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RECONSIDERING THE MISTAKE OF LAW DEFENSE

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I. INTRODUCTION: THE NATURE OF THE PROBLEM

The criminal law is rife with old saws.[1] For example, there is the tenet that there can be no crime or criminal punishment without a positive law, known in Latin as "*Nullum crimen sine lege*" and "*Nulla poena sine lege*."[2] Another such proposition is that a crime consists of "a vicious will" and "an unlawful act consequent upon such vicious will."[3] Also widely known are the principles that every person is entitled to a presumption of innocence[4] and that it is the government's burden to rebut that presumption beyond a reasonable doubt.[5] Another maxim, the *lex talionis*, is "An eye for an eye, a tooth for a tooth,"[6] which can be rephrased as "The punishment should fit

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[1] The civil law, too. For example, every consumer has heard (often to his chagrin) the maxim "*Caveat emptor*" or "Let the buyer beware." *See* Barnard v. Kellogg, 77 U.S. (10 Wall.) 383, 389 (1870).

[2] Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165, 178 (1937).

[3] 4 WILLIAM BLACKSTONE, COMMENTARIES *358; Morissette v. United States, 342 U.S. 246, 251 (1952). For Latin buffs, the phrase is "*Actus non facit reum nisi mens sit rea*." Kevin Jon Heller, *The Cognitive Psychology of Mens Rea*, 99 J. CRIM. L. & CRIMINOLOGY 317, 317 (2009).

[4] *See* Taylor v. Kentucky, 436 U.S. 478, 483–86 (1978); Estelle v. Williams, 425 U.S. 501, 503 (1976); Coffin v. United States, 156 U.S. 432, 453–61 (1895); MCCORMICK ON EVIDENCE § 342 (2d ed. 1972).

[5] *See* Jackson v. Virginia, 443 U.S. 307, 315–16 (1979); *In re* Winship, 397 U.S. 358, 361–62 (1970).

[6] *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 37 (1968). Talionic law sought to moderate punishment, not encourage retribution. THE OXFORD HISTORY OF THE PRISON, at x (Norval Morris & David J. Rothman eds., 1995).

the crime." And there is the well-known saying, drawn from the Bible,[7] that "It is better that ten guilty men go free than that one innocent man be convicted."[8] Finally, an old criminal law proverb is the proposition that "Ignorance of the law is no excuse," which sometimes is phrased as a rule of evidence that "Every man is presumed to know the law."[9]

The ignorance-of-the-law rule traces its lineage back to Roman law.[10] The English common law courts adopted the rule,[11] from whence it came to America. In this country, state[12] and federal courts,[13] including the

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[7] *See Genesis* 18:23–32 (relating how God agrees to spare Sodom if ten righteous men can be found there).

[8] *See Coffin*, 156 at 456 ("[I]t is better that ten guilty persons escape than one innocent suffer."); 4 WILLIAM BLACKSTONE, COMMENTARIES *352; Alexander Volokh, *Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997). Benjamin Franklin put the number at 100. *Id.* at 175.

[9] *See, e.g.*, Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 15–16 (1957); Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 80 (1908) (both discussing the alternative ways of stating the point).

[10] *See* Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 685 (1976). Roman law, however, distinguished between "ignorance as a defense to actions under the *jus gentium,* the law derived from the common customs of the Italian tribes and thought to embody the basic rules of conduct any civilized person would deduce from proper reasoning," to which a mistake of law defense could not be raised, and "the more compendious and less common-sense *jus civile*," as to which "women, males less than 25 years old, soldiers, peasants, and persons of small intelligence" could raise a mistake defense if he or she "had not had the opportunity to consult counsel familiar with the laws." *Id.* (footnotes omitted).

[11] *See, e.g.*, 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 480–81 (5th ed. 1885); 4 WILLIAM BLACKSTONE, COMMENTARIES *26; M. HALE, PLEAS OF THE CROWN 42 (1680); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 27–69 (2d ed. 1947); 3 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 374 (1966); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 45–46 (Belknap Press, 2009) (1881); COURTNEY STANHOPE KENNY, OUTLINES OF CRIMINAL LAW 68–69 (13th ed. 1929); WAYNE R. LAFAVE, CRIMINAL LAW § 5.6, (5th ed. 2010); JOHN SALMOND, JURISPRUDENCE 426 (8th ed. 1930); 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 94–95 (1883); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART §§ 52–74 (2d ed. 1961); Cass, *supra* note 10, at 685; Hall, *supra* note 9; Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1939). The rule has been traced back to the thirteenth century. Keedy, *supra* note 9, at 78.

[12] *See, e.g.*, Schuster v. State, 48 Ala. 199, 202–03 (1872); State v. Paup, 13 Ark. 129, 137–38 (1852); People v. O'Brien, 31 P. 45, 47–48 (Cal. 1892); Fraser v. State, 37 S.E. 114, 116 (Ga. 1900); People v. Cohn, 193 N.E. 150, 153 (Ill. 1934); Winehart v. State, 6 Ind. 30 (1854); State v. O'Neil, 126 N.W. 454, 456 (Iowa 1910); Jellico Coal Min. Co. v. Commonwealth, 29 S.W. 26, 26–27 (Ky. 1895); State v. Goodenow, 65 Me. 30, 33 (1876); Grumbine v. State, 60 Md. 355, 356 (1883); Commonwealth v. Everson, 2 N.E. 839, 840 (Mass. 1885); Black v. Ward, 27 Mich. 191, 201 (1873); State v. Armington, 25 Minn. 29, 38 (1878); Whitton v. State, 37 Miss. 379, 382 (1859); State v. Wilforth, 74 Mo. 528, 529 (1881); Pisar v. State, 76 N.W. 869, 870 (Neb. 1898); State v. Carver, 39 A. 973, 974 (N.H. 1898); State v. Halsted, 39 N.J.L. 402, 412–13 (1877); Gardner v. People, 62 N.Y. 299, 304 (1875); State v. Boyett, 32 N.C. (10 Ired. Eq.) 336, 343 (1849); State v. Pyle, 71 N.W.2d

Supreme Court of the United States,[14] as well as criminal law treatise writers,[15] have long endorsed that rule. The proposition that ignorance or mistake of the law is no excuse therefore has an ancient pedigree.

Most rules of law that have survived that long have a fairly robust justification, even if it is not the same one that gave birth to the rule.[16] Moreover, criminal justice principles repeatedly and recently championed by the Supreme Court have the highest precedential value.[17] The rule that mistake of law is no excuse fits into that category.

342, 346 (N.D. 1955); Ulsamer v. State, 11 Ohio Dec. Reprint 889 (Ohio C.C. 1893); Needham v. State, 32 P.2d 92, 93 (Okla. Crim. App. 1934); State v. Foster, 46 A. 833, 835 (R.I. 1900); State v. S. D. Packing & Shipping Co., 180 N.W. 510, 511 (S.D. 1920); McGuire v. State, 26 Tenn. (7 Hum.) 54, 55–56 (1846); Medrano v. State, 22 S.W. 684 (Tex. Crim. App. 1893); State v. Woods, 179 A. 1, 2 (Vt. 1935). Some states now have codified the rule. *See*, *e.g.*, People v. Mann, 646 P.2d 352, 356 (Colo. 1982) (discussing state statute).

[13] *See, e.g.*, N.Y. Cent. & H.R.R. Co. v. United States, 239 F. 130, 131 (2d Cir. 1917); Chadwick v. United States, 141 F. 225, 243 (6th Cir. 1905); Blumenthal v. United States, 88 F.2d 522, 530 (8th Cir. 1937); Fall v. United States, 209 F. 547, 552 (8th Cir. 1913); Townsend v. United States, 95 F.2d 352, 358 (D.C. Cir. 1938); United States v. Anthony, 24 F. Cas. 829, 831–32 (C.N.D.N.Y. 1873). For some possible exceptions to this rule, see Barker v. United States, 546 F.2d 940, 946–54 (D.C. Cir. 1976) (Wilkey, J., concurring) (reliance upon official authority); *id*. at 954–57 (Merhige, J., concurring) (reliance upon an official interpretation of the law).

[14] *See, e.g.*, Bryan v. United States, 524 U.S. 184, 193 (1998); Cheek v. United States, 498 U.S. 192, 199 (1991); Hamling v. United States, 418 U.S. 87, 119–24 (1974); United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971); Lambert v. California, 355 U.S. 225, 228 (1957); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910); Armour Packing Co. v. United States, 209 U.S. 56, 85 (1907); Reynolds v. United States, 98 U.S. 145, 167 (1878) ("Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law."); Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833) ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally."); The Joseph, 12 U.S. (8 Cranch) 451 (1814).

[15] *See, e.g.*, 1 JOEL PRENTISS BISHOP, COMMENTARIES ON CRIMINAL LAW §§ 294–300 (5th ed. 1872); 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 399 (11th ed. 1912).

[16] A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

HOLMES, *supra* note 11, at 5.

[17] A value that the legislature may not erase. In *Dickerson v. United States*, 530 U.S. 428, 432 (2000), the Supreme Court turned aside the claim that Congress had repealed *Miranda v. Arizona*, 384 U.S. 436 (1966), in the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified in scattered sections of U.S.C. (2006)).

An ancient pedigree for a rule, however, does not guarantee that the rule still makes sense and therefore should not serve to defeat all efforts at reexamination. The rules that govern society today must make sense *today*, whatever their merit long ago. Law is the formal recognition of the mores and values of a society and should be adjusted to fit whatever changes society deems necessary. Sometimes that adjustment cannot be done without revisiting, reshaping, or abandoning law on the statute books or in the case reports. When that happens, the society is better off by altering the law to fit current needs than by trying to force the latter into the former. That makes particular sense here, where the question of whether a mistake of law defense should be permitted is a matter of federal common law, not statutory interpretation. The common law adapts to changed circumstances and the lessons of accumulated experience.[18] That is its biggest strength and virtue. The Supreme Court has made clear that, in limited circumstances, federal courts have authority to develop substantive federal common law,[19] and it effectively has treated defenses to federal crimes as falling within that authority.[20] *Stare decisis* considerations count for less in this context.[21]

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[18] *See, e.g.*, Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 234–35 (1995) ("[I]n our system of adjudication, principles seldom can be settled 'on the basis of one or two cases, but require a closer working out.'" (quoting Roscoe Pound, *Survey of the Conference Problems*, 14 U. CIN. L. REV. 324, 339 (1940))); Paul Oskar Kristeller, *"Creativity" and "Tradition*,*"* 44 J. HIST. IDEAS 105, 112 (1983) ("We should realize from the beginning that a completely stable or rigid tradition that never admits change is humanly impossible and has never existed.").

[19] The Supreme Court has noted that it has limited authority to create federal common law, but, where it enjoys that sanction, the Court has greater freedom to shape the development of federal common law than to change its interpretation of federal statutes. That authority generally is confined to subjects such as the reach of federal sovereign immunity, the obligations of the federal government, and interstate disputes over (for instance) geographic boundaries and water rights. *See, e.g.*, Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 86–88, 95–98 (1981).

[20] *See, e.g.*, Jacobson v. United States, 503 U.S. 540, 548–49 (1992) (entrapment defense); United States v. Bailey, 444 U.S. 394, 409–15 (1980) (duress or necessity defense); United States v. Penn. Indus. Chem. Corp., 411 U.S. 655, 673–75 (1973) (defense of reliance on opinions of government officials interpreting a federal law within their jurisdiction); Sinclair v. United States, 279 U.S. 263, 299 (1929) (reliance on advice of private counsel); Brown v. United States, 256 U.S. 335, 343–44 (1921) (self-defense); Rowe v. United States, 164 U.S. 546, 555–58 (1896) (self-defense); Beard v. United States, 158 U.S. 550, 555–56 (1895) (self-defense); Davis v. United States, 160 U.S. 469, 476–77 (1895) (insanity defense). *See generally* LAFAVE, *supra* note 11, §§ 7.1–7.5, 9.1–9.8, 10.1–10.7 (discussing defenses). By contrast, federal courts do not have authority to create common law crimes. *See*, *e.g.*, United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812).

[21] The federal antitrust laws are a good example, because the Court has felt free over time to develop a federal common law of competition that is sufficiently flexible to adapt to

That proposition is relevant here because the criminal justice system has undergone a complete transformation since the days of Blackstone. Legislatures and courts have made vast changes to the structure of the criminal justice system, to the officials who comprise that system, and to the procedures that govern how those actors play their roles. Those developments may have greatly altered the landscape that gave rise to the common law mistake of law rule—so much so, in fact, that it might no longer make sense to follow the rule. If so, the courts should own up to the responsibility of "retiring" it.[22] As Justice Frankfurter once sagely noted, "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late."[23]

Start with the structure of the system. At common law, sheriffs were the principal law enforcement officers. They could conscript the public into assisting by invoking the "hue and cry," an ancient means of corralling local citizens into acting as what in the American West would have been known as a "posse."[24] In colonial America citizens also served as "watchmen"—that is, ordinary private parties, acting as amateur law enforcement officers, who patrolled the streets and made arrests.[25] Today, we have large-scale police departments in many municipalities—to say nothing of the additional, sizeable cadre of state and federal law enforcement personnel[26]—and we use a full-time professional force to investigate crimes and apprehend suspects.[27] Today's parole and probation officers have no common law ancestor, since neither probation nor parole

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new business arrangements and developments in microeconomics. *See, e.g.*, Leegin Creative Leather Prods. v. PSKS, 551 U.S. 877, 899–900 (2007); State Oil Co., v. Khan, 522 U.S. 3, 10–15 (1997); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 47–59 (1977).

[22] In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007), the Supreme Court decided to "retire," rather than overrule, the pleading standard previously articulated in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). The term is apt here as well.

[23] Henslee v. Union Planters Nat'l Bank & Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

[24] "Hue" derives from the French word *huer,* meaning "to shout," and cry is used in the same sense. "The person discovering a felony would raise a cry of 'Out! Out!' Prompting the neighbors to turn out with their bows, arrows, and knives. The 'hue' would be passed by horn-blowing from town to town until the ad hoc posse caught the malefactor or gave up the chase." Jon C. Blue, *High Noon Revisited: Commands of Assistance by Peace Officers in the Age of the Fourth Amendment*, 101 YALE L.J. 1475, 1479–84 & 1480 n.21 (1992); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 24–27, 67–71 (1993) (discussing common law practices in the courts and by sheriffs and citizens).

[25] William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, *in* VICTIMS IN CRIMINAL PROCEDURE 5–6, 11–12 (3d ed. 2010); FRIEDMAN, *supra* note 24, at 28.

[26] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 65 (2011); Blue, *supra* note 24, at 1484.

[27] *See* FRIEDMAN, *supra* note 24, at 67–71, 149–55, 358–60.

existed at common law.[28] There are specialized courts, such as so-called drug courts,[29] that did not exist thirty years ago, let alone 300.[30] And the facilities housing the nation's prisoners today were unknown at common law. The principal sanctions imposed at common law and in colonial America were fines, the stocks, whipping, banishment, and the death penalty.[31] "Penitentiaries" were a nineteenth-century invention.[32]

The rules of criminal pretrial and trial procedure are also vastly different today.[33] The trial process has been turned over to lawyers;[34] the

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[28] In America, probation and parole were born in the late nineteenth and early twentieth centuries. *E.g.*, Parole Act, ch. 387, 36 Stat. 819 (1910); Probation Act, ch. 521, 43 Stat. 1259 (1925); *see, e.g.*, United States v. Murray, 275 U.S. 347, 353–58 (1928); *Ex parte* United States, 242 U.S. 27, 42–52 (1916); Cosgrove v. Smith, 697 F.2d 1125, 1135–37 (D.C. Cir. 1983) (Bork, J., concurring in part and dissenting in part); FRIEDMAN, *supra* note 24, at 161–63, 406–09; JOAN PETERSILIA, COMMUNITY CORRECTIONS 9–10 (1998).

[29] *See* MARK A.R. KLEIMAN, WHEN BRUTE FORCE FAILS 40–41, 161–63 (2009) (discussing purpose of drug courts).

[30] *See* FRIEDMAN, *supra* note 24, at 24–25, 67, 163–66, 239–50 (discussing courts from common law days through the twentieth century).

[31] *See* DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM 52–53 (rev. ed. 1990).

[32] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 219–20 (3d ed. 2005); ROTHMAN, *supra* note 31, at 79–108. Jails housed defendants awaiting trial or execution, the dangerously mentally ill, misdemeanants, petty offenders, and debtors. ROTHMAN, *supra* note 31, at xxvii–xxviii, 52–53. Prisons have existed as restraints on freedom as early as ancient Egypt and Greece, Edward M. Peters, *Prison Before the Prison: The Ancient and Medieval Worlds*, *in* THE OXFORD HISTORY OF THE PRISON, *supra* note 6, at 5–21, but the belief that incarceration could be used to reform an inmate via "penance" did not occur until the early nineteenth century in America, ROTHMAN, *supra* note 31, at xxiv, 79–108.

[33] Judges created common law trial procedures. The trial process was both more informal in some respects and more rigid in others than the trials seen today. *See, e.g.*, Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources*, 50 U. CHI. L. REV. 1 (1983); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978). For a concise discussion of English common law criminal procedure, see THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 424–41 (5th ed. 1956). For a concise discussion of American criminal procedure from the colonial period through the nineteenth century, see FRIEDMAN, *supra* note 24, at 20–27, 235–58, 383–418.

[34] At common law, a victim had to pursue a prosecution, because there was no office of public prosecutor. State and federal governments later established such an office, FRIEDMAN, *supra* note 24, at 21, 29–30, and it is the standard practice everywhere today. Similarly, at common law, a defendant charged with a felony was not entitled to be represented by counsel (although, ironically, a defendant charged with a misdemeanor was). *See* Powell v. Alabama, 287 U.S. 45, 60 (1932); FRIEDMAN, *supra* note 24, at 27. By contrast, today a defendant cannot be sentenced to a term of imprisonment without first being afforded the right to obtain counsel or to have counsel appointed if he is indigent. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). A defendant's right to counsel comes into play at pretrial proceedings, at trial, at sentencing, and at his first appeal of right. *See, e.g.*, Mempa v. Rhay, 389 U.S. 128, 135–37 (1967) (sentencing); White v. Maryland, 373 U.S.

intricacy of the rules of procedure[35] would stun a judge in the colonies or in the Old Bailey;[36] and defendants have postconviction avenues open to them that were unheard of at common law.[37] Atop all that is the work of the Supreme Court. Over the last sixty years we have witnessed a blizzard of Supreme Court decisions analyzing virtually every facet of the investigative and adjudicatory processes under the Fourth,[38] Fifth,[39] Sixth,[40] Eighth,[41] and

59, 60 (1963) (preliminary hearing); Douglas v. California, 372 U.S. 353, 355–58 (1963) (first appeal of right); Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (trial); Hamilton v. Alabama, 368 U.S. 52, 53–55 (1961) (arraignment).

[35] For example, at common law a defendant could offer an unsworn statement on his own behalf but could not testify in his defense because he was deemed an "incompetent" witness due to his interest in the outcome. *See* 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 576–79 (2d ed. 1923). Today, a defendant has a constitutional right to testify in his defense. *See* Rock v. Arkansas, 483 U.S. 44 (1987); Ferguson v. Georgia, 365 U.S. 570 (1961).

[36] The Old Bailey was the trial court for felonies and other serious crimes in London and adjacent Middlesex County in the seventeenth and eighteenth centuries. Langbein, *supra* note 33, at 3.

