

William & Mary Law Review

Volume 17 (1975-1976)
Issue 4

Article 3

May 1976

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Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 Wm. & Mary L. Rev. 671 (1976), <https://scholarship.law.wm.edu/wmlr/vol17/iss4/3>

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IGNORANCE OF THE LAW: A MAXIM REEXAMINED

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Over the past 20 years the Supreme Court has expanded several doctrines that limit legislators' ability to make conduct criminal.¹ The Court has adopted these limitations, however, while reaffirming the validity of decisions rendered over the preceding 40 years that eschewed certain traditional restrictions on legislative power to declare actions criminal.² These decisions have spawned commentary attacking or supporting nearly every facet of the law that controls when and how criminal liability may be assessed.³ Through the decisions, dissents and discourses, however, one Latin maxim, *ignorantia legis neminem excusat*,⁴ has escaped almost unscathed. Most commentators admit that some injustice results from the application of this maxim,⁵ and both the expansion and contraction of limitations on legislative freedom to criminalize have undermined the theoretical bases of the maxim. Nonetheless, the doc-

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1. See, e.g., *Smith v. Goguen*, 415 U.S. 566 (1974) (void-for-vagueness); *Gregory v. Chicago*, 394 U.S. 476 (1957) (freedom of speech).

2. See, e.g., *United States v. Balint*, 258 U.S. 250 (1922) (no due process objection to indictment failing to allege *mens rea*); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910) (intent not essential element of crime). But see *Morissette v. United States*, 342 U.S. 246 (1952).

3. See, e.g., Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955); Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUSTON L. REV. 1039 (1973); Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 145; Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) [hereinafter cited as *Void-for-Vagueness Doctrine*]; 53 MICH. L. REV. 264 (1954).

4. Sometimes also given as *ignorantia juris non excusat*, e.g., Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 77 (1908), the maxim declares that ignorance of the law excuses no one (*neminem excusat*) or simply does not excuse (*non excusat*). The maxim will be referred to hereinafter as *ignorantia legis*.

5. See, e.g., J. Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 36-37 (1957); L. Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 648-51 (1941); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 419 (1958); Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 600-02 (1958); Packer, *supra* note 3, at 145. The authors differ as to where the line should be drawn separating just from unjust application of the doctrine, but they agree that the greatest problems arise when the maxim is applied to crimes of omission, see Hughes, *supra*, to crimes that are *mala prohibita*, see Hart, *supra* at 420-21, or to crimes not contrary to moral conscience, see J. Hall, *supra* at 35-36.

trine continues to be applied, and judges and authors find justification for the ability of the doctrine to enjoy a vigorous old age.⁶

This Article, after examining the distinctions between *ignorantia legis* and related doctrines, will review decisions that consider whether ignorance should be permitted to excuse. The present health of the maxim, it will be shown, is artificially induced: only a small kernel of logic lies inside this large and illogical doctrine, and if deprived of the unquestioning adherence to which it owes its present form, *ignorantia legis* might pass away without harm to law enforcement and with considerable benefit to the harmony of the criminal law.

VAGUENESS, INTENT, AND IGNORANCE: A DOCTRINAL JUNGLE

The Supreme Court has relied on several distinct doctrines to limit the extent to which legislatures constitutionally may make activities criminal. Unfortunately, the Court often has blurred the distinctions between these limitations,⁷ and occasionally has suggested that legislative compliance with the requirements of some doctrines may obviate the need for compliance with others.⁸ This doctrinal blending has not produced new "combination" restraints on legislative action, however, for the Court has not shown fidelity to its intermingling of doctrines.⁹ Instead, the Court has rendered more difficult the tasks of separating, analyzing, and applying the different restrictions. It may be helpful, therefore, to trace briefly the relevant doctrines used by the Court, attempting to distinguish them from one another before turning to the merits of *ignorantia legis*.

Certain restrictions on the criminalizing power of the legislature are set forth expressly in the Constitution. The prohibition of *ex post facto*

6. See, e.g., *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910); *United States v. Fhrlichman*, No. 74-1882 (D.C. Cir., May 17, 1976), slip op. at 20-21; J. Hall, *supra* note 5, at 23-44; Keedy, *supra* note 4, at 91; Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35, 40-41 (1939).

7. See, e.g., *Lambert v. California*, 355 U.S. 225, 228-29 (1957) (*ignorantia legis* and notice); *Winters v. New York*, 333 U.S. 507, 509-12 (1948) (void-for-vagueness and freedom of speech). See notes 14-17, 77-78 *infra* & accompanying text.

8. Courts may accept a requirement of scienter, willfulness, or bad faith, for example, as a "substitute" for definiteness in a criminal statute that would otherwise be voided as overly vague. *Void-for-Vagueness Doctrine*, *supra* note 3, at 87 n.98. See, e.g., *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340-42 (1952); *Screws v. United States*, 325 U.S. 91, 101-03 (1945). See also notes 29-33 *infra* & accompanying text.

9. See notes 16-17, 29-38 *infra* & accompanying text.

laws¹⁰ and the declaration included in the first amendment that Congress shall make no laws abridging the freedom of speech are obvious examples. The Court has had little trouble achieving a conceptual consensus regarding such express restrictions; differences have arisen, for example, not over the permissibility of preventing free speech but rather over the definition of protected speech¹¹ and over the breadth of legitimate "peace-keeping" regulation of speech that may be said to fall short of abridgment.¹²

In recent years the Court increasingly has faced challenges to criminal laws alleged to be overbroad under the first amendment. The doctrine of overbreadth is applied to invalidate statutes that may be read to proscribe both activities that are protected by the first amendment and actions that constitutionally may be forbidden. Because the Court has recognized that overbreadth is related closely to the void-for-vagueness doctrine,¹³ which requires criminal statutes to be explicit, these doctrines are a point of contact between express constitutional limitations on legislative power and limitations grounded in due process requirements. The most significant applications of vagueness have been in cases involving alleged infringement of first amendment rights;¹⁴ some opinions have suggested that the doctrine imposes higher requirements if a statute impinges on expression protected by the first amendment than if the legislation regulates economic activity.¹⁵ Although the Court recently declared that overbreadth and vagueness are separate doctrines,¹⁶ it previously had applied identical criteria to find statutes to be void for vagueness and for overbreadth.¹⁷

10. U.S. CONST. art. I, §§ 9, 10; see *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388-91 (1798).

11. See, e.g., *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Stromberg v. California*, 283 U.S. 359 (1931) (symbolic speech).

12. See, e.g., *Gregory v. Chicago*, 394 U.S. 111 (1969) (street demonstration); *Tinker v. Des Moines Indpt. Community School Dist.*, 393 U.S. 503 (1969) (school protests); *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (picketing); *Cox v. Louisiana*, 379 U.S. 536 (1965) (obstructing public passage).

13. *Smith v. Goguen*, 415 U.S. 566, 577 n.20 (1974). Hereinafter, "void-for-vagueness" will be noted simply as "vagueness."

14. E.g., *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Winters v. New York*, 333 U.S. 507 (1948). See also *Void-for-Vagueness Doctrine*, *supra* note 3, at 75-85; 53 MICH. L. REV. 264, 273-74 (1954).

15. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 573 (1974). See also 53 MICH. L. REV. 264, 273-74 n.52 (1954).

16. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 577 n.20 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 114 (1972).

17. See *Winters v. New York*, 333 U.S. 507, 509-10 (1948); *Collings*, *supra* note 3, at 218-19.

Vagueness

The vagueness doctrine restricts the power of the legislature to use unclear terms to declare conduct criminal. The doctrine reflects the notion that "[m]en of common intelligence cannot be required to guess at the meaning of [a criminal] enactment."¹⁸ This doctrine has its origins in the common law principle that required criminal statutes to be construed strictly so that criminal liability would attach only to clearly proscribed conduct.¹⁹ The notion that statutes should give "fair warning" of what is forbidden or required has been imported into the concept of due process,²⁰ and for this reason, the prohibition of vague criminal statutes generally now is grounded in the fifth and fourteenth amendments.²¹ The vagueness doctrine, however, also has been supported under the due process clauses as a means of ensuring that juries and law enforcement officials are given standards sufficiently definite to prevent arbitrary or discriminatory application of criminal statutes.²²

The vagueness doctrine more effectively has secured definitive standards to guide law enforcement than it has ensured that persons subject to criminal laws are not punished unless they receive fair warning.²³ The

18. *Winters v. New York*, 333 U.S. 507, 515 (1948) (footnote omitted). See also *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); 53 MICH. L. REV. 264, 267 (1954).

19. See, e.g., *Todd v. United States*, 158 U.S. 278, 282 (1895); *United States v. Brewer*, 139 U.S. 278, 288 (1891); *United States v. Sharp*, 27 F. Cas. 1041, 1043 (No. 16,264) (C.C. Pa. 1815); *The Enterprise*, 8 F. Cas. 732, 734-35 (No. 4,499) (C.C.N.Y. 1810). Strict construction of criminal laws at common law has been traced back to the Roman maxim *ibi jus incertum, ibi jus nullum* (where the law is uncertain there is no law). 53 MICH. L. REV. 264, 266 (1954).

20. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 458 (1927); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). See also Collings, *supra* note 3, at 196, 204-05.

21. See, e.g., *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966); *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 453 (1927). For a discussion of the due process aspects of the vagueness doctrine, see 53 MICH. L. REV. 264, 267-70 (1954). See generally 62 HARV. L. REV. 77 (1948).

22. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-71 (1972). See generally 62 HARV. L. REV. 77 (1948); 53 MICH. L. REV. 264, 265-66 (1954).

In addition to guiding law enforcement officials, prosecutors, and courts in their application of statutes, the requirement of statutory definiteness aids defendants in preparation for trial. *Giaccio v. Pennsylvania*, 382 U.S. 399, 404 (1966); 62 HARV. L. REV. 77, 78 (1948).

23. Packer, *supra* note 3, at 124; *Void-for-Vagueness Doctrine*, *supra* note 3, at 81. One commentator has suggested that vagueness decisions have been more successful in guiding enforcement than in giving warning because the real purpose of the doctrine is to serve as a practical mechanism for "mediating between, on the one hand, all of

fair warning function of the doctrine is diluted by the longstanding practice of upholding convictions for violations of vague laws if previous judicial decisions gave the laws more definite content, either by narrowing the statute so that only clearly prohibited conduct was banned or by simply deciding that certain conduct fell within a vague statute.²⁴ Justice Bushrod Washington, writing as Circuit Justice in 1815, evidenced the tension between the vagueness doctrine and this limitation on it. The Justice declared that "[l]aws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid."²⁵ Following this precept, he dismissed the indictments against four seamen for making a revolt because the statute lacked the required specificity. Although Justice Washington said that the meaning of "revolt" always had been clear to him and the evidence in the case strongly indicated that the defendants committed the offense, the law did not define "revolt" and the term by itself was not a sufficiently definite standard to support criminal liability.²⁶ Nonetheless, Washington said the defendants could be convicted for confining the master because the actions comprising this offense were outlawed explicitly in a prior decision.²⁷ More recently, Justice Rehnquist, writing for the Supreme Court, upheld a conviction by court-martial on the ground that, however vague the articles under which the defendant was charged, prior construction of the statute by

the organs of public coercion of a state and, on the other hand, the *institution* of federal protection of the individual's private interests." *Void-for-Vagueness Doctrine*, *supra* note 3, at 81. Other mechanisms, principally those of statutory construction, are available to federal courts to limit discretionary federal power over individuals, but, except for total proscription of state control in certain areas, no other means exists for federal courts to regulate state exercise of discretionary power. *Id.* at 75-85, 109-15. The confusion and conflict created by the doctrinal similarity of *ignorantia legis* and the "fair warning" theory of the vagueness doctrine also may contribute to the questionable effectiveness of the latter doctrine. Cf. Packer, *supra* note 3, at 123-24. See also notes 69-71 *infra* & accompanying text.

24. In *Parker v. Levy*, 417 U.S. 733 (1974), for example, the Supreme Court relied on narrowing or clarifying judicial construction of vague statutes to find conviction proper when other "authoritative sources" had placed the defendant's conduct within the relevant written proscription. *Id.* at 752-55. See also *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Void-for-Vagueness Doctrine*, *supra* note 3, at 73; 62 HARV. L. REV. 77, 82 (1948).

25. *United States v. Sharp*, 27 F. Cas. 1041, 1043 (No. 16,264) (C.C. Pa. 1815).

26. *Id.*

27. *Id.* It is not clear whether the rationale for Justice Washington's vagueness rulings was the need for fair warning or for controlling discretion of enforcement officials. Both rationales were argued by the defendants in *Sharp*.

"authoritative military sources" established that the defendant's conduct was prohibited.²⁸

Intersecting Intent

In *Screws v. United States*,²⁹ the Supreme Court found statutory vagueness to be cured if conviction under the law, as interpreted, required a showing of intent. The plurality opinion in *Screws*, which declared that the "constitutional requirement that a criminal statute be definite . . . gives a person acting with reference to the statute fair warning that his conduct is within its prohibition,"³⁰ upheld the statute involved against a vagueness challenge because it punished only "willful" violations.³¹ The defendants in *Screws* were charged with violating section 20 of the Criminal Code³² by willfully depriving another of his federally secured rights, privileges, or immunities.³³ The plurality of the Court construed the section to require an intent to deprive a person of his federal civil rights.³⁴ Three of the dissenting Justices, however, noted that "[i]f a statute does not satisfy the due-process requirement of giving decent advance notice of what it is which, if happening, will be visited with punishment, so that men may presumably have an opportunity to avoid the happening . . . then wilfully bringing to pass such an undefined and too uncertain event cannot make it sufficiently definite and ascertainable."³⁵ Recently, in *Smith v. Goguen*,³⁶ the Court rejected the

28. *Parker v. Levy*, 417 U.S. 733, 752-57 (1974). The Court declared that laws are invalidated on vagueness grounds only if no ascertainable standard exists by which to judge their violation; laws are not, however, void if they contain an "imprecise but comprehensible normative standard." *Id.* at 755. The Court admitted that the laws challenged by Captain Levy, articles 133 and 134 of the Uniform Code of Military Justice, were vague, but found their application to Levy's conduct clear. In the words of the Court, "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Id.* at 756. Having found the articles properly applied to the defendant's conduct, the Court said that Levy could not raise a vagueness challenge on behalf of other putative defendants. *Id.* at 755-56. See also *United States v. Powell*, 96 S. Ct. 316, 320 (1975).

29. 325 U.S. 91 (1945).

30. *Id.* at 103-04.

31. *Id.* at 101-04.

32. 42 U.S.C. § 1983 (1970).

33. The fatal beating of an individual by police was alleged to have violated the deceased's right not to be deprived of life without due process. 325 U.S. at 92-93.

34. The plurality further indicated, perhaps in response to the criticisms of dissenting justices, see *id.* at 149-53, that the intent requirement cured indefiniteness only if the scope of the federal right a defendant was accused of violating had been made clear by prior decisions. *Id.* at 103.

35. *Id.* at 154 (dissenting opinion) (footnotes omitted).

36. 415 U.S. 566 (1974).

position taken by the plurality in *Screws*, finding that a requirement of intent did not save a vague statute.³⁷ Concurring, Justice White would have found the statute, a Massachusetts flag contempt law, overbroad but not vague, relying on the specific intent element to overcome the ambiguity of the law.³⁸

Intent

The Court has not determined the meaning of intent, nor has it decided whether intent is constitutionally required for conviction of any crime. Supreme Court opinions have viewed intent variously as a decision to do an act without any necessary purpose to violate the law or to bring about a forbidden harm,³⁹ or as voluntary commission of an act with the purpose of bringing about a forbidden harm.⁴⁰ In *Screws*, the plurality opinion, written by Justice Douglas, intimates that intent additionally includes the desire to violate the law: "The requirement that the act must be willful or purposeful . . . relieve[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware."⁴¹

The inability of the Justices to agree on a definition of intent is to some extent understandable. A finding of *mens rea*, or "criminal intent," involves an inquiry into the mental state of the actor charged with the commission of a crime. Criminal intent traditionally has been an element of criminal liability: a guilty mind, as well as a guilty act, is required for conviction.⁴² Just as the nature of an action that triggers criminal sanctions varies with the crime, so does the requisite intent. With reference to specific crimes, therefore, "intent" properly has various meanings. Whatever the specific definition given intent, however, the objective of the requirement is to limit punishment to persons who commit a forbidden act as the result of some culpable mental state.⁴³

37. *Id.* at 580.

38. *Id.* at 585 (White, J., concurring).

39. *See, e.g., Ellis v. United States*, 206 U.S. 246, 257 (1907).

40. *See, e.g., Screws v. United States*, 325 U.S. 91, 101-07 (1945).

41. *Id.* at 102; *see also id.* at 104-05, 107. *But see Anderson v. United States*, 417 U.S. 211, 226 (1974); *United States v. Ehrlichman*, No. 74-1882 (D.C. Cir., May 17, 1976), at 14-20.

42. *Morisette v. United States*, 342 U.S. 246, 250-52 (1952). *See Sayre, Public Welfare Offenses*, 33 COLUM. L. REV. 55, 55-56 (1933). The importation of *mens rea* into the law has been credited to religion; the intent requirement was designed to limit penalization to those who were morally blameworthy. J. Hall, *Prolegomena to a Science of Criminal Law*, 89 U. PA. L. REV. 549, 558 (1941).

