# WHY IS (CLAIMING) IGNORANCE OF THE LAW NO EXCUSE?

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## I. Introduction[1]

The foremost proponent of the 'consent solution' to the justification of punishment was the legal scholar Carlos Santiago Nino (1943-1993), and I will take Nino's account to be paradigmatic for consensual theories of punishment.[2] The attraction of Carlos S. Nino's consensual theory of punishment is that it attempts to obviate the need to establish that the wrong-doer has political obligations and, most importantly, the obligation to obey the law. Establishing that a citizen has such obligations has proven to be difficult and controversial (starting from Socrates' acceptance of the death penalty to more recent justifications). The important feature of Nino's theory of punishment is that the wrong-doer, by committing an illegal act, consents to assume a liability to punishment. If caught and convicted, this 'assumption of liability' would be decisive for punishing an offender – without having to establish that citizens, including the offender, have an obligation to obey the law. According to Nino individuals have moral obligations, whether they consent to them or not. And the criminal law, on the whole, tends to track these moral obligations.

Nino's theory has, regrettably, not been widely discussed – notable exceptions are Ted Honderich[3], Thomas Scanlon and, most recently, David Boonin[4]. I will concentrate on one objection's to Nino's theory: ignorance of the law precludes consent (to assume liability to punishment) and would thus be an excuse.

In this paper I will discuss two aspects of ignorance of the law: ignorance of illegality (including mistaking the law) and ignorance of the penalty; and I will look at the implications for natives, for tourists and for immigrants. I will argue that consensual theories of punishment need to rely on two premises in order to justify that (claiming) ignorance of the law is no excuse. The first premise explains why individuals are presumed

to 'know' current laws. The second premise explains why individuals are presumed to 'know' new legislation.

This means that the principle 'Ignorantia juris non excusat' does not derive its force from utilitarian justifications (e.g. 'the law must be upheld at all cost') or from the assumption that individuals have so-called 'duties of citizenship', but rather from the insight that individuals are, normally, sufficiently equipped to work out, what the (criminal) law requires and do indeed work it out. In the last part of the paper I ask: When ought a liberal state accept ignorance of the law as an excuse? And I propose an answer.

## II. *Ignorantia juris non excusat*

In Nino's consensual theory of punishment a penalty can only be imposed if certain requirements are met: 1. 'the person punished must have been able to prevent the act to which a liability to suffer punishment is attached' and 2. 'he must have consented to perform the act which involves a liability to suffer punishment' and 3. 'he must have known that the undertaking of the liability was a necessary consequence of the act he consented to perform. This obviously implies the requirement of knowledge of the law and the proscription of retroactive criminal provisions.'[5] A problem arises here: it seems that ignorance of the law would have to count as an excuse for a consensual theory of punishment.

When we talk about ignorance of the law there are two possibilities which we need to consider.[6] First, the offender might not have known that the act in question was against the law. Second, she might have been mistaken about the law in two distinct ways. The offender might have been mistaken in applying the law (e.g. how much force can one use in self-defence) – this would be equivalent to ignorance of illegality and thus might excuse her. There is, of course, a conceptual difference between not knowing the law and mistaking it, but in practice this distinction is usually disregarded.[7] Alternatively, the offender might have been mistaken about the penalty for breaking the law; she might have envisaged a lesser punishment. It seems that she would then only be liable to the lesser punishment.

Let us consider in how far Nino's theory can deal with these possibilities. In modern democracies, or in liberal societies, if a new law is introduced, there might be a consultation period, discussion in the media and, most importantly, before the law comes into force, the public is informed about it (i.e. promulgation). New laws are normally well publicised, particularly if they carry severe penalties or if they affect many people (e.g. the prohibition against using one's mobile phone while

driving). Thus one unstated premise for Nino's theory must be the following:

P1: *For an individual who wants to live within society, it is a requirement of prudence to keep reasonably well informed about changes in the law.*

