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Mistake of Federal Criminal Law: A Study of Coalitions and Costly Information

Erin O'Connor

Mistake of Federal Criminal Law: A Study of Coalitions and Costly Information

Richard S. Murphy[†] *and Erin A. O'Hara*[††]

This article analyzes Supreme Court and other federal court cases, to explain the seemingly disparate incorporation of mistake of law excuses into federal criminal statutes. Most of the cases can be explained from an information cost perspective. If an easily separable subset of the regulated population cannot be induced to learn their legal obligations given credibly low prior probabilities and high information costs, they are excused from criminal liability. Moreover, when criminal statutes are vulnerable to constituent protest, courts require that enforcers increase awareness of the law through information subsidies rather than convicting the ignorant. At least with mistake of law, the federal courts most often interpret federal statutes to enhance both the value and durability of legislative bargains.

I. INTRODUCTION

Law is useful only to the extent it is known. This is true from the perspective of a regulator or lawmaker, who will view a legal rule

[†] Assistant Professor of Law, George Mason University School of Law.
[††] Assistant Professor of Law, George Mason University School of Law.

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as a *message* that enables behavior to be channeled: it is information of the form, "if you do X, or something that looks like X, Y may happen to you." It is true also for the citizenry: a person deciding whether to act must make a prediction about the legal consequences of acting, and decide if the predicted legal sanction makes it worthwhile to refrain from acting. Announced law—statutes, judicial opinions, regulations, media stories about jury verdicts—is a set of data that aids in this prediction.

As with other forms of information, law is not free. The cost of acquiring it can be high, even infinite: a corporation may have to spend hundreds of thousands of dollars to determine if it is in compliance with tax laws, or securities laws, and it may never "know" for certain. Or the cost can be relatively low: a driver in determining whether his driving might cost him his license must make a small investment in knowing the traffic laws. Everyone must spend time ascertaining community moral standards that may be embodied in criminal prohibitions. In any event, the cost is not zero, and the investment in legal information is therefore sometimes not made. And sometimes an inadequately informed prediction turns out "wrong" in hindsight. In criminal law,[1] the regulator must decide whether to treat these mistaken violators any differently from violators who knew that what they were doing was illegal.

Traditionally, courts treated them alike. "Ignorance of the law is no excuse" is so widespread a maxim that it is one of the few things many people do know about the law.[2] A recent line of Supreme Court cases, however, permits mistake of law as a defense to particular statutory crimes, including evading taxes,[3] unauthorized selling and buying of food stamps,[4] and more recently in *United States v Ratzlaf*, violating the anti-structuring provisions of the Bank Secrecy Act.[5] Following this cue, several federal appellate

[1] Criminal law is the subject of this paper, but the broader issues of information cost, uncertainty, and the form of legal rules apply similarly to civil law.

[2] Compare William Blackstone, 4 *Commentaries on the Law of England* 27 (U Chicago, 1979) (maxim dates to Roman law).

[3] *Cheek v United States*, 498 US 192 (1991).

[4] *Liparota v United States*, 471 US 419 (1985).

[5] 510 US 135 (1994). *Ratzlaf* is part of a quartet of 1994 Supreme Court cases dealing with mistake of fact or mistake of law in federal criminal statutes. The others are *Staples v United States*, 511 US 600 (1994) (mistake of fact as to nature of weapon excuses liability under National Firearms Act), *United States v X-Citement Video, Inc.*, 513 US 64 (1994) (mistake of fact as to performer's age excuses liability under the Protection of Children Against Sexual Exploitation Act), and *Posters 'N' Things v United States*, 511 US 513 (1994) (neither mistake of fact nor mistake of law excuses liability under Mail Order Drug Paraphernalia Control Act, 21 USC § 857).

courts have expanded the list to crimes such as causing false reports to be filed with the Federal Election Commission and dealing in firearms without a license.[6] The Supreme Court generally crafts a mistake of law defense as a matter of statutory interpretation. Yet the same statutory phrases that mandated a defense in these contexts proved insufficient to warrant mistake of law in other contexts.[7] Under existing analysis, whether mistake of law is a defense to the myriad federal criminal statutes is highly unpredictable.[8]

Because mistake of law doctrine appears muddled, it provides a useful opportunity to test the explanatory power of competing economic theories. Mistake of law doctrine goes to the heart of the instrumental or deterrent effect of law, and because substantive criminal law is mostly statutory and mistake of law is mostly judicial, it provides a lens through which to observe the interaction of courts and legislatures. This paper attempts to answer the question: In what circumstances does economics predict that legislatures or courts will impose sanctions despite a mistake of law?

Our approach to this question is part of the inheritance from Gary Becker's pathbreaking model of criminal law enforcement, while offering a unique twist on his analysis.[9] Becker, reviving a tradition that dates at least to Jeremy Bentham, was the first modern theorist to model criminal law from an economic perspective.[10] Assuming fully informed rational actors, Becker analyzed the trade-off faced by a social authority between enforcement efforts and magnitude of sanctions. Several scholars have since explored the information problems confronting the social authority, but it is only recently that the consequences of information costs and uncertainty confronting the actor have been rigorously examined. A series of papers by Kaplow, Shavell, Polinsky, and others, trace some of the effects of relaxing the full information assumption.[11]

[6] See *United States v Curran*, 20 F3d 560 (3d Cir 1994), and *United States v Obiechie*, 38 F3d 309 (7th Cir 1994), respectively.

[7] See, for example, *United States v International Minerals & Chemical Corp.*, 402 US 558 (1971); *Hamling v United States*, 418 US 87 (1974); *United States v Yermian*, 468 US 63 (1984).

[8] Throughout this paper, we use the term "defense" interchangeably with "excuse", and intend no implications with respect to burdens of proof.

[9] See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J Pol Econ 169 (1968).

[10] See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum L Rev 1193, 1193 (1985).

[11] The two papers most relevant to mistake of law are Louis Kaplow, *Optimal Deterrence, Uninformed Individuals, and Acquiring Information About Whether Acts Are Subject to Sanctions*, 6 J L Econ & Org 93 (1990) ("Kaplow, *Optimal Deter-*

The emphasis in all these papers is on social optimality: modeling the optimal sanction, for example, or the optimal provision of legal advice, given that information is costly.[12] In this paper, unlike other law and economics treatments of information cost, we do not ask what the socially optimal rule is; such an inquiry may be futile, given its somewhat heroic assumption that substantive criminal prohibitions are themselves chosen to be socially optimal. Further, none of the papers, including Becker's, seeks to explore the behavior of courts or analyzes legal doctrine. For this task, we use as a starting point a different classic intuition of Becker's—regarding political outcomes[13]—and then explore how legal information cost and uncertainty affect enforcement of those outcomes.

The one paper that does discuss the courts' treatment of private information cost is Parker's *The Economics of Mens Rea.*[14] Treating *mens rea* as the common law response to the problem of costly information, Parker's article adds considerable nuance to the Becker thesis. His discussion, however, focuses not on mistake of law, but rather on what he terms the "self-characterization costs" of determining the nature and character of one's acts and the cir-

rence"), and Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality,* 17 J Legal Stud 123 (1988) ("Shavell, *Legal Advice*"). The Shavell article in particular provided us a useful framework for analyzing the value of legal advice, although the formulas we derive differ slightly from the formulas appearing in his Appendix. See also Louis Kaplow and Steven Shavell, *Accuracy in the Assessment of Damages,* 39 J L & Econ 191 (1996); Louis Kaplow and Steven Shavell, *Accuracy in the Determination of Liability,* 37 J L & Econ 1 (1994); Louis Kaplow and Steven Shavell, *Private versus Socially Optimal Provision of Ex Ante Legal Advice,* 8 J L Econ & Org 306 (1992); A. Mitchell Polinsky and Steven Shavell, *Legal Error, Litigation, and the Incentive to Obey the Law,* 5 J L Econ & Org 99 (1989); John E. Calfee and Richard Craswell, *Deterrence and Uncertain Legal Standards,* 2 J L Econ & Org 279 (1986) ("Calfee & Craswell, Deterrence"); I.P.L. Png, *Optimal Subsidies and Damages in the Presence of Judicial Error,* 6 Intl Rev L & Econ 101 (1986) ("Png, *Optimal Subsidies*").

[12] One paper that does take a public choice approach to information cost is Michelle J. White, *Legal Complexity and Lawyers' Benefit From Litigation,* 12 Intl Rev L & Econ 381 (1992) (lawyers will prefer an "intermediate" level of legal complexity). There also have been a number of positive analyses of criminal law. See in particular, Isaac Ehrlich, *The Optimum Enforcement of Laws and the Concept of Justice: A Positive Analysis,* 2 Intl Rev L & Econ 3 (1982), which points out the areas where the efficiency paradigm fails to accord with the reality of criminal law. Compare Posner, *An Economic Theory of the Criminal Law* (cited in note 10) (common law criminal law consistent with efficiency paradigm).

[13] Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence,* 98 Q J Econ 371 (1983) ("Becker, *Competition Among Pressure Groups*").

[14] Jeffrey S. Parker, *The Economics of Mens Rea,* 79 Va L Rev 741 (1993) ("Parker, Mens Rea").

cumstances surrounding those acts. Parker assumes a perfectly known legal standard, and to the extent he considers legal uncertainty, he treats mistakes of law and of fact as analytically indistinct. More significantly, the public choice lens in our paper focuses us in a different direction.

Our approach, motivated by the public choice insight, starts with the recognition that substantive criminal prohibitions often will not reflect social optima. However, prohibitions usually will reflect the preferences of durable political coalitions. In creating the bargains desired by politically powerful coalitions, legislators will not always prefer maximal enforcement against mistaken violators. Sometimes, to sustain the political equilibrium that gave rise to the prohibition, legislators will prefer to excuse certain classes of violators, for otherwise the legislation demanded by the coalition will collapse or be weakened. And as we observe in the case law, courts do not disturb the legislative bargain; in this context at least, their incentives appear to be effectively aligned with legislative desires.

We begin by sketching a theory regarding the incentives of government regulators (Part II), and then, after outlining a model of how costly information affects deterrence and knowledge of the law (Part III.A), we predict how regulators, particularly legislatures, would prefer to treat mistaken offenders when legal information is costly (Part III.B). The short answer is that, in many circumstances the legislature prefers no mistake of law defense, but in some limited cases it will prefer a specialized *reasonable* mistake of law defense, designed to preserve the incentives to learn the law to the maximum extent feasible.[15] Part IV then examines the role that the judiciary, with its own set of incentives and constraints, might be expected to play in fashioning criminal law doctrines such as mistake doctrine.

In Part V, we apply the analysis to the Supreme Court cases and their progeny. Our analysis accounts for the increasing, but still limited, acceptance of mistake of law. It reconciles four Supreme

[15] Of course, mistake of law is only one lever that regulators can pull to deal with the problems of costly information, ex ante uncertainty, and ex post error. Others include adjusting the level of precision of the law (using rules as opposed to standards), adjusting the sanction, or even changing the number of adjudicators or enforcers. And of course, the substantive rule itself can be altered to account for information problems, as is the case for many constitutional decisions. We touch on these subjects here, but we postpone an in-depth model of the complex relationship between the form of the law, the sanction, information costs and uncertainty to a future paper.

Court cases dealing with mistake of Constitutional law,[16] one of which, *Screws v United States,* will be reexamined by the Court this term.[17] Our analysis illuminates the disparate treatments of mistake of fact and law, a difference that has puzzled both economic and rights-based commentators, as well as the differing treatments of mistake of law in the civil and criminal contexts. It also helps explain a prominent example of Congress' disagreement with the Supreme Court on mistake of law (Congress overturned *Ratzlaf* by amending the statute). And perhaps most important from a doctrinal standpoint, we demonstrate how the federal courts use a stylized de facto negligence standard for mistake of law, even though for reasons of statutory interpretation courts often are constrained in their announced rules to excuse either all mistakes, or none.[18]

Finally, we use the mistake cases as one data set that helps answer a broad question: How do courts respond to legislative enactments? Our review of federal mistake of law cases leads us to conclude that, rather than promoting social optimality, the courts are often more appropriately seen as enforcing and enhancing legislative bargains. We argue informally in Part VI that a public choice approach explains the case law better than models based on social optimality, although in some secondary sense courts often do enhance efficiency. In presenting this argument, we hope to spark further public choice analyses of criminal law doctrines.

II. REGULATION AS A MEANS TO CHANNEL BEHAVIOR

Criminal law is enacted, interpreted, and enforced by government. It is a familiar tenet of both public choice and political science that our servants in public office may not be perfect agents of the pub-

[16] The four cases are *Cheek v United States,* 498 US 192 (1991), *Hamling v United States,* 418 US 87 (1974), *Screws v United States,* 325 US 91 (1945), and *United States v Murdock,* 290 US 389 (1933).

[17] See *United States v Lanier,* 116 S Ct 2522 (1996) (granting certiorari to address the scope of the holding in Screws).

[18] Some commentators have made normative arguments in favor of a "reasonable" mistake of law defense. See H.L.A. Hart, *The Aims of the Criminal Law,* 23 L & Contemp Probs 401 (1958) (for mala prohibita crimes, defendants should either know or have good reason to know obligations); Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined,* 17 Wm & Mary L Rev 671 (1976) (arguing for reasonable mistake of law standard); Paul H. Robinson, 2 *Criminal Law Defenses* ch 5 § 182(d) (West, 1984) (same). To our knowledge, however, only one other paper observes the use of "reasonableness" as a de facto governing standard for mistake of

lic weal.[19] Regulators—which we initially define broadly to include the legislature, enforcement agencies such as the Justice Department, hybrid enforcement/lawmaking institutions such as the Internal Revenue Service, and the courts—have their own interests, which are sometimes contrary to "social welfare."

Thus, in terms of prediction or description, the import of nuanced analysis of the socially optimal criminal law or sanctions is not clear. This is especially true of criminal law because it is almost exclusively statutory; academic scholars at least debate whether courts can be expected to pursue efficiency, whereas they have long abandoned the belief that legislatures and bureaucracies are driven inexorably toward the "public good." And even where regulators desire efficiency, there is no reason to believe they can effectively collect the information necessary to calculate the optimal rule or sanction.[20] After all, Kaplow convincingly demonstrated the near impossibility of the task when he derived the quite complex socially optimal sanction given costly information to individuals.[21] Presumably courts are even less well-equipped to ascertain the socially optimal treatment of criminal law, assuming the term has any definite meaning.[22]

To be sure, models of socially optimal criminal law are useful, but they have limited predictive value. Combining an understanding of the socially optimal result with an understanding of how reg-

law generally, and then only for state courts in the early 1900's. See Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 Harv L Rev 75 (1908) (ignorance not excused, but state courts sometimes excuse reasonable mistake as to whether facts constitute illegality). But compare George P. Fletcher, *The Individualization of Excusing Conditions*, 47 So Cal L Rev 1269, 1298-99 (1974) (with a few exceptions, reasonable mistakes of law generally not excused by states). More important, we give analytic content to the concept of reasonableness, and show that our stylized notion of reasonableness seems to be followed, at least roughly, by the federal courts.

[19] See James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* at 4 (U Mich, 5th ed 1974).

[20] See Parker, *Mens Rea* (cited in note 14).

[21] See Kaplow, *Optimal Deterrence* (cited in note 11).

[22] Rubin and Priest have each argued that the common law proceeds toward efficiency as a consequence of party incentives to litigate. Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J Legal Stud 51 (1977); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J Legal Stud 65 (1977) ("Priest, *The Common Law Process*"). While statutes do generate a limited scope of "common law" in the process of interpretation, statutory constraints often prevent the litigation process from moving toward efficiency in the context of criminal law. Moreover, Rubin argues that if only one of the litigants is a repeat player, legal rules developed by the courts may well be biased in that litigant's favor. Rubin, 6 J Legal Stud at 55-56. And there is no reason to believe the government fully internalizes the costs of litigation. The forces tending toward efficient precedents thus seem particularly lacking in the context of criminal law.

ulators will likely act may enable one to see the disparity. And theoretically, if one's normative goal were social optimality, the law-making and enforcing *procedures* might be adjusted to nudge the potential substantive outcomes toward efficiency. But in the absence of a theory as to why regulators will internalize the consequences of sub-optimal law, assuming they will do so and then determining the "best" rule cannot be the full story.