43. *Mens rea* traditionally requires a purposeful, knowing, or reckless act. The Model Penal Code, however, suggests that negligence also may be a criminal mental

Not only has the Supreme Court defined intent inconsistently, but the Court also has been unable to decide whether intent is a required element of crime. The late Professor Packer paraphrased the decisions of the Court on intent: "*Mens rea* is an important requirement, but not a constitutional requirement, except sometimes."⁴⁴ Early in the 20th century, the Court appeared to have rejected conclusively a constitutional requirement of *mens rea*. Although the established facts of *Shevlin-Carpenter Co. v. Minnesota*⁴⁵ seemingly supported a finding of intent, the Court rejected the contention that intent is "an essential element of crime."⁴⁶ Relying on *Shevlin-Carpenter*, the Court, in *United States v. Balint*,⁴⁷ refused a due process objection to an indictment that failed to allege any *mens rea*. After noting the general common law requirement of criminal intent,⁴⁸ Chief Justice Taft stated that the rule had been modified "in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement."⁴⁹ No dissenting opinions were filed in *Shevlin-Carpenter* or *Balint*, and *United States v. Dotterweich*,⁵⁰ decided in 1943, appeared to establish firmly that intent was not constitutionally required. In *Dotterweich*, the Court affirmed the conviction of a pharmaceutical company executive for shipping misbranded drugs even though the drugs apparently were labeled by the defendant's company in reliance on the manufacturer's labeling.⁵¹ The decision, however, spawned a vigorous four-justice dissent,⁵² indicating that the earlier consensus of the Court on the issue of *mens rea* had evaporated.

Although the Court continued to assert the vitality of *Shevlin-*

state. MODEL PENAL CODE § 2.02(2)(d) (1962). See generally Packer, *supra* note 3, at 138-40. Failure to require any intent results in a strict liability crime.

44. Packer, *supra* note 3, at 107.

45. 218 U.S. 57 (1910).

46. *Id.* at 70.

47. 258 U.S. 250 (1922).

48. *Id.* at 251-52.

49. *Id.* at 252.

50. 320 U.S. 277 (1943).

51. Justice Frankfurter, writing for the majority, explained that the "legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing." *Id.* at 281. Although hardship may be caused "under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting," the Court declared with approval that "[b]alancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers" *Id.* at 284-85.

52. Justice Murphy, joined in dissent by Justices Roberts, Reed, and Rutledge, attacked the lack of any statutory *mens rea* requirement, the vagueness of the statute and the imposition of vicarious liability. *Id.* at 285-93 (dissenting opinion).

Carpenter, *Balint*, and *Dotterweich*, the division in *Dotterweich* foreshadowed subsequent equivocation by the Court on the constitutionality of punishing without *mens rea*. In *Morrisette v. United States*,⁵³ the Court without dissent⁵⁴ found the *mens rea* required for larceny at common law to be implicit in a federal statute that prohibited, without mention of intent, theft of government property. The Court, stressing that a "guilty mind" historically was required for criminal punishment under Anglo-American law,⁵⁵ inferred a *mens rea* requirement. The prohibited action, the Court held in *Morrisette*, was akin to common law larceny, for which intent was required.⁵⁶ Although *Balint* had upheld the constitutionality of a criminal statute despite the absence of an intent requirement and had refused to find a requirement of *mens rea* in the statute because none had been specified, the decision in *Morrisette* approved *Balint*,⁵⁷ distinguishing it as dealing with a "public welfare offense."⁵⁸ Unlike the larceny-type statute in *Morrisette*, such regulatory laws "do not fit neatly into any . . . accepted classifications of common-law offenses."⁵⁹ Thus, the Court rationalized its inference of an intent requirement in *Morrisette* with its failure to do so in *Balint*.⁶⁰

The distinction between regulatory statutes and other criminal statutes remains the principal method used by the Court to distinguish otherwise inconsistent holdings on the constitutional necessity of intent in criminal statutes.⁶¹ In *Lambert v. California*,⁶² decided 5 years after *Morrisette*, a five-justice majority reversed a conviction under a Los Angeles felon-registration ordinance. The ordinance, the Court held,

53. 342 U.S. 246 (1952).

54. Justice Douglas concurred in the result and Justice Minton did not participate.

55. 342 U.S. at 250-52.

56. *Id.* at 260-65.

57. *Id.* at 260.

58. *Id.* at 252-56.

59. *Id.* at 255.

60. Justice Frankfurter, writing the opinion in *Morrisette*, stated:

While [public welfare] offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. . . . [C]ourts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime.

Id. at 256.

61. This reasoning has been criticized soundly. See, e.g., Packer, *supra* note 3, at 120-21.

62. 355 U.S. 225 (1957).

violated due process by failing to include any intent requirement while punishing "wholly passive" conduct.⁶³ More recently, in *United States v. Freed*,⁶⁴ the Court held that no intent need be shown to punish possession of unregistered firearms⁶⁵ and, in *Papachristou v. City of Jacksonville*,⁶⁶ struck down vagrancy laws punishing "normally innocent" conduct without any requirement of *mens rea*.⁶⁷ The Court was unwilling to require *mens rea* in *Freed* because the law at issue was "a regulatory measure in the interest of the public safety, which [could] well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act."⁶⁸

Intersecting Ignorance

The decisions of the Supreme Court that invoke the vagueness and intent doctrines thus establish that due process requires persons to be given fair warning of what conduct is prohibited. There need be no reasonable expectation, however, that a defendant actually know what is prohibited when he acts, and conduct proscribed by regulatory statutes may be punished without regard to intent, while other criminal conduct may not.

The acceptance of *ignorantia legis* appears at least partly to be responsible for the inconsistencies in the vagueness and intent decisions of the Supreme Court. In the 19th century, federal courts invariably held ignorance of the law not to excuse statutory crimes, just as such ignorance had not been a defense to common law crimes.⁶⁹ The Supreme Court has adhered to that position throughout the 20th century,⁷⁰ creating tensions with the rationale used to declare statutes invalid because of vagueness.

Certainly, allowing defendants to be punished for conduct that they did not know to be criminal conflicts with the desire to punish only those who have received fair warning that their acts were prohibited. Thus, although the Court often has recognized that potential defendants

63. *Id.* at 228-29.

64. 401 U.S. 601 (1971).

65. *Id.* at 607-10.

66. 405 U.S. 156 (1972).

67. *Id.* at 163.

68. 401 U.S. at 609 (emphasis supplied, footnote omitted).

69. See, e.g., *United States v. Buntin*, 10 F. 730, 734-35 (C.C.S.D. Ohio 1882).

70. See *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 562-65 (1971); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910).

may be ignorant of vague laws, it has, in an apparent attempt to reduce the tension between *ignorantia legis* and the vagueness doctrine, increasingly stressed the alternate rationale for the latter doctrine: prevention of arbitrary or discriminatory application of the law.⁷¹

The difficulty that the Court faces with questions of intent also is linked to its view of ignorance. In 1907, the Court declared that "[i]f a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."⁷² This formulation simply reflects what Justice Brennan recently observed: traditional *mens rea* "does not require knowledge that an act is illegal, wrong or blameworthy."⁷³ In *Screws v. United States*,⁷⁴ however, the plurality seemed to find implicit in the law that defendants were accused of violating a *mens rea* requirement, including intent to violate the law;⁷⁵ without an intent to violate the law, requiring intent would not cure vagueness as the Court in *Screws* found it did.⁷⁶ In *Lambert v. California*,⁷⁷ too, though speaking in terms of intent, the Court prohibited punishment of an individual who had no

71. See *Smith v. Goguen*, 415 U.S. 566, 574 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162-63 (1972).

72. *Ellis v. United States*, 206 U.S. 246, 257 (1907).

73. *United States v. Freed*, 401 U.S. 601, 612 (1971) (Brennan, J., concurring).

74. 325 U.S. 91 (1945).

75. See *id.* at 101-04.

76. *Id.* at 102-04. See Packer, *supra* note 3, at 122-23; cf. Collings, *supra* note 3. As long as one may be ignorant of the law and be convicted nonetheless, an intent requirement—for example, that a prohibited act be done willfully—does not enhance the quality of the statutory warning to defendant. Furthermore, requiring intent may prevent criminalization of "morally blameless" persons, but it does not affect discriminatory enforcement made possible under vague statutes. Thus, neither rationale for vagueness decisions is satisfied by convicting persons for intentional violations of vague statutes. If, however, the intent required is not the traditional *mens rea*, such as purposefully performing an action while aware of all relevant facts, but instead includes the purpose of violating a known statute, at least one rationale for vagueness is fulfilled by the intent requirement: the defendant who intended to violate the statute cannot deny that he had "fair warning" that his act was criminal.

