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I. INTRODUCTION

Since German criminal law theory is rich in fundamental philosophical, ethical, and normative discussion, it is a pleasure to discuss mistake of law in that context. German criminal law recognizes that mistake of law does excuse;[1] therefore, study of the mistake of law defense has shifted from philosophy to practical application. The same is true in neighboring countries, though fine, yet important, distinctions exist among various mistake of law rules.[2]

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* Dr. jur., Tübingen, 1962; LL.M., University of California, Berkeley, 1965; Habil., Tübingen, 1969; o. Prof., Göttingen, 1970; Bern.

1. Judgment of Mar. 18, 1952, Bundesgerichtshof, Grosser Senat für Strafsachen [Bundesgerichtshof, Gr. Sen. St.], W. Ger., 2 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 194. For an English version of excerpts from this Judgment, see J. HALL & G. MUELLER, CRIMINAL LAW AND PROCEDURE 590 (2d ed. 1965); Ryu & Silving, *Error Juris: A Comparative Study*, 24 U. CHI. L. REV. 421, 451 (1957). The 1975 revision of the German Penal Code differentiates between mistake of law, STRAFGESETZBUCH [StGB] § 17 (W. Ger.), and mistakes which exclude intent, StGB § 16 (W. Ger.). A discussion of the doctrine of mistake is found in all textbooks discussing the General Part (Allgemeiner Teil) of German criminal law and in all commentaries. *See, e.g.*, J. BAUMANN & U. WEBER, STRAFRECHT: ALLGEMEINER TEIL (9th ed. 1985); H. JESCHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL (3d ed. 1978); K. LACKNER, STRAFGESETZBUCH (16th ed. 1985); A. SCHÖNKE, H. SCHRÖDER, T. LENCKNER, P. CRAMER, A. ESER & W. STREE, STRAFGESETZBUCH: KOMMENTAR (22nd ed. 1985) [hereinafter A. SCHÖNKE & H. SCHRÖDER]; G. STRATENWERTH, SCHWEIZERISCHES STRAFRECHT: ALLGEMEINER TEIL I (1982); G. STRATENWERTH, STRAFRECHT: ALLGEMEINER TEIL I (3d ed. 1981) [hereinafter G. STRATENWERTH, STRAFRECHT]. For a comparative analysis in English, see G. FLETCHER, RETHINKING CRIMINAL LAW 683-758 (1978); Arzt, *Ignorance or Mistake of Law*, 24 AM. J. COMP. L. 646 (1976). *See also* Hall, *Comment on Error Juris*, 24 AM. J. COMP. L. 680 (1976); Ryu & Silving, *Comment on Error Juris*, 24 AM. J. COMP. L. 689 (1976) [hereinafter Ryu & Silving, *Comment*].

2. Comparisons among many jurisdictions tend to lose in depth what they gain in breadth. That is why this article is limited to German law, except for the following short reference to the Swiss mistake of law rule. The interpretation of Article 20 of the Swiss Criminal Code, SCHWEIZERISCHES STRAFGESETZBUCH, CODE PÉNAL SUISSE, CODICE PENALE SVIZZERO [StGB, C.P., COD. PÉN.] art. 20 (Switz.), is not settled. Under Article 20, a mistake of law is relevant only if it is based on adequate grounds. Even then, the section seems to leave to the discretion of the court whether such a mistake fully excuses or merely mitigates punishment. Ryu & Silving, *Comment*, *supra* note 1, at 689, rely on Judgment of July 2, 1965, Bundesgericht, Switz., 91 Entscheidungen des Schweizerischen

In contrast, Anglo-American discussion centers on *error juris nocet*[3] and its theoretical and ethical bases. Professor Fletcher criticizes American law for its "instrumentalist approach."[4] Such an approach is typical, however, for initial phases of doctrinal development in the field of mistake of law. At that stage, the conviction is still intact that the principle *error juris nocet* is sound. Irritating results under this principle are avoided by some adjustments in cases one considers to be marginal.

The flourishing American debate concerning the principle—modestly disguised under a call for rethinking—suggests that the development there has reached a second stage. America has moved from blind application of *error juris nocet* to a search for theoretical and ethical bases.

German law has advanced to a third stage. It has given up the *error juris nocet* principle and enthroned its opposite. The theorists have left the battlescene and the pragmatists have moved in. Their tedious never ending work of day-to-day application of the new principle and fine-tuning the new maxim, though far from glamorous, is vitally important.

This paper, rather than arguing for or against the mistake of law defense, shows in some detail difficulties encountered by a legal system that has instituted the mistake of law defense. But before turning to problems connected with fine tuning the mistake of law rule, that rule must be placed in the general context in which it belongs. Mistake of law is not a new, marginal, and isolated defense. Instead, it is inseparable from a properly understood mens rea requirement. Anglo-American and Continental criminal law (the generalization is permissible here) require

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Bundesgerichts, Amtliche Sammlung IV [BG IV] 159, 166, 91 Arrêts du Tribunal fédéral suisse, Recueil officiel IV [ATF IV] 159, 166 to show that this has been reduced to the rule that invincible error juris is a full excuse and vincible error juris is none at all; in other words, that the case law has done away with mitigation as an alternative. In Judgment of Feb. 25, 1966, Bundesgericht, Switz., 92 BG IV 70, 74, 92 ATF IV 70, 74 however, the court permitted mitigation where error was avoidable. Compare Judgment of June 26, 1980, Bundesgericht, Switz., 106 BG IV 189, 193, 106 ATF IV 189, 193 (dealing with the procedural aspects of a successful mistake of law defense), in which the court said that the defendant should not be acquitted outright; rather, he should be pronounced guilty, but at the same time the court should declare a waiver of punishment. This is a strange solution which has been widely criticized.

3. Literally translated, the Latin phrase means "an error of law injures." The notion is that a mistake of law has an injurious effect, and the party committing it must suffer the consequences. Thus, the functional meaning is, "an error of law does not excuse."

