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COMMENT ON ERROR JURIS

Jerome Hall

Error juris raises many puzzling problems, and Professor Arzt's excellent essay must increase the puzzlement especially among those who support the new rule that "abolished" the doctrine that *ignorantia legis neminem excusat*. For after a discussion of the great difficulties which led to the abandonment of that doctrine, Professor Arzt comes to some illuminating conclusions—that the new defense is very rarely used in cases of traditional crimes and that even in economic or public welfare offenses it is infrequently applied. He even reports that judges continue to distinguish law from fact. Accordingly, if one keeps an eye on what the courts are actually doing, one is impelled to ask, is the new law a merely verbal change? In any case one need not agree with everything Savigny taught to believe that not every change enacted into a code or statute is an improvement on the former law.

Two or three additional points must be made to clear the air for a dispassionate discussion of the issues. Have those who argue that *error juris* should be a defense faced up to the principal challenge, namely that raised in cases of the most serious crimes? Professor Arzt does refer to that issue but he does not explore the implications of the universal acceptance of the former doctrine. Usually writers on *error juris* discuss the question "in general" on the assumption that the issue is retention of the traditional doctrine or its *complete* abolition. Frequently it is also assumed that mistake of law is of the same order as mistake of fact; and there is apt to be either concentration on or final reliance on petty offenses and economic regulations to support the case against the traditional *error juris* doctrine.

A cogent discussion of this difficult problem, it is submitted, should begin with recognition of the great difference between major crimes and petty or technical offenses, and should make its case, if it can, with the major crimes. Such a discussion would, next, recognize that there is a very large consensus regarding petty offenses and economic regulations—that here indeed the traditional doctrine has been too rigorous. That being recognized, one might explore the reasons for that rigor, the reason why many scholars and judges have insisted on the *necessity* of the doctrine that *error juris neminem excusat*, and how that position can be refuted; or, if it is agreed that the traditional doctrine should apply in major crimes but not in minor or technical offenses, analysis and reform should be concentrated on the latter area. Instead of complete abandonment, which implies that mistake of law can be a defense to any criminal charge, or total retention, which implies that it can never be a defense, a more discriminating solution might be discovered.

Finally, by way of clearing the ground, attention should be paid to the inescapable limitations of any enacted law regarding ignorance or mistake, especially the impossibility of drawing a hard, clear line between crimes that any normal adult knows are morally wrong and harmful and those offenses which, in our complex societies, are not directly or easily recognized as immoral. There is also an infinite variety of persons and facts, so even if a code drew the above-indicated line by providing, say, that *error juris* may be a defense to all charges except traditional ones when the sanction is a fine of less than X dollars, a place must be reserved for the use of discretion by prosecutors, judges and administrative boards. Stated affirmatively, the complexity of *error juris* is such that the most we can expect from legislators and scholars is a set of valid guidelines; we cannot expect beforehand and in the abstract to present a perfect solution for every imagined case in this difficult area of criminal law. With these reservations in mind let us see if we can discover ways out of the difficulties which led to the acceptance of *error juris* as a defense in Germany. (Except for the references in Arz's first footnote, we are not informed whether other countries have also changed their codes in that respect or, more importantly, how the new law functions in those countries.)

Criminal and Non-Criminal Law

There is no insuperable difficulty, so far as *error juris* is concerned, in distinguishing criminal from non-criminal law if more than the punitive sanction is taken into account, i.e. if criminal law is based on a moral foundation, as in the narrow interpretation of *mens rea*, and if "criminal law" is defined in terms of the seven principles discussed in my Comment on Structure and Theory, *supra*. Questions regarding civil commitment, deportation and loss of license do not pose problems if these principles are used, and punitive damage is an historic anomaly of Anglo-American law. Indeed a mere reference to the Criminal Code may suffice for practical purposes in countries which have inclusive penal codes.

The problem actually met arises from the fact that many segments of criminal law are, verbally, parts of non-criminal law, e.g. propositions concerning possession, ownership, parental duties and privileges, divorce and various parts of tort law. Some of these propositions do not directly involve moral values; hence, the required *mens rea* is not expressed if the defendant acted on a mistaken view of those parts of criminal law. It is therefore understandable that many courts sought to limit the *error juris* doctrine by excluding from it what they called errors of "non-criminal law." For example, that the decedent's administrator has the legal right to possession of the estate's personal property is not a clearly moral judgment and the law might just as well give the heir that right and require him to pay the creditors. Accordingly, an heir who honestly but mistakenly believes he has a legal right to take possession of those chattels lacks the *animus furandi* of larceny; so also with questions of jurisdiction and other technical questions regarding the validity of a divorce decree.