Justice Douglas's opinion for the majority in *Lambert* eloquently illustrates the difficulties of the law under the "intent" rubric. The defendants would not be found to have violated the law only because they had beaten the arrestee intentionally; to have willfully deprived the arrestee of his federal rights, defendants had to have beaten him with the purpose of depriving him of his right to trial. 325 U.S. at 107. Nonetheless, recent attempts have been made to harmonize *Screws* with *ignorantia legis*. See *Anderson v. United States*, 417 U.S. 211, 226 (1974); *United States v. Ehrlichman*, No. 74-1882 (D.C. Cir., May 17, 1976), at 14-20.

77. 355 U.S. 225 (1957).

notice of the law involved, declaring nonetheless that as a general rule, "ignorance of the law will not excuse."⁷⁸ Requiring knowledge of the

78. *Id.* at 228, quoting *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910). Justice Douglas's opinion for the majority in *Lambert* eloquently illustrates the difficulties that the Court has had in dealing with doctrines respecting criminal liability that are distinct from, but related to, each other. Initially, Douglas framed the question for decision in terms of ignorance, asking whether due process permits criminal liability for a person who lacked both probable and "actual knowledge" of the violated statute. Immediately, however, the focus of the opinion turned to the question of *mens rea*. The felon-registration ordinance did not specify an intent requirement, and Douglas declared that, as a general rule, criminal statutes need not require intent. *Lambert* was distinguished from prior intent cases by finding circumstances in other cases that would alert the putative defendant to the consequences of his act or failure to act. Clearly, however, the consequences to which the cited cases found defendants alerted were factual, not legal: in *Balint* and *Dotterweich* the Court had noted that persons dispensing drugs should be aware, not that their actions might be criminal, but that their actions might pose a danger to others; the third decision relied upon, *Shevlin-Carpenter*, indicated that the defendants should have known that their permit to cut timber on state land had expired. 218 U.S. at 57, 63, 69. The distinction made between *Lambert* and the cases cited by the Court thus hardly supports the holding that the defendant could not constitutionally be convicted absent a showing that she was alerted to the legal consequences of her actions.

From discussion of *Balint*, *Dotterweich*, and *Shevlin-Carpenter*, Justice Douglas proceeded to note cases declaring that certain interests in property could not be adjudicated if the claimant of an interest lacked adequate notice of the proceeding. 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. Central Hanover Trust Co.*, 339 U.S. 306 (1950). It has been noted that "Miss Lambert, like any criminal defendant, had received [personal notice of the proceedings affecting her interests]." Packer, *supra* note 3, at 132 n.95.

The point Justice Douglas made by all these inapposite citations is that many areas of the law require that persons be warned, actually or constructively, that their actions or omissions may seriously affect themselves or others. In *Lambert*, the defendant lacked warning that anyone would be affected by her unregistered presence in Los Angeles; to prevent a manifestly unjust conviction, the Court must require some warning. In *Lambert*, where no direct potential injury to others could be found, the only effective warning it could require was warning that the defendant's actions violated a law. After lengthy discussion of intent and notice cases, and despite the affirmation that ignorance of the law will not excuse, *Lambert* held that ignorance of either the law or of possible wrongdoing can excuse. 355 U.S. at 229-30.

Two later opinions confirm that if in Justice Douglas's view one who is ignorant of the law should be aware that his actions may be harmful to others, his ignorance will not excuse; if the defendant has no ground for knowledge that his actions may harm others, Douglas would have allowed ignorance or even mistake of law to excuse, but would have done so through interpretation of intent to include purposefully illegal action. Writing for the majority in *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971), Douglas held ignorance of the law no defense to a charge that the defendant "knowingly violated" a regulation pertaining to interstate shipment of sulphuric acid. Three years later, Douglas dissented from a denial of certiorari to the Court of Appeals for the Second Circuit, which had affirmed the

law might well be consistent with the goal of a *mens rea* requirement, to punish only those who voluntarily have committed a crime; clearly, however, knowledge of the law is not essential to traditional *mens rea*. Whether because of or despite its confusion of these separate concepts, the Court has held that neither *mens rea* nor knowledge of the law generally is necessary for criminal conviction.

Ignorantia Legis

The inconsistencies in the judicial pronouncements regarding vagueness and intent, created by the struggle to prevent "unfair" convictions without abandoning the concept that ignorance of the law cannot excuse, do more than introduce disharmony into the theoretical structure of the criminal law. The inconsistencies also reduce the effectiveness of these doctrines in securing the fairness posited as their goal. Both the doctrines and the goal of preventing unfair imposition of criminal liability would be aided by recognizing lack of knowledge of the law as a defense. Putting aside for the moment the types of ignorance that should excuse, the starting point must be acknowledgment that this is a separate defense, not a matter to be accomplished by creating special intent requirements for extraordinary cases. Indeed, the need for a defense of ignorance separate from the law of intent is largely the result of the difficulties faced by the Court with that area of the law since the advent of regulatory crimes. 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.⁷⁹ The combinations of acts and harms to which these requirements applied were known by the community to be proscribed; under the *M'Naghten* rule, failure to appreciate the wrongfulness of one's act became the standard for insanity.⁸⁰ Given common law crimes and intent require-

conviction of a defendant for "knowingly fail[ing]" to comply with the Selective Service laws. *Sundstrom v. United States*, 95 S. Ct. 205 (1974), *denying cert.* to 489 F.2d 859 (2d Cir. 1973). In *International Minerals*, Justice Douglas declared that ignorance of the law never had been thought to excuse nor could it be incorporated into the term "knowingly" that set out the *mens rea* requirement. 402 U.S. at 561-63. In *Sundstrom*, however, Douglas argued that where a defendant clearly was mistaken as to, or ignorant of, the law, courts should not indulge "the fiction that all men know the law." 95 S. Ct. at 206 (dissenting opinion).

79. See L. Hall & Seligman, *supra* note 5, at 644; cf. Keedy, *supra* note 4, at 78-81.

80. *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843).

ments, Anglo-American courts thus found knowledge of the law to be unnecessary to guard against unfair criminal punishment. The rationales for and against *ignorantia legis*, however, merit examination in light of the changed nature of crimes and of *mens rea* requirements.

THE CASE AGAINST IGNORANTIA LEGIS

The case against *ignorantia legis* is rarely argued, though criticisms of the doctrine have been made by authors who support its retention.⁸¹ Along with such friendly criticism, discussions of related doctrines provide a basis for a critique of *ignorantia legis*. Professor Packer, for example, objects to the refusal of the Court to require *mens rea*; his reasoning also could justify excusing by reason of ignorance. He found a consensus that punishment of conduct without reference to intent is "both inefficacious and unjust" because one who acts without "awareness of the factors making [his conduct] criminal" is not to be deterred by criminalizing such conduct, nor can he be held morally culpable.⁸² Similarly, it may be argued that punishing a defendant who acted in ignorance of the law is not likely to deter such conduct or to remove a socially dangerous individual from the public domain; nor is such punishment just—the defendant's ignorance does not mark his act as one properly calling for retribution.

The first basis for criticism of *ignorantia legis*, then, is the inefficacy of punishing the ignorant. Punishing persons who are not aware of the law making their conduct criminal has no direct deterrent effect.⁸³ The act for which such a defendant is punished could not have been deterred by the potential for punishment of which he was unaware.⁸⁴ Nor will such punishment increase the ability of the law to deter him from repeating his illegal act. Having been informed of the illegality of his conduct when charged with a crime, the formerly ignorant offender will not be able to sustain a plea of ignorance as to future similar illegal acts.

81. See note 5 *supra* & accompanying text.

82. Packer, *supra* note 3, at 109. According to Packer, punishment without requiring *mens rea* is "inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or a retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*." *Id.* (footnote omitted).

83. Cf. B. WOOTON, *CRIME AND THE CRIMINAL LAW* 97-103 (1963).

84. Cf. Packer, *supra* note 3, at 109. But cf. Keedy, *supra* note 4, at 90-91.

His future conduct, thus, is shaped no differently by a law that punishes ignorant offenders than by one that excuses them. Punishing ignorant offenders nonetheless may have an indirect deterrent effect: the more persons punished, the more notorious the crime. It seems unlikely, however, that deterrence by notoriety would have much impact on commission of the relatively esoteric regulatory crimes of which ignorance most often is pleaded,⁸⁵ and whatever deterrence is achieved must be weighed against its cost in deterring the regulated activity.

Irrespective of the balance between the benefit of the maxim in crimes prevented and its cost in socially desirable activities discouraged, *ignorantia legis* appears objectionable because it is unfair. The doctrine originally appears to have been a qualified maxim, compatible with common notions of fairness.⁸⁶ Roman law did not allow 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. But ignorance of the more compendious and less common-sense *jus civile* was a defense allowed women, males less than 25 years old, soldiers, peasants, and persons of small intelligence.⁸⁷ A defendant not otherwise exempted from the maxim's application apparently also was allowed a defense of ignorance of the *jus civile* if he had not had the opportunity to consult counsel familiar with the laws.⁸⁸

The English law adopted *ignorantia legis* without the qualifications that, under Roman law, tempered its harshness.⁸⁹ Even so, for centuries the doctrine did not appear to produce unjust results. In Anglo-American civil law, damage to another individual generally is a prerequisite to the defendant's liability.⁹⁰ If damage is not a formal element of liability, as in actions for trespass to land, an intangible damage has occurred by definition if the required elements are proved,⁹¹ and the award of "technical damages," to which plaintiffs are limited unless

85. Commentators have noted that ignorance of the law is pleaded almost exclusively in cases involving "minor offenses." See, e.g., J. Hall, *supra* note 5, at 20; notes 127-28 *infra* & accompanying text.

