

7-1-2013

Taking Mistakes Seriously

Paul J. Larkin Jr.

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Recommended Citation

Paul J. Larkin Jr., *Taking Mistakes Seriously*, 28 BYU J. Pub. L. 71 (2013).
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Taking Mistakes Seriously

*Paul J. Larkin, Jr. **

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In the interest of full disclosure, I would like to note that I was counsel for a party or amicus in several cases discussed below: *Arizona v. Evans*, 514 U.S. 1 (1995); *Ratzlaf v. United States*, 510 U.S. 135 (1994); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Illinois v. Krull*, 480 U.S. 340 (1987); *Rose v. Clark*, 478 U.S. 570 (1986); and *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

Mistakes happen. Some are avoidable, but not all. Some result from human error; some when a system suffers a mechanical breakdown or exhaustion. Some are inevitable, if not predictable (at least in gross); others are flukes. Some happen regularly; others appear once in a blue moon. Some are harmless; some are fatal. Because mistakes come in different shapes and sizes, it is no surprise that the legal system deals with them in different ways. Some may never be forgiven, some may always be excused, and most fall in between.¹

What is a surprise is that the law treats mistakes by private parties in a categorically different manner than mistakes by government officials. A private party who reasonably and honestly believes that he has complied with the law generally cannot assert as a defense to a criminal charge that he may have made a mistake, but did not intend to commit a crime. The criminal law generally does not recognize a reasonable, honest mistake as grounds for exonerating someone charged with a crime. By contrast, the law is quite forgiving when law enforcement officers, prosecutors, or judges make mistakes. Three different doctrines—the reasonable-mistake exception to the exclusionary rule, the qualified-immunity doctrine, and the harmless-error doctrine—all exist to forgive reasonable, honest mistakes by one or more government officials involved in the criminal justice process.

On its face, that difference is quite striking. The law often treats government officials differently than private parties, but the principal difference is that the Constitution limits the actions of the former, not the latter.² There also are circumstances in which the law forgives a government official for conduct that would violate a criminal or non-criminal code if committed by a private party.³ For example, we allow ambulances to speed in order to reach a hospital in time to save a patient's life. That doctrine, however, is generally limited to cases where

1. See, e.g., James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109 (2010) (discussing the nature of mistakes that arise in the criminal justice system).

2. See *United States v. Morrison*, 529 U.S. 598, 621–22 (2000); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883); *United States v. Harris*, 106 U.S. 629, 639 (1883). The Thirteenth Amendment—which forbids slavery and involuntary servitude—is an exception, but is not relevant here.

3. See, e.g., WAYNE R. LAFAYE, *CRIMINAL LAW* § 10.7, at 590–600 (5th ed. 2010) (discussing defenses available to law enforcement officers).

a government official must necessarily act unlawfully to enforce more valuable laws or promote more valuable interests. But the law does not generally deny private parties any opportunity to assert that defense in the same manner that it altogether forecloses a general mistake-of-law defense to a criminal charge.⁴ This article examines whether that distinction makes sense.

Part I of this article discusses the principle that mistake or ignorance of the law is no excuse. It is settled law that no one can defend against a criminal charge on the grounds that he did not intend to flout the law and, at worst, made only a reasonable, honest mistake as to what he was free to do. Part II examines several areas in which the law does precisely the opposite by repeatedly manifesting a willingness to forgive reasonable mistakes by one or more actors in the criminal justice system. Part III then asks whether the developments discussed in Part II justify reconsidering the doctrine set forth in Part I that a mistake of law should not serve as an excuse to a crime. As I explain there, the Supreme Court's recent and oft-stated rationale for its willingness to forgive mistakes made by actors in the criminal justice system militates strongly in favor of allowing private parties to assert a mistake-of-law defense. If the law is willing to countenance reasonable mistakes that government officials make, it also should be willing to forgive the reasonable mistakes that the rest of us make. And if that is true, then it is time to re-examine the hoary mistake-of-law doctrine.

I. MISTAKES THAT ARE PUNISHED: THE MISTAKE-OF-LAW DOCTRINE IN THE SUBSTANTIVE CRIMINAL LAW

One of the oldest proverbs in the criminal law is that neither ignorance nor a mistake of law is a defense to a crime.⁵ The Latin phrase is

4. *Id.* § 10.1, at 552–64 (discussing necessity defense).

5. See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 726–27 (2012). Ignorance of fact stands on a different footing. A mistake of fact can be a defense to a charge because it can disprove a necessary mental state. Mistakenly taking someone else's umbrella does not make one a thief. See LAFAVE, *supra* note 3, § 5.6(b), at 300–04.

ignorantia juris non excusat,⁶ which in English means “tough luck.”⁷ The rule has a pedigree that predates early English common law.⁸ From the thirteenth century onward, the common law has rejected an ignorance or mistake-of-law defense.⁹ American law is the same. State¹⁰ and fed-

6. For the various Latin phrases, see Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 76 n.1 (1908).

7. See Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 267 (1987).

8. Roman law addressed the subject. It rejected ignorance as a defense to a violation of the common customs of the Italian tribes (the *jus gentium*), but permitted ignorance as a defense to “the more compendious and less common-sense *jus civile*,” as to which “women, males less than [twenty-five] years old, soldiers, peasants, and persons of small intelligence” could raise a mistake defense if they “had not had the opportunity to consult counsel familiar with the laws.” Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 685 (1976) (footnotes omitted).

9. See 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 481–84 (Robert Campbell ed., 5th ed. 1885); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 27 (Joseph Chitty ed. 1826); 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 42 (George Wilson ed. 1680); 3 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 374 (1966); JOHN SALMOND, SALMOND ON JURISPRUDENCE 426 (P. J. Fitzgerald ed., 12th ed. 1966); 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 94–95 (London, MacMillan & Co. 1883); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART §§ 52–74 (2d ed. 1961). The rule has been traced back to the thirteenth century. See Keedy, *supra* note 6, at 78.

10. See *Schuster v. State*, 48 Ala. 199, 202–03 (Ala. 1872); *State v. Paup*, 13 Ark. 129, 137–38 (Ark. 1852); *People v. O’Brien*, 31 P. 45, 47–48 (Cal. 1892); *Fraser v. State*, 37 S.E. 114, 116 (Ga. 1900); *People v. Cohn*, 193 N.E. 150, 153 (Ill. 1934); *Winehart v. State*, 6 Ind. 30 (Ind. 1854); *State v. O’Neil*, 126 N.W. 454, 456 (Iowa 1910); *Jellico Coal Min. Co. v. Commonwealth*, 29 S.W. 26, 26–27 (Ky. 1895); *State v. Goodenow*, 65 Me. 30, 33 (Me. 1876); *Grumbine v. State*, 60 Md. 355, 356 (Md. 1883); *Commonwealth v. Everson*, 2 N.E. 839, 840 (Mass. 1885); *Black v. Ward*, 27 Mich. 191, 201 (Mich. 1873); *State v. Armington*, 25 Minn. 29, 38 (Minn. 1878); *Whitton v. State*, 37 Miss. 379, 382 (Miss. 1859); *State v. Wilforth*, 74 Mo. 528, 529 (Mo. 1881); *Pisar v. State*, 76 N.W. 869, 870 (Neb. 1898); *State v. Carver*, 39 A. 973, 974 (N.H. 1898); *State v. Halsted*, 39 N.J.L. 402, 412–13 (N.J.L. 1877); *Gardner v. People*, 62 N.Y. 299, 304 (N.Y. 1875); *State v. Boyett*, 32 N.C. 336, 343 (N.C. 1849); *State v. Pyle*, 71 N.W.2d 342, 346 (N.D. 1955); *Ulsamer v. State*, 11 Ohio Dec. Reprint 889 (Ohio Cir. Ct. 1893); *Needham v. State*, 32 P.2d 92, 93 (Okla. Crim. App. 1934); *State v. Foster*, 46 A. 833, 835 (R.I. 1900); *State v. South Dakota Packing & Shipping Co.*, 180 N.W. 510, 511 (S.D. 1920); *McGuire v. State*, 26 Tenn. (7 Hum.) 54, 55–56 (Tenn. 1846); *Medrano v. State*, 22 S.W. 684 (Tex. Crim. App. 1893); *State v. Woods*, 179 A. 1, 2 (Vt. 1935). Some states now have codified the rule. See, e.g., *People v. Mann*, 646 P.2d 352, 356 (Colo. 1982) (discussing state statute).

eral courts,¹¹ as well as treatise writers and other respected authorities,¹² also have rejected a mistake defense.¹³ The proposition that ignorance or mistake of the law is no excuse to a crime is as firmly settled a legal doctrine as any rule could hope to be.¹⁴

11. See *Bryan v. United States*, 524 U.S. 184, 193 (1998); *Cheek v. United States*, 498 U.S. 192, 199 (1991); *Hamling v. United States*, 418 U.S. 87, 119–24 (1974); *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910); *Armour Packing Co. v. United States*, 209 U.S. 56, 85 (1907); *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (“Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law.”); *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833) (“It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.”); *The Joseph*, 12 U.S. (8 Cranch) 451 (1814); *Townsend v. United States*, 95 F.2d 352, 358 (D.C. Cir. 1938); *Blumenthal v. United States*, 88 F.2d 522, 530 (8th Cir. 1937); *N.Y. Cent. & H.R.R. Co. v. United States*, 239 F. 130, 131 (2d Cir. 1917); *Fall v. United States*, 209 F. 547, 552 (8th Cir. 1913); *Chadwick v. United States*, 141 F. 225, 243 (6th Cir. 1905); *United States v. Anthony*, 24 F. Cas. 829, 831–32 (C.N.D.N.Y. 1873). For some possible exceptions to this rule, see *Barker v. United States*, 546 F.2d 940, 946–54 (D.C. Cir. 1976) (Wilkey, J., concurring) (reliance upon official authority); *id.* at 954–57 (Merhige, J., concurring) (reliance upon an official interpretation of the law).

12. See 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW §§ 294–300 (5th ed. 1872); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 27–69 (2d ed. 1960); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 45–46 (Belknap Press, 2009) (1881); COURTNEY STANHOPE KENNY, OUTLINES OF CRIMINAL LAW 68–69 (13th ed. 1929); LAFAVE, *supra* note 3, § 5.6; 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 399 (11th ed. 1912); Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1939).

13. Although Great Britain still rejects an ignorance or mistake of law defense, some members of the international community disagree with the English common law rule. For example, the Statute of the International Criminal Court specifically provides for a mistake of law defense. See ANNEMIEKE VAN VERSEVELD, MISTAKE OF LAW: EXCUSING PERPETRATORS OF INTERNATIONAL CRIMES 2–6 (2012).

14. There is a related principle that could be said to create an exception to the mistake-is-not-a-defense rule. In certain complex regulatory schemes, Congress has required the government to prove that a defendant “willfully” violated the law. See, e.g., *Cheek*, 498 U.S. at 202–03 (federal tax code); *United States v. Liu*, No. 10-10613, slip op. 11-16 (9th Cir. Oct. 1, 2013) (copyright laws); *United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 826–29 (9th Cir. 1976) (export control laws). The Supreme Court has read the term “willfully” as requiring the government to prove an intentional violation of a known legal duty. See *Bryan v. United States*, 524 U.S. 184, 191 (1998); *Ratzlaf v. United States*, 510 U.S. 135, 138 (1994); *Cheek*, 498 U.S. at 200; *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360

Courts and commentators have offered several rationales for rejecting a mistake-of-law defense.¹⁵ The oldest rationale is that everyone knows the criminal law because it grows out of and conforms to the customs, mores, and morals of the community.¹⁶ There were only nine common law felonies,¹⁷ the argument goes, and they mirrored the prevailing moral code.¹⁸ Everyone, therefore, knew what was and was not a crime. A second justification for the no-mistake rule rests on the fear that a mistake-of-law defense would cripple law enforcement. Any new hurdle for the prosecution to overcome is generally troublesome, the argument goes,¹⁹ and the mistake-of-law hurdle is especially prob-

(1973). In such a case, a defendant can defend by maintaining that he did not subjectively intend to break the law or that he mistakenly believed that he acted lawfully. *See, e.g., Cheek*, 498 U.S. at 194–96, 204–07. A defendant who reasonably believed that he acted lawfully could offer that evidence to defeat the government’s proof. *See Sharon Davies, The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341 (1998).

