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RETHINKING PRESUMED KNOWLEDGE OF THE LAW IN THE REGULATORY AGE

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RETHINKING PRESUMED KNOWLEDGE OF THE LAW IN THE REGULATORY AGE

MICHAEL COTTONE*

“But the guilty person is only one of the targets of punishment. For punishment is directed above all at others, at all the potentially guilty.”**

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I. INTRODUCTION

Diana is a professional hunter and trapper who sells pelts, feathers, and other parts of animals from the animals she captures to supplement her income.¹ Recently, Diana trapped and killed a

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This Article builds on ideas first expressed in Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102 (2013). Much of the inspiration also came from conversations with David Wolitz and from his superb American Jurisprudence course.

** MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 108 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

1. The fictionalized accounts in this section are inspired by and very loosely

red-tailed hawk. The red-tailed hawk is protected under the Migratory Bird Act, and Diana knows that both the killing and the selling of red-tailed hawks violate federal law. Accordingly, due to its absence from the legitimate market, Diana knows she could sell the bird for a significant amount of money. Through a mutual friend, Diana learns of a taxidermy collector who wants a red-tailed hawk to display. She decides to meet with the collector and offers to sell the bird to him. Much to Diana's chagrin, however, the collector turns out to be an undercover agent for the United States Fish and Wildlife Service. He promptly arrests her, and the local United States Attorney ultimately charges Diana with selling migratory birds or bird parts in violation of 16 U.S.C. §§ 703 and 707(a).

On his way home from work, Eric sees a dead red-tailed hawk on the side of the road. An avid bird-watcher, Eric recognizes and properly identifies the bird. Eric knows about the Migratory Bird Act, including that it provides criminal sanctions for selling dead migratory birds, but he does not know that the Act protects red-tailed hawks. Eric's cousin makes jewelry that incorporates various kinds of feathers, including those from birds protected by the Act. Eric's cousin offers to buy the red-tailed hawk, and Eric agrees to sell it. When Eric's cousin is investigated for violating the Act, Eric becomes implicated as a supplier and is arrested and charged with selling migratory birds or bird parts in violation of 16 U.S.C. §§ 703 and 707(a).

Billy, a high-school senior who just turned eighteen, finds a red-tailed hawk talon in the parking lot of his school. He has never heard of red-tailed hawks or the Migratory Bird Act, and he does not know that selling dead birds or bird parts can be illegal in some circumstances. Billy's friend, whose parents own a pet store, is interested in wildlife and collects snakeskins, sharks' teeth, and various types of animal bones. Billy decides that his friend may be interested in the talon and offers to trade it for a goldfish from the store. Billy's friend agrees. When a family friend, an agent for the United States Fish and Wildlife Service, sees the talon and inquires, she learns that it came from Billy. Billy is arrested and charged with bartering with migratory bird parts in violation of 16 U.S.C. §§ 703 and 707(a).

A so-called "regulatory crime," bartering with or selling migratory birds or bird parts in violation of 16 U.S.C. §§ 703 and 707(a) carries no mens rea requirement for any element; strict

liability applies.² That is, if a person barter with or sells a migratory bird or its parts—regardless of whether she knew it was a migratory bird or a part of a migratory bird—she has met the requirements of the crime. Assuming that they are found guilty, Billy, Eric, and Diane will all be subject to criminal penalties, each facing up to a six-month prison sentence and \$15,000 in fines.³ While this may seem incongruous given the differences in what they each knew about the legality of their conduct, under the doctrine of *ignorantia legis*, their knowledge or lack of knowledge of the illegality of their acts will have no bearing on whether they are guilty of the offense.⁴

In this article, I will examine the doctrine of *ignorantia legis*, or presumed knowledge of the law, as it functions in the current milieu of American criminal justice, the age of the regulatory crime. Much ink has been spilled over this doctrine, and many pieces argue against *ignorantia legis*, hinting at normative values of fairness and economic efficiency.⁵ With this article, I intend to formalize and synthesize these discussions, approaching the problem explicitly from both perspectives. As a framework for evaluating the doctrine, I will apply both Lon Fuller's idea of "internal morality of the law" and general principles of economic analysis of law. While I do not

2. See, e.g., *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 684–87 (10th Cir. 2010) (holding that a misdemeanor violation of 16 U.S.C. § 703 is strict liability); *Newton Cty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (noting that strict liability applies to a misdemeanor violation of § 703); *United States v. Pitrone*, 115 F.3d 1, 5 (1st Cir. 1997) (noting that a misdemeanor violation of § 703 carries no mens rea requirement).

