# The Proposed Duty to Inquire as Affected by Recent Criminal Law Decisions in the United States Supreme Court

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## I. INTRODUCTION

In the past several years, Andrew Ashworth[1] and Andrew von Hirsch and Douglas Husak[2] have urged, as a more refined notion of desert liability in cases otherwise characterized as involving mistake (or ignorance) of law, a "duty of citizen inquiry."

von Hirsch and Husak's proposal is actually part of a larger endorsement of *ignorantia lexis* as an excuse. They would not hold liable persons who (1) did not intend to injure a person,[3] and (2) were reasonably unaware of, or mistaken as to, the extent of the law making their conduct illegal. Although their primary focus is on the first prong

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1. Andrew Ashworth, Principles of Criminal Law (2d ed. 1995).

2. Douglas Husak & Andrew von Hirsch, Culpability and Mistake of Law in Action and Value in the Criminal Law 157 (Shute et al. eds. 1993). Professor Husak has also written separately on the topic. See Douglas Husak, Ignorance of Law and Duties of Citizenship, 14 Legal Stud. 105 (1994).

3. The injury can be either physical or psychological. This definition of "injury" is problematic. In their lobster fisherman hypo (see infra note 6 and text), they conclude that "catching a few lobsters is not obviously injurious to anyone (other than the beasts themselves)." Husak & von Hirsch, supra note 2, at 169. But there are obvious injuries done to commercial lobster fishermen, as they then immediately recognize. In many mistake of law cases, including many of those discussed in this article, the "victim" is the state, rather than any identifiable individual or group of individuals. But why that should make a difference is not clear. This is not the place to discuss the first prong of the proposal, except to note that it might be interpreted to preclude exculpation of a person who acts in self defense reasonably believing that he is acting under legally permissible circumstances. I suspect that neither author intends such a result.

of this test, they conclude, discussing reasonableness, that[4]

> reasonableness should not entail a generalized demand that the defendant make full inquiry into the legality of his every action. The circumstances must provide some "clue"—some reason for believing—that his conduct may be proscribed.

They then provide several hypotheticals testing the "reasonableness" paradigm, in many of which the defendant's claim of mistake or ignorance is denied. Failure to pay income taxes, they suggest, is an instance where mistake of law should not be a defensive claim because filing and paying taxes is a duty about which citizens are "routinely informed."[5] A second hypothetical posits a Maine summer vacationer who catches lobsters without a license, not knowing one is required. Here, they argue, the conduct is of such a "specialized" kind that it should "plainly appear to any visitor that lobster fishing is a special skill conducted by many residents for a livelihood, involving a resource not likely to be inexhaustible."[6] Thus, while establishing some small modicum of relief, they are miserly in their exculpation: "This conclusion does not disturb us: a defense of ignorance of law *should* be narrow."[7]

If von Hirsch and Husak focus on the circumstances to alert one to the possibility of legal regulation, Andrew Ashworth expressly adopts a more generalized duty to know the law, even if it can only be applied in a specific context: "To argue that a person might be convicted despite ignorance of the law . . . might . . . support a duty

4. Id. at 169.

5. Id. Husak, supra note 2 at 108, indirectly explains this position on the ground that "substantial efforts are made to inform citizens . . . of their specific obligation to file and income tax return." Perhaps. But surely no substantial efforts are made to inform vacationers about lobster fishing restrictions, yet Husak and von Hirsch would seem to find sufficient "clues" in the environment to warrant imposition of a duty in that case.

6. Id. at 169-170.

7. Id.

on each citizen to take reasonable steps to acquaint himself with the criminal law."[8] Ashworth appears to reject the "circumstance-alerting" test, because he contends that "[t]here are few problems in making the duty known, since 'ignorance of the law is no excuse' is a widely known principle even now."[9] Apparently illustrative of this, he points to a defendant who "was engaging in a business or an activity (such as driving a car) that is known to have changing rules."[10] On this point Husak, in his separately-written article, has disagreed with Ashworth's assumption: "The problem arises from the fact that few persons are likely to be aware of the existence of the alleged duty to know the law."[11] Like Husak, I am not sure how Ashworth knows that "we all know" that driving a car has "changing rules" (or how we all know WHICH types of rules "change"), but I need not resolve that issue because I believe it is irrelevant. I shall argue that there are at least two difficulties with Ashworth's (and to the degree that it overlaps with it, Husak and von Hirsch's) proposal: (1) even if it is true that persons "generally" know that their ignorance of the law is no excuse, they are still not culpable unless they were on "some" notice that their specific conduct might be surrounded by criminal law restrictions;[12]

8. Ashworth, supra note 1, at 234

9. Id. In his separately written article, Husak attacks this generalized proposal as both unworkable and undefinable. Husak, supra note 2. Although I agree with this view, it seems over-nice to me. Ashworth may articulate his position in terms of a universal duty to know, but applied in any context, it can only mean that the defendant, having engaged in activity X, had an obligation to know the laws relating *to that activity*. It may be the ambiguity of an "activity" to which Husak is objecting, but that weakness appears in the suggestion that he and von Hirsch put forth, although not as virulently. In the lobster fishing hypothetical, for example, the defendant's "activity" could be defined as fishing, lobster fishing, commercial fishing, or a number of other ways.

10. Ashworth, supra note 1, at 235.

11. Husak, supra note 2, at 110.

12. In at least one instance, a court has rejected any such "presumption" even in the face of what I would concede would be "universal" knowledge. If "everyone" knows that driving is regulated, and that driving regulations change, surely "everyone" knows that persons over 18 had to register for the United States draft. Yet, in United States v. Bouche, the court found that a statutory presumption of notice of the law, even after a presidential proclamation, was invalid. 509 F.2d

(2) there is unacceptable ambiguity in what might it mean to ask a lay person to take "reasonable steps" to "know" the law. Unless, as the Model Penal Code purports to do,[13] we establish bright line tests of conduct—did defendant contact an expressly listed independent source for his views on the law—the muddles that will arise in implementing the standard of negligence are manifold.

These proposals are attempts to ameliorate the severity of the present strict liability doctrine of *ignorantia lex*.[14] Virtually no commentator has endorsed strict liability, either generally, or with specific regard to the *ignorantia lex* doctrine,[15] and this short piece assumes strict criminal liability is totally incompatible both with retributivism (a camp in which I place myself) and instrumentalism—although the latter point is far less clear. I do not debate that point in this paper: the undesirability of the doctrine as it now stands in many jurisdictions, and is "understood" to stand in virtually all

991 (8th Cir. 1975). If universal awareness of the universal draft cannot be presumed, I am not sure that any activity can create such a presumption, no matter how procedurally fragile.

13. See infra pp. 138-41. As I argue there, the Model Penal Code tries to establish bright lines; but (at least for a lawyer) there are so many ambiguities in the language even of the Model Penal Code that the provisions are, at best, only guides rather than firm rules.

14. Husak, supra note 2, interprets Ashworth's views as endorsing the current rule without any amelioration at all. While I certainly agree that Ashworth is even less sympathetic with defendants than von Hirsch and Husak, I do not read him quite that narrowly. The point is not important here, however, since my contention is that the basis of liability in both proposals–some form of negligence–would be far too restrictive.

15. See generally Pynda L. Arzt, Ignorance or Mistake of Law, 24 Am. J. Comp. L. 646 (1976); Rollin M. Perkins, Ignorance and Mistake in Criminal Law, 88 U. Pa. L. Rev. 35 (1939); Paul A. Ryu & Helen Silving, Error Juris: A Comparative Study, 24 U. Chi. L. Rev. 421 (1957). However, Jerome Hall, one of the most influential writers in the middle of this century, did embrace the notion. See Jerome Hall, General Principles of Criminal Law (1961). For a careful study of the scholars' positions on this issue, see John T. Parry, Culpability, Mistake, and Official Interpretations of Law, 25 Am. J. Crim. L. 1 (1997). Kenneth Simons has suggested that strict criminal liability might be acceptable, even in a retributivist world, on the theory of moral luck, combined with a perception that it is really rule-negligence, and not strict liability, we are applying. Kenneth Simons, When is Strict Criminal Liability Just?, 87 J. Crim. L. and Crim. 1075 (1997).

commentary, is simply asserted as a basic principle.[16] Whether the doctrine should be replaced by a requirement of knowledge of illegality (which this paper advocates) or one of recklessness (into which many of the cases could easily fall, and which I certainly do not dismiss readily), I take the view that negligence (which seems to be the basis advocated by both of the proposals) is too low a standard for culpability.

The "duty to inquire" proposal[17] goes beyond statutes which actually impose such duties—filing tax returns, obtaining a license before driving or fishing, not leaving the scene of an accident, etc.—to create a "common law" of duty. The gist seems to be that when a reasonable person would be put on notice to inquire further into whether his conduct is governed by the criminal law, (or whether the facts are as he supposes them to be) he must pursue the inquiry upon penalty of some sort. The pursuit presumably would have to be conducted in a "reasonable" way under the circumstances.

The motivation behind the proposal—the dilution of the absolutist position of the nineteenth century courts and commentators on mistakes of law—is laudable. Nevertheless, I find the proposal troublesome, particularly since it comes from acknowledged scholars who have increasingly illuminated the heart of criminal theory. The proposal can be placed in the larger context of the ongoing debate between objectivity and subjectivity as the basis of

16. Professor Dan Kahan, in a recent article, has put forward the provocative notion that the doctrine makes sense because it seeks to make people act in conformance not merely with legal norms, but with moral ones: "if maximizing legal knowledge were really the objective . . . the law would apply a negligence standard . . . . [r]efusing to excuse even reasonable mistakes discourages investments in legal knowledge . . . . " Dan M. Kahan, Ignorance of Law is an Excuse, But Only for the Virtuous, 96 Mich. L. Rev. 127, 152-53 (1997). But this view is wrong, he argues, because "morality furnishes a better guide for action than does law itself . . . the doctrine seeks to obscure the law so that citizens are more likely to behave like good ones." Id. This essay is not the place to join that debate, which is a challenging premise.

17. I will refer hereafter to "the proposal," although there are differences in at least some aspects between the two notions. Where these differences are important, they will be noted.

criminal liability. As Ashworth acknowledges,[18] his version embraces liability based upon negligence,[19] thus tacitly assuming that negligence can be blameworthy, and even von Hirsch and Husak permit "criminal negligence" as the mens rea.

The proposal comes at an ironic moment in American criminal law. Within the past few years, the United States Supreme Court, in four separate decisions dealing with both mistake of law and mistake of fact, has adopted at least a modicum, and perhaps much more, of subjective liability, appearing to eschew negligence and require actual knowledge of a fact or of illegality as a proper basis for criminal liability. In this short piece, I will examine the duty concept in the context of those four cases, using the fact patterns and language of the opinions of those and other cases to suggest some problems with the duty-to-inquire approach.

The notion that the criminal law creates upon all of us some responsibilities is not altogether unalluring, as Ashworth makes pellucid by dubbing it a "duty of citizenship."[20] After all, if the criminal law creates rights against the government, why should it not openly and directly also impose some responsibilities? Yet the common law has eschewed the idea that there is a "duty to rescue" because of inherent operational difficulties, such as determining when the duty is generated, the scope of the duty,[21] and the punishments to be inflicted for failing to carry out the duty. After briefly touching upon the proposal and its response to these questions, I will explore how the proposed duty might work (or not) within the context of some actual decisions.

The paper concludes that defendants who do not know

18. Ashworth, supra note 1, at 209, 249.

19. In the immediate text, it is not clear whether Ashworth would require "criminal negligence" or whether tort negligence would suffice. In the context of his entire work, it would appear that tort negligence would be sufficient.

20. Ashworth, supra note 1, at 234-35. See also Husak, supra note 2.

21. See, e.g., George P. Fletcher, Criminal Omissions: Some Perspectives, 24 Am. J. Comp. L. 703 (1976).

that their actions violate the law should not be punished — either at all, or certainly not so much as those who do know that they are violating the law. I conclude, as well, that recent Supreme Court cases point in that direction, although this interpretation is highly debatable. I will not in this paper discuss the full ramifications of a requirement of knowledge. But one side point seems pertinent: An oft-expressed "explanation" for the doctrine is that "every person is presumed to know the law."[22] That articulation is often attacked on its empirical basis, but perhaps more important, it implicitly embraces the view that only those who know the law, and that they are breaking it, are culpable. This admission alone might call for reevaluation of the rule. I make no further argument on that issue at that juncture, but simply raise it for consideration in light of the rest of this paper.