15. *See Meese & Larkin, supra* note 5, at 738–59; Cass, *supra* note 8, at 689–95.

16. *See Cheek*, 498 U.S. at 199 (the rule that ignorance of the law is no defense is “[b]ased on the notion that the law is definite and knowable”); 1 AUSTIN, *supra* note 9, at 481 (“Ignorance or error with regard to matter of fact, is often inevitable: that is to say, no attention or advertence could prevent it. But ignorance or error with regard to the state of the law, is never inevitable. For the law is definite and knowable, or might or ought to be so.”); 4 BLACKSTONE, *supra* note 9, at 27; SALMOND, *supra* note 9, at 426; Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 15–16 (1957); Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 644 (1941) (“[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as ‘custom.’”);

17. The common law felonies were treason, murder, manslaughter, rape, robbery, sodomy, burglary, larceny, and arson. *See* STUART P. GREEN, 13 WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 10, 280 n.3 (2012).

18. *See* Bruce R. Grace, Note, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392, 1395 (1986) (“The refusal to allow mistakes of criminal law as a defense is due to a strong common law presumption that every person knows the criminal law. In the past, this presumption may have been true for the simple reason that the common law of crimes closely tracked a relatively homogeneous community’s moral sensibility.”) (footnotes omitted); Hall & Seligman, *supra* note 16, at 644; LAFAVE, *supra* note 3, §1.2(f) at 14–15.

19. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 19, 77 (2d ed. 2008) (“Any increase in the number of conditions required to establish criminal liability increases the opportunity for deceiving courts or juries by the pretense that some condition is not satisfied. . . . [I]f we admit such excuses, crime may be committed in the hope (surely sometimes realized) that a false plea of mistake, accident, or mental aberration

lematic. The government cannot investigate whether a claim is legitimate by asking the one party who knows that answer—the defendant—because he can fend off any questioning by invoking his Fifth Amendment Self-Incrimination Privilege.²⁰ As the result, a rogue defendant (or his crafty lawyer) could use a phony mistake-of-law defense to raise a reasonable doubt of guilt and snooker the jury into an acquittal. That result over time would discourage people from learning the law.²¹ A mistake-of-law defense, therefore, could be widely, repeatedly, and fraudulently used.

Modern day scholars disagree over the continued desirability of the no-mistake rule. Some defend the common law.²² Others believe that it should be re-examined and rejected or modified.²³ They believe

would succeed.”).

20. See *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (“The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.”); see also, e.g., *United States v. Hubbell*, 530 U.S. 27, 38 (2000).

21. See *Barlow v. United States*, 32 U.S. 404, 411 (1833); Cass, *supra* note 8, at 689–95; Meese & Larkin, *supra* note 5, at 755–59.

22. See, e.g., HALL, *supra* note 12, at 376–414.

23. For parties open to reconsideration of the no-mistake rule, see ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 233–37 (2d ed. 1995); P.J. FITZGERALD, *CRIMINAL LAW AND PUNISHMENT* 122–23 (1962); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 9.3, at 730–36 (1978); JEREMY HORDER, *EXCUSING CRIME* 276 (2004); Cass, *supra* note 8, at 684–89; Grace, *supra* note 18; Douglas Husak & Andrew von Hirsch, *Culpability and Mistake of Law*, in *ACTION AND VALUE IN CRIMINAL LAW* 157, 166–69 (Stephen Shute et al. eds., 1993); Kadish, *supra* note 7, at 267–68; Dan M. Kahan, *Is Ignorance of Fact an Excuse Only for the Virtuous?*, 96 MICH. L. REV. 2123 (1997–98); Dan M. Kahan, *Ignorance of the Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997–98); Gerald Leonard, *Rape, Murder, and Formalism: What Happens If We Define Mistake of Law?*, 72 U. COLO. L. REV. 507 (2001); D. O’Connor, Comment, *Mistake and Ignorance in Criminal Cases*, 39 MOD. L. REV. 644, 644–53 (1976); Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting “Apparent Innocence” in the Criminal Law*, 33 AM. CRIM. L. REV. 1 (1995–96); Paul K. Ryu & Helen Silving, *Error Juris: A Comparative Study*, 24 U. CHI. L. REV. 421, 466–71 (1957); Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO STATE J. CRIM. L. 487 (2011–12); Michael L. Travers, Note, *Mistake of Law in Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301 (1995). For slightly different but overlapping suggested modifications of the rule, see FITZGERALD, *supra*, at 122–24; Grace, *supra* note 18, at 1412–16; Kadish, *supra* note 7, at 267–68; Paul J. Larkin, Jr., *A Mistake of Law Defense as a Remedy for Overcriminalization*, 26 A.B.A. J.

that, regardless of what was true at common law, it no longer is credible to claim that everyone knows the law,²⁴ particularly since “[t]he tight moral consensus that once supported the criminal law has obviously disappeared.”²⁵ Those scholars also maintain that it is fundamentally unfair, and in many cases unconstitutional, to stigmatize and punish (let alone imprison) morally blameless parties for engaging in conduct that no reasonable person would have thought a crime.²⁶ A few in that group are concerned that the proliferation of criminal stat-

CRIMINAL JUSTICE 10 (Spring 2013); Meese & Larkin, *supra* note 5, at 773–75.

24. See, e.g., William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1881 (2000) (“Ordinary people do not have the time or training to learn the contents of criminal codes; indeed, even criminal law professors rarely know much about what conduct is and isn’t criminal in their jurisdictions.”). Even authors who defend the common law rule admit as much. I AUSTIN, *supra* note 9, at 481–82 (The proposition “[t]hat any actual system is so knowable, or that any actual system has ever been so knowable,” in his colorful words, “is . . . notoriously and ridiculously false.”); Hall, *supra* note 16, at 14 (describing the *ignorantia juris neminem excusat* doctrine as “an obvious fiction”); Hall & Seligman, *supra* note 16, at 646 (finding that the ignorance rule may have been justified in the early days of the criminal law in England, but over time that presumption has become “indefensible as a statement of fact”); Keedy, *supra* note 6, at 91 (calling the presumption “absurd”).

25. FLETCHER, *supra* note 23, § 9.3, at 731–32.

26. See Cass, *supra* note 8, at 687; Meese & Larkin, *supra* note 5, at 738–72; Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107–10 (1962). Distinguished scholars have long criticized strict criminal liability for serious offenses on the ground that it “leads to conviction of persons who are, morally speaking, innocent.” A.P. Simester, *Is Strict Liability Always Wrong?*, in APPRAISING STRICT LIABILITY 21, 21 (A.P. Simester ed., 2005). See also LON L. FULLER, *THE MORALITY OF LAW* 77 (rev. ed., 1969) (“Strict criminal liability has never achieved respectability in our law.”); H.L.A. HART, *Negligence, Mens Rea, and Criminal Responsibility*, in PUNISHMENT AND RESPONSIBILITY 136, 152 (“[S]trict liability is odious.”) (2d ed. 2008); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 422–25 (1958); Douglas Husak, *Strict Liability, Justice, and Proportionality*, in APPRAISING STRICT LIABILITY 21 (A.P. Simester ed., 2005), at 91–92; Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 831 n.15 (1999) (collecting citations to numerous books and articles criticizing strict criminal liability); Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067, 1067–70 (1983); Paul Roberts, *Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions*, in APPRAISING STRICT LIABILITY 21, 21 (A.P. Simester ed., 2005), at 182, 191; Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1928). Given that criticism, those scholars would, likely, support a mistake-of-law defense.

utes has made the penal code arcane, unwieldy, unknowable, and unjust, a phenomenon colloquially known as “overcriminalization.”²⁷ Those critics of the no-mistake rule believe that the criminal law must evolve in light of the legislative decision to enforce through the criminal process the increasingly technical and recondite rules promulgated by the modern regulatory state.²⁸ As Oxford Professor Jeremy Horder has explained:

Ignorantia juris neminem excusat is a maxim perhaps appropriately regarded as exception-less in a system of criminal law composed wholly or largely of *mala in se*. But, a legal system that persists in a belief in the absolute character of that maxim in a world of ever more far-reaching, ever more technical and specialized, and ever more inaccessible regulatory criminal laws, is a legal system that has simply failed to adapt its moral thinking to modern circumstances.²⁹

The development of strict liability regulatory or “public welfare offenses” early in the twentieth century could have triggered a reconsideration of the mistake rule, but did not. Perhaps, that was because the limited penalties imposed a century ago for such offenses ameliorated the harsh results of penalizing morally blameless parties.³⁰ The

27. Numerous scholars and practitioners have described the phenomenon of overcriminalization of the law and have debated the multifarious problems it causes. DOUGLAS N. HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2009); ONE NATION, UNDER ARREST (Paul Rosenzweig & Brian W. Walsh eds., 2010); Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO ST. J. OF CRIM. L. 407 (2008); Darryl K. Brown, *Can Criminal Law be Controlled?*, 108 MICH. L. REV. 971 (2010) (reviewing DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008)); Stuart P. Green, *Is There Too Much Criminal Law?*, 6 OHIO ST. J. OF CRIM. L. 737 (2009) (reviewing HUSAK); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715 (2013); Edwin Meese III, *Overcriminalization in Practice: Trends and Recent Controversies*, 8 SETON HALL CIR. REV. 505 (2012); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005); George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417 (2007); Larry D. Thompson, *The Reality of Overcriminalization*, 7 J.L. ECON. & POL’Y 577 (2011); Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279 (2007).

28. See HORDER, *supra* note 23, at 276; Meese & Larkin, *supra* note 5, at 738–72.

29. HORDER, *supra* note 23, at 276 (footnote omitted).

30. See Meese & Larkin, *supra* note 5, at 741; Sayre, *supra* note 26, at 58–59, 67, 72, 78–82. Some courts stated that imprisonment would be inappropriate for public welfare offenses. See

prime conditions for a re-examination, however, may lie just over the horizon. There has been a proliferation of regulatory laws backed up by criminal penalties in the last 40 years. Today, it is not uncommon for those crimes to carry a term of imprisonment.³¹ The result is that there are far more opportunities today to witness the criminal law being used to produce a miscarriage of justice than ever before.

Moreover, the political climate is fertile for legislative or judicial reconsideration of any ancient rule with questionable validity today. The overcriminalization phenomenon has attracted a broad-based coalition of organizations. Groups from the Right and the Left that otherwise ordinarily do not share the same views on public policy have united to oppose overcriminalization of the law.³² All that may need to occur is for some event to force public policy decisionmakers to reconsider the defense or for some powerful or influential party to tee up the issue for consideration by public policy decisionmakers.³³ That event or party could occur or be found in the legislative,³⁴ judicial,³⁵ or

Staples v. United States, 511 U.S. 600, 617 (1994) (collecting authorities); *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474, 477 (N.Y. 1918) (Cardozo, J.).

31. See, e.g., *United States v. McNab*, 331 F.2d 1228 (11th Cir. 2003) (eight years' imprisonment for importing slightly undersized lobsters in plastic, not paper, in violation of Honduran law).

32. See Zach Dillon, Foreword, *Symposium on Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 525, 525 (2013) ("The Heritage Foundation and the American Civil Liberties Union joined forces to cosponsor our live Symposium and send the unified message that whether you are liberal, moderate, or conservative, overcriminalization is an issue that can no longer be ignored."); BRIAN W. WALSH & TIFFANY M. JOSLYN, Heritage Found. & Nat'l Ass'n of Criminal Def. Lawyers, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW* (2010) (joint report authored by The Heritage Foundation and the National Association of Criminal Defense Lawyers).

33. For a discussion of how such events occur, see Paul J. Larkin, Jr., *John Kingdon's "Three Streams" Theory and the Antiterrorism and Effective Death Penalty Act of 1996*, 28 J.L. & POL. 25 (2012).

34. Congress has tentatively offered some interest in revising the federal criminal code. See generally *The Criminal Code Modernization and Simplification Act of 2011: Hearing on H.R. 1823 Before the H. Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. (2011). The proposed Criminal Code Modernization and Simplification Act of 2011, however, did not contain a mistake-of-law defense.