Regulators, of course, are not free to dictate whatever law they desire. Legislatures, where the bulk of criminal law is promulgated, are constrained in the sense that politicians rely on public approval for election or re-election. Yet legislators obtain election and re-election by fusing together winning coalitions of groups, each with its own private interests. Once in office, a legislator can be expected to better serve those coalitions that support him than the population as a whole.[23] This may include using the criminal law to help transfer wealth from losing to winning coalitions. Criminal law can in some circumstances be an especially tempting means for coalitions wishing to bend the law in their favor, because it entails a greater public subsidy (police, prosecutors, prisons) than does civil law to help maximize the effectiveness of those transfers.[24] For our purposes, the phrase "wealth transfers" need not be confined to monetary transfers—for example, coalitions may attempt to criminalize drug use either because it enhances their wealth or because they simply prefer to live in a society without drugs. Regardless, "serving the public" in this sense is certainly not guaranteed to improve social welfare, for successful transfers to the winners need only be net welfare-producing for the winners, not for the population as a whole. Criminal sanctions enforcing racial oppression (such as Jim Crow laws), or licensing requirements for pharmacists, or perhaps much of the regulatory state, are all pre-

[23] See Becker, *Competition Among Pressure Groups* (cited in note 13); William Dougan and James Snyder, *Are Rents Fully Dissipated?*, 77 Public Choice 793 (1993); William Dougan & James Snyder, *Interest Group Politics Under Majority Rule*, 61 J Pub Econ 49 (1996).

[24] The public subsidy of enforcement enhances the value of criminal prohibitions, but heightened procedural protections associated with criminal law may reduce the behavioral effect. And if the civil law provides monetary transfers to winners when losers fail to comply with the law, civil law may provide a greater likelihood that winners actually gain from legislation. Depending on how these factors play out, the coalitions seeking prohibitions may at times prefer civil sanctions. Further, to the extent heightened procedural protections reduce compliance, they also reduce overcompliance, which in some cases may make *criminal* law the preferred outcome of the regulated industry. None of this significantly affects our analysis, however, because many of the statutes we examine involve both criminal and civil sanctions.

dictable wealth transfers that presumably do not maximize "social welfare."

And even where, by happy coincidence, the substantive content of law bequeathed by the legislature is wealth maximizing, those charged with enforcement may not pursue optimality. First, enforcers do not pay for regulations: taxpayers, consumers, and the regulated entities bear the costs. Second, administrative agencies exist to regulate, and they will often work to expand the scope of regulation beyond the optimal. Indeed, some regulators depend on continued harmful activity to survive; for them, complete deterrence is counter-productive. Government agencies often have built-in features designed to alleviate some of these problems—oversight by other branches of government, for example, or limited tenure of employees. But the inherent "agency" costs are inescapable.

Because of all these problems, we make a different assumption. Whatever motivates the regulators, it seems clear that criminal law is essentially a tool for channeling behavior. Whether the regulators or lawmakers themselves are imposing their view of a Good Society on the citizenry, or are simply enacting the desires of a winning coalition into law, criminal law is designed and utilized to deter certain acts subject to constraints we identify in Part III. Achieving this deterrence is not free, of course: someone must bear administrative costs, sanction costs, and "overchanneling" costs. Throughout this paper, we use "underchanneling" and "overchanneling" from the point of view of the regulator's preferences. As discussed in the next Part, we assume that a regulator will attempt to maximize compliance with its mandates. Underchanneling, then, refers to less than perfect compliance, whereas overchanneling refers to situations where, because of the law, people fail to act in ways considered legal by the regulator. Because we use the regulators' preferences rather than social optimality as our benchmark, these terms differ from the terms "underdeterrence" and "overdeterrence" as used in other papers.

This does *not* mean, however, that deadweight costs born by criminals, taxpayers, or the regulated are irrelevant. Extending the theories of Becker and Peltzman,[25] interest groups are more likely to succeed in obtaining and then retaining legislation if they can minimize the social costs of the benefits they seek. As a consequence, legislators serving those interests may very well partially internalize information costs and the deadweight costs of enforcement and

[25] Becker, *Competition Among Pressure Groups* (cited in note 13); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J L & Econ 211 (1976).

punishment. But the value to a group of a substantive criminal statute is enhanced the more effectively it channels behavior. Minimizing the costs of channeling is helpful to that group only if it can be done without significantly affecting the channeling itself.

Of course, Congress is well aware that the other branches of government play a role in the behavioral incentives that individuals ultimately confront. Administrative agencies, prosecutors and courts might be expected to act in a manner that distorts the incentives Congress attempts to create. As a result, the legislature may draft a substantive criminal statute more broadly (or narrowly) than it might in isolation, to achieve more effectively the goals of the interest groups served. In the end, however, we assume the legislature attempts to maximize compliance (regardless of social optimality), subject to the constraint of avoiding undue costs to political opponents of the legislation.

III. CHANNELING BEHAVIOR WHEN INFORMATION IS COSTLY

A regulator's ability to channel behavior turns on the incentives that individuals face. Both the regulators and the regulated will presumably respond rationally to the fact that law is costly and uncertain. In this Part, we present a model of how people will respond to their uncertainties about regulation.

A. Criminal Law and Actors' Incentives

Assume a risk neutral person is contemplating whether to commit an act, which may or may not be illegal. If he does not act, nothing happens. If he acts, he will receive an expected benefit $b > 0$. He also will incur a sanction F if and only if (1) the act is illegal, (2) he is caught, and (3) he is convicted. Let p = the person's subjective probability the act is illegal; r = his subjective probability he will be apprehended if the act is illegal; q = his subjective probability he will be convicted if the act is illegal and he is caught.[26] We assume p, q and r are independent of one another. We assume further the actor knows F.[27]

[26] We assume that the probability of apprehension and conviction if the act is legal is zero. That is, we assume no perceived error in the court's determination of what is illegal. See Png, *Optimal Subsidies* (cited in note 11); Calfee & Craswell, *Deterrence* (cited in note 11); Jason S. Johnston, *Bayesian Fact-Finding and Efficiency: Toward an Economic Theory of Liability Under Uncertainty*, 61 So Cal L Rev 137 (1987).

[27] If the law requires action, such as that certain precautions be taken, it does not change the analysis. The act can be thought of as "acting without the precaution," and not acting becomes "acting with the precaution." The benefit b equals the cost savings from not taking the precaution.

The person will act if and only if his benefit from acting is greater than the expected consequences of acting, that is:

$$b > pqrF. \quad (1)$$

For simplicity, we set $rF = S$, because we are not focusing on or varying r, the probability of apprehension. (S was Becker's "expected sanction"; he implicitly assumed that $p = 1$ and $q = 1$.) We now find that the person will act if and only if:

$$b > pqS. \quad (2)$$

The probability of conviction if the act is illegal, q, can turn on many things, such as the extent of procedural protection. We examine one factor: mistake of law. In the absence of a mistake of law excuse, we assume the person will be convicted (that is, $q = 1$). If mistake of law excuses, we assume that $q = 0$ if the excuse is available to the defendant. We consider these two possibilities in turn.

1. Incentives to buy legal information in the absence of mistake of law defense

Here $q = 1$, so that the person will act if and only if $b > pS$. The person is more likely to act when he has a high benefit relative to his expected sanction, and when his prior perception of the law's applicability (p) is low. For a given benefit and sanction, there is a certain threshold prior probability $k = b/S$, which will trigger the person's decision to act (or not). The expression can then be rewritten such that the person acts if and only if:

$$p < k. \quad (3)$$

Informally, this means that the person looks at the benefit he expects from acting, and at the legal sanction he might get if it turns out the act is illegal, and then calculates how certain he needs to be that the act is legal before he acts. The "needed certainty" that the act is legal is represented by (1-k), with k being the threshold certainty the act is *illegal.* If he has a lot to gain, his threshold k will be high: he will act even if it is quite likely the act violates the law. If he has little to gain, his k will be low: he will not act unless and until he is quite sure the act is legal.

Assume the person can improve his prior estimate of the law's applicability by purchasing information at cost c. This may mean the cost of going to a lawyer or a library to look up a statute, or it may mean the cost of additional research to enhance the person's confidence in his estimate p. The cost c is unique for each person and each act. Buying the information does not itself affect liability, because no mistake defense is available.

Of course, the decision whether to purchase the information must be made without knowledge of what the information will portend. Nonetheless, the value of the information will depend on the individual's expectations of the possible outcomes from investing in the information, with the possible outcomes defined as a probability distribution $f(p_1)$, where p_1 here represents the updated probability the act is illegal, as gleaned from all available legal information.[28] The prior probability p equals the expected value of $f(p_1)$.[29]

Restating this in English, a person can buy information about legality (such as by consulting a lawyer) if he wishes. There is a range of potential probabilities that could come back from the lawyer, represented by p_1: for example the lawyer could say, forget it, the act is illegal ($p_1 = 1$), or the law is a toss-up ($p_1 = .5$), or the act is clearly legal ($p_1 = 0$). Before deciding whether to buy the information, the person must anticipate in some sense what the lawyer will say. These expectations are probabilities represented by $f(p_1)$ for each outcome p_1.

The expected value of legal information depends on whether the person would act in the absence of the information. See Figure 1. If the person would be inclined to act without information ($p < k$), the information has no value unless it induces the person to refrain from acting ($p_1 < k$). To simplify, we consider the special case where the information purchased will provide a certain outcome: that is, the lawyer will tell the person either that the act is legal ($p_1 = 0$) or illegal ($p_1 = 1$). The expected value of the information is:[30]

$$\text{value} = p(S - b).$$

[28] For a description of this general approach and its roots in economics, see J. Hirshleifer and John G. Riley, *The Analytics of Uncertainty and Information—An Expository Survey*, 17 J Econ Lit 1375, 1395 (1971).

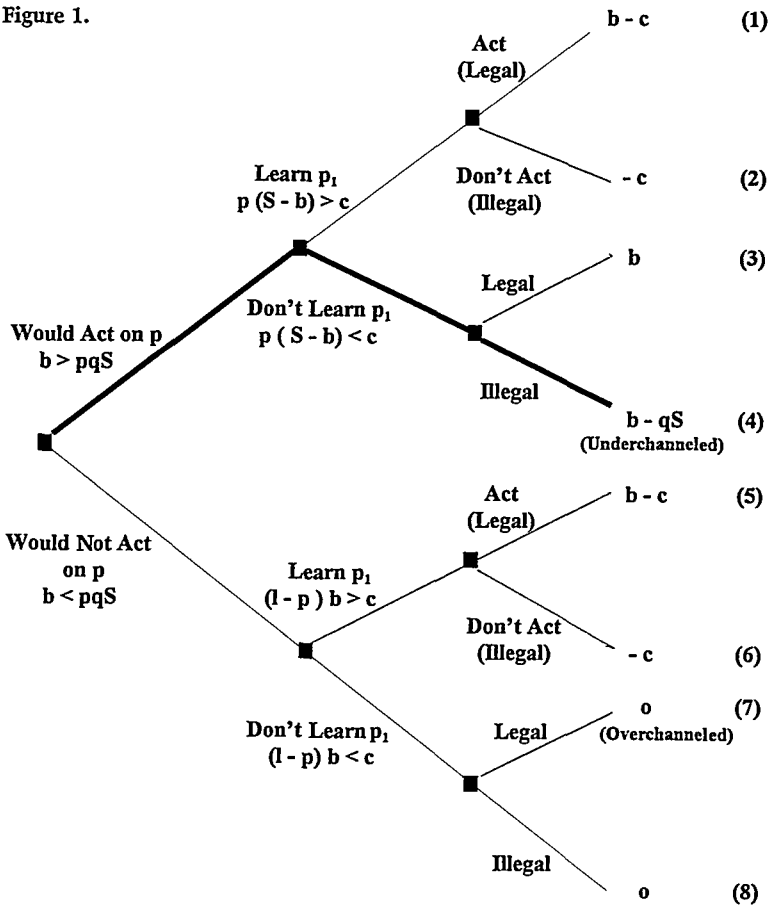
[29] The person's confidence in his prior probability will be reflected in the variance of $f(p_1)$.

[30] In the general case, the information will induce the person to refrain only if $b < p_1S$, in other words $p_1 > b/S = k$. For every posterior outcome $p_1 > k$, the person will decide not to act and will thus end up benefitting by $(p_1S - b)$. His expected benefit is $(p_1S - b)$ because by not acting, he will no longer benefit from the act (losing b), but will save the sanction cost that would have been imposed on him with a probability of p1. Thus, the expected value of the information will be:

$$v = \int_k^1 (p_1S - b)\, f(p_1)\, dp_1. \qquad (4a)$$

In the special case where the law can be known for certain, then we set p_1 = either 1 or 0, with $f(1) = p$, and $f(0) = 1 - p$. Then (4a) reduces to $v = p(S - b)$, as in the text. See Shavell, *Legal Advice*, Appendix at 147 (cited in note 11) for a similar result expressed and derived slightly differently.

Figure 1.



Intuitively, this simple expression means that a person who would otherwise act and risk a sanction S, can get value from finding out for certain the actual probability of illegality. With a *prior* probability p, the person will change his mind and not act, thus saving S and foregoing b. The expected value of the information is positive if $0 < p < k$ and $b < S$; that is, if the person is uncertain about whether the act is illegal, and if the person could save money by changing his mind and not acting. Recall that we assumed individuals are risk neutral: the information has value above and beyond any benefit to reducing risk, because information could (with probability p) increase the expected value of not acting to the point where refraining is better than acting.

Information will be purchased if and only if its expected value exceeds its cost. Conversely, those who do *not* purchase information will be the people for whom:

$$p(S - b) < c. \quad (4)$$

Equation (4) is more likely to hold for

1. high information cost c,
2. low prior probability p,
3. high benefit b,
4. low sanction S.

Of the individuals for whom equation (4) holds, some will turn out to have committed illegal acts. These individuals, who choose not to purchase information and whose acts turn out to be viewed by the regulator as illegal, are "underchanneled." An underchanneled individual is located at node 4 of Figure 1.

Equation (4) applies only to people who would act without information. There is another group who might remain ignorant: those who would decide not to act. If the person, based on his initial estimate p, has initially decided not to act, then information on the law will be valuable to him only if the resulting probabilities would counsel him to act. For him, information has positive value only where $k < p < 1$. Following the reasoning above, he will not buy information if and only if:

$$(1 - p)b < c.^{31} \quad (5)$$

Intuitively, equation (5) means that information has potential value to those who otherwise would refrain from acting only if the benefit to be gained b, times the probability of legality $(1 - p)$, exceeds the cost of the information. Some people for whom equation (5) holds will be overchanneled: their acts would have been legal (ex post, $p_1 = 0$). Equation (5) is more likely to hold for

1. high information cost c,
2. high prior probability p,
3. low benefit b,
4. high sanction S.[32]

[31] In the general case, the information has value only if $b > p_1S$. For each $p_1 < b/S$, he will act and gain a benefit b, with an expected sanction (given the new information) of p_1S. Thus, the value of the information is

$$\int_0^k (b - p_1S)\, f(p_1)\, dp_1. \quad (5a)$$

In the special case where $p_1 = 0$ (he may be told for certain the act is legal), and $f(0) = 1 - p$, then (5a) reduces to $(1 - p)\, b$. Thus, the person will remain ignorant and not act if $(1 - p)b < c$.

[32] Strictly speaking, equation (5) is independent of S. However, as the sanction is raised, $k\ (= b/S)$ falls, and more people fall into the category of refraining from acting. Some of these people will not purchase information (that is, will be "overchanneled"). The effect is clearer in the general case set forth in the preceding footnote.

2. Incentives if mistake of law is an excuse

Mistake of law potentially applies to the unfortunates who acted with the belief that their conduct was legal (or likely legal), but find their conduct was in fact illegal. If they are exonerated, however, they are hardly unfortunate. To the extent that mistake of law is known to be a defense, ignorance will become the preferred route for many of those who wish to act. In the terms of the model, not buying information actually reduces q, the probability of conviction. In other words, the expected payoff from remaining ignorant and acting, represented by nodes 3 and 4 in Figure 1, increases relative to the other possible courses of action. From a regulator's perspective, "underchanneling" will expand—more people will take prohibited actions. For example, if a regulator announces a "rule" that $q = 0$ for anyone who is "mistaken" in the sense of $p < 1$, then everyone aware of this rule who is in the slightest unsure about a prohibition's applicability will act and none of them will investigate the law, because $b > pqS = 0$. In other words, those who would not have acted without information, because their expected payoffs located them at any of nodes 5-8, now find themselves willing to act without information, node 4, since acting entails no cost. Similarly, those individuals at node 2 who would otherwise have investigated the law and ultimately not acted will simply forgo an investigation and act, node 4.

It is true that this "ostrich" effect will occur only for those who are aware that mistake of law could be a defense. Such persons, however, are likely to be sophisticated with respect to the law in question, and thus be the persons most likely to be influenced by the underlying statute to begin with. Hence a mistake of law defense carries with it a particular danger for a regulator attempting to maximize the law's effect on behavior. Further, even unsophisticated parties would be affected by a general mistake of law defense. The maxim "ignorance of the law is no excuse" would gradually lose its force as people slowly learned that it is false in many circumstances. Or put more formally, the marginal cost of people learning that mistake of law is (or might be) a defense to any number of crimes may over time be quite low, because it is something they can learn about criminal law generally without knowing the details of particular prohibitions.

