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THE MISTAKE OF LAW DEFENSE AND AN UNCONSTITUTIONAL PROVISION OF THE MODEL PENAL CODE*

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At common law, a defendant's mistaken belief about the law was no defense, even if that mistake resulted from reasonable reliance on governmental advice. Thus, if a prosecutor or police officer erroneously advised that certain conduct was legal, the government was free to prosecute anyone following that advice. In the mid-1950s, two separate legal doctrines altered the common-law rule. First, the American Law Institute's Model Penal Code included a mistake of law defense; a version of this defense was adopted in many states. A few years later, the Supreme Court held that the Constitution prohibited conviction in those circumstances; the Court cited neither the Model Penal Code nor related criminal jurisprudence, instead relying solely on due process principles. Now, in many states, two distinct mistake of law defenses cover the same situation, one based on the Constitution and another based on the Model Penal Code. However, while the Model Penal Code defense never applies when the constitutional defense does not, in many cases the Model Penal Code allows conviction when the Constitution

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standing alone forbids it. For example, the Supreme Court has granted the defense based on oral advice by government actors, but the Model Penal Code, as enacted in several states, allows the defense only for written advice. Similarly, the Supreme Court has granted the defense for strict liability crimes, but some statutes deny the defense in such cases. There is never a reason for a defendant to raise the statutory defense; the constitutional defense is better or at least as good in all cases. But many courts and lawyers do not recognize that there are two defenses, one offering less coverage than the other. As a result, many defendants are convicted after their claims are rejected under a statute when they might have been acquitted had they raised the argument directly under the Constitution. Ironically, then, a law intended to protect people from government deception has itself become a source of government deception. This is unjust. Courts, counsel, legislatures, and the American Law Institute should reconcile the defenses, and ensure that cases are decided based on applicable law rather than because of lawyers' or judges' mistakes about the law.

INTRODUCTION

American law recognizes that a person should not be convicted if she reasonably relies on official advice that the conduct at issue was lawful. If the police advise protesters that they may picket in a

particular place,[1] or if the Army Corps of Engineers advises a business that it may dispose of waste in a particular way,[2] the government then should not be able to prosecute for that conduct, even if the advice turns out to be incorrect.[3] This defense is called "mistake of law";[4] it is also sometimes referred to as "entrapment by estoppel"[5] or the "reliance doctrine."[6]

The defense arose from, and is now embodied in, two distinct sources. First, the Model Penal Code[7] recognized the defense in an

1. Cox v. Louisiana, 379 U.S. 559, 571 (1965).

2. United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 673–74 (1973).

3. *See, e.g.*, Note, *The Immunity-Conferring Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086, 2092–93 (2008) (noting that the defense may be available to government officials acting on the advice of the U.S. Department of Justice's Office of Legal Counsel).

4. A number of sources offer general discussions of the defense, including its rationale, justification and scope. *See generally* WAYNE R. LAFAVE, CRIMINAL LAW § 5.6(e) (5th ed. 2010) (reviewing the basic features of the mistake of law defense); 2 PAUL ROBINSON, CRIMINAL LAW DEFENSES § 183 (1984) (discussing the mistake of law defense generally); Sean Connelly, *Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law*, 48 U. MIAMI L. REV. 627 (1994) (examining the origins and scope of the defense); Dan M. Kahan, *Ignorance of Law* Is *an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997) (critiquing the moral and philosophical bases for denying a mistake of law defense); John T. Parry, *Culpability, Mistake, and Official Interpretations of the Law*, 25 AM. J. CRIM. L. 1 (1997) (discussing the origins, rationale, and implications of allowing the defense); Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. CRIM. L. 487 (2012) (examining the distinction between a pure mistake of criminal law and a mistake of a noncriminal law that is relevant to the elements of a crime); Note, *Applying Estoppel Principles in Criminal Cases*, 78 YALE L.J. 1046 (1969) (discussing the then-nascent constitutional mistake of law defense in the context of the two early Supreme Court cases providing the defense, *Raley v. Ohio*, 360 U.S. 423 (1959), and *Cox v. Louisiana*, 379 U.S. 559 (1965)).

5. United States v. George, 386 F.3d 383, 400 (2d Cir. 2004); United States v. Batterjee, 361 F.3d 1210, 1216–17 (9th Cir. 2004). Some courts disfavor the term entrapment by estoppel, reasoning that it is a due process defense, not entrapment. *See* United States v. Brady, 710 F. Supp. 290, 295 (D. Colo. 1989). The defense has come to be known as "entrapment by estoppel," although it is neither "entrapment," *see* Note, *supra* note 4, at 1046–47, nor "an estoppel at all in any meaningful sense," *Brady*, 710 F. Supp. at 295. The Supreme Court has never used the term "entrapment by estoppel."

6. Commonwealth v. Cosentino, 850 A.2d 58, 66 (Pa. Commw. Ct. 2004).

7. It provides:

> (3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:
>
> (a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or
>
> (b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other

influential and widely adopted provision.[8] In addition, the Supreme Court recognized the defense as part of the Due Process Clauses of the Fifth and Fourteenth Amendments.[9]

Unfortunately, the Model Penal Code conceptualized the defense as resting on public policy and legislative grace rather than any binding command of the Constitution.[10] Accordingly, the drafters of the Model Penal Code and the state legislatures adopting it believed that the defense could be structured, limited, or even abolished as the states chose, like other parts of the Model Penal Code.[11] The Model Penal Code defense was not understood as a statutory embodiment of the constitutional principle. In practice, then, defendants who are misled by government advice are presented with a choice of one or both of two distinct doctrines. They may choose to invoke a statute that has restrictions and might make them ineligible for the defense. Alternatively, they may choose the constitutional principle that does not have those restrictions and thus is more likely to grant them relief. Amazingly, as this Article shows, defendants sometimes elect to plead the statute alone rather than the Constitution, and as a result, they are convicted rather than acquitted.

This Article proposes that it is an error for the Model Penal Code and the laws of the states to have a defense offering less protection than the freestanding Constitution. A defendant gains nothing by raising a defense based on the statute; the constitutional defense is always as good or better. Ironically, the Model Penal

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enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

MODEL PENAL CODE § 2.04 (1962). Section 2.04, in common with general principles of criminal law, also makes mistake of law a defense in two other circumstances:

(1) Ignorance or mistake as to a matter of fact or law is a defense if:

(a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or

(b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

Id.

8. *See infra* notes 113–15.
9. *See infra* Part I.A.
10. *See infra* Part I.B.
11. It is a "Model," rather than "Uniform," code.

Code's mistake of law defense, designed to prevent unfair convictions based on misleading governmental advice, actually generates unfair convictions because the defense itself constitutes misleading governmental advice, inducing defendants to forego a defense that might work in favor of one that will not.

Part I of this Article discusses the development of the mistake of law defense in the United States.[12] In the early twentieth century, some courts and legislatures recognized the unfairness of imprisoning people for following government advice, while other jurisdictions insisted that ignorance of the law was no excuse, even if that ignorance was induced by good-faith reliance on government advice.

By midcentury, both the Supreme Court and influential law reformers concluded that the arguments in favor of a mistake of law defense had prevailed, but the Court and the American Law Institute ("ALI") created the defense in very different ways. Supreme Court cases held that the Due Process Clauses of the Fifth and Fourteenth Amendments prohibited government actors from advising people that particular conduct was permissible and then prosecuting them for it.[13] When recognizing what this Article will call the "constitutional defense," the "constitutional mistake of law defense," or "entrapment by estoppel," the Court's opinions make clear that the defense was grounded in the principles of fairness embodied in the Constitution; little or no attention was paid to criminal law concerns per se, such as whether the defendant had a particular mens rea or whether the advice negated some element of the offense.

The ALI also concluded that the Model Penal Code should contain such a defense from the beginning of the drafting process in the mid-1950s.[14] However, what this Article will call the "Model Penal Code defense" or the "Model Penal Code mistake of law defense," rested on principles of criminal law and public policy. Indeed, Model Penal Code section 2.04 was initially drafted before the Supreme Court recognized the constitutional basis of the principle, so it could not have been meant to incorporate a constitutional requirement.

Although they arose independently, the Model Penal Code defense and the constitutional defense address precisely the same problem: whether a defendant can be convicted of a crime after the government told him that the conduct was lawful and permissible. Although addressing the same issue, as Part II explains, the Model

12. *See infra* Part I.
13. *See infra* Part I.A.
14. *See infra* note 107 and accompanying text.

Penal Code, particularly as adopted in the states, denies relief in many circumstances where the constitutional defense would grant it.[15]

Part III proposes a resolution of the problem of having a narrow statute coexisting with a broader constitutional provision.[16] Perhaps the Model Penal Code–based statutes represent a failed effort to codify the constitutional mistake of law defense. Alternatively, perhaps the statutes are obsolete, once having served the useful purpose of recognizing the mistake of law defense but now having been superseded by a more capacious understanding of due process of law as embodied in the constitutional defense. In either event, the Model Penal Code–based statutes do much harm and little good by inducing defendants to invoke a defense that will not work instead of one that will or might. Model Penal Code section 2.04 and its state law enactments should be amended to eliminate their misleading character, and they should be construed by courts to be at least as broad as the constitutional defense recognized by the Supreme Court.

I. THE DEVELOPMENT OF MISTAKE OF LAW DEFENSES

At common law, both historically and today, a personal misunderstanding or ignorance of the law is generally not a defense to a criminal prosecution;[17] this is reflected in the familiar maxim "ignorance of the law is no excuse."[18] The ignorance principle arose when most crimes involved clear moral wrongdoing, such as rape, robbery, and murder; people committing such acts could rarely claim that they thought their conduct to be legitimate.[19] Applying this principle rigidly, until the mid-twentieth century, many courts held that ignorance of the law was no defense, even when a person reasonably relied on a government official's advice.[20]

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15. *See infra* Part II.

16. *See infra* Part III.

17. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.6 (2d ed. 2003).

18. *Id.*

19. *See* Parry, *supra* note 4, at 24; Note, *supra* note 4, at 1060–63.

20. *See, e.g.*, Broadfoot v. State, 182 So. 411, 412 (Ala. Ct. App. 1938) (holding that reliance on the opinions of a state attorney general is no defense); Lindquist v. State, 213 S.W.2d 895, 896 (Ark. 1948) (affirming a fine notwithstanding reliance on attorney general opinions); Hopkins v. State, 69 A.2d 456, 460 (Md. 1949) (holding that reliance on the opinion of a prosecutor is no defense), *appeal dismissed per curiam*, 339 U.S. 940 (1950); State v. Foster, 46 A. 833, 834–35 (R.I. 1900) (holding that the advice of the state treasurer that a licensing provision was inapplicable is no defense). *See generally* Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641 (1940) (discussing the history and modern justifications of the mistake of law defense and its relationship with moral culpability); R.H.S., Annotation, *Reliance upon Advice of Counsel as Affecting Criminal Responsibility*, 133 A.L.R. 1055 (1941) (discussing some cases involving advice

However, over time, strict adherence to the ignorance maxim came to seem unjust in some circumstances.[21] Particularly in regulatory areas or other complex branches of law where even scrupulous people acting in good faith found it difficult to avoid occasional mistakes, courts found it unfair to impose criminal liability when a defendant reasonably relied on government advice.[22] The decision of the Supreme Court of Missouri in *State v. White*[23] illustrates the principle. When discharging White from prison, the warden handed him pardon papers and told him, "[n]ow go home and be a good citizen."[24] White presented those papers to election officials, who told him he could vote.[25] He was convicted of voting illegally.[26] Although under the law White's right to vote had not actually been restored, the Supreme Court of Missouri reversed, explaining:

> While it is true that everybody is supposed to know the law, it is nevertheless a fact that the most trained judicial minds often have great difficulty in determining what the law is on a given subject. . . . [I]t would be a harsh rule to say that he can be convicted of a felony, because these election officers were mistaken and gave him improper advice.[27]

Congress also recognized that it was unfair to convict people for violating complicated laws when they relied on official advice in good faith. Accordingly, it relaxed the ignorance maxim in New Deal

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from government officials); G.S.G., Annotation, *Reliance on Judicial Decision as Defense to Prosecution*, 49 A.L.R. 1273 (1927) (discussing cases addressing the effect of a change in judicial decision on the rights of a defendant).

21. Bruce R. Grace, Note, *Ignorance of the Law As an Excuse*, 86 COLUM. L. REV. 1392, 1392 (1986) (arguing that "[t]he principle that ignorance of the law is no excuse, long thought to be basic to criminal law, is no longer appropriate when criminal law applies in surprising ways to otherwise ordinary behavior").

22. *See, e.g.*, People v. Ferguson, 24 P.2d 965, 970 (Cal. Dist. Ct. App. 1933) (reversing conviction where corporation commission officials mistakenly advised the defendant that he could sell certain securities); State *ex rel.* Williams v. Whitman, 156 So. 705, 709 (Fla. 1934) (holding no liability for malum prohibitum offenses made in reliance on judicial opinions); State v. Pearson, 97 N.C. 434, 436–37, 1 S.E. 914, 915–16 (1887) (vacating conviction where election officials mistakenly allowed a convicted felon to vote); *see also* MODEL PENAL CODE § 2.04 cmt. 3 at 139 (Tentative Draft No. 4 1955) (collecting cases upholding entrapment by estoppel defense); Parry, *supra* note 4, at 8.

23. 140 S.W. 896 (Mo. 1911).

24. *Id.* at 896.

25. *Id.*

26. *Id.*

27. *Id.*

regulatory statutes.[28] For example, the Securities Act of 1933 provided that "[n]o provision of this subchapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission . . . ."[29] The Supreme Court extended this principle to tax cases, holding, for example, that a criminal tax conviction requires an intentional violation of a known legal duty; a person who pays no tax and files no return is not guilty if she did not know of the legal obligation to do so.[30]

There are powerful reasons for allowing a defense when a person reasonably relies on government advice. As Professor John T. Parry explained, the reasons for the general rule that ignorance of the law is no excuse do not apply when a person follows official advice.[31] Justifications for limiting the defense of personal mistake of law include problems of judicial competence to evaluate claims of ignorance,[32] the value of societal education about the law,[33] and the idea that laws have some objective meaning.[34] However, Parry argued that these justifications do not apply to a mistake of law defense founded on official advice.[35] The defense does not impose upon judges the difficult task of determining whether a defendant was actually ignorant of the law; the focus is on the government's

28. *See* MODEL PENAL CODE § 2.04 cmt. 3 at 139 (Tentative Draft No. 4, 1955) (noting history).

29. Securities Act of 1933 § 19, 15 U.S.C. § 77s (2012); *see also* Securities Exchange Act of 1934 § 23, 15 U.S.C. § 80a-37(c) (2012) ("No provision of this subchapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, b[e] amended or rescinded or be determined by judicial or other authority to be invalid for any reason.").

30. United States v. Murdock, 290 U.S. 389, 394–96 (1933), *overruled in part on other grounds*, Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), *abrogated by* United States v. Balsys, 524 U.S. 666 (1998); *see also* Ratzlaf v. United States, 510 U.S. 135, 141–42 (1994) (holding that federal reporting requirements for banks require knowledge of unlawfulness).

31. Parry, *supra* note 4, at 66.

32. *Id.* at 67. The judicial competence approach holds that "the maxim exists because it is too difficult for courts to evaluate claims of ignorance." *Id.*

33. *Id.* The societal education argument posits that " 'to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey.' " *Id.* (quoting OLIVER W. HOLMES, JR., THE COMMON LAW 48 (Boston, Little, Brown & Co. 1881)).

