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Regulatory Crimes and the Mistake of Law Defense

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Abstract

No one should be convicted of a crime if no reasonable person would have known, and if the defendant did not know, that the conduct charged against him was criminal. Former U.S. Attorneys General Edwin Meese III and Michael Mukasey have endorsed the adoption of a mistake of law defense, and criminal law scholars have long argued that strict liability crimes lead to conviction of persons who are, morally speaking, innocent. A recent paper by Senator Ted Cruz gives further reason to believe that Congress may debate the continued legitimacy of the rule that neither ignorance nor a mistake of law can excuse criminal liability.

In the summer of 2015, the accepted wisdom is that, for good or ill, the two major American political parties are generally incapable of agreeing on any major policy change for which new legislation is necessary or useful. One exception, however, can be seen in the area of criminal justice. Several bills with bipartisan support would reform the front or back end of the correctional process either by modifying some of the federal laws imposing mandatory minimum sentences or by augmenting the power of the Federal Bureau of Prisons to grant inmates an early release.[1] Perhaps reform of the criminal justice system is an area where the two parties can agree.

Proof that members of each party can cross the aisle to advance sensible criminal justice reform can be seen in a report issued in April 2015 by the Brennan Center for Justice at the New York University Law School. Entitled *Solutions: American Leaders Speak Out on Criminal Justice*, the report contains papers offered by 15 well-known current or former elected or appointed political officials

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Key Points

- A strict liability crime can be a violation of a statute or an administrative regulation. Using the penal law to enforce a regulatory code, however, creates considerable problems, both for regulated parties and for the public.
- A criminal code that reaches people who engage in conduct that no reasonable person would find blameworthy weakens public respect for the law and the public's willingness to support its enforcement.
- A mistake of law defense is a reasonable and efficient response to that concern because it avoids making criminals out of people who engage in blameless conduct.
- A mistake of law defense would focus on situations in which the criminal code forms such a dense thicket that no "person of ordinary intelligence" could readily understand what the law forbids without the assistance of counsel. In that setting, the courts could apply the "mistake of law" doctrine to protect against criminal prosecution of nonblameworthy, nondangerous conduct.

from both parties, along with submissions by noted commentators on the criminal justice system.[2] Most of the recommendations and almost all of the papers focus on procedural or structural reform of the criminal justice system, such as making greater use of community policing,[3] increasing the discretion afforded federal judges at sentencing,[4] or reducing barriers to community reintegration of newly released offenders.[5]

One recommendation, however, focuses on the substantive law defining a category of offenses that has come to be a staple of American law since early in the 20th century: regulatory crimes.[6] Expressing concern that "the proliferation of federal crimes" has led to the phenomenon known as "overcriminalization,"[7] Senator Ted Cruz (R–TX) takes the position that Congress should endorse a mistake of law defense:

> Congress should enact legislation that requires the government to prove the defendant knowingly violated the law—or that, at least, allows a mistake of law defense—for certain classes of crimes that have no analog in the common law or that no reasonable person would understand to be inherently wrong. Where the government has criminalized non-blameworthy conduct for regulatory purposes, ignorance of the law should be a valid defense to criminal liability.[8]

No one should be convicted of a crime if no reasonable person would have known, and if the defendant did not know, that the conduct charged against him was criminal.[9] Edwin Meese III, former Attorney General of the United States, urged Congress to adopt a mistake of law defense in 2012.[10] Three years later, former Attorney General Michael Mukasey also endorsed a mistake of law defense.[11]

Many criminal law scholars have long treated strict liability crimes with derision on the ground that they lead "to conviction of persons who are, morally speaking, innocent."[12] Because a strict liability offense can be defined as "the refusal to pay attention to a claim of mistake,"[13] enactment of a mistake of law defense would be consistent with the views the scholars have expressed.

To further the debate, this *Legal Memorandum* summarizes why a mistake of law defense is a sensible development in the criminal law.