4. G. FLETCHER, *supra* note 1, at 755-56.

mens rea, because mens rea, as the perpetrator's state of mind, implies knowledge of a violation of the law (or in negligent crimes the possibility of such knowledge). One standard argument against accepting unavoidable error juris as an excuse shows this implication very clearly. Some claim unavoidable error juris is not necessary as a defense because every sane man knows the criminal law. Surely, this argument cannot mean that every man has a general knowledge of criminal law prohibitions, because such knowledge is immaterial. Rather, it means that when a man kills another human being he knows that he violates the rule "thou shalt not kill" *if* he acts with mens rea. Once one has recognized that mens rea *implies* knowledge of the pertinent legal norm, the question is how one deals with anomalous situations where the perpetrator acts with mens rea, but the inference that he knows that his conduct violates the relevant norm is not justified. In this exceptional case, the traditional conception of mens rea is not weakened but reaffirmed if we introduce the defense of unavoidable mistake of law. The notion underlying the mistake of law conception is intimately tied to long-standing mens rea concerns.

The argument that the error juris defense is the logical and unavoidable step forward from the mens rea requirement can be illustrated by moving back historically to the point where the mens rea notion itself began to emerge. Ancient criminal law systems were result oriented: "The deed kills the man." These systems based criminal liability on negative results such as death, rape, or personal injuries. Within these systems, such results functioned as crude indicators of what is now called mens rea. Once criminal theorists became aware of that, it was logical to take care of those exceptional situations in which a result such as death or rape was achieved but mens rea was missing by introducing the absence of mens rea as a defense.

One can easily imagine objections to this novel step: How do we prove mens rea? How can someone commit an act such as rape without mens rea—and doesn't this show that the new defense is superfluous? The new defense of mens rea threatens the objectivity of the law! If we accept a subjective component in principle, think of the complications which will inevitably follow when we define the subjective component in detail! We discourage learning if we put a premium on lack of knowledge!

Parallels between results as crude indicators of mens rea on one hand and mens rea as a crude indicator of knowledge of vio-

lation of the law on the other hand become visible only after considerable simplification. Perhaps this is oversimplification, but it seems remarkable that a system which has embraced the mistake of law defense might discover—after a lapse of considerable time and with some astonishment—that the essence of mens rea in crimes of negligence is and always has been knowledge of the law—that is knowledge of the rules of caution necessary under the circumstances.[5]

II. THE LAW IN THEORY

A. *The Basic Distinction Between Mistake that Excludes Intent and Mistake of Law*

In German criminal law the concept of strict liability has become extinct. Intent (*Vorsatz*) is the normal mens rea requirement; crimes of negligence (*Fahrlässigkeit*) are, in theory, the exception.[6]

The German Criminal Code defines intent (*Vorsatz*) only in the negative: standard mistake (roughly, mistake of fact) (*Tatbestandsirrtum*) operates as a defense by excluding intent[7] while mistake of law (*Verbotsirrtum*) does not exclude intent but is recognized as a separate defense.[8] If the mistake of law was unavoidable, the perpetrator is excused; unavoidable error juris is a defense. If the perpetrator could have avoided the mistake of law, he remains punishable for a crime of intent but punishment may be mitigated.

German criminal law's first principle in treating mistake is the explicit distinction between standard mistake which ex-

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5. *See infra* notes 33-36 and accompanying text.

6. StGB § 15.

7. *Id.* § 16. Throughout this article, a mistake that excludes intent will be called a standard mistake. For the most part, what are characterized here as standard mistakes would be referred to as mistakes of fact in common law jurisdictions. However, since the correspondence is not exact, it seems preferable to use the phrase "standard mistakes" to avoid possible confusion.

8. *Id.* § 17. The idea here can most easily be grasped by thinking of the insanity defense. As framed in most United States jurisdictions, that defense operates not by negating the intent element in the definition of an offense, but as an independent ground for denying culpability. The parallel in the context of German mistake analysis is that a standard mistake is thought to negate an element of the definition (i.e., to exclude intent), whereas a mistake of law operates as an independent denial of culpability. Some states have recently narrowed the scope of the insanity defense by declaring it to be a defense only if it negates the intent element in the definition of a crime. *See, e.g.*, UTAH CODE ANN. § 75-2-305 (Supp. 1985). Such a state conceptualizes the insanity defense as one that excludes intent rather than as a separate defense.

cludes intent, and mistake of law which does not exclude intent. With this rule, the German Criminal Code explicitly departs from what is referred to in the German literature as the theory of intent (*Vorsatztheorie*). This theory proposes to treat knowledge of unlawfulness and knowledge of other elements (*e.g.*, factual elements) of a crime equally; in that sense one could refer to it as the *equal treatment doctrine.*

Example 1: *P* watches a child drown, even though he could save the child by intervening. The child is in fact *P*'s own son, *V*.[9]

The *Vorsatztheorie* would treat *P* the same whether *P* recognizes *V* as his son and erroneously believes he has no duty to intervene or mistakes *V* for the neighbors' nasty little boy. In both cases the *Vorsatztheorie* would come to the same conclusion: *P* has no intent to kill by omission since he does not know his duty to intervene. It makes no difference whether he does not know his duty because he does not recognize the drowning child as his son (a standard mistake) or knows the facts but believes he has no duty to intervene (a mistake of law).

German law explicitly rejects the equal treatment doctrine. The line between mistake of law and standard mistake must be drawn by legal systems whether they recognize the mistake of law defense or not. Only legal systems which follow the *Vorsatztheorie* would avoid this distinction. Perhaps, however, the line tends to be different in systems which recognize the mistake

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9. Example 1 is a modification of Judgment of May 29, 1961, Bundesgerichtshof, Gr. Sen. St., W. Ger., 16 BGHSt 155. The significance of the case lies in the scholastic separation of the knowledge of the facts from which the duty of intervention follows (standard mistake) and the duty itself (mistake of law). This separation is now generally accepted. *But see* G. STRATENWERTH, STRAFRECHT, *supra* note 1, § 14 n.40 (suggesting that, together with factual knowledge, knowledge of the duty to intervene *in principle* should be considered a part of the intent and only assumptions of specific exceptions from this duty should be governed by the mistake of law rule).