34. *See id.* at 68. Lastly, the objective-meaning principle recognizes that it is " 'possible to disagree indefinitely regarding the meaning of [those] words.' But 'the debate must end' at some point and legal rules must have an objective meaning." *Id.* (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 382 (2d ed. 1960)).

35. Parry, *supra* note 4, at 66.

statement and the defendant's objectively reasonable reliance.[36] Further, rejecting the defense may encourage ignorance of the law because the availability of a defense incentivizes people to inquire about the permissibility of their conduct. Also, presumably, the normal way that people obtain official advice is by asking government officials for instructions, which is conduct to be encouraged.[37]

These developments reflected a general consensus that it was unfair to impose liability based on misleading official advice. But, the idea had not turned into a constitutional principle. Rather, it was regarded as a policy question upon which jurisdictions and particular legal regimes could, and did, differ. Then, in the 1950s, two distinct general solutions arose: the U.S. Supreme Court created a defense based on the Constitution, and the ALI created a defense in the Model Penal Code.

A. Mistake of Law As a Constitutional Defense

The U.S. Supreme Court recognized mistake of law as a defense[38] in *Raley v. Ohio*,[39] a 1959 decision that was unanimous on

36. *See* MODEL PENAL CODE § 2.04(3) (1962) (stating that the mistake of law defense is available when one "acts in reasonable reliance upon an official statement of the law"). Research has uncovered no cases on the issue, but if a defendant knows that the governmental advice is wrong, the defense should not be available.

37. Although not often discussed by courts or commentators, there is another reason, beyond fairness in a particular case, that the government should not be able to advise people that conduct is permitted or required by law and then prosecute them for it: it would create the risk of oppression and tyranny. If government inducement to do things that were illegal or not to do things that were required by law were irrelevant, then a corrupt government would have a powerful tool to imprison disfavored individuals or members of disfavored groups.

38. The issue was raised in an earlier case, *Hopkins v. State*, 69 A.2d 456 (Md. 1949), *appeal dismissed per curiam*, 339 U.S. 940 (1950). In *Hopkins*, the Maryland Court of Appeals affirmed the conviction of a minister for advertising his availability to perform weddings over a claim that he had a right to advertise grounded in the Free Exercise Clause of the First Amendment. 69 A.2d at 459–60. Hopkins also claimed that the local prosecutor had advised him that the advertising sign did not violate the statute, but the Maryland court held that "advice given by a public official, even a State's Attorney, that a contemplated act is not criminal will not excuse an offender if, as a matter of law, the act performed did amount to a violation of the law." *Id.* at 460. For some reason, Hopkins' jurisdictional statement in his appeal to the U.S. Supreme Court focused exclusively on the free exercise claim, omitting the mistake of law argument. *See* Statement as to Jurisdiction at 2–3, Hopkins v. Maryland, 339 U.S. 940 (1950) (No. 49-727). Accordingly, while the Court's summary disposition is a holding on the merits of the issues presented, it does not represent an expression of the Court's views on the entrapment by estoppel question. *See* Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam) (noting that "dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from"). Reverend Hopkins almost certainly would have First

the point.[40] Relying on the Due Process Clause of the Fourteenth Amendment, the Court held that "convicting a citizen for exercising a privilege which the State clearly had told him was available to him" is "to sanction the most indefensible sort of entrapment by the State."[41]

In *Raley*, the Ohio Un-American Activities Commission[42] held a hearing to investigate the "suspicious activities" of four people who were subpoenaed as witnesses.[43] The Commission Chair began by explaining: "I should like to advise you under the Fifth Amendment, you are permitted to refuse to answer questions that might tend to incriminate you.... But you are not permitted to refuse to answer questions simply for your own convenience."[44] The witnesses then declined to answer questions.[45] As a result, the witnesses were convicted of failing to answer particular questions.[46]

Amendment protection now for his commercial speech. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977) (upholding a lawyer's right to advertise representation in divorces); European Connections & Tours, Inc. v. Gonzales, 480 F. Supp. 2d 1355, 1370 (N.D. Ga. 2007) (upholding disclosure requirements under the International Marriage Broker Regulation Act, noting that "[n]owhere in the IMBRA statute are there any provisions attempting to regulate the content of IMBs' commercial messages in which they tout their respective services in an attempt to induce commercial transactions").

39. 360 U.S. 423 (1959).

40. Justice Potter Stewart did not participate, *id.* at 442, presumably because his father, Ohio Supreme Court Judge James Garfield Stewart, dissented below. The eight participating U.S. Supreme Court justices ostentatiously adopted its rationale. *See id.* at 426 (agreeing with pertinent "part of Judge Stewart's dissenting opinion in the Ohio Supreme Court"); *id.* at 442 (Clark J., concurring in pertinent part) ("Like our Brethren... we, too, agree with Judge Stewart of Ohio's Supreme Court."). Justice Stewart agreed with his father, joining the majority in the later cases applying the doctrine. *See* United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 673–75 (1973); United States v. Laub, 385 U.S. 475, 487 (1967); Cox v. Louisiana, 379 U.S. 559, 571 (1965).

41. *Raley*, 360 U.S. at 438.

42. The Ohio Un-American Activities Commission was established by the Ohio General Assembly "to investigate subversive activities." State v. Morgan, 133 N.E.2d 104, 110 (Ohio 1956), *vacated*, 354 U.S. 929 (1957), *aff'd in part, rev'd in part sub nom.* Raley v. Ohio, 360 U.S. 423 (1959). The Commission was comprised entirely of members of the General Assembly and had the power to prosecute individuals for contempt. *Id.*

43. *See Raley*, 360 U.S. at 424 n.1. One of the four individuals was suspected of participating in communist activities. *Id.* at 426. The other three were questioned about "subversive activities in the labor movement." *Id.* at 428.

44. *Id.* at 426–27. The chairman also advised the witnesses of Ohio's analogous state constitutional right against self-incrimination. *Id.* at 425.

45. *See id.* at 426–28. The witnesses refused to answer questions that arguably were not incriminating. One witness refused to answer simple questions, such as his address. *Id.* at 428. In response, Commission counsel asked "Is there something about the nature or character of the home in which you live that to admit you live there would make you subject to criminal prosecution?" *Id.* (internal quotation marks omitted). Only once did the Commission reject the witness's Fifth Amendment assertion. *Id.* at 429. In most

The prosecution's theory at trial was that, although the privilege might be available in general, it could not be used as a basis to decline to answer specific questions, the answers to which were clearly not incriminating.[47] The Ohio Supreme Court affirmed the conviction but on a different ground. The court discovered and relied on an Ohio statute immunizing witnesses testifying before legislative committees.[48] Because of the statute, although the defendants did not realize it, they could not have been prosecuted based on their testimony.[49] As the witnesses in fact faced no risk of prosecution, they could not invoke the privilege against self-incrimination.

The U.S. Supreme Court reversed. The Ohio Commission had never mentioned the statute to the witnesses; to the contrary, it expressly stated that the privilege could be invoked.[50] Therefore the Court concluded that even though the privilege not to self-incriminate was not legally available because immunity removed the risk of prosecution, the defendants had no reason to know that legal nuance.[51] Accordingly, the defendants could not be convicted for relying on governmental advice that the privilege was available.[52]

The Supreme Court applied the defense again in *Cox v. Louisiana*.[53] Defendant B. Elton Cox[54] organized a protest at a

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instances, after the witness asserted his or her Fifth Amendment privilege, the Commission moved on to the next question. *Id.*

46. *Id.* at 424.

47. *Id.* at 432.

48. State v. Morgan, 133 N.E.2d 104, 115 (Ohio 1956), *vacated*, 354 U.S. 929 (1957), *aff'd in part, rev'd in part sub nom.* Raley v. Ohio, 360 U.S. 423 (1959). The statute provided that:

> [T]he testimony of a witness examined before a committee or sub-committee shall not be used as evidence in a criminal proceeding against such witness, *nor shall a person be prosecuted or subjected to a penalty or forfeiture on account of a transaction, matter, or thing, concerning which he testifies*, or produces evidence.

OHIO REV. CODE ANN. § 101.44 (West 1953) (emphasis added).

49. The Ohio Supreme Court held that the statute applied although the privilege did not protect against federal prosecution. *Raley*, 360 U.S. at 431–34.

50. *Id.* at 431–32 ("For reasons unexplained, . . . the Commission's actions were totally inconsistent with a view on its part that the privilege against self-incrimination was not available. The Commission thought the privilege available, and it gave positive advice that it could be used.").

51. *Id.* at 441–42.

52. *Id.* at 425–26.

53. 379 U.S. 559, 572 (1965).

54. *See generally Benjamin Elton Cox Biography*, FREEDOM RIDERS, http://www.pbs.org/wgbh/americanexperience/freedomriders/people/benjamin-elton-cox (last visited Aug. 20, 2014) (stating that Reverend Cox was a well-known civil rights leader who was one of the first Freedom Riders).

courthouse where twenty-three students were held after being arrested for picketing racially segregated lunch counters.[55] As the group approached the courthouse, the Chief of Police told Cox that the protesters had to stay on the west side of the street, 101 feet from the courthouse.[56] Cox complied, but, after Cox's statements offended the Chief, the Chief ordered the protesters to disband.[57] The protestors initially refused to leave but departed after being tear gassed.[58] Cox was convicted of various crimes, and the Louisiana Supreme Court affirmed.[59] One offense was picketing "near" a courthouse with the intent to influence a public official or jury; the critical question was whether he could be convicted of being too "near" based on being in a place where the police told him to be.[60]

The Supreme Court, applying *Raley*, held that "[t]he Due Process Clause does not permit convictions to be obtained under such circumstances."[61] Cox was "justified in his continued belief that because of the original official grant of permission he had a right to stay where he was."[62] Although the permission had been withdrawn, it was for a reason inconsistent with the First Amendment, and therefore Cox was justified in continuing the protest.[63]

In *United States v. Laub*,[64] the Court again found that a person could not be convicted for actions performed in reliance on government advice.[65] A unanimous Court held that a defendant could not be prosecuted for conspiracy based on a plan to go to Cuba with a U.S. passport not validated for travel to Cuba.[66] The State Department had consistently explained that individuals travelling to a country where a U.S. passport was not valid would be without diplomatic protection, but never suggested that travelers would be

55. Cox v. Louisiana (*Cox I*), 379 U.S. 536, 538–39 (1965).
56. *Id.* at 541.
57. *Id.* at 543.
58. *Id.* at 543–44.
59. Cox v. Louisiana (*Cox II*), 379 U.S. 559, 560 (1965).
60. *Id.* The Court suggested that it might have upheld the conviction had the police chief denied the right to protest in the first instance. *Id.* at 571–72 ("This is not to say that had the appellant, entirely on his own, held the demonstration across the street from the courthouse . . . and . . . had he defied an order of the police requiring him to hold this demonstration at some point further away . . . we would reverse the conviction as in this case.").
61. *Id.* at 571.
62. *Id.* at 572.
63. *Id.*
64. 385 U.S. 475 (1967).
65. *Id.* at 487.
66. *Id.* at 482–85.

guilty of a crime: "Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. As this Court said in *Raley* . . . we may not convict 'a citizen for exercising a privilege which the State clearly had told him was available . . . .' "[67]

There is an arguable limitation to the scope of *Raley*, *Cox*, and *Laub*. While the cases were not decided on the basis that independent constitutional rights were at stake, therefore requiring a greater degree of scrutiny, these cases arguably implicated constitutional rights. *Raley* implicated the privilege against self-incrimination, *Cox* involved freedom of speech, assembly, and equal protection of the law, and *Laub* affected the right to travel. Accordingly, based on just these cases, there might be an argument that a constitutional mistake of law defense is inapplicable in a criminal case where independent constitutional rights are not involved.[68]

However, the Court's most recent case makes clear that the principle is not limited to prosecutions implicating specific constitutional rights. In *United States v. Pennsylvania Industrial Chemical Corp.*[69] ("*PICCO*"), the Court reaffirmed the right to rely on official advice in an ordinary commercial case.[70] Defendant PICCO was convicted under section 13 of the Rivers and Harbors Act of 1899 for dumping industrial refuse into the Monongahela River.[71] Section 13 prohibited dumping in navigable waters.[72] The Army Corps of Engineers, responsible for administering the Act, had consistently interpreted section 13 to apply only to discharges that impeded or obstructed navigation,[73] but the Department of Justice brought criminal charges for a discharge without alleging that it

67. *Id.* at 487 (quoting Raley v. Ohio, 360 U.S. 423, 438 (1959)).
68. *See* Parry, *supra* note 4, at 41 n.160; Note, *supra* note 3, at 2095–96.
69. 411 U.S. 655 (1973).
70. *Id.* at 673–75.
71. *Id.* at 658. That section provides:

> It shall not be lawful to throw, discharge, or deposit, . . . either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water.

Rivers and Harbors Appropriation Act of 1899, ch. 425, § 13, 30 Stat. 1152 (codified as amended at 33 U.S.C. § 407 (2012)).

72. Rivers and Harbors Appropriation Act § 13.
73. United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 672 (1973).

impeded navigation.[74] The question was whether PICCO was entitled to rely on the interpretations of the Army Corps of Engineers.[75]

The Court noted that there was no question that the advice of the Corps of Engineers was wrong and therefore that PICCO violated the law by dumping, even if navigation was unaffected.[76] The Court explained that section 13 in fact applies to water deposits that have no tendency to affect navigation; based on recent Supreme Court and lower court cases, "[section] 13 is to be read . . . as imposing a flat ban on the unauthorized deposit of foreign substances into navigable waters."[77]

Thus, as is typical in such cases, the question was not the rights of the parties going forward; the defendant's conduct clearly violated the law. Instead, the question was whether PICCO could be criminally punished for actions that were in fact illegal but that occurred during the period when "the Army Corps of Engineers consistently construed [section] 13" as inapplicable to the charged conduct.[78]

The Court applied *Raley* and *Cox*,[79] holding that "to the extent that the regulations deprived PICCO of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."[80] Accordingly, the Court held that "it was error for the [d]istrict [c]ourt to refuse to permit PICCO to present evidence . . . that it had been affirmatively misled into believing that the discharges in question were not a violation of the statute."[81]

The power of the defense is underscored by the fact that there was a reasonable argument that PICCO's position was clearly incorrect even at the time of the offense, based on existing Supreme Court decisions and the regulations as a whole.[82] Justices Blackmun and Rehnquist, while not questioning the applicability of the defense in principle, would have held it unavailable to PICCO for that reason.[83] Something quite similar, though, can be said about *Raley*;

74. *Id.* at 658.
75. *Id.* at 657.
76. *Id.* at 670–71.
77. *Id.*
78. *Id.* at 672.
79. *Id.* at 674.
80. *Id.*
81. *Id.* at 675.
82. *Id.* at 674–75.
83. *Id.* at 675–76 (Blackmun and Rehnquist, JJ., dissenting).

because the immunity statute was there for anyone who cared to read it, the government's advice that witnesses could invoke their privilege against self-incrimination was clearly wrong.[84] *Raley* and *PICCO* suggest, then, that reliance on official advice may be reasonable even if, after researching the question, a lawyer could have definitively determined that the governmental advice was wrong. Put another way, the decisions imply that private citizens are not expected to know more about the law than government officials.