3. 16 U.S.C. §§ 703, 707(a) (2012). There is a possibility that both Diana and Eric, based on their knowledge, could also be charged with felony violations of the Migratory Bird Act and face stricter penalties. See *id.* § 707(b)(2).

4. Prosecutorial discretion does not save the day here. An extremely wide range of conduct is criminalized and only reined in by what a prosecutor deems to be politically expedient to charge. See Reynolds, *supra* note *, at 103 ("[P]rosecutors' discretion to charge—or not to charge—individuals with crimes is a tremendous power, amplified by the large number of laws on the books."). See generally HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (paperback ed. 2011). As a descriptive claim, wide prosecutorial discretion may be accurate. As a normative claim, however, this discretion can undermine the rule of law in many ways. See Reynolds, *supra* note *, at 102 ("Prosecutorial discretion poses an increasing threat to justice. The threat has in fact grown more severe to the point of becoming a due process issue."); *infra* notes 121–29 and accompanying text.

5. See, e.g., Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725 (2012); Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671 (1976).

subscribe completely to either view for all purposes, my intent is to demonstrate that the current application of presumed knowledge of the law is extremely troublesome under at least two distinct methods of evaluating law, indicating a strong need for reconsideration of the doctrine. Part II of this article gives an overview of the doctrine of presumed knowledge of the law in the context of the regulatory state, ultimately arguing that it pervades the current legal system. Part III contains the two critiques of the doctrine based on Fuller's "internal morality of the law" and on the economic analysis of law, determining that the current application of *ignorantia legis* is suspect under both. Finally, the Article concludes by synthesizing these arguments and offering a few thoughts on the doctrine moving forward.

II. THE CURRENT STATE OF PRESUMED KNOWLEDGE OF THE LAW

A. Regulatory Crime

Modern American criminal law imposes sanctions on a wide array of offenses. In addition to traditional common-law crimes such as murder, burglary, and arson, criminal codes include more obscure violations such as the sale of migratory bird parts⁶ and the attempted excavation of arrowheads from federal land without a permit.⁷ In general, laws imposing sanctions that enforce and support administrative schemes are referred to as "regulatory crimes."⁸ These laws are typically dispersed throughout codes instead of being grouped into the titles dealing with criminal law, and they often supplement civil remedies without giving guidance as to when civil or criminal enforcement would be appropriate.⁹

Many of these obscure offenses, as well as better-known ones, cover a much wider range of conduct than one might expect. For example, the Clean Water Act, normally perceived as applying to manufacturers and other industrial entities, permits a prosecutor to press charges for a broad range of conduct.¹⁰ In 2007, Lawrence

6. 16 U.S.C. §§ 703, 707.

7. *Id.* § 470ee(a).

8. Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1544 (1997).

9. *Id.*

10. Implicit in this discussion is the reality that most criminal prosecutions will end in a plea bargain. *Missouri v. Frye*, __ U.S. __, 132 S. Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state

Lewis, the chief engineer at a military retirement home, was prosecuted for violating the Act.¹¹ The conduct that gave rise to his indictment? Lewis redirected a backed-up sewage system into a storm drain to avoid flooding the facility.¹² He had operated under the belief that the drain emptied into the municipal sewage system, as had his predecessors.¹³ In actuality, the drain discharged into a small creek.¹⁴ Prosecuting authorities brought charges against Lewis despite his mistake.¹⁵ As further example, the Wilderness Act provides for criminal sanctions for conduct that may seem innocuous. In 1996, Bobby Unser, while caught in a snowstorm, accidentally drove his snowmobile onto protected federal land.¹⁶ When he asked authorities for assistance in locating his snowmobile, Unser was charged with violating the Wilderness Act.¹⁷ For both Lawrence Lewis and Bobby Unser, regulatory crimes penalized conduct falling outside what one might normally consider the scope of the respective administrative schemes.

Not only do many statutes criminalize a wide and varied range of conduct, but the sheer volume of criminal law is overwhelming.¹⁸ Tellingly, no exact count of the number of federal statutes that impose criminal sanctions has ever been given,¹⁹ but estimates from the last fifteen years range from 3,600²⁰ to approximately 4,500.²¹ In

convictions are the result of guilty pleas.”). While one may point to prosecutorial over-zealousness and argue that the statutes themselves may not actually criminalize much of the prosecuted conduct, the fact remains that the principle of *ignorantia legis* works as one principle cutting in favor of the state to force plea bargains in these cases.

11. Gary Fields & John R. Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, WALL ST. J. (Dec. 12, 2011), <http://online.wsj.com/news/articles/SB10001424052970204903804577082770135339442>.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* Rather unsurprisingly, Lewis took a plea bargain. *Id.*

16. Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J. (July 24, 2011), <http://online.wsj.com/news/articles/SB10001424052748703749504576172714184601654>.