86. See L. Hall & Seligman, *supra* note 5, at 643-46; Keedy, *supra* note 4.

87. L. Hall & Seligman, *supra* note 5, at 643-44; Keedy, *supra* note 4, at 80.

88. Keedy, *supra* note 4, at 81.

89. *Id.* at 75, 80. Hall and Seligman argue that *ignorantia legis* found its way into English law not from Roman law but as a vestige of the early Norman doctrine of absolute liability. L. Hall & Seligman, *supra* note 5, at 643.

90. O. HOLMES, *THE COMMON LAW* 79, 144 (1881); J. Hall, *Interrelations of Criminal Law and Torts*, 43 COLUM. L. REV. 967, 969 (1943).

91. See, e.g., *Foust v. Kinney*, 202 Ala. 392, 80 So. 474 (1918). See generally C. McCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 22 (1935).

actual damage may be presumed or shown, hardly can be viewed as a stiff punishment. The imposition of civil liability thus can be justified as compensating the victim for his loss; even if liability is not predicated on intent or negligence, the individual made chiefly liable may be viewed as less "innocent" than the person compensated, because the law of torts makes liable the person thought best able to avoid the harm.⁹² As applied to Anglo-American civil law, therefore, *ignorantia legis* seems consistent with most rights of community members.

Until a century ago, the application of the maxim to criminal law also seemed fair, as a practical if not as a theoretical matter.⁹³ Crimes initially were limited to a relatively few offenses that every sane person old enough to become a defendant reasonably could be presumed to know.⁹⁴ Even as the number of offenses expanded,⁹⁵ their basic nature remained the same and the protection of *mens rea* insured that noncompliance with the law was not punished unless both the actor's intent and his act were blameworthy. Given this setting, the unquestioning acceptance of *ignorantia legis* by the foremost legal minds of the 18th and 19th centuries⁹⁶ is not surprising. Nor is it surprising that as the criminal law increasingly came to be used as a sanction for various regulatory measures designed to advance social and economic policies that were connected only tangentially with community moral standards,⁹⁷ and as *mens rea* was abandoned for these crimes,⁹⁸ authors made greater efforts to examine and to justify the doctrine.⁹⁹ Because the criminal law is designed to enforce rules rather than to compensate victims,¹⁰⁰ and therefore may punish commission of an act even if no damage ensues,¹⁰¹ application of *ignorantia legis* to a wide variety of crimes now appears offensive to the standards of fairness embodied in civil law and expounded in discussions of other facets of criminal law.

92. Cf. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); O. HOLMES, *supra* note 90, at 144-46.

93. Cf. L. Hall & Seligman, *supra* note 5, at 644; Hart, *supra* note 5, at 413-15, 420.

94. See Keedy, *supra* note 4, at 78-80; cf. L. Hall & Seligman, *supra* note 5, at 644.

95. See Hart, *supra* note 5, at 430; Hughes, *supra* note 5, at 594-95.

96. See L. Hall & Seligman, *supra* note 5, at 646-48.

97. Cf. Sayre, *supra* note 42, at 68-69.

98. Hughes, *supra* note 5, at 594-95; Sayre, *supra* note 42, at 58-67. See notes 44-68 *supra* & accompanying text.

99. See, e.g., J. Hall, *supra* note 5; Keedy, *supra* note 4; Perkins, *supra* note 6.

100. J. Hall, *Interrelations of Criminal Law and Torts*, 43 COLUM. L. REV. 967, 969-70 (1943); see Sayre, *supra* note 42, at 67-70.

101. See, e.g., *United States v. Freed*, 401 U.S. 601 (1971); *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Balint*, 258 U.S. 250 (1922). See also J. Hall, *Interrelations of Criminal Law and Torts*, 43 COLUM. L. REV. 967, 969 (1943).

A relatively clear standard of fairness has been espoused, for example, with regard to *ex post facto* laws, which impose or increase criminal sanctions for acts not punishable when committed or alter the evidence necessary for conviction.¹⁰² 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."¹⁰³ 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.¹⁰⁴

In *Shevlin-Carpenter Co. v. Minnesota*,¹⁰⁵ the Supreme Court rejected this analogy, declaring that "innocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse. The law in controversy [punishing casual and involuntary trespass to state lands] has no *ex post facto* element or effect in it."¹⁰⁶ Justice McKenna's majority opinion did not attempt to evaluate the impact of the *ex post facto* provision on *ignorantia legis*, but simply disposed of the analogy by noting that *ex post facto* cases dealt with laws enacted after an individual's action. The expansion of the *ex post facto* prohibition urged by the defendant would have conflicted with *ignorantia*

102. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

103. J. BARLOW, *ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE* (1792), reprinted in 3 *THE ANNALS OF AMERICA* 504, 511 (1968).

104. *Id.* Barlow found that American judicial rules and institutions compared favorably with those of European countries, except that like the English and unlike the French, American courts followed the *ignorantia legis* maxim. He viewed adherence to the maxim as antithetical not only to the specific constitutional provision respecting *ex post facto* laws, but also to basic Anglo-American principles respecting individual freedoms and the reasons for criminal accountability. Barlow concluded that "to compel a compliance with orders which are unknown is carrying injustice beyond the bounds of necessity; it is absurd and even impossible. Laws in this case may be avenged but cannot be obeyed . . ." *Id.* at 512.

More recently, the *ex post facto* provision has been relied on to urge a constitutional requirement of *mens rea* as an essential ingredient of criminal liability. Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 *HOUSTON L. REV.* 1039, 1054-55 (1973). The *ex post facto* analogy, however, has not convinced modern commentators to reassess the validity of *ignorantia legis*. See J. Hall, *supra* note 5, at 35 n.143, 43 n.165.

105. 218 U.S. 57 (1910).

106. *Id.* at 68.

legis; the opinion treated the latter maxim as though it were a constitutional mandate that had to be harmonized with the *ex post facto* clause and refused the expansion.¹⁰⁷

Certainly, more injustice derives from punishing a man for an offense that was not criminal at the time of his act than from punishing him when he was unaware of the act's illegality for another reason. Nonetheless, courts have recognized that it is unfair to penalize one who cannot reasonably be expected to know that his act is illegal, even if his ignorance is caused by something other than the nonexistence of the law at the moment of defendant's assertedly criminal act.¹⁰⁸ Assessing a vagueness challenge, the Supreme Court noted that imposing criminal liability for violation of a statute that failed to define adequately the conduct it prohibited "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.'"¹⁰⁹ In response to a defense of ignorance argued before a federal circuit court in 1810, it was held that sanctions could not be imposed for violation of a law passed before the violation, when no copy of the law had been received at the place where the act occurred until after the alleged offense.¹¹⁰

Most decisions that define a standard of fairness for punishing persons unaware of the illegality of their actions do not involve the inaccessibility of the statute making the actions criminal. In cases in which the vagueness of a statute is alleged, criminal liability is not imposed for violation of an existing, accessible statute unless the statute gives "fair warning."¹¹¹ Although decisions have not always been consistent with this rationale, perhaps as the result of the influence of the rationale used to support *ignorantia legis*,¹¹² a number of cases clearly adhere to the principle that fair warning of the criminality of an act is required before the commission of the act is punishable.¹¹³ In *Lambert v. California*,¹¹⁴ the fair warning requirement was extended beyond statutory specificity to include a reasonable likelihood that the defendant was aware that the law

107. *Id.* at 68-69.

108. See, e.g., *Lambert v. California*, 355 U.S. 225 (1957).

109. *Screws v. United States*, 325 U.S. 91, 96 (1945).

110. *The Cotton Planter*, 6 F. Cas. 620 (No. 3,270) (C.C.N.Y. 1810); see L. Hall & Seligman, *supra* note 5, at 657-58.

111. See notes 19-20 *supra* & accompanying text.

112. See notes 69-78 *supra* & accompanying text.

113. See note 20 *supra*.

114. 355 U.S. 225 (1957).

required some particular conduct.¹¹⁵ 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?

