The Heritage Foundation
LEADERSHIP FOR AMERICA

LEGAL MEMORANDUM

No. 91 | APRIL 11, 2013

The Need for a Mistake of Law Defense as a Response to Overcriminalization

Paul J. Larkin Jr.

Abstract

The maxim that "ignorance of the law is no excuse" does not hold in an age where federal law alone contains thousands of criminal offenses directed at conduct that reasonable people have no ready way to know is prohibited. Just as the courts recognize mistake of fact as a defense to criminal liability, so should they recognize mistake of law to prevent the prosecution and conviction of blameless parties who had no reason to believe that their actions violated the law. This narrow reform, whether adopted by Congress or by the courts, would go a long way toward addressing the costs that the current "overcriminalization" imposes on honest, law-abiding citizens.

By heavily regulating criminal procedure alone but leaving the definition of crimes and offenses almost entirely in the hands of the political process, the Supreme Court has left open only one option to legislators seeking to address the problem of crime: Make more and more conduct criminal. The result in recent decades has been the "overcriminalization" of the law, with thousands of criminal offenses in federal statutes and hundreds of thousands in federal regulations. No person could possibly be expected to know them all or even to know all of those that may apply to his daily activities. Yet the law still clings to the maxim that ignorance of the law is no excuse at a time when some ignorance is inevitable, particularly regarding *malum prohibitum* offenses, or crimes outside the category of inherently harmful or blameworthy acts.

Mistake of law as a defense to criminal liability deserves a second look. The proposition that a defendant should be able to raise a

This paper, in its entirety, can be found at **http://report.heritage.org/lm91**

Produced by the Edwin Meese III Center for Legal and Judicial Studies

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Key Points

- The rule that "ignorance of the law is no excuse" dates back to a time when the law mirrored morality. Because rape and murder were wrong, no one could be ignorant of what was forbidden.
- Today, federal statutes contain more than 4,500 criminal offenses, and regulations define potentially hundreds of thousands more. Because of this "overcriminalization," average people lack notice of the law's requirements and risk criminal punishment for conduct that few would ever expect was illegal.
- Congress or the courts should adopt a "mistake of law" defense to protect against prosecution and conviction for conduct that is not blameworthy because no reasonable person would have known that it was a crime. Such conduct would remain subject to civil penalties.
- A mistake of law defense would restore the fundamental principle of "fair warning" to the criminal law, protecting the blameless from unfair punishment.

mistake of law defense to a charge that he committed a *malum prohibitum* offense sensibly balances society's strong interest in enforcement of the law and 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—whether by the Congress through a revision of the penal code or by the courts through their power to define common law defenses to crimes—it should be done.

The Overcriminalization Problem

The rule against mistake of law as a defense made sense during the development of the English common law, the ancestor of our own common law, hundreds of years ago.[1] There were fewer than a dozen felonies, and they mirrored then-contemporary morality. Murder, rape, and robbery were universally crimes against God in every religious tradition, so everyone knew that such conduct was forbidden. 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."[2]

That no longer is true. There are more than 4,500 federal crimes and potentially more than 300,000 relevant federal implementing regulations.[3] No one could know them all—not a judge, not a lawyer, and certainly not an average citizen untrained in the law. Even the Justice Department failed when it tried to identify every federal crime.[4] In addition, because so many criminal laws outlaw conduct not normally seen as blameworthy, there no longer is an understandable rule of thumb to know what is and is not a crime.[5]

Congress has increasingly used the criminal law to enforce complex regulatory regimes to protect the economy, industry, and the public from the harms endemic in a modern industrial economy. The combination of regulatory programs and criminal liability, however, creates serious problems unknown to the common law.

Over the past 125 years, Congress has increasingly used the criminal law to enforce complex regulatory regimes that were adopted in order to protect the economy, industry, and the public from the harms endemic in a modern industrial economy.[6] The combination of regulatory programs and criminal liability, however, creates serious problems unknown to the common law.

Regulatory statutes are written broadly so that agencies have discretion to respond appropriately to new issues and dangers. Implementing regulations are detailed and complex, and they can demand scientific or technical knowledge that the average person lacks.[7] That combination is unhealthy for the criminal justice system. It demands too much to require the average member of the public to be aware of, to know where to look for, and to understand the

1. *See* Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725, 726–27 (2012) (hereinafter Meese & Larkin).
2. John Salmond, Jurisprudence 427 (8th ed. 1930).
3. *See* Meese & Larkin, *supra* note 1, at 733–36.
4. *See id.* at 739 & n.74.
5. Environmental regulation is a good example of this problem. *See id.* at 735–36, 743–46.
6. Gerard 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.").
7. For an example, see the definition of "excessive noise" found at 36 C.F.R. § 2.18(d)(1), quoted at Meese & Larkin, *supra* note 1, at 740 n.85.

regulatory statutes and rules on pain of criminal liability for making a mistake.