35. The Supreme Court has reiterated the common law no-mistake rule on several occasions within the past several decades, see, e.g., *Bryan v. United States*, 524 U.S. 184, 193 (1998),

executive branch, although that last option is the least likely of the three.³⁶

It is likely that the Supreme Court in particular will have to address this issue over the next decade. Overcriminalization and the problems it causes show no sign of abating.³⁷ In response, defendants will use every possible defense to stave off conviction. One such defense is mistake of law.³⁸ Defendants will assert that defense in the lower federal courts, forcing the judiciary to decide if the common law rule retains validity today. Given the competition between the deeply entrenched nature of the common law rule and the deeply held belief that the rule can cause a miscarriage of justice in a particular case, it is unlikely that the federal circuit courts will reach a unanimous position on the continued wisdom of the no-mistake rule. The upshot is that at some point a convicted defendant, or the government, will ask the Supreme Court to overturn or reaffirm it.

When that happens, there is reason to be hopeful that the Supreme Court can be persuaded to reconsider the no-mistake rule. Over the

albeit sometimes just in passing, *see, e.g.*, *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009) (calling the rule a “legal cliché”). But the Court has not yet reviewed a case that would force the Justices to decide whether to revisit the issue. The closest that the Supreme Court has come to re-examining the no-mistake rule is *Cheek v. United States*, 498 U.S. 192 (1991). *Cheek* involved a prosecution for violation of the federal income tax laws, which require the government to prove that a party “willfully” misstated his income. *Id.* at 192. The Court noted that a mistake of law generally is no defense, but could be raised in defense in that case. *Id.* at 199–201. The reason was that the willfulness requirement obliged the government to prove that the defendant intentionally violated a known legal duty, and a reasonable mistake of law would exonerate a defendant. *Id.* The Court’s willingness to allow a mistake-of-law defense to be asserted in that setting, however limited it may be, does suggest that the Court is receptive to rethinking relevant substantive criminal law doctrines.

36. The Justice Department is unlikely to endorse a mistake-of-law defense because prosecutors see no benefit in new substantive criminal law defenses, however sound one may be. *See, e.g.*, Cass, *supra* note 8, at 689; Meese & Larkin, *supra* note 5, at 749. For a discussion of the accomplice-like relationship between legislators and prosecutors, see Larkin, *supra* note 27; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

37. Congress continues to churn out new federal criminal laws. *See, e.g.*, WALSH & JOSLYN, *supra* note 32.

38. *See* Larkin, *supra* note 27, at 720–21 (discussing acknowledgement of the issue by the academy, Congress, the American Bar Association, and others); Meese & Larkin, *supra* note 5 (endorsing a mistake-of-law defense).

last few decades, the Court has created three different doctrines that rest on the proposition that not every mistake demands a remedy. In each case the Court has concluded that the criminal justice system is better served through forgiveness than punishment when an actor in the criminal process stumbles. The rationale that the Court has given, ironically, also applies when the question is not whether a police officer, prosecutor, or judge should be punished for a mistake, but whether a private party should receive the same treatment. As it turns out, the principle that the law should be blind as between the parties may demand that the Court re-examine and either ditch or revise the common law no-mistake rule.

II. MISTAKES THAT ARE FORGIVEN: THE REASONABLE-MISTAKE, QUALIFIED-IMMUNITY, AND HARMLESS-ERROR DOCTRINES

Three doctrines stand in stark contrast to the common-law mistake doctrine: the reasonable-mistake exception to the Fourth Amendment exclusionary rule, the qualified-immunity doctrine, and the harmless-error doctrine. The Supreme Court has created each doctrine in the last forty years in response to the criticism that it makes little sense to punish an actor in the criminal justice system for making a reasonable mistake in the exercise of his responsibilities. Each doctrine softens the rigors of the principle that a remedy is necessary to ensure that a rule is not just a collection of words.

A. The Reasonable-Mistake Exception to the Exclusionary Rule

At common law, all relevant evidence was admissible regardless of its provenance.³⁹ How a party acquired evidence was immaterial, even

39. For a concise discussion of English common-law criminal procedure, see THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 424-41 (5th ed. 1956); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978). Professors McCormick and Wigmore have the classic treatises on the common law of evidence. See CHARLES KENNETH S. BROUN ET AL., *MCCORMICK ON EVIDENCE* (4th ed., John William Strong ed., 1992); JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* (3d ed. 1940).

if it was obtained unlawfully.⁴⁰ The Supreme Court endorsed that proposition early in the twentieth century.⁴¹

In 1914, the Supreme Court created an exception to the common-law rule for purposes of the Fourth Amendment. In *Weeks v. United States*,⁴² the Court held that evidence the police obtained due to an unlawful search or seizure is inadmissible at trial. Despite the fact that neither the text of the amendment, nor the historical events that lead to its adoption, involved suppression of evidence,⁴³ the Court con-

40. See, e.g., *People v. Adams*, 68 N.E. 636, 638 (N.Y. 1903), *aff'd* *Adams v. New York*, 192 U.S. 585 (1904); cf. *Kerr v. Illinois*, 119 U.S. 436, 444 (1886) (rejecting the defendant's claim that criminal charges against him should be dismissed because he was unlawfully brought into the United States).

41. In *Adams v. New York*, 192 U.S. 585, 594–95 (1904), the Supreme Court acknowledged the common law rule and also refused to construe the Fourth Amendment to require exclusion of evidence seized due to an unlawful search or seizure.

42. *Weeks v. United States*, 232 U.S. 383, 393 (1914).

43. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 21 (1997) (“Tort law remedies were . . . clearly the ones presupposed by the Framers of the Fourth Amendment and counterpart state constitutional provisions. Supporters of the exclusionary rule cannot point to a single major statement from the Founding—or even the antebellum or Reconstruction eras—supporting Fourth Amendment exclusion of evidence in a criminal trial.”); William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 *GEO L.J.* 799, 835–36 (2000) (footnotes omitted) (“As is well known, at the time of the Fourth Amendment’s adoption, courts offered money damages, but not exclusion, for violations of the rules of search and seizure. Neither the framers nor the common-law judges who rendered opinions concerning search and seizure ever intimated that courts should consider exclusion as a remedy for violations of these rules. Moreover, American judges of the early republic consistently rejected arguments for exclusion. Given these points, a critic of exclusion might contend that the only remedy for someone in *Weeks*’s position is money damages for the harm he has suffered. Exclusion, the critic could maintain, can never be constitutionally justified because the framers did not make allowance for it.”). For a discussion of the historical background to the Fourth Amendment, see JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 30–48 (1966); NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 51–105 (1970); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 *COLUM. L. REV.* 1365, 1369–72 (1983); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969).

cluded that suppression of unlawfully obtained evidence was a necessary remedy for a Fourth Amendment violation.⁴⁴ Admitting the evidence would make the courts complicit in the violation by giving judicial “sanction” to the officers’ illegality.⁴⁵ *Weeks* thereby created what has been known ever since as the Fourth Amendment exclusionary rule.⁴⁶

44. In *Weeks*, the Court adverted to the combination of the Fourth Amendment and Fifth Amendment Self-Incrimination Privilege as a rationale for excluding unlawfully seized evidence. See 232 U.S. at 383–84. Over time, however, the Court eschewed reliance on the Self-Incrimination Privilege as a justification for the exclusionary rule. See *Andresen v. Maryland*, 427 U.S. 463 (1976). Later cases have made clear that the sole justification for the rule today is its potential deterrent effect. See *infra* notes 48–49.

45. *Weeks*, 232 U.S. at 392; see also, e.g., *Elkins v. United States*, 364 U.S. 206, 222 (1960) (noting “the imperative of judicial integrity” as a rationale for the rule); James Boyd White, *Forgotten Points in the “Exclusionary Rule” Debate*, 81 MICH. L. REV. 1273, 1279 (1983) (The *Weeks* rule “was simply an automatic consequence of the . . . view that one’s property was immune from seizure; in such cases exclusion is built into the fourth amendment itself.”); cf. *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) (“[F]or my part I think that it a less evil that some criminals should escape than that the government should play an ignoble part.”). In 1949 the Supreme Court incorporated the Fourth Amendment against the states through the Fourteenth Amendment Due Process Clause in *Wolf v. Colorado*, 338 U.S. 25, 33, but did not extend the exclusionary rule to the states for another 12 years, ruling in *Mapp v. Ohio*, 367 U.S. 643, 656–57 (1961), that unlawfully obtained evidence also may not be used in the prosecution’s case-in-chief in state criminal cases.

46. The United States stands alone in this regard. No other country automatically excludes evidence obtained by virtue of an unlawful police search or seizure. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 344 (2006); Craig Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 399–400 (2001). The Court has created other exclusionary rules for violations of different Bill of Rights provisions. See *Stovall v. Denno*, 388 U.S. 293 (1967) (holding that out-of-court eyewitness identifications are subject to review to determine if they are sufficiently unreliable that due process forbids their use); *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding a party subjected to a custodial interrogation must be properly advised of his rights and waive them before his statements can be admitted during the government’s case-in-chief); *Massiah v. United States*, 377 U.S. 201 (1964) (holding evidence obtained from questioning a defendant in violation of the Sixth Amendment Counsel Clause must be suppressed). The Court has not yet had occasion to decide whether a reasonable mistake exception would apply to those rules, but insofar as they are justified on deterrence grounds, it is likely that the Court would apply the same exception.

Since *Weeks*, the Supreme Court has revisited and revised the rule on numerous occasions.⁴⁷ The Court has abandoned the judicial integrity underpinning for the rule in favor of a deterrence justification,⁴⁸ which has become the “sole purpose” for the rule.⁴⁹ The Court also has made clear that the Fourth Amendment itself does not require suppression of evidence and that exclusion is not even required in every case where there is an unlawful search or seizure.⁵⁰ The Court has limited application of the rule to the prosecution’s case-in-chief at trial, allowing unlawfully obtained evidence to be used in a variety of other settings, such as before the grand jury, to impeach a defendant who testifies at trial, or in civil proceedings.⁵¹

Probably few rules of criminal procedure have caused the police and prosecutors as much consternation as the exclusionary rule or have given commentators as much opportunity to debate a Supreme Court doctrine.⁵² Some of the rule’s critics have urged the Supreme Court to

47. The Supreme Court’s development of Fourth Amendment case law is discussed at length in Professor LaFave’s multi-volume treatise. See 1–6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (4th ed. 2004).

48. See *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011); *Herring v. United States*, 555 U.S. 135, 141 & n.2 (2009); *United States v. Leon*, 468 U.S. 897, 905–08 (1984).

49. See, e.g., *Davis*, 131 S. Ct. at 2426.

50. See, e.g., *Davis*, 131 S. Ct. at 2426; *Leon*, 468 U.S. at 909, 921 & n.22.

51. See *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998) (holding the exclusionary rule inapplicable to parole revocation hearings); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding the exclusionary rule inapplicable to civil deportation proceedings); *Havens v. United States*, 446 U.S. 620 (1980) (holding that the exclusionary rule does not forbid use of illegally seized evidence to impeach a testifying defendant); *Stone v. Powell*, 428 U.S. 465 (1976) (holding that the exclusionary rule is inapplicable in federal habeas corpus review of state criminal convictions); *United States v. Janis*, 428 U.S. 433 (1976) (holding that the exclusionary rule is inapplicable in federal civil tax enforcement proceedings); *United States v. Calandra*, 414 U.S. 338 (1974) (holding that the exclusionary rule does not prohibit use before the grand jury of illegally-obtained evidence).

52. Commentary on the rule is voluminous. See A.B.A. STATEMENT CONCERNING THE FOURTH AMENDMENT EXCLUSIONARY RULE (June 1981); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Yale Kamisar, *Is the Exclusionary Rule an “Unnatural” or “Illogical” Extension Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66 (1978); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1973–74); Dallin H. Oaks,

abandon the rule altogether on the ground first articulated by then-Judge (later Justice) Benjamin Cardozo that it is irrational for “a criminal . . . to go free because the constable has blundered.”⁵³ Others have urged the Court to limit its application to only the most egregious cases. They urged the Court to adopt what has been variously called a “good faith” or “reasonable mistake” exception to the exclusionary rule.⁵⁴

Critics in the latter category have won the debate. In 1984, the Supreme Court adopted a reasonable-mistake (or objective “good faith”) exception in *United States v. Leon*.⁵⁵ In *Leon*, the Court reasoned that courts should not suppress unlawfully obtained evidence if a police officer reasonably believed that his actions were lawful.⁵⁶ The test is not a matter of subjective good faith; the inquiry is objective: Could a reasonable police officer have believed that his actions were lawful? If so, *Leon* concluded, the cost of excluding relevant evidence is too great to justify any hoped-for deterrent effect of the exclusionary rule.⁵⁷

Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665 (1969–70); Monrad G. Paulsen, *Law and Police Practice: Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65 (1957); Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215 (1978); Charles Allen Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

53. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926); see also 8 WIGMORE, *supra* note 39, § 2184 (“Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.”).

