

January 2018

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Recommended Citation

Larkin, Paul J. Jr. (2018) "The Folly of Requiring Complete Knowledge of the Criminal Law," *Liberty University Law Review*: Vol. 12 : Iss. 2 , Article 4.

Available at: https://digitalcommons.liberty.edu/lu_law_review/vol12/iss2/4

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ARTICLE

THE FOLLY OF REQUIRING COMPLETE KNOWLEDGE OF THE CRIMINAL LAW

Paul J. Larkin, Jr.[†]

Some criminal law axioms represent moral judgments. A classic example is William Blackstone's adage that "it is better that ten guilty persons escape, than that one innocent suffer."¹ That proposition does not represent an empirically proven conclusion. Blackstone did not make that claim, no one has proved it since then, the variables are too numerous for any attempt to be successful, and there are too many counterexamples for any proof to be persuasive. (What if among the ten guilty persons are Ted Bundy, Jeffrey Dahmer, John Wayne Gacy, Timothy McVeigh, and Usama bin Laden?)

By contrast, at one time the principle that "Everyone is presumed to know the law," which is more a rule of law than a presumption,² did represent the actual state of affairs. There were a limited number of crimes at common law, and they were obvious to everyone given their violent nature (murder, rape, and robbery) or religious underpinnings (blasphemy).³ The colonies brought the common law of crimes to American

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1. 4 WILLIAM BLACKSTONE, COMMENTARIES *358; see *Coffin v. United States*, 156 U.S. 432, 456 (1895) (embracing Blackstone's maxim).

2. See *Michael H. v. Gerald D.* 491 U.S. 110, 119-21 (1989) (plurality opinion) (explaining that an irrebuttable presumption is properly treated as a rule of law); 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 453-54 (2d ed. 1923).

3. There were only eight original common law felonies: treason, murder, manslaughter, rape, robbery, sodomy, burglary, larceny, and arson. Paul J. Larkin, Jr., *Mistakes and Justice—Using the Pardon Power to Remedy a Mistake of Law*, 15 GEO. J.L. & PUB. POL'Y 651, 666 n.76 (2017); see THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 442-62 (5th ed. 1956) (discussing the origin and development of the common law crimes). The common law courts added new ones over time. See, e.g., JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 53 (2d ed. 1960); WAYNE R. LAFAYE, CRIMINAL LAW 78-80 (5th ed. 2010); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 68-69 (1933); see generally 1-3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883).

soil,⁴ and the first federal criminal statute contained approximately thirty offenses.⁵ Everyone would have known where to find the line between legal and illegal conduct.

Today, however, it makes sense to treat that presumption of knowledge only as a rebuttable presumption—that is, the starting point for an inquiry into what someone knew or could be expected to know. The reason is that the small codes of yesteryear have gone the way of buggy whips and slide rules. Today, there are thousands of federal and state criminal offenses spread over the fifty-one titles and 27,000 pages of the U.S. Code and the fifty parallel versions in the states.⁶ Aside from addressing new ways that man has discovered to make life unpleasant for his neighbor (kidnapping, drug trafficking, and so forth), Congress and the state legislatures decided to use the criminal law to enforce numerous rules made necessary by the transformation of America from the rural, agricultural society lauded by Thomas Jefferson⁷ into the urban, industrialized society faced by President Benjamin Harrison and his successors.⁸ The result is that, in some unknown number of cases, the aphorism “Everyone is presumed to know *the law*” should be rewritten as “Everyone is presumed to know *some of the law*.” So

4. See *Kerry v. Din*, 135 S. Ct. 2128, 2133 (2015) (plurality opinion) (“Edward Coke[’s] . . . Institutes ‘were read in the American Colonies by virtually every student of law’”) (citation omitted); *Hurtado v. California*, 110 U.S. 516, 530 (1884) (noting that the “descendants of Englishmen . . . inherited the traditions of the English law and history”); Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6 (1910). Eleven colonies enacted “receiving statutes,” which incorporated the common law as state law. New Jersey adopted the common law through its state constitution; Connecticut, by judicial decision. English common law remained colonial law until replaced by an act of the colonial legislature. See, e.g., MORTON HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 8 (1977); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 18-20 (1975).

5. See *An Act for the Punishment of certain Crimes against the United States*, 1 STAT. 112 (1790). The act made it a crime to interfere with functions of the new government, such as treason, misprision of treason, perjury in federal court, bribery of federal judges, and forgery of federal certificates or securities. It also outlawed common law crimes with a connection to federal property or particular federal interests, such as murder, robbery, larceny, and receipt of stolen property on federal land or on the high seas.

6. See Paul J. Larkin, Jr., *Public Choice Theory & Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 726-27 (2013) (hereafter Larkin, *Public Choice*); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).

7. See THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* (Penguin Classics 1998) (1st ed. 1781).

8. See THOMAS C. MCCRAW, *AMERICAN BUSINESS SINCE 1920: HOW IT WORKED* (3d ed. 2018); GLENN PORTER, *THE RISE OF BIG BUSINESS, 1860-1920* (2006).

revised, the maxim becomes a more humble rebuttable presumption than an audacious across-the-board rule.

It is the burden of this Article to persuade the reader of that proposition. The argument below proceeds in five steps. Part I argues that elementary principles of criminal and constitutional law require the government to identify the line between lawful and unlawful conduct. Part II explains that the standard for deciding whether the population has been adequately informed is whether a “person of ordinary intelligence” or the “average person” would know what the law forbids. Part III shifts from normative and legal to empirical and practical considerations. It maintains that there is too much criminal law for the average person to know its entirety, particularly when you move beyond physically harmful, dangerous, and immoral conduct—conduct that the common law deemed *malum in se* or inherently evil—to crimes that exist only because a legislature or regulatory agency decided to invoke the criminal law as an enforcement tool—conduct known as *malum prohibitum* or conduct that is a crime only because the democratic process has so labeled it. Part IV then takes the position that it is a mistake to assume that the person of ordinary intelligence can acquire complete knowledge of the criminal law by informally learning community social mores. Part V suggests how we can remedy this problem. This Article then concludes by asking for honesty from courts confronted by a defendant’s legitimate claim that no reasonable person would have known that what was charged against him is a crime.

I. THE FUNDAMENTAL REQUIREMENT OF ANY CRIMINAL CODE:
IT MUST BE UNDERSTANDABLE

It is not often that we need to identify the fundamental principles underlying the criminal law. Only a political revolutionary, a member of the American Law Institute, or a law professor (or perhaps all three) could propose that we ditch the entire corpus of federal and state criminal law that has developed over the last millennium and adopt an entirely new criminal code. Legislators, judges, and scholars ordinarily content themselves with merely making revisions around the edges in order to improve the criminal law in the same type of slow and steady manner that enabled the tortoise to beat the hare. Of course, every now and then some people have the chance to wipe the slate clean and start anew. The first state officials elected after the Declaration of Independence was signed, the Framers of our Constitution, and the members of the First Congress were in that position long ago. Yet, even they generally left in place the common law

of crimes that they brought with them from England, at least how it stood in 1776.⁹

Nonetheless, every now and then a criminal code becomes so voluminous and encrusted with barnacles from years of revisions and additions that scholars, judges, and legislators decide to start over rather than revise the existing code. The American Law Institute took up that project in the 1950s and published its Model Penal Code fifty-six years ago in an effort to organize and modernize criminal law.¹⁰ Although that attempt failed to generate the critical mass necessary to become legislation nationwide, some members of Congress have recently taken up the chore of devising a new federal criminal code. Representative James Sensenbrenner, for example, has called the federal criminal code “a mess”¹¹ and sponsored legislation that would have replaced federal penal law, Title 18 of the U.S. Code. Former senior Department of Justice officials, the American Bar Association, and various scholars have urged Congress and the states to reform the criminal law.¹² Perhaps, that rough beast’s hour has come round at last.¹³

Suppose that Congress and the Council of State Governments decided to commission someone to prepare a Model Penal Code 2.0 and selected a reporter for that task. Let’s call her Doris, after the wife of Herbert

9. See *Kerry v. Din*, 135 S. Ct. 2128, 2133 (2015) (plurality opinion); *Hurtado v. California*, 110 U.S. 516, 530 (1884).

10. MODEL PENAL CODE (AM. LAW INST., Proposed Official Draft 1962); see Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

11. See *Criminal Code Reform: Hearing Before the Over-Criminalization Task Force of 2014 on the H. Comm. on the Judiciary*, 113th Cong. 1-3 (2014) (Prepared Statement of Rep. F. James Sensenbrenner, Over-Criminalization Task Force) (“The federal Criminal Code is a mess. Rather than a well-organized, systemic tool for enforcing important Federal criminal statutes, the Code is riddled with provisions that are outdated, redundant, or simply inconsistent with more recent modifications to reflect today’s modern approach to criminal law. This is due, at least in part, to Congress’s penchant for legislating in a vacuum, in a politically popular manner, or in rapid response to a crisis or national news story, instead of thoughtfully and deliberately. The resulting Code is a vast, chaotic, disorganized amalgamation of criminal statutes that is difficult to use for practitioners and nearly incomprehensible to the average American. The size and disorganization makes it extraordinarily difficult to ferret out the law applicable to a particular factual situation, which does a great disservice to the public.”).

12. See Larkin, *Public Choice*, *supra* note 6, at 720–21 & nn.16–20 (collecting authorities).

13. See W.B. YEATS, *The Second Coming* (1919), in 1 THE COLLECTED WORKS OF W.B. YEATS: THE POEMS 189, 190 (Richard J. Finneran ed., 1997) (“And what rough beast, its hour come round at last / Slouches towards Bethlehem to be born?”).

Wechsler, the chief reporter on the ALI's 1962 effort.¹⁴ The content of what she ultimately would have prepared doubtless would be the subject of an interesting debate. For purposes of this Article, however, what is most important is how she would have begun her task. Before deciding what to specifically outlaw, Doris likely would start by identifying what, if any, principles should serve as the foundation for her code. It is likely that Doris would have started with two elementary principles.

The first one would be that there must be a law that a person can be said to have violated. That principle is called the "Rule of Legality," but also is known by the Latin phrases "[N]ullum crimen sine lege" ("There is no crime absent a written law") and "[N]ulla poena sine lege" ("There is no penalty absent a written law").¹⁵ Perhaps an axiom of the criminal law in every Western nation, the Rule of Legality has been described as one of the most "widely held value-judgment[s] in the entire history of human thought."¹⁶ That rule reflects the principle that, for a criminal justice system to be deemed just, a person must be able to avoid committing an act that renders him liable for criminal punishment.¹⁷ Otherwise, the criminal law could become a weapon of oppression rather than a means of promoting social order and would fall somewhere along the spectrum between the fictional system that Shirley Jackson created in *The Lottery*¹⁸ and the real-life systems that some of history's despots actually applied.¹⁹ No one would characterize any such system as just. Accordingly, to Professor George Fletcher, "We start with the assumption that a just conviction presupposes that the actor

14. Tamar Lewin, *Herbert Wechsler, Legal Giant, Is Dead at 90*, N.Y. TIMES (Apr. 28, 2000), <http://www.nytimes.com/2000/04/28/us/herbert-wechsler-legal-giant-is-dead-at-90.html>.

15. Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165 (1937). Closely related to the Rule of Legality are the *Ex Post Facto* Clauses of the Constitution. See U.S. CONST. art. I, § 9, cl. 3; § 10, cl. 1. The Framers recognized that the Rule of Legality is fundamental by prohibiting the federal and state governments from applying a new criminal law retroactively.

16. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 59 (2d ed. 1960).

17. See, e.g., Hall, *supra* note 15, at 165, 178; Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 726 (2012).

18. See Shirley Jackson, *The Lottery*, THE NEW YORKER (June 26, 1948), <http://www.newyorker.com/magazine/1948/06/26/the-lottery>.

19. See, e.g., THOMAS PITT TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 67 (2012) ("In disposition and character John was an oriental despot, a tyrant of the worst sort . . . He was guilty of acts of cruelty rivaling those of Nero.") (footnote omitted).

had a fair chance of avoiding his act of wrongdoing or his violation of a statute.²⁰

The second principle follows from the first one: the criminal law must be understandable.²¹ The reason is simple: having a criminal law that no one can understand is tantamount to having no law at all.²² Several ancillary propositions follow from that one. For example, a criminal law must be publicly available so that people can read it. Legislatures cannot lock it away or put it in an inaccessible location.²³ In fact, Article I of the Constitution requires Congress to publish all federal criminal laws,²⁴ and the Fourteenth Amendment Due Process Clause imposes the same obligation on the

20. GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 731 (1978); *see also* HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 68 (1968) (“People ought in general to be able to plan their conduct with some assurance that they can avoid entanglement with the criminal law; by the same token the enforcers and applicers of the law should not waste their time lurking in the bushes ready to trap the offender who is unaware that he is offending. It is precisely the fact that in its normal and characteristic operation the criminal law provides this opportunity and this protection to people in their everyday lives that makes it a tolerable institution in a free society. Take this away, and the criminal law ceases to be a guide to the well-intentioned and a restriction on the restraining power of the state.”); *cf.* H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 28-53 (2d ed. 2008) (offering that rationale as the justification for recognizing excuses to crimes).

21. *See* Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 *HARV. J.L. & PUB. POL’Y* 337, 381-86 (2015) (hereafter Larkin, *Dynamic Incorporation*).

22. *Cf.* Erwin Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 *HARV. L. REV.* 198, 204 (1934) (lamenting the difficulty in finding an agency rule before the Federal Register Act of 1935, 44 U.S.C. § 1501 (2012), required their publication).

23. *See* *Screws v. United States*, 325 U.S. 91, 96 (1945) (plurality opinion) (“To enforce such a [vague] statute would be like sanctioning the practice of Caligula who ‘published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.’”); 5 JEREMY BENTHAM, *WORKS* 547 (1843) (“We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of.”); 1 BLACKSTONE, *supra* note 1, at *46 (noting that Caligula “wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.”); Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 *U. CHI. L. REV.* 641, 650 n.39 (1941) (“[W]here the law was not available to the community, the principle of ‘nulla poena sine lege’ comes into play . . .”).

24. *See* U.S. CONST. art. I, § 5, cl. 3 (“Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . .”).

states.²⁵ Moreover, published criminal laws must be written in English, the mother tongue in this nation.²⁶ That leaves out Latin, Hausa, Pashtu, Sinhalese, Tagalog, or Urdu, even French or Spanish, as well as Morse code, semaphore, smoke signals, or a computer code series of 0s and 1s. Jabberwocky also doesn't cut it.²⁷

Of course, even an accessible criminal law written in English is inadequate if its terms are so vague that no one can readily understand what they mean. There is even a well-settled criminal and constitutional law doctrine establishing that principle, known as the "Void-for-Vagueness" Doctrine.²⁸ According to that doctrine, a criminal law must fairly tell the public exactly what is a crime, and a statute so vague that a person can only guess as to its meaning cannot be used as a criminal law.²⁹ At bottom, the principle is that vague laws are little better than having no law at all.³⁰ As the

25. See *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964)) (reiterating "the 'basic principle that a criminal statute must give fair warning of the conduct that it makes a crime'"); *id.* at 459 (reiterating the "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct").

26. Larkin, *Dynamic Incorporation*, *supra* note 21, at 387-88.

27. *Id.*; Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 871 (1930) ("A statute made in Latin at the present time is no statute, although the intention of the legislature can be as well or as ill made out from Latin as from English.").

28. 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); Meese & Larkin, *supra* note 17, at 761; Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U.L. REV. 293, 307-08 (2016) (hereafter Larkin, *Lost Due Process Doctrines*).

29. See, e.g., *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.").

30. Vague criminal laws are problematic for several reasons. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'").

Supreme Court explained in *Lanzetta v. New Jersey*, “No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”³¹ That is why no legislature can make it a crime to do “bad things” and leave it to courts to flesh out that term on a case-by-case basis.³²

II. THE STANDARD FOR MEASURING UNDERSTANDABILITY:

WHAT A “PERSON OF ORDINARY INTELLIGENCE” WOULD UNDERSTAND

Once Doris realized that the criminal code must be understandable, she would have turned to the question of what standard she should use to analyze a statute. The Void-for-Vagueness Doctrine, she would have realized, identifies the standard that a court must use when deciding whether a criminal law is sufficiently clear. The issue in every vagueness case is how an average person would understand a statute. As the Court explained in an early application of this doctrine, “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.”³³ Put differently (and in a gender neutral fashion), “[t]he constitutional requirement of definiteness is violated by a criminal statute that fails to give *a person of ordinary intelligence* fair notice that his [or her] contemplated conduct is forbidden by the statute.”³⁴ A “person of ordinary intelligence,” a “person of common intelligence,” “the common world”—those are the phrases that the Supreme Court has used to describe how to decide whether a statute is understandable. The Court has used that standard when it has upheld criminal laws over vagueness challenges and when it has held them unconstitutional.³⁵

31. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

32. *See, e.g., Coates v. Cincinnati*, 402 U.S. 611 (1971) (holding unconstitutionally vague a local ordinance making it unlawful to act “in a manner annoying to” passersby).

33. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (emphasis added).

34. *United States v. Harriss*, 347 U.S. 612, 617 (1954) (emphasis added; footnote omitted).

35. For cases rejecting void-for-vagueness challenges to legislation, *see, e.g., Chapman v. United States*, 500 U.S. 453, 456 (1991) (“mixture or substance containing a detectable amount” of a controlled substance); *United States v. Powell*, 423 U.S. 87, 90 (1975) (“other firearms capable of being concealed on the person”); *United States v. Mazurie*, 419 U.S. 544, 547 (1975) (“Indian country”); *Roth v. United States*, 354, 479–80 U.S. 476 (1957) (“obscenity”); *United States v. Korpan*, 354 U.S. 271, 274 (1957) (“so-called ‘slot’ machine”); *United States v. Spector*, 343 U.S. 169, 593 (1952) (“timely application in good faith” for

departure documents from United States); *United States v. Harriss*, 347 U.S. 612, 614 (1954) (“receiving any contributions or expending any money” to influence the passage or defeat of federal legislation); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 339 (1952) (“so far as practicable”); *Jordan v. De George*, 341 U.S. 223, 224 (1951) (“crime involving moral turpitude”); *Dennis v. United States*, 341 U.S. 494, 496 (1951) (advocating the “propriety of overthrowing or destroying any government in the United States by force or violence”); *Cole v. Arkansas*, 338 U.S. 345, 348 (1949) (a person acting in concert with others “to assemble at or near any place where a ‘labor dispute’ exists”); *United States v. Petrillo*, 332 U.S. 1, 3 (1947) (“in excess of the number of employees needed”); *Screws v. United States*, 325 U.S. 91, 93 (1945) (“rights, privileges, or immunities . . . protected by the Constitution and laws of the United States”); *United States v. Ragen*, 314 U.S. 513, 517 (1942) (“reasonable allowance”); *Gorin v. United States*, 312 U.S. 19, 21 (1941) (“connected with the national defense”); *United States v. Darby*, 312 U.S. 100, 109 n.1 (1941) (“industries engaged in commerce or in the production of goods for commerce”); *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 271, 273 (1940) (“psychopathic personality” as shown by “habitual course of misconduct in sexual matters” demonstrating “an utter lack of power to control their sexual impulses” and a likelihood “to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire”); *Kay v. United States*, 303 U.S. 1 (1938) (permitting only “ordinary charges authorized and required by the Corporation for services actually rendered for examination and perfecting of title, appraisal, and like necessary services”); *Herndon v. Lowry*, 301 U.S. 242, 255 (1937) (“at any time”); *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 185 (1936) (“fair and open competition”); *Sproles v. Binford*, 286 U.S. 374, 381 (1932) (“shortest practicable route”); *United States v. Wurzbach*, 280 U.S. 396, 398 (1930) (to solicit or receive “any . . . contribution for any political purpose whatever”); *Whitney v. California*, 274 U.S. 357, 359 (1927) (“criminal syndicalism”); *Burns v. United States*, 274 U.S. 328, 330 (1927) (same phrase “criminal syndicalism”); *United States v. Alford*, 274 U.S. 264, 266 (1927) (“[w]hoever shall build a fire in or near any forest, timber, or other inflammable material upon the public domain”); *Miller v. Oregon*, 273 U.S. 657 (1927) *affg* 119 Or. 409 (1926) (involuntary manslaughter conviction for doing a lawful act “without due caution or circumspection”); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 249 (1922) (“unjust and unreasonable” or “oppressive” rent); *Omaechevarria v. Idaho*, 246 U.S. 343, 345 n.4 (1918) (grazing sheep on any cattle range “usually occupied by any cattle grower”); *Fox v. Washington*, 236 U.S. 273, 275 (1915) (any written matter “having a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall tend to encourage or advocate disrespect for law”); *Nash v. United States*, 229 U.S. 373 (1913) (antitrust rule of reason).

For cases holding statutes unconstitutionally vague, see, e.g., *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) (“indecent” broadcast); *Chicago v. Morales*, 527 U.S. 41, 45 (1999) (“criminal street gang”); *Kolender v. Lawson*, 461 U.S. 352 (1983); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Smith v. Gogen*, 415 U.S. 566 (1974); *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) (“vagrant”); *Coates v. Cincinnati*, 402 U.S. 611 (1971) (“annoying” public passersby); *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965) (“loitering”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (“sacrilegious”); *Winters v. New York*, 333 U.S. 507, 513 (1948) (“so massed as to become vehicles for inciting”); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (“loiter”); *Lanzetta v. New Jersey*, 306 U.S. 451, 452 (1939) (“[a]ny person not engaged in any lawful occupation, known to be a member of a

Who is the typical “person of ordinary intelligence”? Like the “reasonable person” used in tort law when defining negligence, a “person of ordinary intelligence” is a legal construct, an ideal, not a particular individual. The Supreme Court has not defined the criteria that a court must use to identify that individual for vagueness purposes, but we can safely assume that, for the construct to make sense, it must correspond to reality. Just as someone need not be an Olympic athlete to be physically fit, a person need not be a Nobel laureate to possess “ordinary intelligence.” That would set the bar so high that the extraordinary would become the ordinary. Language does not equate the two, so neither should the law.