The Birth and Growth of Regulatory Crimes

The Industrial Revolution and creation of heavy industry in the United States gave us not only steel plants, railroads, and steamships, but also unsafe working conditions, defectively manufactured products, misbranded pharmaceuticals, and toxic wastes. Troubled by those unfortunate byproducts of America's nascent industrial age, legislatures gradually decided to shift a greater amount of the burden of preventing injuries from laborers to businesses and consumers because the latter groups were deemed to be the parties best able to avoid them.[14]

Legislators also revised the common-law rules of tort liability to provide a damages remedy for parties and to deter dangerous conduct. Legislatures adopted mandatory safety requirements;[15] they abolished common-law defenses like the fellow-servant rule;[16] and in some instances, they even eliminated the common-law requirement that an employee prove negligence on his employer's part to recover for an injury.[17]

But legislatures did not revise only the civil law: "Progressive Era efforts to expand corporate civil liability gradually began to bleed over into the criminal law."[18] Beginning in the second half of the 19th century, the British Parliament and the U.S. Congress, along with state legislatures and municipalities, began to adopt a series of laws that in England were called "regulatory offenses" and in America were known as "public welfare offenses."[19] These new crimes consisted in the violation of a health or safety ordinance designed to protect the public against the newly arisen hazards of industrialization and urbanization. The offenses made it a crime to violate those ordinances regardless of whether the forbidden conduct was inherently blameworthy or the responsible party intended to break the law.[20]

In both respects, these new crimes diverged markedly from the common law, which historically had limited criminal liability to the intentional commission of blameworthy conduct.[21] Nonetheless:

> [Legislatures] came to believe that they had the power to eliminate whatever common law rules stood in the way of public safety. They also began to see the criminal law as just another tool that they could use to prod businesses into promoting public safety objectives and to penalize them when they failed.[22]

The new laws elicited challenges from defendants who argued that the legislatures could not dispense with common-law notions of blameworthiness when defining crimes. English and American courts, however, concluded that legislatures could eliminate scienter requirements.[23] Even the Supreme Court of the United States upheld public welfare offenses against a challenge that, by foregoing any proof of wrongful intent or knowledge, those crimes violated the Due Process Clauses of the Fifth and Fourteenth Amendments.[24]

- *Shevlin-Carpenter Co. v. Minnesota*[25] held that a corporation can be convicted of a state law trespass without proof of criminal intent.

- *United States v. Balint*[26] concluded that an individual can be convicted of the sale of narcotics without a tax stamp even absent proof that he knew the substance was a narcotic.[27]

- *United States v. Dotterweich*[28] ruled 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.

- More recently, *United States v. Park*[29] upheld the conviction of a company president for unsanitary conditions at a warehouse over which he had supervisory but not hands-on control.

In each instance, the Court allowed the legislature to define criminal conduct without the requirement that a defendant must possess the "wicked" state of mind that the common law had always demanded to establish guilt.[30]

Strict liability crimes may have started out as "building code offenses, traffic violations, and sundry other similar low-level infractions,"[31] but over time legislatures took advantage of their discretion to add to that list.[32] As summarized by Gerald Lynch, "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."[33] For example, Congress passed a slew of environmental laws late in the 20th century, and some of them impose strict criminal liability.[34] "Some federal criminal environmental statutes require proof of the same 'wicked' state of mind demanded by common-law crimes, but most can lead to a conviction if a person merely knew what he was doing, even if he did not know that what he was doing was illegal or wrongful."[35]

Congress's decision to empower regulatory agencies to define crimes or to interpret provisions in regulatory provisions the violation of which is a crime also added a new wrinkle to the evolving concept of public welfare offenses: crimes defined by regulations. The Supreme Court upheld that practice over a nondelegation claim in *United States v. Grimaud*,[36] ruling that Congress can empower the Secretary of Agriculture to promulgate regulations whose violation is a federal offense.[37]As a result, a strict liability crime can consist in the violation not merely of a federal statute, a state law, or a municipal ordinance, but also of an administrative rule adopted by one or more regulatory agencies. That has considerably increased the size of the problem. As Stanford Law School Professor Lawrence Friedman colorfully put it:

> 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.[38]

