MISTAKE OF LAW AND MENS REA

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A WELL SETTLED common law rule holds that a mistake of law, as a result of which the defendant does not know that his conduct is illegal, does not operate as a defense in most criminal cases. Why this should be true, when there is also the generally accepted common law principle that some sort of culpability, whether based on subjective moral guilt or objective negligence, should ordinarily be necessary for criminal liability, is a question which has been felt to require explanation by many writers. This article will trace the history of the general rule, consider the reasons justifying its retention in the criminal law, and attempt to evaluate the many exceptions to it which have been urged by counsel in modern times, often with success.

We lay aside at the outset, as not germane to our present inquiry, crimes in which a specific criminal intent to act in a manner known to be illegal (or recklessness in the same respect) is required. In these crimes, the court or legislature, by thus defining the crime, has said that any condition negating the existence of the required state of mind should result in an acquittal. Thus a mistake of law which has this effect may give a defense. But the question whether such a specific intent is required for any given crime has little in common with the problem of giving a general defense of mistake of law in crimes not coming within this category.

This distinction between the concept of culpability as a general requirement of guilt (the classic phrase is that a mens rea is needed) and the non-availability of any general defense of a mistake of law underlies the foundations of criminal liability. It may be that the recent development

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A Austin, Jurisprudence 496–501 (1869); Holmes, The Common Law 47–51 (1881); J. Hall, Prolegomena to a Science of Criminal Law, 89 U. of Pa. L. Rev. 549, 567 (1941); Keedy, Ignorance and Mistake in the Criminal Law, 22 Harv. L. Rev. 75 (1908) (proposing a considerable increase in the scope of the defense of mistake of law, to make it co-extensive with the general principles of culpability); Kohler, Ignorance or Mistake of Law as a Defense in Criminal Cases, 40 Dick. L. Rev. 113 (1936); Perkins, Ignorance and Mistake in Criminal Law, 88 U. of Pa. L. Rev. 35 (1939); Stumberg, Mistake of Law in Texas Criminal Cases, 15 Tex. L. Rev. 287 (1937).

There is a possible exception where the defendant has knowingly violated a statute, believing it to be unconstitutional. See infra, p. 666.
of crimes to which even a reasonable mistake of fact is not a defense presents a similar departure from the general requirement of culpability. Professor Sayre felt that these "public welfare offenses" did constitute another exception to the general rule.³

But Professor Jerome Hall maintains that even in these non-mens rea crimes, culpability is normally required by the prosecuting authorities as a pre-requisite to actual conviction, concluding that

... intent and negligence do in fact play essential parts in such offenses. ... they are designed to catch the wilful and the negligent; they are not intended to penalize sheer accident. ... But they are so phrased as also to include the morally innocent, and these occasionally are caught, aided by administrative incompetence or persecution.⁴

As he points out, the question of how far culpability is regarded as an essential element of criminality extends "far beyond petty offenses," and although his article is largely limited to a consideration of these offenses, he recognizes that reasonable mistake of law presents another aspect of the same general problem.⁵

But this explanation for the absence of any requirement of culpability in the legal definition of these crimes mala prohibita—that the penalties are small, usually fines, and that violations are of enormous frequency⁶—cannot be applied to all crimes. The rule we are discussing is equally valid for serious offenses and trivial ones, and for rare as well as common crimes.

How the general principle that culpability is necessary for criminal liability grew up with the rule that a mistake of law is not a general defense is a matter of history. There are now a number of exceptions to the rule, and their creation and shaping is largely the product of American judicial decision since the beginning of the nineteenth century. The increasing complexity of law, the multiplication of crimes mala prohibita, and a more exact definition of fundamental principles of criminal liability, have shared the responsibility for this development. But the process has been slow and uncertain, and in its early stages not well understood, either by the courts themselves or by text writers.⁷

³ Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55, 56 (1933).
⁴ J. Hall, op. cit. supra note 1, at 568–69.
⁵ J. Hall, op. cit. supra note 1, at 567.
⁶ J. Hall, op. cit. supra note 1, at 568.
⁷ Both Wharton and Bishop have been singularly unilluminating on this point. In 1 Bishop, Criminal Law §§ 294–300 (9th ed. 1923), it is stated that ignorance of law is never a defense except where it "renders the special state of mind" required by a particular crime impossible. In 1 Wharton, Criminal Law § 400 (12th ed. 1932), it is flatly stated that mistake of law is never a defense. Its effect as negativing a specific intent required is dealt with only under the specific crimes involved, as in 2 ibid., at § 1123, dealing with larceny. Even Judge
of the problem was made by Professor Keedy in 1908, and his work on the history of the rule is unsurpassed. The fruit of the last thirty years has gone into a recent article by Professor Perkins, which contains a comprehensive analysis of the entire problem of mistake, both of fact and of law. It is only in the light of the history of the rule, and the reasons for its persistence, that the validity of these exceptions can be tested.

EARLY HISTORY OF THE RULE AS TO MISTAKE OF LAW

The clear-cut distinction which has existed for centuries in the English law between the effect of a mistake of fact and a mistake of law does not come from the Roman law. In the latter there was a well developed rule that ignorance of the jus civile (although not of the jus gentium) was, at least for certain purposes, a defense to “persons under twenty-five years, women, soldiers and peasants and other persons of small intelligence,” or “[persons] who had had no opportunity to consult counsel.” The doctrine that a mistake of law is no excuse appears to be a survival of the early Norman or pre-Norman absolute liability, irrespective of any mistake, whether of fact or of law.

The development of mistake of fact as a defense, starting with Bracton, whose very extensive borrowings from the canon law are well known, and culminating in Coke’s famous statement, “Actus non facit reum nisi mens sit rea,” is directly due to the pervasive influence of ethical concepts of punishment taken from the religious ideas of the period. It is obvious that a mistake of fact might easily result, for example, in an accidental killing, and if the mistake were reasonable, no subjective moral guilt or

Stephen does no more than state that “ignorance of the law is no excuse for breaking it” except where it may negative “the existence of some specific criminal intention.” 2 Stephen, History of the Criminal Law 114 (1883). In Holmes, op. cit. supra note 1, at 47-48, 125, there is a penetrating discussion of the reasons for the rule that “ignorance of the law is no excuse for breaking it,” but no limitations on the rule are indicated. In 1 Brill, Cyclopedia of Criminal Law §§ 176-79 (1922), the general rule is stated without discussion of the reasons underlying it and without consideration of any exceptions beyond the “specific intent” crimes.

8 Keedy, op. cit. supra note 1. 9 Perkins, op. cit. supra note 1.

10 Other materials on the general problem of mistake of law are collected in note 1 supra.

11 Keedy, op. cit. supra note 1, at 80.

12 This condensation of the early history of both of these doctrines is taken from Keedy, op. cit. supra note 1, with respect to mistake of law, and from Lévitt, Origin of the Doctrine of Mens Rea, 17 Ill. L. Rev. 117 (1922), and Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1932), as to mistake of fact.

13 3 Co. Inst. 6, 107 (1641), translated by Lord Kenyon in Fowler v. Padget, 7 Term Rep. 509, 514 (K.B. 1798), as “The intent and the act must both concur to constitute the crime; . . . ."
even objective negligence could be imputed to the defendant. Similarly
an honest belief in the truth of testimony should be a defense to a prosecu-
tion for perjury—a secular crime punishing a consciously false violation of
a religious oath to testify truthfully.\textsuperscript{14}

In some of the crimes in force in those early days a mistake of law
would negative moral blameworthiness. Thus there was, of course, no
moral guilt in taking another's property if the defendant only took what
he believed to be his, and the defense in larceny (or robbery) that the
defendant claimed to own the property taken, dates back at least to
Bracton.\textsuperscript{15} There is an early indication of a defense to house-breaking
based on a belief in a right to make the entry;\textsuperscript{16} this requirement was ap-
parently replaced in a comparatively short time with the more general
"intent to commit a felony within the dwelling house" found in modern
burglary, to which a mistake of law negativing the felonious intent would
be a defense. Thus, where it was felt that a mistake of law did negative
culpability, it was taken care of by requiring a specific intent.

But a defendant's mistake as to the content of the criminal law itself
(i.e., whether certain acts are criminal) would not ordinarily affect his
moral guilt. For the early criminal law appears to have been well inte-
grated with the mores of the time, out of which it arose as "custom." Such
mistakes of law not negativing culpability were therefore left to be
handled by the even earlier principle that mistake was not a defense.
Accordingly, from the earliest cases to the time of Blackstone, no \textit{general}
defense of mistake of law was recognized.\textsuperscript{17}

As bearing on this bit of history, we may also note a statement by
Holmes that "the fact that crimes are also generally sins is one of the
practical justifications for requiring a man to know the criminal law."\textsuperscript{18}
There is the further consideration that even in the canon law, a mistake of

\textsuperscript{14} Indeed, the earliest statement in the English law that "Reum non facit nisi mens rea;"
coming from Leges Henrici Primi, dealt with perjury. See Sayre, op. cit. supra note 12, at 978,
983.

\textsuperscript{15} Sayre, op. cit. supra note 12, at 999.

\textsuperscript{16} Sayre, op. cit. supra note 12, at 1001 n. 105.

\textsuperscript{17} Cases denying the defense in 1231 (imprisonment for breach of fine); 1568 (argument of
counsel in civil case); 1584 (dicta in two civil cases); and 1613 (refusal to take oath of al-
legiance), as well as statements to the same effect from the Doctor and Student Dialogues
published in 1518, and from Sir Matthew Hale in 1680, are cited in Keedy, op. cit. supra
note 1, at 78–80. Keedy also cites a civil case in 1505 in which ignorance of the law appears to
have been an excuse to an action of trespass for carrying off the plaintiff's wife; the defendants
pledged that they were taking her to Westminster, which they erroneously believed was the
place for her to sue for a divorce.

\textsuperscript{18} Holmes, The Common Law 125 (1881).
law was not always a defense to the moral guilt required for ecclesiastical punishment, although it might be a ground for granting an absolution.¹⁹

Prior to the time of Blackstone, the general rule is simply stated as such, without any attempt to assess the real reasons for its existence. In the Doctor and Student Dialogues of 1518, it is stated that “every man is bound to his peril to take knowledge what the law of the realm is.”²⁰ In Brett v. Rigden (a civil case decided in 1568), counsel argued that “it is to be presumed that no subject of this realm is misconusant of the law whereby he is governed.”²¹ In Hale’s Pleas of the Crown, written about 1680, these two statements are put together: “Every person of the age of discretion and compons mentis is bound to know the law, and presumed so to do.”²²

When we come to trace the effect of the English rule on American courts, we must start with the statement in the first American edition of Blackstone’s Commentaries in 1771–72 that defenses to crime may be reduced to the single consideration, “the want or defect of will . . . . so that to constitute a crime against human laws, there must be, first, the vicious will; and secondly, an unlawful act consequent upon such vicious will.”²³ In considering the application of this principle to the type of case under discussion, the learned author goes on to say:

Fifthly, ignorance or mistake is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action: but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so; this is wilful murder. For a mistake in point of law, which every person of

¹⁹ As Sir Edward Coke found out, to his sorrow. “In the year 1598, Sir Edward Coke, then Attorney-General, married the lady Hatton, according to the book of Common Prayer, but without banns or license; and in a private house. Several great men were there present,—as Lord Burleigh, Lord Chancellor Egerton, etc. They all, by their proctor, submitted to the censure of the Archbishop, who granted them an absolution from the excommunication which they had incurred. The act of absolution set forth, that it was granted by reason of penitence, and the act seeming to have been done through ignorance of the law.” Middleton v. Croft, Cunningham 55, 61 (1734), apparently first cited by Mr. Justice Holmes in 5 Am. L. Rev. 717 (1871).

²⁰ Doctor and Student Dialogues II, c. 46.


²² 1 Hale, Pleas of the Crown 42 (1680).