Consider now the case put by Professor Arzt. X, thinking that any adult may discipline an erring child, "punishes" C who is not his child. The definition of battery does not in its terms include parts of family law; the relevant verbs are simply "strikes," "touches," etc. But if a pedestrian honestly believes that any adult is privileged to discipline an erring child, does he have the requisite *mens rea* any more than in the case of the heir who took personal property believing he had a legal right to it? The law of family relations states that a parent may discipline his child, i.e. may "punish" him. That law has moral connotations; it takes account of the parent's special station, imposes consequent obligations and grants necessary privileges to parents. One who is mistaken in thinking that any adult has these privileges makes a moral error (*mens rea*) that is unlike the heir's mistake. The required *mens rea* rests on the fact that the morality of a sound body of penal law is objective; hence error in that respect should not be admitted—at least as regards traditional crimes like assault and battery. In sum, neither the terms of the definition of "battery" nor any ground of justification (for doing the right thing) is applicable.

Where the above argument does not of itself carry conviction, there must also be reliance on the other objective aspect of an advanced legal system, namely the objectivity of the criminal law or, if one prefers, of the process of determining what the criminal law means or, again and finally, what is the criminal law governing a case? In the case of the pedestrian, it is clear that the criminal law does not allow anyone but a parent to strike a child (unless he intercedes to prevent the child from injuring someone or to stop a breach of the peace). That this rule—not the defendant's mistaken idea of the law—must be applied is a phase of the principle of legality.

Professor Arzt's essay is ambivalent on this point. First he dismisses the thesis that "the law is what the judge says it is," as a phase of "rule-skepticism," an attitude not shared by this writer even in the halcyon days of American Legal Realism. Then, later in his essay, he acknowledges that no legal system can accept as a defense every defendant's belief in the legality of every action. It will not "tolerate" that defense if the actor knew "by lay standards" that his conduct was wrong or "unlawful," or if he has the layman's general understanding of the law and errs regarding its "technical interpretation." The first raises no problem in my view if the required *mens rea* is objectively established, as in the case of the pedestrian who strikes a child; but knowing an act is illegal in civil law is not a substitute for *mens rea*. The second limitation, it is submitted with deference, simply begs the question. No sane adult says he did not know it was illegal to strike a child or any other person or to kill a human being. He says e.g. he thought it was legal to strike a vandal or to kill his wife's lover caught in *flagrante delicto* or to kill an armed trespasser. These are the kinds of legal questions that are litigated and, apparently, they are "technical."

In any case, to support his thesis Professor Arzt should tell us what, in his view, is a "technical interpretation." In which litigated

cases that turn on *error juris* are the questions raised by the defense or decided by the judges "technical" and in which "not technical"? And if it be assumed that a satisfactory explanation can be given to support the above distinction, then it would be helpful to know *why* a legal system cannot tolerate mistakes of law regarding the allegedly "technical" issues. If these questions were explored it might be discovered that "rule-skepticism" is not the relevant influence; that instead what does count is that every legal provision has an inevitable penumbra which at some point raises doubts as to its meaning. We would then gain insight into the reasons why an objective principle of legality has long been recognized as *necessary* to the preservation of the legal order and why this requires the exclusion of *error juris* as a defense. There is an inescapable logical conflict between the requirement that "the law" is what it is finally determined to be by authorized officials after proper procedures have been taken by them, and the provision that those officials *must accept* as a defense an erroneous view of the law, i.e. one that conflicts with the officials' interpretation of the law. The unresolved puzzle in Professor Arzt's discussion is this—are his statements regarding "technical interpretation" consistent with the thesis that German law has actually recognized *error juris* as a defense?