Judgment of Mar. 18, 1952, Bundesgerichtshof, Gr. Sen. St., W. Ger., 2 BGHSt 194 and Judgment of May 29, 1961, Bundesgerichtshof, Gr. Sen. St., W. Ger., 16 BGHSt 155, are hard cases in the sense that there is a strong suspicion that the defendant lied in claiming that he made a mistake of law. German criminal theory is unsympathetic towards "penumbra" or "thin ice" reasoning (i.e., the offender who claims exculpation on the ground that he thought he was merely skating near the edge). *See* J. Kaplan, Mistake of Law 14-17 (July 11, 1984) (unpublished manuscript) (available from John Kaplan at Stanford University Law School); A. Smith, Error and Mistake of Law in Anglo-American Criminal Law 37 (July 11, 1984) (unpublished manuscript) (available from A.T.H. Smith, University of Durham, England), because of the painful memory of Nazi attacks on *nullum crimen sine lege* as liberalistic encouragement of borderline morals.

of law defense and those which adhere to the *error juris nocet* principle. This is a point worthy of further investigation.

Under German criminal law, factual mistakes, insofar as they are relevant under the definition of the crime charged, always fall into the category of standard mistakes. They exclude intent regardless of whether they are reasonable. However, one must carefully distinguish between a factual mistake and a mistake of law. It goes without saying that a mistake of law can have a factual basis. For example, the erroneous belief that the president of the republic has refused to render the signature necessary for an amendment to become legally valid is a factual error leading to a mistake of law. It also goes without saying that this kind of factual error cannot turn a mistake of law into a mistake of fact.

B. Normative Mistake as Mistake of Fact

A normative mistake is more difficult to classify.

Example 2: *P* sells a car to buyer, *B*. *P* has an earlier contract with another buyer, *X*, and believes that the car is the property of *X*. However, this belief is based on a mistaken interpretation of the contract with *X*.[10]

P has committed crimes under sections 246 (attempted misappropriation of *X*'s property) and 263 (attempt to defraud *B*).[11] Example 2 illustrates the principle now generally recognized in German law that concepts such as property can only be understood in normative terms. Normative mistakes of this variety are to be treated as factual mistakes and do not fall into the mistake of law category. To be more concrete, erroneous interpretation of rules of contract law leads to the wrong conclusion as to the owner of the car. The mistake is for all intents and purposes the same as a mistake of fact (such as *P* confusing two cars and selling the wrong one). For the most part, normative meaning is to be identified with legal meaning.[12] If the law refers to

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10. The solution offered in example 2 (i.e., that the mistake involved is not to be treated as a mistake of law) is not contested; a well-known borderline case is Judgment of Jan. 12, 1962, Bundesgerichtshof, Senat, [Bundesgerichtshof], W. Ger., 17 BGHSt 87.

11. StGB §§ 246, 263.

12. Hall, *supra* note 1, at 685. As to the borderline between law and fact, see J. Kaplan, *supra* note 9, at 16 (blackmail as "unwarranted" demand). Professor Kaplan's ex-felon example has its parallel in StGB § 211. There, murder is defined as "killing to facilitate or cover up another criminal act." It is settled doctrine that error as to the punishability of the deed which the killer attempts to cover up (e.g., the killer assumes that the deed is only a tort, not a criminal act) negates mens rea and does not fall under

facts—that is, to a piece of reality—these facts gain a normative quality. Full factual knowledge without proper understanding of the normative context can be so empty that it negates mens rea.

> *Example 3:* A German statute prohibits killing game without a license. Assume that rabbits are protected in Germany as game (as they indeed are), but they are considered common pests in Australia (assume this for the argument's sake). *A,* an Australian visitor, knows that one needs a license to hunt game in Germany. However, on his first walk through the German countryside he encourages his dog to chase and kill a rabbit.

In this example, *A* realizes he does not have a license to kill game but may not realize he is hunting or killing game. This shows that reality cannot be properly understood without having a minimal understanding of the correct normative significance of a set of facts. That is why at least some normative mistakes negate mens rea in the same way factual mistakes do, whereas other normative mistakes fall into the realm of *error juris criminalis.*

The line is not drawn between factual mistake and normative mistake but between standard mistake (*Tatbestandsirrtum*) which may be factual as well as normative and mistake of law (*Verbotsirrtum*) which is always normative. A mistake of law occurs when the perpetrator has factual knowledge plus a minimum understanding of the normative significance (*i.e.,* the reason behind criminal law prohibitions), but mistakenly believes that no section in the criminal code applies to the act. Thus, in Example 2, if *P* believed that misappropriation is punishable only if there is a specific violation of trust, and no trust relationship exists between *X* and *P, P*'s mistake would be a mistake of law, since he knows the facts and he understands their normative significance (violation of another person's property is unacceptable). He knows the reason behind the criminal law prohibition even if he does not know the prohibition as such, and his mistake would be a mistake of law.

The next section attempts to clarify the line between standard mistake and error juris in more detail. A helpful test to define this line is the reciprocity principle (*Umkehrverhältnis*)

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the mistake of law rule. Other borderline cases pose further difficulties: What for the perpetrator is a clear mistake of law can be a standard mistake for an instigator (i.e., an accessory who instigates but does not commit the crime) because the same mistake on his part eliminates his mens rea as to instigating a *crime.*

between the doctrine of attempt and the doctrine of mistake:[13] Mistakes of law do not exclude intent; conversely, under the German doctrine of impossible attempts (*Wahndelikt*), mistakes of law do not constitute a sufficient basis for attempt liability. In Example 1, *P* cannot be prosecuted for attempted murder by omission if *V* is actually the neighbor's son and *P* watches *V* drown in the mistaken belief that the law imposes a special duty upon neighbors to intervene in such situations. In Example 2 *P* has committed an attempt to defraud *B* and an attempt to misappropriate what he presumed to be the property of *X*. *P*'s mistake of law does not exclude his intent to commit a crime. The issues of impossible attempt and mistake of law have as their common denominator the grasp of the reasons behind the criminal law prohibition.