54. See, e.g., Edna F. Ball, *Good Faith and the Fourth Amendment: The “Reasonable” Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978).

55. *United States v. Leon*, 468 U.S. 897 (1984).

56. *Id.* at 926.

57. See *Herring v. United States*, 555 U.S. 135, 143 (2009); *Illinois v. Krull*, 480 U.S. 340, 348–49 (1987).

While the reasonable-mistake exception is controversial,⁵⁸ the Supreme Court has reaffirmed *Leon* on several occasions since 1984.⁵⁹ The result is that the reasonable-mistake exception, like the underlying exclusionary rule, has now become settled law.

The reasonable-mistake exception also is very prosecution-friendly.⁶⁰ For example, negligence, and perhaps even intentional misconduct, by non-law enforcement personnel never should lead to suppression. That is the lesson of *Arizona v. Evans*.⁶¹ Invoking the reasonable-mistake exception, the Court refused to suppress evidence seized by officers in reliance on an arrest warrant that had been recalled and should have been culled from the court's computer system, but remained on file due to negligence by the court's staff.⁶² The purpose of the rule was to deter the police from violating the Fourth Amendment,

58. Some commentators criticized the good faith exception that Justice White first proposed in his opinion in *Illinois v. Gates*, 462 U.S. 213, 246–67 (1983) (White, J., concurring), and that the full Court (per Justice White) endorsed in *Leon*. Their argument was that the exception would undo the benefits of the rule. See Yale Kamisar, “Comparative Reprehensibility” and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1 (1987); William J. Mertens & Silas J. Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981).

59. See *Illinois v. Krull*, 480 U.S. 340 (1987) (refusing to apply the exclusionary rule when police reasonably relied on a subsequently invalidated statute that permitted a warrantless search); *Arizona v. Evans*, 514 U.S. 1 (1995) (refusing to apply the exclusionary rule where the evidence was acquired by reliance on a warrant that court employees mistakenly failed to cull from a computer file); *Herring v. United States*, 555 U.S. 135 (2009) (refusing to apply the exclusionary rule where the evidence was acquired by reliance on a warrant that police employees mistakenly failed to cull from a computer file); *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011) (refusing to apply the exclusionary rule when the police rely on subsequently overruled judicial precedent allowing a warrantless search); cf. *Hudson v. Michigan*, 547 U.S. 586 (2006) (relying on the costs of suppression noted in *Leon* in ruling that the exclusionary rule should not be applied to violations of the Fourth Amendment “knock and announce” requirement adopted in *Wilson v. Arkansas*, 514 U.S. 927 (1995)).

60. Commentators now treat the reasonable mistake exception as a given. The current debate is whether the Court's post-*Leon* extension of the exception has gutted the underlying rule. See Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463 (2009); Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1 (2012); Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009).

61. *Arizona v. Evans*, 514 U.S. 1 (1995).

62. *Id.* at 4–5, 14–16.

the Court explained, so it made no sense to apply the rule to the actions of non-law enforcement personnel.⁶³

Even when the police are at fault, the reasonable-mistake exception has an impressive reach. Isolated instances of negligence, “attenuated from” a search or seizure, are insufficient to justify suppression.⁶⁴ Only where the police conduct is “deliberate, reckless, or grossly negligent,” or is due to “recurring or systematic negligence,” should unlawfully obtained evidence be excluded.⁶⁵ The two critical considerations when deciding whether evidence must be suppressed are the flagrancy of police misconduct and the possibility of correcting law enforcement behavior through alternatives to suppression. From what the Court has said about those factors, it appears that the reasonable-mistake exception would allow the admission of unlawfully obtained evidence in all but the most egregious cases of willful police misconduct.⁶⁶ The reasonable-mistake exception, therefore, should forgive a

63. *Id.* at 16 (“Application of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees.”); *see also* *Illinois v. Krull*, 480 U.S. 340, 348 (1987) (stating that the exclusionary is designed to deter police misconduct and refusing to apply it to an officer’s reliance on a statute later held unconstitutional); *Massachusetts v. Shepard*, 468 U.S. 981, 990–91 (1984) (refusing to apply the exclusionary rule when a magistrate failed to attach the search warrant affidavit to the warrant itself); *United States v. Leon*, 468 U.S. 897, 916 (1984) (stating that the exclusionary rule exists “to deter police misconduct rather than to punish the errors of judges and magistrates”).

64. *Herring v. United States*, 555 U.S. 135, 137 (2009).

65. *Id.* at 144.

66. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield “meaningful[]” deterrence, and culpable enough to be “worth the price paid by the justice system.” *Herring v. United States*, 555 U.S. 135, 144 (2009); *accord* *Davis v. United States*, 131 S. Ct. 2419, 2428 (2011). Whether the exclusionary rule is justified “varies with the culpability of the law enforcement conduct,” so making “an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus” of deciding whether to suppress evidence. *Herring*, 555 U.S. at 143 (quoting *United States v. Leon*, 468 U.S. 897, 911 (1984)). Because “the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence,” in order “[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” *Id.* at 144. On the one hand, “[w]hen the police exhibit ‘deliberate’, ‘reckless’, or ‘grossly negligent’ disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs.” *Davis*, 131 S. Ct. at 2427 (quoting *Herring*, 555 U.S. at 144). On the other hand, “when the police act with an objectively reasonable good-faith belief that their

police officer's missteps in the vast majority of cases. The result is that suppression now should occur, not in every case where there is a Fourth Amendment violation, as *Weeks* contemplated, but only in cases where an officer willfully flouted the Fourth Amendment or engaged in a sustained, unrelenting pattern of reckless or negligent conduct.

B. The Qualified-Immunity Doctrine

A close sibling to the reasonable-mistake exception is the qualified-immunity doctrine.⁶⁷ That doctrine followed on the heels of the Supreme Court's decision to recognize a cause of action for damages for the federal government's violation of a party's constitutional rights.

The leading case is *Bivens v. Six Unknown Federal Narcotics Agents*.⁶⁸ Bivens sued several federal law enforcement officers for conducting an illegal warrantless search of his home and for using unreasonable force in the process. The Supreme Court ruled that, in the absence of an

conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.* at 2427–28 (citations and internal punctuation omitted). Two additional factors also lessen the need for the exclusionary rule to play a deterrent role. One is the availability of a civil damages action under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), against federal law enforcement officers or under 42 U.S.C. § 1983 (2012) against state or local officers. See *Hudson v. Michigan*, 547 U.S. 586, 596–98 (2006). The other is “the increasing professionalism of police forces, including a new emphasis on internal police discipline,” as well as “the increasing use of various forms of citizen review.” *Id.* at 598, 599.

67. In *Leon*, the Supreme Court relied on the qualified-immunity doctrine to define the reach of the reasonable mistake exception. See *United States v. Leon*, 468 U.S. 897, 922–23 (1984) (relying on the inquiry set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1987), to define the contours of the reasonable mistake exception); cf. *Hudson v. Michigan*, 547 U.S. 586, 596–99 (2006) (discussing whether the availability of a damages remedy for Fourth Amendment violations eliminates a need for the exclusionary rule). Since then the Court has cited decisions involving the qualified-immunity doctrine in reasonable mistake cases, as well as the opposite. See *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244–45 (2012); *id.* at 1245 n.1 (“Although *Leon* involved the proper application of the exclusionary rule to remedy a Fourth Amendment violation, we have held that ‘the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified-immunity accorded an officer’ who obtained or relied on an allegedly invalid warrant.”) (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986)). *Leon* and *Messerschmidt* show that the two doctrines have a common core and periphery.

68. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

exclusive or equally valuable congressional remedy, federal courts may award a private party money damages against federal officials for a violation of that party's constitutional rights.⁶⁹ "[D]amages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."⁷⁰ Moreover, private parties ordinarily could not obtain injunctive relief because they could not prove that the government's illegality is likely to recur.⁷¹ As a result, for people not charged with a crime, money damages are not just the ordinary remedy, but also the only available remedy. As Justice Harlan pithily explained, "[f]or people in *Bivens*' shoes, it is damages or nothing."⁷²

Bivens gave private parties the opportunity to bring a tort action for constitutional violations directly against federal officials without being shut out by the bar of sovereign immunity.⁷³ But *Bivens* left open the possibility that government officials could defend against liability

69. *Id.* at 390–97.

70. *Id.* at 395.

71. *See id.* at 395–97.

72. *Id.* at 410 (Harlan, J., concurring in the judgment). Since *Bivens*, the Supreme Court recognized similar claims under the Eighth Amendment Cruel and Unusual Punishments Clause and equal protection principles contained within the Fifth Amendment Due Process Clause. *See* *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979). Since then, however, the Court has declined to create similar tort actions in connections with other claims. *See* *Minnecci v. Pollard*, 132 S. Ct. 617 (2012) (declining to create a *Bivens* action against private individuals working at a private prison); *Hui v. Castenada*, 130 U.S. 1845 (2010) (holding that the Public Health Service Act, 42 U.S.C. 233(a) (2012), precluded a *Bivens* action against federal public health officials); *Wilkie v. Robbins*, 551 U.S. 537 (2007) (declining to recognize a *Bivens* action for retaliating against the exercise of property rights); *Christopher v. Harbury*, 536 U.S. 403 (2002) (declining to create a *Bivens* action against government officials for allegedly hindering the plaintiff's ability to bring a tort claim); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (declining to create a *Bivens* action against the corporation running a private prison); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (declining to create a *Bivens* action for the wrongful denial of social security benefits); *United States v. Stanley*, 483 U.S. 699 (1987) (declining to create a *Bivens* action for injuries suffered by military personnel in service); *Bush v. Lucas*, 462 U.S. 367 (1983) (declining to recognize a *Bivens* action for federal employees alleging a violation of their First Amendment rights by supervisors).

73. Plaintiffs injured by state or local officials can sue under the Civil Rights Act of 1871, 42 U.S.C. § 1983.

on the ground that they were immune from suit.⁷⁴ The Court resolved that issue in *Harlow v. Fitzgerald*.⁷⁵

Harlow held that government officials are entitled to “qualified immunity” from liability and trial “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁷⁶ Whether an official may be held personally liable for an unlawful official action “generally turns on the ‘objective legal reasonableness’ of the action, assessed in light of the legal rules that were ‘clearly established’ at the time it was taken.”⁷⁷ By adopting the qualified-immunity doctrine, *Harlow* sought to accommodate two competing interests: the need to ensure that parties injured by unconstitutional government action can recover damages for their injuries⁷⁸ and the need to allow government officials to discharge their responsibilities faithfully, and sometimes aggressively, without fear of incurring personal monetary liability or suffering harassing litigation.⁷⁹ *Harlow* sought to balance those competing interests by

74. *Bivens*, 403 U.S. at 395.

75. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

76. *Id.* at 818. All government officials can invoke qualified immunity, and certain, narrowly defined classes of government officials can also claim absolute immunity from suit when acting in an official capacity. See *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012) (grand jury witnesses); *Briscoe v. LaHue*, 460 U.S. 325, 330–34 (1983) (trial witnesses); *Nixon v. Fitzgerald*, 457 U.S. (1982) (the President); *Stump v. Sparkman*, 435 U.S. 349 (1978) (pre-*Harlow* decision recognizing immunity for judges acting in a judicial capacity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (pre-*Harlow* decision recognizing immunity for prosecutors in their role as advocates); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (pre-*Harlow* decision recognizing immunity for government officials performing a legislative function).

77. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

78. The qualified-immunity analysis is the same for claims brought under *Bivens* or under 42 U.S.C. § 1983. See *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (collecting cases).