Raley and its progeny developed constitutional principles, not criminal law principles, in several senses. First, neither the Court nor the parties emphasized criminal law jurisprudence.[85] The Court did not rest the outcome on common law, statutes, or scholarly authorities dealing with mistake of law. Instead, the critical issues were fairness, notice, and due process. Relatedly, the decision was not based on negation of an essential element of an offense at issue.[86] *PICCO* did not actually cite the Due Process Clause, but it cited *Raley* and *Cox*[87] and has universally been understood as resting on due process principles.[88]

Relying on *Raley*, *Cox*, *Laub*, and *PICCO*, lower courts have continued to elaborate the entrapment by estoppel defense. While the precise formulations differ, most courts require the following:

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84. The difference might be that PICCO might have had access to a lawyer to investigate questions like this. Therefore, it is even more telling that the Court allowed the possibility of a defense.

85. *Cf.* People v. Woods, 616 N.W.2d 211, 217 (Mich. Ct. App. 2000) ("The due process principle underlying the doctrine of entrapment by estoppel is fairness to a well-intentioned citizen who unwittingly breaks the law while relying on government agents' statements under circumstances where reliance is reasonable.").

86. The Court could not have decided the case on that basis, because *Raley* and *Cox* were state cases, and the state courts, which have the last word on the meaning of state laws did not find that, say, knowledge of illegality was an essential element of the offense that was negated by the mistaken advice. *See* Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943) (noting that state courts are the "final arbiters" of state criminal law). Instead, the defense was based on an assumption that every element of the offense had been proved beyond a reasonable doubt. *See generally, e.g.*, *PICCO*, 411 U.S. 655 (allowing PICCO to raise the affirmative defense).

87. *PICCO*, 411 U.S. at 674.

88. *See, e.g.*, United States v. Levin, 973 F.2d 463, 468 (6th Cir. 1992); United States v. Austin, 915 F.2d 363, 366 (8th Cir. 1990); Lerner v. Gill, 751 F.2d 450, 457 n.6 (1st Cir. 1985); United States v. Carroll, 320 F. Supp. 2d 748, 758 (S.D. Ill. 2004); United States v. Conley, 859 F. Supp. 909, 921 (W.D. Pa. 1994); United States v. Brady, 710 F. Supp. 290, 294 (D. Colo. 1989); Commonwealth v. Kratsas, 764 A.2d 20, 27–28 (Pa. 2001); Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 ADMIN. L. REV. 653, 736 (1992).

> [T]hat (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement.[89]

The Pennsylvania Supreme Court stated: "In harmony with the United States Supreme Court's approach to due process challenges, and considering the impossibility of identifying all forms of conduct and practices that may implicate protection, we recognize that such requirements should not be applied rigidly as against a defendant whose claims clearly implicate fundamental fairness."[90] Courts differ on who bears the burden of persuasion,[91] but many federal courts hold that the defendant must prove each element.[92]

The constitutional defense is distinct from several related doctrines.[93] First, although sometimes called entrapment by estoppel, it is not a true estoppel, because once a defendant is disabused of her mistake, she must thereafter comply with the law.[94] A typical case for

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89. United States v. W. Indies Transp., Inc., 127 F.3d 299, 313 (3d Cir. 1997). The Second and Tenth Circuits define entrapment by estoppel in the same manner. *See* United States v. Abcasis, 45 F.3d 39, 43 (2d Cir. 1995); United States v. Nichols, 21 F.3d 1016, 1018 (10th Cir. 1994). The First and Sixth Circuits define entrapment by estoppel slightly differently: "(1) a government must have announced that the charged criminal act was legal; (2) the defendant relied on the government announcement; (3) the defendant's reliance was reasonable; and, (4) given the defendant's reliance, the prosecution would be unfair." United States v. Ormsby, 252 F.3d 844, 851 n.7 (6th Cir. 2001); *see* United States v. Smith, 940 F.2d 710, 715 (1st Cir. 1991). The Ninth Circuit uses another formulation:

> In order to establish entrapment by estoppel, a defendant must show that (1) "an authorized government official," "empowered to render the claimed erroneous advice," (2) "who has been made aware of all the relevant historical facts," (3) "affirmatively told him the proscribed conduct was permissible," (4) that "he relied on the false information," and (5) "that his reliance was reasonable."

United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004) (citations omitted).

90. *Kratsas*, 764 A.2d at 33.

91. *See, e.g.*, State v. Edwards, 837 N.W.2d 81, 90 (Neb. 2013) (holding that the state must disprove defense beyond a reasonable doubt).

92. *Batterjee*, 361 F.3d at 1216; United States v. Benning, 248 F.3d 772, 775 (8th Cir. 2001); *Abcasis*, 45 F.3d at 44; *Austin*, 915 F.2d at 365.

93. Daniel E. Monnat & Paige A. Nichols, *How to Free a 'Guilty' Client by Arguing Entrapment by Estoppel*, THE CHAMPION, Dec. 2010, at 30, 31 (discussing the relationship to related defenses).

94. In *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990), Justice White's concurring opinion distinguished *PICCO* from a claim for affirmative monetary relief against the United States: "In *PICCO*, the courts were asked to prevent the Government from exercising its lawful discretionary authority in a particular case whereas here the

application of the doctrine is when a probationer is mistakenly told she may possess a firearm, when in fact a criminal statute prohibits her from doing so. Entrapment by estoppel (or the constitutional defense, mistake of law), if applied, prevents her conviction for being a felon in possession of a firearm. A true estoppel would not only provide a defense for possession of the firearm, but would allow her to continue to possess the firearm even after learning of the mistake.[95]

Second, entrapment, like the constitutional mistake of law defense, involves government inducement. But with true entrapment, the government induces the defendant's conduct, not necessarily a belief that the conduct is legal.[96] In true entrapment cases, the defendant need not be under the impression that the conduct is lawful or that the encouragement comes from the government.[97]

Third, the public-authority defense benefits private persons who commit crimes while working for the government (say, by purchasing or selling drugs in order to facilitate a prosecution).[98] However, the constitutional defense allows reliance on mere advice that conduct is lawful, and therefore it "does not require the government to have actually asked the defendant to engage in the prohibited conduct."[99]

The constitutional defense is also distinct from the fact that knowledge that conduct is illegal is sometimes made an element of a criminal offense.[100] In such cases, a defendant's belief that conduct is

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courts have been asked to require the Executive Branch to violate a congressional statute." 496 U.S. at 434–35 (White, J., concurring).

95. *See, e.g.*, *In re* Lyon, 882 A.2d 1143, 1145 (Vt. 2005) ("[W]e hold that the Board erred in rejecting the Lyons' estoppel argument and that the State is estopped from revoking the Lyons' wastewater permit.").

96. " 'Entrapment by estoppel' has little to do with the affirmative defense of entrapment, under which a person induced by public officials to commit a crime can be convicted only if he was predisposed to commit that offense independent of the inducement." Kimani v. Holder, 695 F.3d 666, 670 (7th Cir. 2012).

97. Gabriel J. Chin, *The Story of* Jacobson*: Catching Criminals or Creating Crime*, *in* CRIMINAL LAW STORIES 299, 304 (Donna Coker & Robert Weisberg eds., 2013).

98. United States v. Baptista-Rodriguez, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994); *see* United States v. Jumah, 493 F.3d 868, 874 & n.4 (7th Cir. 2007); United States v. Burt, 410 F.3d 1100, 1104 n.2 (9th Cir. 2005).

99. United States v. Fulcher, 188 F. Supp. 2d 627, 642 (W.D. Va. 2002) (citing 53 AM. JUR. 3D *Proof of Facts* § 20 (1999)).

100. *See supra* notes 29–30 and accompanying text; *see* People v. Weiss, 12 N.E.2d 514, 515–16 (N.Y. 1938) (holding that a mistake of law could negate element of offense where statute provided that an action was criminal only if done "without authority of law"). A belief that property has been abandoned may be a defense to a charge of larceny or damage. *See* People v. Goodin, 69 P. 85, 86 (Cal. 1902); *see also* MODEL PENAL CODE § 2.04(1) (1962) (providing that ignorance or mistake of fact or law is a defense if it negates an element of the statute, or if the statute provides that ignorance or mistake constitutes a defense).

legal precludes conviction.[101] This variety of mistake of law differs from the entrapment by estoppel variety in two ways. First, it is not a true defense; it represents a failure of proof of an essential element of the offense.[102] Second, it normally does not matter how or why the mistake is made; a personal mistake or a mistake induced by a private actor has the same consequence as a mistake induced by the government.

Another conceptually related defense is the "void for vagueness" doctrine, which deems a statute unenforceable if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden."[103] But this doctrine is based on the language of a statute itself, not governmental advice about it. Also, for entrapment by estoppel to apply, the advice must be reasonably clear, and the crux of the void for vagueness doctrine is that the law's command is mysterious.[104]

Lambert v. California[105] may be another distant cousin of the constitutional defense because it also provides a defense when the defendant does not understand the actual state of the law. In *Lambert*, the Supreme Court held that due process sometimes precludes punishment of innocent omissions when the defendant is not actually aware of the duty to act.[106] In *Lambert*, the constitutional defect is lack of notice of the law, not a belief that the conduct is legal. In mistake of law defenses, the defendant will normally have had some inkling of the possibility that the conduct might be criminal; otherwise, they would not have sought government advice to clarify the scope of their duties.

B. Mistake of Law As a Model Penal Code Defense

The drafters of the Model Penal Code developed a mistake of law defense based on criminal law principles, independently of the *Raley* line of constitutional cases. In the mid-twentieth century, law

101. ROBINSON, *supra* note 4, § 62(b).

102. *Jumah*, 493 F.3d at 873–74.

103. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)); *see, e.g.*, Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1019 (9th Cir. 2013) ("We conclude that the phrase 'in violation of a criminal offense' is unintelligible and therefore the statute is void for vagueness.").

104. Perhaps, though, reliance on official advice about a vague or unclear statutory command is more likely to be reasonable.

105. 355 U.S. 225 (1957).

106. *Id.* at 229–30; *see, e.g.*, Garrison v. State, 950 So. 2d 990, 993–94 (Miss. 2006); Wolf v. State, 292 P.3d 512, 517–18 (Okla. Crim. App. 2012).

reformers turned individual cases and statutes recognizing mistake of law in particular circumstances into a general principle. Following the suggestion of the National Commission on Reform of Federal Criminal Law ("National Commission"), the ALI concluded that "[i]t is difficult . . . to see how any purpose can be served by a conviction" if the defendant violated the law after relying on the advice of a government official.[107] The National Commission recognized that a person who, in good faith, relies on erroneous advice

> is not culpable, within the framework of a system of definite positive laws. He has done all that can reasonably be expected to conform his conduct to the law. There is no room for deterrence in such circumstances without either imposing on persons an unreasonable burden to study the law, or, in effect, limiting their conduct more broadly than the criminal law intends.[108]

The ALI created this defense in Model Penal Code section 2.04, which was introduced in the 1955 Tentative Draft.[109] Although four years later the U.S. Supreme Court established the due process defense in *Raley v. Ohio*,[110] the ALI did not subsequently amend section 2.04, which remained nearly identical in the 1962 final version.[111] The 1955 draft of section 2.04 was based on Louisiana's mistake of law statute as well as the implications of federal statutes and earlier judicial decisions.[112]

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107. MODEL PENAL CODE § 2.04 cmt. 3 at 138 (Tentative Draft No. 4, 1955).

108. Lloyd L. Weinreb, *Comment on Basis of Criminal Liability; Culpability; Causation: Chapter 3; Section 610*, *in* WORKING PAPERS OF THE NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS 105, 139 (1970).

109. MODEL PENAL CODE § 2.04 at 17–18 (Tentative Draft No. 4, 1955).

110. 360 U.S. 423, 438–39 (1959).

111. MODEL PENAL CODE § 2.04 (1962). The 1955 draft provided:

> (3) A reasonable belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct, when: . . . (b) [the defendant] acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

MODEL PENAL CODE § 2.04 at 17–18 (Tentative Draft No. 4, 1955). For the nearly identical text of section 2.04 in the 1962 version, see *supra* note 7.

112. MODEL PENAL CODE § 2.04 cmt. 3 at 138–39 (Tentative Draft No. 4, 1955).

The Model Penal Code has been influential. Nine states adopted section 2.04 or a nearly identical provision;[113] nine others enacted a modified version.[114] Iowa has a statute applicable only when the mistake negates an element of the offense.[115] An additional twenty states[116] and the District of Columbia[117] recognized the mistake of law defense in judicial opinions. Ten states[118] have apparently neither enacted the Model Penal Code nor considered the defense in a judicial decision. The state statutes differing from the Model Penal

113. *See* ARK. CODE ANN. § 5-2-206 (2006); CONN. GEN. STAT. ANN. § 53a-6 (West 2012); HAW. REV. STAT. § 702-220 (1985); KY. REV. STAT. ANN. § 501.070 (LexisNexis 2008); ME. REV. STAT. ANN. tit. 17-A, § 36 (2006); MO. ANN. STAT. § 562.031 (West 2012); N.J. STAT. ANN. § 2C:2-4 (West 2005); N.Y. PENAL LAW § 15.20 (McKinney 2009); N.D. CENT. CODE § 12.1-05-09 (2012).

114. *See* ALA. CODE § 13A-2-6 (LexisNexis 2005); COLO. REV. STAT. § 18-1-504 (2012); 720 ILL. COMP. STAT. ANN. 5 / 4-8 (West 2002); KAN. STAT. ANN. § 21-3203(6) (2007); LA. REV. STAT. ANN. § 14:17 (2007) (Louisiana's defense predates the MODEL PENAL CODE); MONT. CODE ANN. § 45-2-103 (2011); N.H. REV. STAT. ANN. § 626:3 (LexisNexis 2007); TEX. PENAL CODE ANN. § 8.03 (West 2011); UTAH CODE ANN. § 76-2-304 (LexisNexis 2008).

115. IOWA CODE ANN. § 701.6 (West 2003).

116. *See* Ostrosky v. State, 704 P.2d 786, 792 (Alaska Ct. App. 1985); State v. Tyszkiewicz, 104 P.3d 188, 191 (Ariz. Ct. App. 2005) (citing Miller v. Commonwealth, 492 S.E.2d 482, 486–87 (Va. Ct. App. 1997)); People v. Chacon, 150 P.3d 755, 761–62 (Cal. 2007); Kipp v. State, 704 A.2d 839, 842–43 (Del. 1998); Grisson v. State, 515 S.E.2d 857, 859–60 (Ga. Ct. App. 1999); Meadows v. State, No. 38A01-0906-CR-282, 2009 WL 3486233, at *2–3 (Ind. Ct. App. Oct. 29, 2009) (unpublished memorandum decision); Commonwealth v. Twitchell, 617 N.E.2d 609, 619 (Mass. 1993); People v. Woods, 616 N.W.2d 211, 217–18 (Mich. Ct. App. 2000); Plocher v. Comm'r of Pub. Safety, 681 N.W.2d 698, 705 (Minn. Ct. App. 2004); State v. Edwards, 837 N.W.2d 81, 89 (Neb. 2013); State v. Kremlacek, No. A-98-1195, 1999 WL 759970, at *3–4 (Neb. Ct. App. Sept. 28, 1999); State v. Haddenham, 793 P.2d 279, 286 (N.M. Ct. App. 1990) (dicta implying availability of the defense); State v. Pope, __ N.C. App. __, __, 713 S.E.2d 537, 541–42 (2011); State v. Howell, No. 97CA824, 1998 WL 807800, at *11–12 (Ohio Ct. App. Nov. 17, 1998); State v. Hays, 964 P.2d 1042, 1045–46 (Or. Ct. App. 1998) (implying that mistake of law might be a valid defense if the law in question was found to be ambiguous and did not allow the offender to know what conduct is permissible); Commonwealth v. Kratsas, 764 A.2d 20, 37–39 (Pa. 2001) (declining to allow the defense in these circumstances but recognizing its existence under the Due Process Clause); State v. Berberian, 427 A.2d 1298, 1301 (R.I. 1981); State v. Mosher, 465 A.2d 261, 265–66 (Vt. 1983); Miller v. Commonwealth, 492 S.E.2d 482, 486–88 (Va. Ct. App. 1997); State v. Leavitt, 27 P.3d 622, 627–28 (Wash. Ct. App. 2001); State v. Reitter, 595 N.W.2d 646, 659–60 (Wis. 1999).