If the individual does not do so, she runs the risk (i.e. consents to the risk) of suffering harm through punishment without knowing when and where she will incur this liability. This requirement of prudence – needs to be sharply distinguished from any alleged duties of citizenship[8], duties to others or to the state. The prudential requirement, of keeping reasonably well informed about changes in the law, can be achieved, without great cost to the individual, by reading a newspaper, watching the news or just by interacting with friends, family or work colleagues. It is not something that the individual need actively pursue. One could stay abreast of new legislation (which is immediately relevant to individuals) through the everyday interactions one has in society. What is actively required for living within society is *not to shut oneself off from society*; one should not act like a 'hermit' if one wants to live in society.[9] If you consciously decide not to keep informed, if you shut yourself off from society, then you consent to run the risk of harm through punishment, but without knowing when and where you will incur the liability to punishment.[10]

So, for new laws, ignorance is no excuse, because they have been properly publicised. And if the individual wants to take part in societal life and wants to avoid suffering harm through punishment, it is a requirement of prudence to keep reasonably well informed about changes in the law (i.e. not to live like a 'hermit' within society). But what about 'old' laws. Most of them were publicised before the individual was born. Could this be an excuse?

Judges and courts, normally, do not accept ignorance of 'old' laws as an excuse. Why? Because everybody is presumed to know the law of the land. This presumption relates primarily to *mala in se* – which always carry the severest punishments. *Mala in se* are considered to be the most reprehensible crimes in society (e.g. murder, torture and rape). Individuals are inculcated from an early age with moral knowledge. Part of this moral knowledge is learning about *mala in se*, which is a relatively small corpus of knowledge. Whereas learning about (the multitude) of *mala prohibita* might not be part of this moral education – the individual usually learns about them at a later age.

It is actually impossible, even for legal scholars, to 'know' all *mala prohibita*. But this is not as troubling as it seems at first glance. Citizens,

usually, do not live in fear of breaking the law by accident, and large numbers of them are not routinely punished for unwittingly committing illegal acts. Why is this? Because individuals acquire the ability to work out what might be a *malum prohibitum*. Furthermore, only a fraction of all possible *mala prohibita* would ever be relevant to an individual. It might, therefore be prudent to acquaint oneself with such *mala prohibita*. For example, an individual who sets up business as a (private) day trader, ought to find out about the relevant legislation, particularly the legislation against insider trading (– this is, again, a requirement of prudence). And lastly, ignorance of the law is more likely to be accepted as an excuse for *mala prohibita*, particularly if it is clear that there was no *mens rea*.[11]

Ignorance of current laws would not count as an excuse because an individual is normally socialised by their parents, through attending school and through interacting with other people. Thus, by the age of culpability[12], an individual is normally aware of which acts are morally most reprehensible in society (and there is a large overlap between committing such acts and between 'illegal acts' which carry the most severe penalties in law).[13] And, secondly, she would have acquired a (basic) grasp of what the law prohibits (or what types of actions the law might prohibit[14]). So, a further unstated premise for Nino's theory must be:

P2: *Growing up in society, normally, provides the individual with knowledge of what is morally wrong and what is/might be legally wrong.*

At the age of culpability the moral knowledge would (ideally) be comprehensive, whereas the legal knowledge can only be expected to be basic – but it will expand in time.

It is presumed that the combination of these two elements (i.e. moral and legal knowledge) sufficiently equips a person to work out which actions might be against the law, so that they will not accidentally suffer harm through punishment. J.R. Lucas writes: 'Law is not simply something the sovereign tells his subjects to do, but is rather something that the subjects themselves work out in their daily lives. It is a social phenomenon, part of their way of life.'[15]

The individual also knows that any act, which is (either morally and/or legally) wrong, might carry a penalty. When in doubt, it would be a requirement of prudence to find out, whether something is illegal (e.g. what is a tax loophole, what is tax avoidance and what counts as tax evasion).

However, there could be acts, prohibited by law, which are not well known to the public. But since these acts are either obscure and/or clearly

wrong, they would not pose a serious threat to Nino's consensual theory of punishment. With regard to the former, such acts have presumably become obscure because violations are either not being prosecuted any more (e.g. blasphemy in English or Scottish law) or they would only affect very few people (at present the British monarch cannot marry a Catholic).[16]

With regard to acts which are clearly wrong, David Boonin[17] gives an example from the Martha-Stewart-Trial in the US, in which it became apparent that most Americans did not know that there was a law against lying to a federal agent, even if not under oath. Boonin believes that this example of ignorance of the law shows a weakness of Nino's consensual theory of punishment.