79. *Harlow*, 457 U.S. at 813–14; see also *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Wyatt v. Cole*, 504 U.S. 158, 167 (1992); *Anderson v. Creighton*, 483 U.S. 635, 638–39 (1987). Judge Learned Hand described those costs in an oft-cited passage:

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to

shielding government officials from liability and trial as long as a reasonable person would have thought that they acted lawfully. A government official is entitled to qualified immunity, the Court explained, unless it was “clearly established” at the time he acted that the Constitution prohibited the actions he took.⁸⁰

Harlow involved very high-level government officials: White House advisors to the President. Pre-*Harlow* case law had concluded that lower-level government employees also could invoke immunity,⁸¹ but *Harlow* technically left open the question of whether front-line government personnel—in particular, law enforcement officers, the type of parties whose conduct gave rise to the *Bivens* case itself—were also entitled to qualified immunity for their actions. The Supreme Court answered that question six years later in *Anderson v. Creighton*.⁸²

There, a homeowner sued an FBI agent under *Bivens* for damages for making an allegedly unlawful warrantless search of his home, in violation of the Fourth Amendment. The Supreme Court held that the *Harlow* qualified-immunity doctrine is just as applicable to inferior government officials as it is to the President’s closest lieutenants. Since

know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as *res nova*, we should not hesitate to follow the path laid down in the books.

Groire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

80. *Harlow*, 457 U.S. at 818.

81. See *Scheuer v. Rhodes*, 416 U.S. 232, 245–48 (1974).

82. *Anderson v. Creighton*, 483 U.S. 635 (1987). In *Malley v. Briggs*, 475 U.S. 335 (1986), the Court implied that law enforcement officers could invoke qualified immunity under *Harlow*, but that was not the holding of the case.

then, the Court has applied the qualified-immunity doctrine in numerous other contexts,⁸³ including cases involving law enforcement officials.⁸⁴

As the Court has explained in those later cases, the *Harlow* qualified-immunity standard is a difficult hurdle for a plaintiff to overcome. Courts may not analyze the challenged action at “a high level of generality.”⁸⁵ Otherwise, plaintiffs would convert qualified immunity into “a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.”⁸⁶ The question is not, for example, whether warrantless searches *generally* are permissible, but is whether *this particular* warrantless search is lawful.⁸⁷ Moreover, the “clearly established” requirement also is a very strict one. A government official “could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful.”⁸⁸ Overcoming a qualified-immunity defense “do[es] not require” a plaintiff to identify “a

83. See *Pearson v. Callahan*, 555 U.S. 223 (2009) (when resolving a qualified-immunity claim, a court may first decide whether the plaintiff has stated a valid claim before addressing qualified immunity); *Crawford-El v. Britton*, 523 U.S. 574 (1998) (declining to require a plaintiff to adduce evidence of an improper motive in order to defeat a qualified-immunity claim); *Behrens v. Pelletier*, 516 U.S. 299 (1996) (holding that district court orders denying qualified-immunity claims are immediately appealable even if other claims remain for trial); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (holding that district court orders denying qualified-immunity claims are immediately appealable under 28 U.S.C. § 1291 (2012) under the collateral order doctrine).

84. See *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011); *Pearson v. Callahan*, 555 U.S. 223 (2009); *Groh v. Ramirez*, 540 U.S. 551 (2004); *Hope v. Pelzer*, 536 U.S. 730 (2002); *Saucier v. Katz*, 533 U.S. 194 (2001); *Wilson v. Layne*, 526 U.S. 603 (1999); *Kalina v. Fletcher*, 522 U.S. 118 (1986); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Hunter v. Bryant*, 502 U.S. 224 (1991); *Burns v. Reed*, 500 U.S. 478 (1991).

85. *al-Kidd*, 131 S. Ct. at 2084.

86. *Anderson*, 483 U.S. at 639; see also *al-Kidd*, 131 S. Ct. at 2084; *Brosseau v. Haugen*, 543 U.S. 194, 198–99 (2004); *Wilson v. Layne*, 526 U.S. 603, 615 (1999); cf. *United States v. Lanier*, 520 U.S. 259, 271 (1997) (same standard to be used when deciding whether a state official can be prosecuted under 18 U.S.C. § 242 (2012) for a violation of a party’s constitutional rights).

87. See *al-Kidd*, 131 S. Ct. at 2083; *Anderson*, 483 U.S. at 639–40.

88. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Crawford-El*, 523 U.S. at 590 (1998); *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.”⁸⁹ The nature of the error also is immaterial. Qualified immunity applies whether a government official makes a mistake of fact, a mistake of law, or a mistake of both.⁹⁰ The result is that qualified immunity affords government officials “breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.”⁹¹

C. *The Harmless-Error Doctrine*

The last example of forgiveness is the harmless-error doctrine. Police officers are not the only ones who make mistakes; prosecutors and judges do, too, more often today than at common law.⁹²

Trials at early common law were fairly straightforward affairs. The

89. *al-Kidd*, 131 S. Ct. at 2083.

90. See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (“The protection of qualified immunity applies regardless of whether the government official’s error is “a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.”) (citing *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting), and *Butz v. Economou*, 438 U.S. 478, 507 (1978); internal punctuation omitted).

91. *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011), and *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (internal punctuation omitted from *Messerschmidt*).

92. Most mistakes made by prosecutors and judges occur at trial, but some happen beforehand. A classic example occurs when a prosecutor fails to disclose exculpatory material to the defense in a timely manner. In *Brady v. Maryland*, 373 U.S. 83, 86–88 (1963), the Supreme Court held that the Due Process Clause requires the government to disclose exculpatory evidence to a defendant before entry of a final judgment. Applying *Brady*, the Court in *Giglio v. United States*, 405 U.S. 150, 153–55 (1972), ruled that the government also must disclose evidence impeaching a government witness. Some prosecutors still have not gotten the message. See *Smith v. Cain*, 132 S. Ct. 627, 630–31 (2012); *Cone v. Bell*, 556 U.S. 449, 451, 475 (2009); *Banks v. Dretke*, 540 U.S. 668, 675, 705–06 (2004). *Brady* does not require the government to disclose exculpatory material before trial, but Congress has imposed such a requirement by rule. See FED. R. CRIM. P. 16. The prosecutor or court also could make a scheduling error and unduly delay the start of trial. The Sixth Amendment guarantees a defendant “the right to a . . . speedy trial.” See, e.g., *Barker v. Wingo*, 407 U.S. 514 (1972) (establishing factors for courts to use when evaluating a Speedy Trial Clause claim); *Vermont v. Brillion*, 129 S. Ct. 1283 (2009) (applying *Barker* factors). In order to give the parties concrete guidance on when trials should commence, Congress also has regulated the subject in the Speedy Trial Act, 18 U.S.C. §§ 3161–3174 (2012).

crimes, such as robbery and murder, were, by contemporary standards, legally uncomplicated. There were no racketeering offenses⁹³ or continuing criminal enterprises⁹⁴; even the crime of conspiracy lay in the future.⁹⁵ The story is different today. The substantive criminal law has greatly expanded beyond its humble origins. The criminal law reaches not only the simple acts forbidden at common law, but also a wide range of complex conduct made criminal by legislatures that have used the criminal law to police the modern regulatory state.⁹⁶

93. The paradigm racketeering law is the Racketeer Influenced and Corrupt Organizations Act of 1970, which Congress enacted as § 901(a) of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970). See 18 U.S.C. § 1961-68 (2012); *United States v. Turkette*, 452 U.S. 576 (1981).

94. In order to deal with organizations engaged in large-scale narcotics trafficking, in 1970 Congress enacted the Continuing Criminal Enterprise statute as § 408 of Title II of the Comprehensive Drug Reform Act of 1970, Pub. L. No. 91-513, 84 Stat. 1265 (1970). See 21 U.S.C. § 848 (2012); *Jeffers v. United States*, 432 U.S. 137 (1977).

95. See LAFAVE, *supra* note 3, § 12.1(a), at 649-50.

96. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 282-83 (1993); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 37 (1997); Meese & Larkin, *supra* note 5, at 735-36, 744-46. Potential defendants now include not only the parties who actually commit an offense, known as "principals," but also an increasingly broad range of confederates, sometimes including parties who are held responsible simply because they occupy a superior position in an organization, such as a corporation. See John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996); Note, *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1243 (1979). Common law crimes required proof of an evil intent to establish guilt. At common law a crime consisted of "a vicious will" and "an unlawful act consequent upon such vicious will." 4 BLACKSTONE, *supra* note 9 at 20; see also *Morissette v. United States*, 342 U.S. 246, 251 (1952); Kevin Jon Heller, *The Cognitive Psychology of Mens Rea*, 99 J. CRIM. L. & CRIMINOLOGY 317 (2009) (the Latin phrase was the phrase "*Actus non facit reum nisi mens sit rea.*"). By contrast, contemporary legislatures have modified or abandoned that requirement for a large number of offenses, sometimes leaving parties strictly liable for their own actions or those of a colleague in a legitimate business enterprise. See, e.g., Meese & Larkin, *supra* note 5, at 733-36.

The trial process at common law also was uncomplicated.⁹⁷ Jurors were not disinterested fact-finders. They were members of the community who knew the facts of the case. Courts devised simple procedures, and there were no rules of evidence. Evidentiary principles came into being only after lawyers became commonplace, which did not occur in felony cases for several hundred years.⁹⁸ Trial procedure today is far more complex and is subject to still-developing rules of federal constitutional law.⁹⁹ At any stage during trial—particularly a jury trial—one party or the other, as well as the judge, can stumble. The likelihood of that happening increases as appellate courts refine old rules or establish new ones for trial courts.¹⁰⁰

At common law even if prosecutors and judges made mistakes before or at trial, convicted defendants had few opportunities for post-trial, appellate, or habeas corpus relief from a conviction,¹⁰¹ so most

97. For a concise discussion of English common law criminal procedure, see THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 424–41 (5th ed. 1956). For in-depth treatments of the process, see JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003); JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIENT RÉGIME* (1976); JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT* (2008). For an in-depth description of contemporary English criminal procedure, see ANDREW ASHWORTH & MIKE REDMAYNE, *THE CRIMINAL PROCESS* (4th ed. 2010). For a concise discussion of pre-20th century American criminal procedure, see FRIEDMAN, *supra* note 96, at 20–27, 235–58, 383–418.

98. The common law rules governing representation by counsel were counterintuitive. A defendant charged with a misdemeanor was entitled to be represented by counsel, but, ironically, a felony defendant was not, even though felonies generally were capital crimes. See *Powell v. Alabama*, 287 U.S. 45, 60 (1932); FRIEDMAN, *supra* note 96, at 27. Today, a defendant can be convicted, but not imprisoned, without first being afforded the right to obtain counsel or to have one appointed if he is indigent. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

99. See, e.g., Meese & Larkin, *supra* note 5, at 730–33.

100. For example, for nearly 200 years the Supreme Court had little occasion to define the scope of the Sixth Amendment Confrontation Clause. In the last thirty years, however, the Court has made up for lost time. See *Ohio v. Roberts*, 448 U.S. 56 (1980) (ruling that the preliminary hearing testimony of a witness unavailable at trial can be admitted if the evidence bears adequate indicia of reliability). In fact, the Court still is developing the law governing confrontation requirements. See, e.g., *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (introduction of DNA lab results by an expert who did not perform the analysis does not violate the Confrontation Clause).

101. A defendant had scant opportunity to win a new trial at common law in England and early in the history in the United States. See *Herrera v. Collins*, 506 U.S. 390, 408–10 (1993); FRIEDMAN, *supra* note 96, at 255–58. The Judiciary Act of 1789 did not establish a right to appeal

errors likely went uncorrected.¹⁰² But this has changed as legislatures established appellate systems for criminal cases,¹⁰³ and the Supreme Court expanded the scope of federal habeas corpus review.¹⁰⁴ By the twentieth century, it became common for defendants to claim that they were entitled to a new trial (or to be set free) because of an error that occurred before or at trial.¹⁰⁵

At first, the courts were reluctant to forgive a trial error and would routinely award a defendant a new trial, sometimes for errors that would seem entirely trivial today.¹⁰⁶ But legislators and judges later realized that some trial process errors would have had no effect on the

a conviction in a federal criminal case. Judiciary Act of 1789, ch. 20, 1 Stat. 73. Congress did not create a right to appeal in capital cases until 1869. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656. Congress did not extend that right to all convicted defendants until 1891 with The Circuit Courts of Appeals Act, ch. 517, § 5, 26 Stat. 826, 827 (1891). Shortly thereafter, the Supreme Court held that defendants have no constitutional right to an appeal, *McKane v. Durston*, 153 U.S. 684, 688 (1894), thereby making clear that legislatures are to create appellate rights. As for post-conviction avenues, The Judiciary Act of 1789 extended the right to petition for a writ of habeas corpus to parties held in federal custody, but Congress did not grant parties in state custody that opportunity until the Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385. Today, the governing federal habeas corpus statute is the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code). Finally, the Constitution vests the federal clemency power in the President, U.S. CONST. art. II, § 2, cl. 1, but it does not require the states to have a clemency process, *Herrera*, 506 U.S. at 414.