The Mistake of Law Defense

Using the penal law to enforce a regulatory code creates considerable problems, both for regulated parties and for the public. "The function of the criminal law at bottom is to enforce the moral code that every person knows by heart—to enforce the minimum substantive content of the social compact by bringing the full moral authority of government to bear on violators."[39] By contrast, "the function of the regulatory

system is to efficiently manage components of the national economy using civil rules, rewards, and penalties to incentivize desirable behavior without casting aspersions on violations attributable to ignorance or explanations other than defiance."[40]

Treating regulatory crimes as if they were common-law crimes like murder, robbery, or theft "ignores the profound difference between the two classes of offenses and puts parties engaged in entirely legitimate activities without any intent to break the law at risk of criminal punishment."[41] Hundreds of thousands of statutes and regulations impose criminal liability and threaten to make felons out of people who try to comply with the law but trip over one or more technical rules that can serve as the basis for a criminal charge.[42] A criminal code that cuts such a wide swath and reaches people who engage in conduct that no reasonable person would find blameworthy weakens both public respect for the law and the public's willingness to support its enforcement:

> When we know that everyone could be found guilty of something because there is no activity that the criminal law does not reach, we may look at a defendant as being unlucky, not immoral. There, but for the grace of God, go I. Extending criminal law to the point where nearly everyone at some time has done something for which he could be sent to prison erodes the law's ability to signal that certain conduct and certain people are out of bounds. The law cannot distinguish "us" from "them." Instead, to quote Walt Kelly, "we have met the enemy, and they are us."[43]

How can American law respond to that concern? A mistake of law defense is a reasonable and efficient way to avoid making criminals out of people who engage in blameless conduct.

An ancient proverb, known to the criminal law since at least the 13th century, is that neither ignorance nor a mistake of law is a defense to a crime.[44] American courts and ancient commentators have rejected an ignorance or mistake of law defense for more than a century.[45] That rule has been justified on several grounds.

The oldest and most basic rationale is that the public knows the criminal law because it grows out of and tracks the customs, mores, and morals of the community.[46] Moreover, the harm potentially caused by inherently dangerous activities, such as the transportation of hazardous waste, is so great as to justify a legal rule demanding that anyone involved in that line of work fully know and strictly follow whatever rules the legislature or an agency has adopted to protect the public safety. Finally, a mistake of law defense would cripple law enforcement because a rogue defendant (or his crafty lawyer) could use a phony mistake of law defense to raise a reasonable doubt of guilt and snooker the jury into an acquittal.[47]

That is the way the criminal law has traditionally treated the argument that a mistake of law should excuse someone, but some old shibboleths should be re-examined to see whether they still make sense today. After all, the criminal justice system no longer resembles the community-based systems that existed at common law.[48] There is no sound reason to hold onto common-law doctrines that makes little or no sense today. As Oliver Wendell Holmes once 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."[49] The no-mistake doctrine is one of those ancient "rules of law" that has outlived its usefulness.

Numerous contemporary scholars have recommended that the common-law no-mistake doctrine should be rejected or modified.[50] The argument in favor of abandoning the rule rests on an appeal to common sense: There were only nine felonies at common law,[51] whereas today there are thousands of statutes defining crimes and an even larger number of implementing regulations. Just as a matter of federal law, there are more than 4,000 federal criminal laws, and the number of regulations affecting the reach of the criminal code has been estimated to exceed 300,000.[52] No one could know all of those statutes and regulations,[53] and even the most fully law-abiding individuals could trip over an unknown rule.[54]

The modern-day moral code does not provide a useful go-by because "[t]he tight moral consensus that once supported the criminal law has obviously disappeared."[55] Moreover, it does not advance the legitimate purposes of the criminal law—retribution,

deterrence, incapacitation, rehabilitation, and education—to stigmatize and punish (let alone imprison) morally blameless parties for conduct that no reasonable person would have thought had been outlawed.[56] In addition, as noted, the criminal justice system no longer resembles the small, community-based systems that existed at common law. Its components have become large, bureaucratic machines, particularly in urban areas, that are designed not to police community norms among neighbors and acquaintances, but to deal with commission of crimes by strangers. The combination of those changes often makes it possible for a person to trip over an unknown regulatory proscription with potentially severe consequences. Judicial adoption of a mistake of law defense therefore could be a natural common-law development.[57]