IGNORANTIA LEGIS DEFENDED

Because the courts have seemed willing to accept *ignorantia legis* as a fixed star, the task of answering the question posed in opposition to the maxim has fallen largely to academicians. Legal scholars have defended punishing those ignorant of the law on numerous bases;¹¹⁶ from these, five major rationales appear. Professor Austin argued that to investigate a man's knowledge or ignorance of the law in each case would hopelessly enmesh the courts in assessing virtually insoluble problems.¹¹⁷ Although fear of presenting difficult factual issues to courts may be a prime factor in continued judicial adherence to *ignorantia legis*, the argument was rejected firmly by Holmes nearly a century ago and no one has expressed much support for it since.¹¹⁸ Holmes "doubted whether a man's knowledge of the law is any harder to investigate than many questions which are gone into."¹¹⁹ Considering the range of issues now put to judges or juries, particularly those relating to a defendant's state of mind when "specific intent" crimes are involved, it is difficult to quarrel with Holmes's observation.

The second major justification for *ignorantia legis*, advanced in Blackstone's *Commentaries*¹²⁰ and advocated most vigorously by Holmes,¹²¹ is that adherence to the maxim deters crime.¹²² If ignorance

115. See note 78 *supra*.

116. The historical development of early defenses of *ignorantia legis* is set forth in L. Hall & Seligman, *supra* note 5, at 646-51.

117. J. AUSTIN, LECTURES ON JURISPRUDENCE 498-500 (1869); see also L. Hall & Seligman, *supra* note 5, at 646-47.

118. O. HOLMES, *supra* note 90, at 48; but cf. L. Hall & Seligman, *supra* note 5, at 647.

119. O. HOLMES, *supra* note 90, at 48.

120. 1 W. BLACKSTONE, COMMENTARIES *45-46; see also L. Hall & Seligman, *supra* note 5, at 646.

121. O. HOLMES, *supra* note 90, at 48-49.

122. See also Perkins, *supra* note 6, at 41. Application of the maxim is said to deprive criminals of an easy defense to criminal charges, thereby raising the likely penalty sufficiently to prevent persons contemplating committing crimes, or indifferent to the criminality of their actions, from committing criminal acts. See notes 123-24 *infra* &

excused, according to Blackstone, the law could be "eluded with impunity,"¹²³ or as Holmes put it, allowing a defense of ignorance would encourage ignorance of the laws.¹²⁴ Application of *ignorantia legis*, however, cannot deter persons from repeating their offenses and can have only an indirect effect on deterring others.¹²⁵ Holmes used robbery and murder as examples of crimes that should be discouraged for the good of the entire community; the community, he reasoned, must sacrifice the individual to the public goal of avoiding murder and robbery by punishing ignorant as well as knowing and intentional transgressors so that all may know these acts to be illegal.¹²⁶

Robbery and murder offer attractive examples, but ignorance of their criminality is virtually impossible. Ignorance is most likely to be pleaded to regulatory measures;¹²⁷ examples, collected by Professor Perkins, of cases in which ignorance of the law was pleaded, and rejected, as a defense include operating a gaming device, betting on a horse race, conducting a raffle, and operating a saloon on election day after the close of the election.¹²⁸ Although defendants may harbor mistaken beliefs as to what constitutes robbery or murder,¹²⁹ it is unlikely that any defendant would plead ignorance that these were criminal, except incident to a plea of insanity. If regulatory, rather than heinous, crimes are used as prototypes, the inadequacies of the deterrence rationale may be seen clearly. Convictions for these crimes are unlikely to receive the publicity accorded trials for murder, assault, embezzlement, and other crimes that appeal to the popular sense of adventure, so that *ignorantia legis* sacrifices the individual without educating, and hence without deterring, the public. Further, if less heinous crimes are involved, surely the balance between community and individual rights must be weighed more in favor of the individual. Embodied in the Constitution is the notion that

accompanying text. Hall and Seligman, however, attribute the deterrent effect of *ignorantia legis* to facilitation of the educational function of the law: if all persons are punished, regardless of ignorance, all members of society more easily will accept the "wrongness" of the punished act. L. Hall & Seligman, *supra* note 5, at 648.

123. 1 W. BLACKSTONE, *supra* note 120, at *46; see L. Hall & Seligman, *supra* note 5, at 646.

124. O. HOLMES, *supra* note 90, at 48.

125. See notes 83-85 *supra* & accompanying text.

126. O. HOLMES, *supra* note 90, at 48.

127. Professor Jerome Hall found that ignorance was pleaded almost solely where "minor offenses" were involved. J. Hall, *supra* note 5, at 20.

128. Perkins, *supra* note 6, at 36.

129. See notes 144-148 *infra* & accompanying text.

fairness to individuals and orderliness in criminal proceedings are as much public desiderata as prevention of harm to persons and property.

The third justification for *ignorantia legis* is perhaps the best known and was the reason originally given in American criminal cases for adoption of the doctrine:¹³⁰ all men are presumed to know the law.¹³¹ This presumption has been labelled "absurd,"¹³² and seems to ignore common experience if applied generally. There undoubtedly are many crimes known to all competent, nonjuvenile members of society, but even lawyers are not aware of all federal crimes, much less of the multitude of state offenses. Beyond the illogic of such a presumption, there is no reason it should be exempted from the scrutiny the Supreme Court finds constitutionally mandated for other irrebuttable presumptions. The Court in 1969 reaffirmed the rule of *Tot v. United States*¹³³ that the validity of a presumption created by statute depends on a "rational connection between the facts proved and the ultimate fact presumed."¹³⁴ In *Leary v. United States*,¹³⁵ the Court reversed a conviction obtained by use of a presumption that possessors of marijuana knew the marijuana to have been imported.¹³⁶ The Court was unable to say "with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."¹³⁷ If the basis for

130. L. Hall & Seligman, *supra* note 5, at 646.

131. This formulation of *ignorantia legis* had been put forward in England for centuries. 1 M. HALE, *PLEAS OF THE CROWN* 42 (1680); 4 W. BLACKSTONE, *supra* note 120, at *26. See also Keedy, *supra* note 4, at 80; Perkins, *supra* note 6, at 37-39.

132. Keedy, *supra* note 4, at 91.

133. 319 U.S. 463 (1943).

134. *Id.* at 467.

135. 395 U.S. 6 (1969).

136. *Id.* at 12.

137. *Id.* at 36 (footnote omitted). After announcing this test, Justice Harlan, writing for the Court in *Leary*, seemed to weaken the test in its application. The ultimate, "presumed," fact was that a possessor of marijuana knew that the marijuana he possessed had been imported. The Court recognized that "a significant percentage of domestically consumed marijuana may not have been imported at all . . ." *Id.* at 46. But then Justice Harlan declared that the presumption of knowledge of importation may be sustained if a majority of marijuana possessors are aware of the high rate of importation. *Id.* at 46-47. Thus, a particular possessor's knowledge that his marijuana was imported could be found from the knowledge of more than half of other marijuana possessors that a large proportion of marijuana was imported. The Court went on to find, however, that the government had failed to prove this or alternative factual predicates for the presumed fact. *Id.* at 47-52. For pre- and post-*Leary* discussions of the rational connection test for statutory presumptions, see Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341 (1970); Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141 (1966).

ignorantia legis is the presumption that anyone who commits a crime knows of the law he violated, that presumption should be tested in each case by the standard of *Tot* and *Leary*.¹³⁸ Use of the presumption when it fails to satisfy that standard would violate due process.¹³⁹

Another rationale relied on to support punishment of persons ignorant of the law is that such ignorance is blameworthy in itself.¹⁴⁰ Holmes rejected this thesis, noting that if it were the rationale for *ignorantia legis* a nonsensical result would be achieved: failure to learn the law

138. If the justification of *ignorantia legis* is based on a presumption that the defendant knows of the law he violated, use of the standard set out in *Tot* and *Leary* would make criminal law theoretically more consistent: the presumption of legal knowledge would be treated in the same fashion as other presumptions, and tensions would be lessened between decisions employing the *Tot-Leary* standard and judicial pronouncements concerning *ignorantia legis* and *mens rea*.

A requirement of a rational connection between proven facts and presumed facts is difficult to square with the present state of Supreme Court law on intent and ignorance. *Leary* illustrates this problem. Since the legislature may dispense with *mens rea*, Congress could have made possession of marijuana a crime without requiring the possessor to have knowledge that the marijuana was unlawfully imported. A congressional requirement of knowledge combined with a presumption of knowledge amounts to a roundabout statement that knowledge of importation is not required. One possible defect to this indirect abolition of an intent requirement is that it is stated in language too unclear to give fair warning to possible offenders. The Supreme Court, however, never has applied the void-for-vagueness doctrine to scrutinize the validity of irrebuttable presumptions.