[37] The common law in England and in the early days in the United States offered scant opportunity for a defendant to obtain a new trial. *See* Herrera v. Collins, 506 U.S. 390, 408–10 (1993); FRIEDMAN, *supra* note 24, at 255–58. The Judiciary Act of 1789, ch. 20, 1 Stat. 73, did not establish a right to appeal a conviction in a federal criminal case. Congress did not create a right to appeal in capital cases until 1889, Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656, and did not extend that right to all convicted defendants until 1891, The Circuit Courts of Appeals (Evarts) Act, ch. 517, § 5, 26 Stat. 826, 827 (1891). Shortly thereafter, the Supreme Court held that defendants have no constitutional right to an appeal, *McKane v. Durston*, 153 U.S. 684, 688 (1894), thereby making clear that appellate rights were up to the legislatures to define. As for postconviction avenues, The Judiciary Act of 1789 extended the right to petition for a writ of habeas corpus to parties held in federal custody, but Congress did not grant parties in state custody that opportunity until the Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385. Today, federal habeas corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of U.S.C. (2006)). Finally, while the Constitution vests the clemency power in the President, U.S. Const. art. II, § 2, cl. 1, it does not require the states to have a clemency process, *Herrera*, 506 U.S. at 414.

[38] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 19 (1968) (finding that the government's brief detention for questioning of a person is a "seizure" under the Fourth Amendment and a "pat down" of his clothing for weapons is a "search"); Katz v. United States, 389 U.S. 347, 358–59 (1967) (holding that government's warrantless recording of a telephone conversation is a "search" under the Fourth Amendment).

[39] *See, e.g.*, Kastigar v. United States, 406 U.S. 441, 453 (1972) (holding that the Fifth Amendment Self-Incrimination Clause requires "use immunity" in order for the government to compel a person to testify over a self-incrimination claim); Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring that a person in custody be advised of his rights to remain silent and to speak with an attorney before being questioned in order for any statement to be admissible); Griffin v. California, 380 U.S. 609, 612–13 (1965) (holding that the Self-Incrimination Clause prohibits a prosecutor from commenting on the defendant's decision not to testify at his trial); Green v. United States, 355 U.S. 184, 188 (1957) (holding that the Fifth Amendment Double Jeopardy Clause bars retrial of an acquitted defendant).

Fourteenth[42] Amendments, as well as the various mechanisms for enforcing what the Constitution guarantees.[43] The result is that, with the dual (albeit

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[40] *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 50–51 (2004) (holding that the Sixth Amendment Confrontation Clause guarantees a defendant the right to be confronted with the witnesses against him and therefore limits use at trial of out-of-court statements); Apprendi v. New Jersey, 530 U.S. 466, 483–84 (2000) (holding that the Sixth Amendment Jury Trial Clause guarantees a defendant the right to have the jury make all findings necessary for a sentence to be imposed in excess of the statutory maximum); Massiah v. United States, 377 U.S. 201, 204–05 (1964) (holding that the Sixth Amendment Counsel Clause prohibits the police from deliberately eliciting incriminating statements from a charged suspect in the absence of counsel or a waiver); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that the Sixth Amendment Counsel Clause guarantees an indigent defendant charged with a felony the right to the appointment of trial counsel at state expense); *see generally* Perry v. New Hampshire, 132 S. Ct. 716, 716 (2012) (discussing Sixth Amendment fair trial guarantees).

[41] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (holding that the Eighth Amendment prohibits imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim); Roper v. Simmons, 543 U.S. 551, 569–75 (2005) (holding that the Eighth Amendment prohibits imposing the death penalty on minors); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibits imposing the death penalty on mentally retarded defendants); Harmelin v. Michigan, 501 U.S. 957, 997–1001 (1991) (Kennedy, J., concurring) (ruling that the Eighth Amendment prohibits only grossly disproportionate terms of imprisonment); Gregg v. Georgia, 428 U.S. 153, 179 (1976) (rejecting the claim that the death penalty is invariably a cruel and unusual punishment and upholding a capital sentencing scheme that guided the jury's discretion); Furman v. Georgia, 408 U.S. 238 (1972) (upholding challenge based on the Eighth Amendment Cruel and Unusual Punishments Clause to purely discretionary capital sentencing schemes).

[42] *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 86 (1985) (stating that due process requires that an indigent defendant be provided psychiatric assistance when the defendant shows that sanity will be a significant issue at trial); Chambers v. Mississippi, 410 U.S. 284, 294–303 (1973) (finding due process violated when state evidentiary rules excluded compelling evidence of innocence); Brady v. Maryland, 373 U.S. 83, 86 (1963) (holding that due process requires the prosecution to disclose exculpatory information to the defense); Tumey v. Ohio, 273 U.S. 510, 531 (1927) (explaining that due process is violated when town mayor-and-judge receives fees only for cases resulting in a conviction).

[43] *See, e.g.*, Weeks v. United States, 232 U.S. 383, 398 (1914) (adopting an exclusionary rule to suppress evidence obtained by federal law enforcement officers in violation of the Fourth Amendment); Minneci v. Pollard, 132 S. Ct. 617, 619 (2012) (declining to imply a *Bivens* action for federal prisoners raising tort claims against a privately managed prison's personnel); Davis v. United States, 131 S. Ct. 2419, 2426–29 (2011); United States v. Leon, 468 U.S. 897, 912 (1984) (adopting a "reasonable mistake" exception to the *Weeks* exclusionary rule); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (ruling that the victim of an unconstitutional search can bring a damages action against the responsible government officials); Monroe v. Pape, 365 U.S. 167, 178 (1961), *overruled in part by* Monell v. Dep't of Soc. Servs. Of City of N.Y., 436 U.S. 658 (1978) (explaining that Section 1 of the Ku Klux Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2006)), provides a private party with a remedy against state and local officials for a violation of the Constitution); Mapp v. Ohio, 367 U.S. 643, 656 (1961) (applying the *Weeks* exclusionary rule to evidence obtained by state law

important) exceptions of plea bargaining[44] and non-capital sentencing,[45] there is scarcely any feature of the criminal pretrial and trial processes[46] that is not primarily governed by federal constitutional law.[47]

The contemporary penal code also is vastly different from what existed at common law. The common law recognized a limited number of crimes. Treason, murder, rape, robbery, larceny in some form, and a small number of additional offenses were the corpus of the common law of crimes.[48]

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enforcement officers in violation of the Fourth Amendment); *see also* Herring v. United States, 555 U.S. 135, 136 (2009), Hudson v. Michigan, 547 U.S. 586, 597–99 (2006), and Arizona v. Evans, 514 U.S. 1, 14–16 (1995) (all applying the *Leon* exception in various non-warrant contexts).

[44] The Constitution plays a limited role in regulating the plea-bargaining process. In general, plea bargaining between the prosecutor and defense counsel does not violate a defendant's Fifth Amendment self-incrimination privilege or Sixth Amendment right to a fair trial. *See, e.g.*, McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970). The Constitution does require a prosecutor to keep his promises if the defendant pleads guilty pursuant to a plea bargain. *See, e.g.*, Santobello v. New York, 404 U.S. 257 (1971). Absent case-specific proof of racial animus or some other invidious or retaliatory intent, *see, e.g.*, Blackledge v. Perry, 417 U.S. 21 (1974), however, the Constitution does not bar a prosecutor from making good on his promise to throw the book at a defendant who declines a plea offer. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357 (1978). On plea bargaining generally, see GEORGE FISHER, PLEA BARGAINING'S TRIUMPH (2003); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979).

[45] Capital sentencing procedures have been strictly regulated by the Eighth Amendment Cruel and Unusual Punishments Clause ever since *Furman v. Georgia*, 408 U.S. 238 (1972). The same strict rules do not apply to non-capital sentencing. *Compare, e.g.*, Williams v. New York, 337 U.S. 241, 251–52 (1949) (explaining due process does not require disclosure to the defense of any information used to impose a death sentence), *with, e.g.,* Gardner v. Florida, 430 U.S. 349, 362 (1977) (holding, post-*Furman*, that due process requires disclosure to the defense of any information used to impose a death sentence; overruling *Williams* for capital cases).

[46] The post-trial process is in a different category. The Constitution does not guarantee a defendant the right to take an appeal, *see* McKane v. Durston, 153 U.S. 684, 686–88 (1894), but, if a state creates an appellate process, the Constitution plays a limited role in regulating access to it, *see, e.g.*, Halbert v. Michigan, 545 U.S. 605, 610 (2005) (holding that an indigent defendant has a right to appointed counsel on his first appeal); Griffin v. Illinois, 351 U.S. 12, 16–19 (1956) (holding that indigent defendants have a right to a free trial transcript for appeal).

[47] Even those two excepted fields eventually may be smothered by federal constitutional law. *See, e.g.*, Missouri v. Frye, 132 S. Ct. 1399, 1411 (2012) (holding that defense counsel's failure to advise a defendant of a favorable plea offer allows a prisoner to challenge his later guilty plea); Lafler v. Cooper, 132 S. Ct. 1376, 1382 (2012) (holding that defense counsel's constitutionally deficient advice not to accept a favorable plea offer allows a defendant to challenge his conviction at trial); Graham v. Florida, 130 S. Ct. 2011, 2030 (2010) (holding that the Eighth Amendment Cruel and Unusual Punishments Clause prohibits imposition of a sentence of life without the possibility of parole on a minor for a nonhomicide crime).

[48] *See*, *e.g.*, PLUCKNETT, *supra* note 35, at 442–62 (discussing the felonies at common law).

Moreover, each of those offenses mirrored the moral code in England[49] and, later, in the colonies;[50] this moral code was called by some "the rules of natural justice,"[51] which would have been known to all. The result was that an offense against a neighbor or the king already was a crime against God. As John Salmond put it: "The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right."[52] For that reason, "[i]f not to his knowledge lawless, he is at least dishonest and unjust. He has little ground of complaint, therefore, if the law refuses to recognise his ignorance as an excuse, and deals with him according to his moral deserts."[53] Lastly, even if mores and ethics did not alert someone to forbidden conduct, a reasonable person would avoid committing a "mischievous" act as a matter of common sense.[54] Accordingly, being charged with one of the few crimes then known would have surprised no offender.

The offenses found in federal law today reach far beyond what common sense and generally accepted moral principles would forbid. There is an ever-increasing number of crimes that are outside the category of inherently harmful or blameworthy acts—what criminal law treatises call *malum in se* offenses—but are crimes only because the legislature has banned that conduct by using the criminal law to regulate public behavior, crimes known as *malum prohibitum* offenses.[55] Such crimes, originally called "public welfare offenses," originated in the nineteenth century with the sale of impure or adulterated food and alcohol, but grew in number early in the twentieth century to include building code and traffic violations as well.[56] Today, in order to keep pace with the growth in size and complexity

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[49] *See* HOLMES, *supra* note 11, at 125 ("[T]he fact that crimes are also generally sins is one of the practical justifications for requiring a man to know the criminal law."); LAFAVE, *supra* note 11, § 1.3(f); Livingston Hall & Selig J. Seligman, *Mistake of Law and* Mens Rea, 8 U. CHI. L. REV. 641, 644 (1940) ("[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as 'custom.'").

[50] *See* FRIEDMAN, *supra* note 24, at 31–58.

[51] SALMOND, *supra* note 11, at 426–27.

[52] *Id.* at 427.

[53] *Id.*

[54] AUSTIN, *supra* note 11, at 485.

[55] *See* LAFAVE, *supra* note 11, § 1.6(b) (defining those terms). Jerome Hall phrases this concern in a slightly different manner. He distinguishes between actions that are inherently immoral and ones that are immoral only because they are forbidden. Hall, *supra* note 9, at 35–36. The point is the same, however it is described.

[56] *See* Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 595 (1958) ("For it was in the latter half of the nineteenth century that the great chain of regulatory statutes was initiated in England, which inaugurated a new era in the administration of the criminal law. Among them are the Food and Drugs Acts, the Licensing Acts, the Merchandise Marks Acts,

of the administrative state, the public welfare offense doctrine now includes additional modern-day fields.[57]

Consider environmental law.[58] What would have been at most a nuisance at common law now may be a crime that can be prosecuted under

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the Weights and Measures Acts, the Public Health Acts and the Road Traffic Acts. With these statutes came a judicial readiness to abandon traditional concepts of *mens rea* and to base criminal liability on the doing of an act, or even upon the vicarious responsibility for another's act, in the absence of intent, recklessness or even negligence." (footnotes omitted)); Francis Bowles Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 63–67 (1933).

[57] *See, e.g.*, Sanford Kadish, *Some Observations on the Use of Criminal Sanctions in the Enforcement of Economic Regulations*, 30 U. CHI. L. REV. 423, 424–25 (1963); Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 37 (1997) ("Legislatures, concerned about the perceived weakness of administrative regimes, have put criminal sanctions behind administrative regulations governing everything from interstate trucking to the distribution of food stamps to the regulation of the environment." (footnote omitted)).

[58] For a discussion of the history of federal environmental regulation, see RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW (2004); PETER S. MENELL & RICHARD B. STEWART, ENVIRONMENTAL LAW AND POLICY (1994); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY (5th ed. 2006).

Congress enacted a few federal laws prior to 1970 that had a limited effect of protecting the environment. Section 13 of the Rivers and Harbors Appropriations Act of 1899, also known as the Refuse Act, 33 U.S.C. § 407 (2006), was primarily designed as a means of protecting navigation and commerce, but that law made it a misdemeanor to jettison garbage or other material, such as petroleum products and industrial solid wastes, into navigable waters. *See* United States v. Standard Oil Co., 384 U.S. 224, 229–30 (1966); United States v. Republic Steel Corp., 362 U.S. 482, 489–92 (1960). As such, the federal government used the Refuse Act early on to prosecute polluters of the nation's waters. *See, e.g.*, United States v. Penn. Indus. Chem. Corp., 411 U.S. 655 (1973); United States v. White Fuel Corp., 498 F.2d 619 (1st Cir. 1974).

Environmental law has principally come into being in the last forty years. The first modern-day substantive environmental protection laws were the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C. (2006)), the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified in scattered sections of 33 U.S.C. (2006)), and the Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795. Congress amended those statutes over time in order to strengthen their effectiveness. As to the Clean Air Act, see the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C. (2006)); and the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C. (2006)). As to the Clean Water Act, see the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1281(a), 1294–97 (2006)); and the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (codified as amended at 33 U.S.C. §§ 1267–1377 (2006)). As to RCRA, see The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 33 U.S.C. §§ 6901–91 (2006)). Congress also passed several other laws, such as the Ocean Dumping Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052 (codified at 16 U.S.C. §§ 1431–47, 33 U.S.C. §§ 1401–45, 2802–05 (2006)); the Comprehensive Environmental Response,

a variety of federal criminal environmental laws.[59] Most federal environmental statutes also impose recordkeeping and reporting requirements that can serve as the basis for a criminal charge.[60] Some statutes even provide criminal sanctions for negligent acts.[61] In sum, the environmental laws offer a full-service panoply of rules of conduct enforceable in a criminal prosecution.

Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 26 U.S.C. §§ 4611–12, 4661–62, 42 U.S.C. §§ 9601–75 (2006)), which Congress amended in the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at scattered sections of 10, 26, 42 U.S.C. (2006)); the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990) (codified in scattered sections of U.S.C. (2006)); the Pollution Prosecution Act of 1990, Pub. L. No. 101-593, tit. 2, 104 Stat. 2962; the Toxic Substances Control Act, 15 U.S.C. §§ 2601–97 (2006), the Safe Drinking Water Act, 42 U.S.C. §§ 300f–j-25 (2006); the Federal Fungicide, Insecticide, and Rodenticide Act, 7 U.S.C. § 136 (2006); the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001–50 (2006); Underground Storage Tank Compliance Act, 42 U.S.C. § 6991j–m (2006); and the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–62 (2006). The result is this: The 21st edition of THE ENVIRONMENTAL LAW HANDBOOK (Thomas F. P. Sullivan ed., 2011), a collection and discussion of all federal environmental laws, is more than 1,000 pages in length, nearly twice as long as the 12th edition of that text, which was published in 1993, and many of the provisions discussed in that text can underlie a criminal charge. *See* Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 869 & n.3 (1994) [hereinafter Lazarus, *Assimilating Environmental Protection*].

[59] For the history of the federal government's environmental criminal program, see PERCIVAL ET AL., *supra* note 58, at 962–63; Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 792–93 (1991); F. Henry Habicht, II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 ENVTL. L. REP. 10,478, 10,478–80 (1987); Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900, 902–12 (1991); Judson W. Starr, *Countering Environmental Crimes*, 13 B.C. ENVTL. AFF. L. REV. 379, 380–84 (1986); and James M. Strock, *Environmental Criminal Enforcement Priorities for the 1990s*, 59 GEO. WASH. L. REV. 916, 917–22 (1991); *see also* ENVIRONMENTAL LAW HANDBOOK, *supra* note 58, at 96–127. For an insider's guide to the investigation of environmental crime, see STEVEN C. DRIELAK, ENVIRONMENTAL CRIME (1998).

[60] PERCIVAL, ET AL., *supra* note 58, at 962; Habicht, *supra* note 59, at 10,478. The most prominent federal law used to prosecute false statements is 18 U.S.C. § 1001, which makes it a crime to make a materially false statement on a matter "within the jurisdiction of" a federal agency. Unlike the laws outlawing perjury, the false statement statute does not require a party to be sworn. *See* STUART P. GREEN, LYING, CHEATING, AND STEALING 161 (2006). The federal environmental laws can impose additional penalties. Under the *Blockburger* test, Congress can impose multiple sentences under different laws for the same conduct as long as each statute requires proof of a fact that the others do not. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932); *see also, e.g.*, Rutledge v. United States, 517 U.S. 292, 297 (1996); Brown v. Ohio, 432 U.S. 161, 164–66 (1977).

[61] PERCIVAL ET AL., *supra* note 58, at 962.

If the structure and procedures of the contemporary criminal justice system, as well as current substantive criminal law, no longer resemble the common law, we should ask whether the ancient ignorance or mistake of law rule still makes sense. To remain vibrant, the law should be subject to change as knowledge increases, wisdom accrues, experience teaches, and customs develop. The common law rule that a mistake of law is no defense is very old, indeed, but longevity alone should not be a sufficient justification for its continued use. Justice Holmes, to pick one example from the raft of common law authorities, would agree. In his article *The Path of the Law*, Holmes wrote:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[62]

This Article asks whether, in light of the manifold changes that have occurred to the criminal justice system over several centuries, it still makes sense to give effect to the common law rule that, generally speaking, ignorance or mistake of law is not a defense.[63] Given the rule's longevity, it is incumbent on any critic to carry the burden of persuasion regarding why the rule should be jettisoned. To meet that task, we must examine the pros and cons of the rule. The starting point should be the justifications for the rule, to which we now turn.

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[62] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

[63] Currently, ignorance or mistake of law plays only a limited role as a defense to criminal liability. Ignorance or mistake of law can be a defense if the statute requires or demands proof that the defendant knew he was breaking the law. For example, a defendant's good-faith belief that he owned the property he took would defeat a larceny charge. *See* State v. Brown, 16 S.W. 406, 407–08 (Mo. 1891). A mistake of law defense also can be raised in the case of certain complex regulatory schemes where it is unreasonable to conclude that Congress intended to penalize a person's good-faith belief that his conduct is lawful. *See, e.g.*, Cheek v. United States, 498 U.S. 192, 202–03 (1991) (federal tax code); United States v. Lizarraga-Lizarraga, 541 F.2d 826, 826–29 (9th Cir. 1976) (export control laws). In some circumstances, ignorance of a *fact* may be a defense, even if ignorance of *law* cannot. *See* Staples v. United States, 511 U.S. 600, 607 n.3 (1994); 1 AUSTIN, *supra* note 11, at 481; Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109 & n.10. Some have treated "ignorance" as a lack of knowledge and a "mistake" as a failure of reasoning, *see* Hall, *supra* note 9, at 2 & n.5; Keedy, *supra* note 9, at 76, but the distinction is too fine to matter for this purpose.

II. THE COMMON LAW RULE THAT IGNORANCE OR MISTAKE OF LAW IS NO EXCUSE

A. THE RATIONALE FOR THE RULE

Several rationales have been offered in defense of the ignorance or mistake rule.[64] Close examination shows that reflexive application of the common law rule can be unjust and irrational in many criminal cases brought today.