117. Bsharah v. United States, 646 A.2d 993, 1000–01 (D.C. 1994).

118. They are: Florida, Idaho, Maryland, Mississippi, Nevada, Oklahoma, *but see* Ethics Comm'n v. Keating, 1998 OK 36, ¶ 27, 958 P.2d 1250, 1275 (Opala J., dissenting) (citing *Raley* and *Cox* and suggesting that the defense should be available for state-sanctioned behavior), South Carolina, South Dakota, Tennessee, and West Virginia.

Code are more restrictive,[119] except for a New Jersey statute that allows a limited defense of personal mistake of law.[120]

Two states seem not to recognize the mistake of law defense. An Arizona statute provides: "Ignorance or mistake as to a matter of law does not relieve a person of criminal responsibility."[121] The Arizona Court of Appeals recently explained that "[i]n jurisdictions that recognize it, entrapment by estoppel is a defense to a crime . . . ," implying that recognition was not mandatory or required by law,[122] although the Arizona Court of Appeals seemed to recognize the defense in dicta in an earlier case.[123] A Wyoming judicial decision held that mistake of law is no defense.[124]

In 1955 when it was created, section 2.04 served a useful purpose. It took a position on a contested question of criminal law upon which the states were divided and offered a clear and reasoned position to any state adopting it. However, after the constitutional defense was recognized and elaborated beginning in 1959, the Model Penal Code defense became potentially problematic, particularly when the Code made no effort to explain the relationship between the statute and due process principles or explain the scope of the statute in light of the Supreme Court decisions. The Model Penal Code suggested that the definition and scope of the defense was a question of legislative or judicial policy rather than application of the federal Constitution. But states are not free to offer less protection than is required by the

119. *See infra* Part II.

120. N.J. STAT. ANN. § 2C:2-4(c)(3) (West 2005) (allowing defense where "[t]he actor otherwise diligently pursues all means available to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances in which a law-abiding and prudent person would also so conclude").

121. ARIZ. REV. STAT. ANN. § 13-204(B) (2010).

122. State v. Kosatschenko, No. 2 CA-CR 2010-0116, 2010 WL 4888037, at *1 (Ariz. Ct. App. Nov. 29, 2010) (noting that "entrapment by estoppel is not a statutorily recognized defense in Arizona, nor has it been created or recognized by common law").

123. State v. Tyszkiewicz, 104 P.3d 188, 191 (Ariz. Ct. App. 2005).

124. Harris v. State, 2006 WY 76, ¶ 28, 137 P.3d 124, 131 (Wyo. 2006). In *Harris*, the defendant previously had been convicted of two felonies. *Id.* ¶ 31, 137 P.3d at 27. After his convictions, he wanted to purchase a firearm. *Id.* A deputy sheriff and a store employee informed him that he could legally purchase a muzzle-loading black powder rifle. *Id.* He was subsequently arrested for owning the muzzle-loader. *Id.* At trial, the defendant wanted to argue mistake of law and mistake of fact. *Id.* ¶¶ 23–24, 137 P.3d at 130. Without citing *Raley* or *Cox*, the court held that "[t]he fact that [defendant] took steps to inquire whether he was allowed to possess the rifle is simply irrelevant. '[A] good faith or mistaken belief that one's conduct is legal does not relieve a person of criminal liability for engaging in proscribed conduct.' " *Id.* ¶ 27, 137 P.3d at 131 (quoting 21 AM. JUR. 2D *Criminal Law* § 137 (1998), but attributing the quote to § 153).

federal Constitution.[125] Accordingly, the Model Penal Code laid the groundwork for confusion. As is explained in Part II, that confusion was realized.

II. DIVERGENCE BETWEEN THE MODEL PENAL CODE DEFENSE AND THE CONSTITUTIONAL DEFENSE

In five distinct ways, state statutes or court decisions deny the defense under circumstances where courts following the principles established by the Supreme Court would grant a defense. However, there appear to be no circumstances in which the Model Penal Code or a statute based on it would grant a defense when the Constitution would not. This raises the question of what function or purpose the Model Penal Code–based statutes serve.

The first way some state courts go below the federal floor is by denying the defense entirely.[126] Second, some states diverge from the constitutional cases by allowing reliance only on written statements of government officials.[127] Third, at least one state holds that the defense is inapplicable to strict liability crimes, even though courts applying the constitutional defense recognize that it is potentially applicable to all offenses.[128] Fourth, some states limit the defense to actions taken in reliance on statements from specified government actors.[129] Fifth, some states require that the government official have actual authority to interpret the law.[130]

A. Jurisdictions Categorically Denying the Defense

Arizona[131] and Wyoming,[132] both Model Penal Code states, seem to deny the defense entirely. None of the cases rejecting or questioning the defense address *Raley*, *Cox*, or their progeny, and

125. *But see* Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 502–03 (2008) (noting that while state courts may not reject binding Supreme Court precedent, states have attempted to do so in certain cases); Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Constitutional Limits*, 50 ARIZ. L. REV. 227, 228–30 (2008) (demonstrating that state courts have, at times, offered less protection than required by the Supreme Court, even though many believe that the federal Constitution and Supreme Court set a minimum "floor" that states must reach).

126. *See infra* Part II.A.

127. *See infra* Part II.B.

128. *See infra* Part II.C.

129. *See infra* Part II.D.

130. *See infra* Part II.E.

131. *See supra* notes 121–23.

132. *See supra* note 124 and accompanying text.

therefore there is no explanation as to how or why the constitutional defense can be disregarded.

Wyoming determined that mistake of law was no defense in *Harris v. State*,[133] where a sheriff's deputy mistakenly told the defendant, a convicted felon, that he could own a muzzle-loading rifle.[134] The Wyoming Supreme Court rejected his "mistake of law" defense because "[t]he fact that Mr. Harris took steps to inquire whether he was allowed to possess the rifle is simply irrelevant."[135] Neither the court nor the parties' briefs mentioned *Raley*, *Cox*, or their progeny.[136] Had the court applied the constitutional mistake of law defense, the defendant might well have been acquitted.

The Virginia case of *Miller v. Commonwealth*[137] involved virtually identical facts; the defendant, a convicted felon, was informed by his probation officer and other government officials that he could own a muzzle-loading rifle.[138] The Virginia Court of Appeals reversed his conviction, because, applying the constitutional defense, the court concluded that "Miller's reliance on the advice of his probation officer was reasonable and in good faith."[139] Thus, applying the federal Constitution, Virginia granted the defense in precisely the same circumstances in which Wyoming denied it.

Outright rejection of the constitutional defense is unconstitutional. In rejecting a claim by the U.S. Department of Justice that federal law did not recognize the defense, the U.S. Court of Appeals for the Tenth Circuit, whose territorial jurisdiction includes Wyoming, was right when it explained that "not accept[ing] the entrapment by estoppel defense . . . is incorrect and, in fact, cannot be correct in light of Supreme Court precedent."[140] Because the court recognized that "where an agent of the government affirmatively misleads a party as to the state of the law and that party proceeds to act on the misrepresentation . . . criminal prosecution of the actor implicates due process concerns under the Fifth and

133. 2006 WY 76, 137 P.3d 124 (Wyo. 2006).

134. *Id.* ¶¶ 4, 27, 137 P.3d at 127, 131.

135. *Id.* ¶ 27, 137 P.3d at 131.

136. *See generally id.* (not citing *Raley* or *Cox*); Brief of Appellant, *Harris*, 2006 WY 76, 137 P.3d 124 (Wyo. 2006) (No. 05-29), 2005 WL 4781262 (not citing *Raley* or *Cox*); Brief of Appellee, *Harris*, 2006 WY 76, 137 P.3d 124 (Wyo. 2006) (No. 05-29), 2005 WL 4781263 (not citing *Raley* or *Cox*).

137. 492 S.E.2d 482 (Va. Ct. App. 1997).

138. *Id.* at 484.

139. *Id.* at 491.

140. United States v. Nichols, 21 F.3d 1016, 1018 n.2 (10th Cir. 1994).

Fourteenth amendments."[141] As the Nebraska Supreme Court held, in deciding a previously unresolved question, "[g]iven the constitutional roots of the entrapment by estoppel defense, we conclude that it should be recognized in this state."[142] It is difficult to see how any court reading these cases could come to a contrary conclusion.

B. Jurisdictions Restricting the Defense to Written Statements

Statutes in Colorado,[143] New Hampshire,[144] Texas,[145] and Utah[146] allow the defense only when the government official's statements are written, presumably to avoid allowing the defense when the advice was not in fact given.[147] Statutes requiring a writing cannot faithfully reflect the constitutional defense. While *Laub* and *PICCO* involved written advice, the Court reversed convictions based on oral advice in *Raley* and *Cox*.[148] If states were free to deceive defendants so long as they did so orally, the convictions in *Raley* and *Cox* should have been affirmed.

Nevertheless, state courts have denied the defense based on oral advice when a statute required that the advice be in writing. A pair of Utah cases underscores the consequences of defendants invoking the Constitution rather than a statute alone. In *State v. Norton*,[149] the Utah Court of Appeals denied a defense resting on oral advice instead of the "written interpretation of the law contained in an

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141. *Id.* at 1018 (citing Cox v. Louisiana, 379 U.S. 559, 568–71 (1965)); *see also* Raley v. Ohio, 360 U.S. 423, 437–39 (1959); United States v. Billue, 994 F.2d 1562, 1568 (11th Cir. 1993); United States v. Clark, 986 F.2d 65, 69 (4th Cir. 1993); United States v. Tallmadge, 829 F.2d 767, 773–74 (9th Cir. 1987).

142. State v. Edwards, 837 N.W.2d 81, 89 (Neb. 2013).

143. COLO. REV. STAT. § 18-1-504 (2012). *But see* Turney v. Civil Serv. Comm'n, 222 P.3d 343, 348 (Colo. App. 2009) (citing *PICCO* and *Raley*).

144. N.H. REV. STAT. ANN. § 626:3(II) (LexisNexis 2007).

145. TEX. PENAL CODE ANN. § 8.03(b) (West 2011); *see* Bonilla v. State, No. 14-08-00289-CR, 2010 WL 2195440, at *9 (Tex. Crim. App. June 3, 2010); Austin v. State, 541 S.W.2d 162, 166–67 (Tex. Crim. App. 1976).

146. UTAH CODE ANN. § 76-2-304(2) (LexisNexis 2008).

147. Yet, the statutes provide no exception for cases in which the government admits to offering the advice.

148. Cox v. Louisiana, 379 U.S. 559, 570 (1965) (oral statements by the chief of police); Raley v. Ohio, 360 U.S. 423, 438–39 (1959) (oral statements issued by a legislative commission); *see, e.g.*, United States v. Abcasis, 45 F.3d 39, 44 (2d Cir. 1995) (oral statements by a drug enforcement agent); United States v. Thompson, 25 F.3d 1558, 1565 (11th Cir. 1994) (oral statements by law enforcement officers); United States v. Hedges, 912 F.2d 1397, 1404, 1406 (11th Cir. 1990) (oral statement by a U.S. Air Force officer); United States v. Tallmadge, 829 F.2d 767, 775 (9th Cir. 1987) (oral advice of a federally licensed firearms dealer).

149. State v. Norton, 2003 UT App 88, 67 P.3d 1050.

opinion of a court of record" required by the Utah version of the Model Penal Code.[150] Defendant Norton, a bail bondsman, claimed to rely on the oral advice of a deputy county attorney that he could arrest a bailee who failed to pay his bond;[151] Norton was subsequently charged with kidnapping.[152] The trial court precluded Norton's defense because the advice was not written, and the court of appeals affirmed.[153] The court did not discuss *Raley* or its progeny.

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150. *Id.* ¶ 15, 67 P.3d at 1053 (quoting UTAH CODE ANN. § 76-2-304(2)(b)(ii) (LexisNexis 1999)) (internal quotation marks omitted). Utah's version of the Model Penal Code provides:

> Ignorance or mistake concerning the existence or meaning of a penal law is no defense to a crime unless:
>
> (a) Due to his ignorance or mistake, the actor reasonably believed his conduct did not constitute an offense, and
>
> (b) His ignorance or mistake resulted from the actor's reasonable reliance upon:
>
> (i) An official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or
>
> (ii) A written interpretation of the law contained in an opinion of a court of record or made by a public servant charged by law with responsibility for interpreting the law in question.

UTAH CODE ANN. § 76-2-304(2)(a)–(b) (LexisNexis 1999).

151. *Norton*, 2003 UT App 88, ¶¶ 4, 14, 67 P.3d at 1051, 1053.

152. *Id.* ¶ 7, 67 P.3d at 1052.

153. *Id.* ¶ 13, 67 P.3d at 1053 ("Because Defendant did not rely on a written interpretation of the law, the trial court did not err when it held that the defense was inapplicable."). Texas reached a similar conclusion in *Linder v. State*, 734 S.W.2d 168, 171 (Tex. Crim. App. 1987). Like Norton, the defendant in *Linder* was a bail bondsman who had been arrested for kidnapping a principal obligor on a bond who failed to appear in court. *Id* at 169. The defendant had established that the local District Attorney told him that him that he could arrest bond jumpers. *Id.* at 171. But his defense was precluded because "no evidence of a written document as required by article 8.03 of the Penal Code was introduced, only that oral permission had been granted." *Id.* Texas's version of the Model Penal Code provides that:

> It is an affirmative defense to prosecution that the actor reasonably believed the conduct charged did not constitute a crime and that he acted in reasonable reliance upon:
>
> (1) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or

Another Utah case, however, allowed the defense based on oral advice, where the defense did not invoke the statute, but instead invoked the Constitution itself. In *South Salt Lake City v. Terkelson*,[154] the Utah Court of Appeals allowed the defense based on oral advice. The defendants operated a sexually oriented business in a city with an ordinance prohibiting employees of such businesses from touching or being touched by patrons.[155] The defendants and the city had discussed the ordinance and reached an understanding about its scope, but the city unilaterally and without notice reinterpreted the law and charged the defendants with violating it.[156] Relying on *Raley*, *Cox*, and *PICCO*, the court held that the defendants were entitled to present the constitutional defense.[157] The court remanded the conviction and instructed the trial court to consider

> the identity and authority of the person who informed Defendants regarding the scope and reach of the ordinance, the specificity of such information, how such information was transmitted, whether the City notified Defendants of its intent to change its interpretation and enforcement of the ordinance, and the reasonableness of Defendants' reliance, if any.[158]

The court in *Terkelson* neither cited Utah's mistake of law statute nor required that the government official's statements be in writing. Instead, the decision required the trial court to make a determination of reasonable reliance based on all the circumstances.[159]

Based on the rationale of *Terkelson*, the defendant in *Norton* would have been acquitted if he had raised the constitutional defense instead of the statutory defense and if his reliance was found to be reasonable. Interestingly, one judge of the Utah Court of Appeals, Gregory Orme, joined the opinion in both *Norton* and *Terkelson*.

