Public Policy Doctrine of Criminal Law

Ignorance of the law is not an excuse

The idea that ignorance of the law is no excuse is captured today in the doctrine of "*scienter*." In general, an individual can be guilty of a criminal act only if he acts with a criminal intent, or *scienter*, to accomplish a criminal purpose. Under most statutes, to win a conviction, the government must prove beyond a reasonable doubt that the defendant acted "knowingly." The concept comes from Roman law, and is expressed in the brocard *ignorantia legis non excusat*.

Ignorance of law means want of knowledge of those laws which a person has a duty to know and which everyman is presumed to know. Ignorance can be voluntary or involuntary. It is voluntary when a person might by taking reasonable pains could have acquired the necessary knowledge. For example every man can acquire knowledge of the laws which have been promulgated. Therefore neglect to become acquainted with them is voluntary ignorance. On the other hand it is involuntary when the ignorance is not of choice and it cannot be overcome by the use of any means of knowledge known to him and within his power. For example ignorance of a law which has not yet been promulgated.

Ignorantia juris non excusat or Ignorantia legis neminem excusat is a Latin maxim which means "ignorance of the law does not excuse" or "ignorance of the law excuses no one." The rationale of this maxim is that if ignorance of law was an excuse then any person charged with a criminal offense or subject of a civil suit can claim that he or she was unaware of the law in question and avoid liability. The law imputes knowledge of all laws to all persons within its jurisdiction. The

doctrine assumes that the law in question has been properly published and distributed, for example, by being printed in a government gazette, made available over the internet, or printed in volumes available for sale to the public at affordable prices.

Even though general rule that ignorance of the law or a mistake of law is no defense is deeply rooted in the American legal system, case law has recognized certain exceptions to the doctrine. For example in Cheek v. United States, 498 U.S. 192, 200-201 (U.S. 1991) the court observed that the proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Therefore the Congress has softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule that ignorance of law cannot be excused. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.

http://definitions.uslegal.com/i/ignorance-of-law/

[THE CODE] has criminal sanctions, fines and penalties

Cheek v. United States, 498 U.S. 192 (1991)

The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. *See, e.g., 18 U. S. Smith,* 5 Wheat. 153, 18 U. S. 182 (1820) (Livingston, J., dissenting); *Barlow v. United States,* 7 Pet. 404, 32 U. S. 411 (1833); *Reynolds v. United States,* 98 U. S. 145, 98 U. S. 167 (1879); *Shevlin-Carpenter Co. v. Minnesota,* 218 U. S. 57, 218 U. S. 68 (1910); *Lambert v. California,* 355 U. S. 225, 355 U. S. 228 (1957); *Liparota v. United States,* 471 U. S. 419, 471 U. S. 441 (1985) (WHITE, J., dissenting); O. Holmes, The Common Law 47-48 (1881). Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common law rule has been applied by the Court in numerous cases construing criminal statutes. *See, e.g., United States v. International Minerals & Chemical Corp.,* 402 U. S. 558 (1971); *Hamling v. United States,* 418 U. S. 87, 418 U. S. 119-124 (1974); *Boyce Motor Lines, Inc. v. United States,* 342 U. S. 337 (1952).

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the extent of the duties and obligations imposed by the tax laws

[Footnote 4]

The attorney also advised that, despite the Fifth Amendment, the filing of a tax return was required and that a person could challenge the constitutionality of the system by suing for a refund after the taxes had been withheld, or by putting himself "at risk of criminal prosecution."

The Heritage Foundation

Backgrounder #2812 on Legal Issues

June 17, 2013 | Backgrounder on Legal Issues

Ignorance of the Law Is No Excuse, But It Is Reality

By Paul Rosenzweig

The traditional legal maxim is that "ignorance of the law is no excuse." Today, however, even the Congressional Research Service can't count the federal criminal laws. A unified list of crimes was unimportant when criminal law focused on crimes that are wrong in their essence, like robbery or murder, but it is of vital concern when crimes are "wrongs" only because of an arbitrary statutory definition. Given the proliferation of criminal law, ignorance of the law is reality. To fix the problem, Congress should demand that all crimes in the U.S. Code be counted and identified. Once that is done, the crimes in the code should all be consolidated or referenced in Title 18, accessible over the Internet without charge, and kept up-to-date so that a conscientious citizen can find the criminal law.