1. Everyone Knows the Criminal Law

The first and oldest justification is that ignorance or mistake of the law cannot be an excuse since every person is presumed to know the law.[65] The rationale for the presumption is that people generally know what the law forbids in whatever jurisdiction they live. Even if they do not, the knowledge is easy to acquire, so anyone who does not learn what is outlawed is, at least, guilty of negligence.[66] That presumption has the virtue of being simple and straightforward, and it was reasonable in Blackstone's days, when the penal code was small and reflected community mores. The problem is that this principle is no longer a sensible one, at least not when considered as an across-the-board rule.

Over time, the justification for the ignorance-of-the-law rule began to wear thin. Victorian-era judge and legal historian Sir James Fitzjames Stephen described the presumption of knowledge of the law as resembling "a forged release to a forged bond."[67] As the late-nineteenth-century jurist John Austin wrote, even then the proposition "that any actual system is so knowable, or that any actual system has ever been so knowable," in his colorful words, is "notoriously and ridiculously false."[68] In this century, Jerome Hall described the rule as "an obvious fiction."[69] Other critics concluded that "even though the ignorance rule may have been justified in the early days of the criminal law in England," over time that presumption

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[64] *See generally* Cass, *supra* note 10, at 689–95.

[65] *Id.* at 691.

[66] *E.g.*, Cheek v. United States, 498 U.S. 192, 199 (1991) (stating the rule that ignorance of the law is no defense is "[b]ased on the notion that the law is definite and knowable"); 1 AUSTIN, *supra* note 11, at 480–81 ("Ignorance or error with regard to matter of fact, is often inevitable: That is to say, no attention or advertence could prevent it. But ignorance or error with regard to the state of the law, is never inevitable. For the law is definite and knowable, or might or ought to be so."); 4 BLACKSTONE, *supra* note 11, at *27; SALMOND, *supra* note 11, at 426; Hall, *supra* note 2, at 15–16.

[67] 2 STEPHEN, *supra* note 11, at 95.

[68] 1 AUSTIN, *supra* note 11, at 481–82.

[69] Hall, *supra* note 2, at 14; *see also* People v. O'Brien, 31 P. 45, 47 (Cal. 1892).

has become "indefensible as a statement of fact."[70] Edwin Keedy was even less kind; he called the presumption "absurd."[71]

It is easy to see why. The first federal criminal statute created approximately thirty offenses.[72] Today, the federal and state penal codes are immense in size.[73] There are more than 4,000 federal criminal statutes alone spread out across the fifty-one titles and 27,000 pages of federal law—so many, in fact, that no one, not even the Justice Department, knows the actual number of federal criminal offenses.[74] This growth has been particularly large in the field of "regulatory crimes"—that is, offenses that consist in violation of a regulatory scheme governing the environment, commerce, finance, or health and safety.[75] And if you include federal

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[70] Hall & Seligman, *supra* note 49, at 646.

[71] Keedy, *supra* note 9, at 77.

[72] "The first Congress enacted laws punishing treason, misprision of treason, perjury in federal court, bribery of federal judges, forgery of federal certificates and securities, and murder, robbery, larceny and receipt of stolen property on federal property or on the high seas." George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commerical Regulation*, 44 AM. CRIM. L. REV. 1417, 1419–20 (2007) (footnotes omitted); *see* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790). That number increased over time as American society began to recognize that only the federal government could regulate interstate commerce, and as the Supreme Court expanded Congress's power in this regard. *See, e.g.*, Champion v. Ames, 188 U.S. 321, 354–55 (1903) (upholding federal statute prohibiting the mails from being used for the purpose of promoting a lottery); FRIEDMAN, *supra* note 24, at 264–65.

[73] For example, the Illinois penal code grew between 1961 and 2001 from 72 pages to 1,200 pages. John R. Emshwiller & Gary Fields, *Criminal Code Tough to Crack: Struggle to Revamp Illinois Laws Offers Glimpse of What Congress Faces in Its Effort*, WALL ST. J., Dec. 29, 2011, at A3.

[74] *See id.*; JOHN S. BAKER, JR., HERITAGE FOUND. LEGAL MEMORANDUM, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES (June 16, 2008), *available at* http://s3.amazonaws.com/thf_media/2008/pdf/lm26.pdf; Paul Rosenzweig, *The History of Criminal Law*, *in* ONE NATION, UNDER ARREST 127, 131 (Paul Rosenzweig & Brian W. Walsh eds., 2010); Terwilliger, *supra* note 72, at 1418. That problem only gets worse when a prosecutor "digs into ancient books to exhume and enforce long-forgotten statutes." Hall, *supra* note 2, at 35 (footnote omitted).

[75] *See* FRIEDMAN, *supra* note 24, at 282–83 ("There have always been regulatory crimes, from the colonial period onward . . . . But the vast expansion of the regulatory state in the twentieth century meant a vast expansion of regulatory crimes as well. Each statute on health and safety, on conservation, on finance, on environmental protection, carried with it some form of criminal sanction for violation . . . . Wholesale extinction may be going on in the animal kingdom, but it does not seem to be much of a problem among regulatory laws. These now exist in staggering numbers, at all levels. They are as grains of sand on the beach.").

regulations that can be enforced in criminal prosecutions, the number of potentially relevant federal laws may exceed 300,000.[76]

The federal criminal law also is not limited to crimes that mirror any readily recognizable moral code.[77] No criminal code that outlaws the unauthorized use of Smokey the Bear's image or the slogan "Give a Hoot, Don't Pollute" can credibly claim to exclude trivial conduct wholly unrelated to moral delinquency.[78] Other equally nefarious crimes are the failure to keep a pet on a leash that does not exceed six feet in length;[79] digging or leveling the ground at a campsite;[80] picnicking in a non-designated area;[81] operating a "motorized toy, or an audio device, such as a radio, television set, tape deck or musical instrument, in a manner . . . [t]hat exceeds a noise level of 60 decibels measured on the A-weighted scale at 50 feet" (whatever that means);[82] "[b]athing, or washing food, clothing, dishes, or other property at public water outlets, fixtures or pools" not designated for that purpose;[83] "[a]llowing horses or pack animals to proceed in excess of a slow walk when passing in the immediate vicinity of persons on foot or bicycle";[84] operating a snowmobile that makes "excessive noise";[85] using roller skates, skateboards, roller skis, coasting vehicles, or similar devices in non-designated areas;[86] failing to turn in found property to the park

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[76] Edwin Meese, III, *Introduction* to ONE NATION, UNDER ARREST, *supra* note 74, at xv–xvi, 218.

[77] Meese, *supra* note 76, at xviii; Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279, 1281 (2007).

[78] Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J., July 23, 2011, at A1; *see also* Sayre, *supra* note 56, at 67.

[79] *See* 36 C.F.R. § 2.15(a)(2) (2011).

[80] *See* 36 C.F.R. § 2.10(b)(1).

[81] *See* 36 C.F.R. § 2.11.

[82] *See* 36 C.F.R. § 2.12(a)(1).

[83] *See* 36 C.F.R. § 2.14(a)(5).

[84] *See* 36 C.F.R. § 2.16(e).

[85] *See* 36 C.F.R. § 2.18(d)(1). The term "excessive noise" is helpfully defined as follows:

> Excessive noise for snowmobiles manufactured after July 1, 1975 is a level of total snowmobile noise that exceeds 78 decibels measured on the A-weighted scale measured at 50 feet. Snowmobiles manufactured between July 1, 1973 and July 1, 1975 shall not register more than 82 decibels on the A-weighted scale at 50 feet. Snowmobiles manufactured prior to July 1, 1973 shall not register more than 86 decibels on the A-weighted scale at 50 feet. All decibel measurements shall be based on snowmobile operation at or near full throttle.

Id.

[86] *See* 36 C.F.R. § 2.20.

superintendent "as soon as practicable";[87] and using a surfboard on a beach designated for swimming.[88]

Historically, this growth in the criminal law was not a major public policy problem because of the scienter or mens rea element in the criminal law. The common law placed great emphasis on the requirement that a person could be found guilty only if he acted with a "vicious will."[89] Given that requirement, the common law courts found it unnecessary to require that a defendant be shown to have acted with the purpose of intentionally breaking a known law.[90] Congress, through the scienter element, in effect required the government to prove that a person knew that he committed acts that were wrongful, harmful, or illegal. A mens rea requirement was deemed essential to the criminal law—and therefore to freedom—because it did not punish reasonable mistakes honestly made[91] or actions that were negligent or accidental.[92] It distinguished between innocent and guilty parties by requiring the state to prove that an offender was blameworthy.

To be sure, there were exceptions to the mens rea requirement. What were known as "public welfare offenses" are the best example. That narrow exception was limited to violations of housing, sanitary, motor vehicles codes, and the like. Also, public welfare offenses imposed only light monetary fines and did not single out anyone for public obloquy.[93] Indeed, some courts noted that imprisonment was incompatible with the reduced scienter element for such offenses.[94] Public welfare offenses, like *malum prohibitum* crimes, truly were a small-scale exception to the proposition that the criminal justice system should not condemn someone

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[87] *See* 36 C.F.R. § 2.22(a)(3).

[88] *See* 36 C.F.R. § 3.17(b).

[89] Roscoe Pound made this point well: "Historically, our substantive criminal law is based upon the theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." Roscoe Pound, *Introduction* to FRANCIS BOWLES SAYRE, CASES ON CRIMINAL LAW (1927); *see also* HOLMES, *supra* note 11, at 47.

[90] As Professor Cass has explained,

> At common law, the *mens rea* necessary to convict generally required that the government show the defendant to have acted purposefully to bring about a harm, to have known facts indicating that the harm would be a likely result of his action, or to have acted without concern for whether the harm would follow.

Cass, *supra* note 10, at 683 (footnote omitted).

[91] *Id.* For example, a person who mistakenly took someone else's umbrella would not have committed theft because he did not realize that the umbrella was not his.

[92] Which gave rise to Holmes's famous quip that "even a dog distinguishes between being stumbled over and being kicked." HOLMES, *supra* note 11, at 5.

[93] *See* Sayre, *supra* note 56, at 58–59, 67, 72, 78–82.

[94] *See, e.g.*, Staples v. United States, 511 U.S. 600, 617 (1994) (collecting authorities); People *ex rel.* Price v. Sheffield Farms-Slawson-Decker Co., 121 N.E. 474, 477 (N.Y. 1918).

who neither intended to break the law nor knowingly engaged in obviously harmful conduct.

That is no longer true.[95] Today, Congress oftentimes creates felony offenses that do not require proof of Blackstone's "vicious will."[96] These offenses authorize imprisonment and carry the same moral condemnation as common law crimes.[97] Some such laws require only proof of negligence, while some establish strict liability offenses.[98] That development is a dramatic change from Blackstone's day.

An additional problem stems from the growth of the administrative state. Laws delegating to federal administrative agencies the power to flesh out a statutory scheme often have included power to define the terms of criminal offenses. That practice is defended on the ground that administrative expertise is needed to ensure that the public is adequately protected against whatever schemes an offender can devise. But pursuing that tack creates its own problems. Not every regulatory scheme can be readily used as the basis for a criminal prosecution. Some public welfare laws have an expansive reach and delegate broad authority to officials to craft a detailed regulatory scheme using changing, newly available scientific data. The promulgation of implementing regulations can lead to

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[95] *See* Gerald E. Lynch, *supra* note 57, at 38–39 ("[T]he more dominant and longer-standing trend in our century has been the erosion of *mens rea* requirements. This period has seen the dramatic growth of strict liability offenses (and their close cousin, liability for negligence) in American criminal law, and such offenses have found a particular home in the kind of regulatory criminal statutes that have the greatest impact in corporate settings.").

[96] *See, e.g.*, BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND. & NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (Apr. 2010), *available at* https://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf.

[97] STUNTZ, *supra* note 26, at 32; Rosenzweig, *supra* note 74, at 138–50; *see, e.g.*, United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971); United States v. Freed, 401 U.S. 601 (1971).

[98] Consider the case of *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1101 (2000). *See* Rosenzweig, *supra* note 74, at 127–28, 145–48. Edward Hanousek, Jr. was an employee of the Pacific & Arctic Railway and Navigation Company working as the roadmaster of the White Pass & Yukon Railroad. Hanousek supervised a rock quarry project at a site on an embankment 200 feet above the Skagway River in Alaska. One day during rock removal operations—while Hanousek was off duty and at home—a backhoe operator, employed by an independent contractor retained before Hanousek was hired, accidentally struck a petroleum pipeline near the railroad tracks. The operator's error ruptured the pipeline and spilled 1,000 to 5,000 gallons of oil into the river. Hanousek was convicted under the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A) (2006), for negligently discharging oil into a navigable water of the United States. The district court and court of appeals rejected his argument that the Due Process Clause prohibited him from being convicted only for negligence.

an avalanche of positive criminal laws in one form or another.[99] That approach may serve well the needs of officials tasked with filling in the blanks of a regulatory program, but it ill serves the interests of regulated parties, who need clearly understandable rules defining criminal liability in order to avoid winding up in the hoosegow. Worse still is the prospect that the government has interpreted its regulations in nonpublic guidance documents that, in effect, create "secret law."[100]

The environmental laws are an example of that predicament. The marriage of the environmental and criminal laws raises concerns not present in the case of common law or, to use the vernacular, contemporary street crimes.

The criminal laws historically have focused on actual or likely immediate physical or monetary injury to a particular individual. The facts of the crimes themselves are readily understandable and provable in court. Anyone can easily comprehend the significance of the image of a person, smoking gun in hand, standing over the dead body of a longtime enemy or rival, shouting out, "He deserved it!" The prosecution can present that scenario to a jury in a manner that leaves no doubt what happened, how it happened, to whom, by whom, and why.

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[99] The Environmental Protection Agency has been a particularly fruitful source of regulations. "Since its inception in 1970, the [EPA] has grown to enforce some 25,000 pages of federal regulations, equivalent to about 15% of the entire body of federal rules. Many of the EPA rules carry potential criminal penalties." Fields & Emshwiller, *supra* note 78. There are numerous other statutes aside from the environmental laws that authorize federal agencies to issue regulations that can be used in a criminal prosecution. *See, e.g.*, National Park Service Organic Act, 16 U.S.C. §§ 1–4 (2006); Arms Export Control Act, 22 U.S.C. §§ 2751–99aa-2 (2006); Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. §§ 6701–71 (2006); Export Administration Act of 1979, 50 App. U.S.C. §§ 2401–20 (2006).

[100] The complexity of environmental statutes and regulations is well known, but their obscurity may not be fully understood. A significant problem in this area is that the government's interpretation of regulations is often issued in "guidance documents" that may not be generally available. No one seems to know (or even to have investigated) the number of memoranda reflecting a federal agency's interpretation of its own regulations, even though that interpretation is generally considered controlling. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 255–58 (2006); Auer v. Robbins, 519 U.S. 452, 461–62 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 417–18 (1945); *cf.* Stinson v. United States, 508 U.S. 36, 45 (1993) (collecting cases and holding that the same rule applies to the U.S. Sentencing Commission's interpretation of the Sentencing Guidelines). The result is that critics of environmental law complain that the government may rely on "secret" or "underground" law as a basis for claiming a violation. Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TULANE L. REV. 487, 503 (1996). The Internet allows such documents to be posted for public viewing; that may ameliorate the problem, but is unlikely to make the problem go away.

But the same cannot be said of the environmental laws. They primarily seek to reduce the potential, long-term risk of injury to human health and the environment generally, not just to a specified person or persons. The scientific evidence necessary to establish the likelihood and type of harm can be a matter of estimate, judgment, and dispute even among experts. To empower regulators to reduce such potential, evolving risks, the environmental laws use broad, aspirational, complex, and dynamic standards in order to enable regulators to capture all possible harms. Unlike the criminal laws, which require that forbidden conduct be defined with certainty, the environmental laws intentionally leave regulators ample room to maneuver in case new evidence amplifies the known potential adverse effect of hazardous substances (e.g., carcinogens) or brings to light new harms.[101]

Moreover, the environmental laws often do not require proof of the same type of mental state and actions that ordinary crimes demand.[102] Some criminal environmental laws require proof of the same "evil meaning" mind demanded by common law crimes.[103] But most can lead to a conviction if a person knew what he was doing, even if he did not know that what he was doing was illegal or wrongful,[104] and sometimes even if he merely acted negligently.[105] Moreover, the "knowledge" necessary to establish a violation can be imputed to a person from the knowledge of

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[101] *See* Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO L.J. 2407 (1995); Lazarus, *Assimilating Environmental Protection*, *supra* note 58, at 881–84.

[102] ENVIRONMENTAL LAW HANDBOOK, *supra* note 58, at 80 ("Criminal provisions in environmental law challenge traditional notions of criminal conduct.").

[103] *Id.* at 97; *see* Toxic Substances Control Act, 15 U.S.C. § 2615(b) (2006); Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1)-(2) (2006); Safe Drinking Water Act, 42 U.S.C. § 300h-2(b)(2) (2006).

[104] KATHLEEN F. BRICKEY, ENVIRONMENTAL CRIME 25 (2008); Lazarus, *Assimilating Environmental Protection*, *supra* note 58, at 881; *see, e.g.*, United States v. Cooper, 482 F.3d 658, 667–68 (4th Cir. 2007); United States v. Sinskey, 119 F.3d 712, 715–16 (8th Cir. 1997); United States v. Hopkins, 53 F.3d 533, 537–41 (2d Cir. 1995); United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1993) (en banc); United States v. Baytank (Houston), Inc., 934 F.2d 599, 613 (5th Cir. 1991).

[105] *See, e.g.*, Clean Water Act of 1977, 33 U.S.C. § 1319(c)(1) (2006); Clean Air Act of 1970, 42 U.S.C. § 7413(c)(4) (2006); United States v. Ortiz, 427 F.3d 1278, 1282–83 (10th Cir. 2005); United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999) (upholding conviction for negligence); United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1129 (3d Cir. 1979) (same); ENVIRONMENTAL LAW HANDBOOK, *supra* note 58, at 97. One law, the Rivers and Harbors Appropriations Act of 1899, also known as the Refuse Act, 33 U.S.C. § 407 (2006), makes it a strict liability misdemeanor to discharge garbage into navigable waters of the United States. *See, e.g.*, United States v. White Fuel Corp., 498 F.2d 619, 623 (1st Cir. 1974); BRICKEY, *supra* note 100, at 58–59.

others in his company.[106] As far as the necessary criminal acts go, a person can be held liable not only for his own actions, but also for the conduct of others under his supervision because of his position in the company.[107] In some instances, a person can be held criminally liable for *not* reporting a crime.[108] Finally, "[i]gnorance or mistake-of-law are generally not valid defenses, except perhaps for a specific intent crime that requires a knowing violation."[109]

Atop that, some amount of pollution and waste is inevitable in a modern industrial society.[110] There is no realistic possibility of eliminating

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[106] The courts have permitted that imputation of knowledge pursuant to what is known as the "collective knowledge" doctrine, under which a corporation's knowledge is the sum of what all its employees know when acting within the scope of their responsibilities. United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987); BRICKEY, *supra* note 100, at 49–50; ENVIRONMENTAL LAW HANDBOOK, *supra* note 58, at 97.

[107] United States v. Johnson & Towers, Inc., 741 F.2d 662, 670 (3d Cir. 1984) (holding that the jury may infer knowledge of the lack of a permit "to those individuals who hold the requisite responsible positions with the corporate defendant"); ENVIRONMENTAL LAW HANDBOOK, *supra* note 58, at 97 ("For management, culpability is largely a measure of whether they actively participated in or countenanced the environmental misconduct."); *cf.* United States v. Park, 421 U.S. 658, 677–78 (1975) (explaining that juries may infer corporate officers are aware of the facts constituting a crime without proof that they subjectively knew the facts). Some courts, however, have imposed a stricter proof requirement on the government. *See* United States v. McDonald & Watson Waste Oil Co., 933 F.2d 35, 55 (1st Cir. 1991) ("[K]nowledge may be inferred from circumstantial evidence, including position and responsibility of defendants such as corporate officers, as well as information provided to those defendants on prior occasions. Further, willful blindness to the facts constituting the offense may be sufficient to establish knowledge. However, the district court erred by instructing the jury that proof that a defendant was a responsible corporate officer, as described, would suffice to conclusively establish the element of knowledge expressly required under [42 U.S.C.] § 3008(d)(1). Simply because a responsible corporate officer believed that on a prior occasion illegal transportation occurred, he did not necessarily possess knowledge of the violation charged. In a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge.").