²³ 4 Bl. Comm. 20–21 (1st Am. ed. 1772). See Pound, Criminal Justice in America 82 (1930): “From the beginning Blackstone was the foundation of American legal education, and was treated by bench and bar as an authoritative statement of the English law which we had inherited or received.”
discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law, as it was of the Roman.24

As we have already seen, Blackstone was in error in ascribing the origin of the rule to the Roman law. He offers no other explanation of it in his fourth book on criminal law, but in his first book, dealing with law generally, he lays down the general principle that law is "a rule prescribed" which should be made to commence *in futuro*, and goes on to say:

But when this rule is in the usual manner notified, or prescribed, it is then the subject’s business to be thoroughly acquainted therewith; for if ignorance, of what he might know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.25

But when the rule was first adopted in American criminal cases,26 it was stated in the same way that Blackstone phrased it in his fourth book, as an absolute presumption of knowledge of the law, rather than as a means of law enforcement in the terms last quoted above.

It is easy to show that such a presumption is now indefensible as a statement of fact, even though it may have been substantially true in the very early days of the criminal law. Today it is obvious that on many points, no one can know the law, and of course no one does know the law on all points.27 Judge Stephen, writing in 1883, called the rule that a mistake of law is no defense "a doctrine which is sometimes stated in the form of a maxim that everyone is conclusively presumed to know the law—a statement which to my mind resembles a forged release to a forged bond."28 The present justification for the rule, if it has any, must be found elsewhere than in this traditional statement of the presumption.29

**THE MODERN JUSTIFICATION FOR THE RULE**

There are two pragmatic bases which have been advanced to justify the retention of the rule in modern times. Austin felt that "if ignorance of law were admitted as a ground of exemption, the Courts would be involved in questions which were scarcely possible to solve, and which would render the administration of justice next to impracticable."30 Were a mis-

24 4 Bl. Comm. 27 (1st Am. ed. 1772).
25 1 Bl. Comm. 46 (1st Am. ed. 1771).
27 A number of eloquent illustrations of this point are collected in Ryan v. State, 104 Ga. 78, 82, 30 S.E. 678, 680 (1898).
28 2 Stephen, op. cit. supra note 7.
29 The true meaning of this presumption of knowledge of the law is discussed in Perkins, op. cit. supra note 7, at 37–38.
30 1 Austin, Jurisprudence 498 (1869).
take of law negating culpability to be admitted as a defense, the courts would have to determine, first, whether the party was actually ignorant of the law, and second, whether his ignorance was inevitable or was due to his fault. These questions Austin regards as so insoluble and interminable that "the administration of justice would be arrested" if they had to be litigated.31

Mr. Justice Holmes, whose alternative theory of the basis of the general rule is discussed later, believed that this problem of difficulty of proof could be solved "by throwing the burden of proving ignorance on the law-breaker."32 It may be added that in crimes requiring specific intent, ignorance of law has been admitted as a defense for centuries, and courts and juries do not seem to have any more trouble with this type of issue than they do with such problems of fact as the identity of criminals.

But Austin's point is not to be disposed of so simply as this. Granted that we can, without too much difficulty, probe the defendant's belief on questions of law, how shall we determine whether a belief that his act was not illegal was inevitable or was due to his own fault? Suppose he knew that his acts were wrong according to the mores of the time (which were based on the law then in force), but he could prove an excuse for his personal ignorance of the law itself? Or suppose he claimed to be ignorant of both law and mores?

If the law were to give any general defense of ignorance of law, it ought to place on the defendant the burden of showing (1) that he did not know that his act was criminal under the law; (2) that if it was morally wrong according to the mores, he did not know that either; and (3) that both beliefs were reasonable on his part. These questions are even more complicated than those raised by the defenses of insanity and infancy, where the justification for the defendant's failure to know of the law and mores is not in issue, being assumed to be due to mental disease or youth. Even where, as in England and in many states, the burden of proving the defense of insanity is placed upon the defendant, the resolution of the question whether the defendant "did not know he was doing what was wrong"33 is difficult for juries. Indeed the entire handling of the defense of insanity is one of the weakest points of the criminal law. The unsatisfactory working of the similar test for infants has been one of the factors leading to the widespread adoption of the juvenile court system.

We may thus conclude that Austin's point is well-taken so far as the de-

31 Ibid., at 500. 32 Holmes, The Common Law 48 (1881).
33 This is the widely used insanity test from M'Naghten's Case, 10 Cl. & Fin. 200, 210 (H.L. 1843).
termination of the defendant's reasonable beliefs about the law are based on his knowledge of the social mores of the community or on his excuses for lack of such knowledge. This is certainly one issue which no court will willingly permit to be litigated where the defendant is not suffering from mental disease or defect of reason and is of full age.

The theory suggested by Holmes as underlying the general rule is that "to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales." If ignorance of the law were a defense, it would be difficult for the state to bring home to its citizens knowledge of new regulations affecting their rights and duties, or of new crimes, and thus to establish the new rules in social mores of the community. Changes in legal rules may often lag behind developing mores, but the criminal law plays a much larger part in shaping them than many writers have been willing to admit.

This problem of educating the community by law is a practical one. A conviction for doing that which violates a new law, although not regarded as wrong in the community, is a matter of considerable interest and does a great deal to educate the community; an acquittal for violation of such a law, on the ground of a mistake of law, would scarcely cause a ripple in the current of community thought. As de Saint-Exupéry has his airline manager say, to justify cutting pilots' punctuality bonuses whenever their planes started late, even where it was due to the weather and was not their fault: "If you only punish men enough, the weather will improve." It is a hard doctrine, but an effective one.

But there is also one limitation which we feel should be grafted upon


35 The defects of the sociological positivists in this respect are pointed out forcefully in J. Hall, op. cit. supra note 1, at 579. See Fuller, Law in Quest of Itself 135–38 (1940), for a general discussion of the problem of the influence of law on morality. Professor Fuller traces the modern development of this idea to a Swedish school of thought under the leadership of Alex Hägerström, citing Olivecrona, Law as Fact (1939), as its most recent statement.

36 This is well illustrated by the result of such a decision in Texas. A statute required the ear-marking of all hogs, sheep, and goats before they were six months old. In Debs v. State, 43 Tex. 650 (1875), the court held that one who took a yearling hog, which had not been marked by its owner as the statute required, believing that he had a right to do so, was not guilty of larceny. Eleven years later the court was confronted with an offer of proof that there had grown up a custom that it was proper to take unmarked yearling hogs, and in Lawrence v. State, 20 Tex. App. 536 (1886) it felt obliged to exclude the evidence of the custom as a defense in a larceny prosecution, resting its decision on the somewhat shaky ground that no one could honestly believe that the custom was legal.

37 De Saint-Exupéry, Night Flight 37 (1932).
Holmes’ theory. Punishment of a given person “to make men know and obey” has two facets—first, punishment of the defendant as a member of the community, in order to adjust the mores of the community to the new or forgotten rule, and second, punishment of the defendant as an individual. If some reason appears in a particular case which shows that it is unfair, unwise, and unnecessary to punish all members of the community who violate an unknown law, the defendant, as a member of the community, should be excused. We must also recognize the possibility that the defendant should be entitled to the defense if he can show that it is unfair, unwise, and unnecessary to punish him, and that giving him this defense will not interfere with the enforcement of the law or with the adjustment of the mores in the community at large. Insanity and infancy, as a result of which the defendant does not know either the law or the mores, are examples of such a personal defense.

The theories of Austin and Holmes in support of the general rule that mistake of law is not a defense are by no means inconsistent. Professor Perkins has called them “the two pillars which support the maxim.” But in applying them, we must carefully note their limitations, discussed above, and where neither reason requires a conviction, the defense should be allowed. Parrot-like repetition of the ancient rule denying such a defense is no substitute for re-examination of a modern problem in the light of modern conditions.

Steering our proposed defense between the Scylla of Austin’s difficulty of proving the defendant’s lack of knowledge of the mores, and evaluating his excuse therefor, and the Charybdis of Holmes’ determination “to make men know and obey,” our course must have certain characteristics.

Where the defense is based upon some excuse available to the community, including the defendant, for not incorporating the legal rules into the mores, it should suffice if we can find either clear-cut impossibility of anticipating the legal rule, or at least conduct of the legislature, courts, or executive officers of the state itself which might have misled the community as to the legal rule. Nothing short of this can properly overcome the need of punishment to make the legal rule effective to mould the mores, or in any event to compel obedience to the law, under Holmes’ theory.

But it should be immaterial whether the conduct, thus reasonably believed by the community to be lawful, is proscribed by the mores. The community is entitled by fundamental principles of Anglo-American jurisprudence to an opportunity to know whether or not there are legal sanc-

38 Perkins, op. cit. supra note 1, at 44.
tions behind its mores, before it is fair to punish its members with such sanctions.  

If the defense is to be based upon an excuse personal to the defendant, there must be clear, objective evidence that the defendant did not know his conduct was forbidden by the law, and his excuse for this lack of knowledge must be one which objectively negatives any possible fault on his part, under Austin's requirement. In other words, his excuse must be of such a nature that it is not tied up with the question of the mores. Further, under Holmes' test we must find that giving him a personal defense will not relax the influence of the law generally on the community.  

A mistake of law not giving an absolute defense may nevertheless be a ground for mitigating the punishment. Unwitting violation of the law does not show the same prospect of recidivism or moral guilt on the part of the defendant as if he had deliberately committed acts which he knew were criminal, thus flouting the authority of the state and showing a need, not merely of education as to the law and mores, but of moral reformation. In the decisions it is not uncommon to find instances where reduced or nominal penalties are imposed upon a defendant who acted under a mistake of law, and there are a few cases in which the appellate court itself recommended a pardon. Punishment in this type of case is usually justified solely on the deterrent theory, and although deterrent punishments tend toward severity rather than leniency, this is one instance where the establishment and vindication of the law is all that is needed, and a heavy penalty is out of place. However, the existence of such a dispensing power in the courts should not lead them to deny the defense where they should properly, on a sound analysis of the problem, have held that the defendant was legally, as well as morally, innocent.  

Where the legal rule is clear and there is an opportunity to learn of it, we admit that a defendant is culpable if he knows that his act is proscribed by the mores, although he may not know that it is a crime. This is recognized in the insanity test; see M'Naghten's Case, 10 Cl. & Fin. 200, 210 (H.L. 1843), in which Tindal, C. J., says: "If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; . . . ." But where the law was not available to the community, the principle of "nulla poena sine lege" comes into play to protect even such defendants. See infra, p. 655.  

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40 Coffey v. State, 38 Okla. Crim. 91, 258 Pac. 923 (1927) (fifteen year sentence for peace officer killing a suspected misdemeanor reduced to ten years); Rex v. Lynn, 2 Term. Rep. 733, 2 Leach 560 (K.B. 1788) (fine of only five marks for taking a corpse from a cemetery for dissection). See cases cited in note 42 infra, where a pardon was recommended.  

41 L. Hall, Reduction of Criminal Sentences on Appeal, 37 Col. L. Rev. 521, 533-34, 549 (1937).
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The cases in which a pardon has been recommended are usually cases in which, on our analysis, an acquittal should have been ordered.\(^4\)

**THE GENERAL RULE: MISTAKE OF LAW IS NO DEFENSE WHERE A SPECIFIC INTENT IS NOT REQUIRED**

Before discussing the cases in which misleading conduct attributable to the state is the basis of a defense of mistake of law, some other suggested exceptions to the general rule may conveniently be considered at this point.

I. **SHOULD EVERY REASONABLE MISTAKE OF LAW BE A DEFENSE?**

Professor Keedy has advocated giving a defense of mistake of law wherever a mistake of fact would be a defense. He writes:

When . . . . a person does an act under an erroneous idea of a situation reached by applying law to facts, if the act done would not be criminal provided the situation were as he believed it, the defendant should have a good defense. He is in the same position, so far as his state of mind is concerned, as though the situation regarding which he was mistaken were one solely of fact. By applying the test which governs mistake of fact the defendant in the above case does not have the criminal mind.\(^4\)

With such a person Professor Keedy contrasts the defendant who “does an act without giving any attention to the law as such”; to him he would give no defense.\(^4\) Following the mistake of fact analogy further, Professor Keedy would give no defense based on mistake of law unless the mistake were reasonable.\(^4\)

But there are essential differences between mistake of fact and mistake of law which we feel are not sufficiently taken account of in this analysis. Few laws are passed, or prosecutions instituted, in order to bring home to a defendant true knowledge on a question of fact, or to change unsound mores based on factual premises.\(^4\) But as Holmes has pointed out, the necessity of changing the mores and of influencing the future conduct of others keeps out the defense. Further, mistakes of fact do not present the same difficulties of proof as would be present if reasonable mistake of law were to be a defense.

