

## Ignorance or Mistake of Law--Will the Memory Ever Fade?: People v. Marrero

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# IGNORANCE OR MISTAKE OF LAW — WILL THE MEMORY EVER FADE?: *PEOPLE v. MARRERO*

The maxims *error juris*<sup>1</sup> or *ignorantia legis*,<sup>2</sup> which provided that mistake or ignorance of law was no defense to criminal prosecution, were enshrined under the common law to promote legal order and secure prompt and practical enforcement of the law.<sup>3</sup> In an effort to alleviate the unjust results which had ensued from the unyielding application of such maxims, courts and legislatures have accepted that one's ignorance or mistake of law is a defense if it negates a mental state required to establish a material element of the crime.<sup>4</sup> As our society has become increasingly complex and

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<sup>1</sup> The maxim *error juris non excusat* declares that mistake of law does not excuse. See Ryu & Silving, *Error Juris: A Comparative Study*, 24 U. CHI. L. REV. 421, 430-31 (1957).

<sup>2</sup> *Ignorantia legis non excusat*, sometimes expressed as *ignorantia juris neminem excusat*, declares that ignorance of the law excuses no one (*neminem excusat*) or simply does not excuse (*non excusat*). See Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 671 n.4 (1976).

<sup>3</sup> See J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 360 (2d ed. 1960). Legal scholars have provided various arguments defending the punishment of individuals who are ignorant or mistaken as to the law. See Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 646-51 (1941). Professor Hall argues that if society were to allow a defendant to successfully assert a mistake of law defense the premise of legal order itself would be contradicted. J. HALL, *supra*, at 361-68.

Oliver Wendell Holmes stated that even though the maxim of *error juris* would operate to convict a defendant who really did not know that he was breaking the law, the maxim should so operate because allowing such an excuse would encourage ignorance of the law. O.W. HOLMES, *THE COMMON LAW* 48 (1881). Holmes argued, "men [must] know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales." *Id.*

Professor Austin has asserted that "to investigate a man's knowledge or ignorance of the law in each case would hopelessly enmesh the courts in assessing virtually insoluble problems." J. AUSTIN, *LECTURES ON JURISPRUDENCE* 498-500 (1869). See also Hall & Seligman, *supra*, at 647 (questions raised by mistake of law defense even more complex than insanity defense).

Blackstone's *Commentaries* justified *ignorantia legis* as an effective deterrent to crime. 1 W. BLACKSTONE, *COMMENTARIES* \*45-46.

Professor Perkins has suggested that various arguments advanced in support of the maxim are dependent upon "matters of 'public policy' or 'public necessity.'" Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35, 40-41 (1939). Moreover, "[t]he welfare of society and the safety of the state have been felt to require this maxim 'in order practically to administer justice among men.'" *Id.*

<sup>4</sup> See W. LAFAYE & A. SCOTT, *CRIMINAL LAW* § 5.1, at 405 (2d ed. 1986). In crimes which

a growing number of strict liability and regulatory offenses have been created by legislation, the application of these maxims to such new offenses may lead to even more unjust results.<sup>5</sup> In response to this trend, legislatures have created a limited exception to the mistake of law doctrine when an individual relies on an official statement of the law.<sup>6</sup> New York's Penal Law, for example, has

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require specific criminal intent, courts or legislatures have provided that "any condition negating the existence of the required state of mind should result in an acquittal. Thus a mistake of law which has this effect may give [rise to] a defense." Hall & Seligman, *supra* note 3, at 641. Similarly, a special mental element required for some particular offenses may be other than intent, and mistake or ignorance of law may negate the existence of such an element. Perkins, *supra* note 3, at 47. *See, e.g.*, United States v. Murdock, 290 U.S. 389 (1933) (defendant who honestly believed he was not obligated to provide information could not be punished for "willfully" failing to provide information); United States v. Squires, 440 F.2d 859 (2d Cir. 1971) (defendant not guilty of making material false statement when ignorance negated "knowledge" necessary to establish material element); State v. Lazarus, 181 Iowa 625, 164 N.W. 1037 (1917) (defendant honestly mistaken as to existence of a fact who swore thereto was not guilty of "willfully and corruptly" swearing falsely); People v. Weiss, 276 N.Y. 384, 12 N.E.2d 514 (1938) (defendants had valid defense in good faith belief that they were acting within the law). However, in each case where a mistake or ignorance of law is a defense, the defendant "is saved from conviction [because] . . . one of the elements required for guilt has been disproved." Perkins, *supra* note 3, at 46. "Needless to say guilt would be established even in such a case if defendant's knowledge of law was conclusively presumed, but this is one of the recognized exceptions and the presumption is not conclusive at this point." *Id.*

<sup>5</sup> See Note, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392, 1392 (1986); Note, *Reliance on Apparent Authority as a Defense to Criminal Prosecution*, 77 COLUM. L. REV. 775, 784 (1977) [hereinafter Note, *Apparent Authority*]. There is a tension between the rule that ignorance or mistake of law does not excuse, and the idea that moral blameworthiness should precede punishment. Note, *Apparent Authority*, *supra*, at 784. At common law, these concepts were more congruent because criminal acts were recognized by the whole community as morally wrong (*malum in se*). *Id.* "Awareness of wrongdoing was inferred from the commission of the criminal act that also constituted a moral wrong . . . In modern times, the criminal law has been vastly extended to include conduct not previously deemed criminal (*malum prohibitum*)." *Id.* The classification of criminal acts based solely on moral standards has become increasingly difficult because of the growing number of mala prohibita offenses and "[t]he common law fiction that every man is presumed to know the law has become indefensible in fact or logic." *Id.* Thus, "where it is '[u]ndesirable to characterize as criminal an individual who has not demonstrated any degree of social dangerousness,' the modern trend has been to recognize mistake of law as a defense in limited instances." People v. Studifin, 132 Misc. 2d 326, 327-28, 504 N.Y.S.2d 608, 609-10 (Sup. Ct. Kings County 1986) (citation omitted). The court found the defendant not guilty of criminal possession of a handgun and possession of weapons with intent to sell because he believed, based on misleading official advice, he had complied with all applicable laws. *See id.*

<sup>6</sup> See MODEL PENAL CODE § 2.04 (Proposed Official Draft 1962). Section 2.04 provides in pertinent part that:

(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

. . . .

