the actor has no right to the advantage claimed). But accused was to be held guilty of "coercion." The mistaken belief as to scope and limits of permissible self-help, while an error of law, afforded no excuse since it was based on the accused's own fault.

¹⁸¹ Consult discussion at 454 *supra*.

¹⁸² Consult note 180 *supra*. However, she was held guilty of another crime concurrently committed.

¹⁸³ 2 BGHSt. 194, 206 (1952).

¹⁸⁴ BGHSt. (Dec. 23, 1952), reported in 6 NJW 432 (1953) (Neue Juristische Wochenschrift [New Juristic Weekly], hereafter cited NJW).

court said that if the error of law on which they relied was the belief that the regulation was illegal, in the sense of being inconsistent with a higher moral law, it afforded no defense for "whoever lives in a community must accept the prevailing law also against himself."¹⁸⁵ Clearly, the court assumed that the defendants must be held responsible for having decided incorrectly, that is, against the law. The purity of their intent was of no avail.

If guilt means blameworthiness within Welzel's conception of ethics of responsibility, then it is demanded of men not only that they have pure intent but also that they exert their conscience to establish the right course of action. Thus it is most important to determine what constitutes that exertion and by what standards a man's exertion or his ability to exert his conscience is adjudged. Here the Bundesgerichtshof adopted a complex standard composed of both objective and subjective elements.

Where knowledge of the law is not readily accessible, an educated man, even an attorney—just as a judge—might err. Indeed, one of the most significant features of the German decisional law of legal error is that many cases deal with error of law by an attorney. One case involved, however, a physician who claimed to have believed himself entitled to participate in the Nazi program of mass murder of inmates of institutions for the insane because this participation enabled him to save some lives. It was held that, while his belief was wrong at law, he might not have possessed the required "consciousness that the act was wrongful."¹⁸⁶ The court emphasized that inquiry into the presence of such consciousness was particularly suggested by the fact that the question of whether or not, in a situation of common danger, a man may save some lives at the expense of others is highly controversial.

However, precisely because the legal problem involved is often more difficult to solve than factual questions, the standard of care in exerting one's conscience is higher than that required in negligence cases. Thus, the Bundesgerichtshof has said:

The principles for the evaluation of fault developed in connection with crimes of negligence cannot be simply applied to the question whether a mistake of law is caused by fault . . . [M]an must, in all actions he is about to undertake, consider whether they are in accord with the principles of the legal ought. He must eliminate doubts by thinking and by seeking advice. For that, it is necessary that he exert his conscience. The measure of exertion is determined by the circumstances of the case and the life and occupation environment of the individual, and to this extent, by tests which also apply to the question of whether a person has committed a crime of negligence. But exertion of conscience is something different from the observance of the care which the individual is expected to apply in order to avoid jeopardy or

¹⁸⁵ *Ibid.*

¹⁸⁶ BGHSt. (Nov. 28, 1952), reported in 6 NJW 513 (1953). For report and discussion of this case consult Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. of Pa. L. Rev. 350, 356-58 (1954).

injury of legally protected interests. With regard to acquiring knowledge of illegality of an *actus reus*, the requirements are greater than with regard to acquiring knowledge of the factual circumstances themselves, because, as a rule, illegality is inherent in the *actus reus* and because this is generally known. For this reason, the actor must examine with special care whether in a particular case commission of the *actus reus* is nevertheless permissible.¹⁸⁷

Obviously, the operative principle used by the court is the Roman canon-law concept of vincibility or invincibility of the error. That concept, in the German law, includes strong subjective elements. Where a decision concerning legality or illegality of conduct is involved "the actor is required to apply all his mental powers and all his ethical value judgments."¹⁸⁸ However, his error will not be judged solely by the standard of the reasonable man. For the same error may be superable for one man but insuperable for another. The individual superability of error depends not only on the objective character of the issue but also on the intellectual qualities of the actor, that is, the ability peculiar to him to evaluate the particular situation with which he is faced. In applying this subjective test, the court came close to breaking down the limits of the insanity test. In one of its decisions¹⁸⁹ it held the ignorance of two mentally retarded farm-hands of the prohibition of sexual intercourse with an insane woman to have been invincible. The peculiarity of the case, in the opinion of the court, was that the defendants, while in possession of full mental capacity within both the insanity and diminished responsibility tests, had, owing to their lack of education, never even remotely imagined that such act might be forbidden. It thus did not occur to them to inquire. Nor would inquiry have been of any avail, for their ignorance was shared by the local mayor. However they might have exerted their conscience, their primitiveness stood in the way of acquiring the necessary knowledge. Thus, the error, superable by a person of higher intellectual and moral quality, was insuperable for them.

Since the introduction of the defense of error of law in Germany, innumerable cases have been decided on that ground. The wide range of importance attributed to such error may be best conveyed by correcting the description of the contention of error of law as a defense. It is not a technical defense at

¹⁸⁷ 4 BGHSt. 236, 242-43 (1953). The lower court convicted accused, a police officer, of embezzlement for giving unused ration cards to merchants in return for contributions to a police benefit fund. The Bundesgerichtshof reversed on the ground that accused had derived no profit from the action, the crime of embezzlement requiring that the actor desire to "acquire" the thing "for himself." However, the court found the act a violation of Section 11 of the Economic Crimes Law, even though the lower court had upheld accused's defense that he thought himself entitled to give away the cards. The Bundesgerichtshof held that the court below had not properly ruled on the standard of care required in the exertion of conscience.