[108] *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9603(b)(3) (2006); *McDonald*, 933 F.2d at 55 ("CERCLA imposes criminal sanctions upon any person in charge of a facility from which a 'reportable quantity' of a hazardous substance is released who fails to immediately notify the appropriate federal agency.").

[109] ENVIRONMENTAL LAW HANDBOOK, *supra* note 58, at 102 (footnote omitted). An additional problem in the criminal environmental area is that there are more political controversies and interbranch feuding than in other areas of the federal criminal law. *See* Lazarus, *Assimilating Environmental Protection*, *supra* note 58, at 872–79.

[110] *See* Lazarus, *Assimilating Environmental Protection*, *supra* note 58, at 882; Terwilliger, *supra* note 72, at 1418 ("Environmental laws for instance, incorporate steep criminal penalties for failing to meet regulatory standards in conducting what is otherwise legitimate commercial activity. Polluting is legal in the United States; the government issues

all risk of harm from some activities. Even breathing releases carbon dioxide into the environment. The question, therefore, is not how we can eliminate pollution entirely, but how we should manage known and unknown risks from the known, inevitable consequences of running a modern economy.[111] The difficulty of making those fine judgments reinforces the need for a scienter standard focusing on blameworthiness, but, unfortunately, few federal criminal environmental laws require proof that someone intended to break the law.[112] The result is that criminal laws designed to deal with common law crimes are blunt instruments not easily wielded when criminal law is used to promote environmental policy.[113]

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permits to allow it. Polluting too much, however, can be a felony. Some acts of pollution may indeed be criminal because they involve volitional and intentional acts that can result in foreseeable and significant harm—dumping highly toxic materials in an open field or waterway, for example. But the more common subject matter of environmental 'crimes' involves the line between permitted and not permitted discharges, which can be razor thin, often expressed in parts per million, and the stuff of great debate between experts and scientists.").

[111] *See, e.g.*, STEPHEN BREYER, BREAKING THE VICIOUS CYCLE 3–29 (1993).

[112] What makes such an approach to mens rea particularly problematic in the environmental law context is that environmental standards, unlike most traditional crimes, present questions of degree rather than of kind. Murder, burglary, assault, and embezzlement are simply unlawful. There is no threshold level below which such conduct is acceptable. In contrast, pollution is not unlawful per se: In many circumstances, some pollution is acceptable. It is only pollution that exceeds certain prescribed levels that is unlawful. But, for that very reason, the mens rea element should arguably be a more, not less, critical element in the prosecution of an environmental offense.

Lazarus, *Assimilating Environmental Protection, supra* note 58, at 882; *see also* Terwilliger, *supra* note 72, at 1419 ("Problems caused by such explosive growth in federal regulatory prosecutions, especially in the criminalization of what in the past would have been viewed as purely civil or administrative matters, have been exacerbated by the various legal doctrines that have made it far easier to prosecute corporations. These include the respondeat superior doctrine and vicarious corporate liability, the collective knowledge doctrine, and the general lessening of the intent standard in many of the crimes involved. Where 'intent' simply means 'knowing conduct,' and where a corporation is held to know everything any of its employees knows and is held responsible for the actions of every employee, it is easy to understand why corporate prosecutions proliferate.").

[113] Professor Richard Lazarus has argued that the markedly different goals and designs of the environmental and criminal laws make their integration an enormously difficult challenge. *See* Lazarus, *Assimilating Environmental Protection*, *supra* note 58, at 883–84; Lazarus, *supra* note 101, at 2466–67; *see also* Brickey, *supra* note 100, at 497–504. In his words:

> [T]here is a danger, indeed a potential impropriety, in Congress's approach to environmental criminal liability. The question whether certain conduct warrants a criminal sanction is far different than whether a civil sanction may be warranted, precisely because the latter is susceptible to being no more than an economic disincentive. Criminal liability standards should be more settled and less dynamic. They should be more reflective of what in fact can be accomplished rather than of the public's aspirations of how, if pushed, the world can change in the future.

The result is that, for some activities, federal criminal law has become a monstrously large and complex trap. In the words of the late Professor William Stuntz, American criminal law today "covers far more conduct than any jurisdiction could possibly punish."[114] Worse still than the fact that the federal criminal code is generally unruly and incoherent is the fact that the penal code no longer can be said to give the average person notice of what the law prohibits. Blameworthiness used to serve as a criterion that distinguished those who were evil-minded from those who were morally innocent, or just negligent. But we no longer can rely on the legislature to draw that line. We are gradually heading toward the prospect that everything not expressly permitted is forbidden, as was said of the former Soviet Union.[115] If so, everyone can be charged with some crime regardless

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> Perhaps most importantly, criminal sanctions should also be tempered by the gravity of the decision that certain conduct warrants the most severe of sanctions. Criminal sanctions are not simply another enforcement tool in the regulator's arsenal to promote public policy objectives. A criminal sanction is fundamentally different in character. The reason why criminal sanctions have greater deterrent value is also the reason why they must be used more selectively. Criminal sanctions should be reserved for the more culpable subset of offenses and not used solely for their ability to deter.
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> To date, Congress, however, has made no meaningful or systematic effort to consider criminal sanctions as presenting an issue distinct from that presented by civil sanctions. Congress has not tried to identify those circumstances in which the culpability of conduct warrants taking the next step of imposing criminal sanctions. Congress has not tried to identify those kinds of environmental standards for which criminal sanctions are more appropriate. Nor has Congress focused as carefully as it should on the mens rea issue.

Lazarus, *Assimilating Environmental Protection*, *supra* note 58, at 883–84 (footnote omitted).

[114] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001); *see generally* Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005) (discussing the vast number and breadth of federal criminal laws). Both parties are to blame for the problem of overcriminalization. *See* Kevin McKenzie, *Law Professor Slams Expansion of Federal Crimes*, COMMERCIAL APPEAL (Oct. 25, 2011, 11:21 PM), http://www.commercialappeal.com/news/2011/oct/25/law-professor-slams-expansion-federal-crimes/ ("[Law professor John S.] Baker blamed Republicans as well as Democrats for the trend, saying that both parties fuel it. One-third of about 4,200 federal crimes on the books have been passed since 1970 and Republican President Richard Nixon's 'war on crime.'"). The problem may be most acute during election years. *See* Thornburgh, *supra* note 77, at 1282 ("A significant aspect of this increase in federal crimes over the past ten years, incidentally, is the wholly unsurprising fact that a disproportionate number of these criminal laws were passed in three election years, 1998, 2000, and 2002. The 'jail-centric' approach by the Congress, which is fueled by the almost reflexive notion that being 'tough on crime' is good fodder on the campaign trail while trolling for votes, has deep societal costs that are especially poignant in the regulatory and business arenas.").

[115] For those who may find that statement overblown consider the following list of "crimes" and "criminals": (1) Abner Schoenwetter spent sixty-nine months in federal prison for importing marginally small lobsters and for bulk packing them in plastic, rather than bin boxes, in violation of Honduran law, which is made applicable to U.S. citizens by virtue of the Lacey Act, ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 3371–78

of the effort that he or she makes to learn where the line is drawn and to stay far away from it. Pushing the presumption of knowledge of the law to reach every nook and cranny of today's penal code would lead to an unsound and irrational result. Those developments in the criminal law make a reflexive application of the common law ignorance or mistake rule unreasonable today.[116]

(2006)); (2) the federal government charged retired race-car champion Bobby Unser for accidentally driving a snowmobile in a blizzard onto federal land where such devices are not allowed; (3) the federal government charged Robert Kern for moose hunting in Russia in violation of Russian law, as incorporated by the Lacey Act; (4) the federal government charged Eddie Anderson and his son with attempting to take arrowheads from a campsite that, unbeknownst to them, was on federal property; (5) the federal government charged George Norris with importing the wrong type of orchids, in violation of a treaty, the Convention on International Trade in Endangered Species, as incorporated by the Lacey Act, and of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–34 (2006); (6) the federal government charged Robert Eldridge, Jr., with freeing a whale caught in his fishing net, rather than reporting the ensnarement to federal authorities so that they could free the whale instead, in violation of the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1371–1423 (2006); (7) the federal government charged Lawrence Lewis with diverting a backed-up sewage system (clogged by the adult diapers flushed down the toilet by the elderly residents at the nursing home where he worked) into the Potomac River, in violation of the Clean Water Act, despite his belief that the water was being sent to a sewage treatment plant; (8) the federal government charged Wade Martin with selling a sea otter skin to a person who turned out to be a non-native Alaskan, in violation of the Marine Mammal Protection Act of 1972; (9) the City of Palo Alto, California, had sixty-one-year-old grandmother Kay Liebrand arrested and criminally charged for allowing the bushes on her property to exceed two feet in height; and (10) New York City makes it a crime to hail a cab for someone not in one's "social company." *See* Trent England et al., *The Overcriminalization Problem*, *in* ONE NATION, UNDER ARREST, *supra* note 74, at 3, 3–11, 23–30, 61–78; Gary Fields & John R. Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, WALL ST. J., Dec. 12, 2011, at A1; Gary Fields & John R. Emshwiller, *The Animal Enterprise Terrorism Act Sets an Unusual Standard for Crime*, WALL. ST. J., Sept. 27, 2011, at A12; Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J., Sept. 27, 2011, at A1; Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Ensnared*, *supra* note 78, at A1; Michael M. Grynbaum, *Under Rule, Hailing a Cab for a Stranger Can Be Illegal*, N.Y. TIMES, Nov. 25, 2011, at A14.

[116] Because the ignorance rule is stated as a presumption, it could be argued that the presumption cannot be applied where doing so is irrational. On occasion, the Supreme Court has held that Congress may not rely on a presumption to serve as proof of an element of an offense if the presumed fact is more likely than not to follow the predicate fact. *See* Leary v. United States, 395 U.S. 6, 36 (1969); Tot v. United States, 319 U.S. 463, 467 (1943). Application of the *Tot* and *Leary* standard to the common law ignorance rule could prove unjustified in some cases. Cass, *supra* note 10, at 689. Of course, if Congress can and does dispense with the element of proof to which the presumption applies, the rule of *Tot* and *Leary* becomes of dubious utility. Packer, *supra* note 63, at 121 n.51. That is the case here. The presumption is irrebuttable, and therefore is the same as a rule of law foreclosing a mistake of law defense. Jellico Coal Mine Co. v. Commonwealth, 29 S.W. 26, 26–27 (Ky. 1895); SALMOND, *supra* note 11, at 426; *see* 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2492 (2d ed. 1923).

2. The Ignorance Rule Is Necessary to Enforce the Law

The second justification for the ignorance-is-no-excuse rule is expediency. A contrary rule, the argument goes, would place on the prosecution the inordinately difficult burden of showing what knowledge of the law a person had at the time of the charged offense.[117] In Austin's words, "if ignorance of the law were a ground of exemption, the administration of justice would be arrested."[118]

That fear may best explain why the government strenuously defends the ignorance rule, and why courts diligently have continued to follow it.[119] Ultimately, however, that argument is unpersuasive. The best—and shortest—refutation was given more than a century ago by Oliver Wendell Holmes in his work *The Common Law*.[120] As he explained, the difficulty-of-proof objection is irrelevant. "If justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try . . . unless we are justified in sacrificing individuals to public convenience . . . ."[121] It also is no argument that permitting this issue to be litigated will unduly lengthen criminal trials. Both the criminal law and the Constitution recognize that certain values can trump the state's interest in

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[117] *E.g.*, Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833) (explaining that the principle that mistake of law is not an excuse "results from the extreme difficulty of ascertaining what is, *bonâ fide*, the interpretation of the party. . . ."); *see also* People v. O'Brien, 31 P. 45, 46–47 (Cal. 1892); AUSTIN, *supra* note 11, at 483; 4 WILLIAM BLACKSTONE, COMMENTARIES *46; *see* HOLMES, *supra* note 11, at 41; KENNY, *supra* note 11, at 68 n.5 (suggesting the rationale for the ignorance rule is "not a realisation of ideal justice, but an exercise of Society's right of self-preservation") (quoting Prof. Henry Sidgwick); SALMOND, *supra* note 11, at 426; 1 WHARTON, *supra* note 15, at § 399; Hall & Seligman, *supra* note 49, at 646–47; Packer, *supra* note 63, at 109. As Holmes explained:

> The true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

HOLMES, *supra* note 11, at 46.

[118] AUSTIN, *supra* note 11, at 483; *see also id.* ("For, in almost every case, ignorance of the law would be alleged. And, for the purpose of determining the reality and ascertaining the cause of the ignorance, the Court were [sic] compelled to enter upon questions of fact, insoluble and interminable.").

[119] Cass, *supra* note 10, at 689.

[120] *See* HOLMES, *supra* note 11, at 45.

[121] *Id.* at 45 & n.*.

efficiency.[122] Separating the blameless from the blameworthy is a sufficiently weighty interest that society should be willing to countenance some delays in reaching a verdict. In any event, the objection is unfounded. "[N]ow that parties can testify, it may be doubted whether a man's knowledge of the law is any harder to investigate than the many questions which are gone into,"[123] Holmes noted, and "'[t]he difficulty, such as it is, would be met by throwing the burden of proving ignorance on the law-breaker."[124]

It also is fair to ask just how big this problem is. The government already faces a version of it in federal criminal tax prosecutions. The government must prove that a defendant "willfully" violated the income tax laws,[125] and a defendant can defend against such a charge by maintaining that he did not subjectively intend to break the law or that he mistakenly believed that he properly reported his taxable income.[126] Yet, there is no reason to believe that this mistake of law has freed scores of willful tax evaders, and there is even less reason to believe that this defense otherwise

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[122] *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 656–57 (1972) ("The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.").

[123] HOLMES, *supra* note 11, at 45; *see, e.g.*, Arave v. Creech, 507 U.S. 463, 473 (1993) ("'The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove . . . but if it can be ascertained it is as much a fact as anything else.'") (quoting Edgington v. Fitzmaurice, (1885) 29 Ch. D. 459, 483); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716–17 (1983).

[124] HOLMES, *supra* note 11, at 45.

[125] The term "willful" often is used to describe that state of mind necessary for violations of the federal tax laws. *See, e.g.*, Bryan v. United States, 524 U.S. 184, 191 (1998); Ratzlaf v. United States, 510 U.S. 135, 138 (1994); Cheek v. United States, 498 U.S. 192, 200 (1991); United States v. Pomponio, 429 U.S. 10, 12 (1976); United States v. Bishop, 412 U.S. 346, 360 (1973).

[126] The *Cheek* case involved just that. An airline pilot and tax protestor claimed that he had a good-faith belief that he was not obliged to file an income tax return because the federal tax laws and Sixteenth Amendment could not authorize a federal income tax on wages and salaries. After being convicted of willfully failing to pay his taxes, he argued that a subjective good-faith belief is a complete defense to such a charge, even if that belief is not objectively reasonable. The Supreme Court agreed with him. *See Cheek*, 498 U.S. at 194–96, 201–07.

nullifies the government's ability to prosecute taxpayers for fraud. The absence of such evidence in the one instance in which a mistake of law defense is being litigated today is a strong argument that the defense is not likely to scuttle many justified federal criminal prosecutions.[127]

Is the government's concern that a defendant will go scot-free by claiming that he did not know that it is illegal to murder, rape, rob, burgle, steal, cheat, lie, or possess controlled substances? Doubtful. Anyone who grows up in America today (or enters from elsewhere) is likely to know that the criminal law prohibits thievery and homicide.[128] A defendant who claims ignorance of those laws probably should be committed as insane[129] (or given an award for having world-class chutzpah). But the likelihood that he will walk out of the courtroom a free man is nil because a jury is almost certain to find that defense incredible.

To be sure, the jury always can refuse to convict someone "in the teeth of both law and facts"[130] and the government doubtless will offer that argument as a reason for refusing to recognize a mistake of law defense. But if a defendant snookers the jury into believing that he actually was ignorant of the law prohibiting murder, the government has a bigger problem than one isolated miscarriage of justice. The government's problem is with the gullibility of the twelve jurors who decided that case,

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[127] There are a few other cases involving other complex regulatory schemes a person may defend by relying on a good-faith belief that his conduct is lawful. *See, e.g.*, United States v. Lizarraga-Lizarraga, 541 F.2d 826, 828–29 (9th Cir. 1976) (export control laws). But the criminal tax field remains the largest one in this regard.

[128] *See, e.g.*, FRIEDMAN, *supra* note 24, at 108–09 ("Perhaps the most primitive and basic rules in the criminal justice system were those that protected property rights. . . . The laws against theft, larceny, embezzlement, and fraud are familiar friends. People may not know every technical detail, but they get the general point. Probably all human communities punish theft in one way or another; it is hard to imagine a society that does *not* have a concept of thievery, and some way to punish people who help themselves to things that 'belong' to somebody else."); *see also* SALMOND, *supra* note 11, at 427; Mark D. Yochum, *The Death of a Maxim: Ignorance of the Law Is No Excuse (Killed by Money, Guns and a Little Sex)*, 13 ST. JOHN'S J. LEG. COM. 635, 636 (1999) ("[E]vil is fundamentally known. . . . Ignorance that murder is a crime is no excuse for the crime of murder.").

[129] The historic M'Naghten test of insanity exculpated a defendant suffering from a "defect of reason, from a disease of the mind," if he did not know the nature and quality of his actions or, even if he did, did not know that they were wrong. *See* M'Naghten's Case, (1843) 8 Eng. Rep. 718 (H.L.) 722. The Model Penal Code definition of insanity and federal law have modified those elements, but still focus on the presence of a mental disease depriving a person of the ability to conform to the law's requirements or to know that his actions are wrongful. *See, e.g.*, 18 U.S.C. § 17 (2006); Clark v. Arizona, 548 U.S. 735, 749–56 & nn.7–22 (2006) (discussing the development of various forms of the insanity defense). A person who claims that he was unaware that theft and murder are illegal effectively is raising an insanity defense and should be treated as if he had done so directly.

[130] Horning v. District of Columbia, 254 U.S. 135, 138 (1920).

and perhaps with the community from which that jury was seated, not with a mistake of law defense. By contrast, if the jury *knows* that the defendant is lying but acquits him anyway, the government's problem, again, is with the jury or the community, not with a mistake of law defense. In fact, in that case the government has a far, far bigger problem than the need to refute one spurious defense. Something that the government has done, either in that case or in general, has so alienated the members of the jury or community that they have let go a dangerous offender because doing so was the only way to send a message of frustration with the operation of the criminal justice system or with how the government uses that system in the vicinity from which the jurors were drawn.[131] If a jury vents its frustration and rage at the government by letting a guilty offender go free, the government should reexamine and remedy its own actions, rather than deny innocent defendants the opportunity to present a reasonable mistake of law defense.

A more serious objection is that allowing a mistake of law defense will cut deeply into the government's ability to prosecute white-collar offenders for regulatory crimes, such as environmental offenses.[132] The argument goes as follows: Traditionally, judges have been lenient on white-collar criminals, in part because society treated such offenses as mere economic crimes as to which compliance is only a matter of comparative efficiency—that is, society wants parties to comply with regulatory laws only when doing so is less costly than violating them.[133] The belief is widespread that businessmen would—and should—comply with economic regulations only as long as the costs of compliance are less than the potential penalties for noncompliance (discounted by the likelihood of detection, prosecution, and

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[131] *See* STUNTZ, *supra* note 26, at 285–86, 386 nn.1–4 (collecting authorities and summarizing the debate over jury nullification).