\(^{42}\) See Rex v. Bailey, Russ. & Ry. 1 (C.C.R. 1800), discussed infra, p. 657; Green v. State, 58 Ala. 190 (1877); and Hoover v. State, 59 Ala. 57 (1877), discussed infra, p. 670.

\(^{43}\) Keedy, Ignorance and Mistake in the Criminal Law, 22 Harv. L. Rev. 75, 91 (1908).

\(^{44}\) Ibid., at 90.

\(^{45}\) Ibid., at 95.

\(^{46}\) Perhaps the belief in the existence of supernatural spirits among the Indians, as in Reg. v. Machekequonabe, 28 Ont. Rep. 309 (1897), or as to the sufficiency of religious treatment for disease, as in Commonwealth v. Breth, 44 Pa. Co. Ct. 56 (1913), are examples of such “unsound” mores found in at least a portion of the community. In both cases the defendants were convicted.
II. SHOULD ADVICE OF PRIVATE COUNSEL GIVE A DEFENSE?

Another exception which has been put forward as a defense is found where the defendant has consulted private counsel and has been advised that his proposed acts are legal. Professor Perkins favors giving a defense under these circumstances, limited to advice from a "reputable attorney," where the "belief in the legality of the conduct is in good faith," and "the thing done is not obviously anti-social in character." Aside from the difficulty of determining in borderline cases what acts are "obviously anti-social," his point that the proof of the defendant's mistake of law would not present "questions incapable of solution" where he has consulted an attorney, appears to be well-founded.

It is not entirely clear whether the emphasis on reasonable reliance in the defense here proposed by Professor Perkins is upon the good faith and reasonableness of the defendant, or of the attorney whom he has consulted, or both. Apparently he would view the question from the standpoint of the defendant, a layman. This means that legal advice that was clearly unreasonable under the law as it then stood would give a defense.

The cases uniformly hold that no defense should be given and it is submitted that they are correctly decided. It would be unwise social policy to reward the clients of lawyers who gave favorable but unreasonable advice, at the expense of others in the community who were given unfavorable but correct opinions on the law. Lawyers are under enough temptations toward dishonesty already, without giving them the power to grant indulgences, for a fee, in criminal cases. Nor is the private attorney an "officer of the state" for whose advice the state is responsible, whatever may be his status as an "officer of the court" for other purposes. Different

47 Perkins, op. cit. supra note 1, at 42-43. One of the cases cited by Professor Perkins as one of the "exceptions at extreme points" in favor of his position appears to involve a statute in which the specific intent to register unlawfully, required by the crime, was negatived by the defendant's mistaken reliance upon legal advice from the registration officers. See State v. White, 237 Mo. 208, 140 S.W. 896 (1911) (under statute punishing "fraudulent registration").

48 In addition to the cases cited by Perkins, op. cit. supra note 1, at 42-43, see Sinclair v. United States, 279 U.S. 265 (1929); People v. McCalla, 63 Cal. App. 783, 260 Pac. 436 (1923); State v. Huff, 89 Me. 251, 36 Atl. 1000 (1897); Forwood v. State, 49 Md. 331 (1878); State v. Marsh, 36 N.H. 196 (1880); Hamilton v. People, 57 Barb. (N.Y.) 625 (1870); Green v. Griffin, 95 N.C. 50 (1886) (disobedience of injunction on advice of counsel that it had been vacated by an appeal); State v. Reeder, 36 S.C. 497, 15 S.E. 544 (1892). Of course, if the advice of the attorney is as to a matter of fact rather than of law, reliance upon such advice would ordinarily constitute a reasonable mistake of fact, and is a defense to most crimes. People v. Flumerfelt, 35 Cal. App. (2d) 495, 96 P. (2d) 190 (1939). Under any view, if the defendant's personal belief in the legality of his conduct was unreasonable, even though he had consulted counsel, he would be guilty. See Ward v. State, 42 Tex. Crim. 435, 60 S.W. 757 (1901); Crouch v. State, 39 Tex. Crim. 145, 45 S.W. 578 (1898).
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considerations arise when some officer of the state has given the erroneous advice, and a defense may then be justified.

If Professor Perkins would require that the advice given by the attorney must be reasonable, the advice would be erroneous only if there were an ambiguity in the existing law. In cases where the state is fairly to be held responsible for this ambiguity, we shall see that the defense, if allowed, is granted even though the defendant has not consulted counsel or otherwise personally relied on the misleading conduct of the state. If it is felt that the state cannot afford to permit the defense, whether or not the defendant has consulted counsel becomes immaterial, for the considerations of public policy which require that the defense be denied do not depend upon the reliance or non-reliance of the particular defendant.

III. SHOULD A CUSTOM TO ACT AS DEFENDANT DID GIVE HIM A DEFENSE?

Numerous defendants have urged that if they followed a course of conduct customary in the community (i.e., not only not proscribed, but quite possibly encouraged, by the mores), they should have a defense if it turns out that their conduct was illegal. The defense is commonly denied, unless a specific intent is required for guilt, and even in such crimes, the defense is not available unless the defendant can prove that he believed that the custom gave him a legal right thus to act. The rule is thus the same as where a religious belief that it is not wrong to do the forbidden act is relied upon by a defendant who is not in a position to avail himself of the insanity defense. This is one of the clearest cases for denying the defense, since the urgent need for moulding the mores of the community or of the religious sect is apparent from the proof relied upon as a basis for the defense.

49 Schuster v. State, 48 Ala. 199 (1872); Everhart v. People, 54 Colo. 272, 130 Pac. 1076 (1913); Bankus v. State, 4 Ind. 114 (1853); Lincoln v. Shaw, 17 Mass. 410 (1821); Hickman v. State, 64 Tex. Crim. 161, 141 S.W. 973 (1911).


52 No defense is given in any of these cases. Reynolds v. United States, 98 U.S. 145 (1878); Commonwealth v. Has, 122 Mass. 40 (1877); State v. White, 64 N.H. 48, 5 Atl. 828 (1886); Copeland v. Donovan, 124 Misc. 553, 208 N.Y. Supp. 765 (Erie Co. Ct. 1925); Reg. v. Price, 3 Per. & Dav. 421, 11 Ad. & El. 727, 9 L.J. (M.C.) (N.S.) 49, 4 Jur. 291 (1840).

53 Indeed, where the custom is sufficiently outrageous, it has been held that it is not available as a defense even in a crime requiring a specific intent. In Lawrence v. State, 20 Tex. App. 536 (1886), two Union sympathizers had had their property taken by Confederate irregulars,
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THE FIRST EXCEPTION: WHEN LEGISLATION MAY HAVE LED THE COMMUNITY OR THE DEFENDANT TO BELIEVE (ERRONEOUSLY) THAT CERTAIN CONDUCT IS NOT ILLEGAL

For many years the legislature has been the most prolific, and in many states the only, source of new penal law. When a statute is passed there is not even the pretense, which is found in most judicial decisions broadening the common law, that the new legislation should flow out of premises already established by judicial decision or earlier legislation. Many statutes are frankly passed to change or eliminate conditions which are not proscribed by the existing social mores. This is not to say that legislation which is unable to secure such acceptance after its passage can be wholly effective, or can, as Professor Jerome Hall has put it, be an "actual criminal law." But on the other hand, it is safe to say that most new laws can never become integrated with the mores, if no attempt is ever made to enforce them.

Because of this very nature of criminal legislation, the problem of the wisdom of granting a defense of mistake of law where there is a variance between law and mores is acute, and the resolution of this problem is correspondingly illuminating.

I. EFFECT OF A STATUE NOT ENACTED UNTIL AFTER THE ALLEGED CRIME WAS COMMITTED

The power to make its legislation, even criminal legislation, operate retroactively, is one of the inherent powers of any legislature, unless limited by constitutional provisions or abjured by the mores of the legislators themselves. The German Reichstag has used this power. For centuries it was the rule in England that an act of Parliament, passed and approved during a session, took effect as of the beginning of the session unless the act itself provided a later date. Even though it was not until 1793 that a general statute abolishing this rule was passed, there are almost no recorded prosecutions for acts done prior to the date such bills

and had retaliated by taking other property from Confederate sympathizers. Their testimony that they and the rest of the community believed, under the rules of war, that such retaliation was not larceny, was held to present no defense, insofar as their belief was based upon the custom. Perhaps much the same considerations underlie the somewhat similar decision in State v. Welch, 73 Mo. 284 (1880).

54 J. Hall, op. cit supra note 1, at 577.
55 See J. Hall, Nulla Poena Sine Lege, 47 Yale L.J. 165, 170 n. 35, 175 n. 44 (1937).
57 33 Geo. III, c. 13 (1793).
were signed, although there are a few instances of retroactive bills of attainder applying to specific persons.

Our analysis indicates that in cases of ex post facto penal legislation there can be no justification for not giving the defense of a mistake of law. There is no way by which future legislation may be forecast, and if the penal statute was not passed until after the acts penalized were committed, there can be no possible basis for punishing the community for not performing a task it had never been asked to do—proscribing such conduct in its mores. Nor is there any problem of proof, for the facts all appear in the public records of the state.

Even if the conduct was in fact forbidden by the mores in existence at the time the act was done, the community has never been warned that there would be penal consequences for violating them. The concept of fairness summarized in the phrase *nulla poena sine lege* comprehends not merely knowledge (or the opportunity to acquire knowledge) that the act is against the mores, but also similar knowledge (or opportunity to acquire knowledge) that a violation of the mores will be punished. Were liability to depend on the actual state of the mores of the time, many of the difficulties of proof against which Austin warned would be present.

These facts are so obvious that in the United States, by Sections 9 and 10 of Article I of the Federal Constitution, neither the Congress nor the state legislatures are permitted to pass ex post facto laws. The need of a defense analogous to that of mistake of law is thus obviated by making such a law void. It is not necessary to prove reliance by the defendant or by the community upon the fact that there was no law in effect at the time the defendant acted; for instance, if at the time he acted his conduct was thought illegal because violative of a statute later determined to be unconstitutional, no subsequent enactment could constitutionally impose punishment, although the later statute were passed in such form as to be constitutional as applied to future acts.

The question was raised in *Rex v. Thurston*, 1 Lev. *91* (K.B. 1663), where the defendant's criminal liability depended upon the question whether an act of Parliament validating certain proceedings related back to the first day of the session. The court declined to decide the case when it was argued, but the fact that the defendant was not released until he had been pardoned seemed to indicate to the reporter that "the opinion of the court was against him," i.e., that the statute did relate back. A similar question might have been raised as to the effect of a "declaratory act," but there is no evidence that any such prosecutions ever were instituted.

A number of such instances are collected in *Calder v. Bull*, 3 Dall. (U.S.) 385, 386, 389 (1798).

See J. Hall, op. cit. supra note 55, at 170.