102. The king could grant a convicted defendant clemency. See NAOMI D. HURNAND, *THE KING'S PARDON FOR HOMICIDE BEFORE A.D. 1307* (1970); see also *Matthew 27:15-23* (Pontius Pilate released Barabbas as an exercise in clemency during Passover). The President can do so today. See U.S. CONST. art. II, § 2, cl. 1 (Pardon Clause); *United States v. Wilson*, 32 U.S. 150 (1833); JEFFREY P. CROUCH, *THE PRESIDENTIAL PARDON POWER* (2009); WILLARD H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* (1941); KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989).

103. Congress gave every convicted defendant a right to an appeal in 1891 in The Circuit Courts of Appeals (Evarts) Act, ch. 517, § 5, 26 Stat. 826, 827 (1891).

104. See Larkin, *supra* note 33, at 34-35.

105. The number of claims that a defendant could raise also skyrocketed in the last century. See Larkin, *supra* note 33, at 34; Meese & Larkin, *supra* note 5, at 731-33.

106. See *Kotteakos v. United States*, 328 U.S. 750, 759 (1946) (“[C]ourts of review ‘tower above the trials of criminal cases as impregnable citadels of technicality.’ So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus

outcome of the case because the error was trivial and the proof of the defendant's guilt was overwhelming.¹⁰⁷ In this setting, awarding a defendant a new trial became a needless luxury. And so, these new attitudes resulted in the birth of the new legal doctrine, harmless error.

At first, the Supreme Court applied this doctrine only to non-constitutional errors. But it was not long before the Court extended the doctrine to mistakes that violated the Constitution.¹⁰⁸ The result has been a sizeable expansion in the breadth of that doctrine. Although the Supreme Court has identified a few errors that cannot be found harmless regardless of the evidence in the record,¹⁰⁹ the Court has largely

obtained.") (footnote omitted); Edson R. Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126 (1927); ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 14, 41–43, 81 (1970).

107. The Supreme Court articulated the following standard that an appellate court should use to determine if an error is harmless:

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos, 328 U.S. at 764–65 (citation and footnote omitted).

108. The seminal case is *Chapman v. California*, 386 U.S. 18 (1967). The prosecutor in closing argument informed the jury that the defendant had not testified at trial, a practice that was permissible under state law prior to *Griffin v. California*, 380 U.S. 609 (1965), where the Supreme Court held that such a comment improperly burdens the defendant's Fifth Amendment Self-Incrimination Clause privilege to remain silent at trial. The Court in *Chapman* held that a constitutional error can be found harmless if a reviewing court could find that it was harmless beyond a reasonable doubt. 386 U.S. at 24. The *Chapman* standard for constitutional errors is stricter than the *Kotteakos* standard used for nonconstitutional errors. See *Fry v. Pliler*, 551 U.S. 112, 116 (2007) (describing the *Kotteakos* standard as "more forgiving" than the *Chapman* standard); *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993).

109. See *Sullivan v. Louisiana*, 508 U.S. 275, 279–82 (1993) (a constitutionally deficient jury instruction on the "reasonable doubt" standard of proof); *id.* at 279 (identifying as non-harmless errors total deprivation of representation by defense counsel at trial and trial before a biased judge, citing *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Tumey v. Ohio*, 273 U.S. 510

been willing to allow appellate courts to apply the harmless-error doctrine widely. The current rule is that most errors that occur before or at trial can be found harmless in a given case.¹¹⁰

(1927)); *Gomez v. United States*, 490 U.S. 858, 876 (1989) (district court's unauthorized delegation of jury selection to a magistrate); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (right to self-representation at trial); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in the selection of grand jurors); *cf. Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (suggesting that the denial of the right to a public trial cannot be harmless). Those errors—mistakes that the Court has termed “structural,” *Washington v. Recuenco*, 548 U.S. 212, 218 (2006)—defy harmless-error analysis for one of three reasons: (1) they are so egregious as to render a trial a nullity; (2) they so alter the trial record that appellate review of their effect is impossible; or (3) they would be harmless as a matter of law in every case, making appellate review vacuous. *See United States v. Marcus*, 130 S. Ct. 2159, 2166 (2010); *Arizona v. Fulminante*, 499 U.S. 279, 306–12 (1991). There is a fourth category of errors where harmless-error analysis is unavailable: claims that require a defendant to establish prejudice in order to make out a violation. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984) (ineffective assistance of counsel).

110. *See Marcus*, 130 S. Ct. at 2164–66 (2010) (jury instruction that allowed defendant to be convicted for conduct predating enactment of the relevant statute, in violation of the Ex Post Facto Clause); *Rivera v. Illinois*, 556 U.S. 148 (2009) (denial of defense right to exercise a peremptory challenge to a potential juror); *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (one invalid alternative theory of guilt is unconstitutional); *Fry*, 551 U.S. at 116 (exclusion of potentially exculpatory defense evidence); *Recuenco*, 548 U.S. 212 (failure to submit a sentencing factor to the jury in violation of the Sixth Amendment Jury Trial Clause); *Mitchell v. Esparza*, 540 U.S. 12, 16–19 (2003) (trial court's failure to instruct the jury on the meaning of a “principal” offender under state law); *Neder v. United States*, 527 U.S. 1 (1999) (trial judge found that a false statement was “material,” instead of submitting the issue to the jury); *California v. Roy*, 519 U.S. 2, 5–6 (1996) (omission of an essential element of an offense); *Brecht*, 507 U.S. at 627–31 (improper use for impeachment purposes of defendant's silence after being given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Fulminante*, 499 U.S. at 306–12 (erroneous admission of a confession coerced from the defendant); *Clemons v. Mississippi*, 494 U.S. 738, 752–54 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); *Carella v. California*, 491 U.S. 263, 266 (1989) (jury instruction containing an erroneous conclusive presumption); *Satterwhite v. Texas*, 486 U.S. 249 (1988) (admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); *Pope v. Illinois*, 481 U.S. 497, 501–04 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570 (1986) (jury instruction containing an erroneous rebuttable presumption); *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (erroneous restrictions on defense cross-examination, in violation of the Sixth Amendment Confrontation Clause); *United States v. Mechanik*, 475 U.S. 66 (1986) (violation of FED. R. CRIM. P. 6(d), which restricts who may be present before the grand jury); *Rushen v. Spain*, 464 U.S. 114 (1983) (right to be present at trial); *United States v. Hasting*, 461 U.S. 499, 503–04 (1983) (improper comment

III. RECONCILING PUNISHMENT WITH FORGIVENESS

Those three doctrines—the reasonable-mistake exception to the exclusionary rule, the qualified-immunity doctrine, and the harmless-error doctrine—pose an interesting question when placed side-by-side with the common law no-mistake rule: Why does the law forgive the government’s mistakes, but not ones made by a private party?

Consider the contrast in the type of treatment that the law affords government officials and private parties. If a police officer makes a reasonable mistake, he does not lose his case or his home; the evidence he acquired can be used at a trial of a suspect to establish his guilt. If the prosecutor or judge makes a reasonable mistake at his trial, an appellate court will uphold the defendant’s conviction. Additionally, a suspect or defendant cannot successfully sue the officer, the prosecutor, or the judge for damages even if one of them makes a mistake.¹¹¹ By contrast, if that same suspect made a reasonable mistake in believing that his actions were lawful—a mistake that any reasonable person would have made—he still can be sent to prison. To add insult to injury, the prosecution perhaps can use against him the evidence obtained by the very officer who violated the Fourth Amendment in the course of investigating the case.

on defendant’s silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); *Hopper v. Evans*, 456 U.S. 605, 613–14 (1982) (statute improperly forbidding court from giving a jury instruction on a lesser included offense in a capital case, in violation of the Fourteenth Amendment Due Process Clause); *Kentucky v. Whorton*, 441 U.S. 786 (1979) (failure to instruct the jury on the presumption of innocence); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (admission of identification in violation of the Sixth Amendment Counsel Clause); *Brown v. United States*, 411 U.S. 223, 231–32 (1973) (admission of out-of-court statement in violation of the Sixth Amendment Confrontation Clause); *Milton v. Wainwright*, 407 U.S. 371 (1972) (admission of confession in violation of the Sixth Amendment Counsel Clause); *Chambers v. Maroney*, 399 U.S. 42, 52–53 (1970) (admission of evidence obtained in violation of Fourth Amendment); *Coleman v. Alabama*, 399 U.S. 1 (1970) (denial of right to counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause).

111. It is even more difficult for a plaintiff to sue a judge than a police officer or prosecutor. Judges can invoke absolute immunity for all actions taken in the exercise of their judicial function regarding matters over which they have jurisdiction. *See Mireles v. Waco*, 502 U.S. 9 (1991) (collecting cases); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871).

This variance in the law's treatment of mistakes requires a justification. Elementary principles of fairness, to say nothing of the Constitution, demand an explanation for the dissimilar treatment of facially similar people. Indeed, as Professor John Ely explained, the Equal Protection Clause often works best when it is used to force the government to justify why one party is treated differently than another.¹¹² Here, the courts bear the burden of justification. Neither Congress nor the Executive Branch has the responsibility for stating what the law is. That chore falls to the judiciary.¹¹³ Moreover, it is the courts that have rejected a mistake-of-law defense for private parties while creating the three reasonable-mistake doctrines noted above for federal officials. Accordingly, in deciding whether this disparate treatment can be justified, it is important to examine the reasons the courts have given for each doctrine and to see whether they justify this apparent discrimination.

A. Examining the Rationales for the Different Rules

What do the rationales that the Supreme Court has accepted for creating the reasonable-mistake, qualified-immunity, and harmless-error doctrines have to say about creating a mistake-of-law defense? How do they compare with the rationales offered to defend the proposition that a reasonable, good faith, mistake of law should not exculpate a member of the public? Let us answer those questions by walking through the rationales for the no-mistake rule.

1. Everyone knows the criminal law

The first and oldest rationale is that everyone knows the criminal law.¹¹⁴ It is difficult to believe, however, that supporters of the no-mistake rule would offer that justification today. As an empirical proposition, that defense is risible. There are more than 4,000 federal statutes

112. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 125–31 (1980).

113. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

114. See, e.g., Meese & Larkin, *supra* note 5, at 738–59; Cass, *supra* note 8, at 689–95.

alone that potentially create criminal liability,¹¹⁵ and that number turns out to be a paltry sum. Empowering administrative agencies to define the criminal law¹¹⁶ has resulted in more than 300,000 potentially relevant implementing federal regulations.¹¹⁷ Perhaps, that number might not be so overwhelming if the criminal code was patterned after principles of contemporary morality—assuming, of course, that those principles were widely understood. But there is no such match.¹¹⁸ Use of the criminal law to regulate a modern industrial economy has the effect of disconnecting the penal code from moral precepts. This means that the latter do not invariably offer principles or rules of thumb to use in order to avoid breaking the law.¹¹⁹ Atop that, lawyers and law professors do not know all of the criminal laws,¹²⁰ so it is unreasonable to expect the average layman to know them. The *coup de grace* is that even the authors who defend the no-mistake rule admit that this rationale is unjustifiable.¹²¹

Therefore, the first rationale, that everyone knows the criminal law, cannot stand on its own today. It also turns out even more poorly when compared with the rationale for the reasonable-mistake, qualified-immunity, and harmless-error doctrines. The law is far more forgiving in connection with those doctrines. Ironically, the reasons given for that attitude readily justify a mistake-of-law defense.