[132] The term "white-collar crime" has been defined various ways in the law and the social sciences. *See* GREEN, *supra* note 60, at 9–20; DAVID WEISBURD & ELIN WARING WITH ELLEN F. CHAYET, WHITE-COLLAR CRIME AND CRIMINAL CAREERS 8–18 (2001). Edwin Sutherland, the father of the concept, defined it as crime "committed by a person of respectability and high social status in the course of his occupation." EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 7 (1983) (footnote omitted). By contrast, the FBI (like most people) defines that term in its colloquial sense of "lying, cheating, and stealing," and as being "synonymous with the full range of frauds committed by business and government professionals." *White-Collar Crime*, FBI, http://www.fbi.gov/about-us/investigate/white_collar/whitecollarcrime (last visited Feb. 25, 2012); *see also* FRIEDMAN, *supra* note 24, at 290. This article will use the term in that manner, too.

[133] Edwin Sutherland, the grandfather of white-collar crime theory, believed that society mistakenly belittled or overlooked the harmful effects of white-collar crime because of the high social status of the offenders. *See generally* Edwin H. Sutherland, *Is "White Collar Crime" Crime?*, 10 AMER. SOC. REV. 132 (1945); EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (1949); EDWIN H. SUTHERLAND, ON ANALYZING CRIME (1973).

conviction). Moreover, historically society has not viewed economic or regulatory offenses as morally reprehensible. Until recent examples of villainy,[134] that attitude had been reserved for violent or street crimes. White-collar criminals commonly were seen as "upstanding members of the community," quite unlike the ruffians who perpetrate the common law crimes of assault, burglary, larceny, theft, and homicide.[135] Prosecutors and judges can sympathize with white-collar criminals because they can see themselves in the same position as corporate officers and can understand the value system of corporate America. And insofar as there are environmental crimes on the books, the public has held the same attitude toward the businessmen who infringe on the environmental laws as it has toward the ones who violated the antitrust laws: their conduct is regrettable, but not morally blameworthy, and, given the economic imperative to make a profit, sometimes even necessary. The only way to prosecute someone successfully for such crimes, the argument would go, is to reduce the government's burden by lowering the mental state necessary for a conviction. Requiring the government to prove willful wrongdoing effectively would render the environmental laws, for example, incapable of criminal enforcement.[136]

If that is the government's concern, the government may be right as to its assessment of the litigation risk in some (but not all) cases, but wrong as to whether the presence of that risk is a persuasive reason to deny a mistake of law defense altogether. The criminal law expresses the community's condemnation of certain conduct as blameworthy,[137] and that consideration always has been an important part of the type of antisocial conduct that we label a crime.[138] Dragging a morally blameless person into the criminal

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[134] The failure of Enron and the Bernie Madoff Ponzi scheme come to mind. *See* Skilling v. United States, 130 S. Ct. 2896 (2010); Nick Carbone, *Top 10 Swindlers*, TIME (Mar. 7, 2012), http://www.time.com/time/specials/packages/article/0,28804,2104982_2104983_2105005,00.html.

[135] *See supra* note 133.

[136] *See, e.g.*, Michele Kuruck, Comment, *Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes*, 20 LAND & WATER L. REV. 93, 95 (1985).

[137] *See* George K. Gardner, Bailey v. Richardson *and the Constitution of the United States*, 33 B.U. L. REV. 176, 193 (1953) ("The essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a court-room; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.").

[138] *See, e.g.*, HOLMES, *supra* note 11, at 50 ("It is not intended to deny that criminal liability . . . is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it another way, a law which punished conduct which

justice system forces him—as well as his family, friends, colleagues, and anyone else who cares for him—to endure the series of harms and indignities that a modern law enforcement bureaucracy inflicts on every suspect, the guilty and innocent alike: being arrested, undergoing a thorough probing of one's person and whatever is worn or carried incident to a search following arrest; being handcuffed, driven to the police station in the back seat of a patrol car, booked, waiting for hours in a temporary holding cell, and doing the "perp walk" before the media; waiting in jail until bail is posted (a cost that will never be recouped); paying for a lawyer with one's life savings or child's college fund; and spending a terribly long and painful period awaiting trial while the police and media investigate, and sometime publicize, every embarrassing aspect of one's life.[139]

But there is more. Convicting a morally blameless party also brings the criminal justice system into disrepute and dilutes the effect of society's communal condemnation of his actions. No one treats a parking ticket as the mark of Cain because everyone (on multiple occasions) has received one. Regulatory or *malum prohibitum* crimes certainly are a step up from traffic offenses, but the step is not remotely as steep as the one that leads to violent crime. The upshot is that a properly defined and limited mistake of law defense can balance the interests of all concerned parties without forcing any one interest to be sacrificed for any other.

The trial procedure for adjudicating a mistake of law defense also can be set forth in a manner that does not make a big dent in the system's need to operate efficiently. For example, as explained below, courts can presume that a defendant knows the law and can place on the defendant the burdens of raising a mistake of law defense and of producing evidence to

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would not be blameworthy in the average member of the community would be too severe for that community to bear."); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 419 (1958); *see also*, Packer, *supra* note 63, at 109; Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 1–2 (1995) ("Equally fundamental to our criminal justice tradition is the notion that a culpable criminal intent, or *mens rea,* is generally a moral prerequisite to the imposition of punishment. Criminal punishment in the absence of personal blameworthiness is counterintuitive to the average person, and American law purports to permit such results only in the face of compelling public health and safety interests."); Sayre, *supra* note 56, at 72 ("To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice . . . .").

[139] Not to mention that once a person is arrested, law enforcement submits the arrest information to the National Crime Information Center, which can be accessed via a patrol car computer. *See National Crime Information Center*, FBI, http://www.fbi.gov/about-us/cjis/ncic (last visited Apr. 10, 2012) (explaining function of the NCIC). The result is that every future traffic stop becomes a far less welcome adventure.

substantiate that claim.[140] That approach would avoid the prosecution's need to raise and refute the issue in every case. Only when a defendant raises the issue and marshals sufficient proof that his mistake was reasonable would that issue be litigated to the jury.[141]

3. The Ignorance Rule Promotes Deterrence

A third, related justification for the rule is that it promotes deterrence by encouraging members of the public to make themselves aware of what the law prohibits and facilitates enforcement of the criminal law by disallowing a defense that otherwise could be widely used.[142] Moreover, the argument goes, the criminal law may further those goals even though the rule would lead to some unjust convictions in particular cases of defendants who are not blameworthy. In Holmes's words: "Public policy sacrifices the individual to the general good."[143]

That principle works better as a defense of the constitutionality of the mistake rule than as a justification for the rule itself. That justification does not deny that the rule will lead to mistaken and unjust convictions in some cases; it takes the position that society legitimately may adopt a rule with that effect. So phrased, that defense is formidable, with a variety of supporting battlements. We do not require the government to prove a defendant's guilt beyond any doubt, only beyond a reasonable doubt.[144] We

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[140] A defendant can be made to bear the burden of production regarding a defense—that is, of raising the defense and introducing sufficient proof to make the defense an issue. *See, e.g.*, Simopoulos v. Virginia, 462 U.S. 506, 510 (1983) (collecting cases). Sometimes a defendant must bear the burden of proof, *see, e.g.*, Martin v. Ohio, 480 U.S. 228, 230 (1987); Patterson v. New York, 432 U.S. 197, 199–200 (1977), but not always, *see, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 703–04 (1975); Keedy, *supra* note 9, at 86. Placing on the defendant the burden of persuasion also would avoid the risk that a jury would need to acquit if it found itself in equipoise whether the defendant intended to break the law. Further elaboration on that subject is beyond the scope of this article.

[141] *See* United States v. Bailey, 444 U.S. 394, 409–15 (1980) (discussing the defendant's evidentiary burden to properly raise a duress or necessity defense); Keedy, *supra* note 9, at 86.

[142] *See* Barlow v. United States, 32 U.S. 404, 411 (1833) ("[I]t results from . . . the extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public. There is scarcely any law, which does not admit of some ingenious doubt; and there would be perpetual temptations to violations of the laws, if men were not put upon extreme vigilance to avoid them."); *see* 4 WILLIAM BLACKSTONE, COMMENTARIES *45, *46; HOLMES, *supra* note 11, at 48–49; *see also* Hall & Seligman, *supra* note 49.

[143] HOLMES, *supra* note 11, at 48; *cf.* Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910) ("'[I]n a few instances, the public welfare has made it necessary to declare a crime, irrespective of the actor's intent.' A concession of exceptions would seem to destroy the principle.").

[144] *See* Victor v. Nebraska, 511 U.S. 1, 7–22 (1994); Jackson v. Virginia, 443 U.S. 307, 317 (1979) ("A 'reasonable doubt,' at a minimum, is one based on 'reason.'"); Holt v.

do not require the prosecution to make every scientific advance available to a defendant to establish his innocence.[145] We do not bar the government from obtaining evidence from the accused—e.g., evidence dealing with an alibi or insanity claim—that may be critical to puncturing his defense.[146] We do not require that the courts, rather than the clemency process, always be open to review a defendant's claim that his rights were violated at trial, or even that he is innocent.[147] And we allow the legislature to revise the criminal justice system in ways that "have the effect of making it easier for the prosecution to obtain convictions."[148] In sum, "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."[149]

But even if the Constitution allows the government to trade off greater deterrence for an unknown number of unjust convictions, the question remains why the government would want to make that choice when it can have the benefits of the former without the costs of the latter. In other

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United States, 218 U.S. 245, 254 (1910) (rejecting argument that "any mere possibility" of doubt is sufficient to acquit); Perovich v. United States, 205 U.S. 86, 92 (1907); Dunbar v. United States, 156 U.S. 185, 199 (1895) (approving a jury instruction defining "reasonable doubt" as requiring that the evidence "must be so strong, as not to exclude all doubt or possibility of error, but as to exclude reasonable doubt"); Hopt v. Utah, 120 U.S. 430, 439–40 (1887) (approving a jury instruction stating that "a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence" and that "[p]ersons of speculative minds may in almost every such case suggest possibilities of the truth being different from that established by the most convincing proof" but "the jurors are not to be led away by speculative notions as to such possibilities"); Miles v. United States, 103 U.S. 304, 312 (1880).

[145] *See* Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2319 (2009) (explaining that due process does not require the state to make post-trial DNA testing available for a convicted defendant).

[146] *See, e.g.*, Fed. R. Crim. P. 12.1 (requiring defense on request to provide notice of alibi defense); Fed. R. Crim. P. 12.2 (requiring defense to provide notice of insanity defense); Fed. R. Crim. P. 12.3 (same, reliance on public authority defense); Taylor v. Illinois, 484 U.S. 400, 413–16 (1988) (rejecting constitutional challenge to enforcement of defense notice-of-alibi requirement by excluding alibi witness for violating rule); Williams v. Florida, 399 U.S. 78, 80–86 (1978) (upholding over constitutional challenge pretrial notice-of-alibi requirement on defense); *cf.* Michigan v. Lucas, 500 U.S. 145, 153 (1991) (rejecting facial challenge to rape-shield statute requiring pretrial hearing on admissibility of complainant's past sexual conduct).

[147] *See* Herrera v. Collins, 506 U.S. 390, 398–417 (1993); Barefoot v. Estelle, 463 U.S. 880, 887 (1983) ("Federal courts are not forums in which to relitigate state trials.").

[148] McMillan v. Pennsylvania, 477 U.S. 79, 89 n.5 (1986) ("From the vantage point of the Constitution, a change in law favorable to defendants is not necessarily good, nor is an innovation favorable to the prosecution necessarily bad." (quoting John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1361 (1979))).

[149] Patterson v. New York, 432 U.S. 197, 208 (1977).

words, the problem with this defense of the ignorance or mistake of law rule is that it is overbroad.[150] A properly defined and limited rule better serves the interests of public safety and civil rights than the current rule. For example, if the conduct at issue is widely followed and if no reasonable person would have known what the law proscribed, it is arbitrary to single out one person for enforcement of that law.[151] In fact, it is not clear that Holmes—let alone Blackstone—would have disagreed with resort to such a properly cabined defense today. After all, Holmes published *The Common Law* in 1881, long before the advent of the public welfare offenses that first began to eliminate a mens rea requirement in the 1920s.[152] Holmes did not

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[150] *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.17 (1978) ("The possibility that those subjected to strict liability will take extraordinary care in their dealings is frequently regarded as one advantage of a rule of strict liability," but "where the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged, as in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessarily redound to the public's benefit.").

[151] HOLMES, *supra* note 11, at 47; Hall & Seligman, *supra* note 49, at 649; The most common examples are traffic offenses, but the commercial world is relevant, too. *See* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1382–83 (2009) ("[Deferred prosecution agreements] and [nonprosecution agreements] do look great when compared to full enforcement of the law, but full enforcement of the law is unthinkable. Every Fortune 500 company presumably has had at least one employee who violated a federal criminal law while carrying out his duties. The law of corporate crime thus makes every Fortune 500 company subject to prosecution, conviction, and punishment. In addition to the reputational damage a criminal conviction is likely to bring, conviction may bar a company from obtaining needed business licenses, holding a national bank franchise, receiving Medicaid and Medicare payments, auditing the accounts of publicly traded corporations, and contracting with the government. The *respondeat superior* standard apparently empowers the Justice Department to put most American companies out of business and to bring the economy to a standstill—and to do so just as other federal agencies are bolstering failing companies to keep the economy from coming to a standstill." (footnote omitted)); *see also* Lazarus, *Assimilating Environmental Protection*, *supra* note 58, at 882–83 ("Full compliance with all applicable environmental laws is consequently the exception rather than the norm. Just as the EPA rarely meets congressional aspirations in meeting all of the deadlines in environmental laws—it meets roughly fourteen percent of all congressional deadlines—industry rarely meets all of those aspirations as reflected in the statutory and regulatory requirements themselves. Nor does government itself or its contractors—as in Rocky Flats—strictly comply with environmental requirements. In a recent survey, two-thirds of all corporate counsel reported that their companies have recently been in violation of applicable environmental laws." (footnote omitted)). Plus, widely followed, customary, unchallenged practices in the commercial, financial, or manufacturing industries over time can assume a presumption of legitimacy. That is particularly important where the law permits, or even encourages, competition among rivals and where it may be difficult to draw a line between lawful and unlawful conduct. Disagreements with how private parties see that line are better addressed administratively or civilly than criminally. *See U.S. Gypsum Co*., 438 U.S. at 441 n.17.

[152] *See generally* HALL, *supra* note 11, at 325–59 (discussing strict liability); Sayre, *supra* note 56, at 79.

address the cases where such a defense is most needed today: namely, a law imposing strict liability for violation of a commercial or environmental law, regulation, or policy. Refusing to consider a party's "blameworthiness," Holmes wrote, makes a law "too severe for that community to bear."[153] Given Holmes's willingness to reconsider ancient rules that have outlived their justification,[154] even Holmes may have abandoned this objection had he lived today.

4. Ignorance of the Law Itself Is Blameworthy

A final justification for the ignorance-is-no-defense rule is that ignorance of the law itself is blameworthy.[155] The failure to learn where the line is drawn justifies punishing whoever crosses it.[156] Of course, that defense of this rule equates the failure to learn where the line is with actually crossing it and substitutes negligence for blameworthiness.[157] Negligence has been sufficient to establish liability for damages in tort law throughout American history, but it ordinarily has not been deemed sufficient to establish liability under the criminal law.[158] A criminal conviction uniquely embodies "the judgment of community condemnation which accompanies and justified its imposition."[159] Allowing negligence to

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[153] HOLMES, *supra* note 11, at 47.

[154] Holmes, *supra* note 62.

[155] Cass, *supra* note 10, at 692–93.

[156] Holmes criticized this defense on the ground that it irrationally equated the failure to learn the law with its violation. For a related version of this argument see *id.*

[157] *See* HOLMES, *supra* note 11, at 48, 50, 57–58.

[158] *See, e.g.*, LAFAVE, *supra* note 11, §§ 1.3, 5.4; Hart, *supra* note 138, at 421–22 (discussing why negligence is a disfavored basis for criminal liability); Keedy, *supra* note 9, at 84–85; Otto Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615, 638 (1942); Pilcher, *supra* note 138, at 1–2; Sayre, *supra* note 56, at 72.

[159] Hart, *supra* note 138, at 404.

> To engage knowingly or recklessly in conduct which is wrongful in itself and which has, in fact, been condemned as a crime is either to fail to comprehend the community's accepted moral values or else squarely to challenge them. The maxim, *Ignorantia legis neminem excusat,* expresses the wholly defensible and, indeed, essential principle that the action, in either event, is blameworthy. If, however, the criminal law adheres to this maxim when it moves from the condemnation of those things which are *mala in se* to the condemnation of those things which are merely *mala prohibita,* it necessarily shifts its ground from a demand that every responsible member of the community understand and respect the community's moral values to a demand that everyone know and understand what is written in the statute books. Such a demand is *toto coelo* different. In no respect is contemporary law subject to greater reproach than for its obtuseness to this fact.

Id. at 419.

satisfy blameworthiness in the criminal law takes in a far larger scope of conduct than the criminal law historically has thought justified.[160]

That principle still makes sense today. Labeling someone as a "criminal" has an altogether different meaning than calling someone "negligent." A "criminal" is someone who, for whatever reason, intentionally breaks the law, violates community norms, harms people and their property, and damages the sense of trust and comfort that allows neighbors to avoid barricading themselves into their homes. A negligent person is just sloppy. We avoid such people because they are unsafe, bothersome, a nuisance. We avoid criminals because we *fear* them and fear that they (and their associates) may be *evil*. The term "criminal" always has had a special meaning in American society. Negligent conduct falls far short of the proper use of that term.[161]

B. THE AFFIRMATIVE CASE FOR A MISTAKE OF LAW DEFENSE

Being able to criticize the rationales for the common law ignorance rule gets us only halfway home. We still need to identify the legal and policy arguments for jettisoning that rule and allowing a defendant to raise a mistake of law defense.

Let's start with the legal argument. That argument proceeds in four steps.

First: An elementary principle of criminal law is the "rule of legality." The rule provides that no conduct can be punished as a crime without a law clearly prohibiting that conduct[162] and affixing a penalty to it.[163] As

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[160] BRICKEY, *supra* note 104, at 25. Jerome Hall offers an additional defense of the rule. In his view, allowing this defense would undermine the role of the courts by making each person the arbiter of his own conduct. *See* Hall, *supra* note 9, at 18–20. That concern, however, is "exaggerated." Cass, *supra* note 10, at 692–93.

> By exempting a defendant from punishment on the ground that he operated under a mistaken belief as to the law, courts would not abdicate their role in interpreting the law any more than they do by excepting from punishment one who acted under an impression of the law sufficiently far from correct to render the defendant insane. In either case, the court declares what the law is but also declares that the defendant is not criminally liable for violating it. The court thus remains law-declarer in theory; allowing mistake of law to excuse will not impair the law-declaring function of the courts in practice unless it impairs obedience to the law declared. If allowing ignorance of a law to excuse would not lessen the deterrent effect of the law, then allowing a mistaken belief concerning the meaning of a law to excuse should have no greater adverse effect.

Id. at 694.

[161] *See supra* notes 91–98 & 151–60 and accompanying text.

[162] From 1660 to 1860 (and in scattered instances thereafter) the English courts exercised authority to declare as crimes certain actions that were deemed *contra bonos mores*. HALL, *supra* note 11, at 179. By contrast, federal courts have lacked power to create common law

Professor Jerome Hall has noted, "[t]he principle of legality is in some ways the most fundamental of all the [criminal law's] principles."[164]

Second: A "corollary of the principle of legality" is that a law passed *after* the conduct at issue has occurred cannot serve as a basis for punishment.[165] As far as the criminal law is concerned, "there has probably been no more widely held value-judgment in the entire history of human thought than the condemnation of retroactive penal law."[166] Retroactive application of a new law is tantamount to having no law at all.[167]

Third: Even a preexisting law cannot sustain criminal liability if the average person cannot understand what that law prohibits. Such a law is not materially different from one that is kept secret or one that, like the laws of Caligula, is published in a location that makes it unreadable.[168] As the Supreme Court explained in *Lanzetta v. New Jersey*, "[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."[169] For that reason, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its

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crimes almost from the start. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812).