II. EFFECT OF A STATUTE, PROCLAMATION OR REGULATION WHOSE EXISTENCE WAS NOT KNOWN TO THE DEFENDANT AT THE TIME THE ALLEGED CRIME WAS COMMITTED

a) Legislation.—Where the legislature has passed a valid statute, of which both the defendant and the community might have secured knowledge, had they but kept track of the legislature’s activities, or checked over the older statutes still in force, there is also no ground of defense, for the passage of the statute into the mores would be hindered by allowing the defense. Where the acts complained of occurred soon after the passage of the act,62 or where the usual formalities of official publication have not been fully complied with,63 the courts have somewhat reluctantly affirmed convictions, but where there is neither factor present, there is no hesitation in enforcing the law.64 The same rule is in effect as to civil statutes.65

A similar result is found where the defendant is a stranger who offers to prove that the law in his state of residence would not have penalized his conduct, and that he did not know that the law of the forum was otherwise. Liability is clear under the cases,66 even where the defendant was forcibly brought within the jurisdiction,67 or had sent his partner there to do business while he remained in another jurisdiction.68 The defendant, by acting within the jurisdiction, becomes a member of the community and as such may be justly held liable, for the purpose of enforcing uniform standards of conduct within the jurisdiction. After all, no impossible

64 Dickens v. State, 30 Ga. 383 (1850); Winehart v. State, 6 Ind. 30 (1854); Forwood v. State, 49 Md. 537 (1878); State v. Wilforth, 74 Mo. 528 (1881); State v. Welch, 73 Mo. 284 (1880); Townsend v. Commercial Travelers Mutual, 188 App. Div. 370, 177 N.Y. Supp. 68 (1919); State v. McBrayer, 98 N.C. 619, 2 S.E. 755 (1887); Pappas v. State, 135 Tenn. 499, 188 S.W. 52 (1916); Debardeleben v. State, 99 Tenn. 649, 42 S.W. 684 (1897); Atkins v. State, 95 Tenn. 474, 32 S.W. 391 (1895); McCallister v. State, 55 Tex. Crim. 393, 116 S.W. 1154 (1909); Reg. v. Crawshaw, 30 L.J. (m.c.) (N.S.) 58 (C.C.R. 1860).
65 Heard v. Heard, 8 Ga. 380 (1850); Webster v. Sanborn, 47 Me. 471 (1859).
66 Commonwealth v. O’Brien, 172 Mass. 248, 52 N.E. 77 (1898); Reg. v. Lopez, Dears. & B. 525 (C.C.R. 1858); In re Barronet, 1 E. & B. 1 (Q.B. 1852); Rex v. Esop, 7 C. & P. 456 (C.C.C. 1856). In Chaplin v. State, 7 Tex. App. 87 (1879), a case involving ignorance of a governor’s proclamation reinstating a statute, the general rule was applied even though the defendant, a stranger, had asked a member of the local community about the law in question, and had been informed that it was not in effect.
task is usually asked of him, and any other rule would open the doors to give the more liberal (or rudimentary) laws of the defendant's state a limited extra-territorial effect in other states or countries to which the defendant might come, or be brought, or decide to do business.

But the reasons behind the general rule do not require a conviction where the defendant can prove by clear objective evidence that neither he, nor any member of the community in his part of the world, could possibly have learned of the enactment of the new law under which he was being prosecuted. With the coming of the radio, such cases can hardly arise today, but the older decisions are of interest for the light they shed on the fundamental problem.

The first case raising this problem is *Rex v. Bailey,* which was decided in England in 1800. A statute had been approved in London on May 10, 1799, and it was enforced to convict the defendant, in an English ship off the coast of Africa, who maliciously shot at another English ship on June 27 of the same year. The jury was told that the impossibility of communicating the new law to the defendant before he acted would constitute no defense. It is of course true that his act was immoral and forbidden by English mores, but this is not mentioned as a ground of decision. That the general "badness" of the defendant was immaterial is also shown by the fact that most of the judges recommended a pardon, which the defendant was later given. A later English dictum by the Court of Appeal appears to impose a serious limitation on the rule of the *Bailey* case, by giving a defense until the defendant has had a reasonable time to learn of the new law, where a continuous course of proceedings (carrying natives on a cruise without a license) was made unlawful after its commencement.

Two early American decisions in the federal courts reach opposite results. A defense was given in *The Cotton Planter,* which involved a forfeiture prosecution for violation of an embargo act which was approved January 9, 1808, but which was unknown in St. Mary's, Georgia, when the defendant sailed on January 18, 1808, from that port. There was a practice of posting federal laws in ports when received, and the court reasoned that since Congress had not indicated the precise date when the statute was to go into effect, the court could supply the effective date, holding that "such

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69 It is of course permissible to split the community up geographically, as here, or in any other way, in order to see what effect the law could have had on its mores. See J. Hall, op. cit. supra note 1, at 577 n. 88.

70 Russ. & Ry. 1 (C.C.R. 1800).


laws should begin to operate in the different districts only from the times they are respectively received." Technician, a mistake of law was not involved, since the law was not in effect under the decision. However, the strong language of the court, and the policy underlying its opinion, suggest that the court, if forced to admit that the law was in effect from the date of its passage, would nevertheless have given the defendant his defense. The decision is to be compared with the contemporaneous circuit court decision by Mr. Justice Story in The Ann, which enforced the forfeiture upon the basis that the statute took effect at once.

While Mr. Justice Story's opinion is sound as to the effective date of such a statute, we believe that it would have been better policy to allow the mistake of law as a defense. There is no real problem of proof, and enforcement of the statute against those too far off to have heard of it is as truly ex post facto in substance as to enforce it retroactively. Time is merely the fourth dimension; it is not the only one. The same considerations apply to these cases.

A much more difficult problem is presented where the later statute amends or supersedes an earlier one, and the defendant acts before he could have heard of the later legislation. If criminality is based on a violation of the earlier statute, which was repealed before the defendant acted, he should be released, although the problem has apparently not arisen. Or if the second law merely supersedes the earlier legislation, without appreciably changing the penalty, there is no real unfairness in prosecuting the defendant under it, where he had an opportunity to learn of the prior law.

But what if the later act amends the prior law by increasing the penalty? In the one early case presenting this question, the court enforced a customs forfeiture provided by the later act, pointing out that the de-

22 Ibid., at 621.

24 "A more abject state of slavery cannot easily be conceived, than that the legislature should have the power of passing laws inflicting the highest penalties, without taking any measure to make them known to those whose property or lives may be affected by them. It is not only necessary, therefore, in a country governed by laws, that they be passed by the supreme or legislative power, but that they be notified to the people who are expected to obey them." Ibid., at 621. "... the law never compels a man to do an impossibility.... Why then should he be compelled here to do as great an impossibility, that of conforming his conduct to a rule which he had no opportunity of being acquainted with?" Ibid., at 622.


26 So held in Bank of Mobile v. Murphy, 8 Ala. 100 (1845).

27 This was apparently true in The Ann, Fed. Cas. No. 397 (C.C. Mass. 1812), although Mr. Justice Story was not content to rest his decision on this ground alone.
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Defendant knew he was acting illegally under the prior law.\footnote{United States v. Fourteen Packages of Pins, Fed. Cas. No. 15,151 (D.C. Pa. 1832).} Although a retroactive act increasing the penalty would unquestionably be invalid as an ex post facto law,\footnote{Calder v. Bull, 3 Dall. (U.S.) 385 (1798).} there is here no subsequent legislation which brings the case under the constitutional prohibition, and our analysis does not require that one who has acted in violation of the earlier law which he could have known to be in existence, should be given a defense. The protection of this defense is for those who conform to the law, to the extent that they could have known of it, and not for those who violate it, gambling on the extent of the penalty.

The fairest way to deal with the entire problem of ignorance of the passage of a statute is to provide that a reasonable period shall intervene between the enactment of a statute and its taking effect, and a number of states have done so, either by constitutional provisions applying to statutes subject to a referendum petition\footnote{Mass. Const., art. 48 (90 days); Ohio Const., art 2, § 1(c) (90 days).} or by a general construction statute.\footnote{Mass. Gen. Laws (1932) c. 4, § 2 (30 days).} But even under such provisions, emergency legislation will take effect at once.

b) Executive proclamations.—The same rule should be applied where the statute under which the defendant is being prosecuted expressly provides that it shall come into effect only under certain conditions and after a proclamation by the chief executive officer of the state that the conditions have been fulfilled. Such proclamations are public acts and are matters of record, and it is just as much the policy of the law "to make men know and obey" the legislation made effective by them, as that made effective on approval of the executive after passage by the legislature. The only case we have found which raised the question held that ignorance of such a proclamation was not a defense.\footnote{Chaplin v. State, 7 Tex. App. 87 (1879).}

It must be admitted that proclamations are not so widely publicized as the fact of passage and executive approval of legislation, nor are they so commonly printed, but proclamations do also stem from a single source and can usually be located. If it were actually proved to have been physically impossible for the defendant to have known of the proclamation, he should be acquitted, according to the analysis here set forth. And in any event, if executive proclamations declaring statutes to be effective are to have real effect in moulding the mores of the community, they should be permanently collected and printed in such form as to be available for public distribution. The Federal Register fills a very real need,
and some similar publication ought to be developed for use in the many
states which now provide no such machinery.3

c) Local legislation.—Should a defendant ignorant that his act is un-
lawful under a city charter or a city or town ordinance be given a de-
fense, if his mistake was due to the fact that the provisions thereof were
not available for general distribution, and were in fact unknown to most
members of the community? Such local legislation, or legislation of local
bodies, is rarely given much publicity, and in many cases is not even
printed, except at rare intervals.

If it is physically impossible for the defendant to learn of such pro-
visions, he should be given a defense. But where this is not true, it would
be difficult to litigate the question of the validity of his excuse for his
ignorance. Perhaps in such a case it would be better to follow the general
rule, and give no defense. One court has denied the defense where no such
impossibility was shown to exist.8

But that case involved a conviction for murder while resisting legal arrest, and the fact that the defendant
did not know that the city charter gave the arresting officer that power
could constitute no defense to a murder prosecution, since it is immaterial
in this crime whether the defendant knew the arrest to be legal or not.

d) Rules of commissions.—The tremendous growth of regulation by ad-
ministrative bodies, both state and federal, with rule-making powers, has
left the citizen faced with a vast mass of rules promulgated by various
commissions, and covering many phases of business, which have the force
of law and for the violation of which criminal penalties are often imposed
by statute. Except as to federal regulations, printed in the Federal Regis-
ter, it is not, we believe, an exaggeration to say that it is literally im-
possible for a citizen to assemble all the relevant rules of administrative
bodies which might apply to his daily conduct at any given time. A num-
ber of commissions may have some jurisdiction over him, whereas laws
come only from the legislature or inferior legislative bodies with definite
territorial jurisdiction, and proclamations only from the chief executive.
It appears fair to say that many people believe it is the duty of the ad-
ministrative commission to bring home to them its rulings, and that there
is not the same need for such commissions to have the legislature’s power
“to make men know and obey” at their peril.

83 In Griswold, Government in Ignorance of the Law—A Plea for Better Publication of
Executive Legislation, 48 Harv. L. Rev. 198 (1934), the chaotic condition of the federal
records was reviewed, and a bill recommended which led to the establishment of the Federal
Register. Conditions in many states are bad enough, in spite of the smaller volume of material
and its lesser importance in most cases.

84 State v. Williams, 36 S.C. 493, 15 S.E. 554 (1892).
The authorities on this question are meager. One Arizona court, in a case in which the defendant argued that a statute penalizing non-compliance with a wage scale to be fixed by the state highway commission was unconstitutional for vagueness, because he might be convicted if the wage scale was changed without his notice, stated:

... if ... such wages should be changed without his knowledge, and he should be arrested for not complying with the change, he could defend on that ground. It would be a question of fact whether he knew of the change or not. It is true that the mere doing of an act forbidden by statute in some kinds of cases makes out the crime, but, where the criminality of the act is made to depend upon a rule or order of the state highway commission or other agency, the person charged with its violation should be permitted to show that he did not knowingly do so.85

But in a later case the same court interpreted its earlier language as giving the defense of ignorance of the adoption of a rule of the commission only if the defendant, "although exercising care, did not know of such rule or change";86 in other words, the mistake must be reasonable and not merely honest.

It is also interesting to note that the Securities Exchange Act of 1934 provides for a mitigated penalty for a defendant who "willfully violates any rule or regulation thereunder ... if he proves that he had no knowledge of such rule or regulation."87 In the Public Utility Holding Company Act of 193588 and the Investment Company Act of 1940,89 an absolute defense to both fine and imprisonment is given if such lack of knowledge is proved by the defendant. Oddly enough, however, neither mitigation nor defense is found in the original Securities Act of 193390 or in the more recent Trust Indenture Act of 1939.91

86 Borderland Construction Co. v. State, 49 Ariz. 523, 68 P. (2d) 207 (1937). The court went on to hold that the defendant’s mistake as to whether a given workman was a “blacksmith’s assistant” or an “unskilled laborer,” where it knew the wage scale for each which the commission has established, was no defense under any circumstances, but this mistake was as to interpretation of the regulation only, for the defendant did know the text of the regulations then in force.
A defense of reasonable ignorance of the regulations of state and federal commissions seems to be clearly justified, in spite of the difficulties of proof. Factors such as the nature of the regulation, whether the defendant ought to have known that the matter in question might be the subject of regulation, the initial publicity given to the making of the regulation in question, whether the text of the regulation was easily available, and whether the defendant is charged with violation of an original regulation or of a recent amendment which he had no reason to anticipate, are all material.\textsuperscript{22} Sound discretion on the part of the prosecuting officials is of course a considerable protection to the morally innocent, but many of the crimes involved here carry serious penalties, as distinguished from the petty offences commonly termed \textit{mala prohibita} as to which society can better afford to let administrative discretion be the only safeguard.\textsuperscript{23}

\textbf{III. EFFECT OF A STATUTE WHOSE CONSTITUTIONALITY IS NOT JUDICIALLY DETERMINED UNTIL AFTER THE ALLEGED CRIME WAS COMMITTED}

We are here dealing with the attitude which the defendant and the rest of the community should adopt toward statutes whose constitutionality had not been passed upon by the courts at the time the defendant committed the acts for which he is criminally prosecuted. The extent to which a defendant will be protected by a court decision in his favor which is later overruled, or is charged with notice of a court decision adverse to him of which he had no actual knowledge, is reserved for discussion later in this article.