¹⁸⁸ BGHSt. (Dec. 23, 1952), reported in 6 NJW 431, 432 (1953).

¹⁸⁹ BGHSt. (Oct. 6, 1953), reported in Juristische Rundschau 188 (1954).

all, for where there are doubts as to the existence of legal error, those doubts must be resolved in favor of the defendant.¹⁰⁰ His knowledge of law must be proven by the prosecution as part of his guilt.¹⁰¹

III. POINTS IN ISSUE

The import of the statement that knowledge of illegality is of the essence of crime depends on the definition given "illegality." Without specification of the meaning of that term, the statement might fit into a positivist framework of thought as well as into a framework based on a theory of responsibility within a free society. Thus, while owing much to the German theory of responsibility—that there can be no guilt without intent based upon knowledge (psychological theory of guilt)—the Soviet theory of criminal law assumes that such knowledge must encompass the social dangerousness of the act, rather than its non-conformance with law.¹⁰² Social dangerousness, of course, is the central concept of positivist thought, and Soviet jurists have derived it from the Italian school. In a consistent normative theory of responsibility, illegality, knowledge of which is a requisite of punishment, should have a distinctive connotation. Its meaning cannot be determined either by purely social or by purely practical considerations. A survey of various concepts of illegality will facilitate presentation of our own position.

Anglo-American Law

Neither in England nor in the United States has there been a consistent approach to the problem of the scope of required legal knowledge, even in the rare cases where such knowledge has been considered. In England several opinions on the subject were voiced in the famous case of *Regina v. Prince*.¹⁰³ Brett, J., suggested that knowledge that the act constitutes a crime lesser than

¹⁰⁰ Consult decision of the Bavarian Oberlandesgericht (March 2, 1954), reported in 7 NJW 811 (1954).

¹⁰¹ The fact that the requirement of legal knowledge as a condition of criminal responsibility was introduced in Germany by judicial legislation rather than—as might be expected in German law—by statutory amendment, deserves notice. To understand this fact, we must consider the place of guilt in the structure of crime under German law. Guilt is deemed to be a jurisprudential "pre-statutory" requirement of criminality; that is, an inherent or self-evident requirement, not merely undefined by statute but, indeed, not definable in exact statutory terms. Consult Welzel, *Das Deutsche Strafrecht* 44 (4th ed., 1954). Dreher, *op. cit.* supra note 178, mentions that all participants of the Fourth Session of the Great Criminal Law Commission agreed that there should be no definition of either guilt or intent or negligence in the Code. Thus, should the rule on error of law ever be incorporated in the German Penal Code, it would be the only statutory rule partially defining guilt.

¹⁰² Consult notes 132 and 133 supra, and 232 infra. The Soviet view that knowledge of illegality is awareness of the social dangerousness of the act has greatly influenced recent Polish thought. Andrejew, Lernell and Sawicki, *Prawo Karne Polski Ludowej* 188 (1950), state that "[o]ur position is that in the People's Poland, a necessary condition of imputing to the actor intentional guilt is consciousness of the dangerousness of the act."

¹⁰³ L.R. 2 Cr.Cas.Res. 154, 13 Cox C.C. 138 (1875).

the one charged is sufficient. Denman, J., believed that knowledge of the tortious nature of the act would be enough, while Bramwell, J., thought that the actor must be aware of moral wrong-doing. Kenny reports that the latter view is approved by eminent text-writers, although "it must be remembered that it was only an *obiter dictum*."¹⁹⁴ An interesting view was advanced in the United States in *Long v. State*.¹⁹⁵ There the Delaware Supreme Court suggested that, in determining the scope of expected legal knowledge, it is significant to consider the prevailing jurisprudential conception of law as a prediction of what courts will do in the future.

Swiss Law

The Swiss definition of illegality for purposes of the requirement of legal knowledge was formulated in *Ritter gegen Statthalteramt Zürich*,¹⁹⁶ where the Federal Tribunal said that the actor need not:

know the pertinent provision imposing the prohibition and the punishment; rather consciousness of illegality exists whenever *the actor has the feeling that he is violating the law, whether it be the rights of others or general dictates of the legal system, or, without having precise notions, that he is violating that which is right. Only consciousness of wrongdoing is in issue*.¹⁹⁷ [Italics added.]

This much-cited rule¹⁹⁸ resolves the problems of the intensity and of the content of legal knowledge. As we have seen, Swiss law rejects the excuse of ignorance, as distinct from mistake.¹⁹⁹ It is also perhaps the only law which concerns itself with the problem of intensity of knowledge, declaring itself satisfied, however, with a minimum intensity. Any feeling, however vague, that the act might be prohibited or wrong is sufficient.²⁰⁰

With regard to the content and proof of knowledge, the Federal Tribunal, apparently adopting the distinction between *mala in se* and *mala prohibita*, differentiated between error concerning major offenses and error concerning police regulations. It said in the *Ritter* case:

In some cases (e.g., violation of property rights) consciousness of illegality is comprised in the very knowledge and desire [will] of the objective elements of the crime; for whoever, without being authorized, infringes upon other people's rights,

¹⁹⁴ Kenny, *Outlines of Criminal Law* 53-54 (15th ed., 1936). Consult also Williams, *op. cit.* supra note 72, at 151-54.

¹⁹⁵ 44 Del. 262, 65 A.2d 489 (1949).