However, we need to distinguish two different contexts here. It may well be that many Americans did not know this. All that this illustrates is that most people only have a incomplete grasp of the law. But had they been in Martha Stewart's shoes they ought – and would – have worked out that they were about to do something which was seriously wrong.

Martha Stewart was convicted of insider trading, and when she had lied to a federal officer, she presumably knew that lying is normally wrong. But, more importantly, she could have worked out – and probably did – that lying to an officer of the state, who is investigating a possible crime, is more serious than lying in the private sphere. In the former context lying constitutes an obstruction of justice. She could have worked out that her lying might have legal-normative consequences. And, if – genuinely – in doubt, she should have sought legal advice.

There may, occasionally, be cases where the defendant appears to have sufficient moral and legal knowledge to work out the legality/illegality of an act, but, nevertheless, the defendant claims ignorance of the law.[18] Here the defendant appears to stop short of the last step in our everyday intuitions about morality and the law: she claims not to have worked out that her actions were or might be illegal. In such unusual circumstances the medical profession/psychologists will surely be able to ascertain and explain that the defendant's claim is genuine. In such rare cases ignorance would count as an excuse. But in all other cases, where such claims are made (Martha Stewart might have fit this description), courts would presumably class them as instances of 'wilful blindness'. Here 'a defendant claims a lack of knowledge' and 'the facts suggest a conscious course of deliberate ignorance'.[19]

Lastly, let us consider tourists visiting other countries. Any reasonably well informed (or properly socialised) person would know that the legal systems in other countries might differ from one's own legal system. Therefore, in analogy to 'Premise 1' (keeping reasonably well informed

about changes in the law of one's own country), it would be a requirement of prudence for the tourist to find out about any important differences in the law of the country he is about to visit. It seems reasonable, before going on a driving holiday to the US, to find out how the rules of the road differ (e.g. the prohibition to overtake school buses while they are stopping).

Furthermore, friends, family, work colleagues and/or the travel agent would presumably also warn the person that, for example, in Arab countries a different code of conduct is required. Often the differences are well publicised. For example, before Singapore imposed the ban on importing chewing gum (even for personal use), this was widely reported; and there was a transition period, before the ban was enforced.

If a tourist is visiting a country which is known for a strict code of conduct (say, Iran), this requirement of prudence takes on more urgency. When visiting a country with a similar legal system, it might not seem necessary to find out more about their legal system, and most people do not do so. If there is an infraction, ignorance of the law might lead to punishment, but this is unlikely to be severe, because the infraction would not be something which is morally reprehensible (e.g. jaywalking in the US). Therefore, there is also the likelihood that the other legal system might treat the tourist with some leniency (for jaywalking).[20]

In such cases the imposition of a minor punishment/fine would be just, because the tourist did not bother to become acquainted with the other legal system. The tourist consented to run the risk of being liable to punishment, because she calculated that, the legal systems being similar, she might not commit any offences unwittingly, or, if she did, the punishment would not be severe.

What if the tourist unwittingly committed an offence for which the punishment were severe, even in a country with a similar cultural/legal background (say, the US)? The first person to do so would suffer indeed, and one could see an element of injustice in this. But such a case would presumably be well publicised, and subsequent tourists would know and/or be warned about the severe penalty for this particular act.[21]

The prudential requirement for tourists to become informed about any differences in law holds *a fortiori* for immigrants to another country. Martin P. Golding states: 'Especially immigrants, who are aware of the many discrepancies between their original culture and their new home, should make the effort to find out the legalities and illegalities of what they propose to do.'[22] If they don't become informed, they run the risk of being liable to punishment, but without knowing when and how they will incur this liability.

However, if the immigrants come from a society, with a fundamentally different conception of 'the law' (say, a tribal society), then the state has a 'duty of care' to the immigrants – and to its own citizens. In such exceptional circumstances the state ought to educate the immigrants with regard to the law/the legal system beforehand.

Let us consider differences in penalties between countries. If the act in question is clearly wrong, even in the home country of the tourist (or immigrant), but carries a harsher penalty in the other country, ignorance of the law would not be an excuse. For example, if the penalty for drink driving is harsher in the country the tourist is visiting, she cannot argue that the lesser penalty of his home country should apply to her because she was ignorant of the difference in penalties. Performing an illegal (or immoral) act in another country, is assuming (i.e. consenting to) a liability to risk (and here, without knowledge of the possible scope of penalties). Thus, the tourist is acting imprudently in going through with the illegal act.