(b) he acts in reasonable reliance upon an official statement of the law, afterward

incorporated the aforementioned exception to the general rule of *error juris*.<sup>7</sup> In furtherance of this statutory reform, several jurisdictions have allowed a mistake of law defense based on a reasonable misinterpretation of a statute.<sup>8</sup> Recently, however, in *People v. Marrero*,<sup>9</sup> the New York Court of Appeals held that a mistake of

determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

*Id.*

A majority of jurisdictions, following the Model Penal Code's example, have codified a mistake of law defense when premised upon reliance on official statements of law. See MODEL PENAL CODE § 2.04 comment 3, at 274-80 (Official Draft and Revised Comments 1985).

<sup>7</sup> See N.Y. PENAL LAW § 15.20 (McKinney 1987). Section 15.20 provides in pertinent part:

1. A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief of fact, unless:

(a) Such factual mistake negatives the culpable mental state required for the commission of an offense; . . .

2. A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless such mistaken belief is founded upon an official statement of the law contained in (a) a statute or other enactment, or (b) an administrative order or grant of permission, or (c) a judicial decision of a state or federal court, or (d) an interpretation of the statute or law relating to the offense, officially made or issued by a public servant, agency or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law.

*Id.*

The above exceptions "illustrate the principle that ordinarily, citizens may not be punished for actions undertaken in good-faith reliance on authoritative assurance that punishment will not attach; a citizen cannot be convicted for exercising a privilege the state had clearly told him was available." 31 N.Y. JUR. 2D *Criminal Law* § 168, at 308 (1983); see also *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (no conviction under vague law); *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964) ("criminal statute must give fair warning of the conduct that it makes a crime"); *Lambert v. California*, 355 U.S. 225 (1957) (no conviction where notice that the conduct was illegal was highly unlikely).

<sup>8</sup> See Perkins, *supra* note 3, at 45. An exception to the maxim *error juris* has been recognized in the case of a bona fide reliance on or misinterpretation of an obscure or ambiguous statute not clarified by judicial decision. *Id.* at 51.

Another exception exists when the applicable law is vague or unclear so as to cause the defendant to make a good faith mistake, because in those cases "a person's conduct can only be based on guesswork or uncertainty." *United States v. Cianciulli*, 482 F. Supp. 585, 622 (E.D. Pa. 1979). If a defendant believes his act to be lawful and has a reasonable ground for his belief because the law is obscure and unascertainable, "the rule that no mistake of law excuses one from committing an offense cannot be applied." *Burns v. State*, 123 Tex. Crim. 611, 611-12, 61 S.W.2d 512, 512-13 (1933).

<sup>9</sup> 69 N.Y.2d 382, 507 N.E.2d 1068, 515 N.Y.S.2d 212 (1987).

law defense would be recognized only if it is determined that there was a mistake in the law itself or where specific intent is an element of the offense.<sup>10</sup>

In *Marrero*, a federal corrections officer in Danbury, Connecticut,<sup>11</sup> was arrested in a Manhattan social club for possession of a loaded .38 caliber automatic pistol,<sup>12</sup> and charged with criminal possession of a weapon in the third degree.<sup>13</sup> At the time of his arrest, the defendant claimed he mistakenly believed that he was entitled to such possession by virtue of his status as a federal corrections officer.<sup>14</sup> Given the interplay of New York Criminal Procedure Law sections 2.10<sup>15</sup> and 1.20,<sup>16</sup> and New York Penal Law section 265.20,<sup>17</sup> *Marrero* believed that, as a "peace officer," he had the right to carry a handgun without a permit.<sup>18</sup>

The Supreme Court, New York County, held that the defendant, given his status as a federal corrections officer, was a "peace officer" within the meaning of Criminal Procedure Law sections 1.20 and 2.10, and as such, was exempt from prosecution for possession of a weapon in the third degree under section 265.02 of the

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<sup>10</sup> *Id.* at 391, 507 N.E.2d at 1072, 515 N.Y.S.2d at 216.

<sup>11</sup> *Id.* at 385, 507 N.E.2d at 1069, 515 N.Y.S.2d at 213.

<sup>12</sup> *Id.* at 384, 507 N.E.2d at 1068, 515 N.Y.S.2d at 212.

<sup>13</sup> *See id.* at 396, 507 N.E.2d at 1076, 515 N.Y.S.2d at 220; N.Y. PENAL LAW § 265.02 (McKinney 1980). Section 265.02 of the Penal Law provides in pertinent part that "[a] person is guilty of criminal possession of a weapon in the third degree when: . . . (4) He possesses any loaded firearm." *Id.*

However, criminal possession has been construed to require possession which is both knowing and voluntary. *See People v. Persce*, 204 N.Y. 397, 402, 97 N.E. 877, 878 (1912); *People v. Cohen*, 57 App. Div. 2d 790, 791, 394 N.Y.S.2d 683, 684 (1st Dep't 1977).

<sup>14</sup> *Marrero*, 69 N.Y.2d at 384, 507 N.E.2d at 1068, 515 N.Y.S.2d at 212.

<sup>15</sup> N.Y. CRIM. PROC. LAW § 2.10 (McKinney 1980). Section 2.10 provides in pertinent part:

Notwithstanding the provisions of any general, special or local law or charter to the contrary, only the following persons shall have the powers of, and shall be peace officers: . . .