If that is true, actual population demographics matter. Here, then, are the facts: According to the U.S. Census Bureau, in 2015 nearly ninety percent of adults had at least a high school diploma or a Graduate Equivalency Degree (GED).³⁶ Roughly fifty-nine percent had completed at least some amount of college without receiving a degree.³⁷ Only forty-two percent, however, received an associate’s degree, only thirty-three percent received a bachelor’s degree, and only twelve percent received an advanced degree of some type.³⁸

Those facts make clear that the “person of ordinary intelligence” is not a lawyer, a judge, or a law professor. Nor is he someone with legal, technical, scientific, or any other type of advanced education and training in fields such as medicine, biochemistry, geology, hydrology, and so forth. The Census Bureau’s data makes it clear that the standard is what an average high school graduate would know to be the law. Requiring anything more would have the practical effect of requiring a person to obtain legal or scientific education or advice to know what the law forbids. The common law certainly imposed no such duty. Indeed, any such obligation would have been entirely senseless at a time when there were few people who could read and write, even fewer lawyers, and no law schools. That state of

gang”); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 10 (1931) (“unreasonable waste”); *Smith v. Cahoon*, 283 U.S. 553 (1931) (“auto transportation company” as applied to a non-common carrier); *Stromberg v. California*, 283 U.S. 359, 361 (1931) (displaying any “symbol or emblem of opposition to organized government”); *Cline v. Frank Dairy Co.*, 274 U.S. 445 (1927) (“unreasonable” profits); *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926) (“the current rate of per diem wages in the locality”); *Weeds, Inc. v. United States*, 255 U.S. 109 (1921) (charging “excessive prices for . . . necessities”); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) (“any unjust or unreasonable rate or charge in handling . . . any necessities”); *Int’l Harvester Co. v. Kentucky*, 234 U.S. 216 (1914) (“real” price or value).

36. See CAMILLE L. RYAN & KURT BAUMAN, U.S. CENSUS BUREAU, U.S. DEP’T OF COM., EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2015, at 1-2 Tbl. 1 (Mar. 2016).

37. See *id.*

38. See *id.*

affairs, of course, is no longer true. The average person now has a high school diploma. But no legislature has required a person to consult an attorney or other expert to avoid becoming a criminal. On the contrary, courts have looked askance on claims that a person should be exculpated because he followed legal advice.³⁹

With the Void-for-Vagueness Doctrine in mind, Doris would then have drafted the code. She would have included the common law crimes, supplemented by the blue-collar and white-collar crimes that assemblies and courts had added over the years. Before giving her draft to the legislatures, she would have stood back and looked at her draft code as a whole. That is when it would have struck her.

The Void-for-Vagueness Doctrine teaches that each individual law must be understandable, and it supplies the test for gauging the comprehensibility of a particular statute. Making sure that a person of ordinary intelligence could understand precisely what each statute outlaws, however, solves only part of the notice problem. The penal code demands that every person comply with every criminal statute, which means that everyone must know what the entire code prohibits. That raises the question whether there were too many statutes in Doris's draft code for the average person to understand and remember. Doris would have realized that she had an entirely different problem, one that no legislature or court had ever considered.

III. THE CRIMINAL LAW IS TOO VOLUMINOUS AND COMPLEX FOR A PERSON OF ORDINARY INTELLIGENCE TO KNOW IT ALL

The problem was due to the enormous growth in the volume and complexity of the penal code. Consider the federal criminal code. What started in 1789 as a copse of roughly thirty trees had now become a jungle more than 100 times larger. There are thousands of criminal laws, many of them quite new, making the code one-third larger in 2004 than it had been in 1980.⁴⁰ In fact, there are now so many federal offenses that no one—neither the U.S. Department of Justice, the American Bar Association, nor the Congressional Research Service, each of which had actually tried to answer that question—knew what was the correct number.⁴¹ If they could

39. See, e.g., *Sinclair v. United States*, 279 U.S. 263, 299 (1929) (ruling that reliance on the advice of counsel is not a complete defense to a crime).

40. See Larkin, *Public Choice*, supra note 6, at 729.

41. See *id.* at 726.

not answer that question, Doris realized, the average high school graduate could not be expected to have the answer.

That problem is only worsened, Doris would have realized, when she considered that agencies can promulgate regulations whose violation can be punished as a crime.⁴² People of “ordinary intelligence” do not read the Code of Federal Regulations (unless they have trouble falling asleep). Few have probably heard of the Federal Register, let alone know where to find it. As Justice Lewis Powell once noted, it “is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation . . . would have knowledge of its promulgation or familiarity with or access to the Federal Register.”⁴³ People are generally aware of what the criminal law prohibits insofar as it tracks the prevailing moral code. By the time of adolescence, everyone knows not to murder, rape, rob, or swindle someone else.⁴⁴ (Anyone who claims that he was unaware that theft and murder are illegal is effectively raising an insanity defense and should be treated as if he had expressly done so.) Indeed, Anglo-American criminal law grew out of pre-Norman customs.⁴⁵ But no society, including this one, catalogues its morals or mores in a Code of Federal Regulations, nor is there a longstanding American tradition of referring to any such document to learn those norms. If so, why is it reasonable to expect that people should be required, at risk of imprisonment if they fail, to know what rules are found in the CFR?

42. See *United States v. Grimaud*, 220 U.S. 506 (1911); Larkin, *Public Choice*, *supra* note 6, at 728–29.

43. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring).

44. See, e.g., LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 108–09 (1993) (“Perhaps the most primitive and basic rules in the criminal justice system were those that protected property rights The laws against theft, larceny, embezzlement, and fraud are familiar friends. People may not know every technical detail, but they get the general point. Probably all human communities punish theft in one way or another; it is hard to imagine a society that does *not* have a concept of thievery, and some way to punish people who help themselves to things that ‘belong’ to somebody else.”); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 125 (1881) (“[T]he fact that crimes are also generally sins is one of the practical justifications for requiring a man to know the criminal law.”); LAFAVE, *supra* note 3, at 14–15; JOHN SALMOND, *JURISPRUDENCE* 427 (8th ed. 1930); Hall & Seligman, *supra* note 23, at 644 (“[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as ‘custom.’”); Sayre, *supra* note 3, at 68–69; Mark D. Yochum, *The Death of a Maxim: Ignorance of Law Is No Excuse (Killed by Money, Guns and a Little Sex)*, 13 ST. JOHN’S J. LEG. COM. 635, 636 (1999) (“[E]vil is fundamentally known Ignorance that murder is a crime is no excuse for the crime of murder.”).

45. See Larkin, *Lost Due Process Doctrines*, *supra* note 28, at 327–29.

What does that tell us? The above figures, of course, do not equate with intelligence or mental ability. Many people without formal education and degrees are more learned and savvier than some college faculty members, particularly with regard to understanding community norms. But those figures give us some help in deciding how much knowledge of the criminal law we can expect the average person to have. If you expect people to know what high school graduates know, you should succeed with nearly ninety percent of adults. That will not reach everyone, but ninety percent is a very large portion of the population, and it may be the most that anyone could expect. By contrast, if you expect the population to know what only someone with a college or advanced degree could understand, two-thirds of the population would fail. That is quite troublesome. No system of justice could call itself fair if two of every three people cannot avoid running afoul of the law. Indeed, it is possible that more than two thirds of the Roman public knew the criminal code during the time of the Roman Emperor Caligula even though he published the laws in a location that effectively made them unreadable.⁴⁶

We now have a very serious problem, Doris would have surmised.

On the one hand, the Due Process Clause requires the government to inform someone in a particular case of the specific charges and penalties he faces when he is sued for a tort or charged with a crime.⁴⁷ The rationale is that everyone has the right to defend himself against any claim or charge, and that right is meaningless if a trial can be held in his absence. On the other hand, the Supreme Court has never required a legislature to send a copy of every new criminal law to everyone in its jurisdiction, and for more than 200 years none of them did. Publication of a statute in the federal or a state penal code is the traditional means of notifying the public what is now a crime.⁴⁸ But that is more a matter of necessity than anything else.⁴⁹ No one

46. See *supra* note 23.

47. See, e.g., *Jones v. Flowers*, 547 U.S. 220 (2006); *Lankford v. Idaho*, 500 U.S. 110, 120–21 (1991) (ruling that the defendant must have adequate notice of his eligibility for the death penalty); *Greene v. Lindsey*, 456 U.S. 444 (1982); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313–20 (1950); *In re Oliver*, 333 U.S. 257, 273 (1948) (“A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence . . .”).

48. See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 207 (1985) (“Publication of a statute’s text always suffices; the government need make no further effort to apprise the people of the content of the law.”).

49. See *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment, joined by Kennedy & Thomas, JJ.) (“It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at

believes that the average person reads the Congressional Record, the Statutes at Large, or the Federal Register. The result is that a person can unwittingly engage in conduct that neither he nor any reasonable person would have known to be a crime. That is particularly true when the criminal law proposes to outlaw conduct that previously was not an offense.⁵⁰ Yes, he will be notified when the government charges him with committing that offense, but his trial will largely be a formality. What a person needs to know is whether he is near the line of criminality. Proving that someone crossed a line that no one knew existed is uncomfortably similar to proving that he crossed a line that was drawn only after he had crossed it. Because “compliance presupposes knowledge,”⁵¹ the public must be aware of the metes and bounds of the criminal law; otherwise, there is a serious risk of oppression.

How, then, can the very different notice rules mentioned above be reconciled?⁵² Claiming that there is a difference between the notice required in civil and criminal cases is unsatisfactory. Why should less notice be sufficient when the potential penalty is far greater? Relying on history is even less comforting. Have the federal and state governments regularly violated the Due Process Clause in criminal cases throughout the last two centuries plus? The implications of an affirmative answer to that question are disturbing. Even less satisfying is resort to the maxim that “Every man is presumed to know the law.” We indulge that fiction, at least insofar as the code reflects the Decalogue, because, as discussed below, it makes sense to that limited extent, but principally due to the limits of practicality. There is

Large give adequate notice to the citizen is something of a fiction . . . albeit one required in any system of law . . .”).

50. See, e.g., *Rogers*, 532 U.S. at 459 (quoted *supra* note 25); *Connally*, 269 U.S. at 391 (“That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law . . .”).

51. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 400 (1994).

52. See *Jeffries*, *supra* note 48, at 207 (“In the context of civil litigation, where notice is taken seriously, publication is a last resort; more effective means must be employed wherever possible. It may be objected that no more effective means is possible where the intended recipient of the information is the entire populace or some broad segment thereof, rather than an identifiable individual or entity. But this argument at most explains why publication should sometimes suffice; it does not explain why no further obligation is ever considered. Nor does it explain why publication in some official document, no matter how inaccessible, is all that is required.”) (footnotes omitted).

little else that we can do.⁵³ But “necessary fiction descends to needless farce,” to quote Justice Antonin Scalia, when that proposition is pushed too far.⁵⁴

Historically, the criminal law has built a critical safeguard to prevent the conviction of people who are not morally blameworthy: the requirement that the government prove that a person committed an unlawful act with a “guilty mind” or an “evil intent.” Anglo-American common law traditionally has required both elements for conduct to be a crime. “*Actus non facit reum nisi mens sit rea*”⁵⁵—a crime consists of “a vicious will” and “an unlawful act consequent upon such vicious will.”⁵⁶ Unfortunately, criminal laws today generally do not require the government to prove that the defendant knew he committed a crime. One way to require that proof is for the legislature to force the prosecution to prove that someone acted “willfully”—that is, he voluntarily and intentionally violated a known legal duty.⁵⁷ But that is a rarity in federal and state criminal law.