### *A. A Brief Overview of the Proposal*

#### 1) Generating the Duty.

The first question in discussing any duty is when the duty is generated: at what point must a citizen do "something?" At least three possible answers suggest themselves: (1) whenever the citizen is engaged in any *activity* which turns out to be potentially criminally regulated; (2) whenever the citizen is engaged in any *business*, since most businesses are regulated; (3) whenever the citizen is engaged in *a specific business which is regulated because of the type of business*. Thus, if I were

22. Such a presumption is constitutionally suspect today: due process tolerates neither a conclusive presumption nor a burden-shifting presumption. See Allen v. Ulster County, 442 U.S. 140 (1979); nor even a presumption that *appears* to shift the burden. Sandstrom v. Montana, 442 U.S. 510 (1979). The most a constitutionally valid inference may do is activate a burden of going forward upon the defendant. See Allen v. Ulster County, 442 U.S. 140 (1979). Thus, to the extent that the doctrine incorporates such a presumption, as opposed to an inference, it is almost surely subject to constitutional attack. I hope to explore this avenue at a later time.

disposing of used motor oil, the duty would be generated respectively if: (1) I were merely a citizen, not engaged in any business much less one in which I regularly dispose of motor oil; (2) only if I were engaged in a business that actually disposed of motor oil, although that was not the focus of the business; (3) only if I were actively engaged in the business of disposing of waste materials. Obviously, the first is the broadest and the last the narrowest situation in which a duty arises.

von Hirsch and Husak establish a duty when the circumstances "must provide *some* clue—some reason for believing—that his conduct *may* be proscribed."[23] As indicated above, the example given is a vacationer who, in Maine, decides to begin fishing for lobsters.[24] He is not in a business, much less in the business of catching lobsters.[25] They go on to explain that "lobster fishing is (1) a special skill; (2) conducted by many residents for a livelihood; (3) involving a resource not likely to be inexhaustible."[26] But it is not clear from their discussion whether all three of these criteria are necessary or whether any one (or two) factors will suffice. And the factors are ambiguous. If exhaustibility of resource is a key, what activity (besides breathing, perhaps) would not be covered? Does trout fishing or golf involve a special skill? Is the hobbyist rodeo rider covered? Many lawn mowing businesses are now established—does this mean that the suburban mower of his own lawn is a covered actor? These seem improbable, but the test is ambiguous.

However broad the von Hirsch-Husak view might be, Ashworth seems to envision an even broader duty. He argues that the duty should be activated in every situation where the defendant is "engaging in a business *or an*

23. Husak & von Hirsch, supra note 2, at 169.

24. See id. at 169-70.

25. There is nothing in the text of the article which suggests that the vacationer is "going into business," although it is possible that the authors intended such a limitation.

26. Husak & von Hirsch, supra note 2, at 170 (Parentheticals added).

*activity that is known to have changing rules*."[27] This proposal is not limited to special skills, or exhaustible resources. He gives us one example: a defendant whose car, unknown to him, begins to violate exhaust restrictions.

Both suggestions seem excessive. If driving or vacation fishing is covered, what is not covered? In a welfare state (even a welfare state which has been "deregulated") virtually thousands of everyday activities—fertilizing one's lawn, draining (and disposing of) the oil in one's car, (or even of one's old soda cans), buying (or installing) a car seat for a child—are or may be regulated in some way. Indeed, one might suggest that no one living in such a society would be absolutely sure that the law did not in some way regulate or touch the conduct involved. Moreover, Ashworth seems to suggest not only that one is under a duty to inquire initially, but periodically to update those inquiries to assure that the rules have not changed in the interim. The prospect of paralysis, both of the citizens who must make these continuing inquiries with regard to hundreds of facets of their lives, and of the governmental agencies who must respond to each of these inquiries, is staggering.

It may be more plausible to impose at least a duty not to become "willfully blind" to the possibility of regulation and changes in such regulations. But, rather than sounding in negligence, such an approach would sound in–or come close to sounding in—"knowledge"—which Section II will contend is precisely the position taken by the United States Supreme Court, and which I suggest is the sounder

27. Ashworth, supra note 1, at 235 (emphasis added). Husak and von Hirsch would also seem to hold a driver who is unaware that a newly passed statute requires biannual, rather than annual, automobile inspections. See Husak & von Hirsch, supra note 2, at 168. They do so on the basis that driving is a regulated activity, and the defendant should be aware that regulations change. See id. The problem with both proposals here, it seems to me, is that there are literally hundreds of ways in which the regulations could be altered—ranging from the regularity of inspections, to the level of emissions, to a number of other items. To require an individual defendant to keep constantly aware of new regulations seems incredibly burdensome, particularly since he is not "in the business" of driving, and cannot, unlike the owner of a fleet of cabs, engage a staff to keep him so informed.

view.

2) Fulfilling the Duty

The second question—what must the citizen do once he is aware of a duty to act—has also perplexed the courts. In the context of a duty to rescue, for example: must a potential rescuer (1) actually rescue; (2) merely attempt to rescue, or (3) merely call other, professional, rescuers? At what point does the duty cease? Does it continue so long as the circumstances exist? The answer to many of these subsidiary questions may be subsumed, in tort, in the response that the standard is "reasonableness" under all the circumstances. Criminal statutes of civilian countries require only that the actor take reasonable steps, rather than actually attempt to effectuate the rescue.[28] Thus, a call to 911 might suffice. But in the criminal law, where the sanction is heavier, one might expect and require more clearly delineated guidelines. As I will suggest, defining the "reasonable inquiry" will prove a daunting, if not impossible, task.

3) Punishing the Failure to Fulfill the Duty

Finally (and to my mind a barrier which proved impermeable to the common law courts), of what crime is the defendant liable? Again, in the context of a rescuer, if there is a duty to rescue, is the defendant guilty of murder for failing to (attempt to) rescue? Even tort doctrine, where the jury may reduce compensatory damages subrosa to

28. See, e.g., F.J.M. Feldbrugge, Good and Bad Samaritans, 14 Am. J. Comp. L. 630 (1966); Jean Larquier, French Penal Law and Duty to Aid, 38 Tul. L. Rev. 81 (1963). Eight states have enacted "duty to rescue" laws, seven imposing a criminal penalty of some sort if the duty is not followed. But most of these establish fines as the penalty, and the maximum term of imprisonment appears to be one year. See Jessica R. Givelber, Note: Imposing Duties on Witnesses to Child Sexual Abuse: A Futile Response to Bystander Indifference, 67 Fordham L. Rev. 3169, 3189 (1999); See also Bryan A. Liang and Wendy L. Macfarlane, Murder by Omission: Child Abuse and the Passive Parent, 36 Harv. J. on Legis. 397 (1999).

reflect a lessened blame, declines to approach this question. To the extent that the label of conviction of offense, and not the sentence, inflicts moral stigma upon the defendant, the option of "reducing damages" by rendering the defendant guilty of some lesser included offense is not available to the criminal law. No legislature has gone so far—in this country the few states which make failure to rescue or take other appropriate action follow the civilian countries and impose relatively minimal penalties for violation of the duty, even when the failure results in (does not prevent) death. In short, the violation of a duty is merely a violation of a duty, and does not hold one responsible for the effects of that violation.

I will explore each of these questions in more detail. First, however, I will sketch recent decisions of the United States Supreme Court, which may bear upon these questions.

## II. IGNORANCE AND MISTAKE OF LAW AND THE DUTY TO INQUIRE

### *A. Ignorance of the law: Ratzlaf v. United States*[29]

Let me begin with the (extraordinary) facts of the most recent Supreme Court case on ignorance of the law: *Ratzlaf v. United States.*[30] Defendant, having lost large amounts of money gambling in Nevada, attempted to repay that money by proffering to the casino some $100,000 in cash. He was told by the casino employees that if he repaid that amount of debt in one action, the casino, pursuant to federal "money laundering" statutes, would have to inform the federal government. He was also told that if he paid the debt in a number of repayments each less than $10,000 the casino would be under no obligation to report. Ratzlaf, for reasons we do not know, chose the latter route. The casino,

29. 510 U.S. 135 (1994).
30. Id.

anxious to obtain repayment, provided a chauffeured limousine which took him from bank to bank throughout the city, while he obtained a number of cashier's checks each less than $10,000. Unknown to Ratzlaf, federal law also prohibited anyone from structuring a transaction so as to avoid a duty to report. Quite clearly, Ratzlaf had structured these transactions to avoid such requirements, and he was subsequently prosecuted for "willfully" structuring a transaction so as avoid the reporting requirements. At trial, Ratzlaf argued ignorance of law, but the trial court excluded all such contention. The Supreme Court reversed his conviction.

The Court's opinion is important for its implication for all "mistake" and "ignorance" cases. The Court could merely have cited its earlier decision in *Cheek v. United States (*discussed below) which had held that a mistake of law was a valid claim against a statute which penalized "willful" acts. In *Cheek*, the Court made clear that "willfulness" required the *knowing* violation of a *known* legal duty. While such a holding in *Ratzlaf* would have extended *Cheek* beyond tax law (and possibly beyond "complex" law),[31] it would have been a relatively small step.

31. See Cheek v. United States, 498 U.S. 192 (1991). When Cheek was first decided it could have been restricted to tax cases. But *Ratzlaf* expanded it AT LEAST to "complex cases." In Bryan v. United States, 524 U.S. 184 (1998), the Court, in dictum, referred to *Cheek* and *Ratzlaf* as involving "highly technical statutes," id. at 187, possibly suggesting that the Court is now ready to limit these two cases. The defendant in Bryan used "straw purchasers" to buy guns in Ohio which he then sold, with the serial numbers filed off, from a car in Brooklyn, New York. The trial judge instructed the jury that they would have to find that the defendant knew he was violating a law before they could find him guilty of "willfully" violating federal firearms registration statutes. Both the jury instructions and the majority opinion were unclear whether the defendant had to know that he was violating (a lesser) federal criminal law, or whether a known violation of state criminal law would suffice. Justice Scalia, in a scathing dissent, scoffed at the idea that one who knows that he is violating a state parking ordinance thereby opens himself to federal criminal liability under a statute requiring willfulness. *Bryan* does not undermine the basic premise of this article nor of the general notions which Doug Husak and I have suggested that the Court has become increasingly willing to protect "innocents" from the imposition of strict criminal liability. See Richard Singer & Douglas Husak, Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer, 2 Buff. Crim. L. Rev. 859 (1999); cf. Sharon L. Davies, The Jurisprudence of Willfulness: An

Instead, in an opinion by Justice Ginsburg, the Court took a much broader tack. The Court first began by typical statutory analysis, pointing out that to construe willfulness differently in different sections of the same subchapter could be confusing to lower courts (and juries).[32] But Justice Ginsburg soon moved to the heart of culpability and the government's contention that Ratzlaf (and others who structured transactions) exhibited a purpose to do wrong. Noting that the statutes were initially aimed at money laundering connected with drug dealings, Justice Ginsburg declared that "currency structuring is not inevitably nefarious."[33] She then noted that many "non nefarious" persons might not wish to tell the government (or others) about transactions involving huge sums of money.[34] She

Evolving Theory of Excusable Ignorance, 48 Duke L.J. 341 (1998); John Shepard Wiley, Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation, 85 Va. L. Rev. 1021 (1999). Instead, *Bryan* is properly understood as embracing the "greater crime" thesis—that one who knowingly commits a crime takes the risk that the harm he inflicts will be greater than he knows or intends. That doctrine, while highly suspect, does not undercut the points here. See Richard Singer, The Model Penal Code and Three Ways Courts Avoid Mens Rea, 4 Buffalo Crim. L. Rev. (forthcoming 2000). See also Rachael Simonoff, Ratzlaf v. United States: The Meaning of "Willful" and the Demands of Due Process, 18 Colum. J.L. & Soc. Probs. 397 (1995).

32. See Note, Mens Rea in Federal Criminal Law, 111 Harv. L. Rev. 2401, 2406 (1998) (criticizing the court's "textualist" analysis).

33. Ratzlaf, 510 U.S. at 144.

34. The Court's own examples—such as a divorced husband seeking to hide assets from his former wife to avoid increased alimony payments or a business person "seeking to reduce the risk of an IRS audit,"—hardly seem the epitome of probity. Ratzlaf, 510 U.S. at 145. But even if the examples are dubious, the point is not. This was not the first time the Court had been concerned with the possible over-inclusion of "innocents." In Liparota v. United States, 471 U.S. 419 (1985), the Court had overturned the conviction of a restaurant owner who, contrary to regulations of the Department of Agriculture, had paid a discounted fee for food stamps. Against the government's vehement contention that the "ignorance or mistake of law is no excuse" doctrine meant that the statute under which the defendant was prosecuted did not require knowledge of the regulations, the Court concluded that to dispense with such a requirement would, in this kind of case, potentially capture thousands of unsuspecting "innocent" citizens:

> [a construction eliminating a mens rea requirement] would be to criminalize a broad range of apparently innocent conduct . . . . Of course Congress could have intended that this broad range of conduct be made illegal, perhaps with the understanding that prosecutors would exercise their discretion to avoid such harsh results. However . . . we are

also noted that tax avoidance (as opposed to evasion) as perfectly legal, and pointed in particular to *United States v. Isham*,[35] in which the Court had referred to a federal statute which required a two cent duty on bank-checks in denominations in excess of $20.00. Persons avoiding the tax by writing multiple checks to the same person under $20.00, the Court had said at that time, were acting at least legally (and perhaps non-immorally).[36] Thus, in the *Ratzlaf's* Court's view, legally and morally innocent people might be caught in the law's web unless ignorance of the law was a relevant claim.