¹⁹⁶ BGE 60 I 412 (1934).

¹⁹⁷ *Ibid.*, at 218.

¹⁹⁸ The Federal Tribunal has consistently followed the standard established by this rule, even after the Penal Code of 1937 became effective. Cf. *Görner gegen Statthalteramt Luzern-Stadt*, BGE 70 IV 97 (1944).

¹⁹⁹ Consult discussion at 445 supra.

²⁰⁰ Thus in *Staatsanwaltschaft des Kantons Basel-Land gegen L.*, BGE 75 IV 150 (1949), accused's instinctive awareness of the prohibition of sexual intercourse with children was sufficient to constitute knowledge of illegality.

by his very conduct, acts consciously illegally, without it being necessary for him to know special rules of law. In the field of police regulations this is not necessarily so. A conduct may "violate police law" even though its wrongfulness is not, in accordance with general opinion, evident. Hence, in this field, one can speak of consciously illegal acts or omissions only where the actor knew the norm or prohibition that he violated or at least had a suspicion that he might be violating a police rule or instruction, and nevertheless acted as he did, thus consciously accepting the risk of a law violation (*dolus eventualis*).²⁰¹

As regards major offenses, the distinction between the rule laid down by the court and the presumption of legal knowledge arising from commission of the *actus reus* is very tenuous. The inference of legal knowledge is drawn from consciousness that there is no justification for the act. This is shown by a case in which the defendant was indicted under the Espionage Act of June 21, 1935, for having attempted to inform to German authorities against members of a ski-club with whom he had a personal feud.²⁰² The information, which by accident fell into the hands of Swiss authorities, was addressed to the German Customs Office, and upon its face charged the persons concerned with violation of foreign exchange regulations and with smuggling. But it was held that the information was intended to cause their arrest on political grounds. This fact, in the court's view, also disposed of the question of defendant's awareness of violating the espionage law:

This implies that the appellant possessed the consciousness of illegality which is required for intent under Art. 11, Federal Criminal Law. For this [law] does not require direct knowledge of the pertinent penal provision; rather, the actor's feeling of doing something prohibited is sufficient (BGE 60 I 418). This emotional certainty, in cases of acts which are in themselves injurious, is implicit in the very consciousness of the absence of a ground justifying the injury.²⁰³

The distinction drawn in the *Ritter* case between error as to major offenses and error as to police regulations would seem to suggest adoption of a liberal rule with regard to the latter. But the *Ritter* case itself shows that the contrary is true. In that case, defendant, a German citizen, had had his residence permit renewed with the proviso that he could not engage in any gainful occupation except within a specific trade. He was fined for having assumed the functions of a house manager without compensation and his defense was that, in his understanding, a gratuitous occupation did not fall within the prohibition. The Federal Tribunal held any occupation that deprived others of the opportunity of work to be included and, rejecting the view adopted by the court below "that the accused as a merchant can be assumed to have some

²⁰¹ *Ritter gegen Statthalteramt Zürich*, BGE 60 I 412, 418 (1934).

²⁰² *Schmitt gegen Basel-Stadt, Staatsanwaltschaft*, BGE 66 I 107 (1940).

²⁰³ *Ibid.*, at 112-13.

understanding of the duties relating to the policing of aliens and their significance,"²⁰⁴ said:

It is unnecessary to determine whether it is generally known that alien residents require a permit for activities such as here in issue, and it is unnecessary to discuss whether the appellant had reason to regard the activity with which he is charged as one directed to gain. It is sufficient that he must have realized that he was performing functions, the performance of which might be generally considered on the labor market as affording an opportunity of gainful employment and that they must certainly or, at least, very likely be deemed by the competent authority as a performance of an employment and, hence, as requiring a permit.²⁰⁵

In another case the Federal Tribunal held that although the traffic law and regulation which the accused violated were not generally known, the accused should have known that driving as he did was dangerous.²⁰⁶

The Federal Tribunal has rather summarily disposed of the contention that an accused, while aware of the prohibition imposed by law involving a major offense, should not be convicted because he acted on conscientious grounds.²⁰⁷

German Law

In contrast to Swiss law, the new German law²⁰⁸ assumes, in terms at least, that knowledge of illegality means knowledge of legal prohibition. Thus, the leading case defines consciousness of illegality by saying: "The actor knows that what he does is legally not permitted but prohibited. . . . Error concerning illegality is error concerning the prohibition (*Verbotsirrtum*)."²⁰⁹

Until recently the conception of the legal prohibition that is the object of required knowledge was rather broad. That prohibition need be neither the legal rule as formulated in the Penal Code nor even the particular prohibition that has been violated. In one decision the First Criminal Senate of the Bundesgerichtshof held that the requirement of legal knowledge necessary for conviction of the crime of sexual intercourse with in-laws was satisfied by

²⁰⁴ Ritter gegen Statthalteramt Zürich, BGE 60 I 412, 419 (1934).

²⁰⁶ Ibid., at 420.

²⁰⁸ Baumann gegen Staatsanwaltschaft des Kantons Aargau, BGE 75 IV 131 (1949). Cf. Statthalteramt Zürich gegen Hodel, BGE 81 IV 191 (1955), where accused, although he knew licenses were required for special sales, claimed that he had no consciousness of wrongdoing in conducting such a sale without a license because he believed his sale was not of the type requiring a license. Accused had made no inquiries as to the correctness of his views, believing the authorities were likely in any event to inform him that the sale was illegal. The Federal Tribunal reversed his acquittal and held mitigation under Article 20, Penal Code, not applicable for, under the circumstances, accused lacked "the feeling not to do wrong." Ibid., at 196.