To preserve the channeling effect of the law, a mistake of law excuse must be more narrow. That could be done using two limiting rules. First, "mistake" could be defined as having a low prior probability estimate, p. Second, the regulator could set $q = 0$ only for those *reasonably* mistaken as to the law. "Reasonable" could be defined several ways, but we focus on one—where the benefit to

"learning" the law is less than the cost, so it makes sense for the individual to not buy the legal information before acting. In the model, this is the category of persons for whom equation (4) holds—$p(S - b) < c$. These individuals could not have been induced to learn the law, even in a regime disallowing mistake of law defenses. The rule helps prevent a growth in the number of individuals for whom node 4 is the payoff-maximizing behavior.

This decision rule will have several effects relative to a rule where no mistake of law is allowed:

1. It will save wasteful sanctioning costs that the social authority would otherwise have to bear.
2. It will decrease overchanneling, because qS falls as q falls off of 1, making acting more attractive than not acting. For example, a person who thinks but is not sure that a tax deduction is permissible may take the deduction if he suspects he can rely on a mistake defense if his guess turns out to be incorrect. This individual has a low p and finds investing in information, given c, not worthwhile. In terms of Figure 1, the mistake rule allows the individual to move from node 7 to node 3, because he knows he will be excused if it turns out he was actually in node 4.
3. It will increase underchanneling, but much less than a pure mistake of law defense, because it will excuse only those who would not have purchased the information in any event, while leaving intact the incentives for others to invest in information. That is, nobody will move from node 2 into node 4. There will be some increased underchanneling, because more people will decide to act in the first place and thus there will be more people who potentially could fall into node 4 in Figure 1, when without the excuse they would have been in node 6 or 8.[33]

[33] More precisely, suppose the act is in fact illegal. There will be some people who would not have acted if no mistake defense is available ($q = 1$), because $b < qpS = pS$. These people can get $q = 0$, and thus be able to act, only if they meet the conditions of the defense: that is, p is low and $p(S - b) < c$. Thus, *additional* illegal acts will be committed by those for whom $b < pS$, $p(S - b) < c$, and p is low, presumably a small group. Nonetheless, the model's result that sanctioning those who would not learn the law in any event still causes some reduced deterrence is surprising. Compare Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions As a Deterrent*, 85 Colum L Rev 1232, 1255 (1985) (Shavell, *Nonmonetary Sanctions*") (reasonable mistake of law optimal because sanctioning a reasonably mistaken person will not reduce deterrence).

We explore the consequences of reasonable mistake of law in detail in the next section.

B. Legal Implications for The Regulator

Assuming a given substantive prohibition, we consider two factors that can affect both awareness of and compliance with that prohibition: first, the sanction, and second, mistake of law doctrine.

1. Enhancing the bargain by maximizing the sanction

Given that regulators will want to maximize their control over others' behavior, at first blush it seems the easiest way to accomplish this is to set the expected sanction maximally high, because that will maximize compliance. From Part III.A, increasing the fine or prison term, a component of the sanction S, causes more individuals who would have committed the illegal act to now refrain, both because fewer people will act in the first place under equation (1), and because more people who are considering acting will first buy information to determine if their act is illegal, as shown in equation (4). But there are two brakes on the willingness of legislatures to maximize the sanction.

First, the deterrent effect of a law is a function of the marginal or additional sanction for committing the act. If we assume an upper bound on punishment that can be inflicted because of, for example, the Eighth Amendment, then this punishment must be reserved for the most serious crimes. Behavior less harmful from the regulator's perspective must be punished less severely, if the actor is to have any incentive to refrain from committing more harmful acts. For example, an EPA regulation sanctioning polluters with the death penalty will result in reduced pollution, but it might also result in murdered EPA regulators. An act that is farther down the list of undesirable activities might therefore have a lower sanction attached to it than necessary to eradicate it, in order to reserve that sanction for more harmful behavior.[34]

Second, the regulator may have concerns other than entirely eliminating the act. Regulators often want to channel acts: that is, eliminate some acts but not other closely related acts, or eliminate some particular aspects of general conduct that is itself deemed

[34] The marginal deterrence point has a direct analogue in the efficiency literature. See, for example, Steven Shavell, *A Note On Marginal Deterrence*, 12 Intl Rev L & Econ 345 (1992). Our point is that even if a regulator's objective is not social optimality, but rather compliance with inefficient laws, a similar constraint on sanctions obtains.

valuable to the regulators. A high sanction might deter persons who engage in favored "nearby" or related activity from obtaining information that their acts are in fact not illegal. This follows from equations (1) and (5): an increase in S will mean that more people will not act even though their conduct is in fact legal.

For example, if the sanction for dumping bottles in the trash is raised high enough to deter *all* individuals with high benefits or low probability estimates, then others will begin throwing diapers and egg cartons in the recycling bin to avoid a fine for discarding them. Or people might take all their garbage somewhere else, reminding themselves to vote for the opposition candidate in the next election. In short, a regulator's attempts to decrease under-channeling likely lead to increased overchanneling. And the social costs of overchanneling decrease the likelihood that the regulation will persist over time.

Further, this problem is enhanced to the extent the law is inherently uncertain. Recall that we defined the threshold probability $(1 - k) = 1 - b/S$ as the individual's required certainty that an act is legal before he will act. The higher the S, the higher this threshold. If the law is inherently uncertain, placing a ceiling on even the informed probability level (one can never be more than 75% certain that a given deduction is permissible under the tax laws, for example), then increasing S means more people will *never* be able to be certain enough that their act is legal. They simply will not act. Because the tax codes are used to channel behavior as well as raise revenues, uncertainties regarding deductions, when coupled with relatively high sanctions, can limit the desired behavioral effects of the code.

The severity of the overchanneling problem faced by the regulator turns on several factors. First, and most obviously, the more a regulator, through the group he serves, values nearby or related activities, the more severe his constraints. Second, the more discrete and easily separable the prohibited acts are from related conduct the less the regulator worries about overchanneling. If individuals can cheaply ascertain whether acts are within the sanctioned group (that is, if c, the cost of information, is low), then increasing the sanction will not significantly increase overchanneling. Third, overchanneling turns on the elasticity of supply of the activity. For example, sanctions for non-compliance with building codes raise the cost of building; this matters to the building regulators if the additional cost significantly reduces the amount of construction.

Of course, overchanneling is relevant only to the extent the regulator cares about sustaining the supply of related or more general activity. Sometimes the regulator will be indifferent to the deterrent

effect on "legal" conduct. And occasionally the chilling effect on legal conduct is part of the point of the regulation; because of drafting or constitutional limitations, the regulator defines the prohibition more narrowly than preferred. Examples of this include 24-hour waiting periods for abortion, and to pick two examples from mistake of law cases, licensing requirements for hand grenades and restrictions on obscenity. And to return to the building code example, the very purpose of some building code legislation may be to discourage construction and thus enhance property values.

At some point, however, increasing sanctions will deter activities on the other side of the legislature's intended line. Consequently, we expect an inherent moderating influence on sanctions. And this conclusion has little to do with optimal sanctions. There may be many acts in which the social benefit is greater than the social harm, but the regulator does not care and still wants to prohibit the act; even then, the regulator is somewhat constrained in setting the sanction. As one would expect, there is an equilibrium sanction level that maximizes the regulator's desired influence over conduct.

Note how our approach to sanctions (an approach we reprise in mistake of law) differs from both sides of an important normative debate in the literature. Becker's original model was a *pricing* model: assuming perfect information, the optimal expected sanction S (which is the product of the probability of apprehension r and the penalty if apprehended) equals the social harm of the crime. That way, only criminals with benefits greater than the social harm will in fact commit the crime. Two criticisms arose, however: precision in "pricing" crimes is impossible because of information costs confronting the social authority, and what we really want is to *eradicate* crimes. Accepting this criticism, many economists retreated into a theory of efficient sanctions that "devalues" the benefit to the criminal and ignores overdeterrence of criminals: sanctions should be and are set "high" to eradicate crime.[35] We take a descriptive approach to the problem. The regulator does want to eradicate the activity that a coalition desires to prohibit, but at the lowest cost to other members of the coalition or even opposing coalitions. Thus, it cares about marginal deter-

[35] See, for example, George J. Stigler, *The Optimum Enforcement of Laws*, 78 J Pol Econ 526, 527 (1970) (disvaluing offenders' gain, and criticizing Becker); Shavell, *Nonmonetary Sanctions* at 1234 (cited in note 33) (disvaluing offenders' gain); Posner, *An Economic Theory of the Criminal Law* at 1215 (cited in note 10) (for common law crimes, optimal number of offenses is "close to zero"); Robert Cooter, *Prices and Sanctions*, 84 Colum L Rev 1523, 1550 (1984) (optimal amount of offenses is zero).

rence, partially internalizes overchanneling (both of which have similar but not identical counterparts in the efficiency literature), and ends up with a sanction that achieves a "compromise" compliance level. And as we argue next, the legislature then relies on the courts to enforce the legislative bargain by maintaining compliance but minimizing sanctions that are wasteful.[36]

2. Enhancing the bargain through mistake of law

As the model shows, certain categories of persons may be highly unlikely to know and thus be influenced by a given prohibition. If the governing law is in the form of a complex rule, mistake of law could be used to remove wasteful prosecution of such individuals, and to reduce the overchanneling costs of the prohibition. (And more rarely, if the governing law is in the form of a hopelessly vague standard, courts can use the void-for-vagueness doctrine to insist on re-formulation by the legislature.) In this way, the legislative bargain is actually enhanced: costs to potential opponents of the legislation are lowered, enabling the coalitions to achieve more to begin with for the same cost.

Yet a mistake of law defense can frustrate investment in legal information, inhibiting the overall effect of specific prohibitions. Thus, we would predict legislatures not to explicitly write into criminal statutes the requirement that the prosecution prove knowledge of the law. Still, there are circumstances where a narrow defense could promote the efficient implementation of the criminal law, with negligible effect on compliance. As we argued earlier, the legislature can more effectively deliver subsidies to interest groups if it can minimize the social costs of doing so. A "reasonable" mistake defense defined as in the model (low p, and $p(S-b) < c$) reduces both overchanneling costs and costs of sanctions

[36] Our conclusions also differ from Parker, *Mens Rea* (cited in note 14). Parker views *mens rea* as valuable in the efficiency sense, and persistent, because it helps minimize excessive information costs partly created by sanctions that he perceives as too high. The descriptive aspect of Parker's article rests on two assumptions: first, an explicit assumption that criminal sanctions are set higher than socially optimal to eliminate rather than price crimes, and second, an implicit (and controversial) assumption that judges are maximizing efficiency by countering the overinvestment in information created by excessive sanctions. As the text shows, as to the first assumption we argue instead that the government's ability to eradicate crime is often practically limited. And to the extent sanctions are excessive from a social optimality perspective, we argue that the Court is enforcing legislative preferences for a sub-optimal criminal law regime rather than mitigating the laws' effects. As can been seen in Part V, at least with respect to mistake of law we believe the cases comport more closely with our suppositions.

imposed on the "undeterrable". Punishment is costly, both in terms of the monetary cost of imprisonment and the additional court time consumed by defendants contesting their sanction. Therefore, because it does not significantly inhibit channeling of behavior, but saves costs elsewhere, we should see courts excusing those reasonably mistaken as to the law.

Our reasonableness definition requires some qualifications, however. Equation (4) could be true because of a low prior probability p, a high information gathering cost c, a high benefit, or a low sanction. The first two variables seem intuitive: If an actor had a prior belief that the act was unlikely to violate the law, and/or learning the details of the prohibition was expensive, sanctioning the individual has little effect. But the third reason—"the act was very beneficial to me"—hardly provides a compelling excuse, especially if legislatures are trying to prohibit rather than price the activity.[37] Because regulators cannot completely eradicate acts given the pressures limiting sanctions mentioned earlier, excusing the people who are not deterred because their benefits are high relative to those limited sanctions could seriously weaken channeling efforts. Moreover, even individuals who enjoy a high enough benefit from criminal activity to engage in that activity one time might choose a lower *level* of activity if they are sanctioned, given that the marginal benefit to the activity presumably declines the more it is engaged in.

As for the sanctions, equation (4) seems to predict that the mistake of law defense will be observed *less* often when sanctions are high. The higher the expected sanction, the less often people will reasonably act without verifying that their acts are legal.[38] (In terms of Figure 1, the payoff to node 4 falls as S rises.) Thus, the need for a mistake of law defense is reduced because it will rarely be reasonable to not know the law. But there are countervailing effects. First, the higher the sanction, the more costly each individual imposition

[37] Suppose an individual views it 50% likely that his planned building is in violation of code, yet decides to build anyway because he will save $5,000 by not complying and the sanction is only $6,000. He also could have hired experts for $1,000 to determine for certain whether he is in compliance, but he does not do so, because p(S − b) = 500 is less than c = 1,000. A regulator desiring compliance with building codes will not allow the builder an excuse no matter how "reasonable" it was for him to not look up the law.

[38] Recall that the model assumes the actor knows his expected sanction if his conduct turns out to be illegal. If the actor is mistaken as to both the legality of the act and the severity of the sanction (because, for example, he does not even know the entire regulatory environment he is in exists), then punishment would be pointless for him. But presumably, at some point higher sanctions themselves enhance the awareness of a regulatory regime.

of the sanction will be to the regulator, both in terms of vigorous litigation and actual imprisonment costs. Second, recall that the higher the sanction, the larger the overchanneling costs. In other words, higher sanctions lead more people to refrain from acting in ways valuable to the regulator out of fear of being mistaken.[39] (In terms of Figure 1, more people do not act as S rises, even for conduct that turns out to be legal, node 7.) The net effect on channeling is therefore indeterminate. Thus, perhaps surprisingly, we make no prediction about whether a mistake of law excuse is more likely when sanctions are higher. Interestingly, the Supreme Court and lower federal courts have in fact employed mistake of law in both high and low sanction environments.[40]

IV. JUDICIAL INFLUENCE

Occasionally, a single regulatory body manages to act as lawmaker, enforcer, and interpreter. Much more often, however, no single body enjoys a monopoly over channeling behavior. A full or even moderate treatment of the resulting strategic issues is obviously not possible here, but because mistake of law is generally a creature of the judiciary, we briefly explore judicial incentives and constraints. If legislative preferences are as we described, why would courts lend a hand? And assuming courts act to promote legislative preferences, what role can they play?

A. Judges' Incentives

To the extent judges are the lawmakers, they will want compliance with their rules. It is true that unlike legislators, judges (especially life-tenured judges) do not directly answer to coalitions trying to embody their preferences or private interests into law. Yet judges presumably select their profession because they want to impose

[39] In terms of Figure 1, not knowing ex ante whether they will end up at node 3 or 4, individuals may choose not to act. Mistake of law allows some people to move from node 7 to node 3 once they know that a mistake that lands them in node 4 will be excused.

[40] For examples in a low sanction environment, see *United States v Bishop*, 412 US 346 (1973) (mistake of law is a defense to misdemeanor tax evasion prosecution as much as to a felony prosecution); *Lambert v California*, 355 US 225 (1957) (due process violation to convict defendant for failing to register as required by municipal misdemeanor ordinance in the absence of proof that felon had opportunity to know the law; sentence had been $250 fine and probation). For an example in a high sanction environment, see *United States v Frade*, 709 F2d 1387 (11th Cir 1983) (mistake of law is defense to Trading With The Enemy Act, which carries sanctions of up to ten years in prison).

their own normative beliefs on others. Most could have much higher incomes in private practice; the difference is made up by something else: part leisure, part prestige, and significantly, influence over the law. Judges become judges for the same reason individuals form coalitions: to influence people.[41]

Of course, when an individual judge is confronted with a defendant who seeks excuse because he did not learn the law, that judge will rarely himself be the author of the law. That judge may have no more desire to encourage compliance with disagreeable common law then he does to encourage compliance with disagreeable statutes. Nonetheless, the mutually reinforcing effect of stare decisis may help keep judges' behavior sufficiently incentive compatible so that treating the judiciary as a single entity often makes sense.[42] And because the federal judiciary is monitored by a single decision-making entity, the Supreme Court, agency problems among individual judges are further minimized. Thus, if excusing ignorance reduces compliance with the law, one would expect judges to be quite chary of excusing ignorance of judge-made law.

Yet today criminal law is statutory. Judge-made substantive contributions still abound—an important one for our purposes is constitutional limits on statutes. But since criminal law is largely an attempt by *legislators* (or bureaucrats) to channel conduct, can courts be expected to strengthen legislative mandates? If judges' normative preferences diverge from legislative outcomes,[43] and if judges are inclined to be activist,[44] statutory bargains will likely be weakened without structural or practical con-

[41] For an exploration of judges' utility functions, see Richard A. Posner, *What Do Judges and Justices Maximize?*, 3 Sup Ct Econ Rev 1 (1992).

[42] For an analysis of stare decisis as an imperfect solution to nonproductive strategic judicial behavior, see Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 Seton Hall L Rev 736 (1993).