For present purposes, however, the point of *Ratzlaf* is how the defendant would have fared under the proposed "duty of inquiry" approach. Ratzlaf had *not* inquired about his own duties under federal law; instead, he had been informed (only by the casino) only of the casino's duty. Could he (reasonably) infer that only the casino had such duties? Or would the information that the casino had a duty spur the need for further inquiry from him? Of course, the Court never addressed this question, because it developed the subjective approach to liability. However, I find nothing in the Husak-von Hirsch-Ashworth proposal which assists me in answering this question.

In the first place, since Ratzlaf was certainly not "in the business of" repaying casino debts,[37] and paying money requires no special skill, perhaps there would be no von Hirsch-Husak duty. However, perhaps he would (a la Ashworth) be in an "activity" which he actually knew was regulated. On the (possibly erroneous) assumption that at least one, if not both, of these versions of the proposal would require Ratzlaf to inquire, let us try to imagine what

reluctant to adopt such a sweeping interpretation.

Id. at 426-27. Note that the statute did not require willfulness. See generally Singer & Husak, supra note 31.

35. 17 Wall 496, 21 L. Ed. 728 (1873).

36. Id.

37. Actually, although the Supreme Court did not go into detail, the briefs in the case suggest that Ratzlaff, a restaurateur from Portland, was a very heavy gambler, both frequently winning and losing amounts in six figures. He might therefore be "in the business of paying debts"—if this is a "business" at all.

such an inquiry would look like:

Casino: If you pay us more than $10,000, we will have to report it to the U.S. government.

R: Why is that?

Casino: Because the government is worried about people laundering drug funds, and it requires deposit agencies to report.

R: Well I'm not laundering drug funds, so the law doesn't seem to apply to this transaction. Are you sure that it applies to this *at all*?

Casino: Even though the purpose of the law seems clear, the statute itself doesn't limit transactions to laundering of drug funds.

R: *If YOU have a duty to report such a transaction, do I also have such a duty*?[38]

Casino: We can't say. We only know what our reporting duties are.

R: Well, how can *you* avoid *your* duty to report?

C: If you pay us in amounts less than $10,000 each, we do not have to report.[39]

R: Surely you're joking. You mean you can get around the law that easily?

Should Ratzlaf now be under a duty to inquire about *his* duty, when the casino has told him about its duty, and how easily its duty can be avoided? Does his amazement at the way in which the law can be "avoided" require him to ask the casino either about their, or his, liability for

38. This, of course, is the key moment in the discussion. Why in the world would Ratzlaf, having been told that the casino has a duty to report, think that he *also* would have a duty to report or not to structure? First, the government would get the information it wants from the casino. Second, (even though case law had already decided this point adversely to him) surely Ratzlaf might have had some "sense" that there was some "rule" that the government couldn't make him incriminate himself—which is exactly what he may reasonably think the government is doing when it requires him to report.

39. This is the point where the advice given to Ratzlaf would be *mistaken*. The federal law required the casino to report any transactions that are intentionally structured to avoid the reporting requirement. Of course, in the usual case, the casino would not *know* (though if it received eleven checks for $9,999 each it might suspect and be reckless, or even be found to be willfully blind, about) that the customer is seeking to avoid the reporting requirements.

attempting to avoid such a requirement?[40] Should the casino be familiar with Ratzlaf's duties as well as its own? Or, should it tell him to go to a lawyer (or other source of legal advice)?

Surely the point is obvious—if we *really* want Ratzlaf to pursue his duty of inquiry, are we not (at least in danger of) turning him (or the casino) into a lawyer? Even under the Model Penal Code, there would be no reasonable reliance, because the casino officials were not state officials.[41]

The problem raised in *Ratzlaf* is much more aggravated now than when *ignorantia lex* was first (erroneously)[42] established. In earlier times, when most laws reflected the basic morals of the community, most citizens were in fact aware of the general gist of the law. The earlier cases—*Esop,*[43] *Baronnet,*[44] etc.—often involved aliens not familiar with those mores. In today's world, these cases are still possible,[45] but the much more difficult issues arise because of the complexity of regulations which surround virtually every action one can take, but which do not necessarily reflect a moral assessment. *Ratzlaf* is a perfect example. Transactions involving large amounts of money are not inherently "wrong." Prior to the federal

40. Of course, this is not quite clear. If the casino *knew* that Ratzlaf had structured the payments to avoid its reporting duty, it is almost surely liable as an accessory to his violation.

41. Under Section 2.04(3) of the Code, a defendant who reasonably relies on "official advice" of specific persons charged with the enforcement, administration, interpretation, etc., of a statute may claim mistake of law, which is a true affirmative defense which the defendant must prove by a preponderance. Model Penal Code § 2.04(3) (Proposed Official Draft 1962). The Model Penal Code's proposal is a modest inroad on *ignorantia legis*, but it would preclude entirely Ratzlaf's reliance—however reasonable—on the casino's guidance. See infra section III and accompanying text.

42. See 4 William Blackstone, Commentaries *27, the source of the mistake of law doctrine. However, his citations are now acknowledged to have been based on a mistake as to Roman Law. See Paul Matthews, Ignorance of the Law is No Excuse?, 3 Legal Stud. 174 (1983); A.T.H. Smith, Error and Mistake of Law in Anglo-American Criminal Law, 14 Anglo-Am. L. Rev. 3 (1985).

43. The King v. Esop., 173 Eng. Rep. 203 (K.B. 1836).

44. In re Baronnet, 188 Eng. Rep. 337 (1852).

45. See, e.g., United States v. Moncini, 882 F.2d 401 (9th Cir. 1989).

money laundering statutes, they were commonplace, and certainly were not "regulated" in any sense. While most would agree that it is "wrong" to "launder" money through large bank transactions, particularly for the purpose of hiding criminal activity, and while it is obviously helpful to the federal government's criminal prosecutions to learn of these transactions, nothing has changed about the innate "innocence" of such transactions in general. Justice Ginsburg vehemently denied that there was anything "nefarious" in hiding such transactions.[46] Whether one is enamored of the examples she gave,[47] or the possible reasons the defendant did not wish his transactions to be known, the fact remains that large bank transactions are not "inherently" immoral.

Finally, on the precise question of a duty to inquire about structuring, the *Ratzlaf* Court noted that the Secretary of the Treasury had considered, but did not promulgate, a regulation requiring banks to inform currency transaction customers of the section's proscription.[48] It is not impossible to see an "entrapment by silence" argument similar to that which might explain *Lambert*,[49] or other "estoppel" cases.

46. See Ratzlaf v. United States, 510 U.S. 135, 145 (1994). For a discussion of the Court's general movement toward protecting "innocent" actors, see Singer & Husak, supra note 31. See also Susan Pilcher, Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law, 33 Am. Crim. L. Rev. 1 (1995).

47. See Singer & Husak, supra note 31.

48. See Ratzlaf, 510 U.S. at 140 n.6.

49. Lambert v. California, 355 U.S. 225 (1957), is a case which has always been hard to explain. Lambert, an ex-felon in California, was convicted of failing to report her address to Los Angeles authorities, as required by city ordinance. The Supreme Court, in an opaque opinion by Justice Douglas, reversed her conviction, although the precise basis for the reversal, promulgated under the guise of "due process," is not clear. Many explanations are possible; among them: (1) that the case involved inaction rather than action or (2) that the harm involved was non-tangible. It is also plausible to argue (3) that the Court thought the ordinance too arcane to require inquiry, but that rationale might apply to the thousands of administrative regulations which far too frequently form the basis of *ignorantia lex* cases today. A final explanation is that it would have been simple, at least in Lambert's case, for the state, through its correctional authorities, to inform Lambert of the duty when she was released from prison, and that their failure to do so "estopped" them from prosecuting. See, e.g., Cox v. Louisiana, 379

In summary, it is not clear that the proposal would see Ratzlaff as someone who had a duty to inquire. But if there were such a duty, it is hard to see how Ratzlaf would be unreasonable in not asking whether he (as opposed to the casino) would be able to avoid reporting duty by structuring the transfer of monies. Any notion that he was unreasonable would tend to suggest that he must have the Machiavellian nature of a lawyer.

### *B. Mistake of Law: Cheek v. United States*[50]

If *Ratzlaf* is an "ignorance of the law" case, another

U.S. 379 (1965), in which a police officer specifically told a group of protesters that they could picket in a certain area, and then arrested them for picketing too close to a court house. Not surprisingly, the Supreme Court reversed the conviction. Variations of *Cox*, however, raise questions of its, and Lambert's, reach. Suppose the officer had seen the protesters heading for the area but had simply refrained from warning them that they were approaching a forbidden area. I suggest that that case is different from one in which the officer comes upon the protesters who are already in the prohibited space. However, in United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973), the Court appeared to adopt the principle of estoppel (while not employing the term) holding that a defendant's reliance on an administrative agency's long-standing interpretation of its own regulations might preclude the agency from criminally prosecuting that defendant, even though the defendant had not sought guidance, and had not been affirmatively mislead. Thus, estoppel principles may be at the base of at least some of the "reliance" doctrine. See also United States v. Laub, 385 U.S. 475 (1967), where the Court unanimously concluded that an ambiguously worded public notice which did not mention criminal penalties for travel to Cuba had "misled" defendants; the Court declared: "[C]itizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach." See Raley v. Ohio, 360 U.S. 423 (1959). See also Newman, Should Official Advice Be Reliable?–Proposals as the Estoppel and Related Doctrines in Administrative Law, 53 Col. L. Rev. 374 (1953); State v. Studifin, 504 N.Y.S.2d 608 (Sup. Ct. 1986) (holding letter from Federal Bureau of Alcohol, Tobacco and Firearms that defendant needed additional licenses to "sell" handguns (mis)led defendant reasonably to believe that he did not need additional license to possess them). See generally Sue Ann D. Billimack, Reliance on an Official Interpretation of the Law: The Defense's Appropriate Dimension, 1993 U. Ill. L. Rev. 565; Sean Connelly, Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law, 48 U. Miami L. Rev. 627 (l994); Michael L. Travers, Mistake of Law in Mala Prohibita Crimes, 62 U. Chi. L. Rev. 1301 (l995).

50. 498 U.S. 192 (1991). On remand, and after retrial, Cheek was again convicted. See United States v. Cheek, 3 F.3d 1057 (7th Cir. 1993).

recent decision from the Supreme Court extends its rationale into mistake of law situations. In *Cheek v. United States*[51], the Court held that even an unreasonable mistake of law could negate liability for willful failure to file tax returns. The facts were extreme: John Cheek, an airline pilot, was told constantly that his wages constituted "income" for purposes of the federal income tax laws. Indeed, he personally had lost several lawsuits on this very point.[52] But he was also told, by anti-income-tax zealots and by lawyers who agreed with them, that this was not the proper interpretation of the laws. He also was told, and was persuaded subjectively, that the income tax law (and the Sixteenth Amendment which allowed it) was itself unconstitutional. Cheek was indicted for "willfully" failing to file tax returns. The trial judge instructed the jury that Cheek's actual belief that the wages were not income would not be a relevant claim unless his belief was reasonable—and he then proceeded to instruct them that the belief was, as a matter of law, unreasonable. Nevertheless, the jury returned for re-instruction on this point three times, obviously unhappy about having to convict Cheek, whom they credited as honest. Ultimately, the jury acquiesced to the judge's stricture. In reversing Cheek's conviction the Court concluded that the jury should have been instructed that *any* reliance, however unreasonable, on *any* advice would exculpate.[53]

51. 498 U.S. 192 (1991).

52. See Cheek, 498 U.S. at 195 n.3.

53. The decision was, unfortunately, muddled by the Court's conclusion that while Congress intended ignorance of tax law to negate liability, it did not intend ignorance or mistake of Constitutional law to do so. One could easily argue, of course, that Constitutional law is even murkier than tax law. Justice Scalia's scathing remark on statutory interpretation is appropriate:

> I find it impossible to understand how one can derive from the lonesome word 'willfully' the proposition that belief in the nonexistence of a textual prohibition excuses liability, but belief in the invalidity (i.e., the legal nonexistence) of a textual prohibition does not . . . it seems to me impossible to say that the word refers to consciousness that some legal text exists, without consciousness that that legal text is binding, i.e., with the good faith belief that it is not a valid law.

Cheek, 498 U.S. at 208 (Scalia, J., concurring).

*Cheek* might be restricted to cases involving statutes that contain the word "willfully." Or it might be restricted to tax cases—or other areas of "complex" law. But there is much in the Supreme Court opinion itself, which would make such conclusions doubtful. Combined with *Ratzlaf*, which interpreted a similarly worded statute, and barely cited *Cheek* (as it could have done had it desired to limit the scope of the two decisions), the inference from *Cheek* is strong that the Court, despite a specific declaration to the contrary,[54] was moving to restrict *ignorantia lex*. Indeed, the question which the facts of *Cheek* raises is the critical one: if Cheek, having heard the arguments of lawyers and courts on both sides, concluded that one side "seemed" better, why should he be convicted?[55] After all, if Cheek actually believed the advice he got, he might argue that his resistance to an improper and immoral interpretation of law was morally required. The utilitarian arguments are less clear. To the extent that we can "incapacitate" Cheek by withholding taxes from his salary, thus "forcing" him to pay his required taxes, it is unnecessary to convict him of a crime. In light of his willingness to reject court decisions directly on point, it is unlikely that he (or others like him) will be deterred. Perhaps we could rehabilitate Cheek by compelling him to sit through a course on constitutional (or tax) law—an approach which many law students would agree is "rehabilitative punishment" at its worst.