If a presumption is clear, the *Tot-Leary* rule also conflicts with acceptance of *ignorantia legis*. Under the maxim, a defendant is required to know the law; the defendant logically also should be charged with knowledge of what the law presumes. In a fact situation similar to that of *Leary*, then, *ignorantia legis* requires the defendant to know that possession of imported marijuana is illegal; similarly, he should be assumed to be aware of the presumption that possessors know their marijuana to have been imported. The *Tot-Leary* standard requires courts to examine the rationality of the irrebuttable presumption. Why, however, should this examination be undertaken if knowledge of importation need not be required and if defendants are assumed to know of the presumption? The only apparent answer is that the presumed fact may be essential to the competence of Congress to define and punish the crime involved—in *Leary*, importation, or transportation across state lines, might have been necessary to a commerce clause basis for congressional action. Clearly, the Court has not limited the rational connection test to presumptions affecting jurisdiction, and if the presumed fact is necessary to Congress' jurisdiction, the presumption, even if reasonable, may be insufficient.

139. Justice Black, concurring in *Leary*, attacked the constitutionality of statutory criminal presumptions on different grounds: separation of powers and right to trial by jury. His opinion declared that Congress could define crimes but could not tell courts what evidence was sufficient to prove the elements of those crimes. Statutory presumptions, he reasoned, deprived defendants of their full rights to be represented by attorneys, to summon witnesses on their behalf, and to cross-examine witnesses against them. 395 U.S. at 55-56 (concurring opinion).

140. See Hart, *supra* note 5, at 412-15.

would be punished as severely as failure to obey it.¹⁴¹ Yet, after examining other justifications for the doctrine, it is this argument for *ignorantia legis* that seems most plausible. Holmes's objection to this rationale assumes an incorrect factual predicate. Failure to know the law is not punished unless it leads to a violation of the law; this coincidence, not mere ignorance, is punished to the same extent as knowing and willful violation of the law.¹⁴² If ignorance of the law does not excuse because it is blameworthy, the judge or jury in each case should ask whether the particular ignorance claimed by a defendant is in fact blameworthy.¹⁴³ This determination should not present any inordinate difficulties; the usual question to be resolved would be whether a reasonable, prudent member of the community of average intelligence would be aware of the violated law. If defendants were engaged in some regulated occupation and charged with violation of a law regulating that occupation, a more rigorous test would be applied: the fact-finder would determine whether the reasonable, prudent practitioner of that occupation would have known the law. As presently applied, however, *ignorantia legis* makes no allowance for the possibility that ignorance of the law is not always blameworthy. In light of the nature of crimes of which ignorance is pleaded, the possibility that some ignorance may be

141. O. HOLMES, *supra* note 90, at 48. See also *id.* at 50, 55-57.

142. Punishment, of course, may be mitigated by proof of ignorance. See L. Hall & Seligman, *supra* note 5, at 650-51; Perkins, *supra* note 6, at 41.

143. Although finding justification for the doctrine of *ignorantia legis* in the culpability of failure to comprehend the law, Professor Hart found such culpability applicable only to crimes that are *mala in se*. Hart, *supra* note 5, at 419-21. Professor Hall took exception to any distinction between *mala in se* and *mala prohibita*. J. Hall, *Prolegomena to a Science of Criminal Law*, 89 U. PA. L. REV. 549, 563-69 (1941). He traced the distinction back to Aristotle's bifurcation of improper acts between those contrary to convention and those contrary to nature. *Id.* at 563. Hall argued that we cannot separate positive law from ethical considerations as the dichotomy between crimes *mala in se* and crimes *mala prohibita* requires. *Id.* at 565-66. Rather than limiting *ignorantia legis* to crimes *mala in se*, authors who find that bifurcation of criminal law untenable apply *ignorantia legis* to criminal acts the community would find unethical. See J. Hall, *supra* note 5, at 36.

Limiting *ignorantia legis* to instances of culpable failure to know that an act is illegal gives a somewhat more legalistic cast to the limitation. Although one's view concerning the morality of the underlying act may in some measure determine whether one thinks a defendant should know of the illegality of an act, morality is not always a helpful guide. Persons may be expected to know that certain acts, such as driving on the wrong side of the street, are illegal, even though they carry no connotation of immorality. Conversely, it may be quite common for people to believe that other acts, such as tax avoidance techniques, are legal, even though the acts may be considered unethical by the same people. Cf. Hart, *supra* note 5, at 421; Hughes, *supra* note 5, at 611.

culpable cannot justify the maxim's application in so many cases where ignorance is likely to be blameless.

A final support for *ignorantia legis*, offered by Jerome Hall, is more concerned with mistake of law than with ignorance of it.¹⁴⁴ Although Hall found the origin of *ignorantia legis* in the Roman notion that law is definite and knowable,¹⁴⁵ he argued that defense of the doctrine must rest on the unavoidable vagueness of the law.¹⁴⁶ Courts have been designated as law declarers. If defendants' mistaken beliefs about the lawfulness of certain conduct exempted the defendants from criminal liability, Hall said, the function of the courts as law declarers would be destroyed and the law would become what anyone thought it was.¹⁴⁷ Hall's fear seems exaggerated. 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,¹⁴⁸ then allowing a mistaken belief concerning the meaning of a law to excuse should have no greater adverse effect.

Further, if a mistaken belief of law is blameworthy, in that the average community member or professional would have learned the meaning of the law, the erroneous belief should not excuse criminal conduct even if *ignorantia legis* is narrowed to reflect its proper basis.¹⁴⁹ A requirement that mistake not be blameworthy substantially limits the number of cases in which mistake could excuse. Certainly a professional knowing of the existence of a law concerning his profession might be thought adequately forewarned to find out its meaning and, if that meaning is unclear, to regulate his actions so as to avoid possible illegality. When the defendant

144. For a discussion of the difference between ignorance and mistake, see Keedy, *supra* note 4, at 76.

145. J. Hall, *supra* note 5, at 15-16.

146. *Id.* at 18.

147. *Id.* at 19. Hall said that the alternative to use of *ignorantia legis* would be abandonment of the rule of law. *Id.* at 23, 44.

148. Cf. notes 82-84 *supra* & accompanying text.

149. See notes 140-43 *supra* & accompanying text.

claiming mistake of law knows of the existence and basic meaning of the statute but allegedly believes his conduct did not violate the law, the doctrine of *ignorantia legis* could not be used to convict him, nor would limiting that doctrine absolve him of liability. Unless his belief negated a required intent, the defendant will be held to answer for his act; if he acted voluntarily with knowledge of the law and that act is found to violate the law, the defendant's intent to violate the law could be inferred.¹⁵⁰ Hall's argument, that allowing mistake of law to excuse would destroy the legal system, thus does not support *ignorantia legis*.

CONCLUSION

Although the doctrine still receives widespread judicial and academic adherence, retention of *ignorantia legis* is unnecessary to effective enforcement of the criminal laws and, in many cases, is inconsistent with the bodies of law that prevent punishment for acts declared criminal *ex post facto* and that void statutes for vagueness. In its general application, the doctrine is both inefficacious and unjust. Additionally, accept-

150. This statement may be qualified if the law violated was not drawn with sufficient clarity for the defendant to have been able to know its terms or if the law was not reasonably available to the defendant. Of course, the former requirement, under its designation as the vagueness doctrine, already has been recognized as one of major constitutional proportions. See notes 18-28 *supra* & accompanying text. The latter requirement was recognized implicitly by the Supreme Court in *Screws v. United States*, 325 U.S. 91, 96 (1945). See also *The Cotton Planter*, 6 F. Cas. 620, 621-23 (No. 3,270) (C.C.N.Y. 1810).

Criminal prosecutions arising out of the "Watergate" scandal have given rise to extensive, and not entirely coherent, judicial discussion of the effect of mistake of law. In *United States v. Barker*, No. 74-1883 (D.C. Cir., May 17, 1976), a three-judge panel of the Court of Appeals for the District of Columbia Circuit issued opinions with three different views of the applicable impact of mistake of law. All three opinions merged mistake and ignorance of the law; all three conceded that ignorance of the law as a general rule does not excuse; all three admitted to some injustice in the rule; and each suggested a different solution to ease its harshness. The defendants in *Barker* knew of the existence of the relevant law, but incorrectly believed their actions to have been authorized by a person with legal authority to do so. The judges sought to determine whether that mistake was legal or factual and whether it fit within one of the exceptions to the rule that mistake of law does not excuse. Although the judges attempted to create categories of excusable mistake, mistake of law has been allowed to excuse only if it negates a required intent or if the law was not sufficiently clear or sufficiently accessible to satisfy due process—that is, if some other legal doctrine provided a defense. See examples of excusable mistake, *id.* at 19-26 (Leventhal, J., dissenting). The difficulties of the decisions could have been eased had analysis been in terms of the blameworthiness of defendants' mistake. Although much in the opinions indicates a leaning toward similar concepts, see *id.* at 11-13, 20-22 (Wilkey, J.), 1-4 (Merhige, J.), 16-26 (Leventhal, J., dissenting), straightforward analysis depends on rejection of *ignorantia legis*.

ance of *ignorantia legis* has produced inconsistencies in vagueness cases and in decisions concerning *mens rea*. Of the many arguments advanced to support *ignorantia legis*, none justifies the breadth of that doctrine, and only one provides a persuasive reason for not allowing ignorance to excuse in all cases: there are circumstances in which ignorance of the law is blameworthy.