²⁰⁷ Consult note 243 *infra*.

²⁰⁹ Since the leading decision of 2 BGHSt. 194 (1952). For discussion consult 450 *supra*.

²⁰⁸ 2 BGHSt. 194, 196-97 (1952).

accused's knowledge of the prohibition of adultery,²¹⁰ because the two prohibitions were oriented to protection of the "same or a closely related legal interest."²¹¹ The same result was reached by the Fifth Criminal Senate in an earlier case.²¹² That Senate assumed, however, that before knowledge of one legal prohibition could be substituted for knowledge of another, both prohibitions must be based on the same policy ("inner ground") and protect the same legal interest.

The position of the Bundesgerichtshof has been criticized by many writers.²¹³ One critic alleged that the position assumes the existence of a "wrong in itself"²¹⁴ while another claimed that it threatens the very existence of the principle *nulla poena sine lege*.²¹⁵ The question has been raised whether the wrongfulness to which knowledge must be directed is something contained in the Penal Code at all or rather only an ethical quality.²¹⁶ As a result of such criticism, the Bundesgerichtshof assumed a new orientation. The Fourth Senate, in a decision rendered December 6, 1956, rejected the theory of indivisibility of the consciousness of illegality,²¹⁷ stating that knowledge of one prohibition cannot serve as a substitute for knowledge of another prohibition and that the contrary view implies acceptance of the doctrine of *versari in re illicita*, which was repudiated by German law.²¹⁸ The German theory of legal error—meaning error with regard to illegality rather than immorality—is still threatened by the Great Senate's requirement of exertion of conscience for the purpose of acquiring the necessary knowledge.²¹⁹ However, while it apparently rejected Binding's scheme, according to which illegality is a feature of the

²¹⁰ 3 BGHSt. 342 (1952).

²¹¹ The court said: "Everybody knows that adultery violates not only the moral law but also the legal order. Nor did the accused . . . rely on unawareness of the criminality of adultery. If, however, he was conscious of the wrongfulness of the act as constituting adultery, this consciousness comprised the illegality of his act generally. For consciousness of illegality . . . is not divisible, simply because it does not include knowledge of the manner in which the legal order punishes the wrong committed by the act. This applies particularly in cases where the several criminal statutes violated by the act protect the same or a closely related legal interest. . . ." *Ibid.*, at 343.

²¹² BGHSt. (April 10, 1952), reported in 5 NJW 671 (1952).

²¹³ Consult Zimmermann, *Unteilbares oder tatbestandsbezogenes Unrechtsbewusstsein?* 7 NJW 908, 909 (1954); Bindokat, *Kritisches zum Verbotsirrtum*, 8 *Juristenzeitung* 71 (1953); Warda, *Tatbestandsbezogenes Unrechtsbewusstsein*, 6 NJW 1052 (1953).

²¹⁴ Bindokat, *op. cit. supra* note 213, at 73.

²¹⁵ Zimmermann, *op. cit. supra* note 213.

²¹⁶ *Ibid.* Bindokat, *op. cit. supra* note 213.

²¹⁷ 10 NJW 229 et seq. (1957). The First and Fifth Senates have indicated that they will henceforth take the same position. Consult *ibid.*, at 229, 230.

²¹⁸ This was done by adoption of Section 56, Penal Code (text of Sept. 1, 1953, BGBl. I 1083), providing that accused is not responsible for consequences of an act unless he caused these very consequences by conduct at least negligent.

²¹⁹ 2 BGHSt. 194 (1952).

actus reus,²²⁰ the Great Senate did adopt, on the whole, his positivist conception of "norm" as the content of required legal knowledge. Under this theory, that which the actor must know is the "norm" behind the positive legal prohibition, and it is unnecessary that he know the criminal code. But the actor must know that the act he is about to perform is prohibited.²²¹ His evaluation of that act is different from that of the judge who later considers its criminality. The actor merely asks himself: "May I or mustn't I?" His conclusion that he mustn't means that he considers the act contrary to duty or prohibited. His process of arriving at that conclusion is a process—unconscious perhaps—of subsumption of the act under the norm that prohibits it. Binding described that process as a layman's subsumption and emphasized that a layman can hardly be expected to engage in more sophisticated technical legal reasoning. Mezger developed this idea into the notion of "parallel evaluation [of the act] in the lay sphere of the actor."²²² He defined this evaluation as one "within the thought-compass and environment of the individual, having an orientation parallel to the statutory-judicial evaluation."²²³ Mezger's view was, in turn, adopted by the Bundesgerichtshof, in an opinion summarized as follows:

No one can expect the actor to formulate a complete conceptual definition of a "document"; were that the case, only criminal lawyers—and, indeed, only adherents of the prevailing view—could commit a crime concerning a document; it is, therefore, sufficient for the actor to know that the writing he forges is expected to claim significance and credit in social life; a man possesses consciousness of the lewdness of his conduct as soon as he knows that he does something indecent or improper in the sexual sphere.²²⁴

That norm which is reflected in the lay sphere is, in Binding's view, a provision of positive law rather than of morality. So also is the prohibition to which reference is made by the Bundesgerichtshof a provision of positive law. However, as we have seen, the Bundesgerichtshof assumes that a layman may acquire knowledge of that prohibition by exertion of his conscience. This apparent inconsistency can be resolved—only partially, to be sure—in the light of the present belief, prevailing in Germany, in the tangential nature of law and morality. Basically, the law required to be known is positive law (or its reflection in the lay mind), but that law is assumed to incorporate a minimum standard of morality and to be valid only to the extent that it conforms to certain basic conceptions of justice prevailing among civilized nations.