C. *The Layman's Parallel Evaluation as a Limit to Normative Mistake*

Example 4: *P* distributes a movie which is pornographic within the meaning of the relevant section of the Criminal Code. *P* believes that the pornographic scenes have been cut.[14]

In Example 4 *P* has committed no crime because he does not have the intent to distribute pornographic material. A first variation of Example 4 is equally easy to resolve. Suppose *P* has full factual knowledge but believes the Criminal Code proscribes

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13. H. JESCHECK, *supra* note 1, §50(II)(1); A. SCHÖNKE & H. SCHRÖDER (A. Eser), *supra* note 1, § 22, Marginal Nos. 78, 83; Baumann, *Das Umkehrverhältnis zwischen Versuch und Irrtum im Strafrecht*, 15 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 16 (1962); Oehler, *Attempted Crimes*, 24 AM. J. COMP. L. 694, 695 (1976). The details are much contested.

14. Example 4 and its subsequent variations are borrowed from F. LINDENMAIER & P. MÖHRING, NACHSCHLAGEWERK DES BUNDESGERICHTSHOFES IN STRAFSACHEN, StGB § 184, No. 6 (1956). *Compare* Judgment of May 28, 1974, Oberlandesgericht, Köln, 27 NJW 1830 (1974) *with* Judgment of Mar. 16, 1967, Oberlandesgericht, Celle, 20 NJW 1921 (1967) (for details as to the latter case see Arzt, *supra* note 1, at 665). A. Smith, *supra* note 9, at 28, provides another excellent example on the question of reasonable force. The lawyerlike judgment of "reasonableness" is not up to the defendant. The question is whether the defendant knows—in a layman's parallel evaluation—the grounds upon which the law judges the force applied to be unreasonable. In this there is no difference between "reasonable" and "force." Nobody claims that knowledge of "using force" should be exempted from the mens rea requirement. Otherwise, we would have to acquit a defendant who thinks that releasing the trigger of a gun is not "force" since it is so easily done. Here, it is obvious that the defendant knows in a layman's parallel evaluation why the law judges this to constitute the use of force. "Reasonable" is a more normative phrase than "force," but the difference is in quantity, not in quality.

only distribution of hardcore pornography whereas the Code actually proscribes even softcore pornography. This is a clear-cut mistake of law.

A second variation of Example 4 is much more problematical. Suppose *P* knows it is illegal to distribute softcore pornographic material but judges his material as still barely permissible (not yet pornographic). This is a normative mistake. According to the German majority view, this mistake constitutes neither a standard mistake nor a mistake of law. Rather, it is irrelevant under the doctrine of *Subsumptionsirrtum.* German courts would hold that *P* knows the meaning of pornographic in a layman's evaluation which parallels the legal evaluation. Proof of his knowledge would be P's (unavoidable) admission that he knew his material was sexually explicit. He also knows that the distribution of pornographic material is illegal; thus, his mistake is limited to the technical, lawyerly subsumption of his behavior under the relevant section of the criminal code—with negative results. This subsumption is not up to him as a layman, and he remains liable for the criminal offense despite his mistake.

Example 4 and its variations show that mistake of law negates the knowledge of wrongdoing. Knowledge of wrongdoing cannot mean technical lawyerly knowledge. This is nothing new. The German mens rea requirement of murder, for example, is the knowledge of causing death—in a layperson's terms. Technical knowledge is not required; otherwise, only doctors could commit murder because only they can understand and know, in a technical sense, how death was caused. The irrelevance of technical mistakes of law is obvious if the layperson makes a mistake as to which section of the Criminal Code covers the conduct in question (e.g., whether conduct constitutes theft or fraud in dubious borderline cases involving theft by tricks). Carrying knowledge of wrongdoing a critical step further implies that knowledge in terms of a civil wrong is sufficient in principle to hold one responsible for criminal acts.[15] Since the criminal law requires knowledge of wrongdoing, a mistake about the punishability of the behavior is irrelevant. This is but one of the many traces of the connection between the mistake of law doctrine and the insanity defense.[16] The mistake of law doctrine is based

15. *See infra* notes 22-27 and accompanying text for exceptions.

16. Regarding the link between insanity and mistake of law, see Arzt, *supra* note 1, at 647, 677.

on the distinction between right and wrong, and wrong is to be interpreted as material wrongdoing, not as knowledge of punishability.

The second variation of Example 4 shows that there are cases in which knowledge of wrongfulness could disappear because of a technical interpretation of the criminal law which is incorrect. If the perpetrator believes that books are not legally or technically pornographic, it follows that he believes it is not wrongful to distribute them. Courts have dealt with this link between technical interpretation of the criminal law and knowledge of material wrongdoing in two ways. One approach is to shift from a concept of legal wrong to a concept of moral wrong.[17] This is especially tempting because a layman's parallel evaluation of the criminal law is often couched in terms of moral judgments. The second approach is to translate statutory elements into layman's expressions. Frequently, the two approaches converge: It is immoral to distribute material that is "just barely not pornographic." And, if we define "pornographic" in lay terms, the border between "pornographic" and "just barely not pornographic" vanishes. It is, after all, a legal border and all lay explanations, such as "sexually explicit" and "appealing to prurient interests," and the like cover both sides of the line.

Obviously German case law and legal literature reflect considerable uncertainty concerning which lay concepts do and which lay concepts do not parallel the legal definition. A lay concept which does not sufficiently parallel the legal definition leads to a standard mistake, since the layperson misunderstood a definitional element of the crime. A lay concept which does sufficiently parallel the legal definition leads to an irrelevant mistake under the doctrine of *Subsumptionsirrtum.* Example 4 illustrates that the parallel evaluation in the lay sphere is mostly a matter of defining the line between irrelevant *Subsumptionsirrtum* and standard mistake. However, in at least some cases there is considerable uncertainty as to the placement of the line between these two types of mistake.[18]

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17. The dilemma is that mere knowledge of immorality or social undesirability cannot suffice for liability, but on the other hand, technical knowledge cannot be required. This dilemma has been widely discussed. *See* K. LACKNER, *supra* note 1, § 17 n.2(a) and sources cited therein.