25. Officials, as designated by the commissioner of the department of correctional services pursuant to rules of the department, and correctional officers of any state correctional facility or of any penal correctional institution.

*Id.*

<sup>16</sup> *Id.* § 1.20. Section 1.20 of the Criminal Procedure Law provides in pertinent part that "peace officer means a person listed in section 2.10 of this chapter." *Id.*

<sup>17</sup> N.Y. PENAL LAW § 265.20 (McKinney Supp. 1988). Section 265.20 of the Penal Law provides in pertinent part that "[section] . . . 265.02 shall not apply to: (1) Possession of any of the weapons, instruments, appliances or substances specified in [section] . . . 265.02 . . . by the following: . . . (c) Peace officers as defined by Section 2.10 of the criminal procedure law. . . ." *Id.*

<sup>18</sup> *Marrero*, 69 N.Y.2d at 384, 507 N.E.2d at 1068, 515 N.Y.S.2d at 212.

Penal Law.<sup>19</sup> A divided appellate division reversed the trial court's decision and reinstated the indictment, holding that the defendant was not exempt from prosecution because the legislative intent of the exemption in Penal Law section 265.20 was to limit its application to New York officers and federal officers only when possession of a weapon was duty-related or authorized by federal law, regulation or order.<sup>20</sup>

The trial court rejected the defendant's assertion that personal misunderstanding of the statutory definition of a "peace officer" was sufficient to exempt him from criminal liability under New York's mistake of law statute.<sup>21</sup> The court's refusal to instruct the jury on a mistake of law defense resulted in the defendant's conviction.<sup>22</sup> The appellate division upheld the conviction.<sup>23</sup> The court of appeals affirmed and held that the defense of mistake of law was not available to the defendant based on his personal misunderstanding of the statutory definition of "peace officer."<sup>24</sup>

Writing for the court, Judge Bellacosa stated that the New

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<sup>19</sup> See *People v. Marrero*, 94 Misc. 2d 367, 368, 404 N.Y.S.2d 832, 833 (Sup. Ct. N.Y. County 1978), *rev'd*, 71 App. Div. 2d 346, 422 N.Y.S.2d 384 (1st Dep't 1979), *aff'd*, 69 N.Y.2d 382, 507 N.E.2d 1068, 515 N.Y.S.2d 212 (1987). The trial court determined that the language of the Criminal Procedure Law which provided that, "[a]n attendant, or an official, or guard of any state prison or of any penal correctional institution . . . [was] . . . ambiguously drawn" and it was "not inclined to choose an interpretation that will operate to the detriment of the defendant." *Id.* Thus, the court hermeneutically determined the statute to include persons who work for any penal correctional facility, not merely one under state jurisdiction. *Id.*

<sup>20</sup> See *Marrero*, 71 App. Div. 2d at 346-50, 422 N.Y.S.2d at 384-87. To interpret "peace officer" the appellate division relied on principles of statutory construction and interpretation which require that "all parts of a statute must be harmonized with each other as well as the general intent of the whole statute." *Id.* at 348, 422 N.Y.S.2d at 386 (quoting N.Y. STATUTES 98(a) (McKinney 1980)). The court determined that the first two exemption clauses under Penal Law section 265.20 dealt with two different categories of employees: clause (a) dealt only with those of New York State, and clause (b) dealt only with those in federal service. See *Marrero*, 71 App. Div. 2d at 347, 422 N.Y.S.2d at 386. Since the defendant was in the latter category, he would have the legal right to carry a weapon in New York State only if it was duty related or duly authorized by federal law, regulation or order. *Id.* at 350, 422 N.Y.S.2d at 387. The court reasoned that the defendant could not be deemed a "peace officer" under clause (a) because the legislature had enacted a specific subsection which was applicable to the defendant. *Id.*

The defendant allowed an appeal from the Appellate Division to lapse and be dismissed, and thus review of that aspect of the case was precluded. See *Marrero*, 69 N.Y.2d at 384, 507 N.E.2d at 1068, 515 N.Y.S.2d at 212.

<sup>21</sup> See *id.* at 384-85, 507 N.E.2d at 1068, 515 N.Y.S.2d at 212.

<sup>22</sup> See *id.* at 385, 507 N.E.2d at 1069, 515 N.Y.S.2d at 213.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

York mistake statute was an outgrowth of the dogmatic common-law maxim that ignorance of the law is no excuse.<sup>25</sup> In interpreting the New York mistake statute, the court reasoned that the influence of the Model Penal Code<sup>26</sup> and the policies underlying the common-law doctrine were determinative.<sup>27</sup> The court concluded that the mistake of law defense was intended as a very narrow exception to the general rule that mistake of law is no defense.<sup>28</sup> Consequently, its application is restricted to situations where either the mistaken belief negates a specific intent required by a particular crime,<sup>29</sup> or where there is a mistake in the law upon which a

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<sup>25</sup> *Id.* When the provision was first proposed, one commentator viewed the new language as "codify[ing] the established common-law maxim on mistake of law, while at the same time recognizing a defense when the erroneous belief is founded upon an 'official statement of the law.'" Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469, 1486 (1964).

<sup>26</sup> §§c<sup>26</sup> *Marrero*, 69 N.Y.2d at 388, 507 N.E.2d at 1070-71, 515 N.Y.S.2d at 214-15. The court of appeals adopted the prosecution's argument that the New York statute on mistake or ignorance of the law is analogous to the approach taken by the Model Penal Code, even though New York did not adopt the precise language of the Model Penal Code. *See id.* at 389, 507 N.E.2d at 1071, 515 N.Y.S.2d at 215. The defense, under the Model Penal Code, would be available when reliance was based upon "an official statement of the law, afterward determined to be invalid or erroneous." *Id.* at 388, 507 N.E.2d at 1070, 515 N.Y.S.2d at 214 (quoting MODEL PENAL CODE § 2.04 (Proposed Official Draft 1962)) (emphasis omitted). However, the court found that the legislature intended the New York statute to be similarly construed, as the legislative history of Penal Law section 15.20 was "replete with references to the influence of the Model Penal Code provision." *Id.* (citation omitted).