[163] *See* United States v. Evans, 333 U.S. 483, 485 (1948) (refusing to allow a criminal penalty to be imposed on conduct when Congress had outlawed it, but had not clearly defined what the penalty should be).

[164] HALL, *supra* note 11, at 25; *see id.* at 27–69; *see also* Rogers v. Tennessee, 532 U.S. 451, 467–68 (2001) (Scalia, J., dissenting). A corollary is that no one can be convicted of a crime without sufficient evidence proving his guilt. *See* Jackson v. Virginia, 443 U.S. 307, 316 (1979); Thompson v. Louisville, 362 U.S. 199, 204 (1960).

[165] HALL, *supra* note 11, at 63.

[166] *Id.* at 59.

[167] The Ex Post Facto Clauses, U.S. Const. art. I, § 9, cl. 3 and art I, § 10, cl. 1, keep federal and state legislators from passing a new criminal statute to ban past conduct or to enhance the penalties already on the books. Those provisions do not apply to the courts, *see, e.g.*, Rogers v. Tennessee, 532 U.S. 451, 456 (2001), but the Due Process Clause imposes the same type of restriction on courts by not allowing them to adopt an unforeseeable interpretation of a penal law, *see, e.g.*, *id.* at 458–62; Marks v. United States, 430 U.S. 188, 192 (1977); Douglas v. Buder, 412 U.S. 430 (1973); Rabe v. Washington, 405 U.S. 313 (1972); Bouie v. City of Columbia, 378 U.S. 347 (1964).

[168] *See* Screws v. United States, 325 U.S. 91, 96 (1945) (plurality opinion) ("To enforce such a [vague] statute would be like sanctioning the practice of Caligula, who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.'"); Hall & Seligman, *supra* note 49, at 650 n.39 ("[W]here the law was not available to the community, the principle of 'nulla poena sine lege' comes into play.").

[169] 306 U.S. 451, 453 (1939) (footnote omitted).

application violates the first essential of due process of law."[170] Put differently, a law that cannot be understood might as well not exist.

What is known as the void-for-vagueness doctrine polices the criminal law in this regard. Under this doctrine, a criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute"[171] or is so indefinite that "it encourages arbitrary and erratic arrests and convictions,"[172] is void for vagueness.[173] On occasion the Supreme Court has used a mens rea requirement to limit the reach of a law that otherwise might be so broad as to be unconstitutionally vague.[174] But it is questionable whether that approach actually has the effect of making a vague statute more understandable. If the law is unclear as to what it prohibits, a person has no notice of what conduct (or actus reus) is illegal, regardless of the definition given to the scienter requirement of the law.[175] Nonetheless, the Court has relied on this proposition to uphold a law that otherwise might not pass muster, so it bears on the issue here.

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[170] Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

[171] United States v. Harriss, 347 U.S. 612, 617 (1954).

[172] Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972).

[173] *E.g.*, Chicago v. Morales, 527 U.S. 41 (1999); Kolender v. Lawson, 461 U.S. 352 (1983); Grayned v. City of Rockville, 408 U.S. 104, 108–09 (1972); Bouie v. City of Columbia, 378 U.S. 347 (1964); *see* United States v. Reese, 92 U.S. 214, 221 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."). *See generally* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (discussing the historical development of the void-for-vagueness doctrine). The Supreme Court has applied the doctrine with particular severity if the statute deters the exercise of constitutional rights. *See, e.g.*, Colautti v. Franklin, 439 U.S. 379, 390–94 (1979) (abortion); Smith v. Gougen, 415 U.S. 566, 573 (1974) (First Amendment Free Speech Clause).

[174] *See, e.g.*, Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952); *Papachristou*, 405 U.S. 156; Screws v. United States, 325 U.S. 91, 101–02 (1945) (plurality opinion) ("[T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid . . . . The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."); *cf. Colautti*, 439 U.S. at 394–96 (asserting lack of a scienter requirement exacerbates the problem of a vague law).

[175] Packer, *supra* note 63, at 123 ("The dissenting opinion [in *Screws*] pointed out that importing a *mens rea* requirement into the definition of the offense did nothing to make the definition more precise. Accepting the 'decent advance notice' rationale for the vagueness requirement, the dissenters asked how it could help to be told that you must not do something 'willfully' if you are not told what that something is. Their question seems unanswerable." (footnotes omitted)).

Fourth: Given those first three propositions, the conclusion follows naturally. The void-for-vagueness doctrine prevents the government from punishing someone for violating a statute if that law does not draw a readily understandable line separating innocent from prohibited conduct. That line sometimes can be fine, but it never can be invisible. The rationale underlying that doctrine is that the government must supply everyone with "fair notice" of forbidden conduct before someone can be criminally punished for having committed it. That rationale applies equally to the person who, acting in good faith and consistent with contemporary mores, is unaware that his conduct is unlawful. He, too, has little or no opportunity to conform his conduct to the requirements of the criminal law; in fact, that is precisely what he thought he was doing. Yet, he was mistaken because the law has moved so far beyond what an average person reasonably can be deemed to know that it becomes unreasonable to attribute to him knowledge of where the law has wound up. An exception can be made for conduct that universally would be deemed injurious, dangerous, or wrongful. In those cases, a person could be deemed to have known that his conduct might be criminal and to have acted regardless of the suspicions that a reasonable person would or should have entertained.[176] But where the law forbids conduct that has none of those characteristics, it is no less unfair to impose a criminal sanction upon a party who reasonably, albeit mistakenly, believes that his conduct is lawful than it is to punish someone whose conduct violates an unduly vague statute. Neither party has the evil or nefarious intent that is the hallmark of culpability and that the criminal law seeks to curb, so neither person should be subject to condemnation and sanction. Neither one purposefully chose to break a known law because neither one knew what the law in fact prohibited. Neither one, therefore, deserves to be criminally punished.

The teaching of the void-for-vagueness doctrine goes a long way toward the proper analysis of this problem. In the typical void-for-vagueness case, the question is whether a particular statute supplies fair notice. Is a law that outlaws vagrancy, loitering, or "annoying" public

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[176] Those exceptions describe the scenarios in which the Supreme Court has not been troubled by application of strict liability principles. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975) (maintenance of rat-infested food warehouses); United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971) (transportation of hazardous waste); United States v. Freed, 401 U.S. 601 (1971) (possession of hand grenades); United States v. Dotterweich, 320 U.S. 277 (1943) (mislabeled sale of drugs). The Court's decision in *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), is an instance in which the Court was untroubled by the reach of a criminal statute outlawing "piracy," because the Court found the interpretation of that term to be the same throughout the world. *See infra* text accompanying notes 269–73 (discussing *Smith*).

passersby sufficiently clear?[177] What about a law that makes it a crime to be a "gangster"?[178] Or one that combines both of those elements by outlawing loitering by members of a "criminal street gang"?[179] In each case the courts must scrutinize the specific law at issue in order to gauge its intelligibility.

While the problem here may appear different, any difference is only superficial; fundamentally, the concerns are the same. Traditionally, the concern has been whether *a particular statute* is sufficiently clear so that the average person can readily understand it and remain law-abiding. Nowadays, the difficulty is that *the entire criminal code* has become unknowable and subject to manipulation. In traditional void-for-vagueness cases the problem occurs at the retail level, when a person is charged with a specific crime under a vague law. By contrast, here the problem lies at the wholesale level, with the entire body of federal criminal law, in all of its complexity, capturing conduct that maybe only a few would reasonably deem a crime. The "fair notice" principle underlying the void-for-vagueness doctrine, however, is equally applicable at both levels. In each case the law has failed in its elementary task of identifying clearly the line separating what is outlawed from what is allowed. If it is fundamentally unfair to hold someone liable for violating an unconstitutionally vague law, why is it not equally unjust to make that person liable for a reasonable, good-faith belief that his conduct was lawful?[180] Professor Packer made this point well:

> If the function of the vagueness doctrine is, as is so often said in the cases, to give the defendant fair warning that his conduct is criminal, then one is led to suppose that some constitutional importance attaches to giving people such warning or at least making such warning available to them. If a man does an act under circumstances that make the act criminal, but he is unaware of those circumstances, surely he has not had fair warning that his conduct is criminal. If 'fair warning' is a constitutional requisite in terms of the language of a criminal statute, why is it not also a constitutional requisite so far as the defendant's state of mind with respect to his activities is concerned? Or, even more to the point, if he is unaware that his conduct is labeled as criminal by a statute, is he not in much the same position as one who is convicted under a statute which is too vague to give 'fair warning'? In both cases, the defendant is by hypothesis unblameworthy in that he has acted without advertence or

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[177] *See, e.g.*, *Papachristou*, 405 U.S. 156; Coates v. Cincinnati, 402 U.S. 611 (1971); Shuttlesworth v. Birmingham, 382 U.S. 87 (1965).

[178] *See* Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[179] *See* Chicago v. Morales, 527 U.S. 41 (1999).

[180] "The crux of the case against *ignorantia legis* thus is embodied in this question: If it is inconsistent with basic notions of fairness to penalize one for an act that, because of the nonexistence, inaccessibility, or vagueness of the law, the actor believed legal when done, why is it fair to punish one who is ignorant of the law for any other reason?" Cass, *supra* note 10, at 689.

> negligent inadvertence to the possibility that his conduct might be criminal. If warning to the prospective defendant is really the thrust of the vagueness doctrine, then it seems inescapable that disturbing questions are raised, not only about so-called strict liability offenses in the criminal law, but about the whole range of criminal liabilities that are upheld despite the defendant's plea of ignorance of the law.[181]

Now turn to the policy argument. The central argument in favor of a rule requiring the government to prove blameworthiness (or, what would largely have the same effect, a rule permitting a defendant to raise a mistake of law defense) is that it is fundamentally unfair to punish someone who acted without knowledge that his conduct was illegal or inherently wrongful. That is, uncritically applying the common law ignorance rule today often can lead to results that are unjust, ineffectual, or both.[182] Unjust, because imposing the stigma of a criminal conviction and allied punishments on someone morally blameless cannot be justified on retributive grounds.[183] A person unaware of what the law forbids or what custom deems blameworthy by definition harbors neither ill intent nor any purpose to violate a known legal duty.[184] Ineffectual, because the law cannot deter someone from breaking a law of which he is unaware; a person must know where the line is drawn in order to avoid stepping over it. Put differently, deterrence cannot operate retroactively. Society can penalize someone for unwittingly breaking a law, which may deter him from doing so *again*, but the law obviously had no effect on him the first time.[185]

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[181] Packer, *supra* note 63, at 123 (footnotes omitted). Professor Cass agrees.

> An early objection to *ignorantia legis* was that it embodied the same unfairness as *ex post facto* laws, at least when applied to ignorance of "positive regulations, not taught by nature." An author surveying American customs and institutions and comparing them with their European counterparts wrote in 1792: "Where a man is ignorant of [a positive regulation], he is in the same situation as if the law did not exist. To read it to him from the tribunal, where he stands arraigned for the breach of it, is to him precisely the same thing as it would be to originate it at the time by the same tribunal for the express purpose of his condemnation."

Cass, *supra* note 10, at 687 (footnotes omitted) (quoting J. BARLOW, ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE (1792), *reprinted in* 3 THE ANNALS OF AMERICA 504, 511 (1968)).

[182] *See, e.g.*, Cass, *supra* note 10, at 692–93; Hughes, *supra* note 56, at 602; Packer, *supra* note 63, at 109.

[183] *See* Hart, *supra* note 138, at 420 ("To condemn a layman as blameworthy for a default of technical judgment in a matter which causes trouble even for professional judges is, in many cases, so manifestly beyond reason that courts have developed various makeshift devices to avoid condemnation in particular situations."). This problem is exacerbated when only a judicial decision can resolve whether certain conduct actually is criminal. *See* P.J. FITZGERALD, CRIMINAL LAW AND PUNISHMENT 122 (1962).

[184] Cass, *supra* note 10, at 684; Packer, *supra* note 63, at 109.

[185] Cass, *supra* note 10, at 684; Packer, *supra* note 63, at 108–09; *cf.* Linkletter v. Walker, 381 U.S. 618, 637 (1965) (refusing to apply retroactively the exclusionary rule adopted in *Mapp v. Ohio*, 367 U.S. 643 (1961), by stating: "We cannot say that this

Perhaps, the ignorance rule can be said to promote incapacitation, rather than retribution or deterrence, by taking off the streets people who should have been more wary or risk-averse and who carelessly broke the law. But that argument makes a crime out of negligence, which the criminal law generally has refused to do. That position likely also would induce undue caution in an area in which caution may not be justified.[186] Lastly, justifying on incapacitative grounds the punishment of someone who was *neither* blameworthy *nor* negligent is not materially different from allowing the government to select people at random for punishment, a practice that clearly is unconstitutional.[187]

Those arguments also may serve as a bridge to the position that a defendant has a constitutional right to raise this defense. If Alexis de Tocqueville was right that, in the eighteenth century, every political question ultimately became a legal question,[188] it also is true that, in the twentieth and twenty-first centuries, every legal question becomes an issue of constitutional law. So, how strong is the argument that a defendant has a constitutional right to assert a mistake of law claim? It turns out that the argument has considerable force.

The Supreme Court on one occasion has interpreted the Due Process Clause to impose an actual notice requirement as a prerequisite to a criminal prosecution. The case is *Lambert v. California*.[189]

In all honesty, *Lambert* was an odd case. It involved a local ordinance in the Los Angeles municipal code making it a crime, punishable by imprisonment, for an ex-felon to fail to report to the sheriff after being present in Los Angeles for five days. The ordinance apparently was designed to inform the police of the whereabouts of an ex-felon in case they had evidence that he or she was still involved in crime, so that the police could engage in surveillance. Lambert argued that application of the ordinance to her violated the Due Process Clause because she had no way of knowing that her mere presence in town was a crime.

[deterrent] purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved.").

[186] *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.17 (1978); *supra* note 150.

[187] *See, e.g.*, Chapman v. United States, 500 U.S. 453, 465 (1991) ("Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees.").

[188] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835) ("Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.").

[189] 355 U.S. 225 (1957).

The Supreme Court was quite troubled by the facts of the case,[190] especially by the combination of these two: the ordinance created a crime of omission that could be committed passively, and the violation, a *malum prohibitum* offense, was not one that a person could be expected to know without being told.[191] Relying on precedents dealing with the requirement that a party receive notice of a pending lawsuit before an adverse judgment could be entered,[192] the Court, by a slim five-to-four majority, held that due process required that Lambert receive actual notice of the Los Angeles ordinance before it could be applied to her.[193]

The Court started its analysis by noting that ignorance of the law generally is no excuse to a crime.[194] But the Court then went on to add that "the requirement of notice" is "[e]ngrained in our concept of due process" and "is sometimes essential so that the citizen has the chance to defend" against civil charges, assessments, or penalties.[195] Moving on to analyze the ordinance, the Court acknowledged that local ordinances commonly impose registration requirements as a condition of doing business.[196] This ordinance, however, was not of that ilk. The Los Angeles ordinance was "entirely different" because a person could violate it by doing nothing at all. Because "mere presence in the city" constituted a violation, the Court explained, there was no reason for a person to inquire about the need to register.[197] Lambert's failure to do so, while technically a violation of the ordinance, nevertheless "was entirely innocent."[198] The Court therefore held that "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand."[199] Otherwise, the Court noted in an oblique reference to its void-for-vagueness

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[190] In an unusual move, the Court appointed an amicus curiae to argue on behalf of Lambert, along with her own attorney. The Court also had the case carried over for reargument, another rare occurrence. *Id.* at 227.

[191] *Id.* at 229–30; *see* Hart, *supra* note 138, at 419–20 (discussing need to inform the public of an offense that is both a malum prohibitum offense and a crime of omission); Hughes, *supra* note 56, at 636 (discussing the same).

[192] *Lambert*, 355 U.S. at 228 (citing Walker v. City of Hutchinson, 352 U.S. 112 (1956); Covey v. Town of Somers, 351 U.S. 141 (1956); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950)).

[193] *Id.* at 228–30.

[194] *Id.* at 228.

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.*

precedents, "the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community."[200]

The Court has not revisited a problem like this one since the *Lambert* case.[201] Perhaps its time has come. The importance of a properly defined mens rea element of criminal liability in distinguishing blameless from blameworthy defendants is equally strong today.[202] The number of offenses

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[200] *Id.* at 230. Interestingly, the reference to a law "written in print too fine to read" is reminiscent of the Court's reference in *Screws v. United States*, 325 U.S. 91, 96 (1945) (plurality opinion), to Caligula's practice of publishing laws in a very small print. *Screws* was a void-for-vagueness case that, like *Lambert*, was written by Justice William O. Douglas.

[201] Justice Frankfurter predicted in his dissent that the majority opinion would become "an isolated deviation from the strong current of precedents—a derelict on the waters of the law." *Lambert,* 355 U.S. at 355 (Frankfurter, J., dissenting).

[202] The classic statement of the value of a *mens rea* requirement is found in *Morissette*. There, the defendant took rusted bomb casings he found in a field that happened to be federal property. Prosecuted for theft, he sought to defend by establishing a good-faith belief that he believed the casings to have been abandoned. The trial and circuit courts rejected his defense, but the Supreme Court concluded that he was entitled to present it to the jury. In so ruling, the Court went on at length about the role and value of mens rea in the criminal law:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will." Common-law commentators of the Nineteenth Century early pronounced the same principle, although a few exceptions not relevant to our present problem came to be recognized.
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> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "*scienter*," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.

Morissette v. United States, 342 U.S. 246, 250–52 (1953) (footnotes omitted).

that lack a properly defined scienter element has increased considerably. And the difficulty facing many members of the public today in knowing what the law requires is at least as acute as the one in *Lambert*. Today, there is not just one local ordinance, but a goodly number of local, state, and federal criminal laws governing conduct that no reasonable person readily would believe is criminal.[203] If the void-for-vagueness doctrine discussed in cases such as *Connally*[204] and the notice principles discussed in *Lambert* make sense when applied to a single law, they also make sense when applied to the entirety of the criminal code. In each case, imprisoning a person who is morally blameless not only violates longstanding principles of fairness, not only engenders disrespect for the criminal law, and not only fails to promote the retributive or deterrent purposes of the criminal law, but it also creates a risk of a haphazard or lottery-like system of enforcement, one in which there is no rational basis for distinguishing the few who are caught from the rest for whom ignorance is not just bliss but freedom.[205]

The strongest objection rests on a small number of cases that the Supreme Court decided early in the twentieth century dealing with challenges to the constitutionality of public welfare offenses: *Shevlin-Carpenter Co. v. Minnesota*,[206] *United States v. Balint*,[207] and *United States*

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[203] *See supra* text accompanying notes 72–88. As discussed below, the problem extends to the potential violation of a foreign nation's laws. *See infra* Part II.D.

[204] Connally v. Gen. Constr. Co., 269 U.S. 385 (1926).

[205] Henry Hart noted that certain "evils" attendant upon forcing parties to rely on the discretion of prosecutors are "at their most acute in the sphere of regulation of conduct which is not intrinsically wrongful," as with regulatory crimes. Hart, *supra* note 138, at 429.

> The stupidity and injustice of the thoughtless multiplication of minor crimes receives its most impressive demonstration in police stations and prosecutors' offices. Invariably, staffs are inadequate for enforcement of all the criminal statutes which the legislature in its unwisdom chooses to enact. Accordingly, many of the statutes go largely unenforced. To this extent, their enactment is rendered futile. But it proves also to be worse than futile. For statutes usually do not become a complete dead letter. What happens is that they are enforced sporadically, either as a matter of deliberate policy to proceed only on private complaint, or as a matter of the accident of what comes to official attention or is forced upon it. Sporadic enforcement is an instrument of tyranny when enforcement officers are dishonest. It has an inescapable residuum of injustice in the hands even of the best-intentioned officers. A selection for prosecution among equally guilty violators entails not only inequality, but the exercise, necessarily, of an unguided and, hence, unprincipled discretion.

Id. at 428–29.

[206] 218 U.S. 57 (1910) (holding that a corporation can be convicted for trespass without proof of criminal intent).