18. Regarding the distinction between *Subsumptionsirrtum*/standard mistake and *Subsumptionsirrtum*/mistake of law, see J. BAUMANN & U. WEBER, *supra* note 1, at 425

Again, the reciprocity principle can be used as a helpful test. If *P* distributes softcore pornography in the mistaken belief that the legal concept of pornography is not limited to hardcore pornography (as it in fact is), there would not be a sufficient basis for the crime of attempt to distribute obscene material.[19] On the flip side, the reciprocity principle suggests that the mistake should be treated as a mistake of law which would afford a defense, but not by excluding intent.

One reason for refusing to adopt the mistake of law defense is the ill conceived idea that it would honor a defendant's interpretation of law more than the judge's interpretation.[20] That is patently wrong. Just because knowledge of criminal wrongdoing is required to convict a criminal does not mean that all laymen will be acquitted or that convictions will be limited to jurists. Laymen with knowledge that parallels the legal definition will still be convicted. Some may argue that German courts do not define the layman's parallel evaluations correctly. However, the fact that courts distinguish between technical lawyerly knowledge of the law (which is not required) and a layman's parallel knowledge (which is required) is misunderstood if interpreted as a kind of "escapist decision making" that would excuse perpetrators who held conveniently exculpatory interpretations of controlling law.[21]

D. The Requirement of Specific Knowledge of Wrongdoing as Expanding the Scope of Normative Mistake

If we ask ourselves as jurists in which terms a layman will express his parallel evaluation of right or wrong, it is fairly obvious that at least in the field of traditional crimes the layman will make ethical and not legal judgments. German courts hold that knowledge of moral wrongdoing is sufficient knowledge of legal

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ff.; A. SCHÖNKE & H. SCHRÖDER (P. Cramer), *supra* note 1, at § 15 nn.45-47.

19. More difficult is the situation in which *P* judges his material to be barely pornographic whereas the law considers it barely not pornographic. It could be argued that *P* has a sufficiently correct notion of pornography in lay terms and therefore commits an attempt to violate the prohibition. The prevalent view, however, would conclude that *P* commits an impossible attempt because he imagines that the factual situation is covered by the prohibition. This kind of expansion of the legal rule is typical for impossible attempts.

20. Hall, *supra* note 1, at 682-84. A. Smith, *supra* note 9, at 28-29, acknowledges that the mistake of law defense does not change the law. Nevertheless, Smith finds the distinction problematic.

21. Hall, *supra* note 1, at 684.

wrongdoing under the doctrine of sufficient parallel evaluation. However, this approach cannot be accepted without qualification.

The most important qualification that is needed has to do with the divisibility of knowledge of wrongdoing or—expressed from another viewpoint—the requirement of specific knowledge of wrongdoing (*Teilbarkeit des Unrechtsbewusstsens/ spezifisches Unrechtsbewusstsein*).

> *Example 5*: Assume a broad legal concept of incest which includes intercourse between father-in-law and daughter-in-law. A daughter-in-law has intercourse with her father-in-law knowing that she is committing adultery and that her actions are legally and morally wrong, but not knowing that the act is included in the definition of incest.[22]

The daughter-in-law's knowledge has been held to be insufficient knowledge of the specific wrong inherent in incest.

The most spectacular case along these lines is the Adams case,[23] decided by the Swiss Bundesgericht in 1978. Adams had informed EEC officials in Brussels about practices of his employer, Hoffmann La Roche, which violated EEC rules. He was convicted for economic espionage under article 273 of the Swiss Criminal Code.[24] The court upheld this conviction and rejected—among other arguments—Adams' claim of mistake of law. The court argued that Adams knew he violated an obligation of secrecy imposed upon him by his contract. "If defendant acted with knowledge that he was violating a labor law duty, then he was definitely on notice that he was unlawfully violating at least some rights of others, and this prevents him from claiming mistake of law (*Verbotsirrtum*)."[25] The decision is defensible because the wrongdoing associated with a duty under labor law is essentially identical to the wrong of the crime of economic espionage—namely, a violation of secrecy.

At the same time, the case brings into focus the Achilles heel of the German and Swiss mistake of law doctrine: The law requires knowledge of material wrongdoing as opposed to knowl-

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22. Example 5 is a modification of leading cases: Judgment of Feb. 7, 1969, Bundesgerichtshof, W. Ger., 22 BGHSt 314; Judgment of Dec. 6, 1956, Bundesgerichtshof, W. Ger., 10 BGHSt 35.

23. Judgment of May 3, 1978, Bundesgericht, Switz., 104 BG IV 175, 104 ATF IV 175.

24. StGB, C.P., Cod. pén., art. 273 (Switz.).

25. Judgment of May 3, 1978, Bundesgericht, Switz., 104 BG IV 175, 184, 104 ATF IV 175, 184.

edge of punishability. Yet the law adheres to the doctrine of specific knowledge of wrongdoing. A perpetrator must have understood with some level of specificity what was wrong with his conduct. One can argue that the two doctrines are in conflict with each other.

If a criminal wrong and a civil wrong have a significant qualitative difference, then knowledge of civil wrongdoing cannot be specific enough to satisfy the knowledge of criminal wrongdoing. This line of reasoning, by requiring specific knowledge of the criminal wrongfulness of conduct as a basis for liability, would lead to the substitution of knowledge of punishability for knowledge of wrongdoing as the requirement for liability. Certainly this is not the majority view. Section 17 of the German Criminal Code[26] clearly demands only knowledge of wrongdoing, not knowledge of punishability. The tensions between this principle and the doctrine of divisibility of wrong are largely ignored.[27]

E. Mistake of Law and the Erroneous Assumption of a Factual Situation of Justification

The issue of erroneous assumptions concerning justificatory facts can be dealt with briefly because it has been dealt with elsewhere by Professors Fletcher[28] and Stratenwerth.[29] Strangely, this special issue does make plain the rationale behind the general discrimination against mistake of law in contrast to mistake of fact as an excuse.

Example 6: *P* mistakenly believes that *A* is making an unlawful attack on *P*'s life. Consequently, *P* kills *A* in what *P* thinks is an act of self defense.