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(2) a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question.

TEX. PENAL CODE ANN. § 8.03(b)(1)–(2) (West 2011).

154. South Salt Lake City v. Terkelson, 2002 UT App 405, 61 P.3d 282.

155. *Id.* ¶ 2, 61 P.3d at 283.

156. *Id.* ¶ 3, 61 P.3d at 283.

157. *Id.* ¶¶ 12–16, 61 P.3d at 285–86 (citing United States v. Pa. Indus. Chem. Corp., 411 U.S. 655 (1973); Cox v. Louisiana, 379 U.S. 559 (1965); Raley v. Ohio, 360 U.S. 423 (1959)).

158. *Id.* ¶ 16, 61 P.3d at 286.

159. *Id.*

C. *Jurisdictions Denying the Defense for Strict Liability Crimes*

The North Dakota Supreme Court denies the mistake of law defense for strict liability crimes.[160] North Dakota has a mistake of law statute similar to the Model Penal Code.[161] In *State v. Fridley*,[162] the defendant was prosecuted for driving with a suspended license, a strict liability offense.[163] He was precluded from showing at trial that a State Highway Department employee incorrectly told him that his license would not be suspended until he sent in a work-permit request.[164]

The North Dakota Supreme Court reasoned that the state's mistake of law statute "is an almost complete adoption of Chapter 6 of the Proposed [Federal Criminal] Code dealing with defenses involving justification and excuse."[165] The proposed code states "[t]his section sets forth those circumstances under which a person is excused from criminal liability for his conduct because he mistakenly believed his conduct did not constitute a crime. *The defense is not available for infractions where proof of culpability is generally not required.*"[166]

Based on its understanding of the proposed code, the court held "[it was] evident that, in this regard, the draftsmen intended the applicability of the mistake of law defense to turn on the presence of a culpability requirement within the statute, rather than the probability of confinement."[167] The court concluded: "[A]llowing the assertion of the mistake of law defense, which rests upon a defendant's 'good faith belief' that his conduct does not constitute a crime, is difficult to reconcile with the concept of a strict liability

160. *See* State v. Fridley, 335 N.W.2d 785, 789 (N.D. 1983); *see also* State v. Kleppe, 2011 ND 141, ¶ 25, 800 N.W.2d 311, 318; State v. Buchholz, 2006 ND 227, ¶ 12, 723 N.W.2d 534, 538; State v. Egan, 1999 ND 59, ¶ 17, 591 N.W.2d 150, 154; State v. Eldred, 1997 ND 112, ¶ 31, 564 N.W.2d 283, 290–91.

161. *See* N.D. CENT. CODE § 12.1-05-09 (2012); MODEL PENAL CODE § 2.04 (1962).

162. 335 N.W.2d 785 (N.D. 1983).

163. *Id.* at 787–88.

164. *Id.* at 788.

165. *Id.* at 788 (quoting State v. Leidholm, 334 N.W.2d 811, 814 (N.D. 1983)) (alteration in original). The Proposed Federal Criminal Code was influenced by the Model Penal Code. NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE, at xi (1971). However, the Model Penal Code generally does not have strict liability offenses. *See* MODEL PENAL CODE § 2.02(1) (1962). Accordingly, the question of the applicability of mistake of law to strict liability offenses did not arise.

166. *Fridley*, 335 N.W.2d at 789.

167. *Id.*

offense for which proof of a culpable state of mind is not required."[168] North Dakota courts have since refused to allow the defense for strict liability offenses.[169] It is odd, to say the least, that the North Dakota Supreme Court gave dispositive weight to commentary on an unenacted draft model code, while devoting not a single word to binding decisions of the U.S. Supreme Court, such as *Raley* and its progeny.[170]

Other state and federal courts do not limit the constitutional defense to particular crimes or categories of crimes[171] and hold that "[b]ecause the defense . . . 'rests upon principles of fairness . . . it may

168. *Id.* at 789. The court here is mistaken. The point is that the defense is unavailable unless the belief is actually held, i.e., held in good faith. United States v. Shafer, 625 F.3d 629, 638 (9th Cir. 2010) (holding the defense is unavailable if the defendant is not misled). It is perfectly consistent to have a good-faith belief that conduct is not criminal, even if the conduct constitutes a strict liability offense. For example, if the state highway agency were to post signs indicating that the speed limit was 65 miles per hour when by state statute it was 55, motorists might well be able to claim in good faith that they believed it was legal to drive at 64.9 miles per hour, even if speeding were a strict liability offense.

169. *See* State v. Kleppe, 2011 ND 141, ¶ 25, 800 N.W.2d 311, 318; State v. Buchholz, 2006 ND 227, ¶ 12, 723 N.W.2d 534, 538; State v. Egan, 1999 ND 59, ¶¶ 17, 21, 591 N.W.2d 150, 154; State v. Eldred, 1997 ND 112, ¶ 31, 564 N.W.2d 283, 290–91.

170. It is particularly difficult to understand the court's decision not to address the constitutional law because the court knew about the cases. In *Olson v. City of West Fargo*, the court quoted with approval a Fifth Circuit case analyzing *Raley* and *Cox*, using it to hold that an adult-licensing statute was not unconstitutionally vague, because "[t]here is little doubt that patterns of enforcement and tacit understandings will develop to the point where all involved will not question the reach of the ordinance." 305 N.W.2d 821, 829 (N.D. 1981) (citing Int'l Soc'y for Krishna Consciousness v. Eaves, 601 F.2d 809, 830–31 (5th Cir. 1979)). *Olson* was implicitly decided on the basis that actions of government officials could create legally binding expectations. Yet, neither *Olson* nor *Raley* and *Cox* were addressed in *Fridley* or subsequent cases.

171. United States v. George, 386 F.3d 383, 400 (2d Cir. 2004); United States v. Dixon, No. 97-6088, 1999 WL 98578, at *4 (6th Cir. Jan. 27, 1999) (citing Connelly, *supra* note 4, at 641) (unpublished opinion); United States v. Brebner, 951 F.2d 1017, 1025 (9th Cir. 1991). State cases also apply it to a variety of offenses. Kipp v. State, 704 A.2d 839, 843–44 (Del. 1998) (unlawful possession of a firearm); State v. Guzman, 968 P.2d 194, 210 (Haw. Ct. App. 1998) (public protest); Walker v. Commonwealth, 127 S.W.3d 596, 608–09 (Ky. 2004) (false arrest by bail bondsman); Commonwealth v. Twitchell, 617 N.E.2d 609, 619 (Mass. 1993) (involuntary manslaughter); People v. Woods, 616 N.W.2d 211, 211, 217–18 (Mich. Ct. App. 2000) (election crimes); Whitten v. State, 690 N.W.2d 561, 565 (Minn. Ct. App. 2005) (unlawful firearm possession); State v. Cooper, No. A03-1685, 2004 WL 2283431, at *2 (Minn. Ct. App. Oct. 12, 2004) (speeding on a snowmobile); State v. Sheedy, 480 A.2d 887, 889 (N.H. 1984) (unlawful interception of telephone conversations); State v. Grammenos, No. 5705, 2006 WL 2057191, at *9 (N.J. Super. Ct. App. Div. July 26, 2006) (driving "go-peds" without a license); State v. Berberian, 427 A.2d 1298, 1301 (R.I. 1981) (obscenity law); State v. Mosher, 465 A.2d 261, 265–66 (Vt. 1983) (denying use of post-Miranda silence against defendant); Miller v. Commonwealth, 492 S.E.2d 482, 484–88 (Va. Ct. App. 1997) (unlawful firearm possession); State v. Leavitt, 27 P.3d 622, 627 (Wash. Ct. App. 2001) (unlawful firearm possession). Nevertheless, the nature of the crime will often be a relevant factor in determining whether the reliance was reasonable.

be raised even in strict liability offense cases.' "[172] This is correct as a matter of precedent and as a matter of criminal law doctrine.

As a matter of precedent, the general rule is correct and the North Dakota rule is not because the Supreme Court applied the doctrine to what was apparently a strict liability offense in *PICCO*. The Third Circuit opinion, which the Supreme Court in this respect affirmed, rejected the government's argument that any mistake was irrelevant because the statute required no scienter.[173] In addition, lower courts had interpreted the statute at issue as imposing strict liability.[174] The Third Circuit recognized that the question of whether the statute required scienter had been left open in an earlier Supreme Court decision,[175] but it found that the defense it recognized was available whether or not scienter was required.[176] Because the Court

172. United States v. Sistrunk, 622 F.3d 1328, 1332 (11th Cir. 2010); Poppell v. City of San Diego, 149 F.3d 951, 960 (9th Cir. 1998); United States v. Thompson, 25 F.3d 1558, 1564 (11th Cir. 1994) (quoting United States v. Hedges, 912 F.2d 1397, 1405 (11th Cir. 1990) (citing United States v. Tallmadge, 829 F.2d 767, 773 (9th Cir. 1987))); United States v. Smith, 940 F.2d 710, 714 (1st Cir. 1991) (citing United States v. Hedges, 912 F.2d 1397, 1405 (11th Cir. 1990)); United States v. Brady, 710 F. Supp. 290, 296 (D. Colo. 1989); State v. Guzman, 968 P.2d 194, 208 (Haw. Ct. App. 1998); *see also* People v. Stephens, 937 N.Y.S.2d 822, 824–25 (N.Y. App. Term 2011) (considering the defense in a prosecution for a strict liability offense); People v. Meldman, No. 276245, 2008 WL 3540218, *4 (Mich. App. 2008) (considering the defense in a prosecution for a strict liability offense); *cf.* 21 AM. JUR. 2D *Criminal Law* § 136 (2008) ("[B]ecause the defense of 'entrapment by estoppel,' . . . rests upon principles of fairness, it may be raised even in strict liability cases."); 53 AM. JUR. 3D Proof of Facts § 9 (1999) ("Because motive or intent is generally irrelevant with respect to strict liability offenses, prosecutors have argued entrapment by estoppel is not available to defendants charged with strict liability crimes, but this argument has been universally rejected.").

173. United States v. Pa. Indus. Chem. Corp., 461 F.2d 468, 478 (3d Cir. 1972) ("It is the position of the Government, on the other hand, that the statute does not require a showing of scienter—criminal intent . . . ."), *aff'd in pertinent part*, 411 U.S. 655, 674–75 (1973).

174. As the First Circuit explained:

> In the seventy-five years since enactment [of the statute at issue in *PICCO*], no court to our knowledge has held that there must be proof of scienter; to the contrary, the Refuse Act has commonly been termed a strict liability statute. *See* United States v. United States Steel Corp., 328 F. Supp. 354 (N.D. Ind. 1970), *aff'd*, 482 F.2d 439 (7th Cir.), *cert. denied*, 414 U.S. 909, 94 S. Ct. 229, 38 L. Ed. 2d 147 (1973); United States v. Interlake Steel Corp., 297 F. Supp. 912 (N.D. Ill. 1969).

United States v. White Fuel Corp., 498 F.2d 619, 622 (1st Cir. 1974). The Court later cited *White Fuel* with approval on this point. *See* United States v. Ward, 448 U.S. 242, 250 (1980).

175. *Pa. Indus. Chem. Corp.*, 461 F.2d at 478.

176. The court explained:

did not find it necessary to determine whether the offense was strict liability, *PICCO* itself indicates that the question is irrelevant to the availability of the defense. That is, in *PICCO*, even though the proceedings below clearly raised the likelihood that the statute was one of strict liability, the Supreme Court held the defense was available.

PICCO's approach makes sense, because the constitutional defense does not implicate the defendant's mental state. A defendant may be convicted of a strict liability crime even if she acted with due care to ensure that her conduct was within the law.[177] Thus, a defendant may be guilty even if she is unaware that her activity is illegal or believed her activity is legal, and even if she was unaware of facts or circumstances making her conduct illegal or believed that those facts did not exist.[178] But the constitutional mistake of law defense "rests upon principles of fairness rather than the defendant's mental state and thus it may be raised even in strict liability offense cases."[179] The focus is on the conduct of the government official, not the defendant's mental state.[180] It is no fairer to induce an otherwise innocent person to commit a strict liability crime than it is to induce him to commit a crime requiring scienter.

North Dakota's approach is also at odds with basic principles of criminal law, which distinguish between mistakes constituting defenses even if every element of the offense is proved and mistakes negating elements of the offense. As Justice Sonia Sotomayor explained when she was a judge on the Second Circuit, while the constitutional defense "does not negate any of the statutory elements of a crime," it grants relief because "even though the government may have proved all of the elements of a crime, to convict the defendant for acts committed in reasonable reliance on a government official's statement would violate due process or fundamental fairness."[181] That is, it is irrelevant that strict liability offenses do not

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> PICCO does not claim that it did not know the law existed. Its proofs showed that it was well aware of section 407. Rather, PICCO asserts that it was affirmatively misled by the Corps of Engineers to believe that the Act would be inapplicable to discharges of waste that did not impede navigation. Thus the assertion is not that PICCO was ignorant of the law's application to it and therefore lacked scienter.

Id.

177. *See* 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 23 (15th ed. 2009).

178. *Id.*

179. United States v. Hedges, 912 F.2d 1397, 1405 (11th Cir. 1990).

180. *Id.*

181. United States v. George, 386 F.3d 383, 399 (2d Cir. 2004).

require scienter because the mistake of law defense does not operate to negate scienter. The defense operates primarily when all elements, including scienter or not, are proven. Take, for example, a crime like possession of a controlled substance, which generally requires knowing the nature of the object possessed and therefore is not a strict liability offense. If, say, a state Assistant Attorney General erroneously informed an Emergency Medical Technician that she was authorized by statute to possess a controlled substance in connection with her duties, that advice would not negate the relevant mens rea: the defendant would still know that she possessed a controlled substance, satisfying every element of the offense. The mistake does not negate scienter or any other element, yet, a conviction would still be unfair.

If negation of mens rea were the key function of the mistake of law doctrine, then it would apply only to the relatively rare crimes that themselves require knowledge of illegality. It would also be entirely redundant of the statutorily required element. The statute makes sense only if it operates in some cases not covered by the independently applicable legal principle that if a statute requires knowledge of the law as an element, a mistake about that law means that the defendant is not guilty. Therefore, North Dakota's approach is incorrect as a matter of criminal law doctrine as well as inconsistent with Supreme Court precedent.

Indeed, a defendant's reliance must be reasonable, and it is generally more reasonable to rely on advice about a technical regulatory regime than on advice that it is legal to commit a traditional, non-strict-liability offense, like rape, robbery, or burglary. For this reason, Professor Dru Stevenson reasonably concludes that "[r]ules on the strict liability end of the continuum are the ones most likely to give rise to an entrapment by estoppel defense."[182]

D. Jurisdictions Requiring an Opinion from Specified Officers

Several jurisdictions deny the defense unless the advice is given by a specified officer or agency. Ultimately, these limitations are in irreconcilable tension with the Supreme Court cases.