The Bundesgerichtshof has expressed the above position in two cases, one of which answered questions submitted by the appellate court of Hamburg.

²²⁰ 2 Binding, op. cit. supra note 23, at 161, 230.

²²¹ 3 *ibid.*, at 148.

²²² Mezger, *Strafrecht, ein Lehrbuch* 328 (1931).

²²³ *Ibid.* If the actor is a lawyer he may be held to a legal "parallel evaluation."

²²⁴ Maurach, op. cit. supra note 133, at 230, citing 3 BGHSt. 82, 248 (1952), discussed at note 177 supra.

That court, on intricate jurisprudential grounds which it thought applicable to the special circumstances of this case, desired to depart from the previous ruling of the Great Senate which required the exertion of conscience. Defendants were convicted by the trial court of having violated, on conscientious grounds, a Hamburg Police Ordinance which prohibited promoting a referendum against the remilitarization of Germany. The appellate court pointed out that while the trial court had failed to consider the issue of defendants' consciousness of illegality, there were grave doubts as to the appropriateness of that issue to a criminal provision for the protection of public order:

In . . . in cases where the person concerned believes that he must not submit to an ordinance, e.g., on basic political grounds, he neither fails to exert his conscience nor omits inquiry. In such cases, in the opinion of the Senate [of the appellate court], ethical evaluations cannot afford a standard for the correct attitude of the criminal, while the general social need for order calls for dispensing with examination of the psychological process where the mental attitude toward lawful conduct may be predominantly influenced by, for example, the basic political philosophy and approach of the particular actor.²²⁵

The Bundesgerichtshof summarily disposed of the rather simple problem posed by the case: Since defendants knew the Hamburg Police Ordinance, there was no need to inquire into the question whether they exerted their conscience or whether such exertion could have been of any avail under the circumstances. However, the Bundesgerichtshof proceeded to deal with the broader jurisprudential issue raised by the appellate court, namely, the treatment of error of law based on rejection, rather than on ignorance or mistaken view of the law. The court took the position that if the actor knows that his conduct is prohibited it is irrelevant that he denies the validity of the prohibition. In such a case there is no error of law. The actor must be punished because "[w]hoever lives in a community must accept the prevailing law also as against himself."²²⁶ There may be an error of law, however, where the actor violates a known legal prohibition in the belief that it violates a higher law, for example, the constitution. In this case, contrary to the view of the appellate court, inquiry into the question of whether or not the defendant exerted his conscience is required.²²⁷

²²⁵ BGHSt. (Dec. 23, 1952), reported in 6 NJW 431, 432 (1953).

²²⁶ *Ibid.*, at 432. The court further pointed out that there can be no distinction, in the treatment of error of law, between criminal provisions "for the protection of public order" and other criminal provisions.

²²⁷ In view of the fact that the question of the constitutionality of Germany's remilitarization was controversial, it may be assumed that belief in its unconstitutionality is governed by the ruling in BGHSt. of Nov. 28, 1952 (note 186 *supra*). It may be further assumed that the accused properly exerted his conscience in order to find the solution to the constitutional question. Since the court did not resolve these problems, the suggested solutions are but conjectural.

In the second case the defendant was convicted by the trial court of the crime of false imprisonment in office for having, in 1941, as Police President of N., participated in the compulsory deportation of Jews to Riga, in accordance with orders of the Reich Security Office.²²⁸ The appellate court reversed that conviction on the ground that there was no proof of defendant's knowledge of the illegality of these orders. The Bundesgerichtshof reversed and remanded the case for further inquiry regarding the issue of legal error. Even should it be found in a future trial that defendant possessed no consciousness of illegality,²²⁹ it would be necessary—in the opinion of the Bundesgerichtshof—further to find whether he could have acquired the necessary knowledge had he properly exerted his conscience. The problem of proper exertion must, in turn, be viewed in relation to the nature of the order which accused alleges to have believed lawful. The trial court was to be guided by the following:

The more clearly the error of the actor is related to an area which the legal order regulated in a certain manner but which it might have regulated in a different manner without exceeding the limits set to the law creating power, the more justified will be the assumption—depending on the personality of the actor—that the error was unavoidable even in case of a proper exertion of conscience. On the other hand, the more definitely the circumstances suggest the question whether measures of the kind under examination are at all compatible with the esteem of human dignity, the more readily will it have to be assumed that the actor would have answered the question of right or wrong correctly had he—as required—exerted his conscience.²³⁰

Thus the Bundesgerichtshof, following earlier views expressed by Welzel, tends to extend the scope of individual responsibility within the framework of exertion of conscience by requiring the individual to examine the ultimate ethical validity of positive legal enactments. Welzel and Maurach, on the other hand, now seem to question the necessity of a present actual consciousness of illegality, expressing the view that it is sufficient if the actor "knew or *could recognize* the illegality" of the act.²³¹ Under this view possibility of knowledge is equivalent to knowledge. Both the position of the Bundesgerichtshof and of Welzel and Maurach are under vigorous attack by adherents of the psychological theory on the ground that both positions tend to obliterate the distinction between intentional and negligent guilt and result in the absurdity of "intentional guilt incurred by negligence."²³²

²²⁸ 3 BGHSt. 357 (1952).