Theoretical purists view Example 6 as a case of mistake of law, contending that the intent to kill is present. This view is referred to in the literature as the strict theory of guilt (*strenge Schuldtheorie*). However, prevailing scholarly opinion and courts hold that the mistake excludes intent in such cases. The rationale on either side is doubtful and the issue is far from settled.

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26. StGB § 17.

27. For a notable exception see F.-C. Schroeder, Strafgesetzbuch: Leipziger Kommentar § 17, n.7 (10th ed. 1980); *see also* G. Arzt, Strafrechtsklausur 95 (4th ed. 1984).

28. *See* G. Fletcher, *supra* note 1, at 689-90, 696, 751-52.

29. Stratenwerth, *The Problem of Mistake in Self-Defense*, 1986 B.Y.U. L. Rev. 733.

The mistake of law defense is disadvantageous as compared to standard mistake because under the unavoidable error juris doctrine (*vermeidbarer Verbotsirrtum*), an avoidable mistake of law does not hinder punishment for crimes of intent. Conversely, an avoidable (even unreasonable) standard mistake excludes intent and results in nonliability, except where conviction for a lesser negligence crime is possible. A crime of negligence does exist in Example 6—negligent homicide (*fahrlässige Tötung*).[30] However, for the crimes in Examples 2, 3 and 4 no crime of negligence exists. There is no crime of negligent fraud, negligent misappropriation, negligent hunting without a license, or negligent distribution of pornographic material.

The main reason for discrimination against the mistake of law defense by German scholars leads back to the distinction among the elements of the crime (*Tatbestand*), wrongfulness (*Rechtswidrigkeit*), and culpability (*Schuld*).[31] Intent relates to the *Tatbestand*—the elements of the crime. "Normally" behavior which satisfies the elements of the crime is also wrongful; situations involving justifications are the exception. Therefore, knowledge associated with committing an act which is "normally" violative of the defined elements of a crime saddles the perpetrator with the burden of carefully investigating facts which may allow him to claim justification as an exception. Because he is warned by his own knowledge of the elements of the offense, the perpetrator who relies on information which is untrue deserves punishment in spite of and indeed because of his mistake of law (*Warnfunktion des Tatbestandsvorsatzes*).[32] On the other hand, the perpetrator who does not realize that his conduct fulfills the elements of a crime, has not been warned and thus, has no reason to investigate the lawfulness (or wrongfulness) of his actions. This line of reasoning explains why purists (*strenge Schuldtheorie*) hold that Example 6 falls under the mistake of law category. *P* knows that he is about to kill and thus has reason to inquire whether exceptional circumstances really do exist.

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30. StGB § 222.

31. For a useful analysis of this distinction, see Naucke, *An Insider's Perspective on the Significance of German Criminal Theory's General System for Analyzing Criminal Acts*, 1984 B.Y.U. L. Rev. 305.

32. *See* Arzt, *Zum Verbotsirrtum beim Fahrlässigkeitsdelikt*, 91 Zeitschrift für die gesamte Strafrechtswissenschaft 857, 859 (1979). Knowledge can *warn* the perpetrator either because his behavior is normally prohibited or because it *appeals* to his conscience.

F. Mistake of Law and Crimes of Negligence

Besides discrimination inherent in all theories which differentiate between mistake of law and standard mistake,[33] German courts discriminate further against mistake of law. The test of excusable mistake of law is much more stringent than the test for ordinary negligence.[34] The desire to erect simple and efficient floodgates against mistake of law defenses may dictate this result. Many mistake of law defenses carry little credibility but mean a lot of work for courts. This creates special problems in the field of crimes of ordinary negligence. At least in theory, the distinction between negligent standard mistake and mistake of law is relevant even in crimes of negligence.

> *Example 7*: *P* mistakenly interprets a traffic sign governing the right of way. As a result, *P* causes a fatal traffic accident.

In this example, does the crime of negligent homicide[35] follow the test of ordinary negligence, or does the stricter mistake of law test prevail?[36]

III. The Law in Practice

A. Traditional Criminal Law

In traditional criminal law the mistake of law defense has little practical impact. Initially, a mistake of law as to traditional crimes is hardly conceivable and if it does occur it is almost always avoidable.[37] This provides the sound root for the *error juris criminalis nocet* principle. Furthermore, the doctrine of *Subsumptionsirrtum*[38] further limits the scope of the mistake of law defense. Consequently, the fear that the mistake of law defense might somehow endanger the objectivity of the criminal process or challenge the values of the community is highly irrational.

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33. *Vorsatztheorie* does not discriminate because it treats mistakes of law and standard mistakes equally.

34. *See* Judgment of Jan. 27, 1966, Bundesgerichtshof, W. Ger., 21 BGHSt 18; Judgment of Apr. 23, 1953, Bundesgerichtshof, W. Ger., 4 BGHSt 18.

35. StGB § 222.

36. The negligence test ought to prevail over the stricter test of invincible error juris. *See* Arzt, *supra* note 32, at 857-87. Many scholars criticize the Bundesgerichtshof test for invincible error juris as being too strict and thus reach the same result. *See, e.g.*, H. Rudolphi, Strafgesetzbuch: Systematischer Kommentar § 17 n.30(a) (4th ed. 1984).

37. *See generally* Arzt, *supra* note 1.

38. *See supra* text accompanying notes 14-21.

The mistake of law defense does burden the prosecution with evidentiary problems. However, the burden of proving knowledge of law is, in principle, identical to the burden of proving knowledge of fact. In traditional crimes, the presumption is that the defendant knows what everybody knows. If the defendant claims ignorance of the law, the burden of proof is technically not on him; however, for practical purposes his mere denial of knowledge will lead him nowhere.

B. Modern Criminal Law

A radically different situation is presented by modern crimes such as regulations protecting consumers, the environment, or other more or less "technical" crimes. The more complex our rules become, the less realistic is the assumption that factual knowledge works as an indicator of the unlawfulness or wrongfulness of the conduct involved. The separation between intent as an element of the definition of a crime and knowledge of unlawfulness or wrongfulness (*Unrechtsbewusstseins*) as an independent issue bearing on an offender's culpability may still be possible in theory. But in practice, it is meaningless in the context of modern crimes. It is difficult to argue, for example, that an individual who acts in ignorance of some more or less arcane environmental regulation should infer from his factual knowledge that he engages in criminal conduct.