To make matters worse, in some instances legislatures have consciously adopted strict liability statutes, laws that impose liability simply for doing an act regardless of the actor’s state of mind.⁵⁸ In other cases, legislatures,

53. See *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring in part and concurring in the judgment) (“It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, . . . albeit one required in any system of law”) (citation omitted).

54. See *id.* (“[N]ecessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.”).

55. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932). In English, the maxim means that an act does not make one guilty unless the mind is guilty.

56. See, e.g., 4 BLACKSTONE, *supra* note 1, at *21; see also, e.g., Roscoe Pound, *Introduction to FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW* 8–9 (1927) (“Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.”).

57. The Supreme Court has consistently read the term “willful” to have that meaning. See, e.g., *Bryan v. United States*, 524 U.S. 184, 192 (1998); *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994); *Cheek v. United States*, 498 U.S. 192, 200 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973); see also *United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 828–29 (9th Cir. 1976) (adopting the same interpretation for the export control laws).

58. See, e.g., Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J. L. & PUB. POL’Y 1065, 1075–76 (2014) (hereafter Larkin, *Strict Liability*); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 38–39 (1997) (“[T]he more dominant and longer-standing trend in our century has been the erosion of mens rea requirements. This period has seen the dramatic growth of strict liability offenses (and their close cousin,

whether due to forgetfulness, sloppiness, or otherwise, have failed to ensure that a statute requires proof of a guilty mind as to an important element of an offense.⁵⁹ Either failing is troublesome. Numerous giants in the criminal law—H.L.A. Hart, Lon Fuller, Herbert Packer, and the American Law Institute, among others—have consistently denounced strict criminal liability on a variety of grounds.⁶⁰ As Herbert Wechsler once noted, “The most that can be said for such provisions 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.”⁶¹ In those instances, “large injustice can seldom be done.”⁶² Yet, as he added, “[i]f these considerations are persuasive,” strict liability should never be an option “where any major sanction is involved.”⁶³ As long as the

liability for negligence) in American criminal law, and such offenses have found a particular home in the kind of regulatory criminal statutes that have the greatest impact in corporate settings.”).

59. See, e.g., *McFadden v. United States*, 135 S. Ct. 2298 (2015).

60. See, 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.”); 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: ESSAYS IN THE PHILOSOPHY OF LAW* 152 (2008) (“[S]trict liability is odious.”); PACKER, *supra* note 20, at 130–31; 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., 2015); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 422–25 (1958); Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 602–03 (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); Paul Roberts, *Strict Liability and the Presumption of Innocence: An Expose of Functionalist Assumptions*, in *APPRAISING STRICT LIABILITY* 182, 191 (A.P. Simester ed., 2005); Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571 (1978); Sayre, *supra* note 3, at 56; A.P. Simester, *Is Strict Liability Always Wrong?*, in *APPRAISING STRICT LIABILITY*, *supra*, at 21 (Strict liability is wrong because it “leads to conviction of persons who are, morally speaking, innocent . . .”); Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989); see generally Larkin, *Strict Liability*, *supra* note 58 at 1079 n.46.

61. Wechsler, *supra* note 10, at 1109.

62. *Id.*

63. *Id.*

criminal law sought to imprison only those people who, as the saying goes, took the law into their own hands, the risk of oppression could be kept to a minimum. Today, however, that safeguard is less certain, making the notice problem more acute.

Doris would have then turned back to the rationale why the criminal law must be written, clear, and understandable. She would have considered the rationale that the Supreme Court had offered why the criminal law must be clear. The law must afford the average person fair warning of what can get someone fined, imprisoned, or hung. Doris would have discovered that the Court had offered a similar rationale for the canon of statutory construction teaching that ambiguous criminal laws must be strictly construed. As Justice Oliver Wendell Holmes explained in *McBoyle v. United States*,⁶⁴ the criminal law does not demand clarity on the ground that it assumes that the average person will read a criminal statute before acting. The likelihood of that happening is slim.⁶⁵ It requires clarity so that, *if someone were* to do that, he would know where to find the line between lawful and unlawful conduct.⁶⁶ For that reason, the criminal law must ensure that “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed,” and, “[t]o make the warning fair, so far as possible the line should be clear.”⁶⁷

Perhaps that rationale made sense in 1914, when the Supreme Court adopted the Void-for-Vagueness Doctrine, Doris would have surmised, or perhaps it made sense in 1931, when the Court decided *McBoyle*. But she knew that it made little sense in 2018. The reason is that the issue today is materially different from the one that the Court faced in those years. Today, the question is not whether the average person can identify a tree as a tree when he looks at it close up, but is whether he can know the number of trees in the forest when he is standing in the middle of thousands of them.

64. *McBoyle v. United States*, 283 U.S. 25 (1931).

65. I am reminded of an old joke told about W.C. Fields. A passerby saw him reading the Bible one day and, because Fields was not considered a religious man, the passerby asked him why he was reading it. “I’m looking for loopholes,” Fields replied.

66. “Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.” *McBoyle*, 283 U.S. at 27.

67. *Id.*

IV. SOCIAL NORMS ARE INADEQUATE TO TEACH A PERSON OF ORDINARY INTELLIGENCE THE FULL CONTENT OF THE CRIMINAL LAW

Maybe informal social norms could make up the difference, Doris would have hoped. The criminal law began as a collection of local customs and mores,⁶⁸ and there continues to be a consensus about certain basic offenses.⁶⁹ Perhaps the basic precepts of contemporary social norms would be adequate to supply an ordinary person with the knowledge that he needs to stay on the right side of the law if he is so inclined. Aside from informally learning the basic principles represented by the penal code, Doris would have remembered, individuals learn a host of different community norms that are necessary for a civil society and that, when absent, are signs of social disorder, such as the accumulation of garbage, public drinking and urination, panhandling, prostitution, the congregation of teenagers, graffiti, abandoned buildings and property, and so forth.⁷⁰ At least, she thought, the issue was worth considering. To see what she could learn about the development of social norms, Doris would have sought to learn about the relationship between morals and the law from traditional legal sources⁷¹ and

68. See *supra* text accompanying note 45.

69. See WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* 5 (1990) (“In the case of common crime, a large body of research indicates that there *is* in fact a value consensus. People of all races and classes agree we should shun theft, violence, sexual assault, and aggression against children. They give very similar ratings to the seriousness of various kinds of offenses, and they agree to a surprising extent on how stiff the punishments ought to be for violations of the law. The issue of what is criminal has been settled politically in debate over the criminal code, and within law-abiding society there is broad consensus on such matters. These middle-class values are just about everyone’s values.”); *supra* note 44. In theory, recent immigrants may be unaware of those norms, and studies apparently go both ways on the issue. See RUTH D. PETERSON & LAUREN J. KRIVO, *DIVERGENT SOCIAL WORLDS: NEIGHBORHOOD CRIME AND THE RACIAL-SPATIAL DIVIDE* 36 (2010). Some have argued that a defendant should escape criminal liability if he reasonably believed that foreign law or custom justified his actions. See Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986) (proposing a defense based on foreign cultural acceptability). That argument, to put it kindly, is absurd. Perhaps, the rape of women is culturally acceptable in some parts of the world, but not in this country. Nor would warfare between Boston and Philadelphia fans be acceptable because the Eagles beat the Patriots in the Super Bowl. Endorsing any such defense would invite disregard of the law, discrimination, and chaos. It is for precisely those reasons that the courts have uniformly rejected a plea for a right to jury nullification. See Paul J. Larkin, Jr., *A Mistake of Law Defense as a Remedy for Overcriminalization*, 28 A.B.A. J. CRIMINAL JUSTICE 10, 15 (Spring 2013).

70. See SKOGAN, *supra* note 69, at 1-5.

71. See, e.g., JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); ERIC A. POSNER,

from scholars in the fields of cognitive, developmental, evolutionary, and social psychology.⁷²

According to the theory proposed by Professor Michael Tomasello, norms arose during the two stages of human evolution and societal development. The first stage occurred hundreds of thousands of years ago as humans evolved from primates. Over time, proto-humans came to realize that cooperation was a necessary strategy for survival because multiple hunters (“We”) were more successful than one (“I”).⁷³ The result was an awareness of the benefits of cooperative behavior, the recognition of a sense of group purpose, and the development of the “We” versus “They”

LAW AND SOCIAL NORMS (2002); Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325 (1980); William K. Jones, *A Theory of Social Norms*, 1994 U. ILL. L. REV. 545 (1994); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEGAL STUD. 377 (1997); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996); Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519 (1996); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

72. See, e.g., ELLIOTT ARONSON, *THE SOCIAL ANIMAL* (9th ed. 2004); GEOFFREY BRENNAN ET AL., *EXPLAINING NORMS* (2013); ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (Rev. ed. 2006); CRISTINA BICCHIERI, *NORMS IN THE WILD: HOW TO DIAGNOSE, MEASURE, AND CHANGE SOCIAL NORMS* (2017); *THE DYNAMICS OF NORMS* (Cristina Bicchieri et al. eds., 1997); CRISTINA BICCHIERI, *THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS* (2006) (hereafter BICCHIERI, *THE GRAMMAR OF SOCIETY*); DONALD BLACK, *THE BEHAVIOR OF LAW* (Special ed. 2010); HUGO MERCIER & DAN SPERBER, *THE ENIGMA OF REASON* (2017); DARCIA NARVAEZ, *NEUROBIOLOGY AND THE DEVELOPMENT OF HUMAN MORALITY* (2014); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (Rev. ed. 1971); ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); ROBERT SCHELLING, *THE STRATEGY OF CONFLICT* (Rev. ed. 1981); MICHAEL TOMASELLO, *A NATURAL HISTORY OF HUMAN MORALITY* (2016) (hereafter TOMASELLO, *HUMAN MORALITY*); EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* (2015).

73. TOMASELLO, *HUMAN MORALITY*, *supra* note 72, at 2-3 (“We proceed from the assumption that human morality is a form of cooperation, specifically, the form that has emerged as humans have adapted to new and species-unique forms of social interaction and organization. Because *Homo sapiens* is an ultracooperative primate, and presumably the only moral one, we further assume that human morality comprises the key set of species-unique proximate mechanisms—psychological processes of cognition, social interaction, and self-regulation—that enable human individuals to survive and thrive in their especially cooperative social arrangements.”).

concept that is essential to group cohesion.⁷⁴ Once combined, the success of those precepts ultimately gave birth to awareness of the desirability of group identity based on a shared morality.⁷⁵ The second stage stemmed from the need for specialization as communities grew larger. Subgroups became responsible for different tasks for community survival. To maintain cohesiveness, the overall community developed social norms to which each individual and subgroup was required to adhere even when doing so ran contrary to his or their personal interests. Community norms required sacrificing personal gain for the betterment of all. The community punished its members when they deviated from a norm in order to give it teeth for the purpose of encouraging compliance and to avoid creating in compliant members the belief that they were fools for foregoing individual advancement for communal benefit.