Boonin mentions another, general, problem for the consent solution: many natives 'do not know the penalties for the illegal acts they knowingly perform.'[23] They are not just mistaken about the tariff attached to an illegal act, they do not know what the tariff might be in the first place. But, as I have argued in the previous paragraph, knowingly performing an illegal act (and thus assuming liability to punishment) without knowledge of the scope of penalties, is an act of imprudence – or folly.

Boonin[24] is right that in such cases one could not say that the offender consented to the punishment, because he did not know what the punishment would be. But this does not correctly reflect Nino's position. The offender does not consent to a specific punishment, she consents to the loss of immunity from punishment. Thus, being certain about which tariff is attached to an illegal act, is not a necessary condition for the imposition of punishment in Nino's theory. The voluntary assumption of risk of an offender who is not certain about the attached penalty, Nino could argue, is analogous to the voluntary assumption of risk in the law of torts. When accepting a lift from a drunk driver, to use one of Nino's examples,[25] the injured party, did assume liability for any injury (or worse), but without knowing whether they would in fact be injured and, if so, without knowing the extent of the injury.

Furthermore, for many illegal acts the law allows for flexibility in the imposition of punishments (e.g. a fine between £1 000 and £10 000; or imprisonment between 5 to 10 years). Thus, very often, the offender cannot know what the exact punishment for her will be. It is the voluntary

assumption of the legal-normative consequences which the offender consents to, rather than a particular punishment.[26]

The adjudication in criminal law suggests that, generally, knowledge of the law (primarily relating to *mala in se*) is presupposed by the judges. But 'knowledge of the law' does not mean to know all of the law or to have the near perfect grasp of a legal scholar. It means, having comprehensive/ expert moral knowledge combined with a (basic) grasp of the law (or of 'right and wrong'). To 'know the law' does not mean the ability to recall facts about the law. If that were so, we would have children learn the law by rote, just like the times tables. Rather, 'to know the law' means the ability to work out if an act might have legal normative consequences. This view seems to be an accepted practice in liberal societies. For this reason children, the mentally handicapped and the insane are not seen as culpable.[27]

A complete grasp or knowledge of the law is only a theoretical possibility. 'There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so … If there were not [such a thing as a doubtful point of law], there would be no need of courts of appeal, the existence of which shews that judges may be ignorant of law.'[28]

Even though nobody can be said to 'know' all of the law, ignorance of the law is normally not an excuse, because citizens are presumed to have sufficient moral knowledge and/or sufficient legal knowledge to be able to work out for themselves which actions might be in agreement or contrary to the law.[29]

Robert Goodin writes that 'by and large we simply surmise what is a crime, at law, from what we know about what is wrong, morally.'[30] If the (criminal) law did not track morality, then one could be prosecuted for actions, which one did not know to be 'wrong'. Then, one would have to strive to know all the law, because morality would not function as a guide to required standards in society, nor to the particular requirements of the law.[31] In such a situation, ignorance of the law would presumably be a much more frequent occurrence and would indeed be costly.

Goodin writes:

> 'For people to have good epistemic access to the content of the law, what is needed is:
> 1) A way for people to intuit, without detailed investigation, what the law is for most common and most important cases of their conduct;
> 2) A way for people to intuit when their intuitions are likely to be unreliable, and hence that they need to investigate further what the law actually is.'[32]

Society normally does equip the individual with the tools to have good epistemic access to the content of the law: comprehensive moral knowledge combined with (basic) legal knowledge. Thus, the unstated premises (P1 and P2) in Nino's theory justify that the default position of courts is: *Ignorantia juris non excusat*. However, it would be better and clearer to say: *Claiming ignorance of the law will, normally, not count as an excuse*.