\textit{a) Where a statute which purports to legalize the defendant's conduct is later held to be unconstitutional.—}Citations are unnecessary for the proposition that provisions in a statute which it is beyond the constitutional power of the legislature to enact are void. But where these unconstitutional provisions purport to legalize conduct (which would have been criminal under the earlier law) we ought nevertheless to give the defendant a defense in a prosecution for violation of the earlier law. Such a defense should not necessarily rest on estoppel, and the defendant ought not to be required to prove knowledge of the later law or his express reliance on its constitutionality.

The true reason why the defense should be given is because the policy of the legislature "to make men know and obey" its laws is advanced by the establishment of the rule that anyone who does act in accordance with its legislation will be protected against criminal prosecution. Thus

\textsuperscript{22} The completion of the Code of Federal Regulations last year may make it unreasonable for a person who knows that there are regulations of federal commissions affecting him to be ignorant of such regulations which have been printed therein.

\textsuperscript{23} See J. Hall, op. cit. supra note 1, at 568.
only can the social mores be encouraged to develop a tenet that the social mores themselves should follow legislation. A prosecution for doing the very thing which we wish to encourage the community to do will only hinder the attainment of the desired larger end, by providing a real basis for a feeling that legislation is unjust and arbitrary. It should also be noted that the problem of proof is simple, for the evidence lies in legislative and judicial records.

The problem has arisen in its clearest form where the later statute purported to repeal a law, and after the repealing statute has been held unconstitutional, the defendant has been prosecuted under the earlier law. There is a wide split of authority as to whether or not a defense will be granted. In a court which does not recognize this defense, another more cumbersome method of securing the acquittal of such a defendant is available if the repealing section of the new law is separable and can be upheld, although the substituted provisions of the repealing act are held unconstitutional. But this device, involving the abrogation of both the earlier law and its unconstitutional substitute, thus leaving the subject unregulated by legislation, would be unnecessary if the courts frankly recognized the nature of the problem.

The question has also arisen in other forms. The New Jersey court, in a case decided in 1893, denied a defense to one convicted of selling liquor without a license, although the defendant pleaded that a license had been issued to him by a county board created by a statute which was subsequently held to be unconstitutional. The court applied the rule that there could not be a de facto officer where the statute creating the office

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94 The defense was given in State v. Godwin, 123 N.C. 697, 31 S.E. 221 (1898) and in Claybrook v. State, 164 Tenn. 440, 51 S.W. (2d) 499 (1932). It was denied and the defendant was convicted for violating the earlier statute in Dupree v. State, 184 Ark. 1120, 44 S.W. (2d) 1097 (1932) and in Ex parte Masters, 126 Okla. 80, 258 Pac. 861 (1927). There is at least a dictum (and perhaps a square holding, for the facts are not clear) to the same effect in Ex parte Davis, 21 Fed. 396 (C.C. Ky. 1884). See the discussion of the problem in Perkins, op. cit. supra note 1, at 43-44; 45 Harv. L. Rev. 1113 (1932); Reliance upon an Unconstitutional Statute as a Defense to Criminal Prosecution, 82 U. of Pa. L. Rev. 371 (1934).

95 Meisshofer v. State, 11 Ind. 482 (1858); Ely v. Thompson, 3 Marsh. (Ky.) 70 (1820).

96 Brent v. State, 43 Ala. 297 (1869) (unconstitutional statute giving defendant right to carry on lottery a defense to prosecution for violation of general lottery laws); Carr v. District Court, 147 Iowa 665, 126 N.W. 797 (1910) (unconstitutional statute purporting to legalize bond issue held defense to contempt proceedings against state officers who had been enjoined by an earlier decree from paying the bonds); Swincher v. Commonwealth, 24 Ky. L. Rep. 1897, 72 S.W. 306 (1903) (unconstitutional statute permitting private policemen to carry concealed weapons no defense to prosecution under general statute); cf. Birdsall v. Smith, 158 Mich. 390, 122 N.W. 626 (1909) (institution of criminal prosecution under unconstitutional statute held not to be ground for civil liability for malicious prosecution).

97 State v. Camden, 56 N.J.L. 244, 28 Atl. 82 (1893).
was unconstitutional. This doctrine, however useful in civil cases, should have no application in criminal cases, and the decision was overruled a few years later.

There is an intimation in one case that if the defendant knew that the statute under which he was purporting to justify his conduct was unconstitutional, he should have no defense. Proof of such knowledge on his part, in advance of judicial determination, would be difficult, but if it could be proved, there would be no mistake of law on his part for which a defense could be given. It would also appear that the defense should be denied if the statute in question was so absurd or so palpably beyond the powers of the legislature that no one could honestly believe it to be valid.

Another limitation on the suggested defense should be mentioned. A belief in the constitutionality of a statute exempting the defendant from prosecution should be permitted only where the exemption purports to be from prosecution by the very jurisdiction in which the statute was passed. Thus it has been held that a state statute permitting the dispensing of drugs in a manner violative of the federal narcotic laws cannot avail the defendant to protect him from federal prosecution, even though the invalidity of the state statute was not judicially determined until after the defendant had acted. In such a case, the prosecuting jurisdiction has done nothing to mislead the community, nor is it fairly to be held responsible for what another legislative body has done.

b) Where a statute which purports to amend an earlier statute, without releasing the defendant from liability thereunder, is later held unconstitutional.—There is clearly no material mistake of law where the statute which is later held invalid amended the prior law but did not purport to make legal, or reduce the penalty for, acts which were already criminal. Under these circumstances, courts uniformly hold that the prior law remains in force, and convict the defendant for violating it. The case is

The leading case applying the doctrine is Norton v. Shelby County, 118 U.S. 425 (1886). The effect of an unconstitutional statute as a defense in civil cases is considered generally in 53 A.L.R. 258 (1928), and, with reference to public officials, in Rapacz, Protection of Officers Who Act under Unconstitutional Statutes, 11 Minn. L. Rev. 585 (1927). The problem, however, is beyond the scope of this paper, since protection of the interests of the injured plaintiff may require a different rule.

Lang v. Bayonne, 74 N.J.L. 455, 68 Atl. 90 (1907) (civil case); State v. Carroll, 38 Conn. 449 (1872); Beaver v. Hall, 142 Tenn. 416, 217 S.W. 649 (1919).


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like that of the defendant who intends to kill A, but by mistake causes the
death of B. By the fiction of “transferred intent” such a defendant is
guilty of the murder or manslaughter of B, in the same manner as if he
had caused A’s death, and his mistake of fact neither excuses nor mitigates
his crime.\textsuperscript{103}

An interesting problem would be presented if the second statute pur-
ported to reduce the penalty for the crime, but was held unconstitutional
after the defendant had acted. No actual cases appear to involve this
situation, but it would seem that the defendant would not be entitled to
the lower penalty. The constitutional provision against ex post facto
legislation obviously does not apply, since both statutes were enacted be-
fore the act was committed. Nor could the defendant have been misled
into believing that his act was innocent, and it is only if the second
statute could constitute the basis of such a belief, that it should afford a
defense under our analysis.

c) Where a statute imposing criminal liability, which the defendant be-
lieves to be unconstitutional, is later upheld by the court.—In any period
such as the present, in which constitutional limitations are being rapidly
and in many instances unexpectedly broadened, citizens are put in some-
what of a dilemma when they wish to challenge new legislative action
which they deem, often upon reasonable grounds, to be unconstitutional.
The naked motive of “making a test case” is clearly not a general de-
fense.\textsuperscript{104} Nor can a state which has determined “to make men know and
obey” afford to give a defense to those who knowingly violate the legisla-
tive fiat, merely because they prophesy (incorrectly, as the event turns
out) that the courts will strike down the act on constitutional grounds.
Were the rule otherwise, the penal provisions of any statute of doubtful
constitutionality would never go into effect until after its constitution-
ality had been definitely upheld in some court.

There are few cases in which the defense has been seriously offered. In
one it was properly denied.\textsuperscript{105} But in an extortion prosecution, in which a
specific corrupt intent was required for guilt, the defendant’s belief that
the statute taking away his right to the fees was unconstitutional was
held to negative the existence of a corrupt intent.\textsuperscript{106} Although the prob-

\textsuperscript{103} Coston v. State, 139 Fla. 250, 190 So. 520 (1939); Gore’s Case, 9 Coke *81a (K.B. 1611).

\textsuperscript{104} Purvis v. United States, 61 F. (2d) 992 (C.C.A. 8th 1932).

\textsuperscript{105} Hunter v. State, 158 Tenn. 63, 12 S.W. (2d) 361 (1928).

\textsuperscript{106} Leeman v. State, 35 Ark. 438 (1880).
lem of specific intent crimes is beyond the scope of this article, it might well be better public policy to deny the defense, if the defendant knew his acts were forbidden by the statute, even in such crimes. 107

Where a constitutional amendment adopted after the enactment of the criminal statute is relied upon as the basis for the belief that the statute is unconstitutional, there is more ground for granting the defense. Which must the citizen follow: the earlier statute or his interpretation of the later constitutional amendment? There is obviously no "presumption of constitutionality" based upon the fact that the legislature adopted the statute after investigating its constitutionality, in this type of case. In the only case we have found raising this question, the defendant was convicted 108 and perhaps this is the only practical solution of the problem. Indefiniteness per se, as will be pointed out below, is not a ground of defense.

In partial mitigation of these rather severe rules, we should state that there are often ways of testing the constitutionality of statutes by civil process, and that an injunction against the enforcement of some statutes, pending the determination of their constitutionality, may be obtained where there would otherwise be great hardship. 109 Of course, it goes without saying that if the defendant's belief is right, and the statute is held to be unconstitutional, he cannot be convicted. 110

IV. EFFECT OF MISTAKE AS TO MEANING OF INDEFINITE STATUTE

One of the most common mistakes of law which a defendant may urge as a ground of defense is that he misinterpreted a somewhat ambiguous statute, not previously clarified by judicial decision, and reasonably believed in good faith that his acts were perfectly legal. Professor Perkins favors giving such a defense. 111 On the authorities, except where a specific state of mind is required for guilt, 112 such a defense is never recognized. 113

107 See Hunter v. State, 158 Tenn. 63, 68, 12 S.W. (2d) 361, 362 (1928). That such a rule was in the mind of the court in United States v. Anthony, Fed. Cas. No. 14,459 (C.C. N.Y. 1873), also appears likely. The defendant's knowledge that his actions are in violation of the express provisions of a statute would seem in many cases to show a sufficiently corrupt intent to warrant a conviction even for a crime requiring a specific intent to act fraudulently or illegally.


109 See infra, p. 673.


111 Perkins, op. cit. supra note 1, at 45.

112 The cases cited by Professor Perkins in support of his general defense appear to be of this type. Perkins, op. cit. supra note 1, at 45 n. 86.

113 Sinclair v. United States, 279 U.S. 263 (1929); Horning v. District of Columbia, 254 U.S. 135 (1920); Nash v. United States, 229 U.S. 373 (1913); United States v. Learned,
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This, it is submitted, is as it should be. A statute, whether federal or state, which is so indefinite that it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law" and is unconstitutional. If the court feels that a statute is sufficiently definite to meet this test, it is hard to see why a defense of mistake of law is needed. Such a statute could hardly mislead the defendant into believing that his acts were not criminal, if they do in fact come under its ban.

If a statute requires a specific intent to act in bad faith, its other provisions may be more indefinite, without being unconstitutional, than if good faith were not a defense. This indicates that if the defense of mistake of law based on indefiniteness is raised, the court is either going to require proof of bad faith (as a specific intent) or proof that the act was sufficiently definite to guide the conduct of reasonable men. Thus the need for such a defense is largely supplied by the constitutional guarantee.