Aside from serving as commitment to overall welfare, compliance with social norms performed as an important signaling function.⁷⁶ It constituted a public declaration that a particular subgroup's members deemed the community's norms legitimate, while also manifesting each individual's commitment to the community's survival.⁷⁷ Small bands and their members

74. That sense of "We" can survive even if the group's members know little about each other except for the fact that they belong to the same group, a phenomenon known as the "minimal group effect." SAM GLASER, *SUSPECT RACE: CAUSES AND CONSEQUENCES OF RACIAL PROFILING* 54 (2015).

75. TOMASELLO, *HUMAN MORALITY*, *supra* note 72, at 5 ("Conventional cultural practices had role ideals that were fully 'objective' in the sense that everyone knew in cultural common ground how anyone who would be one of 'us' had to play those roles for collective success. They represented the right and wrong ways to do things.").

76. Of course, not every conforming behavior signals commitment to the community's needs. See POSNER, *supra* note 72, at 25-26 ("It should be clear that there are actually two ways in which signaling results in social norms. First, people engage in *costly* actions, like gift-giving, consumption of expensive goods, and shunning of people with certain characteristics, to signal that they value future payoffs more than bad types do. Second, people engage even in *cheap* actions, like combing their hair in one way rather than another, because their deviation from the norm will be punished by *others* who seek to signal their types by taking the costly action of shunning people who act in an unusual way. What we call a social norm, when, for example, we advise well-meaning strangers about how to behave in our communities, is simply a description of the behavior that emerges in these signaling equilibriums. In this model the social norm has no independent power, it is not an exogenous force, it is not internalized; it is a term for behavioral regularities that emerge as people interact with each other in pursuit of their everyday interests.") (footnote omitted).

77. TOMASELLO, *HUMAN MORALITY*, *supra* note 72, at 5 ("Moral norms were considered legitimate because the individual, first, identified with the culture and so assumed a kind of coauthorship of them and, second, felt that her equally deserving cultural counterparts deserved her cooperation. Members of cultural groups thus felt an obligation to both follow

displayed their allegiance to the larger community by adhering to collectively generated objective cultural values.⁷⁸ By internalizing social norms, individuals conformed their behavior to accepted group standards of right and wrong, which promoted “homogeneity of behavior” and communicated a strong sense of solidarity to insiders and outsiders.⁷⁹

The result was the creation of objective cultural norms that served several different community survival goals: They provided a standard of right and wrong conduct useful for measuring group allegiance; they created the opportunity for compliance to signal approval of and allegiance to communal norms; and they defined and telegraphed to neighbors a separate community to which no one could join without agreeing to sacrifice individual interests to the greater good.⁸⁰ At bottom, social norms and the governing institutions enforcing them provided the glue that held successful communities together.⁸¹ In a competitive struggle for resources, communities that were able to foster cooperation among their constituents were able to outcompete rival groups that were unable to generate comparable group commitment.⁸² Compliance with norms enabled each community to undertake survival functions efficiently while also presenting itself as a formidable adversary to neighboring bands that might potentially compete for resources.

and enforce social norms as part of their moral identity: to remain one who one was in the eye of the moral community, and so in one’s own eyes as well, one who was obliged to identify the right and wrong way of doing things[.] . . . One could deviate from these norms and still maintain one’s moral identify only by justifying the deviation to others, and so to oneself, in terms of the shared values of the moral community[.]”); *see also* POSNER, *supra* note 72, at 21 (“[S]ignaling is an important way not only of entering relationships, but also of maintaining them. . . . A large amount of social, family, political, and business behavior can be understood in terms of signals.”).

78. TOMASELLO, HUMAN MORALITY, *supra* note 72, at 5 (“And so was born a normatively constituted social order in which cooperatively rational agents focused not just on how individuals do act, or on how I want them to act, but, rather, on how they *ought* to act if they are to be one of ‘us.’”) (emphasis added).

79. *Id.* at 12; *see also* POSNER, *supra* note 71, at 24 (“[S]ocial norms are always about *observed* behavior . . .”).

80. TOMASELLO, HUMAN MORALITY, *supra* note 72, at 5 (“[In Stage Two], the normative standards were fully ‘objective,’ the collective commitments were by and for all in the group, and the sense of obligation was group-mindedly rational in that it flowed from one’s moral identify and the felt need to justify one’s moral decisions to the moral community including oneself. In the end, the result of all these new ways of relating to one another in collectively structured cultural contexts added up for modern humans to be a kind of *cultural and group minded* ‘objective’ morality.”).

81. *Id.*

82. *Id.* at 12.

Ancient social norms critical to community survival have endured to the present.⁸³ Norms have become the “grammar,”⁸⁴ the “cement,”⁸⁵ or the “traffic rules”⁸⁶ of society. Even today a norm is “a prescription about how to behave in a specific situation.”⁸⁷ Norms refer to “behavior, to actions over which people have control, and are supported by shared expectations about what should/should not be done in different types of social situations.”⁸⁸ A norm can be “formal or informal, personal or collective, descriptive of what most people do, or prescriptive of behavior.”⁸⁹ Norms provide “scripts” for us to follow in making unconscious, automatic choices.⁹⁰ Because social norms define collective obligations, they can require us to act contrary to

83. *Id.* at 6-7 (“One outcome of this two-step evolutionary process beyond great apes—first to collaboration and then to culture—is that contemporary human beings are under the sway of at least three distinct moralities. The first is simply the cooperative proclivities of great apes in general, organized around a special sympathy for kin and friends: the first person I save from a burning shelter is my child or spouse, no deliberation needed. The second is a joint morality of collaboration in which I have specific responsibilities to specific individuals in the specific circumstances: the next person I save is the firefighting partner with whom I am currently collaborating (and with whom I have a joint commitment) to extinguish the fire. The third is a more impersonal collective morality of cultural norms and institutions in which all members of the cultural group are equally valuable: I save from the calamity all other groupmates equally and impartially (or perhaps all other persons, if my moral community is humanity in general), with perhaps special attention to the most vulnerable among us (e.g., children).”).

84. “Norms are the language a society speaks, the embodiment of its values and collective desires, the secure guide in the uncertain lands we all traverse, the common practices that hold human groups together.” BICCHIERI, *THE GRAMMAR OF SOCIETY*, *supra* note 72, at ix.

85. JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* (1989).

86. *Id.* at 101.

87. CRISTINA BICCHIERI, *THE GRAMMAR OF SOCIETY*, *supra* note 72, at 94.

88. *Id.* at 10.

89. *Id.* at 1.

90. A “script” is a “stylized, stereotypical sequence of actions that are appropriate in [a particular] context” and “defin[e] actors and roles.” *Id.* at 94. “Social norms are embedded into scripts.” *Id.* (emphasis omitted). “[W]e reason in modular ways: Most reasoning does not involve the application of general-purpose reasoning skills. Rather, our reasoning is tied to specific schemata or scripts related to particular bodies of knowledge Once a problem is understood in terms of a familiar schema, reasoning is correctly applied. Logicians and moral philosophers handle abstract concepts professionally, but the vast majority of people need the familiarity of well-known schemata to seamlessly perform logical operations and successfully employ moral reasoning.” *Id.* at 95. That is, a norm calls for Response X in Situation Y. A script explains how Response X plays out. *Id.* at 96.

our self-interest.⁹¹ They are not “written and codified; you cannot find them in books or be explicitly told about them at the outset of your immersion in a foreign culture.”⁹² Sometimes, we learn when others teach us; occasionally, observation alone is sufficient; in some cases, we learn through trial and error.⁹³ We comply with “social norms,” the rules of the road for cooperative social behavior, for several reasons,⁹⁴ such as the desire to avoid suffering an externally imposed sanction for noncompliance or in reliance on a decision-making heuristic operating consciously (or unconsciously) whenever we face a normative choice.⁹⁵ Communal norms even influence

91. CRISTINA BICCHIERI, *THE GRAMMAR OF SOCIETY*, *supra* note 72, at 34, 38, 42 (“Social norms prescribe or proscribe behavior; they entail obligations and are supported by normative expectations. Not only do we expect others to conform to a social norm; we are also aware that we are expected to conform, and *both* these expectations are necessary reasons to comply with the norm.”).

92. *Id.* at ix (emphasis omitted).

93. *Id.*

94. *Id.* at 176-77 (“[N]orm formation is a step-by-step process. In a newly formed group, all members will anchor the current situation to what they perceive are previously experienced situations. Each group member will have a sense of what behavioral scripts are appropriate to the new situation because they resemble behaviors adopted in similar social contexts. As they interact, group members trade scripts, and, through discussion, they come to form a shared perspective what the ‘appropriate behavior’ is. Once a new, local script has been adopted people will interact according to the script and will even tend to apply the same script to new situations in which they are matched with different group members. When a script is agreed upon, a local norm is formed, and usually attempts to alter the behavior it controls will be met by sanctions . . . [S]ince we are not a *tabula rasa*, every new group norm will be the result of a process of importing and reshaping old scripts to new situations. We look for analogies with past experiences to guide us, and the final outcome of this collective search will be something new that we can still recognize as familiar.”).

95. *Id.* at 3-4. Heuristic decision-making involves the automatic recall of the same or similar situations and an analysis of the plusses and minuses of following alternative paths, all of which is done in milliseconds. Norms provide a default or starting point for that analysis. Heuristic decision-making differs from the classic Chicago School cost-benefit analysis, which is done consciously. *Id.* at 4-6, 68-69 (“[T]he deliberational route to behavior is hardly the most common *modus operandi*, and social norms are habitually followed in an automatic way. We leave a tip in a foreign country although we know that service is included, trust strangers, exact revenge, donate to charities, reprimand transgressors even when we are not directly harmed, and show favoritism toward groups to which we belong without much thought to the reasons for, or the consequences of, what we are doing. More often than not, we behave in the ‘right’ way in that we follow the rules of our group, subculture or society. In so doing we coordinate with others, fulfill their normative expectations, and collectively behave in ways that validate our material expectations.”); Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503, 522 (2007) (“[P]eople have rapid, immediate reactions to persons,

how we perceive the reality that gives rise to such choices, because people are far more willing to accept facts that support their social predispositions.⁹⁶

The evolutionary development of social norms serves a didactic function, Doris would have thought, because social norms are the background against which the law is imposed.⁹⁷ Anglo-American criminal law originated out of the customs of pre-Norman England.⁹⁸ “Early English ‘law’ reflected the Anglo-Saxon-Jute-Dane customs of the local community and was rudimentary at best, both ‘rough and crude.’”⁹⁹ The first “laws” were not even “laws” as we know them today. They consisted of either the local customs, “the folk-right,” of each separate English community, or decrees, known as “dooms,” which were essentially a tariff of payments due to the victim or his kin to forestall violent retaliation for injuries such as murder, mayhem, or cattle theft.¹⁰⁰ Everyone knew the conduct forbidden by local norms. William I left those customs in place after becoming king. To centralize his control over England’s diverse local communities, he established a system of justice. The crown’s judges initiated the process of “riding circuit” to adjudicate disputes across the kingdom. To develop rules of decision, royal magistrates developed “the common law”—*viz.*, the “customary practice,” the “common conviction of the community,” or the

activities, and processes, and the immediate reaction operates as a mental shortcut for a more deliberative or analytic assessment of the underlying issues.”).