[43] Often the criminal prohibition enacted by the legislature will accord with the normative preferences of the judge. Although a half-century of expansion in federal criminal law has engulfed so much conduct that criminal law does not always reflect widely shared beliefs about appropriate behavior, much of Title 18 of the United States Code as enforced channels behavior in relatively uncontroversial ways. At least two recent symposia have focused on the controversy over the *federalization* of criminal law. See *Symposium—Federalism and the Criminal Justice System*, 98 W Va L Rev 757 (1996); *Symposium—Federalization of Crime: The Roles of the Federal and State Government in the Criminal Justice System*, 46 Hastings L J 965 (1995).

[44] Many judges view their role as non-activist. A judge can propagate his or her views about law in many ways, and being a good agent of the legislature is to some the most defensible way. After all, vigorous enforcement of problematic law may be an effective way to expose its shortcomings.

straints on judicial behavior. Some such constraints surely exist on the federal courts. For example, the Supreme Court Justices, as the ultimate judicial interpreters of congressional statutes, are subject to extensive screening in the appointment process. As long as a majority on the Court remain non-activist, the value of legislative bargains is enhanced.[45] Moreover, even if activist judges wish to thwart particular legislation through a restrictive interpretation or invalidation, they may find it difficult to succeed. If the coalitions that formed to enact legislation are stable (and absent exogenous shifts they usually will be), then interest group transfers are unlikely to disappear with judicial invalidation of particular legislation. If the group seeking legislation was part of a majority coalition for legislators, then the legislators presumably benefit by continuing to regulate on the group's behalf. As a result, the legislation may simply return in a new, more complex, more expensive, and hence more inefficient form, as the New Deal Court found. This is not to say that judges have no power to impede legislation, merely that the exercise of that power will often be limited.

Consequently, judicial incentives may be largely compatible with the legislature's goals. Whether they are is a complex empirical question that may never be answered. But mistake of law is one area where the interaction between courts and legislatures can be observed. If the courts are acting as good agents of the legislature, then they can be expected to use criminal law doctrines, including mistake of law, in a way that maximizes the value to the interest group of the legislation itself. Mistake of law can help avoid wasteful sanctions, and avoid using judges' time in ways not likely to impact behavior. The doctrine must be sharply confined, however, to prevent watering down the channeling effect of the law itself. As we detail in Part V, this is what we observe the courts doing. To the extent criminal law is a legislative engine for pulling people in a certain substantive direction, judges rarely seem to be stopping the train, at least with mistake of law doctrine, and often they assist the conductor.

[45] Landes and Posner focus on the role of an independent judiciary in enforcing legislative bargains struck by the enacting Congress rather than serving the preferences of the present Congress. William Landes and Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J L & Econ 875 (1975). However, they never answer the question of why the judiciary serves any Congress at the expense of the judges' own normative preferences. Perhaps the judiciary's intermediate level of independence ensures general fidelity to congressional preference, while encouraging a focus on the originating Congress.

B. The Role of Judges as Good Legislative Agents

1. Administering "reasonableness"

We predicted that legislatures would prefer, at the most, to excuse only those who acted while reasonably mistaken as to the law. As with any legal rule, the application will be uncertain no matter how precisely defined, and reasonableness tests are notoriously imprecise. To the extent the imperfect administration of a reasonable mistake of law excuse will induce some to remain ignorant who otherwise would have learned and complied, deterrence will be reduced. Every legal test carries error costs with it, but because of its direct effect on compliance, one would expect the legislatures to be wary of even a reasonable mistake of law defense. And even if perfectly administered, some additional reduced compliance will result inevitably as the probability of conviction, q, is reduced for some. The same problems that exist with the pure mistake of law defense exist here, only less so.

On the other side of the coin, each sanction is wasted if imposed on a person for whom the prior probability is low enough and the information cost is high enough such that no information will be gathered. The courts, with greater hindsight than the legislature, can more easily weigh these costs against the watering down effect of allowing the excuse. One way to accomplish this is to conduct the "reasonableness" calculation on a statute-by-statute basis, sometimes as a matter of law, rather than for each person prosecuted under every statute. For each statute, a court can examine the universe of activity prohibited, and determine if a defined group of people can be expected to remain ignorant of the law. One can then expect a reasonable mistake of law excuse if:

1. Many actors "reasonably" will not know the law when they act (because p is low and c too high, given p, to obtain more information); and
2. Those actors are easily separable from the actors for whom not knowing the law is likely unreasonable (because they have a high p or a low marginal c); and
3. The legislative bargain is one in which imposing sanctions on the ignorant and overchanneling behavior potentially jeopardizes the bargain itself.

The first requirement reduces wasteful punishment and court time. The second requirement helps ensure that compliance will not be weakened. As to the second requirement, it could be that

the group reasonably mistaken as to the law can be easily identified and distinguished by fact finders. Or it may be that the courts find a way to distinguish the groups with a specific formulation of mistake of law. But if neither can be successfully accomplished, then the effectiveness of the prohibition itself is jeopardized.[46] The third requirement is where public choice comes in: it ensures that the enacting coalition gains something for the small reduction in compliance that a mistake defense entails.

Importantly, the fact that judges actually enhance the legislative bargain by reducing deadweight costs does not mean that aiding the bargain and maximizing social welfare amount to the same thing. If the underlying criminal law prohibits behavior that is valuable, the welfare-maximizing rule would be for the courts to let as many people go free as possible. Or at the least, for a court pursuing "efficiency", a dollar reduction in deadweight costs associated with enforcing the statute would be worth a dollar reduction in compliance with the statute. Courts would set rules that equally trade off such costs and gains. But a court enhancing the legislative bargain would not make such a trade; reducing costs has only an *indirect* effect on the legislative bargain— it matters only to the extent it induces the groups who bear such costs to resist the underlying bargain. In contrast, reducing the deterrent effect of the law causes a direct reduction in the value of the transfer itself. Thus, a court enhancing the legislative bargain will not fully internalize deadweight costs, but will fully internalize reduced compliance: the court will place a thumb on the scale in favor of compliance.

2. Subsidization of information costs: controlling the agencies

Sometimes the regulator can reduce the cost of information. Even a legislature subject to popular will, however, cannot be expected to fully internalize the costs borne by the populace of uncovering the law. Elected officials serve the members of their majority coalitions, not the entire citizenry. To the extent regulation represents a transfer from losing to winning coalitions, the gainers are even better off if they can impose the information costs on the losers. Other things equal, then, legislators prefer private markets in the provision of legal information.

Private markets often fail to maximize compliance, however, for the obvious reason that whenever equation (4) holds, the private

[46] The actor separability noted here is different from the act separability discussed earlier. See Part III.B.1. If actors are easily separable, mistake of law is more likely to excuse, whereas easily separable acts are less likely to warrant mistake excuses, because the overchanneling problems are reduced.

marginal cost exceeds the private marginal benefit to that information. Particularly when regulation is obscure yet generally applicable, the deterrent effect of the law is threatened without a public subsidy of legal information.[47] That subsidy could take many forms, including press releases, posters and notices in areas where illegal conduct occurs, or broadcast commercials. The legislators presumably prefer that public funds are expended to the point where the marginal benefit of increased deterrence, above and beyond that achieved in the private market for information, equals the marginal cost to the legislator and his supporters of the public subsidy. In any event, the public subsidy preferred by the legislature will not likely be the socially optimal subsidy, whatever that may be.

What role can the courts play in reinforcing legislative subsidization preferences? Where the legislature as lawmaker delegates to another entity the task of enforcing the law, agency problems may result in less public subsidization than the legislature prefers. A legislature may desire full knowledge of its prohibitions (to maximize behavioral influence), but an enforcement agency may not. The enforcement agency gets paid for *catching* criminals, not deterring them. To the extent the judiciary views its job as enforcing *legislative* preferences, it may nudge the enforcement agency toward greater subsidization of information costs in cases where much deterrence could be accomplished at small cost.[48] And as we shall see, it has.

V. THE SUPREME COURT AND LOWER FEDERAL COURT TREATMENT OF MISTAKE OF LAW: A STUDY OF DETERRENCE AND INFORMATION COSTS

To recap our predictions, we expect courts to take a cautious, highly limited approach to mistake of law. If the substantive law is judge-made or if courts faithfully promote legislative goals, we predict a mistake of law defense only when it can be applied to those who reasonably mistake their obligations without eroding the channelling effect of the substantive law itself. Recall also

[47] Alternatively the government could increase awareness of the law by punishing the ignorant, and capitalizing on the resulting media coverage. See Livingston Hall and Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U Chi L Rev 641, 648 (1941) ("A conviction for doing that which violates a new law, although not regarded as wrong in the community, is a matter of considerable interest and does a great deal to educate the community"); Wayne R. LaFave & Austin W. Scott, 1 *Substantive Criminal Law* § 5.1, at 587 (West, 1986) ("LaFave & Scott, *Substantive Criminal Law*"). In Part VI we discuss political constraints on using this alternative.

[48] Compare Joseph E. Murphy, *The Duty of the Government to Make the Law Known*, 51 Fordham L Rev 255, 285 (1982).

that "reasonableness" has a very stylized meaning for us: a mistake of law is reasonable only if the court expects that some identifiable and separable group has a low prior probability that the conduct is illegal and a sufficiently high cost of gathering correct legal information that they cannot be induced to know the law.

We think that the courts treat mistake of law as we predict. The federal courts have some difficulty perfectly incorporating a reasonableness standard into mistake of law because the mistake defense is largely a matter of statutory interpretation. The courts are thus constrained by the language of the statutes themselves. Many of those statutes prohibit "knowing" or "willful" conduct, and the question for the courts is whether the language applies to knowledge about the legal requirements themselves. As an official statement of law, then, the courts have a binary choice: either the prosecution must prove a defendant knew about the law or it need not. In many cases, the courts cannot explicitly use a reasonableness standard and simultaneously remain faithful to the language of the statute.

Nevertheless, as a practical matter, those who should have known the law go to jail. Before deciding that knowledge of the law is an element of the offense, the federal courts seem to consider whether the criteria examined above have been satisfied. If so, mistake of law becomes an excuse, and the courts often seem to rely on juries to, in effect, incorporate a reasonableness standard into mistake of law. When the juries have managed to do so, the appellate courts signal to the lower courts that challenges to the sufficiency of evidence about the defendants' knowledge will be unsuccessful.

We divide our discussion of case law into three parts. Section A explains why courts treat mistakes of fact and law differently. Section B discusses mistake of law as applied to judge-made substantive law, both common law and constitutional law. And section C analyzes Supreme Court interpretation of mistake of statutory law.

A. Mistakes of Fact and Law Distinguished

In contrast to mistake of law, which is available only in extremely limited circumstances and only where mistakes seem reasonable, mistake of fact excuses criminal conduct as a rule rather than as an exception. Mistake of fact, whether reasonable or not, is a broad defense to criminal liability, both at common law and in the federal courts.[49] Indeed, mistake of fact excuses were read into two fed-

[49] See Rollin M. Perkins and Ronald N. Boyce, *Criminal Law* ch 9 § 1, at 1028 (Foundation, 3d ed 1982) ("Perkins & Boyce, *Criminal Law*"); Model Penal Code and Commentaries § 2.04 (ALI 1985) (mistake need not be reasonable if the crime or the element of the crime involved requires that a person acted purposefully or knowingly).

eral criminal statutes by the Supreme Court during the 1994 term.[50] From a culpability standpoint this seems odd: unless the crime is *malum in se,* how could one be more deserving of punishment if unaware of the illegality than if unaware of what he is doing?[51] Yet viewed from the lens of information costs and deterrence, the result makes sense.

From a regulator's perspective, the disadvantage of mistake of law is that it reduces knowledge of the law and thus reduces compliance. A mistake of fact, in contrast, is much less likely to do so. To illustrate, consider the facts of *Staples v United States.*[52] Staples was convicted of possession of an unregistered machine gun. His gun, originally a semi-automatic rifle (firing only one shot per pull of the trigger), had been modified for fully automatic fire. Staples claimed he did not know the gun would fire automatically, and it had never fired automatically when he used it. The Supreme Court overturned his conviction, holding that the trial court should have instructed the jury that Staples' mistake, if believed, was grounds for acquittal.

Analyzed from an incentives perspective, the result is predictable. Staples himself aside, individuals have a strong interest in accurately characterizing the type of guns they are using. To the extent guns are used for hunting or safety, individuals presumably rely on those characteristics before deciding how challenging a situation to enter. Moreover, the physical characteristics of a weapon affect the price an individual is willing to pay for it and the care taken in cleaning, loading and storing it. Given that denying or limiting a mistake of fact defense is often extremely unlikely to have more than scant marginal effect on individual awareness, the

[50] *Staples v United States,* 114 S Ct 1793 (1994) (National Firearms Act prohibition of possession of unregistered machine gun requires government to prove defendant knew that weapon he possessed had characteristics that made it "machine gun" as defined in statute); *United States v X-Citement Video, Inc.,* 115 S Ct 464 (1994) (Protection of Children Against Sexual Exploitation Act's prohibition of knowingly transporting, shipping, receiving, distributing or reproducing a visual depiction involving the use of a minor engaging in sexually explicit conduct requires government to prove defendant knew the depiction was of a minor and that he knew the minor was engaged in sexually explicit conduct). For a more limited mistake of fact defense, see *Posters 'N' Things, Ltd. v United States,* 114 S Ct 1747 (1994).

[51] See Laurence Houlgate, *Ignorantia Juris: A Plea for Justice,* 78 Ethics 32 (1967) (those ignorant of the law do not deserve punishment); Douglas Husak and Andrew von Hirsch, *Culpability and Mistake of Law,* in Stephen Shute, John Gardner and Jeremy Horner, eds., *Action and Value in Criminal Law* 157 (Clarendon, 1993) (concluding that those reasonably mistaken as to the law should be excused entirely, and those unreasonably mistaken should have their sanction reduced).

[52] 114 S Ct 1793 (1994).

courts can economize on ex post sanction and court costs by excusing those who turn out to be mistaken.

The argument is of course more general than the facts of *Staples*. Independent of the law, people internalize the consequences of not knowing what they are doing. They already have an incentive to make reasonable efforts to know the facts surrounding their conduct. In contrast, they do not normally internalize the consequences of ignorance of the law, unless the governing criminal law rules force them to do so. In the mistake of law context, then, the defense is limited to prevent underchanneling. Mistake of fact is excused more liberally, to economize on sanctions and to prevent overchanneling. Note that both these concerns become more acute as the sanction grows. Not surprisingly, then, the Supreme Court has noted a greater need for a mistake of fact excuse in high sanction contexts.[53] In contrast, as we predict, concerns about high sanctions apparently play little role in the Court's mistake of law decisions.

This rationale for the distinction is buttressed by examining some of the limited circumstances in which mistake of fact is *unavailable* as a defense. For example, until recently the defendant in statutory rape cases typically was not excused for mistaking the age of the girl with whom he had sexual intercourse.[54] In these contexts, however, the defendant is presumably interested in the intercourse, not the age of the girl. Denying the mistake defense forces men to internalize the aspects of the conduct that are problematic to the regulators.[55] And in other situations, people can

[53] See, for example, *Staples*, 114 S Ct at 1802-04 (1994) (citing several authorities); *United States v X-Citement Video, Inc.*, 115 S Ct 464, 469 (1994).

[54] See *People v Olsen*, 685 P2d 52, 54 n 10 (Cal 1984) (en banc) (mistake of age no defense to statutory rape in overwhelming majority of jurisdictions); *State v Davis*, 229 A2d 842 (NH 1967); *Eggleston v State*, 241 A2d 433 (Md 1968); *State v Fulks*, 160 NW2d 418 (SD 1968).

[55] In the statutory rape cases, even reasonable mistakes of fact sometimes go unexcused. We think the explanation lies in regulator indifference to overchanneling. As Parker explains, one method for preventing overdeterrence in the criminal context is to excuse mistakes of fact. Parker, *Mens Rea* (cited in note 14). However, an alternative mechanism is to draft the statute to criminalize less conduct than the regulators actually want to deter, so that the overcompliance with the terms of the statute ends up more closely channeling behavior to the preferences of the regulators. As we show below, this technique may well be more common in areas where the Supreme Court has attempted to limit the regulators' wording of statutes with constitutional constraints. But it is true also of statutory rape: by criminalizing intercourse with girls under the age of fourteen, many individuals will forgo intercourse with sixteen year old girls. To the regulators, this chilling effect may not be overchanneling at all. In fact, in separate cases the California Supreme Court held that while a mistake as to age does not excuse the crime of lewd and lascivious con-

deliberately avoid learning some culpable facts without great peril in an effort to avoid criminal liability. An example would be a courier who is paid several hundred dollars to take a package across town. The courier may suspect that he is carrying contraband, but deliberately choose to remain ignorant of the facts to avoid possible imprisonment. In similar situations, courts generally use a "willful blindness" rule to deny the excuse.[56]

Another exception is found in the context of mistake of jurisdictional facts. In *United States v Yermian*,[57] for example, Yermian was convicted of making a false statement within the jurisdiction of a federal agency. Yermian had supplied false information to his employer in connection with a Department of Defense security clearance. He admitted knowing his statements were false, but denied knowing that his false statements would be transmitted to a federal agency. The Supreme Court held that the government need not prove Yermian knew of the jurisdictional fact. Although technically mistake of fact, from the perspective of incentives to uncover information, this case is much more like mistake of law: there is no incentive to learn the particular facts unless the law insists one learns them. Hence, Yermian's ignorance was no defense.[58]

duct with a child under fourteen, *People v Olsen*, 685 P2d 52 (1984) (en banc), a reasonable mistake as to age is a defense to the crime of statutory rape of a minor under age eighteen, *People v Hernandez*, 393 P2d 673 (1964).