## III. When Would a Liberal State Accept Ignorance of the Law as an Excuse?

When it is impossible to know the law: for example, if there is a change of the law in England while a ship is at high seas in the 18th century – the ship's crew will find out about the law change two months later, when they return to port.[33] Secondly, when the defendant 'relies on a judicial opinion, administrative judgement, or other official interpretations of the law that subsequently proves to be erroneous.'[34] Another example would be retroactive legislation. According to Nino, knowledge of the law entails that there must not be any 'retroactive criminal provisions.'[35] Why? Because it would be impossible to have knowledge of the law, if certain acts were to be criminalised retroactively.[36] In such an instance ignorance of the law would be an excuse (– from the perspective of a just legal system). I would suggest that we can derive a general principle from all of this:

*Ignorance of the law is to count as an excuse only if it is impossible to know the law or if the individual does not have the capacity to work out what the law might require. The maxim (ignorance of the law is no excuse) might also be applicable for* mala prohibita *if done unwittingly (particularly for the ever expanding regulatory legislation).*

I would submit that the maxim 'ignorance of the law is no excuse' does not derive its force from considerations like 'the law must be upheld at all cost'[37], or, 'if we did not assume the maxim, criminals would go free' (we presume that most people professing ignorance are lying, and we accept that occasionally genuinely ignorant people are punished[38]), or, 'it would be difficult and costly' to ascertain what people knew about the law, or, 'it would encourage ignorance of the law', or, 'it would establish idiosyncratic interpretations as law'. All such justifications suffer from a weakness – their justification is utilitarian. They shut off the plausible intuition that sometimes ignorance of the law ought to count as an excuse, because only

the blameworthy (i.e. those who consented to assume liability to punishment) should be subject to punishment of the criminal law. Such justifications disregard what the individual deserves. They do not address the individual and her ends – and this is what a consensual theory of punishment aims to do – and what a liberal society ought to do. The maxim, ignorance of the law is no excuse, derives its force from the premises P1 and P2, rather than from any utilitarian considerations.

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# Notes

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[2] Nino, C.S., 'A Consensual Theory of Punishment', *Philosophy and Public Affairs*, Vol. 12, No. 4, 1983, pp. 289-306.

[3] Honderich, T., *Punishment: The Supposed Justifications Revisited*, Pluto Press, London
2006 (first edition 1989).

[4] Boonin, D., 'The Problem of Punishment', Cambridge University Press, Cambridge 2008.

[5] Nino, 1983, p. 299. See also Nino, C.S., *Towards a General Strategy for Criminal Law Adjudication*, unpublished DPhil. thesis, Oxford 1976, p. 117.

[6] See also Boonin, p. 160ff.

[7] 'Generally the institutional writers and the courts have treated these two concepts as synonymous.' See: Matthews, P., 'Ignorance of the Law is no Excuse?', in *Legal Studies*, 3, 1983, pp. 174-192, p. 179.

[8] Andrew Ashworth claims that acquainting yourself with the law, whether current law or new law, is a 'duty of citizenship' (Ashworth, A., *Principles of Criminal Law*, Clarendon Press, Oxford 1991, p. 209). But we are then faced with the problem of establishing that we have duties of citizenship. For a critical discussion of Ashworth see Husak, D.N., 'Ignorance of Law and Duties of Citizenship' in *Legal Studies*, Vol. 105, 1994, pp. 105-115.

[9] But even a hermit who is re-joining society, after having lived in the forest for 20 years, would try to find out how society (including the legal system) has changed.

[10] This would be similar to playing Russian roulette, but not as deadly.

[11] It may help the determination if the defendant is of high moral character, say, a nun or a moral philosopher.

[12] Note that there are wide variations in culpability between modern legal systems. Scotland: 8 years, England/Switzerland: 10, Germany: 14, Argentina/Spain/ Portugal: 16; and Iran distinguishes according to gender – girls: 9 and boys: 15.

[13] Thomas Scanlon argues that there must be safeguards in place to protect individuals from doing something which has been declared illegal by the state. Because such a choice would lead to harm (through punishment) for the individual. Some of the safeguards are 'education, including moral education' and 'the dissemination of basic information about the law'. Note that Scanlon only requires 'basic' information about the law (in the Tanner Lectures), presumably, because a lot of the work is done by (moral) education. However, in *What We Owe to Each Other*, the word 'basic' has been deleted; presumably, because the individual is inculcated with more than a basic grasp of the law by society. Nevertheless, Scanlon does not seem to require expert knowledge of the law. (Scanlon, T.M., 'The Significance of Choice', The Tanner Lectures on Human Values, delivered at

Brasenose College, Oxford University, 1986, p. 202; Scanlon, T.M, *What We Owe to Each Other*, Harvard University Press, Cambridge/Massachusetts 2000, p. 264).