Furthermore, the court found it significant that "no one for over 20 years of this statute's existence has made a point of arguing or noting or holding that the difference in wording has the broad and dramatically sweeping interpretation which is now proposed[]" by the defendant: that a mistaken belief founded upon an official statement of law is a defense under Penal Law section 15.20. *Id.* at 388, 507 N.E.2d at 1070-71, 515 N.Y.S.2d at 214-15.

<sup>27</sup> *Id.* at 386, 507 N.E.2d at 1069, 515 N.Y.S.2d at 213. The policy reasons which the court cited in support of the maxim were: (1) that law makers want to "encourage the societal benefit of individuals' knowledge of and respect for the law"; (2) to encourage the public to read and rely on official statements of the law; and (3) not to have individuals conveniently question the validity and interpretation of the law and act on that basis. *Id.* at 386, 391-92, 507 N.E.2d at 1069, 1073, 515 N.Y.S.2d at 213, 217.

<sup>28</sup> *See id.* at 387, 507 N.E.2d at 1070, 515 N.Y.S.2d at 214. The court stated that the application of the mistake of law defense to the facts in *Marrero* would make the defense generally available—such a result was not intended by the legislature. *See id.*

<sup>29</sup> *See id.* at 391, 507 N.E.2d at 1072, 515 N.Y.S.2d at 216. The court cited *Gardner v. People*, 62 N.Y. 299 (1875), and *People v. Weiss*, 276 N.Y. 384, 12 N.E.2d 514 (1938), to illustrate the restricted application of the doctrine at common law. *See Marrero*, 69 N.Y.2d at 385-86, 507 N.E.2d at 1069, 515 N.Y.S.2d at 213.

In *Gardner*, the court held that the defendant's misinterpretation of a *mala prohibita* law, which related to the removal of election officers, did not constitute a defense. *Gardner*, 62 N.Y. at 305. The court added that "[t]he defendants made a mistake of law. Such mistakes do not excuse the commission of prohibited acts. 'The rule on the subject appears to be, that in acts *mala in se*, the intent governs, but in those *mala prohibita*, the only inquiry

defendant relies and the law is later determined to be invalid.<sup>30</sup> The court stated that this decision would advance the strong public policy reasons at the foundation of the legislature's intentions as to the mistake of law defense.<sup>31</sup>

Writing for the dissent, Judge Hancock argued that the majority's refusal to predicate a mistake of law defense on a reasonable misinterpretation of a statute violated the plain meaning of the mistake statute,<sup>32</sup> as well as the basic precepts of the criminal justice system.<sup>33</sup> The dissent further proposed that in order to uphold

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is, has the law been violated?" *Id.* at 304 (citation omitted).

In *Weiss*, the court held that the defendant, who was charged with kidnapping, was entitled to a mistake of law defense because he acted with the honest belief that seizing and confining the child was done with "authority of law," thereby negating the necessary element of the crime of kidnapping, namely, intent, without authority of law, to confine or imprison another. *Weiss*, 276 N.Y. at 388, 12 N.E.2d at 515.

Judge Bellacosa analogized *Marrero* to *Gardner* in that "the weapons possession statute violated by this defendant imposes liability irrespective of one's intent." *Marrero*, 69 N.Y.2d at 386, 507 N.E.2d at 1069, 515 N.Y.S.2d at 213.

<sup>30</sup> *Id.* at 390, 507 N.E.2d at 1072, 515 N.Y.S.2d at 215. The court determined that "mistake of law is a viable exemption in those instances where an individual demonstrates an effort to learn what the law is, relies on the validity of that law and, later, it is determined that there was a mistake in the law itself." *Id.* (emphasis omitted). In contrast, *Marrero*'s mistake of law defense, founded upon his mistaken belief that the "peace officer" exemption was applicable to him, was vitiated because the mistake was not a situation where the government "ha[d] affirmatively, albeit unintentionally, misled an individual as to what may or may not be legally permissible conduct." *Id.* at 390, 507 N.E.2d at 1072, 515 N.Y.S.2d at 216.

<sup>31</sup> *Id.* at 391, 507 N.E.2d at 1073, 515 N.Y.S.2d at 217. The court reasoned that acceptance of the defendant's argument as to a reasonable mistake or misinterpretation of the law being a defense would allow the exception to "swallow the rule." *Id.* Such a determination by the court would: encourage mistakes about the law; result in a flood of mistake of law defenses in criminal prosecutions; and create "opportunities for wrong-minded individuals to contrive in bad faith solely to get an exculpatory notion before the jury." *Id.*

<sup>32</sup> *Id.* at 392, 507 N.E.2d at 1073, 515 N.Y.S.2d at 217 (Hancock, J., dissenting). The dissent asserted that the majority's construction of Penal Law section 15.20(2)(a) ignored the plain meaning of the statute. *Id.* at 396, 507 N.E.2d at 1075, 515 N.Y.S.2d at 219 (Hancock, J., dissenting). Further, the dissent contended that the language of the mistake statute should have been read in a manner which would have provided that if the defendant entertained an honest, mistaken belief based on his interpretation of "an official statement of the law" codified in a statute, then he would have been afforded the defense of mistake of law. *Id.* (Hancock, J., dissenting).

Judge Hancock concluded that the majority's construction was anomalous since it led to the position that a mistake of law defense is available only to those who correctly read and interpret a statute. *Id.* at 398, 507 N.E.2d at 1077, 515 N.Y.S.2d at 221 (Hancock, J., dissenting).