Interestingly, in recent years more states have begun allowing mistake of fact defenses to statutory rape. See Garnett v State, 632 A2d 797, 802-03 (Md 1993) (by 1993, 21 states permitted a mistake of age defense in some form). This change of law may reflect changing views about the social costs of overchanneling behavior. The Supreme Court's holding in *United States v X-Citement Video, Inc.*, 513 US 64 (1994)—a mistake of fact as to age of the actor in a sexually explicit video is a defense—reflects similar changing assessments. In this First Amendment context, the Supreme Court does care about overchanneling, because it views non-obscene sexually explicit depictions of adults as potentially valuable speech.

[56] See, for example, *United States v Jewell*, 532 F2d 697 (9th Cir 1976); *United States v Restrepo-Granda*, 575 F2d 524 (5th Cir 1978). See also *Barnes v United States*, 412 US 837, 845-46 (1973) (although evidence did not prove Barnes actually knew he possessed stolen checks, it showed he must have known of the high probability the checks were stolen, which sufficed for conviction).

[57] 468 US 63 (1984). See also *United States v Feola*, 420 US 671 (1975) (defendant need not know the individual he is assaulting is a federal officer because identity of victim as federal officer serves merely to provide federal jurisdiction over crime).

[58] Interestingly, the Supreme Court declined to decide whether the government need at least prove that defendant knew *or should have known* of the jurisdictional fact. The jury had been instructed that such proof was required, but the government did not object to the instruction. See *Yermian*, 468 US at 75 n 14. A reasonable mistake of fact defense is, of course, fully consistent with our approach.

B. Mistake of Judge-Made Law

Returning to our analysis of mistake of law, we first treat mistakes of substantive laws that have been fashioned by the judiciary. In these cases, the judges find themselves in the position of both regulator and interpreter. Subsection 1 discusses mistakes as to the common law and subsection 2 mistakes about the constitutionality of criminal laws.

1. Mistake of common law

Criminal law had its genesis in the common law, and it is there that the maxim "ignorance of the law is no excuse" is easiest to predict. The common law generally prohibited acts "mala in se", those considered inherently evil.[59] Criminal law reflected widely shared social norms about highly immoral behavior. In such a context, an individual with a mistaken low prior belief in his act's illegality would be relatively rare. And because the act violated community moral standards, those people were on notice simply by living in society, or could cheaply become aware, that their conduct was not only immoral but also illegal. The person with a credible argument both that he was mistaken as to the law, and that the cost of correcting his mistake was prohibitive (high c), was exceedingly rare. Further, because the judges themselves developed criminal law, surely they had an interest in ensuring maximum compliance with their normative views as expressed in the law.

Moreover, where individuals could be easily separated, based on their peculiar characteristics, from the rest of the population, courts could use other means to excuse their behavior. For example, those who by reason of insanity could not appreciate that their conduct was wrongful have generally not been held accountable.[60] Similarly, young children have been exonerated from the criminal laws.[61] In both these contexts, individuals have characteristics that reliably separate them from others, prior probabilities are low and costs of information are prohibitively high.

Interestingly, the common law developed an exception to the mistake of law maxim that also fits well with our predictions.

[59] LaFave & Scott, 1 *Substantive Criminal Law* § 5.1, at 587-88 (cited in note 47); Hall and Seligman, *Mistake of Law and Mens Rea* at 644 (cited in note 47).

[60] See Model Penal Code and Commentaries § 4.01 (ALI 1985); Perkins & Boyce, *Criminal Law* ch 8 § 2 at 950-95 (cited in note 49).

[61] See Model Penal Code and Commentaries § 4.10 (ALI 1985); Perkins & Boyce, *Criminal Law* ch 8 § 1 at 936-50 (cited in note 49).

Where the mistake entailed a misunderstanding of a body of common law other than the criminal law itself, the actor was sometimes excused from criminal liability.[62] A classic example is *Regina v Smith*.[63] Smith had rented an apartment and, during the lease term, he installed roofing, wall panels and floor boards. On vacating the apartment, his brother damaged these items in an attempt to remove some electric wiring Smith had installed for use with his stereo equipment. Smith was convicted under the Criminal Damage Act of 1971, which provided criminal penalties for any "person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property."[64] Under landlord-tenant law, permanent fixtures become the property of the landlord. Thus, Smith committed the offense, even though the trial judge apparently conceded that it was quite natural for Smith to have concluded that the property he damaged was his own. The court of appeal overturned his conviction, finding that an honest though mistaken belief that the property was his own constituted a defense to the charge against him.

Smith was mistaken about a law developed by the courts, so why does the court allow his mistake to be an excuse? Here, the mistake of law defense is much less likely to water down compliance with the criminal law. A tenant will not initially know and likely not learn the intricate details of landlord-tenant law. A tenant would normally think that given his investment, the floor boards and wall panels belong to him. Consequently, the prior probability for tenants may well be sufficiently low so that they might reasonably mistake the law. If so, allowing the mistake of law defense will not likely reduce compliance, especially given that the tenant remains civilly liable to the landlord for damages. To save the opportunity costs of court time wasted on cases that fail to channel behavior, mistakes here become an excuse.[65]

[62] See Model Penal Code and Commentaries § 2.04(1) at 267-69 (ALI 1985) (where material element of offense incorporates, by reference, some legal characterization, defendant not guilty unless he was aware of a substantial probability of that characterization). See also *State v Sawyer*, 110 A 461 (Conn 1920); *State v Cude*, 383 P2d 399 (Utah 1963).

[63] 1 QB 355 (1973).

[64] Id at 358.

[65] Ignorance of non-penal laws tends to excuse only when, as in *Regina v Smith*, the costs of ascertaining civil duties is high. Compare Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 Ind L J 1, 41 (1957) (maxim applies to all penal law and "simple aspects of torts, family law and other non-penal laws which have obvious moral significance").

2. Mistake as to constitutional law

We predict that mistakes about the constitutionality of criminal laws would rarely immunize actors from criminal liability. Because constitutional law doctrines generally take the form of vague standards, one can almost always make an argument that a given law is unconstitutional. Allowing individuals to rely on these arguments to excuse liability could seriously water down the deterrent effect of the criminal law generally. And as with the common law, the courts use constitutional law to channel behavior. Here too the courts have an interest in ensuring maximum compliance with *their* dictates.

A further concern should make courts wary of fashioning a mistake of constitutional law defense. Stare decisis works to make decisions about constitutional law path dependent.[66] Each decision has to be made against a backdrop of legal doctrine that is difficult to alter or ignore. Hence, those who have a personal interest in the development of constitutional law have an incentive to try to manipulate the path of such developments by strategically timing test cases that are brought before the courts. In an effort to minimize that manipulation, then, courts can be expected to force individuals to suffer the consequences of incorrectly construing constitutional protections by denying a mistake of law defense. The denial helps to make it more likely that cases and their issues develop randomly rather than as a consequence of gaming by litigants.[67]

The analysis is not entirely straightforward, however. When conduct is close to the line, the specifics of constitutional law are hardly easy to predict. Further, in many instances improving one's guess is costly, requiring high-priced lawyer time. The consequences are overchanneling costs or wasteful sanction costs. As discussed earlier, one way to help minimize those costs is to allow a mistake of law defense. Then those who are aware they are near the line of illegality but in fact are acting in ways deemed valuable to the regulator will be more likely to act, knowing they are presumptively immune from having made a judgmental error. Thus, a constitutional mistake of law defense may appear in some limited circumstances where the Court feels secure that the defense will

[66] See Maxwell L. Stearns, *Standing Back From The Forest: Justiciability and Social Choice*, 83 Cal L Rev 1309, 1350- 67 (1995).

[67] Of course, the judges themselves may be attempting to manipulate the docket rather than permitting random law development. But either way, judges certainly want to minimize litigants' abilities to achieve through manipulation the *litigants'* substantive goals.

not reduce compliance. To see how the various factors play out, we examine four prominent Supreme Court cases treating mistakes about the constitutional law in the criminal context.

In the first, *United States v Murdock*,[68] Murdock had refused to give requested information to the Internal Revenue Service, asserting his Fifth Amendment right against self-incrimination. He was convicted of willfully refusing to supply information and took his case to the Supreme Court, which held that because he feared prosecution under the state rather than federal tax laws, he had no constitutional right to refuse to answer.[69] When the case was remanded, however, Murdock insisted his conviction was improper because his misunderstanding of his Fifth Amendment rights precluded a finding that his refusal to supply information was "willful", as required under the federal statute. The Supreme Court agreed with him, holding that his misunderstanding of the law was a defense to his charge.

In a much more recent case, *Cheek v United States*,[70] Cheek was convicted of willfully attempting to evade income taxes and failing to file income tax returns. He appealed his conviction to the Supreme Court, claiming, in part, that he mistakenly believed that the federal income tax on wages and salaries was not authorized by the Sixteenth Amendment. Here the Supreme Court rejected mistake of constitutional law as a defense, stating "Cheek was free in this very case to present his claims of invalidity and have them adjudicated, but like defendants in criminal cases in other contexts, . . . he must take the risk of being wrong."[71]

Both defendants in effect claimed that the application of the criminal tax provisions, as applied to them, was unconstitutional. Both turned out to be wrong. Why is Murdock excused by virtue of his mistake but not Cheek? One explanation is that Cheek's claims were frivolous. They had been universally rejected by the federal courts, and Cheek, who had himself been involved in previous litigation challenging the constitutionality of the income tax, was aware of the courts' lack of sympathy to his claim.[72] In contrast, the validity of Murdock's assertion of his Fifth Amendment rights was very much unsettled until he brought his first appeal to the Supreme Court. In the years preceding his assertion, the question

[68] 290 US 389 (1933).

[69] *United States v Murdock*, 284 US 141 (1931). This holding did not survive the incorporation of the Fifth Amendment into the Fourteenth Amendment. *Malloy v Hogan*, 378 US 1, 3 (1964).

[70] 498 US 192 (1991).

[71] Id at 206.

[72] Id at 194-96.

of whether one could assert a Fifth Amendment right because of probable incrimination under state law had been raised but not decided in one case and specifically reserved in another.[73] Because the law had been explicitly left unsettled in the recent past, the Court concluded that Murdock's assertion of his rights was not "so unreasonable and ill founded as to exhibit bad faith and establish willful wrongdoing."[74]

Moreover, Murdock found himself in a problematic situation driven by the Internal Revenue Service. He had to make a choice between answering and risking state prosecution or asserting his Fifth Amendment rights and risking federal prosecution. Unlike Cheek, who admitted he was attempting to bring a test case through the federal courts,[75] Murdock's refusal to answer had no strategic agenda component. And, once questioned by the IRS, Murdock had no choice but to risk criminal prosecution one way or the other. Cheek, however, faced noncriminal alternatives. As noted by the Court, he was free to pay his taxes, file for a refund, and, when denied, file a claim in federal court challenging the constitutionality of the income tax.[76] The procedures set up in the tax arena allow individuals to test their constitutional beliefs without threatening the deterrent effect of the tax laws themselves. Consequently, the Court had no need to weaken overall compliance with a mistake of constitutional law defense.

Two other Supreme Court cases, *Hamling v United States*[77] and *Screws v United States*,[78] turn on overchanneling costs. Hamling involved convictions under a federal statute prohibiting the knowing use of the mails for mailing or delivering obscene materials. The definition of obscenity, because it implicates First Amendment freedoms, has been left to the courts as a matter of constitutional law. Hamling and others had been involved in the compilation and printing of a book, *The Illustrated Presidential Report of the Commission on Obscenity and Pornography.* They had taken the presidential report, added photographs of the sexual activities described in the report, and put together a brochure that advertised the book for sale. The brochure contained, almost exclusively,

[73] See *Ballman v Fagin*, 200 US 186, 195 (1906) (issue involved but not decided); *Vajtauer v Commr. of Immigration*, 273 US 103, 113 (1927) (specifically reserved).

[74] *Murdock*, 290 US at 396. A later Supreme Court characterization of *Murdock* confirms that "[a]t the time [Murdock invoked the Fifth Amendment] the law upon the point was uncertain" and that Murdock's position was therefore "reasonable." *Browder v United States*, 312 US 335, 341 (1941).

[75] 498 US at 204-05 n 9.

[76] Id at 206.

[77] 418 US 87 (1974).

[78] 325 US 91 (1945).

selected photographs from the book, and was mailed to individuals in several regions of the country. A jury deemed the brochure obscene using the prevailing Supreme Court test, and the defendants appealed their conviction, claiming that they believed the brochure was not obscene under Supreme Court doctrine. To support their claim, defendants offered three pieces of evidence: similar materials were sold at newsstands throughout the country; a magazine featuring similar materials had received second-class mailing privileges; and similar materials had been found non-obscene by the Supreme Court itself. The Supreme Court held that the government need not prove Hamling was aware the brochure was obscene, within the meaning of Supreme Court doctrine.

The Court showed concern about underchanneling in *Hamling*, admonishing that "[t]he evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated."[79] But what about overchanneling—why is the Court not concerned about chilling valuable speech, especially given that the standard for obscenity is vague and difficult to ascertain ex ante?

In fact, the Court's overchanneling concerns have already been incorporated into the constitutional treatment of obscenity. Because Congress regulates as close to the constitutional line as possible, first amendment doctrine is intentionally over-protective to avoid chilling potentially high "value" speech. The Supreme Court (or Congress) perhaps does not care about deterring indecent speech. But if it sets the constitutional rule allowing indecent speech to be banned, the information costs associated with determining what is "indecent" will create overchanneling, effectively inducing some to refrain from speech that may be, say, half-decent. So the court broadens the defense, narrowing the prohibition to only "obscene" speech. Mistakes as to the definition of "obscenity" may deter some indecent speech, but the court no longer cares much. *Having already solved the overchanneling "problem", the Court has little need for a mistake of law defense.* The strong presumption against any weakening of compliance is not overcome.

Screws presents a fascinating contrast. The facts were highly charged: a Sheriff, Screws, beat a black man to death while the man was in his custody. Screws was prosecuted under a federal statute that provided:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected,

[79] 418 US at 120-21 (quoting *Rosen v United States*, 161 US 29, 41-42 (1896)).

> any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, . . . shall be fined not more than $1000, or imprisoned not more than one year, or both.[80]

Screws challenged the validity of the statute for failing to give notice of punishable acts. The legal issue was a broad one, because by its terms, the statute punishes any violations of constitutional rights committed under color of law.

Unlike the obscenity issue in *Hamling*, the Court cannot be confident that all the constitutional standards implicated in this statute fully incorporate overchanneling concerns. Constitutional rights cover broad territory and take many forms, and at times the rights delineated are intended to channel the behavior of government employees who have a strong incentive to act as close to the constitutional line as possible. Those officers are paid to be aware of their constitutional responsibilities and to uphold constitutional values, but to go no further than necessary so that the peace and security of the population as a whole can be maximized. A prominent example is the Fourth Amendment: presumably the police have a powerful incentive to search and seize as much as they can, and if they go over the line, the exclusionary rule does not hold them personally responsible. In such a context the Court may be less concerned with overchanneling when it sets the constitutional standard; it will attempt to precisely influence behavior.

The addition of the criminal statute, however, changes the calculus. Overchanneling of police behavior becomes a real risk. True, on-the-job training and the presence of legal staff significantly lower the costs of ascertaining constitutional rights already fashioned by the Court. But future developments can never be perfectly forecasted by government employees; new constitutional rules, specific as they may ultimately be, are crafted from hopelessly vague standards, such as "due process" and "probable cause". The cost of "correctly" applying vague standards to some official conduct becomes infinite. Faced with the inevitable tension between vigorous enforcement of popular laws and criminal sanctions for mistaking the permissibility of official actions not yet constitutionally tested, many individuals might quite rationally stay out of the fray entirely.

The Court prefers to channel behavior precisely, yet it values the added deterrent effect provided by the criminal statute. The solution, advocated by a plurality of four Justices, was to limit the

[80] *Screws*, 325 US at 93.

statute's application to previously articulated constitutional mandates.[81] The federal statute proscribed only "willful" conduct, and the plurality proposed using the language to cure the statute of potential vagueness problems by limiting prosecutions to actors who were given fair warning that their conduct fell within constitutional prohibitions. In effect, "willfulness" would narrow the application of the statute: "the specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them."[82] So construed, the plurality encourages maximum investment in learning and following its mandates, yet tempers overchanneling by shielding individuals who could not have known constitutional requirements. And as a bonus, wasteful sanctions are minimized.