The law does not presume that every federal official knows all of the rules governing the pretrial or trial stages of the criminal process. The empirical premise underlying those doctrines is that federal officials will make mistakes because they do *not* know what every principle

115. See, e.g., Meese & Larkin, *supra* note 5, at 739–40.

116. Agencies cannot enact laws, but they can fill in the blanks that Congress left for them in statutes. See *Touby v. United States*, 500 U.S. 160, 167 (1991) (holding that Congress can delegate to the Attorney General the authority to list controlled substances); *Yakus v. United States*, 321 U.S. 414 (1944) (upholding statute that made violations of the price administrator's regulations an offense); *United States v. Grimaud*, 220 U.S. 506 (1911) (Congress can delegate authority to an administrative agency to promulgate regulations whose violation is punishable as a crime).

117. See, e.g., Meese & Larkin, *supra* note 5, at 739–40.

118. See FLETCHER, *supra* note 23, § 9.3, at 731–32.

119. See Meese & Larkin, *supra* note 5 at 738–59.

120. See, e.g., Stuntz, *supra* note 24, at 1881; *supra* note 24 (collecting authorities).

121. See *supra* note 24.

of law may be or how it should be applied to every new case. The moral premise underlying those doctrines is that a strict, unyielding, unforgiving application of the law is too costly for society to bear. Yes, government officials must follow the law or else we will have tyranny. But, gee, everybody makes mistakes now and then. We should be willing to recognize the human fallibility of individuals doing their best to comply with the law while doing their jobs. Fastidious attention to ever-changing details only penalizes law enforcement officials—who are, after all, just average fellows like the rest of us—from doing their job. The law should grant government officials “breathing room to make reasonable but mistaken judgments,” and penalize only the ones who are either “plainly incompetent” or “knowingly violate the law.”¹²² Only when the government willfully violates the law, or when there has been an egregious violation of a party’s rights, should the courts impose a remedy on government officials who act unlawfully. A reasonable-mistake rule is good enough for government work.

One could substitute “private party” for “government official” in that line of reasoning without losing anything in the translation. Private parties and law enforcement officials both can act reasonably; both can make mistakes; and both can benefit from the forgiveness that the law currently affords only parties in the latter group. If so, there is an obvious tension between the propositions that (1) every private party knows every criminal law in whatever form it may take, and (2) no law enforcement officer can be expected to know all of the laws governing his job.

The courts, particularly the Supreme Court, have decided a legion of cases that have created those two separate, facially inconsistent propositions without once trying to reconcile them or even acknowledging that this disparity exists. The need to decide cases narrowly, so as not to foreclose unanticipated applications of new legal rules, may explain why the courts have not recognized this anomaly, but that practical necessity does not justify it. The law seeks to treat like cases in a like manner to ensure that justice is blind between the parties.

122. *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244–45 (2012) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011), and *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (internal punctuation omitted from *Messerschmidt*).

Their identity should be irrelevant; all that should matter is the argument for and against a particular judgment or legal principle. If so, the law should treat private individuals engaged in non-law enforcement undertakings with the same consideration for human fallibility that the law affords government officials.

To be certain, if there is a powerful reason to treat the latter (or the former) in a better (or worse) manner, discriminatory treatment would be justified. But that difference first would need to be acknowledged and then defended. It would be no defense to say that government officials, even police officers, are categorically different moral individuals than the rest of us, demanding that a different set of moral rules should apply to them. It also would be deeply insulting to law enforcement officers to defend the difference on the ground that they lack the intellectual capability to learn the rules governing their profession. The same types of individuals who pursue careers in law enforcement may follow career paths that take them into business, one of the other professions (*e.g.*, law, accounting), journalism, or another equally legitimate, equally beneficial, equally noble, and equally (if not more so) intellectually demanding line of work.¹²³

The distinction that the law currently draws between any and every person in a law enforcement position and any and every person on the other side of “the thin blue line” is arbitrary, unless it can be sustained on legitimate, rational, and socially beneficial grounds.¹²⁴ The rationale ordinarily given for the common law no-mistake rule cannot satisfy that test. If we are willing to accept the proposition that no government official, including those involved in law enforcement, can be expected to know the law, we must be willing to recognize that no private party can have that knowledge either. The same people populate

123. Some people spend time on each side of that line throughout their lives. For example, Louis Freeh was an FBI agent, a prosecutor, a judge, and FBI Director, before entering business. Edward Conlon graduated from Harvard to join the family business on the NYPD. Robert Daley was a journalist and Deputy New York City Police Commissioner. *See* EDWARD CONLON, *BLUE BLOOD* (2004); ROBERT DALEY, *TARGET BLUE: AN INSIDER'S VIEW OF THE N.Y.P.D.* (1974); LOUIS J. FREEH, *MY FBI: BRINGING DOWN THE MAFIA, INVESTIGATING BILL CLINTON, AND FIGHTING THE WAR ON TERROR* (2005). Morally and intellectually speaking, they neither gained nor lost anything when they changed positions.

124. I will address below the claim that the law enforcement profession is inherently different from all others.

each category, and regardless of the type and amount of training that we give the people in one category or the other, they still will make mistakes. Therefore, we should not treat every government official in a categorically different manner than people who pursue other careers.

So much for the proposition that everyone knows the law.

2. *Everyone should know the criminal law*

Defenders of the common law no-mistake rule will argue, however, that the rule has an added benefit: encouraging people to learn what the law forbids. Perhaps every individual cannot know every statute, regulation, and judicial decision defining the parameters and content of the penal code, but every person should be encouraged to learn those metes and bounds. A mistake-of-law rule would create a disincentive to keep abreast of developments in the law due to the fear that knowledge would sink this defense and, what is worse, would promote (and shelter) willful blindness. The result would allow phony defenses to perpetuate themselves. Surely, we want to encourage corporations to know what they may and may not do, especially given the potential catastrophes that a modern industrial society can wreak on public health and the environment.¹²⁵ A mistake-of-law rule, therefore, would lead to far more cases of injustice than are created by the no-mistake rule.¹²⁶

Knowledge of the law is socially valuable and should be encouraged, but it is valuable for *everyone*, including government officials. Indeed, it is especially important for government officials to know what the law permits and forbids because only government officials can invoke state power against private parties, such as the unmatched power to arrest and punish for crime. The reason that the Constitution does not apply to private conduct is that the Framers feared the power of

125. See *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494–96 (1909) (the harms that corporations can cause society justifies subjecting them to the criminal law).

126. See *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833) (“[There is] 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.”); 4 BLACKSTONE, *supra* note 9, at *45, *46; HOLMES, *supra* note 12, at 48–49.

the English crown, not that of their neighbors. The Framers sought to ensure, through a system of separated federal powers, decentralized state authority, and specific legal guarantees, that the newly created federal government never would be able to assume the same powers over the public that the English monarchs enjoyed over the people in Great Britain. Americans would be “citizens,” not “subjects,” and our government would be “a government of laws, and not of men.”¹²⁷ If anything, the law should impose a *stricter* obligation on government officials than on private parties. At a minimum, the law should treat their reasonable mistakes in the same manner.

As for corporations: A corporation is an artificial entity that can act only through officers and employees.¹²⁸ A mistake-of-law defense seeks to enable morally blameless individuals honestly trying to comply with the law from being convicted and punished for actions that no reasonable person would know to be a crime without having a lawyer at his elbow. The average person does not have the luxury of such readily available legal advice. That fact is critical. The law must be clear to “men of common intelligence”¹²⁹—not *lawyers* of common intelligence—in order for it to be valid.¹³⁰ The law assumes that the average person lacks legal training. By contrast, some corporations have large legal departments staffed with lawyers who can offer advice if and whenever the company needs it. Individuals need a mistake-of-law defense. Corporations may not.

127. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

128. See, e.g., *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”).

129. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (discussing the void-for-vagueness doctrine).

130. See Meese & Larkin, *supra* note 5, at 781–82.

3. Necessity

A third defense of the no-mistake rule is necessity. The argument is that permitting a mistake-of-law defense would cripple law enforcement.¹³¹ The defense puts the government at a terrible disadvantage because a defendant can always disavow any knowledge of the law and fend off the government's questions by standing on his self-incrimination privilege.¹³² Thus, a defendant could use a phony mistake-of-law defense to raise a reasonable doubt as to his guilt and win an acquittal. Both because a mistake defense upsets the balance between the parties and because the law should always "keep the balance true,"¹³³ the mistake-of-law defense should be rejected.

The necessity rationale is a more defensible bulwark for the no-mistake rule than the first two, but it is still insufficient. First, the law excuses errors by police officers, government employees, and judges only if they are reasonable. A mistake-of-law defense should have the

131. See *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833) (recognizing the principle that mistake of law is not an excuse "results from the extreme difficulty of ascertaining what is, *bona fide*, the interpretation of the party. . . ."); 4 BLACKSTONE, *supra* note 9, at *46; 1 WHARTON, *supra* note 12, at § 399; Herbert L. Packer, *supra* note 26, at 109. As Holmes explained:

The true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

HOLMES, *supra* note 12, at 48; see also AUSTIN, *supra* note 9, at 483 ("[I]f ignorance of law were a ground of exemption, the administration of justice would be arrested. For, in almost every case, ignorance of the law would be alleged. And, for the purpose of determining the *reality* and ascertaining the *cause* of the ignorance, the Court were [sic] compelled to enter upon questions of fact, insoluble and interminable.").

132. HART, *supra* note 19, at 77.

133. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934), *overruled in part by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

same limitation.¹³⁴ A properly defined mistake-of-law defense would exonerate a defendant only if he reasonably and honestly believed that the law did not make his conduct a crime. No jury would find that a defendant reasonably and honestly believed that he could murder, rape, rob, steal, and swindle others. In fact, the laws prohibiting that conduct are so deeply entrenched into American mores that no judge or jury could find such a claim credible.¹³⁵ As a result, a trial judge would not be obliged even to instruct the jury on that defense in such a case.¹³⁶ A “reasonableness” requirement would go a long way toward cutting off fraudulent use of a mistake-of-law defense.¹³⁷

There is also no need to sacrifice an honest defendant in order to stave off an acquittal of a dishonest one if there are satisfactory alternatives to foreclosing all mistake-of-law defenses.¹³⁸ The Supreme Court has said that, in connection with the exclusionary rule, the

134. See Larkin, *supra* note 23.

135. See FLETCHER, *supra* note 23, § 1.1.1, at 4 (“[L]arceny is one of the primordial crimes of Western culture.”) (footnote omitted); FRIEDMAN, *supra* note 96, at 108–09 (“Perhaps the most primitive and basic rules in the criminal justice system were those that protected property rights. . . . The laws against theft, larceny, embezzlement, and fraud are familiar friends. People may not know every technical detail, but they get the general point. Probably all human communities punish theft in one way or another; it is hard to imagine a society that does *not* have a concept of thievery, and some way to punish people who help themselves to things that ‘belong’ to somebody else.”); John Gardner, *The Wrongfulness of Rape*, in OFFENCES AND DEFENCES 1 (2007) (explaining that rape is an offense that is outlawed everywhere); Larkin, *supra* note 23, at 16; SALMOND, *supra* note 9, at 427; Mark D. Yochum, *The Death of a Maxim: Ignorance of Law Is No Excuse (Killed by Money, Guns and a Little Sex)*, 13 ST. JOHN’S J. LEG. COM. 635, 636 (1999) (“[E]vil is fundamentally known. . . . Ignorance that murder is a crime is no excuse for the crime of murder.”).

136. See *United States v. Bailey*, 444 U.S. 394, 414–15 (1980) (explaining that a district court should not instruct the jury on a defense that is not supported by the facts).

137. See, e.g., ASHWORTH, *supra* note 23, at 235; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 1301, at 168–70 (5th ed. 2009). The same reasonableness requirement also supplies a complete answer to the claim that a defendant could use this defense to escape liability if he believed that foreign law or custom justified his actions. See Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986) (proposing such a defense). Intertribal retaliation may be standard fare elsewhere, but we do not allow feuding between New York and Boston fans because the Giants beat the Patriots in the 2012 Super Bowl.

138. See HOLMES, *supra* note 12, at 45 (“If justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try . . . unless we are justified in sacrificing individuals to public convenience.”).

courts should be mindful of alternatives to suppression that would provide an ample opportunity to remedy a police officer's mistake, such as a civil damages action or internal disciplinary review.¹³⁹ The same need to consider alternatives exists here. As a practical matter, a defendant will need to testify at trial in order to persuade the jury that he did not know that his conduct was prohibited. A defendant could try to support that defense in other ways, but it would be difficult to make a convincing case that he lacked knowledge of the law without testifying to that fact. Once the defendant takes the stand, he is subject to cross-examination.¹⁴⁰ The prosecution, therefore, will have ample opportunity to demonstrate that the defendant is a liar,¹⁴¹ and jury will be able to decide whether the defendant is telling the truth by what he says and how he says it.¹⁴² Furthermore, if Congress were concerned that a defendant could still easily, although illegitimately, raise a reasonable doubt as to his knowledge of the law, Congress could impose the burden of proof on the defendant.¹⁴³ Those safeguards should be sufficient to enable the government to defeat a fraudulent defense.