[14] An individual who is aware that carrying a knife is prohibited, can reasonable be expected to conclude that carrying a screwdriver with a (deliberately) sharpened tip must also be prohibited.

[15] Lucas, J.R., 'The Nature of Law', in *Philosophica*, 23, 1979 (1), pp. 37-50, p. 38/39.

[16] Prince Charles, presumably, is aware of this.

[17] Boonin, 2008, p.162.

[18] The defendant is familiar with life in society, i.e. he was not brought up my apes in the jungle or abducted at an early age and held captive in a dungeon, etc. And there is clear evidence that the defendant had, prior to the law-breaking, exercised the ability to work out what morality/the law may require.

[19] See United States v. Coviello (1st Cir. 2000) quoted in United States v. Anthony (1st Cir. 2008) http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=07-1670P.01A. Similarly in English law, see *Westminster City Council v Croyalgrange Ltd* (1986) 83 Cr App R 155, where knowledge on the part of the defendant could be based 'on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from enquiry because he suspected the truth but did not want to have his suspicion confirmed.' (As quoted in Ashworth, p. 192).

[20] The law breaking of the tourist, if it concerns *mala prohibita*, might be treated as a 'mistake of fact' rather than 'ignorance of the law', and thus would be excusing – in a liberal society.

[21] One could, for example, image that there are still countries in which drink driving is a cavalier offence. If a tourist from such a country were to visit China, where the death penalty can be imposed for causing death through drink driving, the tourist could be faced with the severest penalty. But could the tourist claim that she did not know that driving under the influence can cause death, and is therefore morally (and legally) wrong? And could she claim that in her country drink driving is not a serious offence and therefore the harsher penalty in China would be unjust? I don't think the ignorance rule would apply in this case. Furthermore, the country in my example, China, could at present not be seen as a liberal state, which means that it would be prudent to become informed about the Chinese legal system.

[22] Golding, M.P., 'The Cultural Defense', in *Ratio Juris*, Vol. 15, No. 2, 2002, pp. 146-158, p. 154.

[23] Boonin, 2008, p. 162.

[24] Boonin, 2008, p. 163, FN6.

[25] Nino, 1983, p. 298.

[26] See Honderich, p. 51.

[27] The law distinguishes ignorance from nescience of the law. An infant, for example, does not have the capacity to know the law and is thus nescient.

[28] Justice Maule in Martindale v Falkner (1846), as quoted in Matthews, p. 186.

[29] Matthews points out that the 'apparently random way in which the maxim [ignorantia juris non excusat] has sometimes been applied and sometimes not suggests a simple *ad hoc* approach to each offence: does the mental element for the

particular crime include knowledge or appreciation of the law, and, if so, to what extent?' (Matthews, p. 185.) This means that sometimes ignorance is accepted as an excuse, a practice which is in agreement with Nino's theory.

[30] Goodin, R.E., 'An Epistemic Case for Legal Moralism', <http://law.anu.edu.au/news/Bob_Goodin.pdf>, 2008 [an earlier version delivered as the 2008 Dewey Lecture in Law and Philosophy at the University of Chicago Law School], p. 13

[31] See Goodin, p. 15.

[32] Goodin, p. 16.

[33] Note that in a famous case an English court did not accept ignorance as an excuse for the Captain who performed an act which had become illegal while he was at sea. Presumably, the judge thought that the law had to be upheld at all cost (Bailey [1800]).

[34] Model Penal Code [American Law Institute Sect 2.04(3)] as quoted in Husak, p. 115.

[35] Nino 1976, p. 117, and 1983, p. 299.

[36] An exception would be laws which clashed with the moral intuitions/knowledge of society, introduced by a regime of terror in order to make their murderous activities appear to be 'legal' (or just). In such a case the retroactive legislation would serve to make the state a 'Rechtsstaat' again.

[37] See the above example of the ship at high seas (Bailey [1800]).

[38] Chief Justice Ellenborough stated in 1802: "Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in most every case".' (Bilbie vs. Lumley [1802]).