<sup>33</sup> *See id.* at 392-95, 507 N.E.2d at 1073-75, 515 N.Y.S.2d at 217-19 (Hancock, J., dissenting). The dissent asserted that "it is simply wrong to punish someone who, in good faith reliance on the wording of a statute, believed that what he was doing was lawful." *Id.* at 394, 507 N.E.2d at 1074, 515 N.Y.S.2d at 218 (Hancock, J., dissenting). Judge Hancock stated



the legislative purpose of reforming the common law rule, *ignorantia legis*, an interpretation which promoted a mistake of law defense was necessary.<sup>34</sup> Moreover, the dissent maintained that the policy reasons relied upon by the court in rejecting the mistake of law defense were not justified.<sup>35</sup> Thus, a limited mistake of law defense should have been available to the defendant based on his erroneous but reasonable belief that the statute did not proscribe his conduct.<sup>36</sup>

Assuming *arguendo* that the majority was correct in concluding that New York's mistake statute should be narrowly construed, it is submitted that the court incorrectly failed to recognize existing common-law theories that could have been applied to provide for a common-law mistake of law defense under circumstances such as those evidenced in *Marrero*. This Comment will suggest an alternative rationale that could have been employed by the court to permit a mistake of law defense without advancing an unrestrained and uncontrollable use thereof, and would have resulted in the furtherance of substantial justice by strengthening the crucial link between blameworthiness and criminal liability.

#### PROPRIETY OF EXPANDING MISTAKE OF LAW DOCTRINE BEYOND LIMITS EXPRESSLY AUTHORIZED BY STATUTE

Although courts generally will avoid creating exceptions to statutory provisions that are not embodied in the statute itself,<sup>37</sup>

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that the majority's conclusion is "contrary to 'the notion that punishment should be conditioned on a showing of subjective moral blameworthiness.'" *Id.* (Hancock, J., dissenting) (quoting Note, *Apparent Authority*, *supra* note 5, at 784).

<sup>34</sup> See *Marrero*, 69 N.Y.2d at 399, 507 N.E.2d at 1077, 515 N.Y.S.2d at 221 (Hancock, J., dissenting).

<sup>35</sup> *Id.* at 403-04, 507 N.E.2d at 1080, 515 N.Y.S.2d at 224 (Hancock, J., dissenting). Judge Hancock argued that "[i]t is no answer to protest that the defense may become a 'false and diversionary stratagem[.]' or that 'wrongminded individuals [could] contrive [an] infinite number of mistake of law defenses'; for it is the very business of the courts to separate the true claims from the false." *Id.* (Hancock, J., dissenting).

<sup>36</sup> *Id.* at 398-99, 507 N.E.2d at 1077, 515 N.Y.S.2d at 221 (Hancock, J., dissenting). Judge Hancock contended that the defendant's reasonable but mistaken belief that he was a "peace officer" as defined by the Criminal Procedure Law was an example of the scenario under which a mistake of law defense should apply under Penal Law section 15.20(2)(a). *Id.* (Hancock, J., dissenting).

<sup>37</sup> See *Mack v. Mendels*, 249 N.Y. 356, 359, 164 N.E. 248, 249 (1928); see also *Taylor v. New York Cent. R.R. Co.*, 294 N.Y. 397, 402, 62 N.E.2d 777, 779 (1945) (court cannot imply exception not provided for in statute), *cert. denied*, 326 U.S. 786 (1946); *In re Moore's Estate*, 178 Misc. 1010, 1012, 36 N.Y.S.2d 940, 942 (Sur. Ct. Erie County 1942) (when statute employs general language, court may not infer exclusion).

they have acknowledged that in an appropriate case an implied exception may be recognized to avoid an unreasonable or absurd result.<sup>38</sup> Such exceptions have been implied by the judiciary to effectuate legislative intent when it is apparent that application of the plain language of the statute would be unjust.<sup>39</sup>

It is submitted that, in view of the severity of the punishment to which the defendant could have been subject upon conviction,<sup>40</sup> and the difficulty he had in ascertaining his status as a "peace officer" because of the ambiguity of the exemption statute,<sup>41</sup> the *Marrero* court could have employed a common-law exception to Penal Law section 265.02 based on a reasonable misinterpretation of Criminal Procedure Law section 2.10 without usurping legislative authority.

#### APPLICATION OF COMMON-LAW THEORIES TO *Marrero*

##### *Mistake of Law as to a Collateral Matter*

Although a mistake of law as to the criminal offense commit-

<sup>38</sup> See *American Dock Co. v. City of New York*, 174 Misc. 813, 819, 21 N.Y.S.2d 943, 952 (Sup. Ct. N.Y. County 1940), *aff'd*, 261 App. Div. 1063, 26 N.Y.S.2d 704 (1st Dep't), *aff'd*, 286 N.Y. 658, 36 N.E.2d 696 (1941).

<sup>39</sup> See *In re Burns*, 1 Misc. 2d 491, 494-95, 148 N.Y.S.2d 419, 421 (Sup. Ct. Sullivan County 1955). When interpreting statutes, courts have presumed that "no unjust or unreasonable result was intended by the Legislature" thus to abide by the intention of the legislature, "language general in expression may be subjected to exceptions through implication." *In re Meyer*, 209 N.Y. 386, 389-90, 103 N.E. 713, 714 (1913).

The Supreme Court similarly has held that statutes "should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character." *United States v. Kirby*, 74 U.S. 482, 486-87 (1869).

<sup>40</sup> Under section 265.02 of the Penal Law, criminal possession of a weapon in the third degree is a class D felony, N.Y. PENAL LAW § 265.02 (McKinney 1980 & Supp. 1988), with a maximum sentence of seven years. *Id.* § 70(d) (McKinney 1987). "[T]he infamy . . . of a felony, . . . is ' . . . as bad a word as you can give to man or thing.'" *Morissette v. United States*, 342 U.S. 246, 260 (1952) (quoting 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 465 (1895)).