Apart from this defense of unconstitutionality of a really indefinite statute, there are clear limitations upon the courts in interpreting statutes to include unanticipated criminality. The federal courts and most state courts still retain the common law rule of strict construction of penal statutes in favor of the defendant, by which such statutes are to be construed to give "fair warning" of "what the law intends to do if a certain line is passed" in language "that the common world will understand." Even where this rule is not in force, Anglo-American courts are not free to interpret statutes "by analogy" in a way which goes beyond their meaning.


19 See J. Hall, op. cit. supra note 55, at 172-80.
It must be admitted that in spite of these rules, some pretty indefinite standards of criminality have been upheld, of which the Sherman Anti-Trust Act is perhaps the outstanding example.\textsuperscript{120} The early fate of the criminal provisions of this statute is an outstanding illustration of another safeguard—that penal sanctions in really indefinite statutes are rarely enforced, as a practical matter. The defense of mistake of law, as read out of the statute by the courts, comes in again by administrative discretion or by jury verdicts in extreme cases, until the meaning of the statute has been clarified by judicial decision.

We feel that any attempt to apply the defense of mistake of law for indefiniteness to a statute which was sufficiently definite to meet the constitutional requirements would involve the courts in so perplexing a question of degree as to be unworkable as a matter of sound judicial administration. The remedy, if any is needed, lies not in giving the defense of mistake of law, but in widening the scope of the constitutional protection, or in judicial self-limitation in interpretation.

\textbf{THE SECOND EXCEPTION: WHEN JUDICIAL DECISION MAY HAVE LED THE COMMUNITY OR THE DEFENDANT TO BELIEVE (ERRONEOUSLY) THAT CERTAIN CONDUCT IS NOT ILLEGAL}

It has been shown that the defense based on misleading legislation is allowed because it is the policy of the state to "make men know and obey" the law, and to carry out this policy it is both fair and wise to give a defense when the law as declared by the legislature turns out not to be in effect. This same policy underlies the defense based on misleading judicial utterances.

In spite of this fundamental policy, however, there are two factors found in the common law theory of judicial decision which are not present in legislation, and which may sometimes affect the results reached in these cases: first, a decision of a case of first impression, or an overruling decision, is commonly taken to be retrospective in effect, while the \textit{ex post facto} prohibition forbids such penal legislation; and second, a lower court decision is known to be subject, as of course, to reversal or overruling by a higher court, while a statute's \textit{present} validity does not depend upon \textit{later} action of any legislative body.

Much has been written on the effect of these theories on the defense of mistake of law in criminal cases, and there is substantial agreement, both among writers and courts, as to the extent to which it should be given.\textsuperscript{122}

\textsuperscript{120} This was upheld in Nash v. United States, 229 U.S. 373 (1913), earlier common law precedents being applied to give it content.

\textsuperscript{122} See Perkins, op cit. supra note 1, at 43-45; Snyder, Retrospective Operation of Overruling Decisions, 35 Ill. L. Rev. 121 (1940); Retroactive Effect of Judicial Change of Existing
Therefore, it is necessary here only to summarize the situations in which the problem has arisen, and indicate the trend of decision, devoting the major part of our attention to a few controversial questions.

I. THE EFFECT OF IGNORANCE OF COURT DECISIONS

The same principles which charge the community with notice of the passage of new statutes apply to reported judicial decisions, and ignorance of the latter does not appear to have been considered as a general defense. Of course, if a specific intent to act fraudulently or wilfully or in some other unlawful manner is required for guilt, a defendant who did not know of a prior decision holding that he had no right to act as he did should be acquitted if he believed his acts were legal.122

II. WHERE A PRIOR DECISION OF THE HIGHEST COURT IS OVERRULED

The general rule is to give a defense of mistake of law where the legality of the defendant's act has been upheld by a decision of the highest court of the jurisdiction, not overruled until after he had committed the act. It is immaterial whether the prior decision was as to constitutionality of a statute,123 as to the interpretation of a statute,124 or as to the common law.125 There is clearly a strong feeling against such retroactive criminality, even though constitutional provisions against ex post facto laws do not apply to judicial decisions.126 It is not necessary to go the full distance of the decision in Great Northern R. Co. v. Sunburst Oil Refining Co.,127 and adopt the declaratory theory of law, in order to give the defense.128 But a recognition of this possibility of changing judicial decision in criminal cases, without imposing retroactive criminal liability, would go
far to free courts from the necessity of rigidly following the doctrine of stare decisis. 129

There should be but few exceptions to this general rule. Of course, if the test of criminality used by the trial court in convicting the defendant is consistent with the overruled case, the fact that the supreme court takes occasion to overrule an earlier decision in its opinion should give no defense. 130 But the decisions in Green v. State 3 and in Hoover v. State 3 are impossible to support on logical grounds. The recommendation to executive clemency in both cases did, however, prevent substantial injustice to the unlucky defendants who were merely pawns in the reconstruction politics of the time. 133

A qualification that has been suggested by some commentators 3 and courts, 3 is that the defense should not be given if the defendant's conduct was malum in se, or morally bad, even though apparently legalized by the overruled decision. By analogy to ex post facto legislation, however, this does not seem warranted, and it has not been embodied in actual decisions. 136 A Nebraska case, Morgan v. State, 3 has been cited as authority for this limitation, but the "overruled" decision was that of another

129 Where the court feels it cannot change the law without convicting such defendants' changes will be rarely made by it if legislation, operating prospectively, could accomplish the same end. See People v. Tompkins, 186 N.Y. 413, 79 N.E. 326 (1906); Rex v. Younger, 5 Term Rep. 449 (K.B. 1793). The avoidance of the retrospective effect of such overruling decisions is one of the bulwarks of stare decisis. See Von Moschziker, Stare Decisis in Courts of Last Resort, 37 Harv. L. Rev. 409, 423-24 (1924).

130 Odom v. State, 132 Miss. 3, 95 So. 253 (1923).

131 58 Ala. 190 (1877).

132 59 Ala. 57 (1877).

133 A statute passed in February, 1866, by the "unreconstructed" Alabama legislature made intermarriage between the white and colored races a crime. The "reconstructed" supreme court then held the act unconstitutional in Burns v. State, 48 Ala. 195 (1872), as violative of the federal Civil Rights Acts (14 Stat. 27 (1866)). The personnel of the supreme court was then again changed, and in these two cases the constitutionality of the statute was upheld and it was applied against defendants who had married, in violation of its terms, in reliance upon the decision in Burns v. State.

134 Perkins, op. cit. supra note 1, at 44, would require the defendant's conduct to be "socially acceptable." See also Stare Decisis in Criminal Law, 18 Yale L. J. 422, 424 (1909).

135 See State v. O’Neil, 147 Iowa 513, 520, 126 N.W. 454, 456 (1910). One of the judges in State v. Fulton, 149 N.C. 485, 63 S.E. 145 (1908), spoke of the distinction, but felt that the husband's act of slandering his wife was not sufficiently bad to justify refusing to give him the defense.

136 In People v. Tompkins, 186 N.Y. 413, 79 N.E. 326 (1906), the defendant's act was a deliberate fraud, but the court felt constrained not to overrule its earlier decisions, in order to avoid holding the defendant.

137 51 Neb. 672, 71 N.W. 788 (1897), cited in Retroactive Effect of Judicial Change of Existing Law in Criminal Proceedings, 28 Col. L. Rev. 963, 964 (1928), condemning the malum in se distinction. The question was whether an unintended killing committed during a rape was
state, Ohio, construing an Ohio statute which differed from the Nebraska statute on the very point at issue. Obviously, in view of this difference, the Ohio decision was not "overruled" by the Nebraska court. Further, in that case, even under the earlier Ohio decision, the defendant's acts would have been criminal, and he should not have a defense against prosecution for the greater crime of which he is also guilty under the "overruling" decision, even if it had been "overruled." 3

No importance has been attached to the question whether the defendant knew of and relied on the overruled decision in any of the cases on this point. In the civil cases adopting a similar principle, reliance is universally presumed. 39 In criminal cases in which the basis of the defense is a prior court decision, reliance should be absolutely immaterial, just as it is where the defense is based upon misleading legislation.

III. WHERE EARLIER DICTA, DECISIONS BY AN EVENLY DIVIDED COURT, LOWER COURT DECISIONS, OR DECISIONS OF ANOTHER STATE CONSTRUING A SIMILAR STATUTE ARE NOT FOLLOWED

Decisions concurred in by a majority of the highest court are admittedly "law." The community knows that they are controlling and can fairly be expected to follow them until they are overruled, so long as stare decisis is the usual rule and not the exception. But there are many other types of "precedent" of lesser weight, which influence but do not purport to control future decisions of the highest court, and are truly "straws in the legal wind."

There are not many decisions passing on the question of the existence of a defense based upon such prior minor types of precedent which are eventually rejected. Previous dicta have been held to give no defense. 40 The previous decisions of an evenly divided court 41 or of a lower court 42


238 In Morgan v. State, 51 Neb. 672, 71 N.W. 788 (1897), the defendant was intentionally committing rape, and the only question affected by the "overruling" decision was his further guilt of first degree murder. The general problem is fully discussed supra, pp. 658–59.

239 See cases cited in Snyder, op. cit. supra note 121, at 131 nn. 110, 111. The only civil case cited by Snyder in which this presumption was disproved is Nicholl v. Racine Cloak and Suit Co., 194 Wis. 298, 216 N.W. 502 (1927). When it comes to determining the constitutionality under due process of a retroactive application of a civil decision, however, the element of reliance becomes important. See Stimson, Retroactivity in Law—A Problem in Constitutional Law, 38 Mich. L. Rev. 30 (1939).

240 Lanier v. State, 57 Miss. 102 (1879) (previous dicta said intent to injure required for common law assault).

241 Ingersoll v. State, 11 Ind. 454 (1859).

upholding the constitutionality of the statute repealing the act under which defendant was prosecuted have been held to give the defense. The previous decision of a lower court that the act which the defendant violated was unconstitutional has been held to give a defense, where his acts were only mala prohibita, but not where the lower court decision merely construed a gambling statute to permit the use of a certain type of vending machine.

We feel that this is another situation where the policy that "men know and obey" the declared law, coupled with the desirability of encouraging people to discover what the declared law happens to be, makes it necessary that a defense be given when reasonable efforts along this line result in erroneous actions because of some ambiguity in judicial utterance. Thus the defense should be given, if the state of the law is such that these incomplete precedents embody the last judicial word on the subject in the jurisdiction, and if they are so persuasive that a reasonable lawyer, after investigation, would believe that they represented the actual state of the law.

These incomplete precedents are important sources from which law is actually deduced by courts, where there are no decisions squarely in point. In applying state law in civil cases brought in the federal courts, the Supreme Court has stressed the necessity of following "considered dicta" of the highest state court, as well as reported decisions of intermediate courts of appeal and of courts of first instance. The affirmation of a lower court decision by an evenly divided appellate court reinforces the decision of the lower court, and provides an a fortiori case. But an unknown, unreported decision of a trial court, dug up at defendant’s trial for the purpose of giving him a defense, would not seem to meet these requirements, nor should the decision of a lower court, which was known to be pending on appeal, necessarily suffice.

In one case in which the decisions of the courts of another state construing the same statute were not followed, counsel did not even suggest a

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143 State v. Whitman, 116 Fla. 196, 156 So. 705 (1934) (dentist permitting unlicensed person to work for him).
144 State v. Striggles, 202 Iowa 1318, 210 N.W. 137 (1927).
147 Fidelity Union Trust Co. v. Field, 311 U.S. 160 (1940).
148 In State v. Striggles, 202 Iowa 1318, 210 N.W. 137 (1927), the defendant was not permitted to testify that he had known and relied on the prior decision of a municipal court.
possible defense of mistake of law. Although it may be argued that the legislature, by adopting the law of a sister state without negating the interpretation placed upon it by the courts of that state, has misled the community, we are here getting one step further removed from the law of the jurisdiction in which the defendant is being prosecuted, and perhaps there is less reason for allowing the defense.