Finally, a mistake of law defense draws on the rationale of the "void-for-vagueness" doctrine, a principle of constitutional law prohibiting the state from enforcing unduly vague criminal laws.[58] That doctrine focuses on each specific law to determine whether a reasonable person would know what it outlaws. By contrast, a mistake of law defense would focus on situations in which the criminal code forms such a dense thicket that no "person of ordinary intelligence"[59] could readily understand what the law forbids without the assistance of counsel. In that setting, the courts could apply the "mistake of law" doctrine to afford protection against criminal prosecution of conduct that is neither dangerous nor blameworthy.[60] As Professor Herbert Packer once put it:

> 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 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.[61]

More persuasive than a reliance on outdated history is the defense that treating mistakes as exculpatory would enable guilty parties to wiggle out of responsibility by conspiring with an unethical defense attorney to manufacture a defense by obtaining a letter from the lawyer that the defendant's proposed course of conduct is perfectly legal. Ultimately, however, that argument is not convincing.

A mistake of law defense can succeed only if the defendant can prove that (1) no reasonable person would have believed that his conduct was unlawful and (2) he did not hold that belief. In order to establish that second element, in most cases, the defendant would need to take the stand and testify that he thought his conduct was lawful.[62] Once a defendant testifies, he is subject to cross-examination, which enables the prosecutor to examine whether the defendant is fibbing. Even if the defendant chooses not to take the stand, the government should be permitted to call the lawyer who gave him the legal opinion on which he relied so that the government can examine whether the lawyer participated in a scam.

A defendant should be free to raise a mistake of law defense without a need for proof of antecedent legal advice, but if a defendant seeks to offer a legal opinion to bolster his defense, the government should be free to counter it by questioning his counsel about its *bona fides*. That rule should deter parties from manufacturing illegitimate mistake of law defenses and should enable the government to make its case to the jury that a particular defense is fraudulent.

Those arguments and some others define the debate over a modern-day mistake of law defense.[63]

Conclusion

In a country that now allows bureaucrats to define crimes, Congress should consider whether to continue the rule that ignorance or mistake of the law should not excuse criminal liability. Numerous commentators have criticized that rule, but the courts have been unwilling to re-examine it. There now is hope that Congress will take up the issue.