*Ratzlaf* arguably goes to the question of whether there is a duty to inquire, and appears to say that even an unreasonable failure to investigate further will not result in criminal liability. *Cheek* seems to answer the second part of the puzzle: when the defendant *has* inquired, and still has an unreasonable (but honestly held) understanding of the law, he should be acquitted.

It is possible to read these two decisions as being

54. Id. at 202 n.8.

55. On retrial, a jury which was instructed that any belief actually held by Cheek would negate his criminality, nevertheless convicted him, apparently concluding that he did not actually believe the advice he received. See Cheek, 3 F.3d 1057 (7th Cir. 1993).

extremely limited. Each, after all, concerns a statute which contains the mens rea word "willfully." Moreover, each is concerned with an area of law and regulation which might be considered highly technical or complex. Finally, the opinions might suggest no large overarching principle at all, but merely a preferred reading of federal statutes which are silent on mens rea. I agree that each of these interpretations is plausible.[56] Nevertheless, I believe that they are not so limited, a belief which is enhanced by the next two decisions to be discussed.

### *C. Mistake of Fact and the Duty to Inquire*

#### 1) The Knowledge Requirement: *X-Citement Video v. United States*

The duty-to-inquire proposal, based on negligence, is, by the authors' terms, limited to mistake or ignorance of the law. Can it also be helpful in cases of factual mistake or ignorance?[57] Recognizing that neither proposal purports to reach this far, let us nevertheless explore this possibility, since it may illuminate the corners of the actual proposal. In some ways, the "duty to inquire" case, as it appears to be set in terms of negligence, merely activates the assessment of the negligent level of the actor's conduct. Thus, a failure to inquire where one "should" inquire might itself be negligent, thus rendering negligent a failure to understand the facts. Consider these two hypotheticals:

A hands B a package, and asks him to take it to C.

(1) A tells B nothing about its contents. As B is carrying the package, he is arrested and charged with possession and transporting cocaine. Was B under a duty to inquire about the package's content? Is his failure to so

56. Indeed, as suggested, supra note 31, the Court's decision in *Bryan* renders at least one such restriction more than plausible.

57. Many have recognized the anomaly of permitting a mistake of fact to negate liability, while never so permitting a mistake of law. See, e.g., Husak, supra note 2. That is an entirely separate topic, for another day.

inquire negligent?

(2) B inquires about the contents, and A responds that the contents are salt.

Is B under a duty not only to *inquire*, but also to *investigate*? And if he does not do so, is this now a case of mistake, rather than ignorance, of a fact?

In some instances, where the law has concluded that B has been "willfully blind" about the contents, B is treated as though he knew.[58] But those are special cases, where the surrounding facts demonstrate that B is well aware of the risk he is taking. As a normal rule, the American answer, even in drug cases, is that B is not liable even if his mistake was unreasonable: the defendant must act *knowingly* with regard to the facts.[59]

58. See Douglas N. Husak & Craig A. Callender, Willful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality, 1994 Wis. L. Rev. 29.

59. This was not always the situation. In the United States, cases prior to 1970 usually held that lack of knowledge of the identity of the drug was irrelevant. This appears to have followed the 1932 Uniform Narcotic Drug Act, which had been adopted by all fifty states. In 1970, however, the National Conference of Commissioners on Uniform States Laws rewrote the UNDA, explicitly requiring knowledge for a possession conviction. It appears that only Washington now rejects this view, yet even that state provides an "affirmative defense" of "unwitting possession." The English caselaw is much less clear. In Warner v. Metropolitan Police Comm'r [1969] C.A. 256, the House of Lords held that, in the precise facts of the first hypothetical, B did NOT possess the drug because, although he knew he possessed the box, he had never looked at the contents. If, however, the contents had been evident (a white powder, e.g.,), dictum in the case suggested that the defendant would be guilty of possession. Parliament soon altered this result, and allowed mistake of fact as a relevant claim in all cases. Misuse of Drugs Act 1971, § 28. The history of Parliament overruling judicial decisions imposing strict liability is intriguing. In perhaps the most (in)famous case of strict liability in England, Regina v. Prince, 2 Cr. Cas. Res. 154 (1875), Parliament acted quickly to make reasonable mistake as to age a defense. See Glanville Williams, Criminal Law: The General Part § 69 (2d ed. 1961). See also Cross, Centenary Reflections on Prince's Case, 91 L. Q. Rev. 540 (1975). Precisely the same phenomenon occurred in a recent (and hotly disputed) case of alleged strict liability in England, Pharmaceutical Soc'y of Great Britain v. Storkwain Ltd., 2 All E.R. 635 (1986), in which the House of Lords imposed strict liability on a *company* (not an individual defendant) whose agent had sold a drug on the basis of what turned to be a forged prescription. The House assumed that the reliance on the prescription—and hence the mistake—was reasonable, but upheld liability anyway. Parliament then established a statutory defense of due diligence. Medicines (Products Other Than Veterinary Medicines) (Prescription

Of course, the addition of facts alters the perception of (non) negligence. If (1) A tells B (a) to collect $1,000,000 for the package, or (b) to avoid going near the police, or if (2) B knows that A is involved in drugs, the duty to inquire, or even to investigate may be heightened. Indeed, in extreme cases, the defendant's failure to inquire might be interpreted as willful blindness.

In a dramatic and potentially sweeping decision, the Supreme Court recently affirmed the position that knowledge is a bedrock mens rea requirement in mistake or ignorance of fact cases. In *United States v. X-Citement Video*,[60] the defendant was charged with "knowingly transport[ing] and ship[ping] . . . any visual depiction [which] . . . involves the use of a minor engaging in sexually explicit conduct." He argued that he was not guilty because although he knew he was shipping films, and although he knew that the films were sexually explicit, he did not know that there were minors in the films. The trial court rejected the contention that the adverb "knowingly" modified "minor," restricting its reach to the "conduct element" of "shipping." The Ninth Circuit agreed, but then held that the statute established an unconstitutional lack of mens rea as to age.[61] The Supreme Court reversed that decision, holding instead that the statute must be read as including a mens rea of knowledge as to the age of the actors.

Technically, the Court's decision only determined that in this federal statute (and probably all others), a mens rea word such as "knowingly" "travels down the whole sentence." In effect, the Court adopted the "element

only) Amendment Order 1989, Art. 3. The case, and the ensuing statutory changes, are reviewed in Bernard Jackson, Storkwain: A Case Study in Strict Liability and Self-Regulation, 1991 Crim. L. Rev. 892. Jackson's investigation of the underlying facts and political struggles behind the case suggest that, contrary to the assumption in the case, the reliance on the prescription was *not* reasonable, and that the case was "pursued" by the Royal Pharmaceutical Society, against one of its own members, as a matter of a power struggle by the Society to reaffirm its hegemony over prosecutions against druggists.

60. 513 U.S. 64 (1994).

61. United States v. X-Citement Video, 982 F. 2d 1285 (9th Cir. 1922).

analysis" approach of the Model Penal Code.[62] That alone would be a substantial advance in American law. And the fact that it was taken in the context of a case involving sexual activity is even more astounding, since it was in those cases that strict liability as to age (as well as other facts) first reared its head.[63] But of even more importance

62. See Paul H. Robinson & Jane A. Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 Stan. L. Rev. 681 (1983). The Court's decision was perhaps even more important because *neither* side sought this interpretation. Relying upon an earlier Ninth Circuit case, United States v. Thomas, 893 F.2d 1066 (9th Cir.), cert. denied, 498 U.S. 826 (1990), the trial court had instructed the jury that the statute imposed strict liability with regard to age—that the word "knowingly" did not travel down the sentence. The Ninth Circuit then, in *X-Citement Video*, held that (l) the trial court correctly interpreted the statute as imposing strict liability; (2) as so interpreted, the statute was unconstitutional because it precluded lack of mens rea as a relevant claim. 982 F.2d at 1285. Although the statute had been construed by several other circuits, only one had agreed with the Ninth Circuit's first premise: several had construed the statute as requiring knowledge as to the age of the cast. See United States v. Burian, 19 F.3d 188 (5th Cir. 1994); United States v. Cochran, 17 F.3d 56 (3d Cir. 1994); United States v. Gifford, 17 F.3d 462 (1st Cir. 1994); United States v. Prytz, 822 F. Supp. 11 (D.S.C. 1993); United States v. Long, 831 F. Supp. 582 (W.D. Ky. 1993). One had construed it as requiring at least recklessness. See United States v. Kempton, 826 F. Supp. 386 (D. Kan. 1993). One had suggested, à la the Canadian and Australian approach to this area, that there could be a defense of due diligence, which would rest on the defendant. See United States v. United States District Court, 858 F.2d 534 (9th Cir. 1988). One other Court had agreed that the statute imposed strict liability, but disagreed that this was unconstitutional. See United States v. Kleiner, 663 F. Supp. 43 (S.D. Fla. 1987). As framed by the Ninth Circuit, then, *X-Citement Video* raised, for the first time, the constitutionality of strict criminal liability. See Richard Singer, The Resurgence of Mens Rea III—The Rise and Fall of Strict Criminal Liability, 30 B.C. L. Rev. 337 (1989) [hereinafter Singer III]. This may explain why the Court chose the path it did—by so interpreting the statute, it avoided the constitutional issue. Another explanation is possible: there was no doubt, in the actual facts of *X-Citement Video*, that the defendants *did* know that the film they distributed involved minors. Thus, the only way the defendants could avoid conviction was to take the path the Ninth Circuit took. The reversal by the Supreme Court on the grounds used was indeed pyrhhic—the defendants were sure to be convicted at a new trial.

63. The landmark case, of course, is *Regina v. Prince*. 2 Cr. Cas. Res. 154 (1875). But American cases followed the rule as well. See generally Singer III, supra note 62. Until recently, that was the situation in almost all jurisdictions with regard to "statutory rape," (the current descendent of *Prince*) but recent decisions, as well as legislative changes, have drastically altered that position, to the point where nearly twenty states and the federal government allow reasonable mistake as to age as a relevant claim to such a charge. See Garnett v. State, 632 A.2d 797, 802-03 (Md. 1993); W. E. Shipley, Annotation, Mistake or

than the statutory interpretation issue was the Court's approach to the question of criminal liability. After reaffirming that there was always a "presumption" in favor of requiring mens rea in criminal statutes,[64] the Court, echoing the "nefariousness" language of *Ratzlaf,* spoke of the "dangers" of convicting "innocent" persons, such as deliverers of such materials, if "knowingly" were not read to modify all elements of the statute:

> Some applications of respondents' position would produce results that were not merely odd but positively absurd . . . we would sweep within the ambit of the statute actors who had no idea that they were dealing with sexually explicit material. For instance, a retail druggist who returns an uninspected roll of developed film to a customer "knowingly distributes" a visual depiction . . . (o)r a new resident of an apartment might receive mail for the prior resident and stores the mail unopened . . . . Similarly, a Federal Express courier who delivers a box in which the shipper has declared the contents to be "film . . . knowingly transports" such film.[65]

This approach directly and dramatically raises the potential conflict with the "duty to inquire" proposal. If, the Court seems to be saying, *too many* people would have to inquire, then there should be no such duty, because (as suggested above with regard to the law itself), paralysis could result.[66] Defining "innocence" or "innocents" is the, or

Lack of Information as to Victim's Age as Defense to Statutory Rape 8 A.L.R. 3d 1100 (1996).

64. See X-Citement Video, 513 U.S. at 75.

65. Id. at 69. For a more elaborate discussion of this point, see Husak & Singer, supra note 31.

66. The carrier's case is a relevant and telling example for several reasons. In the nineteenth century, both American and English courts had stumbled over whether carriers should be held liable for transporting items when the shipper deceived the carrier. In Hearne v. Garton, 121 Eng. Rep. 26 (K.B. 1859), the court held that (reasonable) mistake of fact was a relevant claim, for otherwise the carrier would have to open every package to assure that the contents were not contraband. In Commonwealth v. Mixer, 93 N.E. 249 (Mass. 1910), on the other hand, the Massachusetts Supreme Judicial Court had imposed strict criminal

one of the, crux(es) of the matter. I assume that the point is that innocent people are either actually naive, or are engaged in what they believe to be legal and indeed moral acts.

Can *X-Citement Video* be limited? One superficially plausible explanation of the decision is that it was merely interpreting the statute. As the Court said, if (as the government conceded) the word "knowingly" modified the term "sexually explicit conduct," there was no reasonable way to explain why it did not modify the intervening term "of a minor." But suppose that Congress were simply to rewrite the statute to ban "knowing shipping of any depiction of sexually explicit conduct using a minor." *Now* the government's concession would not necessarily entail the dilemma it did in the actual statute. One could simply assert that the concerns of innocence would stop with the phrase "sexually explicit conduct," but that as to the element of minor, either strict liability or recklessness could easily apply, as a matter of statutory construction. Thus, mistake of fact would be distinguished from mistake of law.