A fundamental tenet of the criminal law is that the average member of society must be able to understand it.[8] Advance warning of where the line between lawful and illegal conduct lies, or "notice," is indispensable if the criminal law is to avoid ensnaring blameless parties. The size and complexity of today's laws, along with the absence of a usable yardstick to guide non-lawyers, mean that morally blameless parties inevitably, but unwittingly, will commit some acts that turn out to be crimes and as a result could wind up in prison. This problem can ruin the lives of average persons.

- Abner Schoenwetter, for example, spent six years in a federal prison for importing Honduran lobsters that were packed in plastic rather than paper and supposedly violating a Honduran regulation (later declared invalid by the Honduran Attorney General) that made his lobsters marginally too small.[9]

- Lawrence Lewis wound up charged with a felony and pleaded guilty to a misdemeanor for following the procedure he had been instructed to use to clean up toilet overflows at a military retirement home, which wound up shunting the refuse into the Potomac River.[10]

- Finally, the federal government pursued a criminal investigation of the Gibson Guitar Company for importing wood for guitar frets allegedly exported illegally from India and Madagascar in violation of those nations' laws—which in the case of Madagascar were not even written in English.[11]

  In other words, the federal government claimed that Gibson was guilty of a *federal* crime because it did not know the law of a *foreign nation*.

In none of those cases did the federal government accuse a party of conduct that was inherently evil, or *malum in se*, such as murder, rape, or robbery. Instead, the government charged Schoenwetter, Lewis, and Gibson with violating regulatory schemes that made certain conduct a crime simply because legislators decided it to be so. Such crimes are called *malum prohibitum* offenses.[12]

It may be reasonable for the government to employ civil or administrative remedies rather than relying on private tort actions to prevent dangers to the public health or safety. As these cases show, however, using criminal laws to serve those ends can readily lead to a miscarriage of justice. It is unrealistic to expect a law-abiding person to comply with all federal, state, and local criminal laws and nearly impossible to expect people to know the law of a foreign land.

The effect of using the criminal law to enforce a regulatory regime is to require that a person have legal training to avoid criminal liability.

The effect of using the criminal law to enforce a regulatory regime is to require that a person have legal training to avoid criminal liability. Only a lawyer would know where to look to find the relevant statutes and regulations; only a lawyer (and perhaps

8. That tenet is the basis for the void-for-vagueness doctrine, under which a criminal law that cannot readily be understood cannot be enforced against someone. *See, e.g.*, Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No 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.") (footnote omitted); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) ("[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 application, violates the first essential of due process of law.") (citations omitted).

9. *See* United States v. McNab, 331 F.3d 1228 (11th Cir. 2003), discussed at Meese & Larkin, *supra* note 1, at 149–54.

10. *See* Gary Fields & John R. Emshwiller, "*A Sewage Blunder Earns Engineer a Criminal Record*," Wall St. J., Dec. 12, 2011.

11. *See* Letter Containing a Deferred Prosecution Agreement from Jerry E. Martin, U.S. Attorney, M.D. Tenn., *et al.*, to Donald A. Carr (July 27, 2012) (on file with author); Rand Paul, Government Bullies: How Everyday Americans Are Being Harassed, Abused, and Imprisoned by the Feds 100–01 (2012); Harvey Silverglate, *Gibson Guitar Is Off the Feds' Hook. Who's Next?*, Wall St. J., Aug. 19, 2012.

12. *See* Wayne R. LaFave, Criminal Law § 1.6(b) (5th ed. 2010) (discussing the difference between crimes that are *malum in se* and *malum prohibitum*).

few of them) would be able confidently to know that he or she understood all of those laws; and only a lawyer could predict with any degree of accuracy how those statutes and regulations would be applied by bureaucrats, prosecutors, and judges to varying factual scenarios. Yet many of the criminal elements of regulatory laws are premised on the unspoken assumption that persons who are subject to regulation are capable of doing these things.

That assumption is unwise as a matter of policy. At the end of the day, it is not just a legal fiction that everyone knows the law today; it is a hallucination.

The Inadequacy of Piecemeal Solutions

One often-aired solution to the overcriminalization problem is for prosecutors to decline to bring charges in cases like the ones described above. Prosecutors have the discretion not to charge a person who may have technically but unknowingly committed a crime, and in many of those instances, resorting to a civil or administrative fine in lieu of a criminal prosecution can fully satisfy the federal government's need to enforce the law and to compensate those who may have been harmed by the conduct.