IV. THE EFFECT OF AN INJUNCTION AGAINST THE ENFORCEMENT OF A LAW

Courts of equity have power, under certain circumstances, to enjoin the administrative officials of a state from enforcing a statute believed to be unconstitutional and a suit to enjoin enforcement is commonly used to test the constitutionality of such a statute. Where a preliminary injunction is issued pending the hearing, but after hearing it is vacated on the ground that the statute is constitutional, or where the lower court has issued the injunction after determining that the statute is unconstitutional, and then the decision has been reversed on appeal, it is not often that criminal prosecutions are later brought against the petitioners for violations of the statute committed while the injunction was in force. But in two cases convictions for such violations have been affirmed. Two other courts have given the petitioners a defense.

If the only basis for the defense were that the injunction had suspended the operation of the statute, it would be difficult indeed to sustain it. It is not the function of the court to do this. On the other hand, if the penalties are so exorbitant as to deny equal protection of the laws by making it impossible to review the question, the criminal provisions may themselves be unconstitutional and void, and one held for violation of such provisions is entitled to release.

But the defense should be granted on general principles of criminal law as a justifiable mistake of law. So long as the court is willing to continue

149 McCutcheon v. People, 69 Ill. 601 (1873) (no duty to follow such decision where "inconsistent with the spirit and policy" of the local law); see Morgan v. State, 51 Neb. 672, 71 N.W. 788 (1897), discussed supra, pp. 670-71.

150 Cases and material on the propriety of issuing such an injunction are collected in Chafee, Cases on Equitable Remedies, 255-65 (1938).

151 State v. Keller, 8 Idaho 699, 70 Pac. 1051 (1902); State v. Wadhams Oil Co. 149 Wis. 58, 134 N.W. 1121 (1912). The problem is discussed in Methods of Testing the Constitutionality of Rate Statutes Involving Heavy Penalties, 26 Mich. L. Rev. 415 (1928).

152 State v. Chicago, M. & St. P. R. Co., 130 Minn. 144, 153 N.W. 320 (1915) (prosecution actually begun while injunction was in force, but defense wide enough to include later prosecution); Coal & C. R. v. Conley, 67 W. Va. 129, 67 S.E. 613 (1912) (result reached by implying exception into the statute).

153 Ex parte Young, 209 U.S. 123 (1908). But they will be upheld if there is some safe way of testing them by appeal. Wadley Southern R. v. Georgia, 235 U.S. 651 (1915).

the injunction, there is a clear representation that as to them the statute should not be enforced. Their belief that the statute is unconstitutional, based upon the injunction, should on grounds of public policy be accepted as a defense, unless the injunction was obtained on fraudulent or colorable grounds. Where the court believes that the defense should not be granted, it can and should refuse to grant the injunction. Indeed, giving a safe way to test these questions by a suit in equity will go far to render other general defenses based on mistake of law unnecessary, as has been already pointed out.

The defense should, however, be limited to the petitioners and their agents, in so far as it is based simply on the injunction. Of course, if, as a part of the whole proceedings, there has been a decision that the statute is unconstitutional, third persons not parties to the proceedings should be entitled to guide their conduct by it to the same extent as if the decision had been made in any other type of case. As we have already pointed out, such reliance may be unjustified if it is known that an appeal has been taken from the decision of a lower court which is the basis of the defense.

V. THE EFFECT OF AN UNEXPECTED DECISION IN A CASE OF THE FIRST IMPRESSION AT COMMON LAW

In the early, formative period of the common law, extension of criminal liability to include acts undeniably malum in se but not previously indictable was so common that it is rare to find a case of that era in which the “victim” claimed a defense on this ground. As a matter of fact, at that time it was not felt that a defense should be given even where earlier decisions were overruled, but we believe sentiment has now changed on this latter branch of the problem.

Even in recent times, if there are no prior decisions negating liability for a new extension of a common law crime, and thus no affirmative misleading of the community by the state, there appears no trace of such a defense. But there is undeniably a widespread feeling today that any

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155 See supra, p. 666.
156 In Rex v. Lynn, 2 Term Rep. 733, 2 Leach 560 (K.B. 1788), taking a dead body from a cemetery for dissection was first held criminal. The court denied a motion in arrest of judgment based on this fact, but imposed a fine of only five marks.
157 Landmark cases of this character, taken from the field of larceny alone, include Carrier's Case, Y.B. 13 Ed. IV f. 9, pl. 5 (1473); Rex v. Lavender, 2 East P.C. 566 (1793); Rex v. Pear, 2 East P.C. 685 (1779) (a capital offense). But in Rex v. Younger, 5 Term Rep. 449 (K.B. 1793) (baking bread on Sunday), the beginning of the turning of the tide is seen; the court felt the earlier decision denying liability to be right and followed it, but said it would have been “cruel” to overturn it after 34 years during which it had not been questioned.
158 State v. Carver, 69 N.H. 216, 39 Atl. 793 (1897) (compounding a misdemeanor criminal, if the misdemeanor is “one against public justice and dangerous to society”; belief that act was not a crime in New Hampshire, no defense).
such new extension of liability is unfair, and recent cases of this description have been criticized by commentators. Giving the defense would remove this strait-jacket in which the common law is now encased, but the power of growth of the common law is no longer an important factor in American (or even English) substantive criminal law, and the problem is largely academic. In one respect, the need of the defense here is even greater than in indefinite criminal statutes, for there appear to be no constitutional limitations upon the indefiniteness of the premises from which the common law may deduce criminality. However, as in the case of indefinite statutes, we feel that judicial self-restraint in criminal cases would give adequate protection, and that the problem should be handled along these lines, rather than by giving a defense of mistake of law.

THE THIRD EXCEPTION: WHEN OFFICIALS IN THE EXECUTIVE DEPARTMENT HAVE LED THE DEFENDANT TO BELIEVE (ERRONEOUSLY) THAT CERTAIN CONDUCT IS NOT ILLEGAL

The legislature is the proper body in the state to pass laws. The courts have power to decide cases within their jurisdiction and thereby to declare the law of the state. It is therefore fair for the acts of both these organs of government to prevent the state from prosecuting one who has acted in accordance with their rulings, as they existed at the time of his acts. Executive action, when it affects society in a similar rule-making fashion, by proclamations, regulations, opinions and the like, requires the granting of a defense for the same reason.

But the basic policy of "making men know and obey" the laws requires us to go further, and grant the defense in cases where there is express proof of reliance by the defendant on advice given him by state officials on matters within the ambit of their duties, even though these officials possess neither the power nor the authority to act in a rule-making fashion. In order to encourage obedience to the law, as laid down by public officials, in a situation in which some of the officials are empowered to speak with authority and others are not, we must give the broader defense based upon reasonable appearances. To do otherwise would force people to make difficult decisions as to the scope of authority of these officers, and would result in hesitation where unquestioning obedience is desired.

State v. Bradbury, 136 Me. 347, 9 A. (2d) 657 (1939) (privately burning a corpse), criticized in 53 Harv. L. Rev. 1047 (1940); Rex v. Manley, [1933] 1 K.B. 529 (falsely reporting a robbery to the police), criticized in 5 Camb. L. J. 263 (1934) and 49 L. Q. Rev. 183 (1933).


We are not unmindful of the rule in civil cases that officers or agents of
the state "to whom no administrative authority has been delegated can-
not estop [it] even by an affirmative undertaking to waive or surrender a
public right." But this principle is not necessarily controlling, for here
we are considering the effect of such an estoppel upon criminal liability,
and not upon civil rights and obligations.

We have already concluded, and the decisions bear us out, that advice
of private counsel should give no defense and that no defense can be given
merely because the defendant misinterpreted the meaning of the statutes
and decisions then in force. But in dealing with a defendant who has fol-
lowed advice from an officer of the state, one aspect of our general policy
is to make the community do this very thing in its dealings with the state,
and a rule that no defense will be given under any circumstances to such a
defendant will be self-defeating.

It seems unnecessary to adopt such a harsh rule. The difficulty of proof
does not stand in the way of giving this defense of executive estoppel, for
the advice given is an objective fact. As to Holmes' reason, there is little
danger that the giving of advice by public officials will become a "rack-
et," for the good faith of the defendant should have to be established, and
the fact that the advice must be given without charge in the ordinary
course of the officer's duties would remove the temptation to dishonesty
which is one of the reasons why the advice of private counsel should not
give a defense. Any official who made a "business" of giving immunizing
advice would of course be subject to removal, and his "clients" could hard-
ly prove the good faith necessary for the defense.

Nor would advice once given act as a permanent defense, for if the de-
fendant were later told by the prosecuting attorney or some other public
official that his conduct was illegal, he would be put on inquiry again, and
could not plead the earlier advice to bar prosecution for offenses com-
mitted after the warning. Or if the law were changed after he had been
given the advice, he would properly be held to be charged with notice of
the new rules.

Since the fact that such advice has been given can not be generally
known in the community, the defense is not available to all the members
of the community. The giving of the advice could have had no part in
determining the community's behavior. But if it has been given to the
defendant and he has relied on it, he is in a different position, vis-à-vis
the state, than the rest of the community, and it is both fair and wise to
give him this kind of personal defense.

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The proposed defense is much wider than that recognized by most courts. But in a few cases on this point decided in the last ten years, some such defense has been recognized, and we believe the trend is in this direction, subject to the conditions we have already pointed out as necessary to protect the interests of the state.

I. RELIANCE ON ACTS OF THE CHIEF EXECUTIVE

The President or a governor is authorized to veto a bill passed by the legislature. It follows that a decision holding the governor's veto of a bill imposing a duty of collecting taxes to be a defense to an action for a penalty against the defendant for not doing so, where it was not decided until later that the veto was unconstitutional and ineffective, is clearly correct. Here the governor was acting as a law-maker, and it is fair for his acts to bind the state to the same extent as legislation later found to be unconstitutional, or a court decision later overruled. As has already been pointed out, proof of reliance by the defendant is unnecessary in these cases.

The chief executive also possesses a pardoning power, and if he purports to give a valid pardon to a felon the latter should not be convicted of voting illegally, if it turns out that the pardon was void and that his civil rights have not been reinstated. Here again no proof of reliance should be necessary.

But a different question is raised when the defendant has been misled by some advice of the governor, not connected with his acts as a part of the law-making process. In the only case raising this point, a defendant who had been convicted of a felony while a minor, which rendered him ineligible to vote, was indicted for illegal voting. He was not allowed to prove, as a defense to the indictment, that he had asked the governor for a pardon and that the governor had written him that a pardon was not necessary to restore his voting rights, since he was a minor when convicted. The conviction was affirmed. If the letter from the governor, about a matter which was under the governor's exclusive jurisdiction (the granting of pardons), had really misled the defendant, it would seem that he should have been given a defense. However, in this case it should be necessary for him to prove actual reliance, since the governor was acting only as an adviser on existing law and not as a law-maker.

165 People v. Ferguson, 134 Cal. App. 41, 24 P. (2d) 965 (1933); see State ex rel. Smith v. Leonard, 192 Ark. 834, 95 S.W. (2d) 86 (1936) (civil case).
166 Hamilton v. People, 57 Barb. (N.Y.) 625 (1870).
II. RELIANCE ON ADMINISTRATIVE REGULATIONS

Administrative commissions are often authorized to issue orders and establish regulations to carry out the provisions of the law under which they are established. These, of course, are valid only if not inconsistent with the law. But even if invalid, reliance upon an order or regulation requiring or permitting certain action should give a criminal defense, if the acts required later turn out to be illegal. Where a commission is authorized to make regulations, the state should be responsible for them to the extent that they are affirmatively misleading and are actually relied upon by the defendant.

All of the federal statutes concerning the securities business, under which the Securities and Exchange Commission is authorized to make regulations, carry express provisions exempting a defendant from any liability imposed thereunder (whether civil or criminal) for “any act done or omitted in good faith in conformity with any rule, regulation or order of the Commission,” whether later determined to be invalid or not.\(^{166}\) We believe the policy behind these provisions to be sound, and feel that as far as exemption from criminal responsibility, at least, is concerned, no express statutory provision should be necessary to secure the result, where reliance by the defendant is proved.