In such circumstances, there is neither unfairness nor inefficacy in punishing a defendant for the underlying crime. The result is not unfair because the defendant's conduct, with regard both to every element of the crime and to his failure to learn of the illegality of the act, is blameworthy. Nor is the imposition of punishment in these circumstances inconsistent with the concepts of fairness embodied in the *ex post facto* prohibition and due process guarantees of the Constitution. These provisions demand that no defendant be convicted absent a reasonable expectation that he knew, at the time of his offending action, what was necessary to conform his conduct to the legally-mandated standard. When a defendant's ignorance is itself culpable, by definition the test of fair treatment embodied in those constitutional provisions has been met because culpability, at a minimum, is the failure to do that which a reasonable, prudent man of average intelligence would. The test is altered from case to case only insofar as the standard applicable to a defendant may be higher than that imposed on other community members, such as a defendant professional whose conduct should be judged against the normal behavior of his fellow professionals. Judging culpability by these standards, it is efficacious as well as just to punish a person whose ignorance of the law is blameworthy. Because the defendant has failed to learn of the law governing his endeavor, and consequently has violated that law, it is evident that he has adopted a standard of care below that reasonably expected by society; thus, the defendant's unimpeded pursuit of that endeavor presents an unacceptable hazard to the public.

If there is only one area in which application of *ignorantia legis* is justified, it would be far better to abandon the doctrine and start anew than to preserve it and attempt to limit the maxim to its proper scope. To supplant *ignorantia legis*, the following precept is advanced: no person shall be convicted of any crime who, at the time of the allegedly offending action, was unaware that his actions were criminal, excepting only those persons whose ignorance is blameworthy. Under this rubric, a defendant who sought to avoid liability could plead his ignorance in defense. It is of little moment whether the defendant is required initially to produce evidence of his ignorance or instead is allowed simply to plead

ignorance and await the prosecution's production of contrary evidence. The likely access of a defendant to facts respecting his ignorance and notions of judicial economy favor placing the burden of going forward on the defendant. In any event, the burden of proof would remain with the government.¹⁵¹ Faced with a plea of ignorance, the prosecution would be required to introduce evidence showing either that the defendant was in fact not ignorant of the law making his conduct criminal or that a reasonable, prudent man (or reasonable, prudent professional if regulation of an occupation is involved) would have been aware of it.

As with any proposed alteration of the law, two issues remain: by what power the change can be effected and what impact will the change have on the disposition of criminal prosecutions. Neither question poses significant problems for abandonment of *ignorantia legis*. The *ignorantia legis* doctrine exists in most American jurisdictions, including federal law, solely by judicial fiat; courts do not require legislative direction to limit the punishment of ignorant offenders. Courts are not free to create defenses to statutory crimes at will, but extensive areas of the criminal law long have been the exclusive province of judicial construction. These encompass matters such as the extent to which an insane delusion negates a required intent, the precise definition of intent called for by the usually imprecise terms used to indicate an intent requirement, and, as in *Morissette v. United States*,¹⁵² the circumstances under which an intent requirement will be inferred in the absence of legislative language creating or expressly negating the requirement. With the possible exception of a few comprehensive criminal codes like that enacted by Illinois,¹⁵³ these areas remain open to judicial creativity. In the absence of clear legislative direction to the contrary, judges may determine independently that the *ignorantia legis* doctrine no longer merits obeisance.

The concept of judicial power to ensure the fairness of judicial processes is not new, as is evidenced by Justice Livingston's decision in *The Cotton Planter*¹⁵⁴ more than a century and a half ago. A decision that nonculpable ignorance of the law should excuse seems as much within the bounds of judicial power as a decision that a law cannot take

151. In this respect, knowledge of the law would be treated as a rebuttable presumption. This approach avoids violating the *Tot-Leary* proscription against irrebuttable presumptions in such cases. See notes 133-39 *supra* & accompanying text.

152. 342 U.S. 246 (1952). See notes 53-56 *supra* & accompanying text.

153. See ILL. REV. STAT. ch. 38, §§ 4-1 to -9 (1973).

154. 6 F. Cas. 620 (No. 3,270) (C.C.N.Y. 1810). See note 110 *supra* & accompanying text.

effect until a copy has been received in the particular locale concerned,¹⁵⁵ or that statements should be excluded from evidence because obtained during an extended period of detention prior to arraignment¹⁵⁶ or by means constitutionally forbidden to federal officers.¹⁵⁷ The use of "supervisory" judicial powers to adopt the precept that blameless ignorance of the law should prevent criminal liability offers one basis to abandon *ignorantia legis*. The supervisory powers of the judiciary have been guided by a concept of fairness closely related to that embodied in the due process clauses of the fifth and fourteenth amendments; these provisions supply the constitutional power that may be relied upon as an alternative basis for abrogating *ignorantia legis*. The due process guarantees require prosecutors to divulge information to defense counsel¹⁵⁸ and to prohibit imposition of criminal sanctions against one who had no knowledge of the illegality of her "wholly passive" conduct.¹⁵⁹ Due process is even versatile enough to guarantee the right to privacy¹⁶⁰ and the right to travel.¹⁶¹ Certainly the concept of due process would not have to be stretched unduly to encompass judicial construction of a right for persons blamelessly ignorant of the law to escape criminal sanction.

Similarly, such an abandonment of *ignorantia legis* would have no dramatic impact on law enforcement. Its direct effect on the broad range of criminal prosecutions is likely to be minor. The change will have no impact on prosecutions for heinous crimes; defendants ignorant of the illegality of acts satisfying the definitions of these crimes generally will not possess the requisite sanity for conviction. Instead, abrogation of the maxim is most likely to affect prosecutions for more esoteric

155. 6 F. Cas. at 621-23.

156. *McNabb v. United States*, 318 U.S. 332 (1943). The *McNabb* decision, based on the supervisory power of the Supreme Court over federal courts and prosecutors, later was reaffirmed on the basis of rule 5(a) of the Federal Rules of Criminal Procedure. See *Mallory v. United States*, 354 U.S. 449 (1957). The Omnibus Crime Control and Safe Streets Act of 1968, § 701, 18 U.S.C. §§ 3501, 3502 (1970), subsequently provided a different standard for judging the admissibility of the contested class of statements.

157. *Weeks v. United States*, 232 U.S. 383 (1914). For a discussion of the supervisory power invoked in *Weeks*, see *Wolf v. Colorado*, 338 U.S. 25, 28-33 (1949), and *Mapp v. Ohio*, 367 U.S. 643, 654-56 (1961).

158. *Brady v. Maryland*, 373 U.S. 83 (1963). See Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112 (1972).

159. *Lambert v. California*, 355 U.S. 225, 228-29 (1957).

160. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

161. *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

crimes,¹⁶² allowing acquittal if a defendant is prosecuted for an action that he did not know, and had no reason to know, to be criminal.¹⁶³ Acquittal in such cases is sometimes secured by a determined court, but only at the expense of compounding the illogic of the criminal law, as was done in *Lambert v. California*.¹⁶⁴ Absent the need to harmonize such decisions with *ignorantia legis*, the structure of protections against misuse of the criminal sanction can be recast as a more coherent whole; the various limitations affected by *ignorantia legis* may be analyzed more freely, and a more logical, consistent, and fair body of law will emerge.

One defender of *ignorantia legis* concluded that considerations of the public welfare demanded adherence to the maxim even though "[m]ere logic would seem to indicate that the maxim should be abrogated entirely."¹⁶⁵ This rule of illogic has continued long enough. *Ignorantia legis*, as presently construed, should be set aside by the courts as a quaint relic of the times when neighbors knew each other, citizens were familiar with the criminal laws, and crimes required criminal intent.

162. See notes 127-28 *supra* & accompanying text.

163. Such cases most frequently arise as the result either of attempts to enforce new and scantily publicized measures or of sporadic efforts to enforce old and seldom utilized statutes. In *Poe v. Ullman*, 367 U.S. 497 (1961), for example, it was noted that between enactment of the legislation in 1879 and *Poe* in 1961, only one prosecution, *State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (1940), had been initiated under the Connecticut law against dissemination of contraceptives. 367 U.S. at 501. See also *United States v. Freeman*, No. 75-2183 (4th Cir., Mar. 4, 1976), affirming a conviction for violation of a regulation banning parking in certain areas. Despite the absence of a sign to indicate that parking was proscribed, the court, noting that a regulation had been published in the *Code of Federal Regulations*, (which runs approximately 60,000 pages), see H.R. Rep. No. 94-104, 94th Cong., 2d Sess. 7 (1976), declared that publication gave sufficient warning to the defendant that his action was illegal.

164. 355 U.S. 225 (1957). See notes 77-78 *supra* & accompanying text.

165. Perkins, *supra* note 6, at 40.