<sup>41</sup> See *People v. Marrero*, 69 N.Y.2d 382, 397, 507 N.E.2d 1068, 1076, 515 N.Y.S.2d 212, 220 (1987) (Hancock, J., dissenting). *Marrero* mistakenly believed that he could carry a weapon in New York based on the express exemption for peace officers as defined by Criminal Procedure Law section 2.10(25) as a correction officer "of any penal correctional institution." *Id.* (Hancock, J., dissenting) (emphasis in original). The defendant could not foresee that the court would eventually resolve the question of his status against him. *Id.* (Hancock, J., dissenting). It should be noted that defendant's good faith belief that his employment as a correctional officer at a Connecticut correctional facility qualified him under the statute, was shared by the trial court, which dismissed the indictment, and by two judges on the five-member panel of the Appellate Division. *Id.* (Hancock, J., dissenting).

ted is not recognized as a defense,<sup>42</sup> many courts and commentators have espoused the view that mistake of law as to a collateral matter, such as legal status, is a defense to a criminal prosecution when it negates the culpable mental state required for the commission of a particular crime.<sup>43</sup> Where such a mental state is not expressly stated in the statute, the court, to avoid injustice, may read a requirement of fault, such as general criminal intent,<sup>44</sup> into a strict liability offense.<sup>45</sup> The applicable statutes in *Marrero*, when read successively, provide that a defendant is guilty of criminal possession of a weapon in the third degree when he possesses a weapon without a permit unless the defendant is a "peace officer."<sup>46</sup> Given such a reading, it is submitted that there is an implied condition for criminal liability to appropriately result: the defendant must not reasonably believe that he is a "peace officer" under the statute. Moreover, if the defendant reasonably believes that he is a "peace officer," he will not have the requisite general criminal intent that justice demands be implied into the statute.

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<sup>42</sup> See Hall & Seligman, *supra* note 3, at 644. There is no mistake of law defense if the defendant took "[an] umbrella he knew was owned by another but he could honestly say that he was unaware that such taking was proscribed by the criminal law." W. LAFAVE & A. SCOTT, *supra* note 4, § 5.1, at 407. Thus, in a "situation in which the defendant is unaware of the existence of a statute proscribing his conduct" there is no mistake of law defense. See *id.* at 406.

<sup>43</sup> See *id.* at 406-07 nn.3-9. A mistake of law defense is appropriate "where the defendant has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct." *Id.* at 406. See, e.g., *People v. Vogel*, 46 Cal. 2d 798, 804, 299 P.2d 850, 855-56 (1956) (bona fide, reasonable belief that spouse was free to remarry constituted valid defense to bigamy charges); *Long v. State*, 44 Del. 262, 277, 65 A.2d 489, 498 (1949) (defendant who honestly believed he was divorced allowed to proceed to jury on mistake of law defense as did not possess "general criminal intent" to commit bigamy).

<sup>44</sup> See *Long*, 44 Del. at 276, 65 A.2d at 496. See generally G. FLETCHER, *RETHINKING CRIMINAL LAW* 452-54 (1978) (discussing what state of mind proscribed conduct requires).

<sup>45</sup> See N.Y. PENAL LAW § 15.15(2) (McKinney 1980). Section 15.15(2) provides:

Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability.

*Id.*

The New Jersey Supreme Court interpreted a statute which provided that, "if any justice, etc. shall receive or take, by color of his office, any fee or reward . . . he shall be punished," to include a general corrupt intent when the defendant, a justice of the peace, innocently took money believing that he had a legal right to it. *Cutter v. State*, 36 N.J.L. 125, 126-27 (1873).

<sup>46</sup> See *supra* notes 13, 15-17 and accompanying text.

The defendant in *Marrero* was not mistaken as to the actual offense charged: he knew that it was illegal to carry a loaded weapon in New York unless he was a "peace officer" under the meaning of section 2.10 of the Criminal Procedure Law, but at the time of his arrest, he reasonably believed that he possessed the requisite status.<sup>47</sup> Thus, it is suggested that the collateral matter doctrine adequately supplies the doctrinal justification necessary to imply an exception to statutes such as Penal Law section 265.02, which do not require a particular mental state, when an individual entertains a good faith, erroneous belief that he is entitled to an exemption from criminal liability based upon his status.<sup>48</sup>

### *Innocent Possession*

To avoid injustice in criminal prosecutions, New York courts have used the doctrine of innocent possession, an implied excep-

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<sup>47</sup> See *supra* note 14 and accompanying text.

<sup>48</sup> See *United States v. Fierros*, 692 F.2d 1291, 1294 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983). When the defendant is ignorant or mistaken as to an independently determined legal status or condition that is an operative fact of the crime, a defense of mistake of law will be permitted although it is not specifically written into the criminal statute. *Id.* "In such a case, the mistake of the law is for practical purposes a mistake of fact." *Id.*

When a defendant "does an act under an erroneous idea of a situation reached by applying law to facts, if the act done would not be criminal provided the situation were as he believed it, [he] . . . should have a good defense." See Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 91 (1908).