139. See *Hudson v. Michigan*, 547 U.S. 586, 596–98 (2006).

140. See *Brown v. United States*, 356 U.S. 148, 154–55 (1958) (“[I]f a defendant in a criminal case . . . takes the stand and testifies in his own defense[,] his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination. He has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.”) (citation omitted); *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900) (“Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime.”).

141. To aid the prosecution in this regard, Congress can require the defendant to provide notice before trial of his intent to assert a mistake-of-law defense. The Federal Rules of Criminal Procedure impose that duty on a defendant in connection with the defenses of alibi, insanity, or reliance on an official interpretation of the law. See FED. R. CRIM. P. 12.1–12.3. A pre-trial notice requirement, moreover, does not violate the defendant's Self-Incrimination Privilege. See *Williams v. Florida*, 399 U.S. 78, 82–86 (1970) (rejecting a self-incrimination claim in the context of a notice-of-alibi requirement).

142. See HOLMES, *supra* note 12, at 45 (“[N]ow that parties can testify, it may be doubted whether a man's knowledge of the law is any harder to investigate than many questions which are gone into.”).

143. See HOLMES, *supra* note 12, at 45 (“The difficulty, such as it is, would be met by

B. Comparing Apples with Apples or with Oranges?

The final response approaches this issue from a different direction. The argument would state that the foregoing analysis is entirely misguided because it amounts to comparing apples and oranges.¹⁴⁴ The exclusionary rule does not require suppression of evidence obtained by private parties,¹⁴⁵ so the reasonable-mistake exception is immaterial. The qualified-immunity doctrine does not apply to the actions of private parties,¹⁴⁶ so it too, is irrelevant. And the harmless-error doctrine by definition is limited to errors underlying an action that can only be taken by a government agent—the entry of judgment by a court.¹⁴⁷ The purpose of each doctrine is to benefit the public by avoiding the costs that come from treating every mistake as fatal: the exclusion of reliable, incriminating proof of the defendant’s guilt; the refusal of talented candidates for public service to accept such positions due to the fear of damages liability or the burden of defending against lawsuits; and the holding of a pointless retrial of a fairly convicted defendant just to have a mistake-free repeat performance. The rationales given to avoid those costs are not transferrable to the case of private parties. There will always be information costs involved in knowing what the law forbids, but that is just the cost of living in a society protected by the rule of law. It is not too stiff a price to pay for the benefits of having federal, state, and local governments provide public goods—such as a

throwing the burden of proving ignorance on the law-breaker.”); *see also, e.g.*, *Smith v. United States*, 113 S. Ct. 714, 719 (2013) (ruling that the defendant can be made to bear the burden of proof on withdrawal from a conspiracy); *Martin v. Ohio*, 480 U.S. 228 (1987) (same rule for self-defense); *Patterson v. New York*, 432 U.S. 197 (1977) (same rule for the defense of acting out of an extreme emotional disturbance); *cf. Simopoulos v. Virginia*, 462 U.S. 506, 510 (1983) (collecting cases ruling that defendant can be made to bear the burden of production).

144. In fact, the argument would be that the Supreme Court has used that precise metaphor to describe this mistaken analogy. *See Wyatt v. Cole*, 504 U.S. 158, 166 n.2 (1992) (“In arguing that respondents [*viz.*, private parties] are entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the dissent mixes apples and oranges.”).

145. *Walter v. United States*, 447 U.S. 649, 656 (1980); *Burdeau v. McDowell*, 256 U.S. 465, 475–76 (1921).

146. *Wyatt*, 504 U.S. at 166–69.

147. *Chapman v. California*, 386 U.S. 18 (1967); *Kotteakos v. United States*, 328 U.S. 750 (1946).

criminal justice system—that a private market cannot provide in an efficient manner.¹⁴⁸ Doctrines designed to enable the government to function efficiently are of no relevance when private parties operate without using state power.

Moreover, none of the three doctrines noted above has any bearing on the proper definition of the criminal law. The law does not treat actors in the criminal justice system more favorably than others when it comes to the substantive rules of criminal law. The same rules governing murder, robbery, fraud, and the like apply equally to cops on the beat and the people in the neighborhoods they patrol. Yes, the rules of evidence and criminal procedure may differ in the case of government officials, but that is due to the unremarkable proposition that the Constitution applies only to them and to the undeniable fact that we want government officials aggressively to enforce the criminal law. Neither of those considerations, however, detracts from the proposition that the substantive criminal law does not show any leniency for law enforcement officers in the exercise of their responsibilities. The rules of evidence and criminal procedure may recognize a difference between the mistakes that Joe Friday and John Q. Public make, but they operate under the same substantive rules of criminal law and are exposed to the same criminal and tort liability when they cross over the line.

Finally, any benefit that the law confers on law enforcement officials is both desirable and earned. Police officers are “the foot soldiers of an ordered society.”¹⁴⁹ They are responsible for the oftentimes dangerous and always stressful job of enforcing the law and preserving community order. The police deal with the lowest ranks of society—murderers, thieves, child molesters, and so forth—and with otherwise good people during the worst times of their lives. They earn each day whatever breaks the procedural or substantive criminal law affords them as a legitimate, reasonable recompense for the dirty chores that we assign to them.

Those arguments are formidable, but ultimately unpersuasive.

148. See, e.g., N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 223–37 (4th ed. 2007) (positing that private markets do not reliably produce the proper amount of public goods).

149. *Roberts v. Louisiana*, 431 U.S. 633, 642 (1977) (Rehnquist, J., dissenting).

First, the premise is flawed. The Supreme Court has drawn a parallel between the doctrines noted above and the substantive criminal law. That is the lesson of *United States v. Lanier*.¹⁵⁰ *Lanier* involved the prosecution of a state court judge under Section 242 of Title 18 for violating the constitutional rights of women by using his state authority to carry out sexual assaults. Section 242, the modern-day version of three Reconstruction Era federal civil rights laws,¹⁵¹ makes it a federal offense to deprive a person, under color of state law, of “any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . .”¹⁵² The question before the Court involved the proper construction of Section 242; in particular, how that law should be construed in order to ensure that its interpretation provided “fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.”¹⁵³ The Court reasoned that Section 242 is sufficiently clear as long as the text of the Constitution, or decisions interpreting those terms, have made “specific” the right that the accused allegedly violated.¹⁵⁴ The *Harlow* qualified-immunity standard enables courts to determine whether a particular right is sufficiently “specific.”¹⁵⁵ The *Harlow* qualified-immunity standard, the Court explained, provides adequate notice for state officials of what constitutes a crime and enables courts readily to decide when criminal liability is proper.¹⁵⁶

150. *United States v. Lanier*, 520 U.S. 259 (1997).

151. *Id.* at 264 n.1.

152. 18 U.S.C. § 242 (2012).

153. *Lanier*, 520 U.S. at 265 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

154. *Id.* at 267 (quoting *Screws v. United States*, 325 U.S. 91, 104 (1945)).

155. *Id.* at 270–71 (citing, *inter alia*, *Anderson v. Creighton*, 483 U.S. 635 (1987), and *Mitchell v. Forsyth*, 472 U.S. 511 (1985)).

156. As the Supreme Court explained in *Lanier*:

In the civil sphere, we have explained that qualified immunity seeks to ensure that defendants reasonably can anticipate when their conduct may give rise to liability by attaching liability only if the contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right. So conceived, the object of the “clearly established immunity standard is not different from that of fair warning as it relates to law made specific for the purpose of validly applying § 242. The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is

That link is significant because the mistake-of-law defense also serves the purpose of ensuring that the criminal law affords parties adequate notice of what the law forbids. That problem is particularly acute in the twenty-first century because of the proliferation of criminal laws and the use of regulations to define terms in criminal statutes or even to outlaw conduct itself.¹⁵⁷ Private parties are entitled to the same notice as government officials where the lines are drawn defining crimes. If government officials can make reasonable mistakes without winding up in the hoosegow, private parties should receive the same protection.

It is true that, in some instances, the criminal law does treat law enforcement officers differently from average members of the public.¹⁵⁸ A police officer may use force to make an arrest, force that otherwise would be deemed a battery,¹⁵⁹ or to execute a search that otherwise would be deemed a trespass.¹⁶⁰ A law enforcement officer also may

simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than clearly established would, then, call for something beyond fair warning.

Lanier, 520 U.S. at 270–71 (citations and internal punctuation omitted except for bracketed material).

157. See Meese & Larkin, *supra* note 5, at 734–35, 739–41.

158. See 18 U.S.C. §§ 351, 3052, 3107 (2012); 28 U.S.C. §§ 533, 540, 540A, 540B (2012); 50 U.S.C. §§ 401–04, 1801–63 (2012) (authority of FBI agents); 28 U.S.C. §§ 561, 564, 566 (authority of U.S. and Deputy U.S. Marshals); 18 U.S.C. § 3056 (authority of Secret Service agents).

159. See John Baker Waite, *The Law of Arrest*, 24 TEX. L. REV. 279 (1946); LAFAVE, *supra* note 3, § 10.7, at 590–600; Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201 (1940).

160. See 18 U.S.C. § 3109 (2012) (“The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.”). The criminal law also protects officers when they conduct a search or seizure. See 18 U.S.C. § 2231 (2012) (“Whoever forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants or to make searches and seizures while engaged in the performance of his duties with regard thereto or on account of the performance of such duties, shall be fined under this title or imprisoned not more than three years, or both . . .”).

use deadly force in settings unavailable to civilians.¹⁶¹ We grant law enforcement officials that authority, however, not because they or the positions they hold are privileged. The Constitution expressly rejects that notion.¹⁶² We delegate to them the authority they need to perform the responsibilities we give them. The powers of office are not like property that can be possessed indefinitely. Those powers are entirely instrumental and functional. They have a finite half-life, one that expires when a person leaves office. Once a law enforcement official leaves the government, he leaves behind whatever power the government delegated to him. A former federal law enforcement officer may not entirely be like Cincinnatus, but he does become a civilian when he returns to civilian life.

At the end of the day, the discrimination between government officials and private parties cannot be justified. The remedy, however, does not require that government officials and the public forfeit the benefit of the three doctrines discussed above. There is more than one remedy for a case of discrimination. The law can extend a benefit to everyone, rather than take it away from the favored class. Here, the proper remedy is to grant private parties the same forgiveness that we already afford government officials. The reasonable-mistake, qualified-immunity, and harmless-error doctrines serve important social goals. The law is sounder today than it was before the Supreme Court created those doctrines. We do not need to scuttle any one of them, and we should not take that step. The soundest remedy is simply to recognize that private parties deserve the same mercy that our government officials already enjoy.

161. See, e.g., *Scott v. Harris*, 550 U.S. 372 (2007) (discussing Fourth Amendment limitations in the context of a high-speed chase for the purpose of making an arrest); *Tennessee v. Garner*, 471 U.S. 1 (1985) (discussing Fourth Amendment limitations in the context of the use of deadly force to stop a fleeing suspect).

162. See U.S. CONST. art. I, § 9, cl. 8 (“No title of nobility shall be granted by the United States: And no person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”).

IV. CONCLUSION

There are two very different mistake doctrines in the law. The common law doctrine that ignorance of the law is no excuse gives no weight to reasonable, good faith mistakes insofar as criminal liability is concerned. By contrast, three related lines of decisions—the reasonable-mistake, qualified-immunity, and harmless-error doctrines—express great willingness to overlook reasonable, good faith mistakes that police officers, prosecutors, and judges make. That discrimination is unwarranted. There is no good reason to treat private parties systematically worse than public officials in this regard. The courts have created these competing lines of decisions, and they, or Congress, should eliminate that discrimination by extending to members of the public the same grace that they offer to every government official. The most straightforward way to remedy this problem is to recognize a mistake-of-law defense in the substantive criminal law.