The general approach of the plurality in *Screws* fits well with our predictions, but it has not yet been explicitly embraced by a majority of the Court, nor have specific details of the approach been addressed. The Court has just granted certiorari to consider these issues in the 1996-1997 term.[83]

C. Statutory Law: Cautiously Excusing Some Reasonable Mistakes

Congress rarely explicitly writes mistake of law defenses into individual criminal statutes. And for much of their history, the federal courts did not interpret federal statutes as excusing mistakes of law. Their treatment closely tracked the common law rule in state courts, and for similar reasons: mistake of law threatens investment in legal information and provides an excuse to circumvent the criminal laws. Even where poorly drafted statutes were admittedly ambiguous, mistaken interpretations were rarely excused. As noted by the Supreme Court, the common law rule:

[81] A fifth Justice, Justice Rutledge, appears to have implicitly ratified the approach, by stating, "[w]hen, as here, a state official abuses his place consciously or grossly in abnegation of its rightful obligation, and thereby tramples underfoot the *established* constitutional rights of men or citizens, his conviction should stand . . . ." 325 US at 131 (emphasis added).

[82] Id at 104.

[83] *United States v Lanier*, 116 S Ct 2522 (1996). In *Lanier*, two questions are presented: first, does *Screws* prohibit defendant from being convicted under the statute unless the right violated was previously made specific by Supreme Court decisions in factually similar circumstances?; and second, has the due process right to be free from sexual assault by a state official acting under color of law been made specific within the meaning of *Screws*?

> results from the extreme difficulty of ascertaining what is, bona fide, the interpretation of the party; and the extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public. There is scarcely any law, which does not admit of some ingenious doubt; and there would be perpetual temptations to violations of the laws, if men were not put upon extreme vigilance to avoid them.[84]

As the regulatory state expanded, however, with many more criminal acts "mala prohibita", the Court's treatment of mistake of law began a mild transformation. As the scope of federal criminal law encroached upon everyday behavior, many criminal defendants quite understandably complained that they didn't know their acts were criminal. Moreover, as the complexity of federal regulatory programs grew, it became increasingly costly for some individuals to find out that their acts were proscribed. In our terminology, p was low and c relatively high: without excusing some mistakes of law, then, sanctions would be imposed wastefully. And wasteful sanctions threaten to erode the durability of the transfers themselves. To remedy the problem, mistake of law cases over time increasingly took on the language of negligence. At times, the Court decided as a matter of law whether some individuals might reasonably be ignorant of the law in question. If not, mistake of law provided no excuse to criminal charges. If so, the Court was more likely to allow a mistake of law defense, especially where people who would not investigate their legal duties without the excuse could be easily segregated from those who might. In the latter situation, the Court's rule, as incorporated by the lower federal courts, resembles a de facto negligence standard.

To provide relevant background, we discuss the Supreme Court's treatment of "public welfare" cases in subsection 1. We then discuss three areas where mistake of law has become an excuse: in subsection 2, broadly applicable complex prohibitions such as criminal tax evasion; in subsection 3, laws that could be cheaply publicized by the regulator; and in subsection 4, the Supreme Court's most recent treatment of mistake of law, *Ratzlaf v United States.*

1. Where mistakes are rarely reasonable: "public welfare" cases

Because it is important to emphasize how the Supreme Court has remained cautious with respect to mistake of law, we begin with a

[84] *Barlow v United States,* 32 US 404, 411 (1833).

line of cases rejecting the excuse. In each of these cases, the regulated group is homogeneous and relatively sophisticated. Moreover, these individuals are generally in the business regulated; for them, the cost of ascertaining their legal duties is low for each regulated transaction. And by classifying these cases as "public welfare" cases, the Supreme Court implicitly recognizes that Congress was much more concerned about underchanneling than overchannelling.

We discuss three mistake cases that fit this pattern, all of which reject the defense. In *United States v International Minerals & Chemical Corp.* the defendant was charged with shipping sulfuric acid in interstate commerce and "knowingly fail[ing] to show on the shipping papers the required classification of said property, to wit, Corrosive Liquid, in violation of 49 C.F.R. 173.427."[85] The defendant asserted it was unaware of this picayune criminal regulation, but the Supreme Court held that such awareness need not be proved by the prosecution:

> [W]here, as here . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.[86]

In other words, it is not reasonable for the shipper to *not* learn the law. Those in the industry will have a low c, because they are repeat players. Even the dissent agreed with this point, asserting that "triers of fact would have no difficulty whatever in inferring knowledge on the part of those whose business it is to know."[87] The dissent did express concern about the "casual shipper, who might be any man, woman, or child in the Nation. . . who had never heard of the regulation."[88] But of course this is the point: the majority believed such a casual shipper would be exceedingly rare. Since almost all prosecutions will involve a member of regulated industry with a low c, the majority is unwilling to water down the deterrent effect of the sanction merely because of the rare individual who is justifiably unaware of a regulation when shipping sulfuric acid.

Similar arguments appear in two hybrid mistake of law and fact cases. In *United States v Freed,*[89] Freed was convicted of receiving

[85] 402 US 558, 559 (1971).
[86] Id at 565.
[87] Id at 569.
[88] Id at 569.
[89] 401 US 601 (1971).

a hand grenade that was not registered to him as required by the National Firearms Act. Although Justice Douglas' opinion is hardly a model of clarity on precisely what Freed alleged he did not know, the ultimate holding of the Court was that the prosecution need not prove knowledge of the weapon's unregistered status. As Justice Brennan emphasized in concurrence, the regulated devices were "major weapons" such that "the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it."[90] This comment smacks of *de jure* negligence: any mistakes would be unreasonable. And, he might have added, to the extent the absence of a mistake defense overdeters trade in hand grenades, Congress probably does not care nearly as much as it does about preventing too little registration.

The legislative preference for avoiding underchanneling was the explicit rationale in *United States v Balint*.[91] Balint sold opium and coca leaves without using a "written order on a form issued . . . by the Commissioner of Internal Revenue," a requirement of the Narcotic Act of 1914.[92] The Court had little patience with Balint's assertion that he lacked the requisite knowledge, emphasizing that the Act's "manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."[93]

[90] Id at 616.

[91] 258 US 250 (1922).

[92] Id at 251.

[93] Id at 254. As in *Freed*, the *Balint* opinion does not clarify whether the mistake was one of fact or law. But in this context, we would predict that even a mistake of fact might not exonerate. The cost of information is sufficiently low to the targeted sellers, and underchanneling sufficiently worrisome, that any marginal weakening of the statute is not tolerated. The same result occurs in a line of Supreme Court cases watering down scienter requirements for "public welfare" offenses, usually involving dangers to the populace. See, for example, *United States v Dotterweich*, 320 US 277 (1943) (misbranded drugs). Watering down scienter all the way to strict liability (that is, refusing to allow even a *reasonable* mistake of fact), as *Dotterweich* seemed to, is more surprising under our model, however. Even the *Balint* court limited itself to whether the statute required "the punishment of the *negligent* person though he be ignorant of the noxious character of what he sells." *Balint*, 258 US at 253 (emphasis added).

2. Permitting reasonable mistakes: taxes and food stamps

Over time, congressional regulations became more complex, and complex regulations, bolstered by criminal sanctions, became more likely to govern the affairs of the average citizen. Take, for example, tax laws and food stamp regulations. Both of these regulatory structures are complex in order to channel behavior precisely, yet both touch on the behavior of very large portions of the population as a whole, rather than being limited in scope to particular industries. Priors about the details of these laws are relatively disperse, depending on the individual background of those affected. And given both the complexity of the laws and the lack of expertise by many regulated in these areas, the costs of ascertaining legal duties is often high. In short, many people may quite reasonably remain ignorant of relevant legal details.

Criminal Tax Provisions. The federal tax code is designed to both raise revenues and channel conduct toward more desirable activities. Federal regulators, most notably Congress and the Internal Revenue Service, desire maximum compliance with the tax provisions. Those who fail to comply with the tax laws face possible civil actions and criminal prosecutions. At the same time, however, concerns about overchanneling remain significant, for two reasons. First, while Congress prefers to maximize compliance with revenue raising and wealth transfer measures, tax rules that unnecessarily reduce overall social wealth hardly maximize reelection prospects. Second, the complexity of the tax codes makes it difficult to separate taxable and non-taxable income or deductions. Indeed, in determining whether monies are taxable as income, the Supreme Court has admitted that case by case analysis is often essential: "Life in all its fullness must supply the answer to the riddle."[94] The second factor exacerbates the first: given that overchanneling is costly in the tax area, the problem becomes more acute with the relative inseparability of acceptable and unacceptable conduct.

To minimize overchanneling and wasteful sanctions imposed on those undeterrable because of low p and high c, the Supreme Court has interpreted the criminal tax provisions to include a mistake of law excuse. The code punishes "willful" violations of the tax provisions,[95] and the Court has held that willfulness in this

[94] *Welch v Helvering*, 290 US 111, 115 (1933); *Commissioner v Duberstein*, 363 US 278, 288 n 9 (1960).

[95] See 26 USC §§ 7201-7207 (1994).

context entails a "voluntary, intentional violation of a known legal duty."[96]

However, even unreasonable mistakes of federal tax law excuse criminal liability, for two reasons.[97] First, the Court cannot remain faithful to the "willful" language by incorporating a reasonableness standard into the criminal tax provisions. Either willfulness includes knowledge of the law or it does not; a reasonableness standard envisions an entirely different mens rea and cannot fairly be crafted out of thin air. Second, unlike many other areas of the criminal law, individuals have incentives to learn the tax laws for reasons other than a desire to avoid criminal prosecution. Greater knowledge of the tax laws may be equally likely to uncover possible deductions and exemptions, which serve to lower tax liabilities. Mistake of law here may thus resemble mistake of fact, where unreasonable mistakes are excused because adequate care likely results for other reasons.[98] Moreover, the tax codes provide for civil liability in addition to criminal sanctions, and individuals may be moved to investigate the tax laws in order to avoid audits and civil penalties. If these factors fail to spur investigation into the relevant legal details, denying a mistake of law defense is not likely to either, and litigating over "reasonableness" is not worth its costs.

Still, despite the *Cheek* Court's pronouncement, it never dismissed reasonableness as a practical matter. Instead, the Court noted, "[o]f course, the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge."[99] And in fact, as a matter of enforcement policy and jury convictions, those who

[96] *United States v Bishop*, 412 US 346, 360 (1973). Accord *United States v Murdock*, 290 US 389, 396 (1933) ("Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct."); *United States v Pomponio*, 429 US 10, 12 (1976) (per curiam); *Cheek v United States*, 498 US 192, 200-01 (1991).

[97] *Cheek v United States*, 498 US 192 (1991) (rejecting Seventh Circuit's requirement that defendant's belief or misunderstanding of the tax laws be objectively reasonable). Interestingly, while Cheek's conviction was overturned by the Supreme Court, Cheek was re-convicted under the Court's standard, and given a sentence even greater than he received upon his first conviction. *United States v Cheek*, 3 F3d 1057 (7th Cir 1993).

[98] See Part V.A.

[99] 498 US at 203-04.

should have known their tax obligations are convicted. Since the Court's pronouncement, the Internal Revenue Service has focused audit efforts disproportionately on lawyers and accountants.[100] And most criminal convictions that are upheld involve 1) individuals who concealed their income; 2) tax protestors;[101] or 3) attorneys and sophisticated business people.[102] Defendants in the third category are often denied appeals based on sufficiency of the evidence; to the courts of appeals, their backgrounds create a near presumption that they knew the law.[103] In fact, whenever a federal statute is interpreted to require that a defendant knew his legal obligations, "a jury may infer knowledge of the law from a defendant's education and experience."[104]

In contrast, in the rare cases where convicted defendants reasonably did not know their tax obligations, the courts of appeals do not hesitate to overturn the convictions. One example is *United States v Harris*.[105] Harris and her twin sister each had sexual relationships with a wealthy widower who had died by the time they were tried for willful tax evasion. The relationships spanned several years during which time the man gave each a total of over half a million dollars in money and jewelry. The Government claimed that the money and jewelry constituted pay-

[100] See *Crackdown Begins On Lawyers Who Fail to File Taxes*, Wall Street Journal B3 (Aug 19, 1994); *IRS Is Pursuing Lawyers, Accountants for Back Taxes*, Washington Post A1 (Aug 7, 1993); *N. Y. Lawyers Said to Be Tax Probe Targets*, Washington Post A7 (Aug 9, 1993).

[101] See, for example, *United States v Cheek*, 3 F3d 1057 (7th Cir 1993); *United States v Sloan*, 939 F2d 499 (7th Cir 1991); *United States v Beall*, 970 F2d 343 (7th Cir 1992).

[102] See, for example, *United States v Owen*, 15 F3d 1528 (10th Cir 1994) (Kansas state senator, former lieutenant governor, president of multiple companies, and former banker); *United States v Conaway*, 11 F3d 40 (5th Cir 1993) (lawyer); *United States v McGill*, 964 F2d 222 (3d Cir 1992) (lawyer); *United States v Fletcher*, 928 F2d 495 (2d Cir 1991) (non-practicing attorney with accounting background); *United States v Townsend*, 31 F3d 262, 267 (5th Cir 1994) (defendant "was no proverbial babe in the woods").

[103] Fact finders may consider the general educational background and expertise of the defendant as bearing on the defendant's willfulness. See *United States v Fletcher*, 928 F2d 495, 501-02 (2d Cir 1991) (non-practicing attorney with accounting background); *United States v Rischard*, 471 F2d 105, 108 (8th Cir 1973) (attorney with business and bookkeeping experience); *United States v Goichman*, 407 F Supp 980, 987 (ED Pa 1976) (attorney).

[104] *United States v Simon*, 85 F3d 906 (2d Cir 1996) (stockbroker convicted of illegal structuring of transactions); see also *United States v Retos*, 25 F3d 1220 (3d Cir 1994) (while ignorance of law excuses structuring conviction, jury could infer defendant's knowledge that structuring is illegal from fact he was managing partner of law firm).

[105] 942 F2d 1125 (7th Cir 1991).

ment for sexual services and was therefore income taxable to the sisters. The sisters claimed that they were gifts, and presented letters from the man stating that he enjoyed giving the sisters things as tokens of his affection. To a majority of the panel, the fact that the tax treatment of payments to mistresses had never been settled by any federal court other than the tax court,[106] and that the tax court cases seemed to support the sisters, precluded their criminal convictions:

> If defendants in a tax case . . . could not have ascertained the legal standards applicable to their conduct, criminal proceedings may not be used to define and punish an alleged failure to conform to those standards. . . . In the tax area, 'willful' wrongdoing means the voluntary, intentional violation of a known—and therefore knowable—legal duty. . . . If the obligation to pay a tax is sufficiently in doubt, willfulness is impossible as a matter of law, and the defendant's actual intent is irrelevant.[107]

The *Harris* case is thus, in a sense, reminiscent of the *Screws* case discussed earlier. In both, the costs of ascertaining the legal standard could be infinitely high.[108] And in both, noncriminal means exist for setting standards of conduct. Indeed, the *Harris* majority warned that while the government was free to use the courts to forge the treatment of payments to mistresses as income, "new points of tax law may not be the basis of criminal convictions."[109]

[106] The reason for this inherent ambiguity is that "[t]he motivations of the parties in such cases will always be mixed. The relationship would not be long term were it not for some respect or affection. Yet, it may be equally clear that the relationship would not continue were it not for financial support or payments." Id at 1132.

[107] Id at 1131-32 (citations omitted). In *United States v MacKenzie,* the Second Circuit expressed similar sentiments:

> the requirement of willfulness in the criminal tax laws has a bearing on an analysis of vagueness. . . . 'On no construction can the statutory provisions here involved become a trap for those who act in good faith. A mind intent upon willful evasion is inconsistent with surprised innocence.'

777 F2d 811, 816 (2d Cir 1985) (quoting *United States v Ragen,* 314 US 513, 524 (1942), and citing *United States v Bishop,* 412 US 346, 360-61 (1973)).

[108] The *Harris* majority stated: "Before she met Kritzik, Harris starred as a sorceress in an action/adventure film. She would have had to be a real life sorceress to predict her tax obligations under the current state of the law." 942 F2d at 1135.

[109] 942 F2d at 1131. The concurring judge disagreed with the majority's sweeping analysis, arguing instead that the facts presented to the jury were insufficient to prove that the man intended the money and jewelry to be payment for services rather than expressions of affection or charitable impulse. Id at 1137.

In sum, while not perfect, the federal courts have come surprisingly close to incorporating a reasonable mistake of law defense into the criminal tax laws. While possible exclusions from liability and civil sanctions and audits may not motivate everyone to investigate the tax laws, those who by reason of their background should have known the law are often held accountable despite their claims of ignorance. True, the jury is not instructed on reasonableness, so the best the courts of appeals can do is uphold convictions where it appears the defendant's claimed ignorance was unreasonable. However, given statutory constraints, the courts have come as close as possible.