The criminal law is the most severe device that any government can use against its citizens. In cases where the conduct and party at issue are not morally blameworthy, the criminal process is too ruinous a weapon for the government to deploy. No one should be forced to rely on prosecutorial discretion to avoid a criminal charge in such a case.

Under our system of government, the public is entitled to be protected by the law rather than forced to rely on the good faith, common sense, and discretion of government officials. A cardinal principle of our legal system is that the law itself should serve to protect individuals from the excesses and mistakes of the government.[13]

The Supreme Court clearly articulated that principle in 1803 in *Marbury v. Madison*, stating that ours "is a government of laws, and not of men."[14] We once had a system of law in which people were subject to the discretion of a king, but we clearly rejected that approach more than two centuries ago, adopting a Constitution that stands between the government and the public and that limits the actions that prosecutors may take to those that are enacted through the legislative process set forth in the Constitution.

The Need for a Mistake of Law Defense

To address overcriminalization requires ensuring that the law itself does not trip up unsuspecting parties. The key step is to return the criminal law to its common law focus on blameworthy conduct. To achieve that result, Congress could allow a defendant to raise a mistake of law defense to establish his or her innocence.

In cases where the conduct and party at issue are not morally blameworthy, the criminal process is too ruinous a weapon for the government to deploy. No one should be forced to rely on prosecutorial discretion to avoid a criminal charge in such a case.

Traditionally, Congress has left to the federal courts the responsibility to define defenses such as self-defense, duress, or necessity, or reliance on the opinion of a government official.[15] On occasion, however, Congress itself has taken up the task of defining the elements of a defense. Insanity is one example.[16] Whether defined by Congress or by the federal

13. *See* Henry M. Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 424 (1958).
14. 5 U.S. (1 Cranch) 137, 163.
15. *See, e.g.*, Jacobson v. United States, 503 U.S. 540, 548–49 (1992) (entrapment); United States v. Bailey, 444 U.S. 394, 409–15 (1980) (duress or necessity); United States v. Penn. Indus. Chem. Corp., 411 U.S. 655, 673–75 (1973) (reliance on opinions of government officials interpreting a federal law within their jurisdiction); Brown v. United States, 256 U.S. 335, 343–44 (1921) (self-defense).
16. *E.g.*, Insanity Defense Reform Act of 1984, 18 U.S.C. § 20 (2012).

courts, a mistake of law defense would be a sensible way to deal with the overcriminalization problem that we see today.[17]

Mistake of Law vs. Mistake of Fact. Mistakes can be of fact, of law, or both. A mistake of fact already is a defense to some crimes because it can disprove a necessary mental state to a crime such as theft, which requires proof of the intent to deprive someone else of his or her property. Mistakenly taking your colleague's umbrella thinking that it was your own—which is a mistake of fact—would not make you a thief.

A mistake of law defense could be used in different but analogous circumstances. For example, a person who reasonably and honestly believed that the wood he imported to make guitars was taken in full compliance with the law of the host nation could use a mistake of law defense to fend off a criminal charge such as the one used against Gibson Guitar.[18]

The common denominator in both cases is that no reasonable person would have known that his actions were a crime. Yet the criminal law currently permits a defendant to raise a mistake of fact defense but denies him the same opportunity if his mistake is legal. In both cases, however, the defendant is morally blameless.

The Current Need. That disparity made sense when the number of statutes in the penal code could be counted on the fingers of two hands and involved conduct that was commonly recognized as wrong. The economy then was agrarian, not industrial. There were no regulatory agencies and no regulations. There were very few crimes, and the courts created the ones that did exist. Congress had not yet preempted this field. But that day is long past and will never return. The penal code now is far larger and far more complex, the setting that gave birth to the common law "ignorance of the law is no excuse" rule has disappeared, and the rationale that "everyone knows the law" has vanished.

Those changes militate in favor of re-examining the merits of a mistake of law defense. In the classic words of Oliver Wendell Holmes, "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."[19] If that is so, as it surely is here, it is incumbent on Congress to reconsider the common law's refusal to recognize a mistake of law defense.

If no one could reasonably be said to know all of the rules that create criminal liability, it is unreasonable to retain the common law proposition that everyone does know them. Indeed, it is intellectually dishonest for the criminal law to act as if that proposition still is or even could be true today.