KEY POINTS

1. The criminal law today is far different from the criminal law of a century ago. For regulatory crimes, there is in effect a standard of near-absolute liability based on the no-longer-applicable maxim that "ignorance of the law is no excuse."
2. If "ignorance of the law is no excuse," however, then a conscientious citizen should be able to find all of the criminal laws on the books.
3. But there are so many federal criminal laws that the Congressional Research Service cannot count them, much less an average citizen.
4. Congress should require that all of the federal criminal laws be identified, counted, and consolidated or referenced in a single place (such as Title 18 of the U.S. Code) so that citizens can find them.
5. This source should be accessible on the Internet at no charge and should be kept up-to-date.

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Everyone in America knows that "ignorance of the law is no excuse." It is drummed into students from their first civics class in elementary school, so much so that it is a part of our cultural heritage.

The phrase captures an important concept about culpability. It stems from a time when criminal law was grounded in morality and a shared understanding of wrongfulness and when crimes were self-evident wrongs—what the law calls "wrong in their essence," or " *malum in se*." Perhaps the best example of how deeply this idea is ingrained in society is the classic Steve Martin comedy sketch in which Martin gazes into the camera plaintively and presents his defense to being accused of a "foul crime": "two simple words, I forgot"—as in "I forgot armed robbery is illegal." The joke, of course, is that nobody could forget that armed robbery (or rape or murder) is a crime.[1] That is because inherent wrongs put people on notice, in effect, that the criminal law might apply.

But the rule that ignorance is no excuse does not work as well for crimes that are not inherently wrong. Today, there are thousands of crimes that are crimes only because they are prohibited by statute. For these types of crimes—known as "wrongs by prohibition," or *malum prohibitum*[2]—the principle that ignorance of the law is no excuse works only when a person knows what the statute requires or, at a minimum, could have discovered what the statute requires with a reasonable amount of effort.

Therein lies the problem. The criminal laws are not always easy to track down and not always easy to understand. In fact, many laws are nearly impossible to understand in all of their complexity, and the whole corpus of federal law is in fact impossible to know. There are so many crimes in the federal law books that no conscientious citizen (or even a conscientious legislator, law enforcement officer, lawyer, or judge) could possibly know what they require. This puts Americans at risk of conviction and imprisonment for the violation of laws that are impossible to find and impossible to know, effectively discarding the traditional protection that conviction requires culpability.

The way to fix this problem is to require the federal government to identify all of the criminal provisions of federal law. Those provisions should then be consolidated in a single, easily accessible place—such as Title 18 of the U.S. Code—for ease of location and understanding. Additionally, Congress should require the executive branch to keep the list up-to-date, to ensure that Americans have a fighting chance to keep up with the criminal laws that apply to their conduct.

Ignorance Is No Excuse

The idea that ignorance of the law is no excuse is captured today in the doctrine of "*scienter*." In general, an individual can be guilty of a criminal act only if he acts with a criminal intent, or

scienter, to accomplish a criminal purpose. Under most statutes, to win a conviction, the government must prove beyond a reasonable doubt that the defendant acted "knowingly."

The requirement that a crime involve culpable purposeful intent has a solid historical grounding. As Justice Robert Jackson wrote:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."[3]

The very earliest English common law recognized that one who intends to commit a crime (say, injuring a horse) but accidentally commits a different crime (killing the horse) could not be said to have intended the graver offense and therefore could not be held criminally liable for it.[4] But this view of scienter—that the government must show that the defendant intended both to do the act constituting the offense and to accomplish the particular harm prohibited—did not last long. The English and American courts quickly came to the view that in most legal contexts, a criminal actor who intends to engage in an act is liable for whatever harm follows, even if it is different from that which he originally contemplated. In the words of the Model Penal Code, one can act "knowingly" without regard to any specific intent to accomplish a wrongful act or violate a law. It is enough to know that one is undertaking the acts that constitute the offense.

As to *malum in se* offenses, this doctrine is not in the least problematic. Everyone knows, for example, that shooting another person is wrongful conduct and may bring criminal sanction. Accordingly, the law infers intentionality and culpability, even where there may be no direct evidence that the result (killing another person) was specifically intended.