Food Stamp Violations. The tax evasion cases paved the way for mistake of law regarding food stamp violations. In *Liparota v United States,*[110] the defendant had been convicted of unlawfully acquiring and possessing food stamps under a federal statute that provided criminal sanctions for "whoever knowingly uses, transfers, acquires, alters or possesses coupons or authorization cards in any manner not authorized by" the statute or regulations.[111] Under the statute and regulations, retail food stores could accept food stamps, but restaurants were not permitted to accept food stamps as payment for meals unless specifically authorized by the Department of Agriculture.[112] Liparota was a co-owner of a sandwich shop that had not obtained the required authorization to accept food stamps. Nevertheless, he had purchased food stamps in the back room of the restaurant from an undercover government agent on several occasions for substantially less than the face value of the stamps. Liparota appealed his conviction, arguing that the district court should have instructed the jury that, as a prerequisite to guilt, he must have known his purchases were unlawful. The Supreme Court overturned his conviction, holding that the "knowingly" language of the statute was properly interpreted to require actual knowledge of the law transgressed.

This regulatory regime touched on the lives of many who might not reasonably be expected to learn the complex regulations. On the one hand, "[g]rocers are participants in the food stamp program who have had the benefit of an extensive informational campaign concerning the authorized use and handling of food stamps."[113] On the other hand, individual recipients and third party non-participants in the program "may well have had no opportunity to

[110] 471 US 419 (1985).
[111] Id at 420.
[112] Id at 421.
[113] Id at 430.

acquaint themselves with the rules governing food stamps."[114] Given the breadth as well as detail of the regulations, the Court decided that "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct."[115] In effect, the Court was concerned about the wide dispersion of prior probabilities regarding the lawfulness of conduct, which depends in large part on the extent of the individuals' involvement in the program. And for those only tangentially involved in the food stamp program, the cost of learning the detailed regulations is prohibitively high, given the high likelihood that some illegal conduct will appear to them to be perfectly acceptable.

But how does the Court separate these individuals from the grocers who do not reasonably remain ignorant of the law? And how does it separate "apparently innocent" conduct from violations that individuals should be aware might be illegal? As with the tax statutes, the Court is constrained to interpret the statutory mens rea as either applying to knowledge of the law or not. And given the broad criminal provision, the Court cannot isolate some conduct as requiring knowledge of the law but not others. As in the tax area, however, the Court signaled to lower courts that evidence indicating the defendant should have known his conduct was unlawful suffices for a conviction:

> In this case, for instance, the Government introduced evidence that petitioner bought food stamps at a substantial discount from face value and that he conducted part of the transaction in a back room of his restaurant to avoid the presence of the other patrons. Moreover, the Government asserts that food stamps themselves are stamped "nontransferable." . . . A jury could have inferred from this evidence that petitioner knew that his acquisition and possession of the stamps were unauthorized.[116]

Here too, while not perfect, the Court comes as close as feasible to incorporating a reasonable mistake of law excuse into the criminal statute.[117]

[114] Id.

[115] Id at 426.

[116] Id at 434 n 17.

[117] Separability of actors also helps explain contrary holdings in the Ninth and Tenth Circuits regarding mistake of law in interstate wagering. In *Cohen v United States*, 378 F2d 751 (9th Cir 1967), the court held that a federal statute prohibiting "knowing" use of interstate telephone services for transmitting wagers and wagering information allowed a mistake of law defense. Given that gambling is legal in Nevada, some individuals might have no reason to believe their acts were culpable. The court placed the burden of proof regarding knowledge on the defendant, in an

3. Cases requiring information subsidies

The tax and food stamp laws are highly complex and detailed, and the tax laws rife with ambiguities regarding liabilities. In those settings, everyone is aware that his conduct is regulated, so individuals likely assess a positive but low probability that specific aspects of that conduct are unlawful. However, the costs of gathering information, given the complexity of the regulations, is often too high to justify further investments. In contrast, this section considers cases where many individuals are never even put on notice that some aspect of their conduct is regulated at all. If people assess a prior probability of zero on the unlawfulness of conduct, they cannot reasonably be expected to invest anything in knowing the law, and therefore remain reasonably ignorant of even simple rules. If the government could cheaply inform those individuals of the governing laws, compliance could be greatly enhanced. Unlike most criminal law statutes where mistake of law reduces overchanneling at the potential expense of reducing compliance, in this context, mistake of law actually enhances compliance, by inducing the enforcement agency to promulgate information. In short, both Congress and the federal courts sometimes use mistake of law to insist that enforcement agencies aid in furthering legislative bargains.[118] This technique is an extension of the general requirement placed on states that promulgated laws must be made reasonably available to the citizenry.[119]

Federal cases encouraging information subsidies all stem from *Lambert v California*.[120] *Lambert* involved a city of Los Angeles felon registration ordinance which required that anyone convicted of a crime punishable as a felony in California must register with

effort to separate occasional or social bettors from others. According to the court, "the professional gambler will find it difficult to go forward with evidence of ignorance of the law pertaining directly to his business and even more difficult to prevail on that issue with the fact finder." Id at 757. Faced with the same issue, the Tenth Circuit rejected Cohen's holding that the statute requires the defendant to be aware of the prohibition. *United States v Blair*, 54 F3d 639 (10th Cir 1995). Because gambling is generally illegal in all of the states in the Tenth Circuit, the court could not identify a group with significantly lower p or significantly higher c. Thus, the court's rejection of the defense also fits well with our model.

[118] Congress, for example, explicitly wrote an ignorance of the law defense into the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, and the Investment Company Act of 1940. 15 USC §§ 78ff, 79z-3, 80a-48 (1994).

[119] See Model Penal Code and Commentaries § 2.04(3) (ALI 1985) (mistake of law is a defense if statute defining offense not reasonably made available prior to conduct).

[120] 355 US 225 (1957).

the city if in Los Angeles for more than five days in any thirty day period. The Court held that the Due Process Clause requires that the statute include a mistake of law defense. The statute punished some individuals for mere presence in the city, without alerting them that their presence could trigger criminal sanctions.[121] Because the Court was articulating constitutional constraints on state statutes rather than conducting statutory interpretation on federal ones, it was not limited to a binary choice about knowledge of the law. Most interestingly, the Court reached out and adopted what appears to be a negligence standard, stating that "[w]here a person did not know of the duty to register *and where there was no proof of the probability of such knowledge,* he may not be convicted consistently with due process."[122]

Three dissenters, through Justice Frankfurter, took issue with the majority's willingness to force a mistake of law excuse into state statutes.[123] *Lambert* was problematic because it opened the door to even greater federal involvement in state criminal law, something the Court has tried to back away from in recent years. Consequently, as forecasted by Frankfurter, this constitutional constraint on state criminal statutes turned out "to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law."[124] No other case has used the Due Process Clause to insist on a mistake of law defense to state crimes.

Lambert's force remains, however, for federal crimes. In *Lambert,* the government could have provided information relatively cheaply to those regulated. For example, if the state or local government informed California felons upon conviction of their duty to register, and notified out-of-state felons of their duties by placing signs in bus, train and police stations, it might be able to satisfy the *Lambert* standard, which stops short of requiring actual knowledge. With relatively little effort, the government could prove that it was sufficiently probable that a given felon was aware of his duty to register, and could thereby avoid the due process problem.

Thus, several federal courts have used *Lambert* to read mistake of law into federal statutes, at times without supporting

[121] Id at 229 ("circumstances which might move one to inquire as to the necessity of registration are completely lacking").

[122] Id at 229-30 (emphasis added).

[123] The Court had rejected a previous Due Process Clause challenge to a state statute that punished individuals regardless of their reasonable lack of knowledge that they were transgressing state law. See *Shevlin-Carpenter Co. v Minnesota,* 218 US 57, 70 (1910) ("such legislation may, in particular instances, be harsh, but we can only say again what we have so often said, that this court cannot set aside legislation because it is harsh").

[124] *Lambert,* 355 US at 232.

statutory language, to induce a federal enforcement agency to subsidize information costs. A good example is the currency reporting requirements of the Bank Secrecy Act. Among other things, the Act provides criminal penalties for "willfully" taking more than $5000 worth of monetary instruments into or out of the country without reporting to the government.[125] The courts have interpreted the statute to require proof that a defendant knew he had an obligation to report his act.[126] In effect, federal courts require government warnings to those entering and leaving the country.

In *United States v San Juan,*[127] for example, the court overturned the conviction of a woman who had failed to declare bringing in over $75,000 in cash while entering the United States by bus from Canada. The customs inspector never told her that she had a duty to report the cash. Instead, he merely asked her whether she had purchased or acquired any items while in Canada. Noting that the Bank Secrecy Act requires the registration of an otherwise innocent item on which a duty is not generally collected, the court admonished that "in order to prove willfulness, the Government should make some effort to bring the reporting requirements to the traveler's attention."[128]

Customs officials then made some effort by asking people coming into the country whether they were carrying more than $5000 cash with them. In two different cases, the Fifth Circuit found the question alone, whether asked in person or on a form, inadequate to warn incoming persons of the reporting requirements.[129] To the court the question could lead people to conclude that having the money was illegal. If so, efforts to conceal the money from the customs agents would therefore decrease rather than increase the reporting that Congress desired. Clarifying information could be provided at relatively low cost:

[125] 31 USC § 5316 (1994).

[126] See, for example, *United States v Dichne,* 612 F2d 632 (2d Cir 1979); *United States v Schnaiderman,* 568 F2d 1208 (5th Cir 1978); *United States v Granda,* 565 F2d 922 (5th Cir 1978).

[127] 545 F2d 314 (2d Cir 1976).

[128] Id at 319. Based on the court's statement in *San Juan,* the government prominently displayed a number of large multicolored posters in the departure area of New York's airports, telling passengers of the reporting requirements, and placed announcements over the public address system for international flights. These measures contributed to the later conviction of Zeev Dichne for transporting monetary instruments without reporting them. In part because the government had finally taken its suggested measures, the Second Circuit upheld Dichne's conviction. *Dichne,* 612 F2d 632.

[129] *Granda,* 565 F2d 922; *Schnaiderman,* 568 F2d 1208.

> It is interesting to consider how easily the government could avoid a recurrence of this problem. The simplest solution would be to add a sentence on the Customs Declaration Form to the effect that if you are carrying greater than $5000 you are required by law to fill out certain forms. Such a sentence would place all travelers on notice.[130]

In a related context, the Second Circuit used government information provision to distinguish two defendants convicted of failing to register as narcotics law violators on leaving or entering the country. The statute contained no *mens rea* language, providing simply that any convict or addict who failed to register was subject to criminal penalties. In *United States v Mancuso,*[131] the court incorporated the *Lambert* standard into the statute to avoid due process concerns. As a consequence, to obtain conviction, the government was required to prove either knowledge or a probability of defendant's knowledge of his duty to register. The court explained the reasoning behind adopting a *Lambert* standard:

> The primary purpose of law, and the criminal law in particular, is to conform conduct to the norms expressed in that law. When there is no knowledge of the law's provisions, and no reasonable probability that knowledge might be obtained, no useful end is served by prosecuting the 'violators.' Since they could not know better, we can hardly expect that they should have been deterred.[132]

Mancuso's conviction was overturned; although a few signs had been placed in the airport warning narcotics violators of their duty to register, none was placed in the departure area. The government had not demonstrated a sufficiently high probability that narcotics law violators were put on notice of the law. In this context, courts are acting as good agents of the legislature, by attempting to *increase* compliance. The courts view the agencies as insufficiently motivated to deter:

> we are presented with that rare instance in which overturning a criminal conviction will in all probability lead to improved enforcement of the underlying act. The hallmark of this case is sloppiness on the part of those charged with responsibility for enforcing the statute . . . [A] simple notice provided with each passport application, or a printed form given to narcotics

[130] *Granda,* 565 F2d at 926.
[131] 420 F2d 556 (2d Cir 1970).
[132] Id at 559.

> violators on their conviction, warning them of the requirement to register, would provide both the notice and knowledge necessary to sustain a criminal conviction, and to ensure that the aim of the statute would be fulfilled.[133]

In its opinion, the *Mancuso* court distinguished one of the Second Circuit's previous cases, *United States v Juzwiak*,[134] in which the court had upheld a conviction under the same statute. Juzwiak left the country as a seaman on a ship bound for Europe, and testified that he first learned of the registration requirement when he tried to return to the United States. According to the *Mancuso* court, the difference was that the government had made greater efforts to notify seamen of the law. Notices of the registration requirement had been posted at the place Juzwiak obtained his employment, at conspicuous places on the ship he frequented before leaving the country, and in the union hall he had visited several times.[135] In *Juzwiak*, the court found that the government's efforts satisfied the "probability of such knowledge" requirement of the *Lambert* case.[136] In short, Juzwiak may have remained ignorant of his legal duties, but unlike Mancuso, his ignorance was not reasonable.

Of course, there is a dynamic aspect to the reasonableness of a person's ignorance. When a new regulation is first promulgated, unless the press picks up the story for the front pages of the newspaper or the six-o'clock news, most people are unaware of it. Over time, however, as the government and others disseminate information about the regulation, the reasonableness of ignorance may well dissipate. Moreover, to the extent the social costs of regulation are already sunk, they are not likely to threaten the future durability of the regulation.

One example of the differential treatment of ignorance over time is the Cuban Embargo cases in the Eleventh Circuit. The first, *United States v Frade*,[137] involved two priests who made efforts to rescue Cuban refugees during the Mariel boatlift. The priests chartered a boat and negotiated with the Cuban government to assist the release and transport of Cuban relatives of several parishioners of the priests' church. The priests were arrested on their return voyage, and charged with violating the Trading With The Enemy Act, and a regulation promulgated under the Act. The regulation

[133] Id.
[134] 258 F2d 844 (2d Cir 1958).
[135] Id at 847.
[136] Id.
[137] 709 F2d 1387 (11th Cir 1983).

prohibited providing services to Cuban nationals, as well as transporting any baggage or other property of Cuban nationals. The regulation was "quietly promulgated, unexpected, and unannounced" after the priests began negotiations with Cuba,[138] and it prohibited seemingly innocent conduct which had been expressly authorized prior to the regulation. Citing *Lambert,* the court interpreted the criminal provision punishing "willful" violations to require knowledge of the prohibitions, and held as a matter of law that the priests did not know of the prohibitions. The priests had made significant efforts to stay abreast of political and legal developments, and the only evidence of government publication of the regulation was through Coast Guard radio announcements which were being jammed by the Cubans.

Contrast *Frade* with *United States v Macko,*[139] decided a decade later. Macko and others were involved in a scheme to ship cigarette packaging supplies and machinery to Cuba to manufacture counterfeit Winston cigarettes, and were convicted of violating the same two provisions the priests had been convicted under. Unlike the priests, however, Macko's conviction was affirmed, in part because the defendants actively hid the Cuban connection to their transactions. Perhaps more important to the court, however, was circumstantial evidence of Macko's knowledge, including the facts that the defendants were in the business of international sales and exports, by this point the Cuban embargo had been widely publicized, and the government frequently apprised exporters of the regulations. In the words of our model, their mistake of law, even if actual, was no longer reasonable.[140]

4. Structuring cases: *Ratzlaf* and beyond

Prior to 1994, most of the case law conforms with our predictions. The Supreme Court's decision in *Ratzlaf v United States,*[141] however, arguably broadens mistake of law beyond our model. In *Ratzlaf,* the defendant incurred a gambling debt of $160,000 while playing blackjack in Reno, Nevada. When he attempted to pay off

[138] Id at 1391.

[139] 994 F2d 1526 (11th Cir 1993).

[140] Another line of cases treats the criminal provision of the Export Control Act. The Act requires a license before exporting items on the United States Munitions List, which is updated by the President. As a prerequisite to conviction under the statute, an exporter of arms must have known that his exportation without a license was illegal. Compare *United States v Golitschek,* 808 F2d 195 (2d Cir 1986), with *United States v Murphy,* 852 F2d 1 (1st Cir 1988), and *United States v Durrani,* 835 F2d 410 (2d Cir 1987).

[141] 510 US 135 (1994).

the debt in cash, the casino informed him that it must report to the federal government all cash transactions greater than $10,000.[142] Told that this was true of banks also, Ratzlaf decided to purchase a series of cashiers checks from area banks, each in amounts less than $10,000, and then paid off his debt with these checks.

Unfortunately for him, Ratzlaf was unaware that "structuring" transactions to avoid the reporting requirements is also illegal.[143] He was convicted despite his claimed mistake, and the Supreme Court faced the question: assuming the defendant knew of the reporting requirements, must the prosecution also prove the defendant knew of the anti-structuring rules themselves?[144] In a five to four decision, the Court answered "yes", and Ratzlaf went free.