Example 8: *G* walks on the right side of the road, following the rule in his home country. He walks with intent to use the right side. However, because German law requires one to walk on the left side, *G* commits an offense which violates the German Traffic Code.

G has intent but is under a mistake of law. It is difficult to see how *G* is engaging in conduct that is normally illegal. In fact, the problem has been discussed for decades.[39]

Surprisingly, the practical impact of mistake of law defenses even in these technical offenses has been rather low. One reason is that legislatures widely use crimes of negligence—especially in mala prohibita crimes.

The more complex a network of rules becomes, the more

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39. *See, e.g.*, K. TIEDEMANN, TATBESTANDSFUNKTIONEN IM NEBENSTRAFRECHT 318, 388 (1969). I agree with Tiedemann that the mala in se/mala prohibita distinction as such is irrelevant. *See id.* at 388, 401 ff. Each offense should be analyzed separately. The traditional distinction, however, is sufficiently correct to demonstrate the major differences.

reasonable the expectation becomes that anyone engaged in the regulated field or profession will be required to learn the applicable norms. Consequently, mistake of law will rarely provide a defense against crimes of negligence. Furthermore, since penalties for crimes of intent and crimes of negligence are very similar in this field, prosecutors will rarely press charges for offenses of intent.[40]

The above statement on mistake of law in regulatory offenses simplifies difficult problems which arise in the context of section 11 of the German Code of Violations (*Gesetz über Ordnungswidrigkeiten*, the section of this code that deals with mistake.[41] On its face this clause seems practically identical with section 17 of the regular criminal code.[42] Both sections define mistake of law as "lack of the insight into the wrongfulness (or, in the case of the Violations Code, into the "impermissible character") of the conduct." However, section 11 of the Violations Code goes further to add, "especially because the perpetrator does not know of the existence or the applicability of a legal provision."[43]

This raises at least two problems. First, one must examine the description of the prohibited behavior (*Tatbestand*). In regulatory offenses, the description is more often than not factually "empty." Punishable behavior is not described in factual detail; rather, it is described as a violation of legal rules—rules which are usually not in the Criminal Code itself because they are too intricate or apt to change frequently. The question whether knowledge of these norms is a constituent of the intent element of a crime or whether it is a separate matter bearing on culpability under the mistake of law defense is hotly debated. Prevalent scholarly interpretation helps defendants by extending the scope of standard mistake (which exculpates even in the event of negligent mistakes) and limiting the scope of mistake of law (with its notion that only unavoidable mistakes excuse).

The second problem centers on differences between existence of a legal norm and application of that norm in a concrete case. This problem has been discussed in the context of parallel evaluation, *Subsumptionsirrtum* and knowledge of the *specific*

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40. *Id.* at 318 ff., 398.

41. Gesetz über Ordnungswidrigkeiten [OWiG], Bundesgesetzblatt, Teil I [BGBl] 81 (W. Ger.) (1975).

42. StGB § 17.

43. OWiG, BGBl 81 (1975).

wrong as opposed to a *general* knowledge of legal or moral wrong. Whether these doctrines are applicable in regulatory offenses at all or whether they must be modified is an issue which cannot be discussed here.

IV. Conclusion

A. Unavoidable Error Juris Should Be an Excuse

The principle of section 17 of the German Criminal Code is sound; unavoidable error juris should be an excuse. Theories of criminal behavior are not abstract, but rather are connected with sanctions which are the consequences of committing crimes. No plausible theory of criminal sanctions can explain why a person who does not know and cannot know that he is breaking the law should be punished. The growing importance of social welfare offenses, mala prohibita crimes, and administrative offenses has forced us to acknowledge that the insane are not the only persons who might not recognize a violation of the law.

One wonders why this has led to strict liability in Anglo-American law and acceptance of mistake of law as a defense on the Continent. Perhaps Continental judges consider doubt about a defendant's knowledge of wrongdoing unreasonable and convict under circumstances in which American or English judges or juries would find the same doubt reasonable and acquit.[44] Perhaps the trier of fact considers acquittals, which are the consequence of reasonable doubt to be unreasonable. Perhaps German law relies less on fines as a means of enforcement of such regulations and more on administrative courts. In the case of the produce stand on a highway to which Professor Smith has referred,[45] the owner of the stand should have been given time to fight the removal order in administrative courts. These courts could litigate the issue of whether he had a right to set up his stand. Disobedience of the removal order after the order had been affirmed by the courts would then be made punishable and the issue of unavoidable mistake of law would vaporize.

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44. The relative reluctance of Anglo-American law (as compared to Continental law) to excuse in cases of duress, intoxication, and insanity might be connected with questions regarding mistake of law. Perhaps there are differences in the concept of punishment and the function of substantive law. In any event, Anglo-American and Continental systems differ less in the final result than in the ways this result is reached.

45. A. Smith, *supra* note 9, at 22 n.67.

B. The Same Rationale Behind Mistake of Fact and Mistake of Law

As initially stated, the rationale behind mistake of fact and mistake of law is basically the same.[46] It should not be true that mistake of fact negates a positive element of a crime while mistake of law merely constitutes a separate defense. Rather, both doctrines should be an integral part of the modern mens rea doctrine. Acquitting the defendant of a charge of murder or negligent homicide on the basis of unavoidable mistake of fact does not mean it was right to kill under such circumstances. Rather the defendant is acquitted because he did not and could not know that he was breaking the law. The same holds true if the defendant did not and could not know the law because of unavoidable error juris.

Furthermore, on a theoretical level, fact and law become indistinguishable because all facts are normative for the very reason that the law refers to them, and meaningful knowledge of facts is possible only if the perpetrator perceives the normative significance of facts correctly.