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Endnotes

1. *See* S. 52, the Smarter Sentencing Act, 114th Cong. (2015); S. 467, the Corrections Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers in Our National System Act of 2015 (the CORRECTIONS Act), 114th Cong. (2015); H.R. 920, the Smarter Sentencing Act, 114th Cong. (2015).
2. Solutions: American Leaders Speak Out on Criminal Justice (Inimai Chettiar & Michael Waldman eds., 2015) (hereafter Solutions).
3. *See* Vice President Joseph R. Biden, *The Importance of Community Policing*, in Solutions, *supra* note 2, 3–6.
4. *See* Rand Paul, *Restore Fairness in Sentencing*, in Solutions, *supra* note 2, at 83–92.
5. *See* Cornell William Brooks, *Ban the Box*, in Solutions, *supra* note 2, at 18.
6. *See* Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 Harv. J.L. & Pub. Pol'y 1065, 1072–77 (2014).
7. Senator Ted Cruz, *Reduce Federal Crimes and Give Judges Flexibility*, in Solutions, *supra* note 2, at 32.
8. *Id*. at 33.
9. *See, e.g.*, Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. of Crim. L. & Criminology 725 (2012); Paul J. Larkin, Jr., *Fighting Back Against Overcriminalization: The Elements of a Mistake of Law Defense*, The Heritage Foundation, Legal Memorandum No. 92 (June 12, 2013), http://thf_media.s3.amazonaws.com/2013/pdf/lm92.pdf; Paul J. Larkin, Jr., *The Need for a Mistake of Law Defense as a Response to Overcriminalization*, The Heritage Foundation, Legal Memorandum No. 91 (Apr. 11, 2013), http://www.heritage.org/research/reports/2013/04/the-need-for-a-mistake-of-law-defense-as-a-response-to-overcriminalization; Paul J. Larkin, Jr., *Supreme Court Establishes that Police, But Not the Rest of Us, Can Get the Law Wrong—And Not Face Charges*, The Heritage Foundation, The Daily Signal (Dec. 16, 2014), http://dailysignal.com/2014/12/16/supreme-court-establishes-police-not-rest-us-can-get-law-wrong-not-face-charges/; Paul J. Larkin, Jr., *Time for a Mistake of Law Defense*, The Heritage Foundation, Commentary (Apr. 10, 2013), http://www.heritage.org/research/commentary/2013/4/time-for-a-mistake-of-law-defense?ac=1. *See also, e.g.*, Paul J. Larkin, Jr., *Taking Mistakes Seriously*, 28 B.Y.U. J. of Pub. L. 71 (2014) (hereafter Larkin, *Taking Mistakes Seriously*); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715, 777–81 (2013); 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. & Bill Otis, *Colloquy*: *Reconsidering the "Mistake of Law Defense" in the Battle Against Overcriminalization* and *A Debate: The Need for a Reasonable Mistake of Law Defense*, Manhattan Institute, Point of Law.com (Oct. 2, 2013), *available at* http://www.pointoflaw.com/feature/archives/2013/10/a-debate-the-need-for-a-reasonable-mistake-of-law-defense.php; John Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, The Heritage Foundation, Legal Memorandum No. 130 (Aug. 6, 2014), http://www.heritage.org/research/reports/2014/08/criminal-law-and-the-administrative-state-the-problem-with-criminal-regulations.
10. *See* Meese & Larkin, *supra* note 9.
11. *See* Michael B. Mukasey & Paul J. Larkin, Jr., *The Perils of Overcriminalization*, The Heritage Foundation, Legal Memorandum No. 146 (Feb. 12, 2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM146.pdf.
12. A. P. Simester, *Is Strict Liability Always Wrong?*, in Appraising Strict Liability 21, 21 (A. P. Simester ed., 2005). *See also, e.g.*, Model Penal Code § 2.05, cmt. 1 (Tentative Draft No. 4, 1955); Larry Alexander & Kimberly Kessler Ferzan, Crime and Culpability: A Theory of Criminal Law 71 (2009) ("We are not morally culpable for taking risks of which we are unaware." (footnote omitted)); Alan Brudner, Punishment and Freedom: A Liberal Theory of Penal Justice 178–84 (2009); Lon L. Fuller, The Morality of Law 77 (1969) ("Strict criminal liability has never achieved respectability in our law."); H. L. A. Hart, *Negligence,* Mens Rea*, and Criminal Responsibility*, *in* H. L. A. Hart, Punishment and Responsibility 136, 152 ("[S]trict liability is odious.") (2d ed. 2008); Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. Pitt. L. Rev. 737, 742–48 (1981); Gary V. Dubin, Mens Rea *Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 Stan. L. Rev. 322 (1966); Joel Feinberg, *The Expressive Function of Punishment*, *in* Philosophical Perspectives on Punishment 25 (Gertrude Ezorsky ed., 1977); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 422–25 (1958); Sanford H. Kadish, *Excusing Crime*, 75 Calif. L. Rev. 257, 267–68 (1987); Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 Iowa L. Rev. 1067, 1067–70 (1983); Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 56 (1928); Douglas Husak, *Strict Liability, Justice, and Proportionality*, *in* Appraising Strict Liability, *supra*, at 91–92; Paul Roberts, *Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions*, in Appraising Strict Liability, *supra*, at 182, 191; Richard G. Singer, *The Resurgence of* Mens Rea*: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. Rev. 337 (1989); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1109 (1952) ("The most that can be said for such provisions [prescribing liability without regard to any mental factor] is that where the penalty is light, where knowledge normally obtains and where a major burden of litigation is envisioned, there may be some practical basis for a stark limitation of the issues; and large injustice can seldom be done. If these considerations are persuasive, it seems clear, however, that they ought not to persuade where any major sanction is involved."). *See generally* Alan C. Michaels, *Constitutional Innocence*, 112 Harv. L. Rev. 828, 831 n.15 (1999) (collecting citations to numerous books and articles criticizing strict criminal liability).
13. Herbert L. Packer, The Limits of the Criminal Sanction 123 (1968).
14. *See, e.g.*, Prosser and Keeton on the Law of Torts, § 80, at 573 (W. Page Keeton gen. ed., 5th ed. 1984) ("'[T]he cost of the product should bear the blood of the workman.'") (quoting Francis H. Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 Harv. L. Rev. 328 (1912)).