In an important respect, the result is surprising. Once one is aware of the reporting regulations, the marginal cost of finding out precisely what the statute says is low. The anti-structuring provisions are in the same place in the US Code as the reporting requirements, and presumably most violators are sophisticated repeat players. Using this reasoning, prior to *Ratzlaf* the large majority of circuits had rejected a mistake of law defense to a structuring charge. Typical was the Second Circuit's opinion in *United States v Scanio:*

> [Defendant] was not prosecuted for having failed to comply with an obscure reporting requirement; he was charged with . . . evading what he knew to be the bank's legal duty to file CTRs for all transactions exceeding $10,000. [He] demonstrated an awareness of the legal framework relative to currency transactions which, it is reasonable to conclude, should have alerted him to the consequences of his conduct.[145]

Admittedly, the absolute cost of learning the law is not the only variable in the model. Rather, "reasonableness" is determined by examining whether c is sufficiently high, *given* the prior probability estimate. A belief that p is low for some may have been driving the majority opinion in *Ratzlaf:* Justice Ginsburg emphasized how structuring to avoid legal prohibitions comes naturally and is even expected in other areas of the law (such as tax law).[146] So perhaps,

[142] See 31 USC § 5313.

[143] See 31 USC § 5324. This provision was not part of the original act of 1970, but was added in 1986.

[144] The prohibition against structuring inherently requires that the defendant knew of the reporting requirements: the statute outlaws structuring "for the purpose of evading the reporting requirements." Id.

[145] 900 F2d 485, 490 (2d Cir 1990).

[146] 510 US at 146.

at least for some, the failure to look up the law is not so unreasonable, even if it would be cheap in an absolute sense to do so.

Nonetheless, even if Justice Ginsburg's point is granted, the problem remains of separating those few who could not be expected to learn the law from those who could. An attempt at this was made in *United States v Aversa*, an interesting pre-*Ratzlaf* circuit court opinion allowing a partial mistake of law excuse.[147] The *Aversa* court held, en banc, that the defendant must know or have a reckless disregard for the illegality of structuring. As Judge Breyer stated in concurrence:

> One can imagine how a person frequently in contact with these laws, such as a financial officer or drug-fund courier, could be found to have been "reckless" in failing to learn relevant legal data. However, it is difficult to see how one could convict an ordinary citizen on this basis, i.e., in the absence of actual, subjective knowledge of the legal duty, for "recklessness" involves the conscious disregard of a substantial risk.[148]

Recklessness differs from reasonableness, but it serves a similar purpose—separating those with high information costs relative to their prior understanding from those with low relative information costs.[149] The *Ratzlaf* Court presumably expected that such a separation could be conducted by juries on a case-by-case basis, and in fact it has been. Many post-*Ratzlaf* decisions allow the jury to infer actual knowledge from facts, such as experience and education, that in truth only prove what the defendant should have known.[150]

Still, *Ratzlaf* is a somewhat incautious extension of mistake of law doctrine. Structuring is unlike tax law, where potential uncertainty often creates a high information cost and where precise channeling is important. It is unlike regulation of food stamps or border-crossing disclosure rules, where large segments of the population will have low prior probabilities. And overchanneling may be of little concern to Congress: the point of the anti-structuring provision, silly though it may be, is presumably to catch those guilty of other crimes. It will be rare for a non-criminal to exit the banking system simply to avoid cash reporting requirements. Thus

[147] 984 F2d 493 (1st Cir 1993) (en banc).

[148] Id at 503 (Breyer, concurring).

[149] See Parker, *Mens Rea* (cited in note 14).

[150] See *United States v Simon* 85 F3d 906, 910 (2d Cir 1996) ("a jury may infer knowledge of the law from a defendant's education and expertise"; stockbroker convicted of illegal structuring of transactions); *United States v Retos*, 25 F3d 1220, 1231 (3d Cir 1994) (although structuring conviction reversed in light of *Ratzlaf* for failure to instruct jury on ignorance of law excuse, jury could infer defendant's knowledge that structuring is illegal from fact he was managing partner of law firm).

it is perhaps not surprising that Congress swiftly overruled *Ratzlaf*, eliminating the mistake of law defense.[151]

Given Congress' rejection of the holding, the general implications of *Ratzlaf* for federal mistake of law doctrine are unclear. Relying on *Ratzlaf*, two circuit court cases have extended mistake of law to other federal statutes: dealing in firearms without a license,[152] and causing election campaign treasurers to submit false reports to the Federal Election Commission.[153] These cases may be idiosyncratic, however. In the firearms case, Congress signaled its concern about overchanneling by enacting the Firearm Owners Protection Act, heightening the *mens rea* requirements for conviction of firearms violations;[154] in the elections case, the prosecution's interpretation of the underlying statute was dubious.[155]

[151] Money Laundering Suppression Act of 1994. See House Conf Rep No 103-662, USC Cong & Admin News, vol 5 at 2024, 103rd Congress, 2d Session (1994) (statute amended "in order to correct the recent Supreme Court holding in *Ratzlaf v United States* . . . This section restores the clear Congressional intent that a defendant need only have the intent to evade the reporting requirement as the sufficient mens rea for the offense").

[152] *United States v Obiechie*, 38 F3d 309 (7th Cir 1994).

[153] *United States v Curran*, 20 F3d 560 (3d Cir 1994).

[154] In *Obiechie*, the defendant was charged with dealing in firearms without a license, in violation of 18 USC §§ 922 and 924. He had purchased fifty Beretta semiautomatic pistols and admitted to undercover agents that he planned to take the guns back to his home in Nigeria and sell them to public officials. The Seventh Circuit overturned his conviction, holding that "willfulness" in the statute required knowledge that unlicensed dealing was illegal. While the court picked the most natural interpretation of the statute (especially given *Ratzlaf*), it is hard to believe that a person engaged in the business of dealing firearms in our regulatory state cannot be expected to investigate whether he needs a license to do so. The probability is high, and the cost of investigation relatively low in most cases. Yet the Court may have correctly ascertained Congress' intent: the FOPA was presumably passed as a compromise among the various gun lobbies in Congress, some of whom clearly desired to mitigate the risks of overchanneling and overenforcement. See David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb L Rev 585, 588 (1987) ("FOPA reflects not a simple, single legislative decision, but a complex series of compromises").

[155] In *Curran*, the defendant had asked his employees to write checks to candidates for federal office. He then reimbursed the employees in cash, thus circumventing the limits on campaign contributions. Federal misdemeanor charges for making contributions in someone else's name were unavailable because the statute of limitations had expired. The prosecution instead charged him with the felony of "causing" campaign treasurers to submit false reports to the FEC. 18 USC §§ 2(b) and 1001. The false reports were the contributor lists submitted by the various campaign treasurers. Of course, Curran had nothing to do with the preparation of such lists, so saying that he "willfully caused" the submission of a false report in the absence of knowledge of the law is a stretch, to say the least. On the other hand, Curran was a lawyer and frequent contributor to campaigns, implying that the cost to him of knowing the law was low.

VI. THE ROLE OF COURTS

The information cost analysis of this paper clarifies what was an otherwise opaque set of federal mistake of law cases. In this section, we take on a more ambitious task—that of wrapping in the public choice discussion from Part IV—with the hope that the understanding of the cases and the limited role of the federal courts may be strengthened. Several law and economics scholars have argued that the common law tends toward efficiency.[156] George Priest has taken the argument even further: the dynamics of litigation will also force interpretation of statutes toward efficiency regardless of judicial motivations.[157] Constraints on the judicial role can limit the courts' ability to promote efficiency, however, and that is where the public choice story comes in.

By now it is commonly understood that not all government regulation enhances social welfare. Despite procedural constraints, interest groups can use government regulation, including criminal prohibitions, to transfer wealth to themselves at the expense of the rest of the population. At times the regulation taxes the regulated; at others, a government program inures to the benefit of the regulated. In either case, however, the regulation may be inefficient from a social welfare perspective. Priest argues that litigation pressures rules toward efficiency because the deadweight costs of inefficient rules provide a greater incentive to litigate to reduce those costs, and more frequent litigation makes it more likely that a rule will be changed or modified. If Priest is correct, then unconstrained courts would end up watering down inefficient regulation through statutory interpretation. In criminal law, courts would expand excuses and defenses to help restore efficiency.

Or, put another way, if courts "efficiently" enforce statutes, a court would accept one dollar less compliance if it would save more than one dollar in reduced social costs. Social costs include those necessary to the legislative bargain as well as some unnecessary costs, including wasteful sanctions. Yet criminal mistake of law is in fact much more limited. The courts focus on reducing only unnecessary social costs, and actually step in to enhance legislative bargains, which may ultimately increase the social costs that are inextricably tied to the bargain itself.

A good example is the distinction between the public welfare cases and tax evasion. In the public welfare cases, Congress provided criminal penalties to encourage great care on the part of

[156] See note 22.

[157] Priest, *The Common Law Process* (cited in note 22).

those who might otherwise pose a risk of death on the general public. Regulation attempting to reduce the risk of death from explosion, firearms, and dangerous drugs may enhance social welfare. Because these regulations are not clearly narrow interest group bargains, the court risks no loss of compliance, however small, from even a narrow mistake of law excuse. The general public presumably benefits from these regulations, so they may be less sensitive to the deadweight costs of wasteful sanctions than they would be for more narrow interest group bargains.

And to the extent these "public welfare" regulations are really interest group bargains, they likely benefit the very group regulated. Take, for example, the regulations on shipping dangerous substances involved in *United States v International Minerals.*[158] The regulations increase the costs to shipping, raising the costs to substitutes for the shipping industry. Recall that the dissent was concerned that the casual shipper might not know the details of governing regulations. But if part of the purpose of the regulations is to eliminate casual shippers in favor of the established shipping industry, then mistake of law would erode that part of the bargain that might induce the shipping industry to join with the safety groups in promoting the regulation. While an identifiable subgroup of those regulated might not reasonably be expected to know the law, too bad for them: the information costs *are* the barrier to entry, which is part of the bargain in the first place. Hence, no mistake of law excuse.

Contrast the public welfare cases with the tax code, which is exceedingly complex precisely because it is rife with narrow interest group bargains. However, the interest groups benefit from the bargains only if the government is still able to collect revenues from other sources, and can do so without imposing too many costs on the taxpayer. Note that reducing deadweight costs may be comparatively more important in the tax environment because the taxpayers at large likely wield more political influence than, for example, potential casual shippers of goods.[159] To reduce the taxpayer's burden, mistake of law minimizes wasteful sanctions and reduces the overchanneling costs to criminal liability. Civil sanctions, audits, and de facto reasonableness restrictions on mistake of law all help to maintain the revenue base. In short, the courts used mistake of law precisely where interest group bargains are most common, and in a way that enhances

[158] 402 US 558 (1971). See Part V.C.1.

[159] In other words, Becker's influence function may be more elastic in the tax environment. See Becker, *Competition Among Pressure Groups* (cited in note 13).

rather than threatens the durability and therefore the value of those bargains.[160]

The public choice focus also helps explain why courts sometimes force the government to subsidize information costs. Perhaps the easiest way to raise p for individuals is by convicting the ignorant, as a signal to others that they need to know and comply with governing laws, no matter how obscure, complex, or seemingly unpredictable. Often that is the course courts take. But when the interest group bargain forged by the legislature is vulnerable to repeal, exposing the average person to potential criminal liability based on ignorance threatens to unravel the bargain. Or put another way, the media attention given to the conviction will likely increase p, but at the expense of ripening conditions for grass roots or other efforts to change the law.

The courts' narrow focus also helps explain the differing treatment of mistake of law in the civil and criminal contexts. Mistake of law plays a limited role in criminal law, but it never excuses civil liability. A partial explanation turns on efficiency. In civil law, liability is more carefully tailored to actual harm than is the criminal law, where sanctions are set to eradicate rather than price acts. As a consequence, overdeterrence is less problematic in the civil law, so mistake of law is less useful. This explanation is incomplete, however, for two reasons. First, civil law also poses overdeterrence problems, as the law and economics literature attests.[161] Second, as we noted earlier, criminal sanctions may be effectively limited, making eradication infeasible.

The public choice wrinkle provides an additional explanation, and *Regina v Smith*, a case discussed earlier, helps illustrate the point.[162] *Smith* involved a tenant prosecuted under a criminal damage statute for removing floor boards and wall paneling that he had installed in a unit he rented. Under landlord-tenant law, the boards had become the property of the landlord. Assume that the law represents an inefficient transfer of wealth from tenants to landlords. (After all, it is not clear why a tenant loses property rights in a light fixture that he put in his apartment to enhance his environment.) If the law is enforced with criminal sanctions, then the transfer to

[160] Similar results obtain from an analysis of judicial treatment of discriminatory taxes under the due process, equal protection, and takings clauses. William Dougan and Erin O'Hara, *A Contractarian Theory of Constitutional Discriminatory Taxation* (George Mason University School of Law Working Paper Series, on file with the authors).

[161] See Calfee & Craswell, *Deterrence* (cited in note 11). See also note 11 generally.

[162] *Smith*, 1 QB 355 (1973). See Part V.B.1.

landlords is effective only if tenants' behavior is channeled. If not, then the landlord gets nothing from the law. From the perspective of the landlord, sanctions are wasted unless future tenants are more effectively deterred.

Civil liability is different, however. If the tenant's behavior is channeled, the landlord owns the fixtures. If not, he gets a money judgment. Either way, a transfer is completed. From the perspective of the interest group that benefits from the law, the sanction is not "wasted" in the civil context. In this sense, ex post liability is a necessary part of the value of the transfer, so mistake of law is no excuse.

Perhaps ironically, the courts' narrow scope for enhancing efficiency actually increases overall social costs by making durable interest group transfers more likely in the first place. If Priest is correct, then we need an explanation for why courts are effectively constrained in their efficiency-promoting role, especially where constitutional provisions like the due process clause could be used to circumvent inefficient statutes. Unfortunately, we cannot yet satisfactorily answer the question.

VII. CONCLUSION

In one sense, this paper attempts a very traditional task: to explain the cases. It turns out that, whatever they may say, federal courts administer the federal criminal law by *sometimes* excusing those *reasonably* mistaken as to law, as we have defined it. Almost all of the cases can be explained by the interaction of a few variables: the prior likelihood that people will believe the prohibited action is legal; the marginal cost of learning the law given the prior probability; the degree to which overchanneling is of concern; and the watering-down effect on compliance that a mistake defense may have (that is, underchanneling). And as long as one keeps in mind that this last factor can trump the other concerns—that is, legislatures (and hence courts) are reluctant to reduce compliance—the cases fall rather nicely into our model.

In another sense, the doctrine provides an informal test for the approach we take in the paper. On the most general level, the cases provide strong support for the economic approach. It is clear from the language and the holdings of the cases that courts are very aware of information costs, and of underchanneling and overchanneling concerns. That is, the courts treat violators as rationally responding to the probability of being sanctioned and the difficulty of learning the law, and at times the Supreme Court has been quite subtle in its analysis of the variables, as we saw with the four cases on mistake of Constitutional law.

The doctrine also supports our public choice predictions. The cases are certainly consistent both with our assumption that legislatures seek to maximize compliance with their laws, and with our assumption that courts will bolster, not fight, this legislative desire, even if the result is "inefficient". The public choice perspective is richer than previous attempts to model mistake as minimizing the costs of legal information, as the Court's contrasting approaches to tax and "public welfare" offenses shows. And the cases are certainly inconsistent with any notion of first-order social-wealth maximizing, whatever that may mean in criminal law. If courts were maximizing social welfare, to the extent any particular criminal prohibition was socially excessive in scope or sanction, as some surely are, they would excuse as many offenders as possible. Instead, they excuse only in contexts where the excuse is necessary to limit the prohibition's costs (such as overchanneling), but will not significantly reduce compliance. In this way, courts actually enhance the value of the legislative bargain by reducing the legislation's costs to other coalition members or even to opponents of the legislation. We do not satisfactorily resolve why the courts would serve as agents of the legislature, although we discussed some of the practical constraints upon the courts doing anything else.

Finally, we offer a speculative thought on the consequences that costly information has for the scope of criminal law. There is a dynamic aspect to information about criminal law that we did not explore in this paper other than incidentally. If a particular criminal prohibition is stable, over time the number of people who reasonably do not learn the details of that prohibition shrinks. Thus we may see mistake of law for particular provisions actually contracting over time. On the other hand, as federal criminal law expands, covering more and more conduct, the total information costs of knowing whether any given act is legal grows. From a public choice perspective, this latter tendency may provide an inherent brake on the scope of criminal law. At some point, the behavioral effects of law are constrained by the information costs of knowing what is illegal; hence, coalitions may seek avenues other than criminal law to achieve their goals. And as the social welfare costs to criminal prohibitions rise, public choice theories predict that additional prohibitions will become less likely to maximize a legislator's probability of re-election. That saturation point has apparently not been reached in the United States; in principle, however, one would expect a maximum level of criminalization.

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