As to the growing number of *malum prohibitum* offenses, however, the analysis is radically different. Building on the maxim that "ignorance of the law is no excuse," courts now routinely conclude that one can be convicted of a crime for having acted knowingly (that is, purposefully doing an act) without requiring the government to prove that the defendant sought to achieve a

particular end or to violate a known legal duty contained in a statute or regulation. For example, violations of the Sherman Antitrust Act require only proof of deliberate business conduct, not proof of intent to abuse a monopoly or to restrain competition.

As a result, for *malum prohibitum* offenses, scienter requirements provide little protection against conviction in the absence of culpability. Consider, for example, the risk of prosecution in a highly regulated industry. Though the law often requires the government to prove that defendants acted "knowingly"—a seeming protection from the imposition of strict liability—that requirement is but a parchment barrier. At the urging of prosecutors, judges have interpreted many of the statutes that apply to regulated industries so that those who participate in the industry are presumed to be knowledgeable of all the arcane regulatory intricacies that govern their conduct.[5] As a consequence, the only requirement imposed by requiring proof that one has acted "knowingly" is that the government must demonstrate that the defendant has purposefully done the act constituting the offense—in other words, that the defendant was not sleepwalking, acting under some delusion, or the like at the time—and in the context of regulated economic conduct, that showing is trivial. Moreover, proof that the defendant in fact lacked knowledge of the regulatory requirement at issue is uniformly no defense to prosecution.

A typical example is the crime of "knowingly filing a false monitoring report" under the Clean Water Act.[6] The law that defines what is false or misleading is part of a large regulatory scheme that also obligates each individual filing a report to ensure the accuracy of any reports made. As a consequence, the only showing the government must make to the satisfaction of a jury is that the defendant "knowingly filed" the report, irrespective of whether or not he knew it to be false, and because nobody files a report without doing so intentionally, the only showing necessary is that the defendant actually put a letter in the mail. As Justice Potter Stewart noted of defendants accused of such offenses, "[a]s a practical matter…they are under a species of absolute liability for violation of the regulations despite the 'knowingly' requirement."[7]

How Many Federal Crimes Are There?

All of this would be tolerable if it were in fact feasible for law-abiding citizens to know all that the law requires. If, for example, a person could know all of the regulatory requirements of the Clean Water Act and every other statute, then it might be appropriate in some circumstances to charge individuals with the obligation of finding out what the rules are. Thus, it is assumed that a billiards player knows the rules, and they may be held against him whether or not he actually does.

But the premise of that argument is that it is possible to learn all of the rules—that there is some rule book to which one can refer before choosing to act. Sadly, in the criminal law of the United States, there is no such rule book. There is no place that an average American citizen can go to learn all of the criminal laws that may apply to his conduct.

In fact, no one even knows how many federal criminal laws there are, much less what they require. The last time the Congressional Research Service was asked to quantify the number of federal crimes, it told Congress that it could not do so with any certainty.[8] The best recent estimate, by Louisiana State University Professor of Law John Baker, is that there are more than 4,500 criminal offenses contained in federal statutes—and even this estimate is already a half-decade old.[9] All we know for sure is that the number of crimes grows every year.

How could it possibly be so challenging to count the number of federal crimes? In the past, it was not so difficult. Federal crimes were collected in one place—Title 18 of the U.S. Code, titled "Crimes and Criminal Procedure"—and so were easy to find. Today, however, federal crimes are scattered across almost all of the 51 titles of the Code, making it effectively impossible for an average citizen to find them all.

Nor is this problem limited to the federal criminal code. Often, a federal statute criminalizes violations of any requirements contained in agency regulations, and nobody has any idea how many regulations are subject to criminal enforcement. One expert, Professor John Coffee of Columbia Law School, has estimated that there are more than 300,000 separate federal regulations that might be the basis for a criminal prosecution.[10]

It is, if anything, even more difficult to count all the state laws and regulations. There are 50 state jurisdictions, with thousands of laws and tens of thousands of regulations. On top of that are untold thousands of city and county ordinances, many of which impose jail time for violations.

With the proliferation of criminal law, no American citizen can reasonably be expected to know all of the statutes that may apply. It may be that ignorance of the law is no excuse, but for virtually 100 percent of Americans, ignorance is the reality. As a result, according to Harvey Silverglate, a well-respected attorney and author, the average American may commit three felonies a day without even knowing it.[11]

The fact that no one can even locate every criminal offense matters profoundly. Americans would not countenance hidden speed limits on the roads, because there would be no justice in punishing those who exceeded limits that they could not possibly know. Likewise, for criminal offenses that are effectively hidden, punishment is unjust.