15. *See, e.g.*, St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281, 295–96 (1908) (upholding a railroad safety requirement).
16. *See, e.g.*, Second Employers' Liability Cases, 223 U.S. 1, 50–51 (1912) (upholding congressional repeal of the fellow-servant rule).
17. *See, e.g.*, N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 208 (1917) (upholding a no-fault state workers' compensation law).
18. Larkin, *supra* note 6, at 1074 (footnotes omitted).
19. *Id.*
20. *Id.*
21. *Id.*; Morissette v. United States, 342 U.S. 246, 253–56 (1952).
22. Larkin, *supra* note 6, at 1074.
23. *See, e.g.*, Sayre, *supra* note 12, at 67 ("The decisions permitting convictions of light police offenses without proof of a guilty mind came just at the time when the demands of an increasingly complex social order required additional regulation of an administrative character unrelated to questions of personal guilt; the movement also synchronized with the trend of the day away from nineteenth century individualism toward a new sense of the importance of collective interests. The result was almost inevitable. The doctrine first evolved in the adulterated food and liquor cases was widely extended, and police offenses involving small monetary penalties came to be recognized as a special class of offense for which no *mens rea* was required. Courts began to generalize. An English court in 1895 in a much-quoted passage, suggested three general groups of cases in which no guilty mind need be proved. 'One is a class of acts which…are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty.… Another class comprehends some, and perhaps all, public nuisances.… Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right.'" (footnotes omitted)).
24. The Due Process Clause is virtually the same in each amendment. *See* U.S. Const. amend. V ("No person shall…be deprived of life, liberty, or property, without due process of law[.]"); *id*. amend. XIV ("No State shall…deprive any person of life, liberty, or property, without due process of law[.]").
25. 218 U.S. 57 (1910).
26. 258 U.S. 250 (1922).
27. *See also* United States v. Behrman, 258 U.S. 280 (1922) (a companion case to *Balint*, holding that a physician can be convicted of distributing a controlled substance not "in the course of his professional practice" even without proof that he knew that his actions exceeded that limit).
28. 320 U.S. 277 (1943).
29. 421 U.S. 658 (1975).
30. For detailed and trenchant analyses of the *Shevlin-Carpenter Co.*, *Balint*, and *Dotterweich* cases, see Hart, *supra* note 12, at 429–36 & nn. 70–79; Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 111–19.
31. Larkin, supra note 6, at 1075 (footnote omitted). *See also*, *e.g.*, Graham Hughes, *Criminal Omissions*, 67 Yale L.J. 590, 595 (1958) ("[I]t 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, the Weights and Measures Acts, the Public Health Acts and the Road Traffic Acts."); Meese & Larkin, *supra* note 9, at 734; Sayre, *supra* note 12, at 56–67.
32. *See, e.g.*, Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing of Economic Regulations*, 30 U. Chi. L. Rev. 423, 424–25 (1963); Meese & Larkin, supra note 9, at 734.
33. Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 Law & Contemp. Probs. 23, 37 (1997).
34. *See, e.g.*, Meese & Larkin, *supra* note 9, at 734–36, 744–46.
35. Larkin, *supra* note 6, at 1096–97 (footnotes omitted).
36. 220 U.S. 506 (1911).
37. *Id.* at 515–23.
38. Lawrence M. Friedman, Crime and Punishment in American History 282–83 (1993).
39. *See* Paul J. Larkin, Jr., *Prohibition, Regulation, and Overcriminalization: The Proper and Improper Uses of the Criminal Law,* 42 Hofstra L. Rev. 745, 747 (2014) (footnotes omitted).
40. *Id.*
41. *Id.*
42. *See* Meese & Larkin, *supra* note 9, at 109–23; text below accompanying note 53.
43. Larkin, *Public Choice Theory and Overcriminalization*, *supra* note 9, at 750 (footnotes omitted).
44. *See, e.g.*, Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 Harv. L. Rev. 75 (1908); Meese & Larkin, *supra* note 9, at 726–27; Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. Pa. L. Rev. 35 (1939).
45. *See, e.g.*, Bryan v. United States, 524 U.S. 184, 193 (1998); 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.").