That the above interpretation of the necessity of *error juris* is valid is given additional weight by the fact that current German law in such cases seems typically to resort to dogmatic findings of inadvertent negligence and imposes liability, perhaps expressing an intuitive perception that a legal order depends on the objectivity of the judges' decisions. More directly supportive are some very curious findings that the defendant was not mistaken. For example, consider the case reported by Professor Arzt of the student of theology who, informed by a law student that larceny requires an intention to deprive "permanently," takes a book from a bookstore intending to return it, presumably in spotless condition, within a day or two. His conviction for larceny was affirmed on the interesting ground that since he intended to return a "second-hand" book, the student intended permanently to deprive the owner of the store of a *new* book. But given that the provision on temporary use is limited to automobiles and bicycles, did the defendant know (in the established sense of "know") that taking a book with the intention of returning it the next day was larceny? Now either the student "knew the law," in the ordinary sense of that phrase, and did not violate it; or he did not "know the law" in the sense that an intention permanently to alter the "newness" of a book is a sufficient *animus furandi*. But *error juris* is by a provision in the Code a defense; therefore, on either view, the student should have been exculpated. To say that the student intended to deprive the owner of the newness of the book and also knew that to be a sufficient *animus furandi* is to spin liability from fiction. To reply that the student knew he had no legal right to take the book implies only civil liability for damages, not criminal liability, unless *error juris neminem excusat*. In sum, if no one claims that he did

not know it was a crime to steal and if in the litigated cases the judges find that the defendant was not in error, what is left of the new provision? The realistic if not obvious answer is that the old doctrine of *error juris* is very much alive in Germany.

These comments are not intended as criticism of the judges. On the contrary, the judges are maintaining the objectivity of the legal system when they reject *error juris* as a defense. There is added proof of the persistence of this objectivity in the German law on imaginary attempts. As to these (in American law rather awkwardly called "legal impossibility"), Professor Oehler informs us (*infra*), there is no penal liability even though the defendant thought he was committing a crime, since "the law" does not make what he intended to do a crime. In other words, the objectivity of the legal system prevails. We should not permit the obvious adherence to legality in the attempt cases to blur our vision when we examine the implications of a legal provision requiring that *error juris* be accepted as a defense. In a limited, strictly formal sense, any statute or provision in a duly enacted Code is "law"; in a realistic, functional sense, when there are such internal contradictions, undesirable consequences are bound to follow. Either there is self-deception, as in the above decision that the student actually knew the law; or, if actual effect is given to the new provision, there is an inevitable loss of legality. As I shall shortly note, it may be desirable to allow such a defense in some cases but that should be done in full realization of the significance of such decisions. Nor should the fact that there has been no horrendous result in Germany following adoption of the new code obscure our vision of the issues raised in acceptance of *error juris* as a defense. The least which must be granted, as Professor Arzt makes abundantly clear, is that the new defense has not been put to the test in Germany. What we do find are escapist decisions, such as that rendered in the case of the student, and the resort to negligence. This raises the question, which is the better solution: to find defendants guilty of negligence if there is a relevant provision in the Code and to exculpate them if there is none, or to apply the sanction on the ground that *error juris* does not excuse, while recognizing grounds for mitigation in particular cases? The answer to this question may provide the key to understanding the different directions taken in German and Anglo-American law. The answer may depend on one's conditioning in a particular legal culture; habit and tradition limit rational analysis and, sometimes, even one's competence to understand a foreign legal system. Perhaps an answer to the above question should be deferred until we have examined the other major problem that confronts judges dealing with the traditional *error juris* doctrine.

Law and Fact

The problem, "law or fact?", certainly raises difficulties; indeed it is common knowledge that legal philosophers have argued the definition of "law" ever since Plato discussed the question in his *Dia-*

logues. Similarly, as Whitehead said, "fact" is a very complex notion. This is not the place to discuss various meanings of those words in different contexts. The problem met in substantive criminal law does not involve all those difficulties, even if it has been complicated in Professor Arzt's essay by his identification of "legal" and "normative." Many terms in everyday speech have normative meanings, but our concern is to distinguish "law" from "fact" as used in penal law discourse with reference to *error juris* and *error facti*. "Death" may mean one thing in ordinary speech and another when used by medical doctors; it may have a normative meaning; and the legal meaning may or may not coincide with the medical usage.