²²⁹ The orders were held to have been objectively illegal as *ultra vires* of any state. The court proceeded from the assumption, prevailing in Germany, that a positive legal enactment is not "law" when it violates certain principles of human conduct developed on the basis of the concurrent ethical conceptions of all civilized nations.

²³⁰ 3 BGHSt. 357, 366 (1952).

²³¹ Consult Welzel, *op. cit. supra* note 163, at 130; Maurach, *op. cit. supra* note 133, at 410.

²³² Consult Maurach, *op. cit. supra* note 133, at 410-11.

Soviet Law

Ferri,²³³ criticizing the classical doctrine's denial of the relevance of motive in criminal law, has developed a notion of criminal responsibility predicated upon the concurrence of the three psychological conditions of will, intent and purpose. Will pertains to the act in itself: thus, a gun explosion may be voluntary or accidental. Intent is directed to the end to be accomplished: one draws a gun in order to kill, wound, scare or make a noise. Purpose is oriented to the effect which one wishes to accomplish by these means: one draws a gun in order to kill, but for the purpose of taking revenge, of stealing, of defending oneself or of executing a legal command. Criminal responsibility presupposes that there be not only the will to perpetrate an act, but also the intent to violate the law for an anti-social or anti-legal purpose. The more or less anti-social quality of the act and of its end, combined with the more or less anti-social quality of the actor determines the degree of social and legal responsibility and the punishment to be imposed. The anti-social or anti-legal purpose being an essential of responsibility, it is, of course, necessary that the actor be aware of that character of his purpose.

Ferri's conception of illegality is reflected in the Soviet view regarding the criminal character of an act and the scope of required knowledge, while the Soviet idea of responsibility itself is of German origin. The official treatise on criminal law states:

We have in mind not the actor's knowledge of the legal qualification of the act but rather knowledge of its general dangerousness to the Soviet system or social order, established by the workers' and peasants' authority at the time of its progress toward a communist system.²³⁴

While an actor is not subject to punishment unless he knows the social dangerousness of the crime, knowledge of social dangerousness may render him liable even where the act is not proscribed by statute. It is sufficient that it is an act punishable on the basis of analogy, the Soviet law recognizing analogy as a source of criminal law.²³⁵ Thus, social dangerousness that is the subject of legal knowledge reaches beyond the confines of written criminal law.

IV. CONCLUSION

There is a noticeable trend toward increasing recognition of error of law as a defense in several legal systems. The basis of this development differs ac-

²³³ For citations of Ferri's writings on this subject consult Vidal, *I Cours de Droit Criminel et de Science Pénitentiaire* 182 n. 1 (9th ed., Magnol, 1949).

²³⁴ Viun, *Ugolovnoe Pravo, Obschaya Chast* 341 (4th ed., 1948), cited in Kirichenko, *op. cit.* supra note 77, at 23.

²³⁵ Utevsky, *Vina v Sovetskoy Ugolovnom Pravie* 226 (1950), cited in Kirichenko, *op. cit.* supra note 77, at 23-24.

cording to underlying ideology. In thought oriented to the community rather than to the individual, the essence of illegality is the anti-social nature of the act, and the rationale of defense measures is the social dangerousness of the offender: by committing the act in awareness of its danger to society the offender demonstrates his own dangerousness. According to Ferri, the originator of this sociological orientation in criminal law, the anti-social *motive* of the actor is the decisive element in crime. The motive to cause social harm presupposes knowledge of the danger.²³⁶ Excusable error of law is error concerning the social dangerousness of the act.

We believe that disparate application of sanctions according to individual motive is wrong. Within what we have chosen to call the ideology of free society, the central concept is a normative one. The prohibition of the law is addressed to the individual as a responsible agent; it is so addressed to all individuals alike. Individual motives vary infinitely in intensity, and response to them varies with the degree of capacity to resist, while intent is assumed to be uniform.²³⁷ In asserting motive to be irrelevant and intent solely determinative, prevailing law expresses—unconsciously perhaps—a basic belief in individual freedom of choice, which implies capacity to resist strong motivations. This refusal of present law, on the basis of individual motivations, disparately to apply sanctions is also a refusal to tamper with the rational link—essential in a free society—between conduct and punishment.²³⁸ However, motive should be considered in differentiating crime to the extent that a statute may characterize certain conduct in terms of motive, for example, euthanasia. Capacity to resist should be deemed relevant only where the type of conduct proscribed is a failure to exert resistance to motivation. Beyond that, motive and capacity to resist should be considered, except in case of the mentally ill, only in mitigation of punishment.

Within the concept of responsibility, conceived to imply a basic freedom of choice, knowledge of the law is essential for there can be no choice without knowledge. In answering the crucial question—For what is man responsible?—Binding, the most ardent advocate of the defense of legal error, stated that criminality was defiance of the legal prohibition, a contempt of the law or a rebellion against its commands.²³⁹ The idea that the essence of law violation

²³⁶ Ferri's stress on motive rather than intent (consult Vidal, *op. cit. supra* note 233) is reflected in provisions even in countries which do not otherwise follow his ideology. Cf., e.g., German Penal Code (1953) § 211; Korean Penal Code (1953) § 152(2).