In *Long v. State*, 44 Del. 262, 65 A.2d 489 (1949), the defendant, who remarried honestly believing that he was divorced, was charged with bigamy. *Id.* at 275, 65 A.2d at 495. The applicable statute provided that "[w]hoever, having contracted marriage, shall, in the lifetime of his or her husband or wife, marry with another person . . . shall be deemed guilty of bigamy. . . ." *Id.* at 276, 65 A.2d at 496. However, several exceptions were statutorily created to alleviate the harshness of this rule in certain circumstances. See *id.* In deciding whether the defendant's honest belief was a defense, the *Long* court considered the behavior defined by the statute as criminal, the exemptions expressly provided for as a defense thereto, and the serious nature of the punishment specified for the offense. See *id.* The court ultimately held that "the statute does not exclude as a defense the absence of general criminal intent; that is, the intent to do what would constitute a crime if the surrounding circumstances were such as a reasonable man in the defendant's position would likely believe them to be." *Id.*

It is submitted that the facts of *Marrero* are analogous to those in *Long* in that the codification of the offense lacked a culpable mental state, but carved out exemptions in certain circumstances. In addition, in each case the defendant asserted that he was entitled to act by virtue of his mistaken but good faith belief in his status. For the same reasons that motivated the Delaware Supreme Court to order a new trial for *Long*, it is suggested that the New York Court of Appeals should have likewise held that *Marrero's* mistake negated his "criminal mind" thereby exempting him from criminal liability.

tion to a charge under Penal Law section 265.02.<sup>49</sup> The doctrine provides that although criminal possession in the third degree does not require an intentional state of mind, when the accused's possession may be classified as innocent<sup>50</sup> the criminal act of possession is negated by the innocent nature of such possession.<sup>51</sup> It is suggested that in *Marrero*, the defendant's reasonable belief, based on the ambiguity inherent in the statute, that his conduct was not prohibited, did in fact create a case of possession by an innocent act.<sup>52</sup> This afforded the court a justifiable opportunity to broaden the already existing implied exception so as to encompass the defendant's innocent conduct.<sup>53</sup>

### *Due Process*

Due process has been defined as requiring the fundamental fairness essential to the very concept of justice as applied to each

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<sup>49</sup> See *People v. Almodovar*, 62 N.Y.2d 126, 464 N.E.2d 463, 476 N.Y.S.2d 95 (1984). The New York Court of Appeals has held that "[i]n some circumstances . . . a person may possess an unlicensed or proscribed weapon and still not be guilty of a crime because of the innocent nature of the possession. This defense of 'temporary and lawful' possession applies because as a matter of policy the conduct is not deemed criminal." *Id.* at 130, 464 N.E.2d at 465, 476 N.Y.S.2d at 97.

<sup>50</sup> See *People v. Gaines*, 75 App. Div. 2d 826, 826, 427 N.Y.S.2d 471, 472 (2d Dep't 1980); *People v. Trucchio*, 47 App. Div. 2d 934, 934, 367 N.Y.S.2d 76, 78 (2d Dep't 1975); see also *People v. LaPella*, 272 N.Y. 81, 83, 4 N.E.2d 943, 943 (1936) (defendant who finds weapon and is delivering it to police excused by innocent possession exception); *People v. Persce*, 204 N.Y. 397, 402, 97 N.E. 877, 878 (1912) (temporary and incidental possession resulting from performance of a lawful act, such as disarming a wrongful possessor, is innocent possession).

<sup>51</sup> See *Almodovar*, 62 N.Y.2d at 130, 464 N.E.2d at 465, 476 N.Y.S.2d at 97.

<sup>52</sup> See generally *People v. Vogel*, 46 Cal. 2d 798, 804, 299 P.2d 850, 855 (1956). "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense." *Id.* (quoting *Ex parte Ahart*, 172 Cal. 762, 764-65, 159 P. 160, 161-62 (1916)). Furthermore, the above exception applies where statutory offenses are concerned unless it is "excluded expressly or by necessary implication." *Id.*

<sup>53</sup> See *People v. Furey*, 13 App. Div. 2d 412, 217 N.Y.S.2d 189 (1st Dep't 1961). A strong line of cases construe the crime of criminal possession of a weapon as "accommodating many varieties of innocent possession." *Id.* at 415, 217 N.Y.S.2d at 192. See, e.g., *People v. Trucchio*, 47 App. Div. 2d 934, 934, 367 N.Y.S.2d 76, 78 (2d Dep't 1975) (holding gun for friend, unaware it was loaded, could be innocent possession if so found by jury); *People v. Harmon*, 7 App. Div. 2d 159, 159, 180 N.Y.S.2d 939, 940 (4th Dep't 1959) (jury might have found that defendant innocently possessed blackjack taken from aggressor during fight); cf. *People v. Williams*, 50 N.Y.2d 1043, 1045, 409 N.E.2d 1372, 1373, 431 N.Y.S.2d 698, 699 (1980) (finding gun and thereafter handling it in dangerous manner, thereby causing injury not innocent possession).

particular case.<sup>54</sup> Moreover, due process demands that criminal liability not be imposed when the accused cannot reasonably comprehend that the contemplated conduct is proscribed.<sup>55</sup> Generally, due process implications arise when a penal statute is so ambiguous that it forces one to guess as to the meaning intended by the legislature.<sup>56</sup> In recognition of such concerns, many courts and legal scholars believe that when an ambiguity in a statute creates a reasonable but mistaken belief in the mind of the defendant that his conduct is not proscribed by the criminal law, justice dictates that a mistake of law defense be available.<sup>57</sup>

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<sup>54</sup> See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960). The Supreme Court has stated that due process is concerned with "the denial of that 'fundamental fairness shocking to the universal sense of justice.'" *Id.* (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)). See also *People v. Leyra*, 302 N.Y. 353, 363, 98 N.E.2d 553, 559 (1951) (due process safeguards "[t]he essential fairness which is supposed to form the warp and woof of our fabric of justice"), *cert. denied*, 345 U.S. 918 (1953). Furthermore, "[d]ue process of law is not a rigid or static expression. It is a concept of what is fundamentally just . . . and the courts in determining whether the constitutional demands of due process have been met and satisfied in any particular case, must decide the question on the facts of that case." *People v. Colozzo*, 54 Misc. 2d 687, 691, 283 N.Y.S.2d 409, 415 (Sup. Ct. Kings County 1967), *aff'd*, 32 App. Div. 2d 927, 303 N.Y.S.2d 348 (2d Dep't 1969).