In any case, the problem is to distinguish facts from so-called "legal facts" in the context of the above legal issue; this requires lawyers to "lift" the concept of a fact from its legal employment and to visualize that fact as existing outside the legal system. For example, rabbits are animals which, in common understanding, exist in fact regardless whether killing them or calling them "game" is enacted into law or whether "game" is also a term of ordinary speech. If a person kills an opossum, thinking it is a rabbit, he makes a mistake of fact; if he kills a rabbit knowing it is a rabbit but thinking there is no legal prohibition, he has acted in ignorance of the law or, possibly, if he has read but not understood some of its terms, in mistake of law. So too there is a difference between the mistaken belief that X is a judge or a juror and mistaking X's twin brother for X, who is a judge or a juror; and the mistaken belief that a city assessor can assess the value of adjacent county property for tax purposes or that changing the numbers (not the words) in a check is forgery are mistakes of law (in American law). These may be regarded as simple cases; the problem becomes complicated when we deal with "mixed" questions, e.g. "X is married," "X is divorced" or "X is the owner of that house." But in each of these cases it is possible to distinguish certain facts from the rule of law with which the facts are integrated. Without any discussion of the complexities of this problem or the diverse meanings given "fact" in different contexts, it is submitted that the difficulty of solving that problem in the context of *error juris* was not a principal reason for rejection of the traditional doctrine.

What is at the root of concern in this area is not the impossibility of distinguishing law from fact in a given context but the thought that *mens rea* is lacking in either mistake, that it makes no difference whether a person mistakenly believes a rabbit is a rat or that it is not illegal to shoot a rabbit. This returns the question to the problems previously discussed—the need to distinguish major crimes from petty offenses and to keep in mind the objectivity of the principles of *mens rea* and legality.

To weigh the significance of the relevant issues, we must consider whether mistakes of fact are of the same order as mistakes of law. If guilt were the sole issue (as in mistake of fact), it would be inconsistent to exculpate where there was inadvertent negligence regarding

facts and to impose liability when there was such negligence regarding ignorance or mistake of law. How reconcile exculpation in the first case with liability in the second, indeed with liability in cases of major crimes where there was no negligence at all in any realistic sense?

My submission is that mistakes of fact are of a different order than mistakes of law, calling for very different consequences. As regards the latter, it cannot be forgotten that a sound legal order implements a valid moral order. A legal order is a condition of equal treatment and is educational; indeed in some areas the law refines vague moral standards and convictions by drawing distinctions that are not available extra-legally. In addition, even in an unsound or tyrannical legal order, the regularity and consequently the predictability of judicial decisions contribute to the knowledge of that law, which permits lawyers and laymen to choose a circumspect course of action, and thus allows for rational conformity. It is not necessary to belabor the values that have accumulated over the centuries around the *Rechtsstaat* or "the rule of law" to underscore the importance of preserving the objectivity of the legal order.

The situation is quite different as regards mistakes of fact. First, culpability depends not on what the facts actually were but on what the defendant believed the facts were; that is the reason for insisting on subjective guilt even when the defendant unreasonably made a mistake of fact. More to the immediate point, the factually-mistaken actor does not challenge the objective values of the community nor is the acceptance of his factual mistake as a defense inconsistent with the maintenance of objective legality. The exculpation of a defendant who believed he was about to be killed and shot a man who aimed a gun which turned out to be a toy pistol does not challenge the objectivity of the legal process. But acceptance of *error juris* as a defense, e.g. that the defendant believed he had a legal right to shoot anyone who pointed even a toy pistol at him, does erode the legal order by including a requirement that is incompatible with the objectivity of the legal process.

It may be asked, what is more "objective" than the judges' recognition that the Code makes *error juris* a defense and their conformity to that provision? That does indeed seem very simple, but there are limits to what can be validly enacted that apply equally to any legal process, whether centered on a Code or on case law; and the principal limitation is imposed by one of the oldest laws of logic—the law of contradiction. One cannot consistently say that the law (or the law on peripheral or "technical" legal issues) is what judges say it is after a prescribed procedure has been followed by them, and say also that judges must accept as defenses, i.e. the law must include, mistaken views of the law.

Accordingly, if neither a strained view of negligence nor finding that a defendant knew the law is plausible (e.g. the student of theology), we should confront the actuality of acceptance of *error juris* as a defense. In almost every litigated case, the defendant did not

know that his action was prohibited by a penal law although, of course, he knew it was illegal to steal or to kill a human being. In this realistic view, the judge would exculpate all defendants in all these cases. Utter chaos would follow this drastic erosion of the objectivity of the legal system.