²³⁷ Consideration of individual motives would require a grant of almost unlimited discretion to judges, a discretion that is incompatible with the principle of *nulla poena sine lege*.

²³⁸ Consult Cardozo, *Paradoxes of Legal Science* 104 (1928). Actually the positivist stress on motive as distinct from intent has been criticized as psychologically unsound. Mayer, *op. cit. supra* note 120, at 106 et seq., states that both intent and motive are included in the psychological category of *Vorstellung* (psychological image).

²³⁹ 1 Binding, *op. cit.*, *supra* note 23, at 56 et seq.

is "rebellion against the law," however, implies that every lawbreaker is a revolutionary. We believe that in a free society the sanction of the community is imposed neither for "rebellion" nor for "disobedience" but simply for violation of a duty toward the community—the actor's duty, as a member of the community, to abide by its rules. To be subject to a sanction thus conceived, the actor, as a free agent, must know the rule which he violates.²⁴⁰

The duty of free men, however, is not exhausted merely by compliance with known law. They must also exert their conscience to ascertain what the law is. This we conceive to be a political rather than a moral duty, indeed, a form of the individual's participation in the process of finding and creating law.²⁴¹ However, a distinction must be drawn between violation of known law and failure of exertion. As pointed out in the Introduction, responsibility is not an absolute concept, but varies with the nature of the sanction it carries. Thus, within a consistent framework of responsibility, the full rigor of punishment provided for a crime need not be imposed when that crime is committed in error of law which results from a failure to exert the conscience. Such disparity can be further justified on the theory that one sanction is designed to discourage the commission of acts known to be illegal, while the other is designed to encourage knowledge of the law.²⁴² Equal punishment for crimes that are not equally blameworthy violates the principle that no excessive punishment, indeed no punishment beyond that which is clearly necessary, should be imposed. While a person may be subject to a sanction even though he was not aware of the legal prohibition, if he failed to exert his conscience, the policy upon which that sanction is based is entirely different from that underlying punishment of the principal crime. A minor punishment may in such case serve the deterrent and curative purpose of the law as well as the more severe penalty. In a free society the deterrent effect is to be sought by effective enforcement of public order and not by its severity.

Man in a free society can tolerate only an essential minimum of restric-

²⁴⁰ This interpretation is clearly implied in due process, as conceived in *Screws v. United States*, 325 U.S. 91 (1945). The difference between vague and uncertain and clear and definite terms is one of degree. Only where the offender knows the law (as later interpreted) can the requirement of definiteness and of *nulla poena sine lege* be said to be truly fulfilled. Compare also *Long v. State*, 44 Del. 262, 65 A.2d 489 (1949) (discussed note 125 supra), regarding the indefiniteness of the common law.

²⁴¹ If, after proper exertion of his conscience, the individual arrives at a conception of the law which does not conform with that established by courts, he is excused. At least, so far as the particular case is concerned, his conception of law thus, in a sense, prevails. It is this result that is being criticized by adherents of the supremacy of the law, as permitting lawbreakers to triumph over the law. But, as shown above, this "triumph" in no way detracts from the objective validity of the law, unless a nonconforming conception in course of time proves to be so widely spread as to lead to amendment by way of customary law, where such amendment is admissible. Customary law, of course, is a most democratic method of law creation; a rule which allows amendment by that method is within the spirit of a free society.

²⁴² Consult Romagnosi, 2 *Genesi del Diritto Penale* §§ 1364-68 (6th ed., 1836).

tions. These restrictions must be well defined and known to him in advance of the act. As punishment must not be imposed except within the limits of statutory definition strictly construed, neither should it be imposed unless the crime was committed with knowledge of the legal prohibition. As a moral, social, or religious prohibition alone does not afford a proper standard of legal punishment under the principle of no punishment without law, so knowledge of such prohibition alone does not satisfy the principle of no punishment without culpability. However reprehensible may have been the acts of Nazi officials, committed pursuant to authority of National Socialist legislation, we believe that German decisions which punished those officials on the ground that they had made a wrong moral choice violated these essential principles of democratic law. Nor can the problem of responsibility wholly depend on the issue of the validity of National Socialist laws from the point of view of a higher law. For assuming the Nazi laws to have been invalid under some such higher law, there was still no valid legal basis for punishment of those who obeyed them. There was at best a legal vacuum. Moreover, as the defense of subjective error of law does not impair the objective validity of law, neither does the objective invalidity of a law exclude a defense based on its formal apparent validity. Nor should knowledge of one prohibition substitute for knowledge of another, and, a fortiori, knowledge of the tortious nature of an act should not substitute for knowledge of its criminality. Requisite knowledge of the law, however, cannot be understood to mean knowledge of the statutory text or of the concrete type or degree of punishment, although belief that an act constitutes merely a minor offense when in fact it is a major crime should be considered as a ground of mitigation.