[207] 258 U.S. 250 (1922) (holding that a real person can be convicted of the sale of narcotics without a tax stamp without proof that he knew that the substance was a narcotic); *see also* United States v. Behrman, 258 U.S. 280 (1922) (*Balint* companion case) (holding that a physician can be convicted of distributing a controlled substance not "in the course of his professional practice" without proof that he knew this his actions exceeded that limit).

v. Dotterweich.[208] The Court dealt with the issue of whether the Due Process Clause requires the prosecution to prove that the defendant had a "guilty mind" to be convicted of a crime. In each case the Court declined to impose a mens rea requirement as a matter of constitutional law.[209] In fact, despite the impressive pedigree that the mens rea doctrine had at common law, the Court's opinions gave short shrift to a claim based on the Due Process Clause. The Court has never overruled those cases, and the law remains in the state that it occupied in the 1920s.[210]

For two reasons, however, the cases from *Shevlin-Carpenter* to *Dotterweich* do not foreclose the Court from recognizing a mistake of law defense based on the Due Process Clause. *First*: The issue here is not

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[208] 320 U.S. 277 (1943) (holding that the president of a company can be convicted of distributing adulterated or misbranded drugs in interstate commerce without proof that he even was aware of the transaction).

[209] Those three decisions provided the authority for the Supreme Court's later decisions in *United States v. Park*, 421 U.S. 658 (1975), *United States v. Freed*, 401 U.S. 601 (1971), and *United States v. International Minerals & Chemical Corporation*, 402 U.S. 558 (1971). Those cases did not directly resolve a due process challenge; they found that the law set forth in *Shevlin-Carpenter*, *Balint*, and *Dotterweich* was still controlling. For a detailed and trenchant analysis of those cases, see Hart, *supra* note 138, at 429–35 & nn.70–78, and Packer, *supra* note 63, at 111–19.

The rule is slightly different in First Amendment cases. *See, e.g.*, Smith v. California, 361 U.S. 147 (1959) (requiring proof that a bookseller knew the content of his inventory before he could be convicted of distribution of obscene materials); *see generally* Packer, *supra* note 63, at 125 (discussing *Smith*). But free speech concerns are not relevant to the ordinary criminal case. Vagueness challenges to laws that do not involve free speech freedoms are examined in light of the particular facts of each case because, outside the First Amendment context, a party can challenge a statute only insofar as it applies to him and must show that it identifies no standard of conduct at all. Chapman v. United States, 500 U.S. 453, 467 (1991); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n.7 (1982) (collecting cases).

[210] Scholars such as Herbert Packer have been quite critical of the Supreme Court's failure to discuss this issue coherently. *See* Packer, *supra* note 63, at 107 ("*Mens rea* is an important requirement, but it is not a constitutional requirement, except sometimes."); *id.* at 110–11 ("The history of the problem in the Supreme Court is an unedifying example of how constitutional doctrine comes to be fashioned. There are two lines of decision that bear on the issue, one of them apparently establishing that *mens rea* has no constitutional significance, or very little, and the other suggesting that in some situations, at least, it has considerable significance. The odd thing about these two lines of decision is that each has developed almost without acknowledgement of the other's existence."). Writing in 1958, Henry Hart was even less kind:

> Despite the unmistakable indications that the Constitution means something definite and something serious when it speaks of "crime," the Supreme Court of the United States has hardly got to first base in working out what that something is. From beginning to end, there is scarcely a single opinion by any member of the Court which confronts the question in a fashion which deserves intellectual respect.

Hart, *supra* note 138, at 429 (footnote omitted).

whether due process requires the prosecution to prove—or, in what amounts to the same thing, requires the legislature to adopt criminal laws requiring proof of—evil intent on the part of the defendant. The considerations that go into defining what the criminal law may require or permit as elements of an offense do not necessarily apply in the same way or degree when it is a defense to a charge that is at issue. It would not be unreasonable to allow the government to forego proof that the accused intended to break the law when presenting its case in chief, but then to allow the defendant to prove that he had no such intent when offering his own defense. It also is not unreasonable to deny a defendant the right to offer a mistake of law defense when he is charged with a crime that is inherently blameworthy, such as murder. In that case, the defendant ultimately is not claiming that he made a good-faith mistake as to what the law proscribes. Rather, he is hoping to seat a feckless or civilly disobedient jury, and the Constitution guarantees him neither one. By contrast, when the accused is charged with a regulatory *malum prohibitum* offense, his claim that he made an honest mistake is fully consistent with the purposes that the mens rea requirement serves and does not offend any constitutional value.

Second: The Supreme Court has never attempted to square its public welfare cases with its void-for-vagueness jurisprudence. As Herb Packer once noted, the two lines of decisions have "developed almost without acknowledgement of the other's existence."[211] The closest the Court has come to reconciling those cases was an oblique reference in *Lambert*.[212] As noted above, bringing the two lines of cases together does not require a shotgun wedding. The fair-notice principle underlying the Court's void-for-vagueness cases can serve as the justification for recognizing a properly defined mistake of law defense without needing to "retire" the Court's public welfare cases.

Finally, even if the Supreme Court were unwilling to walk back from its public welfare offense line of cases, the Court certainly could limit the harmful effect of those decisions by ruling that a person cannot be *imprisoned* unless the government has proved that he acted with some type of knowledge that his actions were illegal or harmful. The Court did not specifically address that argument in the public welfare offense cases,[213] so

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[211] Packer, *supra* note 63, at 110–11.

[212] *See supra* note 200 and accompanying text.

[213] The initial case in this series, *Shevlin-Carpenter Co. v. Minnesota*, involved only a judgment for damages for cutting timber on state land in excess of a permit. 218 U.S. 57, 64 (1910). (The Court also found that the defendants had willfully exceeded the limits of their permit and thereby committed a "legal wrong." *Id.* at 69.) The cases of *United States v. Balint*, 251 U.S. 250 (1922), *United States v. Berman*, 258 U.S. 280 (1922), *Freed*, 401 U.S. 601, and *International Minerals & Chemical Corporation*, 402 U.S. 558, arose on pretrial

it remains possible that a defendant could persuade the Court to draw the line, if not at conviction, then at imprisonment.[214] Such a rule would ameliorate the effects of the current doctrine. A defendant could still be convicted even if he made a good-faith error, but he could not be imprisoned for it.

One final point in this regard. The argument often is made that the law should allow some overbreadth in its criminal statutes and should entrust the fair enforcement of the criminal law to the "'conscience and circumspection in prosecuting officers.'"[215] That argument, endorsed by Justices Holmes and Frankfurter, is not a trivial one. Nonetheless, it is mistaken. Our legal system is based on the proposition that ours is "a government of laws, and not of men."[216] No one should be obliged to rely on prosecutorial discretion to avoid being charged with a crime. As Henry Hart put it, the notion that a person must rely on the discretion of a prosecutor, rather than the clarity of the law, for his freedom is "immoral."[217]

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motions to dismiss the indictments, so there was neither a conviction nor a sentence in any of those cases. The *International Minerals* case also involved only a corporation as the defendant, so imprisonment was legally impossible. The penalty in *Dotterweich* was a $1,500 fine and six-months' probation. *See* United States v. Buffalo Pharm. Co., 131 F.2d 500, 501 (2d Cir. 1945), *rev'd sub nom.*, *Dotterweich*, 320 U.S. 277. The penalty in *Park* also was only a fine. 421 U.S. at 666.

[214] The Eighth Amendment Cruel and Unusual Punishments Clause may provide a better vehicle for constitutional analysis than the Due Process Clause. The argument would be that no one should be *imprisoned* without some proof of blameworthiness or malicious intent. The Supreme Court has not considered this issue under the Eighth Amendment and has signaled a willingness to reexamine old doctrines when a new constitutional provision is at issue. *Compare, e.g.*, McGautha v. California, 402 U.S. 183 (1971) (rejecting challenge to purely discretionary capital sentencing schemes based on the Due Process Clause), *with* Furman v. Georgia, 408 U.S. 238 (1972) (upholding challenge based on the Eighth Amendment Cruel and Unusual Punishments Clause to purely discretionary capital sentencing schemes), and *compare, e.g.*, Bennis v. Michigan, 516 U.S. 442 (1996), and Calero-Toledo v. Smith Pearson Yacht Co., 416 U.S. 663 (1974) (rejecting Fifth Amendment Due Process and Takings Clause challenges to pretrial seizure and forfeiture laws), *with* Austin v. United States, 509 U.S. 602 (1993) (holding the Eighth Amendment Excessive Fines Clause prohibits excessive forfeitures).

[215] *Dotterweich*, 320 U.S. at 285 (quoting Nash v. United States, 229 U.S. 373, 378 (1913)).

[216] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

[217] Moral, rather than crassly utilitarian, considerations re-enter the picture when the claim is made, as it sometimes is, that strict liability operates, in fact, only against people who are really blameworthy, because prosecutors only pick out the really guilty ones for criminal prosecution. This argument reasserts the traditional position that a criminal conviction imports moral condemnation. To this, it adds the arrogant assertion that it is proper to visit the moral condemnation of the community upon one of its members on the basis solely of the private judgment of his prosecutors. Such a circumvention of the safeguards with which the law surrounds other determinations of criminality seems not only irrational, but immoral as well . . . .

To be sure, society has confidence that the actors in the criminal justice system will act in good faith for the benefit of the public. By and large, that confidence is justified. Police and prosecutors ordinarily act responsibly in the service of protecting the public by seeing to the proper and reasonable enforcement of the criminal law.[218] But "ordinarily" is not the same as "always." Perfection is not possible, but it is worth striving for, and in that process we can identify and correct both obvious and subtle flaws in our criminal statutes. As Robert Browning put it:

> Ah, but a man's reach should exceed his grasp,
>
> Or what's a heaven for?[219]

One important way to seek the perfection that is our goal is to recognize that, just as law enforcement personnel can make good-faith mistakes in the pursuit of their mission, so, too, can ordinary citizens. The "good-faith" or "reasonable mistake" doctrine that the Supreme Court has recognized where the exclusionary rule is concerned is a perfect illustration of that point.[220] That doctrine is designed to avoid punishing the criminal justice system because a police officer made a reasonable mistake. The point here is similar: A person should not be convicted, let alone go to prison, for making a reasonable mistake. If we are willing to pardon the unavoidable flaws of the people who enforce our laws, we should be willing to extend the same grace to the remainder of the people, who suffer from the same shortcomings.

> But moral considerations in a still larger dimension are the ultimately controlling ones. In its conventional and traditional applications, a criminal conviction carries with it an ineradicable connotation of moral condemnation and personal guilt. Society makes an essentially parasitic, and hence illegitimate, use of this instrument when it uses it as a means of deterrence (or compulsion) of conduct which is morally neutral. This would be true even if a statute were to be enacted proclaiming that no criminal conviction hereafter should ever be understood as casting any reflection on anybody. For statutes cannot change the meaning of words and make people stop thinking what they do think when they hear the words spoken. But it is doubly true-it is ten-fold, a hundred-fold, a thousand-fold true when society continues to insist that some crimes *are* morally blameworthy and then tries to use the same epithet to describe conduct which is not.

Hart, *supra* note 138, at 424 (footnote omitted).

[218] *See, e.g.*, Hartman v. Moore, 547 U.S. 250, 263 (2006) (noting there is a presumption of regularity afforded to prosecutorial decisionmaking). Whether police and prosecutors in other countries are entitled to that same presumption is an entirely different question. Corruption may be a fact of life in some foreign nations. Even isolated instances of corruption, however, can have a massive detrimental effect on the poor souls who get ensnared in a foreign land by a rancid criminal justice system.

[219] *Andrea del Sarto*, *in* ROBERT BROWNING, MEN AND WOMEN 184 (Oxford University Press, 1972) (1855).

[220] *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984); *supra* note 43 (collecting "reasonable mistake" cases).

C. THE BOUNDARIES OF A MISTAKE OF LAW DEFENSE

If the discussion above justifies a rule permitting the defendant to assert a mistake of law defense at trial in an appropriate case, two follow-up questions naturally arise: Is the defense workable—that is, how will that issue play out during trial? And how do we define the cases where a mistake of law defense is appropriate?

The prosecution bears the burden of proof beyond a reasonable doubt at trial, so the courts could require the prosecution to prove that the defendant knew that his conduct was illegal or at least blameworthy. That result, while unusual, is not unheard of. The Supreme Court generally has read federal statutes to require the government to prove that the defendant purposefully broke the law whenever it forbids conduct that is done "willfully."[221] That practice has become common in the case of the federal tax code,[222] and the approach followed there could serve as a template for other criminal offenses.

But that approach is inconsistent with the one that the Supreme Court follows in cases of statutory construction. The Court reads statutes literally and has been unwilling to construe them to include additional elements not found in the text of the law.[223] The Court, therefore, is unlikely to read a statute as requiring proof of purposeful illegality if the text of the law lacks the term "willfully."

Defining when a defendant may raise a mistake of law defense would raise a variety of definitional issues.[224] Should it be limited to *malum prohibitum* offenses? So-called public welfare offenses? Petty offenses? Crimes not involving moral turpitude? Or to offenses defined by reference to a source, such as a regulation, outside the penal code? Reasonable arguments can be made for drawing the line in different locations. Although courts generally find it desirable to know at the outset of any such enterprise exactly where they will end up, the uncertainties posed by the line-drawing necessary to define the perimeter of a mistake of law defense

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[221] *See, e.g.*, Bryan v. United States, 524 U.S. 184, 191 (1998); Cheek v. United States, 498 U.S. 192, 200 (1991). By contrast, the term "knowingly" requires only proof of knowledge of the facts constituting the offense, not additional proof of knowledge that those acts are unlawful. *See, e.g.*, Rogers v. United States, 522 U.S. 252, 254–55 (1998) (plurality opinion); Staples v. United States, 511 U.S. 600, 602 (1994); United States v. Bailey, 444 U.S. 394, 408 (1980).

[222] *See supra* note 125.

[223] *See, e.g.*, Bates v. United States, 522 U.S. 23, 29 (1997) (declining to interpret a statute to include proof of "intent to defraud" when the text imposes no such requirement); United States v. Wells, 519 U.S. 482, 490 (1997) (declining to require proof of "materiality" of falsehood as an element of the crime of knowingly making a false statement to a federally insured bank when the text imposes no such requirement).

[224] For a discussion of some of those issues, see Hall, *supra* note 9, at 18–44.

should not prove unduly burdensome. For most of our history the courts have engaged in that process in the context of other defenses, such as duress or necessity, entrapment, reliance on advice of government officials or private counsel, self-defense or defense of another, and insanity.[225] The common law decisionmaking process should be able to handle that problem here as the courts work out over time when a mistake of law defense is appropriate.

There are some general principles, however, that would be appropriate. To start with, a mistake of law defense would exculpate only when the defendant's mistake was reasonable.[226] One result of that limitation would be to render the defense inapplicable as a standalone defense to a crime of violence, because the average person would know that such conduct is illegal or, at a minimum, questionable.[227] By contrast, another principle would be that the defense should apply to the type of regulatory or "social welfare offenses" that began to arise early in the twentieth century, but proliferated in the latter half of that period as Congress and federal administrative agencies began to regulate intensively the environmental, commercial, and safety fields. A particular example of where it makes sense to allow a mistake of law defense is to a charge that a person has violated a regulation implementing a criminal statute.[228] Finally, in order to ensure that society's legitimate law enforcement interests are respected, it would make sense to place on a defendant the burden of production and perhaps even persuasion.[229] Deciding when a mistake of law defense can be asserted might prove difficult in some cases, but the courts have proved themselves fully qualified to make those decisions as to other common law defenses, and those guidelines should help them do so.

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[225] *See supra* note 20.

[226] *See* Keedy, *supra* note 9, at 84–85, 95; Perkins, *supra* note 11, at 52–53. For the different positions on that issue, see United States v. Barker, 546 F.2d 940, 948 & n.23 (D.C. Cir. 1976). The qualified immunity doctrine recognized in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), provides a useful example of how the doctrine would operate. *See* Malley v. Briggs, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

[227] *See supra* note 128. By contrast, a mistake of law defense could be asserted in conjunction with a claim of self-defense. For example, suppose a jurisdiction requires the victim of an assault to flee before using force in his defense. If a person reasonably believed that he did not have to flee before defending himself in such a jurisdiction, he would be entitled to present his mistake of law defense to the jury.

[228] The rationale for allowing a mistake of fact defense to the alleged violation of a regulation is especially powerful in the case of state and local rules. *See* Hall & Seligman, *supra* note 49, at 660.

[229] *See supra* note 140.

There also is a case where the decision to apply a mistake of law defense should be easy to recognize: namely, to the charge that a person has violated the law of a foreign country. In that case, refusing to allow a defendant to raise a mistake of law defense is utterly irrational, so irrational, in fact, that the refusal clearly should be held unconstitutional.

D. THE SPECIAL CASE INVOLVING A MISTAKE OF FOREIGN LAW

Most criminal laws apply only to conduct that occurs within a sovereign's own territory;[230] most crimes are prosecuted by state or local authorities, and the issue of just how far a state can extend its criminal law generally never arises. Were it to arise in a state criminal case, there are several constitutional provisions that limit a state's ability to apply its laws extraterritorially,[231] which would make this issue an academic one in all but the rarest state case.[232]

But the federal government stands on a different footing. The Constitution contemplates that the federal government will exercise sovereign authority beyond our shores,[233] and Congress frequently has

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[230] Each state may exercise sovereign power only within its own defined jurisdiction. *See* Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction.").

[231] Those provisions are (1) the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, *see, e.g.*, Healy v. The Beer Institute, 491 U.S. 324 (1989); (2) the Due Process Clause, U.S. Const. amend. XIV, § 1, *see, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); and (3) the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, *see*, *e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); New York Life Ins. Co. v. Head, 234 U.S. 149, 161 n.1 (1914) (collecting cases). Also relevant are the Privileges and Immunities Clause of Article IV, Section 2, and the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment. They guarantee that each state will treat all persons within its jurisdiction in the same manner as state residents. *E.g.*, Toomer v. Witsell, 334 U.S. 385, 395–403 (1948). Those sections would be unnecessary if each state could govern its own residents wherever they may be.

[232] Such as where a party takes an act in one state that has an effect on another state.

[233] Congress may provide for the defense of the nation from invasion, U.S. Const. art. I, § 8, cl. 15; *see also* U.S. Const. art. I, § 8, cl. 17 ("[T]o exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals"); U.S. Const. art. I, § 9, cl. 2 ("The . . . Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); regulate foreign commerce, U.S. Const. art. I, § 8, cl. 3; tax imports and exports, U.S. Const. art. I, § 8. cl. 1; outlaw conduct on the "High Seas" and even in foreign lands, U.S. Const. art. I, § 8, cl. 10; and empower the military to take aggressive action beyond our shores, U.S. Const. art. I, § 8, cl. 11 ("To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"); U.S. Const. art. I, § 8, cl. 12 ("To raise and support Armies"); U.S. Const. art. I, § 8, cl. 13 ("To provide and maintain a Navy"). The President is made the commander-in-chief of the nation's military forces. U.S. Const. art. II, § 2, cl. 1. He also has the power, with the Senate's advice and consent, to enter into treaties and to appoint and receive ambassadors.

enacted laws that apply overseas.[234] The Supreme Court also has written that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States"[235] as an incident of sovereignty.[236] As the result, although a state ordinarily cannot regulate the conduct of its citizens in other states,[237] Congress generally can do just that.[238]

One example of such a law is the Lacey Act.[239] Originally enacted in 1900, Congress passed the Lacey Act to protect each state against out-of-state poachers.[240] Over time, however, Congress expanded the reach of the law to include, for instance, importation of wildlife obtained in violation of foreign law and later imported into the United States. Eventually, Congress enlarged the act to include even plants. Today, the Lacey Act seeks to protect threatened flora and fauna both here and abroad.[241] The rationale underlying the act is that recognizing foreign laws would help protect wildlife in foreign countries that are at risk of extinction and would

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U.S. Const. art. II, § 2, cl. 2; U.S. Const. art. II, § 3. Finally, the President is vested with the power to execute whatever laws and treaties the Congress may adopt affecting foreign relations. U.S. Const. art. II, § 3. A dramatic illustration of the difference between the states and the federal government can be seen in Article I, Section 10, Clause 1, which forbids a state from "enter[ing] into any Treaty, [or] Alliance." U.S. Const. art. I, § 10, cl. 1.