The Tenth Circuit holds the unique view that courts are not government agencies or officials, and therefore courts as a class cannot make statements giving rise to entrapment by estoppel

182. Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL'Y 1, 63 (2005).

defenses: "[a]ccordingly, any allegation that a court, as an entity, issued a decision inducing [the defendant] to take a particular action is not one upon which an estoppel claim may stand."[183] Alabama,[184] Illinois,[185] Missouri,[186] and Montana[187] allow the defense based only on appellate judicial decisions. Texas[188] and Utah[189] require written opinions of a court of record. Louisiana limits the defense to "a final judgment of a competent court of last resort that a provision making the conduct in question criminal was unconstitutional."[190]

Alaska's courts hold that advice from subordinate law enforcement officers cannot give rise to the defense.[191] The Alaska Court of Appeals explained that

> [t]he defendant must show that he or she relied on an "*official* interpretation" provided by "*the* public officer or body charged by law with . . . enforcement of the law defining the offense." We interpret this language to refer to a formal interpretation of the law issued by the chief enforcement officer or agency; it does not encompass extemporaneous legal advice or interpretations given by a subordinate officer.[192]

183. United States v. Bader, 678 F.3d 858, 887 (10th Cir. 2012).

184. ALA. CODE § 13A-2-6 (LexisNexis 2005) (limiting it to "an official statement of the law contained in a statute or the latest judicial decision of the highest state or federal court which has decided on the matter").

185. 720 ILL. COMP. STAT. ANN. 5/4-8 (West 2002).

186. MO. ANN. STAT. § 562.031(2)(b) (West 2012) (requiring reliance on an appellate court opinion).

187. MONT. CODE ANN. § 45-2-103(6)(c) (2011) (requiring reliance on an opinion of the Montana Supreme Court or a United States appellate court, thereby excluding reliance on statements by a trial court or an intermediate Montana court of appeal).

188. TEX. PENAL CODE ANN. § 8.03(b)(2) (West 2011).

189. UTAH CODE ANN. § 76-2-304(2)(b)(ii) (LexisNexis 2008).

190. LA. REV. STAT. ANN. § 14:17(2) (2007); *see also* State v. Striggles, 210 N.W. 137, 138 (Iowa 1926) (allowing reliance on the judgments of the highest court in a jurisdiction, but disallowing reliance on the decisions of any inferior courts).

191. Haggren v. State, 829 P.2d 842, 844 (Alaska Ct. App. 1992), *overruled on other grounds*, Allen v. Municipality of Anchorage, 168 P.3d 890 (Alaska Ct. App. 2007).

192. *Id.* at 844; *see also* Stevens v. State, 135 P.3d 688, 695 (Alaska Ct. App. 2006) (holding that "the mistake of law defense is not available to people who rely (even reasonably) on a mistaken statement or interpretation of the law received from a police officer or other subordinate officer"); Morgan v. State, 943 P.2d 1208, 1212 (Alaska Ct. App. 1997) (holding that the defense was not available when a "probation officer failed to inform [the defendant] of the law governing his conduct").

At the same time, Alaska law requires citizens to obey a peace officer's instructions in various circumstances, apparently even one of the lowest rank.[193]

Treating mistake of law as a policy question unconstrained by the Constitution, as the Model Penal Code does, could reasonably lead to a variety of approaches. One conceivable line of division is between regulators and enforcers. Perhaps only law enforcement officials, not day-to-day government administrators, should be allowed to give advice about what conduct is permissible. Thus, in *People v. Bradley*,[194] the California Court of Appeals found the defense "inapplicable here because [the City Manager and Assistant City Manager], even if they provided authorization to [defendant government officials] for certain expenditures, had no power to enforce or prosecute the criminal laws of this state."[195] This makes sense to a degree; after all, law enforcement officers are the ones who make decisions that defendants seek to estop; arguably only law enforcement officers' statements or opinions should give rise to the defense.

Perhaps, instead, the priority should be reversed. Perhaps, as the Georgia Court of Appeals held, because criminal law enforcement agencies generally have no day-to-day authority over regulatory matters, only advice from regulators and administrators, who have substantive responsibility and expertise, should give rise to the defense.[196]

Of course, both principles cannot simultaneously be correct—it cannot be that neither law enforcement officers nor regulators and administrators should be able to give reliable advice. Yet, both principles have been used to deny the defense.

But this sort of line drawing assumes that the contours of the mistake of law defense are a matter of discretionary choice rather than application of the Constitution as interpreted by the Supreme Court. Taking the Supreme Court's cases as a binding baseline, that the constitutional defense must be available at least in situations

193. *E.g.*, ALASKA STAT. § 11.61.110(a)(3)–(4) (2010) (disorderly conduct includes disobedience to instructions of peace officers to leave or disperse); *id.* § 12.25.090 (aid in making arrest); *id.* § 28.35.180 (traffic instructions); *id.* § 28.35.182 (failure to stop).

194. 145 Cal. Rptr. 3d 67 (Cal. Ct. App. 2012).

195. *Id.* at 86.

196. *See* Grisson v. State, 515 S.E.2d 857, 859–60 (Ga. Ct. App. 1999) (rejecting the defendant's reliance on a Georgia State Patrol employee because the "person who allegedly spoke with [the defendant] had no authority to issue or advise on the issuance of driver's licenses").

where the Supreme Court has applied it, the defense cannot be limited to particular officers. The defense was granted in *Raley*, *Laub*, and *PICCO* based on the advice of legislators and civil regulators, not law enforcement officials. For this reason, California's *Bradley* decision requiring advice from a prosecutor was necessarily mistaken; the Supreme Court recognized the possibility of the defense in situations when California categorically denies it. On the other hand, *Cox* granted the defense based on statements of a law enforcement officer, so the defense also cannot be limited to those with civil regulatory or administrative authority; if the Supreme Court is right, then the decision of the Georgia court must be wrong.

Similarly, Alaska's approach is inconsistent with the Supreme Court cases given that the defendants in *Cox* and *Raley* were allowed to rely not on the chief law enforcement officers of Ohio and Louisiana, but on a mere legislative committee chair in *Raley*, and on a local sheriff and police chief in *Cox*. A local sheriff or police chief has institutional authority over her subordinates, but with regard to her power over citizens, she has no more authority to enforce the law or prevent disorder than any other peace officer.[197] The sheriff in *Cox* was not acting as a regulator or issuer of parade permits, but as a protector of public safety like any other cop. And the opinion, clearly not in compliance with Alaska's requirement of a "formal interpretation,"[198] was quite casual, a simple instruction of where to protest. Yet the Court found it sufficient to trigger the defense. Similarly, the commission chair in *Raley* was not the highest legislative or law enforcement official in the state. One might respond that the sheriff and committee chair were in charge because at that time and place there were no higher officials. Therefore, it was natural to rely on them. But the same is true of a person who follows the advice or orders of an ordinary cop on the beat, who is in charge where he is.[199] Accordingly, this cannot be a sufficient distinction.

The limitations of Illinois, Kansas, Louisiana, Montana, Texas, and Utah to specified judges, and the Tenth Circuit's exclusion of judges entirely, are equally dubious. The Supreme Court has never

197. "A general deputy or under-sheriff is one who, by virtue of appointment, has the authority to execute all the ordinary duties of the sheriff, and who executes process without special power from the sheriff." 80 C.J.S. *Sheriffs and Constables* § 31 (2010).

198. Haggren v. State, 829 P.2d 842, 844 (Alaska Ct. App. 1992).

199. *E.g.*, KAN. STAT. ANN. § 8-1503 (2001) (requiring obedience to "any lawful order or direction of any police officer or fireman invested by law with authority to direct, control or regulate traffic"); Chicago v. Weiss, 281 N.E.2d 310, 315 (Ill. 1972) (upholding ordinance requiring obedience to orders of peace officer).

applied the constitutional defense based on the statement of a trial court judge, although other courts have.[200] Not surprisingly, though, the Supreme Court's decisions make clear that trial court judges are state actors.[201] In *Douglas v. Buder*,[202] the Court held that a ruling of a trial judge violated due process when it resulted in incarceration based on conduct that the defendant had reason to believe was lawful based on existing law.[203] If the rule, as articulated by a unanimous Supreme Court in *Laub*, is that "we may not convict 'a citizen for exercising a privilege which the State clearly had told him was available to him,' "[204] then it is hard to see why judges in general, or trial judges in particular, among all government actors, are uniquely incapable of misleading people subject to their authority.

Two cases from Louisiana illustrate both the broader nature of the constitutional defense, and the trap for the unwary represented by restrictive statutory defenses. Model Penal Code section 2.04 is based in part on Louisiana's statute, which allows the defense in two situations:

> (1) Where the offender reasonably relied on the act of the legislature in repealing an existing criminal provision, or in otherwise purporting to make the offender's conduct lawful; or

200. *See* United States v. Brady, 710 F. Supp. 290, 294–95 (D. Colo. 1989); Whitten v. State, 690 N.W.2d 561, 565 (Minn. Ct. App. 2005); State v. Leavitt, 27 P.3d 622, 623–25 (Wash. Ct. App. 2001); *see also* United States v. Austin, 915 F.2d 363, 367 (8th Cir. 1990) ("We do not have before us the situation where a government official, such as a judge, a prosecuting attorney, an ATF official, or a probation officer, told a convicted felon that he or she could lawfully own a rifle."); United States v. Mancuso, 139 F.2d 90, 92 (3d Cir. 1943) ("While it is true that men are, in general, held responsible for violations of the law, whether they know it or not, we do not think the layman participating in a law suit is required to know more law than the judge.").

201. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991) (stating that "beyond all question" a "judge" "is a state actor"); Pulliam v. Allen, 466 U.S. 522, 540 (1984) ("Subsequent interpretations of the Civil Rights Acts by this Court acknowledge Congress' intent to reach unconstitutional actions by all state actors, including judges.").

202. 412 U.S. 430 (1973) (per curiam).

203. *Id.* at 432 (citing Bouie v. City of Columbia, 378 U.S. 347, 352 (1964) ("There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.")).

204. United States v. Laub, 385 U.S. 475, 487 (1967) (quoting Raley v. Ohio, 360 U.S. 423, 438 (1959)).

> (2) Where the offender reasonably relied on a final judgment of a competent court of last resort that a provision making the conduct in question criminal was unconstitutional.[205]

In *State v. West*,[206] the defendant was convicted of felony attempted drug possession.[207] After serving his sentence, he received a letter from the state police and the corrections department explaining that his full rights of citizenship had been restored.[208] The police later found West in possession of a firearm,[209] a felony for someone with a felony conviction.[210] The Louisiana Supreme Court had previously held that "restoration of 'all rights of citizenship' " did not restore the right to possess firearms.[211] The defendant argued that he was misled by the "Verification of First Offender Pardon" letter.[212] Citing only Louisiana's statute, the court held that the defendant was not entitled to a "mistake of law" defense because the letter was not an act of the legislature or a decision of a competent court of last resort.[213]

Another Louisiana case, though, allowed the defense under circumstances when *West* said it was unavailable. In *State v. Chiles*,[214] the defendant was allowed to present a mistake of law defense based on the statement of a sheriff.[215] Chiles, who owned a second-hand store, was convicted of violating a statute requiring the filing of a

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205. LA. REV. STAT. ANN. § 14:17 (2009); MODEL PENAL CODE § 2.04 cmt. 3 at 138–39 (Tentative Draft No. 4, 1955).

206. 33,133 (La. App. 2 Cir. 3/1/00); 754 So. 2d 408.

207. *Id.* at p. 2 n.1; 754 So. 2d at 409 n.1 (citing LA. REV. STAT. ANN. § 40:967(A)(1) (2007)). This was defendant's first conviction. *Id.* at p. 2; 754 So. 2d at 410. Section 40:967 is part of the Uniform Controlled Dangerous Substances Law.

208. *Id.* The letter titled "Verification of First Offender Pardon," stated that the defendant had been " 'fully pardoned of the offense . . . and that all rights of citizenship and franchise had been restored in Louisiana.' " *Id.* Louisiana automatically pardons certain first-time felony offenders. LA. CONST. art. 4, §.5(E)(1). The letter did not explicitly state that the defendant could own firearms. *See West*, 33,133, p. 1 (La. App. 2 Cir. 3/1/00); 754 So. 2d at 409. The Louisiana court made a passing reference to the ambiguity of the letter: "The defendant's affirmative defense of mistake of law is based solely on his interpretation of a letter from a state agency." *Id.* at p. 5; 754 So. 2d at 411. Rather the court rejected the defendant's reliance defense because it did not fit one of the statutory pegs. *Id.*

209. *Id.* at p. 1; 754 So. 2d at 409.

210. *Id.* at p. 3; 754 So. 2d at 410 (quoting LA. REV. STAT. ANN. § 14:95.1 (2007)).

211. *Id.* (citing State v. Amos, 343 So. 2d 166, 168 (La. 1977)).

212. *Id.* at p. 1; 754 So. 2d at 409.

213. *Id.* at p. 5; 754 So. 2d at 411 ("T]he letter . . . is not (1) an 'act of the legislature' repealing an existing criminal statute; (2) an 'act of the legislature' otherwise purporting to make the offender's conduct lawful; or (3) a 'final judgment of a competent court of last resort' that a provision making the conduct in question criminal was unconstitutional.").

214. 569 So. 2d 45 (La. Ct. App. 1990).

215. *Id.* at 49–50.

ledger listing the previous day's purchases.[216] Prior to her arrest, the local sheriff provided owners with index cards, not a ledger, to be submitted not daily, but once a week.[217] Chiles complained about the system and was told that she could either "comply with the card procedure or go to jail."[218] Chiles began mailing the index cards several times per week.[219] The sheriff requested that she mail the cards more often, and she began mailing the cards every other day.[220] After the defendant complained to the county attorney about the system, the sheriff arrested her for failing to submit a daily ledger.[221] Citing *Raley* and *PICCO*, the court held Chiles was not guilty because she reasonably relied on the sheriff's instructions.[222]

West and *Chiles* illustrate the difference between the Model Penal Code defense and the constitutional defense. Both cases might well have satisfied the constitutional defense. Yet, the Louisiana court only allowed the defense in *Chiles*, the case in which it ignored its own version of the Model Penal Code and relied only on the constitutional cases.[223] Although *Chiles* was decided a decade before *West*—the case based on Louisiana's statute—*West* does not cite *Chiles*.

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216. *Id.* at 46. The statute provided:

> Every person licensed under the provisions of this Part shall make out and deliver to the superintendent of police of the city or town or to the sheriff of the parish in which he is doing business, every day before the hour of twelve o'clock noon, a legible and correct copy of the entries in the book mentioned in R.S. 37:1864 during the previous day.

LA. REV. STAT. ANN. § 37:1866 (2007). That title further provided:

> Any secondhand dealer who violates, neglects, or refuses, to comply with any provision of this Part, shall, for the first offense, be fined no less than twenty-five dollars, nor more than one hundred dollars or be imprisoned for not less than ten days nor more than thirty days, or both.

LA. REV. STAT. ANN. § 37:1869 (1990), *amended by* 2003 La. Acts 3565.

217. *Chiles*, 569 So. 2d at 47.

218. *Id.*

219. *Id.* at 48.

220. *Id.*

221. *Id.*

222. *Id.* at 49–50 (citing United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 675 (1973); Raley v. Ohio, 360 U.S. 423, 438 (1959)).

223. While it is possible to argue that the letter in *State v. West* was not an unequivocal statement that the defendant could own a gun, the court did not decide the case on that basis, rejecting the defense because it was not based on an act of the legislature or a decision of a competent court of last resort. 33,133, p. 5 (La. App. 2 Cir. 3/1/00); 754 So. 2d 408, 411.