In positing non-conformance with law as the ground of punishment we do not assume an authoritative concept of law which demands blind conformance. Conformance is rather understood to mean an autonomous political judgment of agreement or the political decision to be law-abiding. This formulation raises the significant problem of how to treat the criminal who acts because of a moral, political, or religious conviction which is contrary to the value judgment expressed in the law. Even though ideally immunity should be accorded to such an offender, in realistic terms he must be punished. In the German view, as we have seen, he is punished because he made a wrong choice. This view, however, assumes that the choice of the law is necessarily "right" and the opposing view of the individual "wrong." It is preferable to base punishment in such cases on the fundamental democratic principle of majority rule and the exclusiveness of legal amending processes. It would seem proper, however, that mitigation be accorded to the conscientious objector.²⁴³

²⁴³ Article 64 of the Swiss Penal Code (1937) provides for discretionary mitigation of punishment where the actor was prompted by "an honorable motive." But Meier und Mitangeklagte gegen Staatsanwaltschaft des Kantons Zürich, BGE 70 IV 181 (1944), held

The requisite degree of intensity of legal knowledge has been repeatedly discussed by the Swiss Federal Tribunal. That court declared that any intuitive feeling, however vague, that the act is wrong is sufficient to satisfy the requirement of legal knowledge. The problem is significant, for knowledge is not always clearly either present or absent. Between these extremes there are stages of unconscious, preconscious, and partial knowledge. But the logical meaning of a rule of law cannot be felt. At any given time, it can only be known, unknown, partially known, or mistaken; knowable, unknowable, partially or mistakenly knowable. The test should be the following: The accused need not, at the crucial time, have thought of the prohibition. But if then asked whether or not the act he was about to perform was lawful, he must have been able to give a correct answer or, for purposes of the rule on exerting conscience, to reach such an answer by exertion.²⁴⁴ By correct answer we mean a formulation of the prohibition as above indicated.

Lastly, the difficulty of proving legal knowledge is not in itself greater than is the difficulty of showing the presence of any other mental element. When a man shoots another in broad daylight from a distance of five feet, he will not, in the absence of special circumstances, be heard to say that he believed the target to be a hare. Nor would any man—in legal systems which admit error of law as a defense—be heard to say that he did not know the killing of a human being to be unlawful. The problem of proof changes with circumstances. A man who shoots another might well be heard to say he thought the target a hare if he had shot, in a place reserved for hunting, at great distance and under unfavorable light conditions. So might a man be heard to say that he believed he did no wrong in abbreviating the life of a friend who had but a short time to live, in order to save him from extreme suffering. As in the case of the hunter it might be deemed significant that his companions shared his optical illusion, so in the case of the mercy killer it might be considered relevant that many other persons of his environment shared his legal illusion. Thus a significant question in judging a claim of legal error is: "Is he alone ignorant of that which everybody in the State knows?"²⁴⁵ By "State" we must mean the life environment of the accused; thus it was deemed important in a German case²⁴⁶ that the defendants' error was shared by the local mayor.

this rule inapplicable, under a special legislation, where the personal conviction is contrary not to the particular provisions of the law but rather to the prevailing legal system as a whole, for "otherwise the State would be sacrificing its constitutional system and giving up its own existence." *Ibid.*, at 183. Defendants, convicted of violating a law dissolving the Communist Party—the purpose of which party was forcibly to overthrow the government—contended that they were motivated by the honorable motive of "idealism."

²⁴⁴ Of course, obstruction of knowledge by unconscious desires to be punished cannot be taken into account in normal cases.

²⁴⁵ "*Quid enim, si omnes in civitate sciant, quod ille solus ignorat?*" Digest, 22.6.9.2.

²⁴⁶ Consult discussion at 457 *supra*.

Proof of knowledge of law might be adduced by showing that representatives of the group to which the accused belongs have the required knowledge and that he is not more handicapped in acquiring such knowledge than others. If the accused suffers from a special handicap, for example, if his intelligence is below average, he cannot be expected to know that which average people of his group may know, and it may not be inferred that he shared their knowledge of law. Difficulty of proof, if any, is no reason for reversing the burden of proof—for that would be, in effect, a rejection of the presumption of innocence. The burden of proof may be reversed, however, where the accused erred regarding the availability of a justification ground rather than regarding the legal prohibition. Such a case is analogous to that in which the accused believes in the presence of facts which would render his otherwise illegal conduct lawful.²⁴⁷

As between the theory of intent (psychological guilt) and the theory of guilt (normative guilt) which have played such important roles in the development of Swiss and German law, it would appear—judging by the policy advocated by us—that we give preference to the latter theory. Actually, however, we are not hampered by strict adherence to either of these theories. The theory of intent is based on the unrealistic assumption that there is in modern law a uniform notion of intent that comprises certain constant elements as part of its nature. The theory of guilt, while allowing greater flexibility, is equally dogmatic. The idea of responsibility set forth in this paper is not predicated upon either theory, but is rather built upon an independent, avowedly political, ideological basis.

However, as repeatedly emphasized, responsibility thus conceived requires consistency in distributing justice. From this point of view we are concerned with the problem of differentiating error of law from error of fact, which has been a frequent source of puzzling results. Should our suggestions regarding error of law be accepted while the present rule on error of fact is maintained, that problem would require solution. Perhaps the rule on error of fact should be amended to accord with the suggested rule on error of law.

The policy suggested in this article may be summarized thus: Any restraint imposed upon man is, in a sense, offensive to human dignity. The aim of free society is hence to reduce legal restraint to the minimum required in a given situation. Restraint is less undignified when imposed upon conscious nonconformance with law. Subjection of man to sanctions under a law which is unknown and unknowable to him and which he has no opportunity to accept or to reject expresses the view that he is a mere object of the law. We believe, however, that in a democratic society man is the ultimate end of the law.

²⁴⁷ Consult McKelvey on Evidence 94 (5th ed., 1944).