III. RELIANCE ON OPINIONS OF THE ATTORNEY GENERAL AND OTHER LAW OFFICERS

As it is the duty of the attorney general to advise state officers (and where expressly provided by statute, local officers as well), it seems clear that an opinion advising a certain course of conduct ought to be a defense to criminal prosecution of the officer to whom the opinion was issued, if he follows it. In some states such a defense is expressly given by statute.\(^ {167}\) We do not believe the defense should be strictly confined to the officers who were entitled to ask for the opinion and to whom it was given. But one case held that private individuals are not entitled to rely on an opinion not given to them,\(^ {168}\) and it has been said that an opinion rendered to the board of county commissioners, who were entitled to ask for it, upholding


their right to pay extra compensation to police judges sitting as consulting magistrates, would not protect the police judges themselves (who were not entitled to ask for the opinion), in an action to remove them from office for misconduct. Perhaps a different rule is justified in removal proceedings, which are only quasi-criminal, but if the case had involved a strictly criminal prosecution, the police judges ought to have had a defense if they had relied on an opinion concerning their rights which the attorney general, as a part of his regular duties, had given to the board, or even if the opinion had been given directly to them.

As far as the civil liability of a public officer to the state is concerned, it has been held that, if he has paid money over to others relying on an opinion from the attorney general, he is protected. If he has retained fees pursuant to the opinion, he should, of course, be liable to repay them to the state, on principles of unjust enrichment, if he was not entitled to them under the law.

Local prosecuting attorneys and law officers have a duty to give legal opinions to the local officials within their district, and it is only natural for private citizens as well to come to them for advice on questions of criminal liability. We do not feel that the possibility of an estoppel in such a case should be absolutely foreclosed. But cogent evidence of the defendant's belief in good faith that his acts were legal, based on reasonable reliance upon such an opinion given after a full disclosure of all the facts, should be required. A trip to the prosecuting attorney's office to get from the latter a quick but unthinking approval of a proposed course of conduct known to the defendant to be of doubtful legality is not sufficient to establish this. Further, many prosecuting attorneys engage also in the private practice of the law, and reliance upon an opinion given by one of them consulted in private practice should be no ground of defense.

169 State ex rel. Rowe v. District Court, 44 Mont. 318, 119 Pac. 1103 (1911). The court entirely missed the point, not noticing the statute, Mont. Rev. Code (1907) § 193, as to the duty to render an opinion, and dealing with the case only in terms of specific intent. That part of the opinion bearing on this question is perhaps only dictum, since the defendants had been exonerated by the trial court, and the upper court decided that the acquittal below was final and could not be corrected by mandamus in such a quasi-criminal proceeding.


171 This was the effect of the decision in Dodd v. State, 18 Ind. 56 (1862), although the court put it on the ground that the opinion of the attorney general gave no defense, since the statute authorizing him to give it did not require the recipient to follow it.

172 In Needham v. State, 55 Okla. Crim. 430, 32 P. (2d) 92 (1934), the defendant, who was not a doctor, ran a cancer sanitarium with a licensed physician in nominal charge. He was convicted of practicing medicine without a license, where he personally administered remedies to patients, after the court had excluded his evidence that a number of attorneys, including the county attorney, had advised him that this did not constitute illegal practice of medicine. The court affirmed his conviction, and in the absence of an offer of proof that the opinion was
Justices of the peace and other judges are of course authorized to repre-
sent the state in deciding cases actually before them, but this does not
give them authority to bind the state in giving advice on matters not be-
fore them for decision. Where they are consulted in private practice by
private clients, they should stand on the same footing as lawyers gen-
erally. But judges sometimes have other official functions as well, and
advice given by them on such matters should constitute a defense to
prosecution, if the other requirements are fulfilled.\textsuperscript{173}

\section*{IV. RELIANCE ON RULING OF PUBLIC OFFICIAL Charged WITH
DUTY OF ISSUING PERMITS}

Many activities are legal only when licensed by a state official. Some-
times the duty of such an official is limited to accepting the fee and issuing
the license; in other words, the license is only a means of collecting a tax.
Even under these conditions, we feel that reliance upon advice given by
him while acting in his official capacity, that no license was necessary,
should give the defendant a valid defense of mistake of law, but such
advice has been held to be no defense.\textsuperscript{174} Of course, if he should actually
refuse to accept the proffered fee and issue the license, it is likely that
every court would protect the defendant and not force him to litigate the
question by writ of mandamus in order to escape criminal liability.

There is a decision of a California district court of appeals some years
ago in \textit{People v. Ferguson}\textsuperscript{175} holding that, where the state official has wide
discretionary powers in administering the law, a defendant who consults
him and is advised that no permit is necessary, is entitled to the defense.
The defendant had been convicted of issuing a security without a permit
under the "blue sky" law then in force. The statutory definition of
"securities" covered by the act was not too clear\textsuperscript{176} and the corporation

\footnotesize{\textsuperscript{173} In Hoover v. State, 59 Ala. 57 (1877), the judge of probate who issued the marriage
license to the defendant advised him that it would be legal to marry, but this was held to be
no defense to a prosecution for bigamy. For the peculiar background of this case, see note 133
supra. In State v. Goodenow, 65 Me. 30 (1876), similar advice from the justice of the peace
who performed the ceremony was held no defense. We feel that in both of these cases the
advice was connected with the official duties of the officials concerned and that it should have
been a defense to criminal prosecution for acts done before the defendants were warned that
further cohabitation would be criminal. See also Lewis v. State, 124 Tex. Crim. 582, 64 S.W. (2d)
972 (1933) (advice of district judge; specific intent required; see note 122 supra).

\textsuperscript{174} State v. Foster, 22 R.I. 163, 46 Atl. 833 (1900) (state treasurer had advised the defendant
that he was not obliged to pay license fee as itinerant vendor).

\textsuperscript{175} 134 Cal. App. 41, 24 P. (2d) 965 (1933).

\textsuperscript{176} See 28 Cal. L. Rev. 410 (1940).}
commissioner was authorized to establish "rules and regulations . . . to carry out the purposes . . . of this act." The defendant, who had secured permits for selling other issues, offered to prove that the corporation commissioner had advised him that the issue in question had been investigated by his department and that no permit was necessary, but this proof was excluded in the trial court.

On appeal this was held to be error, and the conviction was reversed. The court referred to the fact that the crime was a felony, and that the acts were only malum prohibitum, the court having previously held that no specific intent was required to violate the law, and concluded: "we cannot believe the law so inexorable as to require the brand of felon upon him for following the advice obtained."

The decision has been generally approved by commentators. It would seem an a fortiori case for the defense where the body charged under the state law with issuing the license had actually done so, although the contrary was held in an earlier case in Nebraska.

The Appellate Department of the Superior Court of Los Angeles County declined to follow People v. Ferguson in a case in which the official from whom the advice came was not directly in charge of the administration of the state law and the issuance of licenses under it. The defendant was prosecuted under a state statute forbidding lotteries. The city council had provided for the issuance of licenses for "games of skill" and had directed the police commission to determine when any given game was a game of skill and not a lottery; if so, it was to issue a permit, on the basis of which other city officials were to issue a license. The defendant pleaded that he had such a license, but this was held to be no defense.

It is submitted that the decision in People v. Ferguson is a step in the right direction, and that the later limitation by the appellate department is unfortunate. Notice to the defendant by the prosecuting attorney that the game in question seemed to him to be a lottery would have destroyed

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178 Cal. Stat. (1925) c. 447, § 9, at 970–71, provided a maximum penalty of five years' imprisonment and $5,000 fine.
181 See Perkins, op. cit. supra note 1, at 43; 22 Cal. L. Rev. 569 (1934).
183 There is a similar decision in Schuster v. State, 48 Ala. 199 (1872), in which the city council had licensed the defendant to run a keno table, in violation of the state gambling laws.
the defense as to later violations, for of course the city council had no authority to set aside the state law. If the defendant was willing to comply with the notice and cease operating the game thereafter, this is all that it was necessary to accomplish, and a conviction for an earlier violation smacks more of persecution than of prosecution under these circumstances.

V. RELIANCE ON RULINGS OF OTHER PUBLIC OFFICIALS

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 when the defendant proves that he acted in reasonable reliance on his advice on legal problems. Determining on what matters any given official should be permitted to estop the state should not be too difficult, when the test of reasonableness is applied to the defendant's conduct. For instance, reliance upon a ruling by the election officials appointed to pass upon the qualifications of voters has been properly held to give immunity against a prosecution for illegal voting, where the defendant fully stated the facts to them, although the other cases on this point (all decided before 1900) deny the defense. Other situations in which we believe the defense should have been granted, but in which the courts refused to do so (all likewise decided before 1900), include reliance on advice from the American minister in St. Petersburg as to the meaning of embargo legislation, from an Indian agent as to the boundaries of the reservation where he was stationed, from town highway commissioners as to whether a certain road was a public way, and

285 State v. Pearson, 97 N.C. 434, 1 S.E. 914 (1887).
286 United States v. Anthony, Fed. Cas. No. 14,459 (C.C. N.Y. 1873); Steinberger v. State, 35 Tex. Crim. 492, 34 S.W. 677 (1896); State v. Perkins, 42 Vt. 399 (1869). Reliance upon such advice should give a defense where a specific intent to vote fraudulently is required, as in State v. White, 237 Mo. 208, 140 S.W. 896 (1911). The decision in State v. Boyett, 32 N.C. 336 (1849), in which the court conclusively presumed that defendant knew the law and was guilty of "knowingly and fraudulently" voting, is analytically indefensible, but these words had been added to the statute on illegal voting by an amendment in 1844, five years before, and the court evidently wanted to get back to the provisions of the earlier law and nullify the effect of the amendment.
287 The Joseph, 8 Cranch (U.S.) 451 (1814).
288 United States v. Leathers, Fed. Cas. No. 15,581 (D.C. Nev. 1879). If the mistake as to the precise location of the boundary was a mistake of fact, the defendant should also have a defense based on the misleading conduct of the official, even though the crime is one from which an ordinary mistake of fact would not relieve him. United States v. Healy, 202 Fed. 349 (D.C. Mont. 1913) (entrapment by public officials who sent an Indian who did not appear to be such to buy liquor, a defense to prosecution for unlawful sale to an Indian).
289 State v. Wells, 70 Mo. 635 (1879). The defense should be granted where a specific intent is required, as in State v. Preston, 34 Wis. 675 (1874) ("willful" obstruction).
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from the state commissioner of sea and shore fisheries as to what constituted fishing with a "purse or drag seine" in prohibited waters. In all these cases the advice was given about matters with which the official who gave it was closely connected, and the defendants, we feel, should have been protected.

But where the advice comes from a public official whose position is not connected with the subject matter concerning which the advice was given, we agree with the decisions holding the advice to be no defense. It is not reasonable for a saloon keeper to rely on advice from the mayor that the state law did not forbid reopening saloons on election day after the polls closed, or for a constable to consult the clerk of court who gives him the oath of office as to the right of constables to carry concealed weapons, or for the keeper of a prison to follow orders of the city officials as to what prisoners he should receive, where the power to direct the prison to which they should be sent is vested in the magistrates themselves.

CONCLUSION

In conclusion, it should be pointed out that there is one general limitation upon the doctrine that a defense to criminal liability should be granted where there has been misleading conduct for which the state should fairly be held responsible. Criminal prosecutions are sometimes brought merely as a means of enforcing civil rights of the state, and the defendant is fined in lieu of compensatory damages. To the extent that this is really true, civil rather than criminal principles should be applied, and no defense based on mistake of law should ordinarily be given. Examples of such crimes are obstructing roads, or trespassing on public property. But if the prosecution is really penal in nature, the criminal defense, if it exists, should be given, even in minor crimes.

State v. Huff, 89 Me. 521, 36 Atl. 1000 (1897).
State v. Simmons, 143 N.C. 613, 56 S.E. 701 (1907).
Rex v. Cope, 7 Car. & P. 720 (K.B. 1835).
Professor Beale has called this type of crime a "public tort." See Beale, Cases on Criminal Law c. 2, § 3 (3rd ed. 1915). In Statutory Penalties—A Legal Hybrid, 57 Harv. L. Rev. 1092, 1100 (1938), the conclusion is advanced that "a proceeding in which neither the life nor freedom of the defendant" is threatened should be treated as a civil case, although it is recognized that such proceedings, when brought by indictment or information, are usually governed by the procedural rules applicable to criminal actions. So far as our point here is concerned, this definition is far too wide.

Perhaps the decision in State v. Wells, 70 Mo. 635 (1879), note 189 supra, may be justified on this ground.