Other cases with virtually identical fact patterns turn on whether a court applies a restrictive statute or the constitutional defense. For example, like the defendant in *West*, the defendant in *Whitten v. State*[224] was informed, upon discharge from probation in Minnesota, that "he was 'restored to all civil rights and to full citizenship with full right to vote and hold office the same as if said conviction had not taken place.' "[225] The district judge mistakenly failed to check a box on the probation discharge form telling the defendant he could not own guns for ten years.[226] Whereas *West* denied the defendant's entrapment by estoppel defense because the advice did not come from the legislature or a high court,[227] *Whitten* held that "the Due Process Clause of the Minnesota Constitution and the Fourteenth Amendment to the United States Constitution prohibit [the defendant's] conviction."[228]

E. Jurisdictions Requiring Actual Authority

Some jurisdictions allow the defense only if the government officer has actual authority to interpret or enforce the criminal statute at issue. The cases applying the constitutional defense are somewhat inconsistent. On the one hand, most courts require that the government official who advised the defendant be from the same sovereign as the prosecuting agency.[229] Thus, when the United States is the prosecuting jurisdiction, the defendant cannot rely on statements from state officials;[230] when a state is prosecuting, a defendant must show advice from an officer of that state.[231]

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224. 690 N.W.2d 561 (Minn. Ct. App. 2005).

225. *Id.* at 565.

226. *Id.*

227. *West*, 33,133, p. 5 (La. App. 2 Cir. 3/1/00); 754 So. 2d at 411 ("[T]he letter . . . is not (1) an 'act of the legislature' repealing an existing criminal statute; (2) an 'act of the legislature' otherwise purporting to make the offender's conduct lawful; or (3) a 'final judgment of a competent court of last resort' that a provision making the conduct in question criminal was unconstitutional.").

228. *Whitten*, 690 N.W.2d at 565–66 (quoting Raley v. Ohio, 360 U.S. 423, 438 (1959)).

229. *See* United States v. Sousa, 468 F.3d 42, 46 (1st Cir. 2006) ("A successful entrapment by estoppel defense generally requires that the misleading statement come from an official representing the sovereign bringing the prosecution . . . ."); United States v. Ormsby, 252 F.3d 844, 851 (6th Cir. 2001); United States v. Funches, 135 F.3d 1405, 1407 (11th Cir. 1998); United States v. Clark, 986 F.2d 65, 69 (4th Cir. 1993).

230. United States v. Miles, 748 F.3d 485, 489 (2d Cir. 2014) (stating that state and local officials cannot bind the federal government); United States v. Spires, 79 F.3d 464, 466–67 (5th Cir. 1996) (holding that to satisfy the requirements of an entrapment by estoppel defense to a federal crime, a defendant must show reliance on an official or authorized agent of the federal government); United States v. Etheridge, 932 F.2d 318, 320–21 (4th Cir. 1991) (rejecting the application of an entrapment by estoppel defense when the

If the officer is part of the prosecuting sovereign, courts differ on whether apparent or actual authority is required. The apparent authority approach is consistent with the Supreme Court cases.[232] First, as Professor Parry has pointed out, in *Raley* itself, the Court emphasized that the legislator who gave the advice "clearly appeared to be an agent of the state,"[233] seemingly finding the relevant standard to be apparent authority. Similarly, in *PICCO*, the Corps of Engineers had no actual authority to authorize conduct in the face of a Supreme Court decision prohibiting that conduct. Nevertheless, the Supreme Court held that the mistake of law defense was potentially available.[234]

Second, because no officer or agency has the authority to authorize criminal conduct, the search for actual authority is difficult to justify. If the officer actually had the power to authorize the conduct at issue, the defendant would need no defense; he would be exonerated for the distinct reason that there was no crime and the conduct was perfectly lawful. That is, if a sheriff granted an invalid permit to carry a pistol, the defendant might have a mistake of law defense. If a sheriff grants a permit to carry a pistol that is later challenged and found to be valid, then the valid permit, not a mistake of law defense, precludes conviction. In almost every case where the

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defendant claimed to rely on the affirmative advice of a state trial judge that he could possess firearms for hunting). The Ninth Circuit recognizes a limited exception for federal firearms dealers. United States v. Tallmadge, 829 F.2d 767, 775 (9th Cir. 1987). Other circuits generally do not agree. *See, e.g.*, United States. v. Hardridge, 379 F.3d 1188, 1193 (10th Cir. 2004) (holding that "[w]e agree with the majority view. *Tallmadge* stretches the holdings of *Cox* and *Raley* too far"); United States v. White, Nos. 98-4770, 4771, 4784, 1999 WL 731250, at *1 (4th Cir. Sept. 20, 1999); United States v. Howell, 37 F.3d 1197, 1206 (7th Cir. 1994) (holding that a "gun dealer . . . is a private individual [and] his license to sell firearms does not transform him into a government official"); United States v. Billue, 994 F.2d 1562, 1569 (11th Cir. 1993) (holding that "a federal license to sell firearms does not transform private licensees into government officials, thereby creating a potential entrapment by estoppel defense"); United States v. Austin, 915 F.2d 363, 367 (8th Cir. 1990); *see also* United States v. Lemieux, 550 F. Supp. 2d 127, 132–33 (D. Me. 2008) (holding that "the federal firearms dealer in this case was not a federal government official within the meaning of the entrapment by estoppel defense").

231. Miller v. Commonwealth, 492 S.E.2d 482, 490 (Va. Ct. App. 1997) ("The ATF agent, although arguably charged with such responsibility under federal firearms laws, has no such duty with respect to Virginia law.").

232. *See supra* Part I.A.

233. Parry, *supra* note 4, at 38 (citing Raley v. Ohio, 360 U.S. 423, 437 (1959)) ("After *Raley*, the defense arguably would apply if a government official with apparent authority made an affirmative and incorrect representation of law to the defendant."); *see also* Raley v. Ohio, 360 U.S. 423, 439 (1959) (noting that committee members were "the voice of the State most presently speaking to the appellants").

234. United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 675 (1973).

defense is available, the officer will have acted outside of her authority by authorizing something prohibited by law.

Third, if, as the Supreme Court has said, the rationale of the cases is fairness under due process principles, then apparent authority is sufficient.[235] Most people cannot distinguish between government officials who reasonably appear to have authority but do not and those who reasonably appear to have authority and in fact do. The critical question must be whether the officer has sufficient apparent authority to make reliance reasonable.

The Second Circuit, in an opinion joined by then-Judge Sonia Sotomayor, has explained why the constitutional defense is available based on a showing only of apparent authority:

> The inappropriateness of government prosecution of conduct that the government has solicited, and the unfairness to the defendant are no less when the government official who communicates with him appears to have authority, but in fact lacks authority to authorize criminal conduct. Furthermore, adding to the unfairness of such a requirement, in some circumstances it would be extraordinarily difficult for an individual, even one trained in law, to determine whether a government official who purports to authorize criminal conduct is in fact empowered by law to grant such authorization.[236]

Just as ordinary people cannot know when facially reasonable substantive advice of a government actor is incorrect, they cannot determine when an officer who reasonably appears to have authority to give advice is actually acting without authorization.[237] The

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235. *See Raley*, 360 U.S. at 439.

236. United States v. Giffen, 473 F.3d 30, 42 n.12 (2d Cir. 2006). Some courts have suggested that the government official must have actual authority. *See, e.g.*, United States v. Gutierrez-Gonzalez, 184 F.3d 1160, 1167–68 (10th Cir. 1999); United States v. Spires, 79 F.3d 464, 466–67 (5th Cir. 1996). But these statements were made in the context of a defendant relying on statements of individuals who were not *federal* officials as a defense in a federal prosecution. *Gutierrez-Gonzalez*, 184 F.3d at 1168; *Spires*, 79 F.3d at 467. At least when the actor is a *federal* official, circuits that have considered the issue agree that only apparent authority is needed. *See* United States v. Baker, 438 F.3d 749, 755–56 (7th Cir. 2006); United States v. Austin, 915 F.2d 363, 366 (8th Cir. 1990) ("It is the authority, whether apparent or actual, of the government official that is crucial to the entrapment by estoppel defense."); United States v. Hedges, 912 F.2d 1397, 1405 (11th Cir. 1990).

237. This question often turns on agency law. Actual authority exists when the government vests a public official with the authority to make statements on its behalf. RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006). Apparent authority exists when a third party would reasonably believe that the government official has the actual authority to interpret the law. *Id.* § 2.03.

Fourth,[238] Seventh,[239] and Eighth[240] Circuits, as well as many state courts,[241] explicitly hold that that the constitutional mistake of law defense may rest on the apparent authority of a government official. Other courts require a defendant to prove reasonable reliance on the statement in light of the identity of the government official as an element of the defense.[242] Because actual authority is not listed as an element and because this element seems to cover the concern about the official's position, these jurisdictions may not require actual authority.[243]

The Model Penal Code, as written and as adopted, seems to require actual authority. The Model Penal Code defense applies when a defendant relies on the advice of a government official "charged by law with responsibility for the interpretation, administration, or enforcement of the law defining the offense."[244] In accordance with the implication of the Model Penal Code, some courts, including the Fifth[245] and Tenth Circuits,[246] have concluded that only a government

238. United States v. Aquino-Chacon, 109 F.3d 936, 939 (4th Cir. 1997) (citing United States v. Howell, 37 F.3d 1197, 1204 (7th Cir. 1994)).

239. United States v. Howell, 37 F.3d 1197, 1204 (7th Cir. 1994) ("In essence, it applies when, acting with actual or apparent authority, a government official affirmatively assures the defendant that certain conduct is legal and the defendant reasonably believes that official.") (citing United States v. Austin, 915 F.2d 363, 366 (8th Cir. 1990)).

240. *Austin*, 915 F.2d at 366 ("It is the authority, whether apparent or actual, of the government official that is crucial to the entrapment by estoppel defense.").

241. *See, e.g.*, People v. Woods, 616 N.W.2d 211, 217 (Mich. Ct. App. 2000); State v. Edwards, 837 N.W.2d 81, 89 (Neb. 2013) ("acting with actual or apparent authority"); State v. Howell, No. 97CA824, 1998 WL 807800, at *5 (Ohio Ct. App. Nov. 17, 1988).

242. *See* United States v. Baker, 438 F.3d 749, 755 (7th Cir. 2006) (quoting United States v. Neville, 82 F.3d 750, 761 (7th Cir. 1996) ("[T]he defendant's reliance [must] be actual and reasonable in light of the identity of the agent . . . .")); United States v. Alba, 38 F. App'x 707, 709 (3d Cir. 2002); United States v. Eaton, 179 F.3d 1328, 1332 (11th Cir. 1999) ("[S]uch reliance must be objectively reasonable—given the identity of the official . . . ."); United States v. W. Indies Transp., Inc., 127 F.3d 299, 313 (3d Cir. 1997); People v. Pierce, 725 N.W.2d 691, 694 (Mich. Ct. App. 2006) (holding that a defendant must show "that the defendant's reliance was reasonable and in good faith given the identity of the government official, the point of law represented, and the substance of the official's statements"); Commonwealth v. Kratsas, 764 A.2d 20, 33 (Pa. 2001) ("[R]eliance must be in good faith and reasonable given the identity of the government official, the point of law represented, and the substance of the statement."); South Salt Lake City v. Terkelson, 2002 UT App 405, ¶¶ 12–16, 61 P.3d 282, 285–86.

243. *See* United States v. Theunick, 651 F.3d 578, 589 (6th Cir. 2011) ("Specifically, the defendant must show that the individual who misled the defendant was an official of the state; the official actively misled the defendant; and the defendant's reliance was actual and reasonable.") (citations omitted).

244. MODEL PENAL CODE § 2.04(3)(b)(iv) (1962).

245. United States v. Sariles, 645 F.3d 315, 318 n.2 (5th Cir. 2011) (citing United States v. Spires, 79 F.3d 464, 466–67 (5th Cir. 1996)) ("As a 'narrow exception' to the mistake of law doctrine, entrapment by estoppel requires a defendant charged with a federal crime to

official with actual authority can provide an opinion giving rise to a defense. Presumably, therefore, if a mayor or police chief issues a pistol permit when the statute assigns that responsibility to a sheriff, or if a defendant relies on instructions of a uniformed police chief or sheriff who happens to be outside their county of jurisdiction, then there is no defense. This makes no sense in the context of a defense resting on the question of whether a government mistake resulted in unfairness to an individual.

A pair of court decisions from Colorado illustrates the consequences of the choice of invoking a narrow statute or broader principles of constitutional law. Colorado's version of the Model Penal Code has been held to require actual authority. It provides:

> A person is not relieved of criminal liability for conduct because he engages in that conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless the conduct is permitted by one or more of the following:
>
> . . .
>
> (c) An official written interpretation of the statute or law relating to the offense, made or issued by a public servant, agency, or body legally charged or empowered with the responsibility of administering, enforcing, or interpreting a statute, ordinance, regulation, order, or law. If such

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show the actual authority of a government official to render the advice about federal law."). However, *Spires* turned on the fact that the officer involved was a state officer, "not an authorized federal government agent." *Spires*, 79 F.3d at 466.

> To satisfy the requirements of the defense when charged with a federal crime, a defendant is required to show reliance either on a federal government official empowered to render the claimed erroneous advice, or on an authorized agent of the federal government who has been granted the authority from the federal government to render such advice.

Id. at 466–67. The court did not require that the officer have actual authority to authorize the conduct, but only to speak. *Id.*

246. United States v. Gutierrez-Gonzalez, 184 F.3d 1160, 1167 (10th Cir. 1999) ("[W]e hold that the defense of entrapment by estoppel requires that the 'government agent' be a government official or agency responsible for interpreting, administering, or enforcing the law defining the offense."). However, this holding was in the context of claimed reliance on a private social service agency. *Id.* at 1168. An actual authority requirement is difficult to reconcile with the Tenth Circuit's subsequent holding that the defendant's reliance must be "reasonable in light of the identity of the agent," which suggests a sliding scale of apparent authority. *See* United States v. Apperson, 441 F.3d 1162, 1204–05 (10th Cir. 2006).

interpretation is by judicial decision, it must be binding in the state of Colorado.[247]

In *People v. Lesslie*,[248] the Colorado Court of Appeals affirmed the conviction of a deputy sheriff for placing a listening device in the men's bathroom at a bar[249] when the deputy claimed he did so at the direction of the sheriff.[250] The court held that Lesslie could not rely on the sheriff because the sheriff did not have actual authority to authorize the use of a listening device.[251] Only a judge, by issuing a court order, had such actual authority.[252] The court did not discuss *Raley* or its progeny, making clear that it was applying the statute alone and not the constitutional principle.

The *Lesslie* court's interpretation of Colorado's version of the Model Penal Code is more restrictive than the constitutional defense. Application of the Constitution should have turned on whether the defendant reasonably believed that the sheriff had the authority to issue the order. As a result, Lesslie was deprived of a potentially meritorious defense. One commentator pointed out the inherent difficulty in requiring actual authority: "[A]ssuming no public body or official has authority to grant permission to break the law, it is difficult to imagine a situation in which a defendant ever could use CRS [section] 18-1-504(2)(b) as a defense."[253] By contrast, in *Turney v. Civil Service Commission*,[254] the Colorado Court of Appeals, citing *PICCO*, concluded that "affirmative assurances" would be enough to give rise to the defense,[255] without mentioning that they would have to be in writing or come from a particular officer, as required by the statute.