96. See Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE L. & POL’Y REV.* 149, 151 (2006) (“[C]ultural commitments operate as a kind of heuristic in the rational processing of information on public policy matters. Again, citizens *aren’t* in a position to figure out through personal investigation whether the death penalty deters, gun control undermines public safety, commerce threatens the environment, et cetera. They have to take the word of those whom they trust on issues of what sorts of empirical claims, and what sorts of data supporting such claims, are credible. The people they trust, naturally, are the ones who share their values—and who as a result of this same dynamic and others are predisposed to a particular view. As a result, even citizens who earnestly consider empirical policy issues in an open-minded and wholly instrumental way will align themselves into warring cultural factions.”).

97. See POSNER, *supra* note 71, at 4.

98. See, e.g., J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 1-3, 8-9 (4th ed. 2007); CHRISTOPHER BROOKE, *FROM ALFRED TO HENRY III* 45 (1961); FREDERICK WILLIAM MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 1-4 (2008); FREDERICK WILLIAM MAITLAND & FRANCIS C. MONTAGUE, *A SKETCH OF ENGLISH LEGAL HISTORY* 6, 19, 193-99 (1915); FREDERICK POLLOCK, *THE EXPANSION OF THE COMMON LAW* 148-53 (1904); see generally Larkin, *Lost Due Process Doctrines*, *supra* note 28, at 327-31.

99. Larkin, *Lost Due Process Doctrines*, *supra* note 28, at 327.

100. *Id.* at 327, 329.

“general custom of England.”¹⁰¹ The common law carried forward the offenses likely to disturb ‘the king’s peace’” and added to that list conduct that the church deemed immoral.¹⁰² Over time, scholars such as Ranulf de Glanville, Henry de Bracton, Thomas de Littleton, Edward Coke, and William Blackstone compiled the common law into treatises, and parliament took over the business of defining crimes.¹⁰³

The result was that the English criminal law came to consist of dangerous, injurious, or appropriative conduct, as well as immoral behavior, crimes against man and God. The early common law, therefore, aligned perfectly with the need to keep the king’s peace and to abide by God’s rules.¹⁰⁴ Anyone who knew the Decalogue would have been familiar with English criminal law. The colonists brought that law with them to America.¹⁰⁵ Even today the average person acquires a basic understanding of the law by learning the mores and customs—the norms—of the community from family, friends, teachers, clergy, and respected elders.

But there is a limit to a person’s ability to acquire the necessary legal knowledge by observing and incorporating norms and social customs into their knowledge base. Scholars in anthropological, behavioral, and cognitive psychology have explained that people acquire knowledge of customs through interaction in various social settings as they observe the behavior of others, experiment with their own responses, and receive feedback whether their actions conform to accepted social norms.¹⁰⁶ Norms of course differ from legal rules. The former are informal; not always enforced; and, when they are enforced, the state plays no role. The latter are formal, are regularly enforced (within resource constraints), and are always enforced only by the state. Knowledge of customs therefore does not always translate into an

101. BLACKSTONE, *supra* note 1, at *67; Larkin, *Lost Due Process Doctrines*, *supra* note 28, at 330-31.

102. See Sayre, *supra* note 3, at 68-69 (“The original objective of the criminal law was to keep the peace; and under the strong church influence of the Middle Ages its function was extended to curb moral delinquencies of one kind or another.”).

103. MAITLAND & MONTAGUE, *supra* note 98, at 2; Larkin, *Lost Due Process Doctrines*, *supra* note 28, at 332.

104. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 125 (1881) (“[T]he fact that crimes are also generally sins is one of the practical justifications for requiring a man to know the criminal law.”); Sayre, *supra* note 3, at 68-69; *supra* note 44.

105. See, e.g., *Hurtado v. California*, 110 U.S. 516, 530 (1884) (noting that the Colonists “inherited the traditions of the English law and history”); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30-31 (1990); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 299-300 (1998); Larkin, *Lost Due Process Doctrines*, *supra* note 28, at 339-40.

106. See *supra* note 74.

understanding of the law, especially when the latter is divorced from moral considerations. A second difficulty is that the criminal law defines *prohibited* conduct, which, by definition, are those actions that others should *not* commit, making it more difficult to learn forbidden conduct through observation.¹⁰⁷ “As anyone who has lived in a foreign country knows, learning proscriptive norms can be difficult and the learning process slow and fraught with misunderstandings and false steps.”¹⁰⁸ The third difficulty deals with the different size of the relevant reference group. As the size of that group increases so too does the difficulty of accurately divining a group norm.¹⁰⁹ A fourth problem is that, as the difficulty increases of knowing the existence of a specific criminal law or how it applies in a particular setting, fewer and fewer members of the same cohort will be aware of what should be done to avoid it. The upshot is that there is no guarantee that individuals can learn the criminal law from observing behavior on a type of “on-the-job” training basis.

Communities enforce social norms through informal methods such as criticism, ostracism, shunning, or expulsion. The criminal law takes those sanctions as givens and adds formal, government-imposed penalties that take the form of fines, incarceration, post-release work disabilities, and, in extreme cases, capital punishment. Yet, the criminal law recognizes that there are limits on the ability of public obloquy and exogenous punishment to force compliance with social norms and legal rules. Jean Valjean was not the first person to steal food rather than starve, and he surely will not be the last. The defenses of necessity and duress exist because there are circumstances in which no one can reasonably be expected to avoid committing a crime.¹¹⁰ Each one recognizes that there can be force of

107. See, e.g., BICCHIERI, *THE GRAMMAR OF SOCIETY*, *supra* note 72, at 8 (“A norm cannot be simply identified with a recurrent, collective, behavioral pattern. For one, norms can be either prescriptive or proscriptive. In the latter case, we usually do not observe the proscribed behavior In most cases in which a proscriptive norm is in place, we *do not* observe the behavior proscribed by the norm, and it is impossible to determine whether the absence of certain behaviors is due to a proscription or to something else, unless we access people’s beliefs and expectations.”).

108. *Id.* at 1, 8 (“Often the legal system helps, in that many proscriptive norms are made explicit and supported by laws, but a host of socially relevant proscriptions such as ‘do not stare at someone you pass by’ or ‘do not touch people you are not intimate with when you talk to them’ are not codified and can only be learned by trial and error.”).

109. See Cristina Bicchieri, *Learning to Cooperate*, in BICCHIERI, *THE DYNAMICS OF NORMS*, *supra* note 72, at 18.

110. See *United States v. Bailey*, 444 U.S. 394, 409-10 (1980) (“Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious

natural (necessity) or human (duress) compulsion that no reasonable person can resist. They are “a tacit admission of man’s impotence against some of the greatest evils that assail him, as well as a measure of his moral obligation even *in extremis*.”¹¹¹ A person cannot murder someone else to avoid his own death,¹¹² yet the same person can leave a burning jail without committing the crime of escape.¹¹³ The existence of those defenses is a candid admission that neither informal social norms nor formal legal rules, nor the punishments that the community and government can impose for their violation, can always guarantee cooperation, compliance, and self-sacrifice in the face of an immediate, unavoidable severe harm.

That concession to human reality is instructive in this context. It would seem to follow that, if the law acknowledges limits to human willpower, the law should also be willing to recognize limits to human candlepower. After all, the latter is as much a feature of the make-up of people as the former. Moreover, the criminal law primarily serves to affect the behavior of actual

bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor’s control rendered illegal conduct the lesser of two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity Modern cases have tended to blur the distinction between duress and necessity. In the court below, the majority discarded the labels ‘duress’ and ‘necessity,’ choosing instead to examine the policies underlying the traditional defenses. . . . In particular, the majority felt that the defenses were designed to spare a person from punishment if he acted ‘under threats or conditions that a person of ordinary firmness would have been unable to resist,’ or if he reasonably believed that criminal action ‘was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense The Model Penal Code redefines the defenses along similar lines.” (citations omitted); MODEL PENAL CODE § 2.09 (A.O.D. 1962) (definition of duress), § 3.02 (same, “Choice of Evils”); LAFAVE, *supra* note 44, at 552-64 (definition of necessity).

111. HALL, *supra* note 3, at 416.

112. See *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884).

113. See *United States v. Kirby*, 74 U.S. 482, 487 (1868) (“[C]ommon sense accepts the ruling . . . that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—for he is not to be hanged because he would not stay to be burnt.”); see also *Tomoya Kawakita v. United States*, 343 U.S. 717, 736 (1952) (“An American with a dual nationality who is charged with playing the role of the traitor may defend by showing that force or coercion compelled such conduct.”).

or potential lawbreakers and the attitude toward lawbreaking.¹¹⁴ It is not primarily a means of educating the public about a particular subject matter, particularly one that is scientific or technical.

Start with a simple but undeniably true proposition: no one does or could know everything. Science offers a paradigmatic example. As Yale Law School Professor Dan Kahan has noted, “The public is only modestly science literate.”¹¹⁵ “Figuring out the empirical consequences of criminal, environmental, and other regulatory laws is extremely complicated. Scientists often disagree about such matters.”¹¹⁶ Even a scientific consensus “is based on highly technical forms of proof that most members of the public can't realistically be expected to understand, much less verify for themselves.”¹¹⁷ The difficulty is enhanced when you remember that experts can, and often do, disagree and that the average person resolves such disagreements by falling back on what he is culturally conditioned to accept as true.¹¹⁸

Consider the example that Professor Kahan uses to illustrate his point: medicine.¹¹⁹ Suppose *A*, a construction worker, is suffering from weakness, shortness of breath, and widespread bruising, and is in such distress that he visits his physician. The physician, suspecting that *A* may be suffering from cancer, refers *A* to an oncologist at the Johns Hopkins Medical School, who diagnoses *A* as suffering from leukemia and recommends that *A* undergo radiation, chemotherapy, and a bone marrow transplant to reduce and hopefully eliminate *A*'s cancer. *A* seeks a second opinion from the Mayo Clinic, and the oncologist there fully agrees with the one at Johns Hopkins. What is *A* now likely to do? *A* could read whatever he can find on the Internet to learn about his disease and the recommended treatments, but that does not guarantee that he will learn what he needs to know. *A* could then decide to apply to medical school, wait a year to learn if he has been accepted, spend four years in school, four more years in a residency program for internists, and then two additional years in an oncology fellowship in order to know as much as his oncologists already know. *A* is unlikely to choose that course because he would likely be dead before he

114. See POSNER, *supra* note 71, at 33 (“When a law changes an equilibrium, it has two separate effects. The first effect is *behavioral*: the law affects the actions people take The second effect is *hermeneutic*: The law changes beliefs that people have.”).

115. DAN M. KAHAN, THE OXFORD HANDBOOK OF THE SCIENCE OF SCIENCE COMMUNICATION 38 (2017).

116. Kahan & Braman, *supra* note 96, at 149.

117. *Id.* at 149.

118. *Id.* at 167.

