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Fighting Back Against Overcriminalization: The Elements of a Mistake of Law Defense

Paul J. Larkin, Jr.

Abstract

Overcriminalization continues to ensnare average citizens in the criminal justice system for committing acts that are not morally blameworthy. Furthermore, these citizens are being prosecuted for crimes that most people would not even recognize as criminal offenses. Punishing someone who is morally blameless is unjust and engenders disrespect for the U.S. legal system. In order to help ameliorate the serious problems created by overcriminalization, a "mistake of law" defense should be added to the criminal law. Such a defense should exculpate morally blameless parties without creating a loophole for miscreants. Both goals can be attained by using a reasonableness standard and by allocating the burden of production and proof to the defendant.

A myriad of problems are caused today by overcriminalization—the misuse and overuse of criminal law, which ensnares average citizens for committing acts that are not morally blameworthy and that most people would not know are crimes. Punishing someone who is morally blameless is unjust and engenders disrespect for our legal system.

As described in a previous Heritage paper,[1] a mistake of law defense is needed to deal with the drastic transformation of America's criminal justice system. This *Legal Memorandum* describes what the elements of that defense should be and why.

The Essential Elements of a Mistake of Law Defense

The mistake of law defense has a simple purpose: to allow a morally blameless individual to avoid conviction. The contours of the

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

Key Points

- Overcriminalization is the misuse and overuse of criminal law whereby average citizens are ensnared in the criminal justice system for committing acts that are not morally blameworthy and that most people would not know constituted a criminal offense.
- Punishing someone who is morally blameless is unjust and engenders disrespect for the U.S. legal system.
- In order to help ameliorate the serious problems created by overcriminalization, a "mistake of law" defense should be added to the criminal law.
- Under this doctrine, a defendant is entitled to a complete defense if a reasonable person in the defendant's position would not have believed—and if the defendant himself did not believe—that the charged conduct was illegal. The defendant should have the burden of producing evidence to support this defense and possibly also the burden of persuasion by a preponderance of the evidence.

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A Complete Defense. The defense would exonerate a defendant and therefore is similar to an alibi defense or a successful claim of self-defense or defense of another. By contrast, provocation can merely reduce murder to manslaughter, which makes it only a partial defense. A successful mistake of law defense, however, frees a defendant.

Knowledge of the Law. The government ordinarily does not need to prove that a person knew that he was breaking the law. Indeed, the criminal law decided centuries ago that ignorance or a mistake of law was not a defense.[2] But that proposition became law when there were few crimes and every one of them also violated the moral code. Times have changed, and today, a person can unwittingly run afoul of the criminal law without engaging in blameworthy conduct. Indeed, attorney Harvey Silverglate has estimated that there is a risk of that happening to at least some people every day.[3]

The use of the criminal law to enforce a complex regulatory regime creates numerous opportunities for that scenario. The reason is that, by definition, a regulatory program allows the conduct in question to occur; agency rules merely define when, where, and how. Even the lawyers who practice in a regulated industry will not know all of the statutes, rules, and regulations—which makes hopeless the plight of the average person who lacks legal training or ready and inexpensive access to an attorney.

The proposition that a defendant should not be held liable if he or she did not reasonably believe that he or she committed a crime is settled law in the area of tax prosecutions. In order to convict a defendant of willfully violating the tax laws, the government must prove that the defendant violated a known legal duty.[4] Therefore, a defendant who has a reasonable, good faith belief that he properly reported and paid his or her taxes is entitled to be acquitted of tax fraud.

That requirement has not nullified the federal government's ability to bring tax prosecutions. A mistake of law defense would simply apply that principle in a broader range of cases.

A Reasonable Belief. Not every mistake of law is exculpatory. A defendant who unreasonably believed that his or her conduct was lawful would not be acquitted. For example, a person who erroneously believed that thievery is not a crime would not be entitled to an acquittal.[5] Some conduct is universally deemed immoral and illegal, and no one reasonably could claim ignorance of those rules. Murder, manslaughter, rape, mayhem, robbery, burglary, arson, and larceny were crimes at common law, and they remain crimes under federal and state law.[6]

Moreover, a mistake defense does not require that the precise circumstances previously have been identified as illegal; conduct closely analogous to the above crimes also would be deemed unlawful. The reason for such measured ambiguity is simple:

1. *See* Paul J. Larkin, Jr., *The Need for a Mistake of Law Defense as a Response to Overcriminalization*, Heritage Foundation Legal Memorandum No. 91 (Apr. 11, 2013).
2. Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense, 102* J. Crim. L. & Criminology 725, 726–27 (2012).
3. *See* Harvey A. Silverglate, Three Felonies a Day: How the Feds Target the Innocent (2009).
4. *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).
5. In fact, the trial judge would not be required to instruct the jury on a mistake of law defense in such a case. *See* United States v. Bailey, 444 U.S. 394, 409–15 (1980).
6. *See, e.g.*, George P. Fletcher, Rethinking Criminal Law § 1.1.1, at 4 (1978) ("[L]arceny is one of the primordial crimes of Western culture.") (footnote omitted); Lawrence M. Friedman, Crime and Punishment in American History 108 (1993) ("[T]he most primitive and basic rules in the criminal justice system were those that protected property rights."); Stuart P. Green, 13 Ways to Steal a Bicycle 1, 10, 280 n.3 (2012); 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.").

While the public might not be conversant with the details of every criminal offense, everyone certainly knows the general picture.[7]

A person should not need legal training to avoid breaking the law. In fact, any such requirement would defeat its purpose. The Constitution requires that a person have notice of what the criminal law prohibits. Under the void-for-vagueness doctrine, a criminal law is unconstitutional if it "fails to give *a person of ordinary intelligence* fair notice that his or her contemplated conduct is forbidden by the statute."[8] The question in that regard, it is important to note, is whether the statute is capable of interpretation by "a person" of common intelligence,[9] not by *"a lawyer"* of common intelligence. The same standard should apply for a mistake of law defense.

This inquiry should not be difficult for the courts to undertake. The question whether a defendant reasonably believed that his or her conduct was not unlawful should be analyzed from the defendant's perspective—that is, based on the facts known to him or her at the time. It makes little difference whether the criminal law treats those differences as issues of fact, law, or both. The important question is whether the defendant acted reasonably, not what type of mistake he made.

Moreover, the reasonableness component of this inquiry is not materially different from the one that the courts use when deciding whether the exclusionary rule or qualified immunity doctrine applies in a given case. For example, in the 1980s, the Supreme Court decided that the suppression of relevant evidence and the imposition of damages liability were unnecessary sanctions in cases in which a government official may have acted unconstitutionally but nonetheless acted reasonably.[10] Those inquiries are objective in nature, and the federal courts have been making those judgments without obvious difficulty for more than 30 years.

Anglo–American courts have also developed the law governing defenses to crimes for centuries.[11] Defining the content and contours of a mistake defense is a traditional task for courts. Indeed, courts readily can rely on reason and experience to define a mistake of law defense just as they have relied on those factors in creating a law of privileges under the Federal Rules of Evidence.[12] Furthermore, if Congress concludes that the courts have gone astray, Congress could overturn their decisions or limit the courts' authority to engage in case-by-case common law decision-making. But the better approach in the first instance is to allow the federal courts to apply a mistake of law defense in the same manner that they always have done for other defenses.

A reasonableness requirement also answers the claim that a mistake of law defense would allow a party to escape liability on the ground that foreign law or custom justified his or her conduct, such as in the case of a so-called honor killing.[13] Any such claim would be unreasonable as a matter of law. Anglo–American law never has recognized such a defense, and there is little that could be said on its behalf. Such a defense invites disregard of the law, even chaos, which is why the courts have uniformly rejected a right to an instruction on jury nullification.[14] That rationale applies here, too. Intertribal retaliation may be accepted elsewhere in the world, but we do not allow feuding between San Francisco and Baltimore fans because the Ravens beat the 49ers in the Super Bowl.