A defendant could reasonably rely on a state building inspector to tell him how to store building materials;[256] on statements by a trial

247. COLO. REV. STAT. § 18-1-504(2) (2012).

248. 24 P.3d 22 (Colo. App. 2000). *See generally* Mark S. Cohen, *Entrapment by Estoppel*, COLO. LAWYER, Feb. 2002, at 45, 47 (discussing *Lesslie*).

249. *Lesslie*, 24 P.3d at 24.

250. *Id.* at 25.

251. *Id.* ("[T]he sheriff was not an official authorized or empowered to permit the interception and recording of communications by such a device.").

252. *Id.*

253. Cohen, *supra* note 248, at 47.

254. 222 P.3d 343 (Colo. App. 2009).

255. *Id.* at 348 (citing United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 673–74 (1973)).

256. State v. Cote, 945 A.2d 412, 429–30 (Conn. 2008).

court judge;[257] on a letter from the Department of Corrections granting a pardon;[258] on a statement from the Department of Game and Inland Fisheries that a hunter with a felony conviction can own a muzzle-loading rifle;[259] or a Motor Vehicle Department employee's statement that a license is valid.[260] Yet, in all these cases, state courts have rejected the defense because the officer making the statement lacked actual authority.[261]

III. REVISING THE MODEL PENAL CODE TO CONFORM TO THE CONSTITUTION

U.S. law now has two independent "mutually oblivious doctrines"[262] for dealing with reliance on official misstatements of the law: the Model Penal Code defense and the constitutional mistake of law defense. These regimes often lead to different results on the same facts. *Norton* and *Terkelson* in Utah, like *West* and *Chiles* in Louisiana, and to a lesser extent *Lesslie* and *Turney* in Colorado, simply talk past each other. Each court faithfully applied the law it perceived to be at issue, without acknowledging that another body of law also applied and, if applied, might well require reaching the opposite result. As a general matter, courts in states with statutory mistake of law defenses do not consider federal precedent along with the statute; the Supreme Court cases are often simply ignored.[263] By

257. People v. Knop, 557 N.E.2d 970, 974–75 (Ill. App. Ct. 1990); State v. V. F. W. Post No. 3722, 527 P.2d 1020, 1025 (Kan. 1974) (holding that defendants cannot rely on statements from lower court decisions).

258. State v. West, 33,133, p. 1 (La. App. 2 Cir. 3/1/00); 754 So. 2d 408, 409.

259. Miller v. Commonwealth, 492 S.E.2d 482, 484 (Va. Ct. App. 1997).

260. Grisson v. State, 515 S.E.2d 857, 858 (Ga. Ct. App. 1999).

261. *E.g.*, *Cote*, 945 A.2d at 430 (building inspector); *Grisson*, 515 S.E.2d at 859–60 (Motor Vehicle Department employee); *Knop*, 557 N.E.2d at 975 (trial court judge); *V.F.W. Post No. 3722*, 527 P.2d at 1025 (trial court judge); *West*, 33,133, p. 5 (La. App. 2 Cir. 3/1/00); 754 So. 2d at 411 (Department of Corrections officer); *Miller*, 492 S.E.2d at 490–91 (Department of Game and Inland Fisheries officer).

262. Anthony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 67 (1960).

263. As one commentator explained, once states codify "the mistake of law defense, [their] courts [tend] to analyze mistake of law claims within the framework of the statute. However, it seems likely that the constitutional defense known as entrapment by estoppel is broader than the statute." Cohen, *supra* note 248, at 47. Many of the leading cases interpreting statutes fail to consider the constitutional cases. *See* People v. Lesslie, 24 P.3d 22, 25 (Colo. App. 2000); *Cote*, 945 A.2d at 426–28; *Knop*, 557 N.E.2d at 974–75; Walker v. Commonwealth, 127 S.W.3d 596, 608 (Ky. 2004); *West*, 33,133, p. 5 (La. App. 2 Cir. 3/1/2000); 754 So. 2d at 411; State v. Woods, 984 S.W.2d 201, 204 (Mo. Ct. App. 1999); State v. Sheedy, 480 A.2d 887, 888–89 (N.H. 1984); People v. Marrero, 507 N.E.2d 1068, 1070–72 (N.Y. 1987); State v. Buchholz, 2006 ND 227, ¶¶ 16–17, 723 N.W.2d 534, 540;

contrast, jurisdictions without a mistake of law statute, notably including federal courts,[264] tend to consider the Supreme Court cases.[265]

In principle, there is nothing problematic with codification and elaboration of rules required by the Constitution. However, implementation of constitutional rights in statutes or rules typically involves expanding those rights or explaining how they apply. For example, Federal Rule of Criminal Procedure 11, establishing procedures for courts accepting guilty pleas, "provides additional protections beyond the minimum required by the Constitution."[266] Similarly, the Speedy Trial Act of 1974[267] "affords greater protection to a defendant's right to a speedy trial than is guaranteed by the [Speedy Trial Clause of the] Sixth Amendment."[268] With Rule 11 (and its state analogues) and state and federal speedy trial statutes, the distinct and independent roles of the statute and the Constitution are clear. The statute offers rights and procedures beyond the protections of the freestanding Constitution, and therefore defendants, prosecutors, and judges have reason to use it. Because constitutional claims in state prosecutions can be vindicated in the U.S. Supreme

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Linder v. State, 734 S.W.2d 168, 171 (Tex. Ct. App. 1987); State v. Norton, 2003 UT App 88, ¶¶ 12–15, 67 P.3d 1050, 1053. *But see* State v. Guzman, 968 P.2d 194, 206–07 & n.18 (Haw. Ct. App. 1998) (considering Supreme Court and federal circuit court entrapment by estoppel jurisprudence); Commonwealth v. Twitchell, 617 N.E.2d 609, 619 (Mass. 1993) (noting that "[f]ederal courts have characterized an affirmative defense of this nature as 'entrapment by estoppel' "); State v. Grammenos, No. 5705, 2006 WL 2057191, at *7–8 (N.J. Super. Ct. App. Div. July 26, 2006) (noting the "United States Supreme Court cases that prohibit the State from prosecuting defendants for acts committed pursuant to permission granted by a government official"); *Miller*, 492 S.E.2d at 485–86 (discussing the "trilogy of United States Supreme Court cases" that underlie the entrapment by estoppel defense); State v. Leavitt, 27 P.3d 622, 626–27 (Wash. Ct. App. 2001) (discussing the Supreme Court's jurisprudence on entrapment by estoppel).

264. *See supra* notes 88–89 and accompanying text.

265. *See* People v. Chacon, 150 P.3d 755, 761 (Cal. 2007); *Twitchell*, 617 N.E.2d at 619; People v. Woods, 616 N.W.2d 211, 216–17 (Mich. Ct. App. 2000); Whitten v. State, 690 N.W.2d 561, 565 (Minn. Ct. App. 2005); Commonwealth v. Kratsas, 764 A.2d 20, 28–29 (Pa. 2001); *Leavitt*, 27 P.3d at 626–27. *But see Guzman*, 968 P.2d at 207 n.18 (discussing Hawaii's mistake of law statute but deciding that it "does not replace or subsume" entrapment by estoppel); *Grammenos*, 2006 WL 2057191, at *8 (deciding that "[a]lthough [the] defendant cannot invoke the [New Jersey mistake of law statute], the constitutional defense is available").

266. Adams v. Peterson, 968 F.2d 835, 841 (9th Cir. 1992) (en banc) (citing Haase v. United States, 800 F.2d 123, 127 (7th Cir. 1986)).

267. Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (1975) (codified as amended at 18 U.S.C. § 3161 (2012)).

268. United States v. Baker, 63 F.3d 1478, 1497 (9th Cir. 1995).

Court by certiorari or in lower federal courts on habeas corpus, state defendants also have reason to rely on the federal Constitution.

There is no advantage to, or function of, a statute offering less protection than the Constitution in every case[269] and no more in any case.[270] For example, it would be startling to see a recent statute requiring jury trials when the defendant faces more than five years in prison, when the Supreme Court has held that juries are required when defendants face potential incarceration of more than six months,[271] and doubly so to see such a statute promulgated by the ALI. The sole function of such a statute would be to mislead.

Model Penal Code section 2.04(3)(b) and its variants as adopted in the states can be understood in two ways. One possibility is that the statutes represent a failed attempt to codify the constitutional doctrine. That is, perhaps the ALI intended to embody at least the constitutional minimum but did not achieve that goal. There is little evidence in the drafting history that this is the case. If that were the goal, one might expect to see a residual clause acknowledging that the defense applied in other cases where the Constitution required it.[272]

Much more likely given the text and the timing of drafting is that the Model Penal Code was never intended to embody a constitutional principle and instead created a non-constitutional defense.[273] If so, given that the statutes never offer protection beyond that of the

269. This issue arises only in state court. Because there is no federal statute recognizing the defense, in federal court it can only be raised as a constitutional claim. In state court, even when the state statute is substantively equivalent, the statutory defense is inferior to the constitutional defense because there is no possibility of federal habeas or certiorari review based on violation of a state statute. *See, e.g.*, Swartz v. Mathes, 291 F. Supp. 2d 861, 872 (N.D. Iowa 2003) ("Because Swartz argued a state-based mistake of law claim and not a constitutional entrapment by estoppel claim before the state courts, he did not present his claims as he is required to do if he seeks habeas corpus relief.").

270. New Jersey allows a defense of personal mistake of law that goes beyond the constitutional defense. But that defense is set out in a separate subsection of the statute and does not cover official mistakes. N.J. STAT. ANN. § 2C:2-4 (West 2005).

271. Duncan v. Louisiana, 391 U.S. 145, 159 (1968).

272. *See, e.g.*, FED. R. EVID. 412(b)(1)(C) (providing an exception to the rape shield law when "exclusion would violate the defendant's constitutional rights").

273. *Cf.* State v. Guzman, 968 P.2d 194, 207 n.18 (Haw. Ct. App. 1998) ("This rationale also underlies our belief that the affirmative defense contained in [title 702, section 220 of the Hawaii Statutes], while similar to the due process defense of entrapment by estoppel, does not replace or subsume the latter defense . . . ."); State v. Grammenos, No. 5705, 2006 WL 2057191, at *8 (N.J. Super. Ct. App. Div. July 26, 2006) ("This constitutional defense is similar to the affirmative defense of mistake of law included in [title 2C, section 2-4 of the New Jersey Statutes]."); Commonwealth v. Kratsas, 764 A.2d 20, 29 (Pa. 2001) ("Some state legislatures . . . have enacted statutes providing for a limited defense based upon a mistake of law in a manner that parallels the reliance doctrine.").

Constitution but often offer less, they are obsolete in that the constitutional defense is always preferable.[274]

The Model Penal Code as drafted, adopted, and interpreted, then, is a trap. It addresses the same problem as a constitutional doctrine, yet it provides less protection than the Constitution standing alone. Reliance on such a statute can only disadvantage a defendant. Therefore, it is always a mistake for defense lawyers to rely on it. That is, there are, apparently, no cases in which the Model Penal Code as drafted or adopted offers relief when the freestanding Constitution does not. In some cases it will be facially obvious that the constitutional defense is preferable because a specific restriction in a statute makes the statute certainly or potentially inapplicable or disadvantageous. In other cases, it is possible that research and analysis might show that the statute is just as good as the constitutional defense on any given set of facts that might arise at trial, and that under no conceivable circumstances will the case be brought to federal court through certiorari or habeas corpus. But no competent lawyer should ever do that research or analysis because the case will be at least as likely to succeed simply by advancing the constitutional defense. No competent lawyer, that is, should ever spend public or client funds in a quest to determine whether an alternative defense that is normally weaker, but might not be in this case, is just as good as a defense that is already in hand.

A defense attorney, therefore, should always raise the constitutional defense when it fits the facts of her client's case. The statutory defense, if raised at all, should be advanced in the alternative if it applies based on the facts and the language of the statute.

Conscientious courts attempting to resolve cases in accordance with the Constitution should save blundering lawyers from mistakes induced by the legislature.[275] A lawyer pleading the statute should be

274. Professor Parry argues that the common-law version of the defense could be advantageous by allowing the defense based on apparent authority and when advice was offered by an official of a separate sovereign. *See* Parry, *supra* note 4, at 59–65. While sensible in principle, this does not amount to a defense of the statutes. Since these statutes seem to require actual authority, which out-of-jurisdiction officials and officials acting outside of their areas of responsibility do not have, the statutes themselves stand in the way of the common-law development he desires.

275. Trial judges have the power and, according to some courts, the duty, to ask defense counsel if they wish to raise particular defenses presented by the evidence to ensure "that the theory has not been inadvertently overlooked by counsel." People v. Sedeno, 518 P.2d 913, 922 n.7 (Cal. 1974) (in bank), *overruled in part on other grounds by* People v. Breverman, 960 P.2d 1094 (Cal. 1998); *see, e.g.*, United States v. Delgado-

deemed by trial and appellate courts to have raised a constitutional claim, and the defense should be evaluated as a due process question as well as under the applicable statute.

Ultimately, the problem should be solved by legislatures. There is nothing wrong in principle with identifying categories of advice or other situations which establish the defense as a matter of law. States could use their statutes to make the defense available in a broader range of circumstances—although they seem to have had little appetite to do so. But to avoid misleading jurors, lawyers, and people charged with crimes, every statute should be amended to provide that the defense is available "in other situations as required by the U.S. Constitution."

Finally, the ALI should revisit this section of the Model Penal Code, and make clear that the defense is available at least in all cases where the Constitution offers a defense. The ALI should consider whether sound practice, policy, and fairness warrant making the defense available in some instances even when not required by the Constitution. But in any event, the text should explain that the defense must apply "in other situations as required by the U.S. Constitution."

CONCLUSION

In the mid-1950s, American law recognized two distinct mistake of law defenses for those who claimed their conduct was lawful after reasonably relying on official advice. One defense was based on considerations of public policy and embodied in the Model Penal Code, the other based on the Constitution. The Model Penal Code defense is now wholly subsumed within the constitutional defense; the Model Penal Code never applies when the constitutional defense does not, but the Supreme Court and other courts have applied the constitutional defense in circumstances when the Model Penal Code defense is unavailable. However, many lawyers and judges applying the Model Penal Code do not recognize or understand this problem. Accordingly, judges sometimes deny the defense after consideration

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Cardenas, 974 F.2d 123, 126 (9th Cir. 1992) ("[T]he supervisory powers of the court provide the authority to raise sua sponte matters that may affect the rights of criminal defendants."); United States v. Stewart, 43 C.M.R. 140, 145 (C.M.A. 1971) ("When an affirmative defense is raised by the evidence, the military judge is required *sua sponte* to instruct thereon." (citations omitted)); State v. Berube, 669 A.2d 170, 172 (Me. 1995) ("[O]bvious error results when the court fails to instruct the jury on a statutory defense generated by the evidence.").

of only the Model Penal Code defense when relief would have been available based on the constitutional mistake of law defense.

Treating the mistake of law defense as a pure question of policy has allowed the states to convict in situations where the Supreme Court has held defendants are entitled to be acquitted. As a result, courts and legislatures have "sanction[ed] an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him."[276] Defense lawyers, courts, legislatures, and the ALI should make sure that justice is done in cases involving claims of mistake of law by ensuring that cases are decided under the legal standard required by the Constitution.

276. Raley v. Ohio, 360 U.S. 423, 426 (1959).