119. KAHAN, *supra* note 115, at 7.

completed that 11-year period. Knowing that, A is likely to trust the oncologists' recommendations. As one scholar has noted, relying on the expertise of others is a "division of cognitive labour that is intrinsic to all cultures."¹²⁰

Ironically, that division of labor makes it extraordinarily difficult for the ordinary person to acquire the criminal law knowledge that today's codes assume he has. Beginning in the second half of the nineteenth century, industrialization and urbanization lead assemblies to draft the criminal code into service as a means of governing a new society. Gone was the agriculturally based economy known to the Framers. In its place was the industrial economy of railroads, steamships, and the telegraph. The dominant philosophy was Progressivism, which endorsed two fundamental tenets: First, properly educated, trained, and experienced specialists can find the necessary scientific or technical solutions for each of society's problems. Second, for those experts to do their job, the law should leave them free from governance by politics, which means from control by the public and their elected officials. The result was the creation of the Administrative State and governance by technocrats.¹²¹

Yet, there is a necessary consequence of a commitment to the necessity of governance by experts that the criminal law has yet to acknowledge, let alone accept, in full. If we leave regulation to specialists because only they can satisfactorily understand how to deal with difficult problems, then it follows that we cannot expect ordinary people to understand the complex solutions that experts devise. Social norms can teach us the basic principles required to generate the trust necessary for coordinated behavior to originate and endure. People learn and understand the simple norms that decry murdering, raping, robbing, or swindling our neighbors. But it does not follow that ordinary people are also capable of comprehending a highly technical subject matter. People can be expected to recognize that dumping a well-known poison such as arsenic into a municipal water supply is no less an assault than hitting someone with a two-by-four. The ordinary person, however, will not be able to extrapolate from elementary social go-bys what the answer is to a highly complicated subject matter. The difference between "recycled material" and "waste" is one such problem that is far too difficult for "a person of ordinary intelligence" to be able to negotiate. The average person lacks the education necessary to understand

120. Frank C. Keil, *Folkscience: Coarse Interpretations of a Complex Reality*, 7 TRENDS IN COGNITIVE SCIENCES 8, 368, 372 (2003).

121. See, e.g., ARTHUR S. LINK & RICHARD L. MCCORMICK, PROGRESSIVISM (1983).

that difference.¹²² Law school graduates—people in that twelve percent of the population with advanced degrees of some kind—would have difficulty drawing that distinction. In fact, few lawyers would be able to define it because the distinction is not a feature of the law of contracts, torts, civil procedure, or any other subject that is a required course in every law school. The distinction is drawn by regulations that only attorneys practicing environmental law have occasion to use. Even then perhaps only lawyers working in the subspecialty dealing with the proper storage and disposal of hazardous waste truly know what those concepts mean.

The problem is not with the delegation of regulatory authority to unelected administrative officials as a means of governing the industrial process. Legislatures need to rely on the expertise of nonpolitical experts in the executive branch for the technical know-how that governance demands. Congress may know that a problem exists (for example, the disposal of hazardous waste near a water supply) but recognize that it can only draft a broadly defined term (for example, “solid waste”) in a statute (for example, the Resource Conservation and Recovery Act) because it lacks the scientific knowledge to completely define that term. The sensible option would be to authorize an expert agency (for example, the EPA) to promulgate rules specifying the meaning of a term (for example, “hazardous waste”) by identifying specific examples of a term’s meaning (for example, “listed hazardous wastes”) or particular exemptions from its reach (for example, “recyclable materials”).¹²³ The most sensible regulatory approach to protect public health dictates that Congress grant agencies both the authority to list specific hazards and the flexibility to revise that list over time as science identifies new dangers.

The problem is also not with society’s decision to use law to provide a remedy for violations of governing statutes and rules. The law is a critical tool for governance of an industrial society and for remedying the harms that occur when a private or public train runs off the tracks. Tort law serves as a mechanism for allocating responsibility for industrial injuries. The law of equity defines the circumstances in which the government or an injured private party can enjoin future violations of statutes and rules. Both options are sensible ones for any society that wishes to force wrongdoers to internalize their costs, in the words of an economist, or to provide justice to parties injured by an errant train.

122. For a discussion of the difficulty that inquiry poses, see *Vidrine v. United States*, 846 F. Supp. 2d 550, 561-69 (W.D. La. 2011).

123. See Larkin, *Strict Liability*, *supra* note 58, at 1088-89 (citing the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-6992k (2012)), and 40 C.F.R. § 261.3 to 261.31 (2016)).

The problem is that it may be infeasible to use the criminal law as the enforcement mechanism. The reason is that the esoteric nature of the subject matter is beyond the ken of the ordinary person. We do not, and could not, demand that the average person *know*—that is, acquire and remember the scientific knowledge necessary to make the relevant decisions—the research-based science underlying the judgments critical to determine whether a particular substance is a hazardous waste. Only people with advanced education possess the know-how critical to making those decisions, education that, as explained above, the average person does not possess.¹²⁴ If we create administrative agencies and staff them with subject matter experts—physicians, biochemists, geologists, hydrologists, and so forth—because they are the only people knowledgeable enough to understand and solve a scientific problem, we must accept that a consequence of our decision is the recognition that ordinary individuals will not know what specialists know. That recognition should have a powerful effect on our willingness to use the criminal law to enforce what only a small percentage of the public can know. We do not convict and punish people for not understanding organic chemistry, at least not if we want ninety-nine percent of the population to remain outside prison.

Congress acts properly by enlisting help from experts staffing administrative agencies. It can best do its job of governing the nation by acting at a macro level—that is, by creating specialized agencies and empowering their experts to regulate at a micro level. By legislating in that fashion, Congress can also grant the executive branch considerable regulatory flexibility. An agency can revise existing rules or promulgate new ones whenever necessary to address worsening or newly emerging hazards without having to return to Congress for supplemental regulatory authorization. That practice also enables the agency to invoke its superior technical and scientific expertise regarding a particular substance, production process, or medical condition whenever a new problem arises or an old one becomes aggravated. Broadly written regulatory statutes granting administrative agencies room to act and react are valuable because they enable agencies to respond quickly by revising their rules and policies more quickly than Congress can (ordinarily) legislate. To be sure, some members of Congress are experts in a particular field; more than a dozen are physicians.¹²⁵ But, for the most part, they are generalists and lack the

124. See *supra* text accompanying notes 38-40.

125. Laura Dyrda, *Meet the 15 Physician Members of the 115th US Congress*, BECKER'S HOSPITAL REVIEW (Jan. 9, 2017), <http://www.beckershospitalreview.com/hospital-management-administration/meet-the-15-physician-members-of-the-115th-us-congress.html>.

knowledge necessary, for example, to decide what substances are hazardous. Scientists are better qualified for that task. If that is true, if members of Congress cannot make expert-level decisions, why should we expect that ordinary people can make them?

The specialization and division of labor that was a consequence of the law's response to industrialization and urbanization has not disappeared over time. On the contrary, it is more prevalent today than in earlier times. Consider, again, medicine. The European Union recognizes more than fifty specialties;¹²⁶ the United States has more than twice that number.¹²⁷ In fact, experts create subspecialties within their profession as they enhance their knowledge of a particular discipline and, as the joke goes, learn more and more about less and less. That development increases the likelihood for a successful resolution of a problem, but also makes it even less likely that an ordinary person will be able to know and understand what to do and what decisions to make. The average person knows that he lacks not only the generalized scientific knowledge necessary to answer a question, but also the know-how that experts acquire in their far more discrete subspecialties. Ordinary people recognize the value of that specialization. They see a cardiologist if their problem is heart disease, not cancer; a pulmonologist for breathing difficulties, not a psychiatrist; and an orthopedic surgeon for a torn ACL, not an obstetrician. In each case, an ordinary person realizes that he lacks the knowledge that a general practitioner possesses, let alone what a board-certified specialist knows.

Change the scenario, have the government charge *A* with a felony, and you are likely to see a parallel process: *A* is likely to seek advice from a criminal defense attorney, not a lawyer who drafts wills, gives tax advice, or handles mergers and acquisitions. *A* is also likely to rely on his attorney's recommendations regarding how to plead and what to do to defend himself against the charge. Part of the reason is that the ordinary person is not familiar with the options available to him. Recognition that a layman is not qualified to defend himself against a professional prosecutor was the principal reason why the Supreme Court of the United States concluded that the Sixth Amendment Counsel Clause grants an indigent defendant the

126. See *Directive 2005/36/EC of the European Parliament and of the Council on the Recognition of Professional Qualifications*, *Official Journal of the European Union*, 30.9.2005, Annex V (V.1. Doctor of Medicine) 58-90, (Sept. 7, 2005), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0036&rid=1>.

127. See Ass'n of Am. Med. Coll. (2017), <https://www.aamc.org/cim/specialty/exploreoptions/list/>.

right to be represented by a lawyer at trial.¹²⁸ There should be no doubt that the average layman does not know the law to the extent that an attorney does.

Society certainly does not expect that the ordinary person can acquire the legal knowledge necessary to practice law simply by being observant or researching the Internet. To practice law, one must pass the state bar examination, and to sit for the exam, one must graduate from an accredited law school or complete a multi-year apprenticeship in states that still allow someone to “read the law.” Like every other type of professional school, law schools do not assume that you know the subject matter before arriving; they teach every student what every lawyer needs to know. Criminal law is a basic course, often taken during the first year. A law student learns the basic principles of the criminal law, and later relearns them when studying for the bar exam. Attorneys who practice in that field—prosecutors, public defenders, and private criminal defense attorneys—learn far more about the criminal law in their jurisdiction through working with clients, opponents, judges, and the various personnel employed by the criminal justice system (such as police officers, federal agents, probation and parole officers, and so forth) than they learned in class in law school.

The growth in the number and size of today’s criminal codes, as well as in the complexity of some offenses, makes relevant the issue whether complete knowledge of the criminal law is humanly possible. For a “person of ordinary intelligence,” the answer is, “No.” Professor Glenn Harlan Reynolds make that point quite well: “[A]ny reasonable observer would have to conclude that actual knowledge of all applicable criminal laws and regulations is impossible, especially when those regulations frequently depart from any intuitive sense of what ‘ought’ to be legal or illegal.”¹²⁹ It is

128. See *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

129. Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 107–08 (2013); see also William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000) (“Ordinary people do not have the time or training to learn the contents of criminal codes.”).

doubtful that the law can place that burden on the average person. In fact, the task involved in acquiring that knowledge on a continuing basis would tax the capabilities of the average lawyer, law professor, or judge. As criminal law scholar Bill Stuntz once confessed, “even criminal law professors rarely know much about what conduct is and isn’t criminal in their jurisdictions.”¹³⁰

Of course, legislators do not always (rarely?) pass new criminal laws after serious reflection and debate over the need for a new rule and the wisdom of enlisting the criminal justice system as the mechanism for enforcing it. Elected officials generally respond to the demands of interested parties. Those parties want the society to formally declare that the subject of interest to them—for example, the environment—is also entitled to the protection of the criminal law—for example, the protection afforded to bodily integrity. Politicians, therefore, trade laws for votes. The former receive support at the polls; the latter, status. Now, they can claim, there is no difference between the importance of copyright theft and automobile theft. Both are investigated and prosecuted by the state, and both can land someone in jail for crossing the line. Forgotten or ignored in that process is any consideration of the average person’s ability to find that line when confronting what to do with, say, a barrel of oil that might or might not be able to be reused or with rags that might or might not contain a sufficient quantity of that oil to create a problem if they wind up in the wrong location¹³¹—to say nothing of whether lobsters have to be packed in plastic or cardboard boxes when caught.¹³² The criminal law should not demand the impossible in pursuit of some “other-worldly idealism.”¹³³

When challenged, legislators will say that prosecutors will exercise good judgment in selecting cases to prosecute. That is not a comforting proposition. Aside from the fact that our legal system places its trust in the law, not in people,¹³⁴ and aside from the fact that any other system would be “irrational” and “immoral,”¹³⁵ there is the problem that experience proves that prosecutors, like other government officials, at times will be far from

130. Stuntz, *supra* note 129, at 1871.

131. See Larkin, *Strict Liability*, *supra* note 58, at 1088-89.

132. See Meese & Larkin, *supra* note 17, at 777-80.

133. JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 416 (2d ed. 1947).

134. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (noting that ours is a “government of laws, and not of men”).