Finally, keep in mind that the defendant also must have believed that his or her conduct was lawful. The purpose of the defense is to exculpate morally blameless parties, not to create a loophole for people who know more law than the average bear. If

7. *See, e.g.*, Friedman, *supra* note 6, at 108–09 ("The laws against theft, larceny, embezzlement, and fraud are familiar friends. People may not know every technical detail, but they get the general point.").
8. United States v. Harriss, 347 U.S. 612, 617 (1954) (emphasis added).
9. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).
10. *See* United States v. Leon, 468 U.S. 897 (1984); Harlow v. Fitzgerald, 457 U.S. 800 (1982).
11. *See, e.g.*, Fletcher, *supra* note 6, §§ 10.1 to 10.5, at 759–875; Wayne R. LaFave, Criminal Law §§ 7.1–7.5, 9.1–9.8, 10.1–10.7 (5th ed. 2010).
12. *See* Fed. R. Evid. 501; *e.g.*, Trammel v. United States, 445 U.S. 40 (1980).
13. *See* Note, *The Cultural Defense in the Criminal Law*, 99 Harv. L. Rev. 1293 (1986) (proposing such a defense).
14. *See, e.g.*, United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969) ("To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic.").

the jury finds that a defendant knew that his or her conduct was illegal—perhaps the government previously had cited him or her civilly or administratively for the same conduct—the jury would be duty-bound to reject the defense. For example, if a person in fact knows that a particular drum contains hazardous waste and cannot be stored, transported, or disposed of in the same manner as ordinary garbage but engages in one of those actions despite this knowledge, the jury should find that he knew that what he did was illegal.

"Willfulness vs. "Mistake of Law." A defendant is not required to prove that his or her conduct was legal; the government has the burden to prove that he or she committed a crime.[15] If a statute requires the government to prove that the defendant "willfully" broke the law, the government, as part of that burden, will have to prove that the defendant intentionally flouted a known legal duty. In any such case, there would be no need for the defendant to assert a mistake of law defense because the issue of whether the defendant knew that his conduct violated the law would be litigated in the context of challenging whether the government has met its burden of proof.

The Burden of Production and Proof. In cases in which the government does not have to prove that the defendant acted willfully, however, Congress could decide to recognize a mistake of law defense and place the burden of production and proof on the defendant.[16] In that event, a mistake of law defense would become an issue in a case only if the defendant raises the defense—which a defendant could be required to assert before trial[17]—and also only if he or she presents evidence that is sufficient to allow the trial judge to conclude that a reasonable jury could find in the defendant's favor on that proof.[18] The government would not be required to disprove a mistake-of-law defense in its case-in-chief, although the government could do so rather than wait for its rebuttal case. If Congress fears that a mistake defense would allow a scallywag to escape justice, it could place the burden of proof on the defendant.[19] If the defendant did not carry his or her burden, the trial judge would not instruct the jury on the defense.[20]

Conclusion

A mistake of law defense should exculpate morally blameless parties without creating a loophole for miscreants. Both goals are attainable by using a reasonableness standard and by allocating the burden of production and proof to the defendant. So applied, a mistake of law defense would be a reasonable addition to the criminal law and would help to ameliorate the serious problems created by overcriminalization.

*—**Paul J. Larkin, Jr.**, is a Senior Legal Fellow and Manager of the Overcriminalization Project in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. The discussion in this paper builds on the detailed treatment of the mistake of law defense in Paul J. Larkin, Jr.,* A Mistake of Law Defense as a Remedy for Overcriminalization*, 26 A.B.A.J. Criminal Justice 10 (Spring 2013); Paul J. Larkin, Jr.,* Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715, 777–81 (2013); and Edwin Meese III & Paul J. Larkin, Jr.,* Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725 (2012).*

15. *See In re* Winship, 397 U.S. 358 (1970).
16. *See, e.g.*, Simopoulos v. Virginia, 462 U.S. 506, 510 (1983) (collecting cases ruling that defendant can be made to bear the burden of production); *see infra* notes 18-20.
17. The Federal Rules of Criminal Procedure require a defendant to assert before trial the defenses of alibi, insanity, or reliance on an official interpretation of the law. *See* Fed. R. Crim. P. 12.1, 12.2 & 12.3.
18. *See* United States v. Bailey, 444 U.S. 394, 409–15 (1980).
19. *Compare* Martin v. Ohio, 480 U.S. 228 (1987) (the defendant can be required to prove that he acted in self-defense), and Patterson v. New York, 432 U.S. 197 (1977) (the defendant can be required to prove that he acted due to extreme emotional disturbance), *with* Mullaney v. Wilbur, 421 U.S. 684 (1975) (in a prosecution for common law murder, the defendant cannot be required, in order to reduce the offense to manslaughter, to prove that he or she acted due to reasonable provocation sufficient to place him or her in a state of "passion").
20. *See Bailey*, 444 U.S. at 409–15; Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 Harv. L. Rev. 75, 86 (1908).