<sup>55</sup> See *People ex rel. Serra v. Warden, Rikers Island Men's House of Detention*, 90 Misc. 2d 654, 656, 395 N.Y.S.2d 602, 604 (Sup. Ct. Bronx County 1977).

<sup>56</sup> See *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). The Supreme Court has held that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Id.* See also *People v. Dioguardi*, 8 App. Div. 2d 426, 434, 188 N.Y.S.2d 84, 93 (1st Dep't 1959) (penal statute should not lend itself to double meaning), *rev'd on other grounds*, 8 N.Y.2d 260, 168 N.E.2d 683, 203 N.Y.S.2d 870 (1960).

<sup>57</sup> See *United States v. Barker*, 514 F.2d 208, 244 (D.C. Cir.) (MacKinnon, J., dissenting), *cert. denied*, 421 U.S. 1013 (1975); see also *United States v. Cianciulli*, 482 F. Supp. 585, 622 (E.D. Pa. 1979) (when applicable law is unclear and defendant has acted upon erroneous but reasonable interpretation, an exception will be made); *Burns v. State*, 123 Tex. Crim. 611, 611-12, 61 S.W.2d 512, 513 (1933) (if defendant reasonably believes his act to be lawful because law obscure and unascertainable, mistake of law defense available).

It has been argued that if a statute is unclear, ambiguous or not judicially determined, a citizen should not be penalized when his good faith mistaken belief results in the commission of an act which is later held to be illegal. *Perkins*, *supra* note 3, at 44-45. One commentator contends that a basic assumption implied in the mistake of law doctrine is that such claims are usually fraudulent. *Jeffries, Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 208-09 (1985). However, it is incumbent on the courts to separate those claims brought in good faith from those fraudulently offered. See *id.* at 209. Since notice of wrongdoing is an essential element of justice, a judicial system must allow a defense if, through an honest mistake of law, a citizen was not put on notice that his conduct was proscribed. See *id.*

Furthermore, if statutory language is unclear or ambiguous, then the state, being responsible for the lack of clarity, and not the individual, should bear the responsibility. See *Ryu & Silving*, *supra* note 1, at 438.

In *Marrero*, the statute upon which the defendant relied in good faith was inherently ambiguous,<sup>58</sup> and *Marrero* was thereby deprived of fair warning that his conduct was criminal.<sup>59</sup> It is proposed that this final operative theory was a fundamental basis upon which the *Marrero* court could have relied in determining that due process demands the availability of a mistake of law defense.<sup>60</sup>

### CONCLUSION

The New York Court of Appeals' decision in *People v. Marrero* establishes a precedent of strict adherence to the ancient rules of *ignorantia legis* and *error juris*, despite societal changes which have caused intricacies and complexities in the law which could not have been foreseen by rules meant to address a more simple society.<sup>61</sup> Such a narrow construction of New York's mistake statute without adopting an implied exception for a reasonable misin-

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<sup>58</sup> See *supra* notes 19-20. It is submitted that the language "any state correctional facility" as codified in Criminal Procedure Law section 2.10(25) is ambiguous in that it may suggest either any state facility in the United States or any New York State facility alone; the former being in harmony with the plain meaning of the statute.

<sup>59</sup> See *People v. Pagnotta*, 25 N.Y.2d 333, 253 N.E.2d 202, 305 N.Y.S.2d 484 (1969). The court stated that "a statute must be sufficiently definite to give a reasonable man subject to it notice of the nature of what is prohibited and what is required of him." *Id.* at 337, 253 N.E.2d at 205, 305 N.Y.S.2d at 488.

<sup>60</sup> See *Cass, supra* note 2, at 691-94. Justice requires that ignorance or mistake of the law should be a defense when the defendant's mistaken belief is not blameworthy. *Id.* at 692.

[T]he judge or jury in each case should ask whether the particular ignorance claimed by a defendant is in fact blameworthy. This determination should not present inordinate difficulties; the usual question . . . would be whether a reasonable, prudent member of the community of average intelligence would be aware of the violated law.

*Id.* at 693.

<sup>61</sup> See *People v. Studifin*, 132 Misc. 2d 326, 504 N.Y.S.2d 608 (Sup. Ct. Kings County 1986). In *Studifin*, Justice Broome stated:

Once life was simpler. Men lived and were governed by short catchy sayings: Possession is nine tenths of the law; all men are presumed to know the law; and its corollary—ignorance of the law is no excuse. Simple rules sufficed in a simpler time.

In an age that valued simplicity, strict adherence to principle made for a swift and uncomplicated system of criminal justice . . . [which], while justified in the interest of society, was often unnecessarily cruel . . . .

Today, we are said to be more sophisticated . . . . Our social order values the individual who has rights he can assert against the State, especially in situations where the very State that seeks to punish him misled him into a violation of law. *Id.* at 327, 504 N.Y.S.2d at 608.

terpretation of an ambiguously drawn statute will result in the punishment of those acting with an innocent mind, and as such, cannot but beget injustice.<sup>62</sup> The judiciary must, hereafter, place greater emphasis on the particular facts and circumstances giving rise to an ignorance or mistake of law defense, and recognize that exceptions must be integrated into such rules by balancing the policies that underlie the common law maxims against judicial interest in achieving justice for each individual. Thus, conformity to lifeless legal precepts would be avoided and the spirit of the law, which demands a departure from strict adherence to *ignorantia legis* and *error juris*, would be achieved.

*Athy Poulos-Mobilia*

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<sup>62</sup> See *Long v. State*, 44 Del. 262, 277, 65 A.2d 489, 498 (1949). To hold a person punishable as a criminal when he affirmatively shows an effort to abide by the law "tested by objective standards rather than the defendant's subjective state of mind . . . would be palpably unjust and arbitrary." *Id.*