There is a powerful case to be made for that defense today. If no one could reasonably be said to know all of the rules that create criminal liability, it is unreasonable to retain the common law proposition that everyone does know them.[20] Indeed, it is intellectually dishonest for the criminal law to act as if that proposition still is or even could be true today. If a lawyer could not hope to know all of the criminal laws, what hope does an ordinary member of the public have? As the late William Stuntz observed, "Ordinary people do not have the time or training to learn the contents of criminal codes; indeed, even criminal law professors rarely know much about what conduct is and isn't criminal in their jurisdictions."[21]

17. Reasonable people can disagree over the question whether the legislatures or the courts should adopt a mistake of law defense. State courts are free to pursue either path based on their own constitutions. In the federal system, courts may not create common law crimes, *see* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812), but they have shaped defenses for more than a century. *See* Beard v. United States, 158 U.S. 550, 555–56 (1895); *supra* note 15.
18. The mistake of law defense would apply only if (1) no reasonable person would have known that the conduct at issue was a crime and (2) the defendant himself also did not know that the conduct was outlawed.
19. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).
20. *See* Joshua Dressler, Understanding Criminal Law § 1301, at 168 (5th ed. 2009).
21. William J. Stuntz, *Self-Defeating Crimes*, 86 Va. L. Rev. 1871, 1871 (2000).

Adults and children alike know the inherent unfairness of being punished for conduct that no one could reasonably have believed was criminal. Past and present prominent legal scholars such as Sir James Fitzjames Stephen, John Austin, Edward Keedy, Jerome Hall, and Wayne LaFave have criticized that proposition as being "an obvious fiction," "notoriously and ridiculously false," "absurd," or "so far-fetched in modern conditions as to be quixotic."[22] Those criticisms have grown stronger over time.[23] Even the Supreme Court of the United States now characterizes the common law rule as a just a "cliché."[24]

The Law Should Guarantee Fair Notice. Several contemporary legal doctrines support the proposition that a party should not be held liable for conduct that no reasonable person would have thought was a crime. The common law rule of lenity requires that any ambiguity in a criminal statute be resolved in the defendant's favor on the ground that no one should bear the risk of criminal punishment for misreading an ambiguous law.[25] Likewise, the "void-for-vagueness" doctrine bars the government from prosecuting anyone under a vaguely written criminal law.[26] Like those doctrines, a mistake of law defense recognizes the inherent unfairness of punishing someone for conduct that he or she was unaware had been outlawed.

The rule of lenity and the void-for-vagueness doctrines address the problem of inadequate notice at the retail level, because those doctrines focus on a statute-by-statute basis. A mistake of law defense addresses the problem at the wholesale level. It addresses the problem that there are so many criminal laws that no reasonable person could be expected to know them all. Stanford Law Professor Herbert Packer's discussion of this point merits reading in full:

> 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 blameless in that he has acted without advertence or 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.[27]

Like the void-for-vagueness doctrine, the mistake of law defense addresses the problem of inadequate notice—the inability for the average person to know the contours of the law without a lawyer's guidance.

Conclusion

As Ronald Cass, Dean Emeritus of Boston University School of Law, has observed:

> The crux of the case against *ignorantia legis* thus is embodied in this question: If it is inconsistent

22. *See, e.g.*, Jerome Hall, General Principles of Criminal Law 378 (2d ed. 1960); LaFave, *supra* note 12, § 5.6, at 308; Meese & Larkin, *supra* note 1, at 114–15.
23. *See, e.g.*, Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 Wm. & Mary L. Rev. 671 (1976); Meese & Larkin, *supra* note 1, at 113–55.
24. Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009).
25. *See, e.g.*, United States v. Santos, 553 U.S. 507, 514 (2008).
26. *See* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).
27. Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 123–24 (footnotes omitted).

> 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?[28]

The common law rule that ignorance or mistake of law was not a defense made sense in a time when the criminal laws were few in number and reflected what contemporary morals made clear to all. That state of affairs no longer exists, however, so it is our duty to change the law to reflect the modern state of affairs.

Properly defined and applied, a mistake of law defense would be a valuable addition to the criminal law today. It would exculpate morally blameless parties for conduct that no reasonable person would have thought was a crime. The defense would ensure that no one could be convicted of a crime when criminal liability was unforeseeable. Both the criminal justice system and society would be better off with such a rule in place.

*—**Paul J. Larkin Jr.** is a Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. This paper is an abridged version of the detailed treatment of the subject in Edwin Meese III and Paul J. Larkin Jr.* Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725 (2012), and Paul J. Larkin Jr.* A Mistake of Law Defense as a Remedy for Overcriminalization*, 26 A.B.A. J. Crim. Just. ___ (2013) (forthcoming).*

28. Cass, *supra* note 23, at 689.