[234] For a collection of the laws that apply extraterritorially, see CHARLES DOYLE, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (Cong. Res. Serv., CRS Report for Congress Order Code 94-166 A, Aug. 11, 2006).

[235] EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991).

[236] *See* Blackmer v. United States, 284 U.S. 421, 437–38 (1932) ("What in England was the prerogative of the sovereign in this respect, pertains under our constitutional system to the national authority which may be exercised by the Congress by virtue of the legislative power to prescribe the duties of the citizens of the United States."); Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004); United States v. Bennett, 232 U.S. 299, 305–06 (1914); Ware v. Hylton, 3 U.S. 199, 281 (1796) (separate opinion of Wilson, J.).

[237] *See* Bigelow v. Virginia, 421 U.S. 809, 822–24 (1975); Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881).

[238] *See, e.g.*, Skiriotes v. Florida, 313 U.S. 69, 72–73 (1941); Blackmer v. United States, 284 U.S. 421, 437 (1932); Cook v. Tait, 265 U.S. 47, 54–56 (1924); United States v. Bowman, 260 U.S. 94, 97 (1922) (collecting cases).

[239] 16 U.S.C. § 701 (2006).

[240] *See* United States v. McNab, 331 F.3d 1228, 1238 (11th Cir. 2003); United States v. Todd, 735 F.2d 146, 149 (5th Cir. 1984); Rupert v. United States, 187 F. 87, 89–90 (8th Cir. 1910); United States v. Molt, 452 F. Supp. 1200, 1203 (E.D. Pa. 1978), *aff'd*, 599 F.2d 1217, 1218–20 (3d Cir. 1979); S. Rep. No. 97-123, at 2 (1981); S. Rep. No. 91-526, at 1–2 (1969).

[241] Lacey Act Amendments of 1981, 16 U.S.C. §§ 1371–78 (2006); *see, e.g.*, *McNab*, 331 F.3d at 1238; United States v. 594,464 Pounds of Salmon, 871 F.2d 824, 830 & n.9 (9th Cir. 1989); United States v. Rioseco, 845 F.2d 299, 302 (11th Cir. 1988); United States v. Bryant, 716 F.2d 1091, 1093 & n.1 (6th Cir. 1983); *Molt*, 452 F. Supp. at 1203, *aff'd*, 599 F.2d at 1218–20; S. Rep. No. 91-526, at 1–2.

encourage foreign nations to provide complementary assistance to this country.[242]

To accomplish those goals, the Lacey Act regulates (*inter alia*) the "taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants."[243] What is most relevant here, however, is a provision in the Lacey Act that makes it a federal offense to take or import fish, wildlife, or plants "in violation of any foreign law."[244] On its face, that provision does not appear to create a particularly difficult interpretive problem for the average person, at least none greater than in the case of domestic American law. But, like an iceberg, the bigger problem lies beneath the surface. Consider the case of *United States v. McNab*.[245]

Abner Schoenwetter and several other individuals were convicted of several federal offenses in connection with their purchase, importation, and sale of Caribbean spiny lobsters from Honduras, in violation of the Lacey Act. The case began with an anonymous tip to agents of the National Marine and Wildlife Fishery Service that Schoenwetter intended to import, into the United States, Honduran lobsters that were too small to be taken under Honduran law and would be packed in plastic, rather than in boxes as required by Honduran law. The agents contacted Honduran officials in that nation's agriculture department, who confirmed that Schoenwetter's shipment violated the Honduran "Fishing Law, the Industrial and Hygienic Sanitary Inspection Regulation for Fish Products and Resolution No. 030-95."[246] The agents seized Schoenwetter's cargo, and an inspection confirmed that a significant number of the lobsters were too small, all were packed in plastic, and some contained eggs and therefore could not be taken under Honduran law.[247] The district court conducted a pretrial evidentiary

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[242] *See Molt*, 452 F. Supp. at 1203, *aff'd*, 599 F.2d at 1218–20; S. Rep. No. 91-526, at 12.

[243] 16 U.S.C. § 3371(d).

[244] 16 U.S.C. § 3372(a)(2)(A). That provision has been the source of some litigation. *See* United States v. Lee, 937 F.2d 1388, 1393–94 (9th Cir. 1991) (collecting cases rejecting delegation challenge to the Lacey Act).

[245] 331 F.3d 1228.

[246] *Id.* at 1232–33.

[247] *Id.* at 1233.

> The minister, the vice minister, the director of legal services, the director of legal affairs, the secretary general of the SAG [the Secretaria de Agricultura y Ganaderia], the director general of the DIGEPESCA [the Direccion General de Pesca y Acuicultura], and the legal advisor for the Servicio Nacional de Sanidad Agropecuaria (SENASA) [an agency within the SAG that is responsible for the enforcement of hygiene laws and regulations] confirmed that the lobsters had been exported illegally without first being inspected and processed. Furthermore, the Honduran officials confirmed that there was a 5.5-inch size limit for lobster tails and that all catches had to be reported to Honduran authorities. The Honduran officials provided certified copies of the laws in question. In September of 1999 NMFS agents inspected the lobster shipment that had been seized earlier in the year. The inspection confirmed that the seized lobsters were packed in

hearing on the issue of whether the defendants had violated Honduran law, as well as another post-trial evidentiary hearing on that issue.[248] Each time the district court rejected the defendants' challenges to the validity and interpretation of the Honduran laws and regulations.[249] On appeal, the Eleventh Circuit, by a two-to-one vote, also spurned the defendants' arguments and upheld their convictions.[250]

Consider for a moment just what some of those defense arguments were. To start with, the defendants argued that the Lacey Act term "any foreign law"[251] incorporated only foreign statutes, not regulations. The Eleventh Circuit rejected that argument, ruling that the act "includes nonstatutory provisions such as Resolution 030-95 and Regulation 0008-93."[252] The defendants also claimed that this resolution and regulation were invalid and could not serve as a predicate law under the Lacey Act because those provisions had never been properly promulgated or, since being adopted, had been repealed.[253] The circuit court noted that this issue was complicated by a "posttrial shift in the Honduran government's position regarding the validity of the laws at issue in this case."[254] Whereas before and during the trial the Honduran government had concluded that the resolution and regulation were lawful, on appeal Honduras shifted its position and "now maintains that the laws were invalid at the time of the lobster shipments or have been repealed retroactively."[255] Starting with the premise that the Lacey Act conviction could be upheld if Honduran law were valid at the time of trial, regardless of what may have happened later, the Eleventh Circuit refused to give effect to the new position of the Honduran government that its regulations were invalid.

> bulk plastic bags without being processed and revealed that a significant number had a tail length that was less than the 5.5 inches required by the Honduran size limit restriction. In addition, many of the lobsters were egg-bearing or had their eggs removed.

Id. (footnote omitted).

[248] *Id.* at 1233–35.

[249] *Id.* at 1235.

[250] *Id.* at 1239.

[251] 16 U.S.C. § 3372(a)(2)(A) (2006).

[252] *McNab*, 331 F.3d at 1239.

[253] *Id.* ("The defendants contend that the Honduran laws that served as predicates for their convictions were invalid. Specifically, they argue that (1) Resolution 030-95, which established a 5.5-inch size limit for lobsters, never had the effect of law, because it was promulgated improperly and has been declared void by the Honduran courts; (2) Regulation 0008-93, which established inspection and processing requirements for the lobster fishing industry, was repealed in 1995, prior to the time period covered by the indictment; and (3) Article 70(3), which prohibits the harvesting and destruction of lobster eggs, was misinterpreted by the district court and was repealed retroactively in 2001.").

[254] *Id.* at 1240.

[255] *Id.*

The court gave great weight to what it saw as an interest in the "finality" of the meaning of foreign law. "There must be some finality with representations of foreign law by foreign governments. Given the inevitable political changes that take place in foreign governments, if courts were required to maintain compliance with a foreign government's position, we would be caught up in the endless task of redetermining foreign law."[256] Giving effect to the Honduran government's new position of the meaning of its own laws would undermine that interest in finality. "Otherwise, there never could be any assurance when undertaking a Lacey Act prosecution for violations of foreign law that a conviction will not be invalidated at some later date if the foreign government changes its laws."[257] Allowing a foreign government to change its position, the court added, could encourage well-heeled defendants to buy a more favorable interpretation of foreign law.[258] "There would cease to be any reason to enforce the Lacey Act, at least with respect to foreign law violations, if every change of position by a foreign government as to the validity of its laws could invalidate a conviction."[259]

The Eleventh Circuit also rejected appellants' specific challenges to Honduran law. For instance, the Eleventh Circuit refused to give effect to a decision of a Honduran court holding Resolution 030-95 invalid on the ground that it had not properly been promulgated.[260] The Eleventh Circuit construed the Honduran court's opinion as having prospective effect only[261]—even though the Attorney General of Honduras offered a different interpretation of the Honduran court's order[262] and the Constitution of

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[256] *Id.* at 1241.

[257] *Id.* at 1242.

[258] *Id.* The court did state, "such is not the case here." *Id.*

[259] *Id.*

[260] The basis for the defendants' argument that Resolution 030-95 never was a valid law is an opinion from the Honduran Court of the First Instance of Administrative Law. In May of 2001 the Honduran administrative law court found that Resolution 030-95 had been promulgated through an incorrect procedure and ordered that the resolution was entirely voided, *but this is only for purposes of [its] annulment and future inapplicability:* This Resolution does not confer any right to claims . . . . Subsequently, the Honduran Court of Appeals for Administrative Law affirmed the lower court's decision invalidating Resolution 030-95.

Id. at 1243 (internal quotation marks omitted) (footnote omitted).

[261] *Id.*

[262] The affidavit of the assistant attorney general of Honduras indicates that the decision annulling Resolution 030-95 does not apply retroactively and does not legalize the shipments of undersized lobsters retroactively. The attorney general of Honduras, however, offers an alternative explanation for the prospective language in the court's decision that favors the defendants. He contends that Resolution 030-95 was annulled ab initio, that it never was a valid law and, therefore, cannot serve as a basis for the defendants' convictions. Although the dissent accepts his explanation that Resolution 030-95 never was binding and that the prospective language merely protects the Honduran government from civil liability, we believe that the

Honduras seemed to require that the Honduran court's order be given retroactive effect.[263] Once more, the Eleventh Circuit reiterated the proposition that the validity of Honduran law, and therefore the Lacey Act charge incorporating that law, had to be gauged at the time of trial.[264] In addition, the circuit court rejected appellants' claim that Regulation 0008-93 also was invalid, because that regulation, as well as the statute authorizing that regulation, had been repealed, as evidenced by a recent interpretive opinion of the Honduran legislature. The Eleventh Circuit disagreed with appellants'—and the Honduran Attorney General's—reading of Honduran law.[265] Finally, the Eleventh Circuit concluded that any potential repeal of a Honduran law forbidding the taking of egg-carrying lobsters to be irrelevant, because only the state of Honduran law at the time of trial mattered.[266]

The Eleventh Circuit's opinion in *McNab* is remarkable in numerous respects. It treated the district court's ruling on a question of Honduran law with the same finality that normally is afforded only to state court judgments when challenged in federal court on habeas corpus. It refused to give any weight to the intervening opinions of the Honduran courts and Attorney General on intricate matters of Honduran law. And it hinted that the Honduran government's new legal opinion had been bought and paid for. But what is perhaps most remarkable about the Eleventh Circuit majority opinion is its utter lack of self-awareness of the practical effect of its decision.

The majority bemoaned the prospect of having to keep up with changing positions taken by a foreign country as to the meaning of its own laws, but never once realized that *private parties operate under the same burden*. The chore that the Eleventh Circuit found so onerous was no greater than the one that the *McNab* defendants had to deal with in the

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attorney general is extracting meaning from the Honduran court's decision that is not supported by the language of the opinion. In addition, although a report from the Honduran national human rights commissioner advised that Secretary General Paz's testimony be disqualified as legal error and that Resolution 030-95 be declared void retroactively, a subsequent meeting between the commissioner and an NMFS agent revealed that the commissioner was unaware of the factual background of the prosecution at the time he rendered his report. Furthermore, the commissioner said that he felt 'pressured' by McNabb's representatives to issue a quick decision.

Id. at 1243 n.28.

[263] *Id.* at 1244 n.30 ("Article 96 of the Honduran Constitution provides, 'The Law does not have retroactive effect, except in penal matters when the new law favors the delinquent or the person that is prosecuted.'" (quoting CONSTITUCIÓN DE LA REPUBLICÁ DE HONDURAS art. 96)).

[264] *Id.*

[265] *Id.* at 1244–46.

[266] *Id.* at 1246–47. Judge Fay dissented in part. He found Resolution 030-95 invalid, as the Honduran courts had concluded. *Id.* at 1247–51.

course of a legitimate business activity. What is more, while the court of appeals labored under the burden of learning a foreign nation's substantive and procedural law, the only possible penalty that the court would suffer for making a mistake is the remote chance that the Supreme Court would reverse its judgment. By contrast, the *McNab* defendants acted *under the risk of the penalty of imprisonment for making a mistake of law*. The Eleventh Circuit's complaint about the difficult burden that the courts and government would bear if the court were to allow a foreign government to bring to the attention of an American court a new position on a legal issue ignores the fact that *there is no penalty imposed on a judge who makes an error of law*. A member of the public has the identical burden, but he or she *faces the prospect of imprisonment if he or she makes a mistake*. In these circumstances, whining is not too strong a term to describe the Eleventh Circuit's complaint. The real burden is borne by the private parties who must find laws such as Resolution 030-95 and Regulation 0008-93, must interpret in the first instance laws that are written in a foreign language and may rest on cultural, economic, or political assumptions without parallel in the United States, and then must keep informed about the actions of a foreign government's officials as they construe and apply their own laws.

The *McNab* case illustrates the difficulties that a person may have in dealing with foreign law. Foreign nations may have as many or more different sources of law—e.g., bicameral legislatures, higher and lower courts, administrative agencies, chief legal officers serving at agencies and as prosecutors, senior and lower-level government officials with authority to enforce a program and, therefore, interpret its rules, etc.—and forms that those laws make take—e.g., statutes, regulations, judicial decisions, interpretative publications, etc.—as we see in the United States. Those laws may not be accessible or published in English. Officials in different departments of government, and at different levels within each department, may have divergent interpretations of those laws. And those laws and their interpretations may change over time, perhaps nullifying the effect of a prior interpretation, perhaps not. Assuming that the average citizen can keep track of such laws, let alone do so without a legion of attorneys at his or her elbow, is not merely a fiction or a "legal cliché";[267] it is lunacy. And it is no argument that a party always can seek legal advice as to how to proceed in a foreign country. Aside from the possibly quite limited number of lawyers with the knowledge, skill, or contacts to answer those questions, there remains the principle that due process requires that the law be capable of understanding by the average person. Unless "men of common

[267] Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009).

intelligence" can understand what a law means,[268] the law might as well not exist. The answer, then, to this problem is clear: No one should be forced to run the risk of conviction and imprisonment for making a mistake of foreign law.

The Supreme Court decided an analogous issue nearly 200 years ago in *United States v. Smith*.[269] The defendant was charged with piracy under an act of Congress that made it a crime to "'commit the crime of piracy, as defined by the law of nations.'"[270] One issue was whether international law defined "piracy" with sufficient clarity so that the defendant would have known what the statute prohibited and that his actions were outlawed. The Court decided that Congress had defined that term in an understandable manner by referring to international law, because international law was unanimous on this point: robbery and murder on the high seas was piracy. Moreover, piracy so defined—that is, robbery and murder at sea, rather than on land—also was a crime at common law and under maritime law.[271] Charging Smith with piracy for committing robbery and murder, therefore, could not have surprised him.

Justice Livingston dissented. In his opinion, Congress should have defined piracy under federal law, rather than leave that definition to the law of nations, even if international law was unanimous on this point.[272] Justice Livingston saw no contradiction between the need to define a federal crime in federal law and the proposition that everyone is presumed to know the law:

> [I]t is the duty of Congress to incorporate into their own statutes a definition in *terms*, and not to refer the citizens of the United States for rules of conduct to the statutes or

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[268] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[269] 18 U.S. 153 (1820).

[270] *Id.* at 157 (citation omitted).

[271] *Id.* at 158–62.

[272] *Id.* at 160–82 (Livingston, J., dissenting). The reason for the approach, he explained, was the following:

> Such a mode of proceeding would be consonant with the universal practice in this country, and with those feelings of humanity which are ever opposed to the putting in jeopardy the life of a fellow-being, unless for the contravention of a rule which has been previously prescribed, and in language so plain and explicit as not to be misunderstood by any one. . . . It is not certain, that on examination, the crime would not be found to be more accurately defined in the code thus referred to, than in any writer on the law of nations; but the objection to the reference in both cases is the same; that it is the duty of Congress to incorporate into their own statutes a definition in *terms*, and not to refer the citizens of the United States for rules of conduct to the statutes or laws of any foreign country, with which it is not to be presumed that they are acquainted.

Id. at 181–82.

> laws of any foreign country, with which it is not to be presumed that they are acquainted.[273]

As noted above, a mistake of law defense would not exonerate a defendant from robbery or murder, and the distinction drawn by Justice Livingston likely would not have made a difference in the *Smith* case. It is difficult to believe that Smith thought that he was absolved from robbery and murder just because he was afloat at the time. But not every case will be so easy to decide. More often than not American citizens may get entangled in the intricacies of foreign regulatory laws, whose complexity may exceed our own by the proverbial mile. In such a case, a mistake of law defense, like the rationale given by Justice Livingston in dissent in *Smith*, would go a long way toward preventing another miscarriage of justice like the one that occurred in the *McNab* case.

III. CONCLUSION

Over the last sixty years, the Supreme Court has heavily regulated the investigative and trial stages of the criminal process and has set up an immovable "No Trespassing" sign over its body of work, effectively stiff-arming the political branches from dealing with crime by making trade-offs between the rules governing criminal law and procedure. The result likely is not what the Court intended. By leaving the definition of crimes and offenses almost entirely in the hands of the political process, the Court may have sacrificed fairness and stability in the criminal law for regularity in criminal procedure. Legislators have found that the best (or even the only) option open to them to address the problem of crime—or be seen as "tough" in doing so, as a way of avoiding critical thirty-second TV campaign commercials—is to make more and more conduct criminal or to punish more severely conduct already outlawed. No one has ever lost an election by making the penal code more wide-ranging and more punitive. The outcome, however, is the "overcriminalization" of the law, as well as a cruel and unsound criminal justice policy.[274] After all, "[w]hat sense does it make," Henry Hart once asked, "to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?"[275]

The proposition that a defendant should be able to raise a mistake of law defense to a charge that he committed a *malum prohibitum* crime sensibly balances society's strong interest in enforcement of the law and

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[273] *Id.* at 182.

[274] *See generally* Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005) (introducing a symposium of six articles about overcriminalization).

[275] Hart, *supra* note 138, at 431.

society's even more powerful interest in not punishing morally blameless parties. Allowing the courts to filter out the phony from legitimate claims of mistake will separate the blameworthy from the blameless and protect the latter. The cost of making that distinction likely will prove minimal and, in any event, is worth it. Punishing someone who is blameless is unjust, and that cost must be weighed, too. However this change is made—by the Congress through a revision of the penal code or by the courts in their power to define common law defenses to crimes—it should be done.

Holmes's insight that the law must be willing to adapt in order to remain rational and vibrant is still a valuable guide for criminal law policymaking today. Let us move forward with that insight as our guide in order to stop the process of making more and more conduct a crime and to reconsider whether we already have gone too far. We have the wisdom to choose that path in a responsible manner. May we also have the courage, whatever the political winds may be, to take the necessary next step.