Example 9: Reconsider Example 3 and the normative concept of game. Assume that weasels are protected under German law and that *P* kills a weasel knowing that it is a weasel, but being mistaken about the normative significance (sport, rarity, usefulness of fur, common pest).[47]

Any interpretation of "game" must consider reasons for protecting animals as "game." Only one who knows these reasons can decide that a mouse is not protected but a weasel is or that rabbits are game in Germany but may be pests in Australia. In Example 9, *P*'s factual knowledge is meaningless; it is "empty." In other words, the layman's parallel evaluation applies not only to knowledge of what is wrong, but also to "knowledge" of facts. Perhaps this is not enough to lead us to adopt the theory of intent, and to conclude that mistake of law and factual error

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46. That is why the intent theory (*Vorsatztheorie*) treats the two types of mistake the same. If, in example 1, *P* is the stepfather of the drowning child *V*, and he is divorced, he has (we assume) a duty to intervene. If *P* does not draw this conclusion, he lacks awareness of the social significance of the facts that he knows. The Bundesverfassungsgericht has rejected the claim that the legislature must treat the two types of mistake the same, and has also rejected the claim that StGB § 17 is unconstitutional. Judgment of Dec. 17, 1975, Bundesverfassungsgericht, W. Ger., 41 BVerfG 121.

47. The example is borrowed from Jürgen Baumann. For a detailed discussion, see E. SCHLÜCHTER, IRRTUM ÜBER NORMATIVE TATBESTANDSMERKMALE IM STRAFRECHT (1983).

should be treated equally. However, since mistake of law and mistake of fact are closely related, it should prevent adherence to the *error juris criminalis nocet* maxim.

Example 9 also shows the influence of legislative technique on the issue of mistake. If legislators use the general term "game," obviously the object of mens rea is normative and one can, therefore, know that he kills a rabbit and not know that he hunts game. If the criminal law names all animals which are protected as "game," it seems that *P*'s factual knowledge that he kills a rabbit combined with his assumption that rabbits are not protected as "game" *must* be a mistake of law. Even in a system of detailed legislation, mistake of law is a matter of mens rea if the perpetrator's factual knowledge lacks the normative associations relied on by the legislators.[48]

C. *Different Consequences of Mistake of Fact and Mistake of Law*

German law discriminates against mistake of law. In crimes of intent, standard mistake excuses in all instances, but mistake of law excuses only in some instances. A system which accepts such discrimination must cope with two problems. First, it must define the borderline between standard mistake and mistake of law. One need not consider all its complexities to conclude that the layman's parallel evaluation is a proper test. This test avoids many purported disadvantages of the mistake of law defense.

Second, after a system defines the borderline between mistake of law and standard mistake, it must define the degree and method of discrimination against mistake of law. The validity of the German solution—to convict in cases of unavoidable error juris for a crime of intent and not for a crime of negligence—is debatable. German courts use a standard for avoidable (i.e., negligent) mistake of law that is much stricter than the standard for

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48. *Cf.* Examples 3 and 9 above. Consider also the following example: The German theft definition, StGB § 242, uses only the phrase *wegnehmen* (take away) and does not specify the objects of the crime. Detailed definitions such as "steal, take, carry, lead or drive away" (found in several American penal codes) are mere illustrations of the concept of theft and do not exclude specific methods such as flying away. If the perpetrator thinks that the legislature has limited larceny to cases in which there is a "taking away of" rather than a "flying away with" another's property, it follows that there is no mistake of law in either jurisdiction. The perpetrator has knowledge of the specific wrong. This knowledge includes an understanding of why the behavior constitutes larceny. That the perpetrator has no knowledge of punishability because of his technical legal interpretation is an irrelevant mistake under the doctrine of *Subsumptionsirrtum.*

ordinary negligence. This difference in standards is unacceptable.

D. Much Theory—Little Practical Effect

On a practical level, recognizing that mistake of law may excuse has not led to a breakdown of law and order in Germany. However, one worrisome aspect still exists. Germany's landmark mistake of law decision,[49] as well as a surprising percentage of later applications of this new defense,[50] concern members of the legal profession. The defense is so complicated that a disproportionate number of those who benefit are either lawyers or defendants who are well counseled by lawyers.

One explanation may lie in a comparison of arguments on the practical and procedural level. Some believe that German procedural law leads to a higher risk of conviction because it permits appellate review of acquittals and that German substantive law balances this risk because it is more lenient than American substantive law.[51] This comparison is important because it moves toward a comparative flow diagram which would include substantive *and* procedural aspects of different laws.[52] A comprehensive comparison should also include distortions or mitigations of the substantive law caused by the plea bargaining process. Indeed, some American scholars feel that since the prosecutor would not prosecute in the case of unavoidable error juris, the mistake of law defense is superfluous.[53] This argument cuts two ways. If discretionary prosecution is largely a sign of a heavy workload, insisting that mistake of law cases be added to this workload is baffling. Perhaps the workload decrease caused by filtering out cases of unavoidable error juris is matched by the new work that would be required to separate rare cases in

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49. Judgment of Mar. 18, 1952, Bundesgerichtshof, Gr. Sen. St., W. Ger., 2 BGHSt 194.

50. German law does not distinguish between defenses and the assertion that the prosecution has not proved its case. *Cf.* A. Smith, *supra* note 9, at 33. The defense of mistake of law is not substantially different from the defense that there is no mens rea.

51. G. FLETCHER, *supra* note 1, at 754; J. Kaplan, *supra* note 9, at 17.

52. Arzt, Book Review, 29 AM. J. COMP. L. 146, 156 (1981). Appellate review of acquittals should not be interpreted as a counterweight to more lenient substantive standards. In German procedure there are no traces of the *absolutio ab instantia*. "Hung jury" situations lead to outright acquittals (or convictions by a ⅔ majority). STRAFPROZESSORDNUNG § 263 (W. Ger.). Also, if substantive standards are more lenient, the risks inherent in appellate review of acquittals are balanced by the higher chance of reversal of a conviction on appeal.

53. J. Kaplan, *supra* note 9, at 12.

which the mistake of law defense is correctly invoked from the many cases in which the mistake of law defense is nothing but sand thrown into the machinery of the judicial process. But if a formal judicial process does not filter mistake of law cases, how can an informal discretionary proceeding filter these cases?