Since *mens rea* is also a principle of criminal law, mistake of fact, if equally universal, would also lead to total exculpation as a logical consequence. Facts are just as important as laws, and *mens rea* is a principle of criminal law no less than is legality. But there are great differences between laws and facts which limit the defense of mistake of fact in ways not applicable to mistake of law. Facts are particulars; laws are generalizations, ideas or abstractions that confer meaning on the facts. Facts relevant to penal law exist in the everyday world and normal perception places many limits on claims that there was a mistake of fact. While in a sense laws also "exist" as general meanings, some parts of law, and especially the penumbra of all laws, are unavoidably ambiguous. A layman is as qualified as, or better than, a Supreme Court Justice to report accurately the speed of an automobile, whether X drew a revolver or a toy pistol, or to identify X as the robber. But it is a very different matter when it comes to deciding litigated questions of law. It takes not only a well-trained legal profession and rational procedures but also the authority of judicial officers to decide what law governs a particular case. Given the inevitable ambiguities and that there is often no "best" solution (there may be several equally valid "solutions," each of them defended by a competent lawyer), it is the *authority* of the official that is paramount; hence the authority of even a mediocre judge takes priority over the opinion of the ablest lawyer in the land. *Error juris neminem excusat* means that any opinion by a layman or a lawyer, if it conflicts with the judge's decision or "interpretation," is "error" in that sense, and both cannot logically be asserted. Perhaps that is why, as a way out of the impasse, German judges invoke "inadvertent negligence" or find no "error" where error is manifest.

I have been discussing the logical implications of *error juris* as a defense. But no legal system is wholly logical. An American sociologist once said that persons who adulterate food are more culpable than most murderers, but we balk at treating them as murderers. A healthy legal system can tolerate a degree of internal inconsistency; there can be some sacrifice of the objectivity of the legal order where morality calls for that sacrifice and as to some questions of doubtful or generally unknown morality. Indeed some concession is made for crimes against property and other crimes, e.g. bigamy, where relatively non-moral propositions of law are the ground of exculpation; the rationale is not an exception to *error juris* but lack of *mens rea* resulting from that error. The traditional doctrine is also narrowed when the defendant relies on the decision or opinion of a judicial officer rendered in the performance of his duties. Here again, the plea is not that there should be an exception to *error juris*; it is, simply, "not guilty"—the defendant did not violate the law.

The petty offenses rise to special importance in this regard, since here there is no evident conflict with a major or traditional value. Even if the same logic applies to the acceptance of *error juris* as a defense in the petty violations, a degree of inconsistency is tolerable. In a perfect legal system, law would always coincide with and enforce morality; but no legal system is perfect. Even if it is generally believed that even the pettiest regulations are sound, there can be some concession to contrary lay opinions that are sincerely held. (Professor Arzt referred to several cases of doubtful or conflicting moral attitudes; one would certainly omit from his list exculpation for such actions as killing a wife's lover and murders committed by terrorists). I believe a healthy legal system can tolerate a degree of internal contradiction when it is limited to petty offenses and there are grounds for differences in the opinions of reasonable persons.

Accordingly, several possible solutions are available. One may hold, as was suggested previously, that for all non-traditional offenses where the sanction is a fine of less than X dollars, *error juris* is a defense; or one may limit that and impose liability when there was any negligence, if one believes inadvertent negligence a sufficiently serious moral fault to warrant punishment. Finally, even in the realm of the petty offenses, one may distinguish mistake of law from ignorance of law and reject the former while allowing the latter as a defense. Again, one should not view this from the viewpoint of *Schuld*, for then a person who tried to discover what the law is, perhaps by consulting a lawyer, would be less culpable or at least not more culpable than one who simply did not know there was a relevant provision or statute. But if the problem is viewed not from the perspective of fault but from that of the principle of legality, the solution might take a different direction. In this alternative, no one would be permitted to say in defense that he knew there was such-and-such a regulation but he decided, or his lawyer or an officer in a bank told him, that it meant so-and-so. For here again there is a conflict with the objectivity of the legal system, with what the judge, who is authorized to render binding decisions, decides is the law. But none of the above measures, if limited to petty offenses, would seriously damage a healthy legal system; indeed the overall judgment might well be that the logic of legality should bend when there is no serious challenge to the basic values of society.