Such a reading, however, would be incompatible with the Court's focus on innocence. A transporter of a white powder which (against his expectation) turns out to be heroin or cocaine is just as innocent as the Federal Express deliverer referred to in the Court's statement, even if the

liability on the driver-employee of a carrier for transporting liquor in boxes marked "sugar." The court accepted the employee's contention that he could not possibly have known that it was liquor he was transporting, but urged that he had a right and a duty, nonetheless, to inspect every item he carried. "[T]he carrier has a right to use any reasonable efforts, by the establishment and publication of general rules, by specific inquiry, or in proper cases by the inspection of packages, or otherwise, to ascertain whether intoxicating liquors constitute any part of the goods offered for transportation, and to refuse to take any as to which this right is denied . . . ." Id. at 252. Other courts disputed whether a common carrier had such a right. See State ex. rel Black v. Southern Express, 75 So. 343 (Ala. 1917). But the point here is that the *Mixer* court showed little concern with whether commerce would be obstructed, or "innocent" people potentially convicted. The United States Supreme Court's concern with "innocents"—a concern permeating all four of the cases discussed in this article—is extraordinarily informative.

statute only reads "knowingly transports heroin." Even if one limits *X-Citement Video* to cases where there are "too many" potential innocents, most cases of mistake or ignorance of fact would fit easily within these parameters. *X-Citement Video* is indeed a sea-change.

On the other hand, the Court did not totally reject a "duty to inquire" approach. Having, in the text, rather soundly rejected any suggestion of strict liability, it suggested in a footnote[67] that a mistake of fact, reasonable or unreasonable, may not protect the producer of a film involving minors precisely on the grounds that the producer would be better able to inquire about, and investigate, claims as to the actors' or actress' ages. This, of course, begs, or assumes the answer to, the earlier question about who should be under a duty to inquire as to the law: by positing that the producer *should* inquire as to age, the Court was *assuming* that a producer would (or should?) know that the law prohibited using minors in such films.

2) The Knowledge Requirement: *United States v. Staples*[68]

Each of these three cases significantly embraced and reaffirmed subjective mens rea as a crucial element of criminal law. But each could, in future years, be read quite narrowly as interpreting a statute which had in it a mens rea word: *Cheek* and *Ratzlaf* as interpreting the meaning of the statutory word "willfully," *X-Citement Video* as involving the reach of a statutory mens rea word ("knowingly"). Neither of these options is open to restrict the impact of the fourth, and therefore arguably most important, case, *Staples v. United States.*[69] Staples was charged under the National Firearms Act with owning a "machine gun" which he had not registered with the Treasury Department. The precise statute required the

67. See X-Citement, 513 U.S. at 97 n.5.
68. 511 U.S. 600 (1994).
69. Id.

registration of "firearms," a term which included "machine guns." A machine gun was defined, by statute, as any weapon which "shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."[70] The gun in question was an AR 15 Assault Rifle, which was *not* manufactured to fire more than once without recocking. However, the particular weapon which Staples owned had been altered—by whom was never determined—so that it could easily be converted to multiple firing.

Staples testified at trial that he was unaware that the gun had been altered. The trial court had refused to admit evidence relating to Staples' factual proofs, concluding that the statute did not require that he know that the weapon he owned had, somehow, become a "machine gun," so long as he knew that he owned a weapon of some sort. On that basis, Staples was convicted, and his conviction affirmed by the Ninth Circuit.

The Supreme Court, in an opinion by Justice Thomas, and with only Justices Stevens and Blackmun dissenting, (Justices Ginsburg and O'Connor concurred separately) construed the statute, which had no mens rea word, to require "knowledge" as to the nature of the weapon (and presumably, after *X-Citement Video*, as to all other elements of the statute.). Justice Thomas first repeated the familiar shibboleth that mens rea was usually required in the criminal law, citing the usual string of cases: *Morissette v. United States*,[71] *United States v. United States Gypsum Co.,*[72] and *Liparota v. United States*.[73] From that point, possibly due to the apparent concession of the United States,[74] but possibly on a broader common law basis, he concluded that the general mens rea required was

70. I.R.C. §§ 5845 (a), (b) & (d) (1994).
71. 342 U.S. 246 (1952).
72. 438 U.S. 422 (1978).
73. 471 U.S. 419 (1985).
74. See Staples, 511 U.S. at 621 (Ginsburg, J., concurring).

knowledge.[75]

It was in its explanation of *why* knowledge was important that the Court essentially explained its other recent decisions. Any other position, it argued as in *X-Citement Video*, might well capture too many "innocent" actors:

> [T]hat an item is "dangerous" in some general sense does not necessarily suggest . . . that it is not also entirely innocent. Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation . . . . [P]recisely because guns falling outside [limited] categories traditionally have been widely accepted as lawful possessions, their destructive potential . . . cannot be said to put gun owners sufficiently on notice of the likelihood of regulation . . . ."[76]

The Court's examples were instructive. In contrast to the suggestion made by Ashworth that regulation alone[77] might be a lodestar, the Court responded:[78]

> [R]egulation in itself is not sufficient to place gun ownership in the category of the sale or narcotics in *Balint*. The food stamps at issue in *Liparota* were subject to comprehensive regulations, yet we did not understand the statute there to dispense with a mens

75. Compare the position of the Model Penal Code § 2.02(3) that, in the absence of a mens rea word, proof of recklessness is sufficient for conviction. "Knowledge" and "purpose" are usually synonymous with "specific intent," while "recklessness" connotes "general intent." The Court's declaration here then suggests that most crimes are specific intent, rather than general intent, crimes. This would have significant implications for later interpretation issues. The cursory nature of the Court's acceptance of this position, however, suggests that it may read this statement as based primarily on the government's concession that if mens rea was required, knowledge was the proper level rather than on general principles of criminal law. Such an interpretation, however unfortunate, would not be impossible given the sweeping nature of the opposite view, even if the Court did not actually intend to so limit it at the time.

76. Staples, 511 U.S. at 611.

77. See Ashworth, supra note 1, at 235.

78. Staples, 511 U.S. at 613.

rea requirement.[79]

Then, in an example which, ironically, directly disagrees with Prof. Ashworth, the Court discussed car ownership and regulation:

> Automobiles for example might also be termed "dangerous" devices and are highly regulated at both the state and federal levels. Congress might see fit to criminalize the violation of certain regulations concerning automobiles, and thus might make it a crime to operate a vehicle without a properly functioning emission control system. But we probably would hesitate to conclude on the basis of silence that Congress intended a prison term to apply to a car owner whose vehicle's emissions levels, wholly unbeknownst to him, began to exceed legal limits between regular inspection dates.[80]

This definition of "innocent" surely has implications for the proposed "duty to inquire."[81] Where Ashworth suggests

79. Id. It must be remembered that the court here is using the term "mens rea" to *mean* knowledge.

80. Staples, 511 U.S. at 612. The court's use of the word "probably" here certainly leaves open the possibility that it would decide the case differently were it to arise. But that possibility seems small indeed. One can never be too sure, however. In McMillan v. Pennsylvania, 477 U.S. 79 (1986), the Court, in upholding a state statute which established a mandatory minimum sentence inside an otherwise discretionary sentencing range against a contention that the trigger for the mandatory sentence was an element of the crime which had to be proved to the jury beyond a reasonable doubt, declared that the defendants' argument would have "more superficial appeal" if the sentencing fact "exposed them to greater or additional punishment." Id. at 88. Twelve years later, in a case where the "sentencing factor" increased the maximum sentence from 2 years to 20, the Court (5-4) dismissed the contention that this language was anything more than hortatory. See Almandarez-Torres v. United States, 523 U.S. 224 (1998). Happily, the Court has since re-embraced, although only by a 5-4 margin, the *McMillan* view that anything which increases the maximum sentence must be proved to a jury. See Jones v. United States, 526 U.S. 227 (1999). For assessment of Jones, see Mark Knoll & Richard Singer, Searching for the "Tail of the Dog": Finding Elements of Crimes in the Wake of McMillan v. Pennsylvania, 22 Seattle U. L. Rev. 1057 (1999) and Richard Singer, The Model Penal Code and Three Ways Courts Avoid Mens Rea, 4 Buff. Crim. L. Rev. (forthcoming 2000).

81. Professor Pilcher notes, quite correctly, that the dissenters had a "fundamentally different conception" of what innocent meant in this context: "[T]o

that the duty is activated where governmental regulation is "widespread,"[82] the Court appears to take a diametrically opposed view: if governmental regulation is widespread, neither strict liability, nor negligence, nor even recklessness will suffice for criminal liability. Only the "specific intent" of knowledge will do. Of course, the opinion reflects a fundamental view of the role of government. If the governmental regulation which permeates a society is thought of as basically desirable and proper (leaving aside quibbles with individual regulations), then a duty to inquire may be sensible; but if pervasive governmental regulation is perceived as "intrusive," then requiring citizens to become acquainted with all those regulations is more likely to be rejected. This invasiveness is amplified by Ashworth's apparent position that the duty to inquire is intensified when the regulations are "constantly changing."[83] In the United States, where new federal regulations alone comprise thousands of pages in the federal register every year, such a duty might well swamp the ordinary citizen—indeed, it might well swamp the ordinary corporation counsel whose job it is to ascertain the meaning of such regulations. On the other hand, the Court's language does suggest the possibility that some activities would alert the average citizen to pay heed—not unlike the duty to inquire which is being assessed here. But if neither guns nor automobiles will activate this duty, what will?[84]

At least on its face, *Staples* may not apply to "straight"

the dissenters, the potential for public danger is sufficient to remove gun possession from the realm of innocuous activity; to the majority, however, the history of gun possession's legality is conclusive." Pilcher, supra note 46, at 26. The debate over the definition of "innocence" will of course be critical. See Husak & Singer, supra note 31.

82. See Ashworth, supra note 1, at 235.

83. See id.

84. One possibility, certainly left open by the Court, is that a person engaged in a specific enterprise which is regulated might be charged with a duty to learn about both the laws and facts of that regulation. This would comport with other suggestions about the imposition of strict liability. It would, in addition, severely limit the number of persons exposed (thereby excluding the "innocents" for whom the Court is so solicitous) and avoid that prong of these opinions as well.

mistake of fact cases: If A knows the chemical composition of what he possesses, but believes it is not legally "cocaine," *Staples* may apply; but if A possesses cocaine, believing (even reasonably believing) it to be salt, he still might be liable under *Staples*, because "cocaine" is not a "legal" category or fact, but a "real" fact. Analogously, courts in the environmental area have held that a defendant who is prosecuted for improperly handling a "hazardous waste" does not need to know that his waste is in fact listed by the EPA as a legal "hazardous waste," but *does* have to know that the material he is handling is "dangerous in nature."[85] Thus, D1, who does not know that used oil is potentially ecologically dangerous, is not liable even if that oil is listed as a hazardous waste. However, D2, who knows that such oil is dangerous, but who does not know that he is handling such oil, is liable. This in effect places upon a defendant who is aware of a risk that his acts are regulated the burden of further factual, and possibly legal, inquiry.

Such an interpretation, however, would be anomalous, particularly in light of the tenderness which the Supreme Court exhibited toward truly "innocent" persons. Perhaps it can be argued that persons possessing white powder for which they are paid (or have paid) a large amount of money are on some kind of duty to inquire about the nature of the item they have. Indeed, such defendants may be found to be "willfully blind." But if circumstances do not suggest such a risk, then to hold them liable conflicts even with the proposed duty to inquire, which at least requires negligence.[86]

85. For a discussion of the cases, see, e.g., Helen Brunner, Environmental Criminal Enforcement: A Retrospective View, 22 Envtl. L. 1315 (1992); Richard Lazarus, Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves, 7 Fordham Envtl. L.J. 861 (1996); Andrew J. Turner, Mens Rea in Environmental Crime Prosecutions: Igorantia Juris and the White Collar Criminal, 23 Colum. J. Envtl. L. 217 (1998); Michael Vitiello, Does Culpability Matter? Statutory Construction Under 42 U.S.C. § 6928 (1982), 6 Tul. Envtl. L.J. 187 (1993).

86. In the sections in his book specifically dealing with the proposed duty, and even in the section conceding that the proposal sounds in negligence, Ashworth is unclear as to whether tort negligence would suffice, or whether "criminal negligence" is required. Further exploration, however, strongly suggests that

Another question left unanswered, at least in part, by the *Staples* opinion is what would occur if the defendant *had* known that the gun had become capable of being fired automatically, but had no idea that that would make it a "machine gun." Again, let us imagine the conversation between Staples and a B.A.T.F. agent:

S: I have just purchased an AT14. I wonder if you would tell me if I need to register this gun?

Agent: I assume the gun is a firearm, sir?

S: Yes, it can fire ammunition.

Agent: Then you must register it only if it is a machine gun.