46. *See* Cheek v. United States, 498 U.S. 192, 199 (1991) (the rule that ignorance of the law is no defense is "[b]ased on the notion that the law is definite and knowable"); 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 481 (Robert Campbell ed., 5th ed. 1885) ("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."); Livingston Hall & Selig J. Seligman, *Mistake of Law and* Mens Rea, 8 U. CHI. L. REV. 641, 644 (1941) ("[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as 'custom.'"); Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 15–16 (1957).
47. Larkin, *Taking Mistakes Seriously*, *supra* note 9, at 77 (footnote omitted).
48. Today's criminal justice apparatus is a large, bureaucratic machine that, particularly in urban areas, is designed not to police community norms among neighbors and acquaintances, but to deal with commission of crimes by strangers. The procedures followed before, during, and after trial do not remotely resemble those that existed at common law. *See* Meese & Larkin, *supra* note 9, 109–23.
49. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).
50. Larkin, *Taking Mistakes Seriously*, *supra* note 9, at 77–79 & nn. 22–29 (collecting authorities).
51. The common-law felonies were treason, murder, manslaughter, rape, robbery, sodomy, burglary, larceny, and arson. *See* STUART P. GREEN, 13 WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 10, 280 n.3 (2012).
52. *See* Meese & Larkin, *supra* note 9, at 109–23.
53. *See*, *e.g.*, William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1881 (2000) ("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."). Even authors who defend the common-law rule admit as much. *See* 1 AUSTIN, *supra* note 41, at 481–82 ("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."); Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 14 (1957) (describing the *ignorantia juris neminem excusat* doctrine as "an obvious fiction"); Hall & Seligman, *supra* note 46, at 646 (finding that the ignorance rule may have been justified in the early days of the criminal law in England, but over time that presumption has become "indefensible as a statement of fact"); Keedy, *supra* note 44, at 91 (calling the presumption "absurd").
54. *See* Meese & Larkin, *supra* note 9, at 118 n.98, 123–24 n.115 (collecting cases).
55. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 9.3, at 731–32 (1978).
56. *See*, *e.g.*, Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 687 (1976); Meese & Larkin, *supra* note 9, at 738–72; Packer, *supra* note 30, at 107–10; *cf*. Larkin, *supra* note 6, at 1080–81.
57. As Oxford Professor Jeremy Horder has explained: "*Ignorantia juris neminem excusat* is a maxim perhaps appropriately regarded as exceptionless in a system of criminal law composed wholly or largely of *mala in se*. But, a legal system that persists in a belief in the absolute character of that maxim in a world of ever more far-reaching, ever more technical and specialized, and ever more inaccessible regulatory criminal laws, is a legal system that has simply failed to adapt its moral thinking to modern circumstances." JEREMY HORDER, EXCUSING CRIME 276 (2004) (footnote omitted).
58. As the Supreme Court explained in *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (footnote omitted), "[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." Accordingly, "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." *See also*, *e.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926); FCC v. Fox Television Stations Inc., 132 S. Ct. 2307, 2317 (2012); Chicago v. Morales, 527 U.S. 41 (1999); *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).
59. United States v. Harriss, 347 U.S. 612, 617 (1954).
60. For a discussion of the meaning of "nonblameworthy" conduct and the scope of the mistake of law defense, *see* Meese & Larkin, *supra* note 9.
61. Packer, *supra* note 30, at 123–24 (footnotes omitted). *See also*, *e.g.*, Cass, *supra* note 56, 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)) ("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.'").
62. *See* Larkin, *Taking Mistakes Seriously*, *supra* note 9, at 71.
63. For an exhaustive discussion of the issues raised by a mistake of law defense, see the authorities cited above in note 9.