The rule that "ignorance of the law is no excuse" was born at a time when there were fewer than a dozen common law felonies, and all those crimes stemmed from and mirrored a commonly shared moral code. Today, the criminal law is a collection of social preferences. Some of them are obvious and reflect common sense notions of wrongfulness, but many reflect only a legislative judgment. It may indeed be a bad idea to ride a manatee for fun, but it is unlikely that anyone would know it was a federal crime—until they read this paper or were prosecuted for it.[12]

An Agenda for Change

The history of change in scienter requirements has been substantial. The criminal law today is far different from the criminal law of a century ago. For regulatory crimes, there is in effect a standard of near-absolute liability based on the no-longer-applicable maxim that "ignorance of the law is no excuse." The tragedy is that while ignorance may not be an excuse, it is the reality for American citizens and even for their legislators. Americans are therefore asked to undertake an impossible task—knowing what conduct is allowed and what prohibited—and then punished when they fail. That is simply unjust.

This problem is not intractable and can be addressed in steps, beginning at the federal level. As an initial matter, Congress should demand that the Congressional Research Service, the Government Accountability Office, or the executive branch identify and count all of the crimes in the U.S. Code.[13] Once that is done, all of the crimes in the code should be consolidated or referenced in Title 18, accessible over the Internet without charge, and kept up-to-date.

Only then would American citizens have a fighting chance of understanding the law that regulates their conduct. Only then would it be possible for us again to expect citizens to know the law.

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[1] Transcript of Steve Martin Monologue, http://snltranscripts.jt.org/77/77imono.phtml (Jan. 21, 1978).

[2] Given how hard it is to know all of the laws, one suggestion is that we should revive the concept of a "mistake of law" defense to criminal charges. *See* Paul J. Larkin, Jr., "Time for a 'Mistake of Law' Defense" (Heritage Foundation, April 2013), http://www.heritage.org/research/commentary/2013/4/time-for-a-mistake-of-law-defense.

[3] Morissette v. United States, 342 U.S. 246, 250–51 (1952).

[4] *See* Dobbs Case, 2 East P.C. 513 (1770); *see also* Thacker v. Commonwealth, 114 S.E. 504 (Va. 1922) (defendant shot at a light and struck and killed a victim; not guilty of murder); State v. Peery, 28 N.W.2d. 851 (Minn. 1947) (requiring proof of "intent to be lewd" in indecent exposure prosecution of defendant who was accidentally viewed through ground-floor window by passers-by).

[5] *E.g.*, United States v. Int'l Minerals & Chemical Corp., 402 U.S. 558, 565 (1971) ("[W]here…dangerous or deleterious 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.").

[6] *See* 33 U.S.C. § 1319(c)(4) (making it a crime to knowingly make a false statement in any certification required by the regulations promulgated by the Environmental Protection Agency). Those regulations, in turn, require the compliance with permit requirements, which typically require the filing of a "discharge monitoring report." *See* 40 C.F.R. § 122.41(l)(4). As this brief exegesis demonstrates, even discerning that the law criminalizes the filing of a false report is itself a difficult endeavor.

[7] United States v. Int'l Minerals & Chemical Corp., 402 U.S. 558, 569 (1971) (Stewart, J., dissenting).

[8] *See* Paul Rosenzweig, "The History of Criminal Law," at 129 & n.4, *in* Paul Rosenzweig & Brian Walsh, eds., *One Nation Under Arrest: How Crazy Laws, Rogue Prosecutors and Activist Judges Threaten Your Liberty* (Heritage Foundation 2010).

[9] *See* John S. Baker Jr., "Revisiting the Explosive Growth of Federal Crimes," Legal Memorandum No. 26 (Heritage Foundation, June 2008), http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes.

[10] *See* John C. Coffee Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991). Note that this estimate is now more than 20 years old. The number today can only be greater.

[11] *See* Harvey Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (Encounter Books 2011).

[12] Specifically, it is a violation of the Endangered Species Act.

[13] Or, failing that, adopt a "Mistake of Law" defense. *See* Larkin, *supra* n. 2.

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http://www.heritage.org/research/reports/2013/06/ignorance-of-the-law-is-no-excuse-but-it-is-reality#_ftn7