S: *This is only a rifle. It is certainly not an Uzi, or a Gatling gun. WHAT IS THE LEGAL DEFINITION OF MACHINE GUN*?[87]

[Again, these are lawyers' questions: we are turning Staples into a lawyer, in order to require him to meet the duty of inquiry.]

Agent: Any weapon which fires automatically is considered to be a machine gun.

Now, and only now, is Staples confronted with a second "duty to inquire." According to his testimony in the case, the rifle had never fired automatically. If he has been prescient enough to ask the question above, is he now under a duty to recheck the rifle, to determine whether it has changed since he last fired it?

But note this is not necessarily the end of the inquiry. The putative response by the agent is certainly *a* correct interpretation of the law. But it is not complete. The *full*

Ashworth would allow mere tort negligence to suffice for liability here. In that view, if that is correct, he differs from von Hirsch and Husak who specifically require "gross" or "criminal" negligence before a violation of the duty to inquire occurs.

87. This is the question that Staples would have to be required to ask in order to establish a "duty to inquire" in this case. This seems so unrealistic as to flounder on itself: as the majority pointed out, "machine gun" has a "common sense" definition. Had the agent responded—at this point—that Staples would have to register any "automatic" weapon, the rest of the scenario would be played out. But this would require all bureaucrats to anticipate the statutory interpretation problems that would arise and prepare responses that would avoid these problems.

answer, which might be given is:

Agent: Any weapon which fires automatically, *or which can be readily restored to shoot automatically*[88] *is* considered to be a "machine gun."

S: Well, MANY guns can be MADE to shoot automatically. *Are all those covered? If not, what is the meaning of "restored?" And how easily must the restoration be before it can be said to be "readily" capable of "restoration?"*

Once again, who but a lawyer would ask these questions?

There is language in the opinion that suggests that in this hypothetical, Staples may be guilty under the statute even if he never had this conversation, but knew the facts as to the gun. But certainly this runs counter to both the "innocence" approach of the Court here, and to its decisions *in Cheek* and *Ratzlaf* on the impact of lack of knowledge of legal duty. While those cases involved the statutory term "willfully," "knowledge" also sounds in "specific intent."[89]

Perhaps the most striking point about *Staples*, however, is that it adopted *knowledge* as the proper level of mens rea. In the three other cases discussed, the Court essentially was "bound" to require knowledge if it required any mens rea. Prior to *Cheek* and *Ratzlaf*, numerous cases had interpreted the word "willfully" (in the context) to mean a *knowing* failure to comply with a *known* duty. Thus, it would have been virtually impossible for the Court to now suddenly decide that a reckless or negligent failure to be aware of the law was nevertheless "willful." Similarly in *X-Citement Video*, the statute itself required knowledge. Although it might have been possible for the Court to conclude that "knowingly" modified the verb parts of the

88. I.R.C. § 5845(a)(6) (1994).

89. The Model Penal Code explicitly so provides. Model Penal Code § 2.02(8) (Proposed Official Draft 1962). Of course, the Code is not binding on federal statutory interpretation, but it is surely helpful and possibly persuasive on the parallelism of the two terms. I recognize that there are federal cases holding knowledge to require only general intent. But after *X-Citement Video* and *Staples* those cases are dubious.

statute, but that recklessness was sufficient as to the age of the actors,[90] although that would have been a difficult position. But in *Staples*, the statute had no mens rea word at all: it was open to the Court, therefore, to construe the statute as allowing conviction upon recklessness, criminal negligence, or tortious negligence, as well as upon knowledge.[91] That the Court proceeded to impose a requirement of knowledge is therefore illuminating, for it suggests that the Court is serious about mens rea generally, in all mistake cases, in both fact and law. *Staples* is a landmark decision in its own right. Combined with *Cheek, Ratzlaf,* and *X-Citement Video,* the cases articulate a strong stance against strict liability in all of its forms.[92]

90. In fact, at least one Circuit court has taken this approach. See discussion supra note 62. This is a difficult, but not impossible, position to accept. The Model Penal Code, for example, adopts the general approach adopted by the Court in *X-Citement Video*—the mens rea word reads all the way down the statute. See Model Penal Code § 2.02(3) (Proposed Official Draft 1962). But the Code concedes the possibility that different mens rea requirements could apply to different elements of the statutory offense, even if the statute does not so state. See Id. § 2.02(4). And the Ninth Circuit, in interpreting a parallel statute dealing with producers of child pornography, had asserted that a defendant could avoid conviction only if *he* proved, by clear and convincing evidence that he did not know of the child's age. See supra note 62 and accompanying text. Thus, there *were* alternative readings of the statute, which had been adopted by other Circuits, upon which the Supreme Court could have seized. But surely the Court's approach here was the more rational, and limited its decision to only one rule of statutory interpretation: how far down the statute does a mens rea word flow?

91. The government apparently conceded that, if mens rea was needed at all, it should be a knowledge requirement. See Staples v. United States, 511 U.S. 600, 620 (1994) (Ginsburg, J., concurring). However, no mention of this concession is made in the majority opinion. Why that concession was made, particularly in light of the other cases interpreting this statute, as well as the other arguments made in note 60 is a mystery. Still, the Court was not bound by such a concession, and it certainly was not bound by precedent immediately to jump to such a high level of culpability. As earlier noted, the Model Penal Code uses recklessness, not the higher level of knowledge, as the "default" position where a statute is silent.

92. Of course, none of these opinions was constitutionally based, since in each the Court was "merely" interpreting a specific federal statute. Each decision, therefore, could be relegated to the dustbin by merely pointing that out. Nevertheless, the consistency with which the Court has adhered to the notions of mens rea seems to me to suggest that it is on to something else – a more general

## III. DUTY TO INQUIRE AND REASONABLE RELIANCE

What steps should a defendant, aware of some duty to inquire, take? Neither von Hirsch and Husak, nor Ashworth directly address this problem. But the obvious answer is that she should seek some information on whether she is covered, and what she should do. The common law, of course, never addressed this question, since no steps which defendants took, except reliance on the word of the highest court in the jurisdiction,[93] would suffice.

Of course, where a defendant relies on himself to determine whether he is acting within the law, it is more difficult to credit his claim that he really believed he was acting legally, and the common law has always so held. Thus, where a defendant relies on a book called "Dirty Divorce Tricks," his claim that he believed his actions to be legal are at best suspect, and a jury could easily find him reckless, if not even more culpable.[94] Similarly, one who claims a reasonable belief as to the legality of his possession of a controlled dangerous substances because it was advertised in a magazine and sent through the United States mail is unlikely to be viewed as reasonable.[95] A more difficult question may arise when the defendant actually attempts to interpret a criminal statute. Since attorneys and judges sometimes have trouble agreeing on the interpretation of such statues, one might expect them to be sympathetic to a layman. Not so. In *State v. Marrero*,[96] a defendant, a Federal Corrections Officer, interpreted a New York statute allowing any "police officer" to carry a gun; the statute included "corrections officer" as a peace officer, but was later construed to include only state, not federal, corrections officers. The court (4-3) held that the New York statute (which it claimed, erroneously,

embrace of mens rea in all cases. See also Wiley, supra note 31; Alan C. Michaels, Constitutional Innocence, 112 Harv. L. Rev. 828 (1999).

93. See Striggles v. State, 210 N.W. 137 (Iowa 1926).

94. See State v. Patten, 343 N.W.2d 30 (N.D. 1984).

95. See State v. Georgens, 404 N.Y.S.2d 651 (App. Div. 1985).

96. 507 N.E.2d 1068, 1070-71 (N.Y. 1987).

was the same as the Model Penal Code), required that the statute actually misstated the law and thus misled the reader; an individual defendant's misreading of the statute, even an ambiguous statute, was therefore not covered, no matter how "reasonable." Defendant's "misreading," however, was estimably reasonable – both one New York State trial judge and two members of the Appellate Division thought his interpretation correct.[97]

### *A. Duty to Inquire and Reasonable Reliance Under the Model Penal Code*

Where a defendant seeks outside legal advice, the case seems clearer. The Model Penal Code, Section 2.04, "Ignorance or Mistake," while not establishing a *duty* to inquire, allows those who *do* inquire a defense if, upon such inquiry, they "reasonably rely" upon information provided by relevant government officials. Its provisions bear quoting verbatim:

> A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:
>
> (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 enactment;
>
> (ii) a judicial decision, opinion or judgment
>
> (iii) an administrative order or grant of permission; or

97. The *Marrero* decision, which is clearly wrong, is the subject of David De Gregorio, People v. Marrero and Mistake of Law, 54 Brook. L. Rev. 229 (1988).

> (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.[98]

The Code is obviously aimed at overruling those cases where, even when the defendant has sought to demonstrate that he has attempted to discover the law, the courts have simply invoked the doctrine and excluded evidence of his attempts, however reasonable they have been.[99] Ashworth explicitly embraces the Code's position on this point[100]—the establishment of a defense of "reasonable reliance" on the word of an official. I assume that von Hirsch and Husak would agree. In the context of the old, implacable doctrine, their proposal, and the Model Penal Code, is not merely sensible, but long overdue: if the fear of criminal liability has in fact motivated the defendant to seek out advice upon which he has reasonably relied, then the "mistake of law" doctrine, like Metternick's male bee, has served its function, and should disappear from the case.

But even here there are questions. Upon whom is the citizen able to rely? The Code's answer—governmental officials charged with "the interpretation, administration or enforcement of the law defining the offense"—precludes reliance upon the person to whom most lay actors would go- a lawyer. While this is at least defensible policy (for fear of collusive lawyers),[101] it does not necessarily reflect a fair

98. See Model Penal Code § 2.04(3)(b) (Proposed Official Draft 1962).

99. See Battersby, 2 W.L.R. 378 (1965), a babysitter had been told by a member of the County Council that her arrangement did not require her to register as a foster parent. When this advice turned out to be incorrect, Ms. Battersby was convicted, and her conviction upheld. See also Hamilton v. People, 57 Barb. 625 (N.Y. 1870) (holding that defendant was precluded from showing that two state Supreme Court judges, several lawyers, *and* the Governor of the state had all informed him that he was legally eligible to vote). But see Regina v. MacLean, [1974] 17 C.C.C. 2d 84 (holding that defendant could rely on erroneous statutory interpretation given by Registrar of Motor Vehicles). For more cases, see Richard Singer & Martin Gardner, Crimes and Punishment, 281-89 (2d ed. 1996); Parry, supra note 15.

100. See Ashworth, supra note 1, at 236-37.

101. The fear that lawyers could or would collude with clients to provide "bad" advice has permeated this area. See State v. Downs, 21 S.E. 689 (N.C. 1895) ("If

definition of reasonableness.

Leaving that aside, however, and agreeing with the Code that the claim should be so limited, how would a citizen know to whom to go and upon whom she might "reasonably rely?" In *State v. Hopkins*,[102] defendant Hopkins, a minister in Elkton, Maryland wished to put up a sign announcing that he was a notary public. He received, from the "County Attorney" an opinion (apparently oral) that this sign would not violate a state statute. Because the court simply applied the *ignorantia lex* rule, it saw no need to describe the functions and powers of the "County Attorney." *To a lawyer*, the source's title suggests that he was *not*, as the Code would require, "charged by law with the interpretation, administration or enforcement of the [criminal] law defining the offense;"; indeed, the "County Attorney's" office might well have nothing to do with criminal law at all. But *a layman like Hopkins*, unless expressly so informed by the Attorney, is unlikely to have understood this. And it is even less likely that Hopkins, attempting to act as a reasonable citizen, would have asked his source: "By the way, are you the kind of source which the Code would recognize as authoritative?" That failure, however, makes his reliance no less "reasonable." Or, to put the point the other way, if Hopkins in fact relied on the information, that should

ignorance of counsel would excuse violations the more ignorant counsel could manage to be, the more valuable, and sought for, in many cases, would be his advice."). See also State v. Western Union Tel. Co., 97 A.2d 480 (N.J. 1953). Of course, if this were provable, the defendant's reliance would not be honest or reasonable, but the law's apparent concern is that this would be extremely hard to prove. Whether, as Holmes suggested, shifting the burden of proof would suffice, is not clear. The Model Penal Code, which generally loosens the common law, here stands with it—reliance on counsel is not allowed as a claim. Model Penal Code § 2.04(3) (proposed official draft 1962). Only New Jersey—with more lawyers per capita than any other state—might allow such reliance. See N.J. Stat. Ann. § 2C:2-4d (1999).

102. 69 A.2d 456 (Md. 1959). See Travers, supra note 49, at 1302 ("Taken collectively, these decisions create a logical framework in which mistake of law should be a viable defense . . . to all *mala prohibita* crime requiring a mens rea of recklessness or higher."). Travers argues that a number of federal cases have in fact extended *Ratzlaf* (and other cases) beyond statutes requiring "willfulness." Id. See also Simonoff, supra note 31.

surely be sufficient, even if the County Attorney was not so authorized, because Hopkins' inquiry meets the purpose "a duty of inquiry" would establish.[103]

A post-Model Penal Code case, *Haggren v. State*,[104] suggests that the code has in fact changed little. Haggren called an Alaska State Trooper to inquire as to whether the "first net in the water" had the right of way in fishing. The trooper in turn called the Fish and Wildlife Office, and responded to Haggren that the first net, indeed, had the right of way. Haggren's reliance on this information was deemed unreasonable in part because the trooper was not the person covered by the Code; Haggren's conviction was affirmed. But to whom should Haggren have turned, other than a police official and a dispatcher and officer of the Fish and Wildlife Patrol? To whom would a *reasonable* layman have turned? For that matter, to whom would a reasonable lawyer have turned?