135. See Henry M. Hart, Jr., *supra* note 60, at 424.

the “angels” who would not be in need of legal restraint.¹³⁶ As long as we use the Vietnam-era “body count” method of measuring law enforcement success,¹³⁷ we will see abuses of the charging power.¹³⁸ Prosecutors will find some cases too tempting to pass up because they look like a few hours of plea bargaining and a “cheap stat.”¹³⁹

V. THE ROAD FORWARD

Where does that leave us? If we require that criminal laws already be on the books, if we require that those laws be accessible, if we require that they also be understandable by the average person—if we do all that, it makes little sense to find someone guilty if no reasonable person would have known where the line separating illegal from legal conduct lies. As Stanford Professor Herb Packer explained long ago:

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

136. See William R. Casto, *If Men Were Angels*, 35 HARV. J. L. & PUB. POL’Y 663, 666 (2012).

137. See Gene Healy, *There Goes the Neighborhood: The Bush-Ashcroft Plan to “Help” Localities Fight Gun Crime*, in GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING 105-06 (Gene Healy ed., 2004) (“Federal prosecutors already operate under an incentive structure that forces them to focus on the statistical ‘bottom line.’ Statistics on arrests and convictions are the Justice Department’s bread and butter. They are submitted to the department’s outside auditors, are instrumental in assessing the ‘performance’ of the U.S. Attorneys’ Offices, and are the focus of the department’s annual report. As George Washington University Law School Professor Jonathan Turley puts it, ‘In some ways, the Justice Department continues to operate under the body count approach in Vietnam They feel a need to produce a body count to Congress to justify past appropriations and secure future increases.’”).

138. See Alex Kozinski & Misha Tseytlin, *You’re (Probably) a Federal Criminal*, in IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE “THE AIMS OF THE CRIMINAL LAW” 43 (Timothy Lynch ed. 2009); Larkin, *Public Choice*, *supra* note 6, at 774-77.

139. It is difficult otherwise to explain the Justice Department’s decision to charge the defendants in *Bond v. United States*, 134 S. Ct. 2077 (2014) (charging a woman who placed a caustic agent on the doorknob of a neighbor having an affair with her husband with a violation of the federal criminal laws implementing the Chemical Weapons Treaty), and in *Yates v. United States*, 135 S. Ct. 1074 (2015) (charging a fishing captain who threw undersized fish overboard with violating the Sarbanes-Oxley Act on the ground that the fish were a type of “tangible object” normally used to store financial information).

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.¹⁴⁰

No legal system worthy of being labeled as just can ignore the plight of parties who cross a line that neither they nor any reasonable person could have known. We must address that problem. Precisely how to do so is beyond the scope of this Article, but there are at least three available options. We can require the government to prove that every defendant knew that he broke the law,¹⁴¹ we can allow someone who unwittingly

140. Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 123–24 (footnotes omitted). Packer does not stand alone in that regard:

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.”

Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 687 (1976) (quoting JOEL BARLOW, *ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE* (1792), reprinted in 3 *THE ANNALS OF AMERICA* 504, 511 (1968)) (footnotes omitted).

141. See *supra* note 57.

crossed the line to raise a mistake-of-law defense,¹⁴² or we can endorse something else nearly as effective.¹⁴³ Whatever choice we make, we need to make one. If we believe that our criminal justice system should never convict, let alone imprison, someone who was blameless because the law was unknowable, we must make the criminal law understandable. Until then, we must leave alone people who would mistakenly cross what can be an invisible line.

Doris, then, would have realized that she had one more question to consider. Does a mistake-of-law defense ask too much of the courts? How can a court know or learn what knowledge the average person possesses about the law? The defense requires a court to know the answers to inquiries such as the following: Does an average person know whether heroin trafficking is illegal (yes); whether selling software, electronic listening devices, explosives, night-vision goggles, and the like to foreign nations—whether Russia, China, or England—requires an export license (probably); and whether printing for your brother an article about him from a website requiring a paid subscription is illegal (who knows). If judges cannot answer those questions in a reasonable, objective manner, perhaps the appropriate course is to skip the issue altogether and decline to recognize a mistake-of-law defense.

Doris would have concluded, however, that there was no need to surrender to the fear that the courts cannot manage that inquiry. There are other issues comparable in their nature to what a court must decide in connection with a mistake-of-law defense. The most obvious one is the inquiry required by negligence law as to whether a person's conduct is reasonable. Courts have undertaken that inquiry for more than a century even though it requires them to make a judgment as to what a cost-benefit analysis would require and what the law makes relevant.¹⁴⁴ Moreover, there are occasions when a person must know what a statute, ordinance, or rule

142. That is the approach I have previously suggested. See, e.g., Paul J. Larkin, Jr., *Taking Mistakes Seriously*, 28 *BYU J. PUB. L.* 71 (2013); Larkin, *Public Choice*, *supra* note 6, at 777-81; Meese & Larkin, *supra* note 17.

143. See Paul J. Larkin, Jr., *Mistakes and Justice—Using the Pardon Power to Remedy a Mistake of Law*, 15 *GEO. J.L. & PUB. POL'Y* 651 (2017) (arguing that the president should use his pardon power to exonerate someone who would have been acquitted if a mistake-of-law defense had been available).

144. See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (Learned Hand, J.); Richard A. Posner, *A Theory of Negligence*, 1 *J. LEGAL STUD.* 29 (1972); Henry T. Terry, *Negligence*, 29 *HARV. L. REV.* 40 (1915); cf. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (discussing the relationship between state tort law and Federal Motor Vehicle Safety Standards issued by the U.S. Department of Transportation).

demands him to do or refrain from doing in order to act in a reasonable manner.¹⁴⁵ Similarly, judges must decide what society considers reasonable when deciding many Fourth Amendment issues.¹⁴⁶ The Amendment protects against unjustified government intrusions into a “reasonable,” “justifiable,” or “legitimate expectation of privacy.”¹⁴⁷ Part of the inquiry necessary to define that concept is to ask whether society is prepared to accept as reasonable an individual’s own subjective expectation of privacy.¹⁴⁸ Both elements must be present; the Fourth Amendment does not protect an individual’s objectively unreasonable expectation of privacy.¹⁴⁹ There also are other instances in which a court must decide a legal issue under a “reasonableness” standard.¹⁵⁰ That type of inquiry, Doris would have realized, is commonplace.

145. See PROSSER & KEETON ON THE LAW OF TORTS § 36, at 220 (W. Page Keeton gen’l ed., 5th ed. 1984) (“The standard of conduct required of a reasonable person may be prescribed by legislative enactment. When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligent to deviate. The same may be true of municipal ordinances and regulations of administrative bodies. The fact that such legislation is usually penal in character, and carries with it a criminal penalty, will not prevent its use in imposing civil liability, and may even be a prerequisite thereto.”) (footnotes omitted).

146. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

147. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 740 (1979), *superseded by statute* 18 U.S.C. § 3121(a).

148. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (“[A] Fourth Amendment search does not occur—even when the explicitly protected location of a house is concerned—unless the individual manifested a subjective expectation of privacy in the object of the challenged search, and society is willing to recognize that expectation as reasonable.”) (internal punctuation and italics omitted).

149. See, e.g., *California v. Greenwood*, 486 U.S. 35, 40-43 (1988) (no one has an objectively reasonable expectation of privacy in garbage placed at the curb for pick-up); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986) (a homeowner does not have an objectively reasonable expectation of privacy in what can be seen from public airspace into the fenced-in backyard within the curtilage of a home).

150. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (describing the standard to measure the effective assistance of counsel for purposes of the Sixth Amendment Counsel Clause: “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”); *United States v. Freed*, 401 U.S. 601, 609 (1971) (“This is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons, no less dangerous than the narcotics involved in *United States v. Balint*, 258 U.S. 250, 254 [(1922)], where a defendant

The inquiry required by a mistake-or-law defense is not materially different. The court would need to decide whether a reasonable person would have known that the conduct charged against him was a crime. To answer that question, a court would compare the conduct alleged to be unlawful against what the law has always recognized as illegal conduct. If “horse stealing” is a crime, it is not much of a leap to conclude that stealing a motor vehicle is just another form of thievery. Moreover, the common law distinction between crimes that are *malum in se*—offenses that are inherently evil—and *malum prohibitum*—offenses deemed an offense only because a statute so declared—is a useful go-by when making those judgments.¹⁵¹

There will be close cases, of course. There always are when the law requires a line to be drawn. But a fine line is just that: fine, not invisible. Judges should be confident that they will be able to identify reasonable legal mistakes with the same degree of objectivity and skill that they already display when defining the reasonableness of factual mistakes.

was convicted of sale of narcotics against his claim that he did not know the drugs were covered by a federal act.”); Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 U. PA. L. REV. 2131 (2015).

151 See Larkin, *Strict Liability*, *supra* note 58, at 1093-94 (“Indeed, it is fair to say that many regulatory statutes are categorically different from criminal laws. The latter altogether forbid identified types of actually or potentially harmful or dangerous conduct, while the former allow certain types of such conduct to occur in limited amounts, at particular times, or by certain parties. The environmental laws, for example, allow manufacturers to discharge certain pollutants into the air, water, or land so long as a responsible party has a permit for that activity and does not exceed the maximum authorized amount each period. By contrast, no one can obtain a permit to commit a bank robbery, and there is no maximum number of burglaries that a person can commit during a calendar year. If pollution is unavoidable and generating X amount of it can be and is expressly permitted, we cannot persuasively argue that pollution is as morally wrong as murder, rape, or robbery and that the criminal law must treat each harm as seriously as it treats these. Moreover, given that generating X amount of pollution is lawful, it is difficult to argue that X + Y always and everywhere is clearly wrongful, particularly when Y is small, when it is unduly onerous (or expensive) to identify precisely the exact difference between those two outputs (and their effect), or when it is equally difficult to know exactly when someone crosses the line between them. The result is that the average person would not necessarily know that the *actus reus*—or ‘guilty act’—element of a regulatory offense is a crime. If you also consider that the subject matter being regulated is one requiring specialized scientific or technical knowledge in order to understand the process at issue or the difference between outputs X and X + Y, the likelihood could approach a certainty that eliminating a *mens rea* element would result in the conviction of a morally innocent party.”) (footnotes omitted).

VI. CONCLUSION

Some hoary criminal law maxims still are sensible today. The presumption of knowledge of the criminal law, however, is not one of them. No one can know everything, and the larger and more complicated a subject matter becomes, the smaller will be the number of people who understand it. No criminal justice system worthy of that name can demand more knowledge of the penal law than what can be expected of the average person. The existence of the necessity and duress defenses proves that the criminal law accepts the reality that average individuals will break the law because they lack the fearless honesty of George Washington or self-sacrificing character of Sydney Carton. If so, the criminal law should also accept the reality that that the average person has less knowledge of the law than William Blackstone. Honesty and humility demand at least that much.