In a maze of government bureaucracy, few citizens can ever be sure that they have received the "right" official.[105] It is unlikely that a citizen would know which of the many bureaucrats in a governmental office meets the Model Penal Code test. Indeed, it may even be unlikely that the bureaucrats themselves would know the answer to that

103. John Parry calls *Hopkins* "the leading case to deny the defense" of reliance on official advice. Parry, supra note 15. It seems to me that *Staley*, infra note 121, and many other cases might more easily wear that sobriquet. And the ambiguity of the facts in *Hopkins*, at least as captured in the opinion, suggest caution in such a description, much less in condemning the actual result (as opposed to the articulated policy in the opinion).

104. 829 P. 2d 842 (Alaska Ct. App. 1992).

105. Sometimes, there is only one "official" from whom one can get any opinion at all. For example, in Bsharah v. United States, 646 A.2d 993 (D.C. Ct. App. 1994), the Court held that defendants, who were licensed to carry a gun in Virginia, and who inadvertently carried a gun on a Washington subway into Washington, D.C. while on a trip to the Washington Zoo, were not, as a matter of law, reasonably relying on advice given to them by the station manager at a subway stop that they could carry a gun in Washington, D.C. because he had no authority, real or apparent, to give advice on firearms law. While one might suggest that the Bsharahs leave Washington and return to Virginia, or leave the subway station and go to the nearest police station, a jury might find their reliance on the subway official at least minimally reasonable under the circumstances, a possibility precluded by the court.

legal question. And it is certainly unlikely that a non-lawyer would think to ask whether the person to whom she is talking (probably the person to whom she has been directed), even if possessing the knowledge, possesses the necessary position in the hierarchy.[106]

Still another problem with the Model Penal Code's language arises: The Code requires that the interpretation, besides being given by the "right person" must be an "official interpretation" of the relevant law. But "official interpretation" is never defined. Is the "official (oral) word" from a "Deputy Assistant" sufficient, or must the interpretation be in a writing, signed by (at least) *the* prosecutor, governor, supervisor, etc.?[107] I would suggest that *any* honest reliance by a citizen on the word of any governmental official (assuming no collusion, etc.) should be sufficient to meet the duty suggested by von-Hirsch, Husak and Ashworth. I have no reason to think that they would disagree, but surely one of the problems with relying on "reasonableness" is defining the term.[108]

Another case decided under the Code, however, gives further pause. In *Linder v. State*,[109] the defendant bounty hunter obtained verbal authorization from the Deputy County Attorney to arrest a bail jumper, although the warrant did not expressly specify the defendant as having that power. The court held that whether the reliance was reasonable or not, it was precluded as a defense because the authorization was not in writing.[110] If a "defense" of

106. One problem in *Haggren* is that it is not clear that the defendant gave the official all the facts. But this will be a constant problem in such situations, unless the official is ingenious enough to smoke out all the facts that the citizen simply does not think relevant (or wishes to hide).

107. At least one court, however, has been willing to extend the estoppel principle to include federally licensed firearms dealers. See United States v. Tallmadge, 829 F.2d 767 (9th Cir. 1987); cf. United States v. Austin, 915 F.2d 363 (8th Cir. 1990), cert. denied, 499 U.S. 977 (1991). See generally Billimack, supra note 49.

108. See Peter S. Cremer, The Ironies of Law Reform: A History of Reliance On Officials as a Defense in American Criminal Law, 14 Cal. W. L. Rev. 48 (1978).

109. 734 S.W. 2d 168 (Tex. Ct. App. 1987).

110. Statutes which adopt some version of the Code, sometimes require the advice to be in writing. See, e.g. I.R.C. § 6040(f) (1991) (permitting IRS tax

mistake of law, consistent with *Ratzlaff* and *Cheek*, required that the defendant violate a *known* legal duty, *Linder* would come out the other way.

Of course, knowledge is not the only mental state, other than negligence, which might be employed as a predicate for liability in these situations. The obvious alternate candidate is recklessness, which combines a subjective requirement of *some* awareness on the part of the defendant with a more malleable measure of risk and damage. The Code, after all, uses recklessness as the "default provision," and it could certainly be argued that *proof* of knowledge of the law might be too high a hurdle. Indeed, it can certainly be argued that in many, if not all, of the "leading cases," the defendant, even if not knowledgeable about the law, was subjectively aware that there was a risk, even a substantial risk, that his course of action was dubious.

Take, for example, *Horning v. District of Columbia*.[111] Defendant, who had previously conducted loan sharking operations in the District of Columbia, moved the site of his office to just over the Key bridge, in Alexandria, Virginia, in order to avoid the impact of a newly passed usury law in the District. But he maintained a storefront in the District, and provided transportation from that storefront to his

abatement only if advice was furnished in writing); Colo. Rev. Stat. § 18-1-504 (1992) (requiring a written interpretation); N.J. Stat. Ann. § 626:3 (1991 & Supp. 1992) (same); Utah Code Ann. § 76-2-304 (1992) (same). A similar result was reached in State v. DeCastro, 913 P.2d 558 (Haw. Ct. App. 1996). Defendant observed a police cruiser driving in what he considered to be an erratic manner, chasing a speeder. When the speeder crashed and the cruiser pulled up behind, the defendant pulled up behind both cars, at which point (defendant alleged), the officer threatened defendant with bodily harm. Defendant then called 911 and asked for guidance as to whether he could leave the scene and file a complaint. The operator (apparently somewhat confused), told defendant he could drive back to his office and make a complaint from there. Defendant proceeded to leave, the officer chased him, and he was charged with leaving the scene of an accident. The court held: (1) the operator was not a person charged by law with interpreting the law; and (2) her advice was not in writing. Again the question—how would a reasonable person know whether he could rely or not? The transcript of the tape, published in the opinion, certainly makes it plain that defendant was striving to assure that he had the right to leave, and that he would not be arrested if he did.

111. 254 U.S. 135 (1920).

Virginia office. When he was nevertheless convicted of violating the D.C. Code, which the trial court deemed applicable to him, the United States Supreme Court in a stinging opinion by Justice Holmes, stressed the fast and loose way in which Horning sought to avoid the law:

> It may be assumed that he intended not to break the law but only to get as near to the line as he could, which he has a right to do, but if the conduct described crossed the line, the fact that he desired to keep within it will not help him.[112]

To say that Horning was at least reckless, if not willfully blind to the potential illegality of his acts, is an understatement.

A reassessment of *State v. Hopkins* (discussed earlier)[113] might lead to the same conclusion. Elkton, Maryland is the northernmost city in Maryland as one moves south from New York City. New York, New Jersey, Pennsylvania, and Delaware all placed significant limits—waiting times, blood tests, etc.—on marriage; Maryland was more indulgent of passion's fleeting moments. The state therefore became the haven for eloping couples whose hormones did not gladly tolerate delay. And since Elkton was the first city such romantics would encounter in Maryland, the term "quickie marriage" became synonymous with Elkton. For me, at least, this information changes my image of Reverend Hopkins, from a sympathetic minister of God seeking to help those who seek true and eternal love to a highly commercialized purveyor of marriage certificates. If the latter is the real image, it is certainly conceivable that a jury (or an appellate court) could believe that Hopkins knew that his sign was "near the edge" of legality, and was seeking only a legal "cover" for his operation should it in fact run afoul of the law. In short, a jury or judge could find Hopkins reckless, even if he did not "know" that he was violating the

112. Id. at 137.

113. See supra note 102 and accompanying text.

law.[114]

We can find the same analysis in another case—one whose result is deplored by Husak[115]—*State v. Striggles*.[116] Striggles, who owned a restaurant in Des Moines, Iowa, was approached by manufacturers of a "gumball machine" who wanted to place the machine in his restaurant. They carried with them a notarized copy of a "declaration" of the Des Moines Municipal Court that the machine was not a "gambling device" within the meaning of a state statute which prohibited the placement of such devices in restaurants and other places. Apparently on the basis of this declaration, Striggles put the machine in his store. Lo and behold, he was prosecuted for having a "gambling device" in his store. By the time of the trial, the Iowa Supreme Court had definitively declared that the gumball machine used by Striggles *was* a "gambling device" within the meaning of the statute. Striggles then pleaded mistake of law—his reliance on the lower court declaration that the machine was *not* such a device. The trial court excluded evidence of the declaration, and of Striggles' reliance thereon, and he was convicted. In affirming his conviction, the Iowa Supreme Court declared that Striggles' reliance was unavailable, because a citizen could properly rely only on a decision of the state supreme court.

Husak quite properly castigates this rule[117]—surely lay people who rely on decisions of intermediate or even lower level courts should not have to know not only the meaning of the law, but the meaning and impact of judicial hierarchy. First year law students (at least) struggle with

114. On the other hand, a jury could almost as easily find that Hopkins was "willfully blind" to what the law required. The report of the case is frustratingly short on facts, which would be important here—e.g., (1) what was the *precise* wording of the statute involved, and (2) in what precise way did Hopkins' sign violate the statute? Imagine, for example, that the statute prohibited certain size or voltage, and that Hopkins' sign transgressed these lines. One is certainly less sympathetic almost immediately.

115. Husak, supra note 2; Douglas Husak, Philosophy of Criminal Law 56-58 (1987).

116. 210 N.W. 137 (Iowa 1926).

117. See Husak, supra note 115; Husak, supra note 2, at 106.

determining the meaning of a "binding" decision; laymen should not be in a worse position than first year law students.

As a remedy for this general ill, the Model Penal Code allows any "reasonable reliance" on the properly published opinion of *any* court of the jurisdiction. But state supreme courts have continued to restrict that view.[118]

But *Striggles* itself might be rightly decided, at least if one adopts either the von Hirsch-Husak culpable negligence approach, or Ashworth's tortious negligence test. Was Striggles himself non-culpable in his reliance on the court opinion? The Iowa Supreme Court opinion is unpleasantly vague on several points, but to a lawyer (at least) some ambiguities remain:

1. How did the "declaration" by the municipal court come about?

Several possibilities suggest themselves: (a) The trial court had reached this conclusion in an actual criminal case, and had written an opinion so declaring; (b) The manufacturers sought a declaratory judgment as to the meaning of the criminal statute itself; (c) The manufacturers sought a declaratory judgment as to the meaning of the phrase in a civil setting.

The first of these seems highly improbable—trial courts usually do not write opinions, much less advisory ones, particularly those interpreting state criminal statutes. Even assuming that the trial court calendar in 1920's Des Moines was not as crowded as a metropolitan calendar (then or now), such an opinion would be highly unusual. *If*, however, such an opinion *had* been written, that alone would have suggested that the case, and the

118. See, e.g., State v. V.F.W. Post No. 3722, 527 P.2d 1020 (Kan. 1974); State v. Groves, 644 P.2d 1013 (Kan. Ct. App.), rev'd on other grounds, 653 P.2d 457 (Kan. 1982). See also State v. Guice, 621 A.2d 553 (N.J. Super. Ct. 1993) (holding that because an earlier decision upon which defendant relied could be distinguished, his reliance was unreasonable); Haggren v. State, 829 P.2d 842 (Alaska Ct. App. 1992) (asserting that reliance on an unpublished decision of an intermediate court is per se unreasonable). For cases giving some weight to, and allowing reliance on, intermediate opinions, see United States v. Albertini, 830 F.2d 985 (9th Cir. 1987); Ostrosky v. State, 704 P.2d 786 (Alaska Ct. App. 1985).

issue, was controversial, a point which might lead a cautious (reasonably prudent?) person to walk softly.

It seems more likely that the decree was a result of an attempt to obtain a declaratory judgment, interpreting the term "gambling device." Again, it is *possible* that such a decree would occur in a "quasi-criminal" context. But as a general rule, courts are hesitant to issue declaratory judgments interpreting a criminal statute.[119] So it is probable, though obviously not certain, that the "decree" came about in a civil matter. If so, the prosecutor would not necessarily have been a party, and might not even have known about the proceeding, much less thought it worth while to contest the declaration.

There is, therefore, at least some question about the "authoritativeness" of the decree of the municipal court. Is it not likely that a jury could find that Striggles, a layman, knew about the risk that the decree was of dubious authority and therefore reckless in his reliance upon it? More to the point of the Husak-von Hirsch-Ashworth approach, could a jury find that Striggles either (a) should have known and therefore was "tortiously" negligent, or (b) *really* should have known and therefore was "criminally negligent" in relying on the decree? Either of these latter conclusions would require a finding that Striggles knew (or should have known) something about the hierarchical structure of the court system, and the manner in which such "decrees" would come about. As suggested above, this seems highly unlikely.

Surely the point is obvious—except in the clearest of cases (in which there is no need to inquire), a duty to inquire would be extraordinarily difficult to confine or define. It may be that *Striggles* involves such a situation. But these cases will be few and far between, and it is difficult even in *Striggles* to require him to ask the right questions about holding and dictum, the binding nature of caselaw, etc.

119. See Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); Raoul Berger, Estoppel Against the Government, 21 U. Chi. L. Rev. 680 (1954). See also Note, Applying Estoppel Principles in Criminal Cases, 78 Yale L.J. 1046 (1969).

But there is more to *Striggles* than this. There is at least one other question:

2. Why did the manufacturers of the machine obtain, and bring with them, a copy of the decree?

It is certainly curious that the manufacturers of the machine suddenly appeared with court decree in hand. There is some evidence, in fact, that they had approached Striggles at an earlier, pre-decree, point, and that he had indicated some uncertainty as to whether this machine was a "gambling device." If so, then this would explain this odd fact. But it would also suggest that Striggles, personally, was aware that there was a controversy over the legality of the machines. And indeed there is good evidence that the question regarding these exact gumball machines was indeed controversial—the decision that they constituted "gambling devices" was rendered in another Iowa Supreme Court opinion.[120] While it may boggle the mind that the Iowa Supreme Court had sufficient time to decide *two* cases involving this earth-shaking issue, it does suggest that there was some concern about this question. Could a (reasonably prudent or even non-reckless) person in Striggles' shoes have been unaware of this controversy? Or, more to the point, could a person who had earlier refused to accept such a machine "simply" rely on this decree? Or even more directly, could anyone not ask why there "had to be" a court declaration that this was not a gambling device? Does not the controversy itself raise some question as to Striggles' state of mind?[121] Was he, in fact, "willfully blind?"

There is, of course, a real danger here. This kind of question threatens to turn into a catch-22, which would argue that a defendant who seeks advice as to the legality of his conduct has demonstrated an awareness of the risk

120. See State v. Ellis, 206 N.W. 105 (Iowa 1925).

121. Again, this is all speculation, and it has nothing to do with the actual issue at stake in Striggles—whether he should have been allowed to introduce *evidence* of his reliance, and the reasonability of that reliance. On that point, the decision seems clearly wrong, and under any test requiring mens rea the evidence would be relevant.

that his conduct is illegal and therefore loses the claim of non-negligence, because one can never rely on "only" one response. For example, see *Staley v. State,*[122] where Staley was told by the Douglas County (Nebraska) deputy county attorney that his Iowa marriage to his cousin was invalid in Nebraska and that he was therefore fornicating with her and would be prosecuted if he continued to do so. Staley consulted three attorneys, each of whom told him the same thing, at which point he abandoned her. A year later, he married another woman; thereupon a (Nebraska) prosecutor indicted him for bigamy. The trial court rejected Staley's attempt to show reliance on the legal advice, a decision that was upheld by the Nebraska Supreme Court. *Staley* is bothersome on a number of points. For example, his mistake (and that of the four lawyers–his three private attorneys *and* the county prosecutor) was not one of criminal law, but one of constitutional law—whether Nebraska was required, as a matter of full faith and credit, to honor the Iowa marriage, which would have been illegal in Nebraska. Even if one accepts the notion that a defendant has an obligation to inquire about *criminal* law, it defies any sense of reality to require a layman to be an expert on constitutional law. As every legal academic knows, not even the Supreme Court can meet that standard.

The investigation is even more interesting, and amusing, if we imagine the inquiry which Staley must make. Assume Staley goes to a lawyer. The first question is what the lawyer tells Staley. He certainly cannot tell him that he is not married "at all," for if Staley returns to Iowa with his cousin, that state will surely recognize his marriage. Nevertheless, for the sake of completeness, let us assume the discussion goes something like this:

L: Mr. Staley, I have perused the cases, and the legal treatises, and I can tell you, with a confidence level of 80%, that so far as Nebraska is concerned you're not legally married to your cousin. The prosecutor is therefore

122. 131 N.W. 1028 (Neb. 1911).

correct—if you are being intimate with her, it is fornication.

S: But I don't understand. *Do you mean that the marriage was void ab initio—that the ceremony performed in Iowa was meaningless? Were we fornicating in Iowa?*

L: Not exactly. The marriage was valid in Iowa. If you had stayed in Iowa, you would have been legally married *there*.

S: So why isn't the marriage valid in Nebraska?

L: Because it is not clear whether the Full Faith and Credit Clause requires Nebraska to honor the marriage in Iowa.

S: What is the Full Faith and Credit Clause?

L: An obtuse section of the Constitution.

S: But why is it obtuse? Why can't you be sure?

L: Because neither the Nebraska Supreme Court nor the United States Supreme Court has interpreted that clause yet, at least as applied to these kinds of marriages.

S: So there's no way to tell what the Nebraska Supreme Court would decide?

L: That's right, I'm afraid.

S: But what about the United States Supreme Court?

L: There are only a few decisions, and nothing speaks directly to the validity of what we call "foreign state marriages." I'm just not sure.

S: So what if we had moved to another state instead of Nebraska?

L: That might be different: that state might have already decided that it would accept the validity of such marriages.

If Staley goes out shaking his head, can anyone blame him?

On the point of inquiry, however, one might infer, from the fact that Staley went to three different attorneys, that he was not subjectively satisfied by their advice. Therefore, the fact that he sought (further) advice was, alone, evidence that he foresaw a risk that the advice was wrong. But surely a layman who is advised by four different lawyers (the prosecutor and three private attorneys), and follows

that advice, does not foresee a "substantial" risk that the advice is wrong. Similarly, it would be harsh to argue that a layman knows, or should know, that four lawyers can all be wrong. There may be some instances where a layman's reliance on advice given by someone whom he views as authoritative is unreasonable (possibly as in Striggles), but the mere fact of inquiry should not be used as a device to conclude, or even argue, that he was negligent or reckless.

Finally, it should be noted that in this case the attorneys gave Staley opinions, which (at least assumedly) he did not want—that he could not continue to live with his cousin in Nebraska. After he got these several views, he did not merely wait until the prosecutor came calling—he acted in a way which he believed was required by the law: he left his "wife." It may be true, as the Nebraska Supreme Court said in its opinion, that Staley had other options available to him to determine the legitimacy of his marriage, but he may well have been unaware of those options. Moreover, even assuming their availability, and his knowledge, he would have been prudent to have left his cousin-wife while those procedures were underway. I have made Staley somewhat conversant with the law, but otherwise fairly dull. There is a plausible interpretation of Staley's facts that could make him reckless, at least. It is not at all clear, for example, why Staley went to Iowa to be married in the first place, but it is certainly possible that he knew at least the following legal "verities": (l) Nebraska disallowed such marriages; (2) Iowa allowed such marriages; (3) It was possible that Nebraska would recognize the validity of the Iowa marriage. Of course, it is the *third* point that is key here. *If* Staley went to Iowa to avoid the impact of Nebraska law, then he also knew that there was at least a chance that Nebraska would *not* recognize the validity of the Iowa marriage. This *might,* in some circles, be regarded as recklessness (although we would then have to inquire whether Staley knew not only that this was a "risk," but that this was a "substantial" risk).

Were any of the four defendants in the above Supreme

Court cases either reckless or negligent (at either level) with regard to the duty to inquire, or inquire further? Surely Ratzlaf was not—it would be farfetched to argue that, having been told that the *casino* had a duty to report, he either was, or should have been, put on alert that *he* had a similar duty. Casinos, after all, are known to be highly regulated by government: it would be foolish to require citizens who deal with institutions they know to be highly regulated to ask whether they, too, are under such a duty.

*Cheek* is a different case.[123] Surely, Cheek was aware that many courts in many cases, including several in which he was a party, had reached different conclusions than his. Even if he actually believed that he was "right," his reliance on the advice he "liked," and his persistence in following that advice, could easily be classified as unreasonable, and even reckless. A defendant in the position of the defendant in *X-Citement Video*[124] is, as the Supreme Court quite rightly observed, in an impossible dilemma: he knows that *any* video may be pornographic, just as any grocer knows that *any* bag of sugar may actually be cocaine. To require a duty of inquiry, in the absence of other facts that would put one on actual notice—a low price, a high price, a glassine envelope, etc.—would paralyze commerce. Reliance on others, absent any good reason not to so rely, must be deemed non-negligent, and surely non-reckless.

*Staples* is surely the most difficult case. And here it matters whether one accepts the majority's or the dissent's characterization of what it was that Staples *knew* he possessed. The majority viewed Staples as knowing only

123. Indeed, when Cheek was retried, and the jury was properly instructed that he could be acquitted if he actually believed the advice given, the jury promptly convicted. See supra note 52.

124. I word the analysis this way because, in fact, the defendant in the actual case *knew* that the film he distributed involved minors. His claim was solely one of constitutional law—the statute, as written, imposed strict liability, and therefore reached even someone who did not know. This legal position, in turn, was based exclusively on the Ninth Circuit's earlier opinion in *Thomas*. See United States v. Thomas, 893 F.2d 1066 (9th Cir.), cert denied, 498 U.S. 826 (1990).

that he possessed a "gun"—which, as "all" Americans know, are not usually regulated. It was therefore unreasonable to require him to inspect (inquire about) the facts of the "gun" more closely, to determine whether it had the characteristics that turned it into a "firearm," which could then become a "machine gun." The dissent, on the other hand, argued that Staples knew that he had a "firearm," many of which are regulated, and which he therefore should have known could easily be converted into a regulated firearm—a "machine gun."

## IV. PUNISHING THE NON INQUIRING (NEGLIGENT) ACTOR

However one resolves these four cases, or cases like them, questions of culpability and punishment remain. If, as these four cases hold, the defendant is guilty only when he *knows* what the facts (and the law) are, then he should be punished for violating the statute itself. But what should be done with the defendant who "fails" either the Husak-von Hirsch or the Ashworth tests of "negligence" or even the higher test of "recklessness"? Since a defendant who *knows* the facts and the law is more culpable than one who negligently or recklessly fails to inquire sufficiently, the negligent actor should be punished less.[125] But this eminently sensible view is at odds with the views of many jurisdictions on similar questions. Not uncommonly, a person who "loses" a defense because he has acted "unreasonably" is punished equally with the "intentional" actor. Thus, if the defendant reasonably, but erroneously, believes he must act in self defense, and kills Y, he is totally exonerated. But if the mistake is *unreasonable*, (i.e. if the defendant is negligent)[126] a number of states remove

125. See the discussion of the "equal culpability principle" in Husak & Callender, supra note 58.

126. See, e.g., Richard G. Singer & J.Q. LaFond, Criminal Law: Examples and Explanations 385 (1996). This wording, employed almost unthinkingly by the common law courts, obfuscates a very important distinction, which was lost by the common law during the nineteenth century. A person who is negligent is "unreasonable." But so too is one who is reckless. When the rules with regard to self defense changed dramatically during the middle of the nineteenth century,

the defense entirely and treat him as though he had known that Y was innocent.[127] This "all or nothing" view of defenses is wrong, and should be rejected. At the very least, it certainly should not be extended to this area of the law, assuming that the law is altered as suggested by Ashworth, von Hirsch and Husak. If a failure to inquire is to be punished at all, it surely should be punished less than a knowing violation of the law. The "duty to rescue" statutes point the way here.[128]

## V. CONCLUSION

A decade ago, the proposals by Ashworth, von Hirsch, and Husak would have been attractive as a mid-point between strict liability, in both mistakes of fact and law cases. But they may now have come too late—with the four decisions of the United States Supreme Court and with the increasing rejection of strict criminal liability in the states,[129] the utility (not to mention the normative problems) of a mid-point seems dubious. And the practical problems of implementing such a "duty of inquiry" coupled with a negligence predicate seem, if not insurmountable, then at least substantial. The proposal is worthy of much more discussion, and should not be readily rejected, for many reasons, not the least of which is the identity of its proponents. But at the moment, in the United States, the

courts held *any* unreasonable mistake as enough to vitiate a defense. See Richard Singer, The Resurgence of Mens Rea II: Honest But Unreasonable Mistake of Fact in Self Defense, 28 B.C.L. Rev. 459 (1987). Thus, a negligent actor was treated as equally culpable with both a reckless (and a knowing) one. Even if one might treat recklessness and knowledge equally, sanctioning the negligent as severely as the knowing seems clearly to violate any notion of proportionality.

127. See Singer, supra note 126.

128. See Fletcher, supra note 21 and accompanying text; see also supra note 28.

129. At this point, this statement must be accepted by the readers on faith. I am currently engaged in a long-term project investigating the current status of strict criminal liability in the United States. I make no representation that the project has covered, or will in fact be able to cover, *every* state and every aspect of the problem. But preliminary indications are that most states have rejected strict liability in large part, or in whole. See supra text accompanying note 61 (statutory rape).

proposal is less than fully attractive. The prospect of a requirement of a full mens rea applied to mistakes of both fact and law is on the horizon.