17. *Id.* While Unser ultimately received only a \$75 fine, he now has a criminal conviction on his record—and the collateral consequences that go along with it. *Id.*

18. See SILVERGLATE, *supra* note 4, at xxxvi–xxxvii (noting the existing “trove of . . . complex and technical prohibitions”).

19. See Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation’s Federal Criminal Laws*, WALL ST. J. (July 23, 2011), <http://online.wsj.com/news/articles/SB10001424052702304319804576389601079728920>.

20. Robert H. Joost, *Federal Criminal Code Reform: Is it Possible?*, 1 BUFF.

addition to the numerous criminal statutes, many regulations impose criminal penalties.²² Moreover, the number of criminal statutes has expanded over time.²³ According to one study, Congress enacts nearly sixty new criminal statutes each year, a figure that does not include new regulations that carry criminal penalties.²⁴ Generally correlating to the increase in criminal laws, the levels of criminal prosecutions reached all-time highs in 2011, and regulatory crimes remained one of the few categories of crimes that saw an increase in prosecutions in 2012.²⁵ Taken as a whole, the broad increases in both enactment and enforcement of regulatory crimes show prosecutors' increased ability and willingness to bring these kinds of charges as part of their law enforcement plan.

While an increase in the quantity and enforcement level of regulatory crimes may not seem worrisome at first blush, cause for concern arises when one examines certain characteristics of regulatory crimes. Generally, crimes derived from common law offenses require the defendant to have some culpable mental state,²⁶ often referred to as criminal intent, scienter, or a mens rea requirement. On the other hand, regulatory crimes, often referred to as "public welfare offenses" in this context,²⁷ do not necessarily require a culpable mental state or may have a greatly reduced mental requirement.²⁸ Some doubt exists as to the constitutionality of certain provisions without reading in particular mental requirements.²⁹ However, knowledge of the illegality of an act is only very rarely read into the requirements of a criminal offense, at least

CRIM. L. REV. 195, 198 (1997).

21. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, LEGAL MEMORANDUM (Heritage Found., Washington, D.C.), June 16, 2008, at 1, available at <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>.

22. See Fields & Emshwiller, *supra* note 19.

23. See Baker, *supra* note 21, at 1.

24. *Id.*

25. Admin. Office of the U.S. Courts, *Judicial Business 2012: U.S. District Courts*, UNITED STATES COURTS (last visited Mar. 10, 2013), <http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx>.

26. See *Morissette v. United States*, 342 U.S. 246, 260–63 (1952).

27. See, e.g., Green, *supra* note 8, at 1556.

28. See *id.* at 1556–57.

29. See *Lambert v. California*, 355 U.S. 225, 229–30 (1957) (overturning on due process grounds a conviction for failing to register as a felon where the defendant had no notice of the duty to register).

in the absence of a language supporting legislative intent for knowledge of the law to be included as an element of the crime.³⁰

Another distinction between crimes derived from the common law and regulatory crimes has sometimes been loosely characterized as the difference between *malum in se* offenses, which have intrinsic moral value, and *malum prohibitum* offenses, which have moral value only because they are legally prohibited or serve to promote a regulatory scheme.³¹ Insofar as certain actions can be considered morally reprehensible regardless of how society is organized, this distinction is meaningful.³² However, problems arise when one tries to use *malum in se* and *malum prohibitum* as concepts to describe how people know when their conduct is subject to criminal penalty. The idea that some actions are inherently wrong, that is, *malum in se*, lends itself to the notion that people know that these actions are criminal *a priori*, whereas actions that constitute a *malum prohibitum* offense would require notice. However, because not all morally reprehensible actions are illegal, it follows that all criminal laws require some form of notice for a person to know that conduct covered by the laws is illegal. This notice comes easily in the case of most *malum in se* offences. For example, one would be hard-pressed to find a person that never heard of someone going to prison for murder or robbery—the illegality of these acts has been hammered into our collective consciousness.

Turning our inquiry to regulatory crimes, however, illuminates the problem with scenarios such as Lawrence Lewis's and Bobby Unser's. The illegality of many regulatory crimes often is not a part of our cultural in the same way as murder and robbery. Indeed, the likelihood is low that an individual would know, in the absence of actual notice of the relevant law, that driving a snowmobile onto a particular piece of land,³³ selling a particular dead bird,³⁴ or

30. See *infra* notes 66–72 and accompanying text.

31. See, e.g., Green, *supra* note 8, at 1554–58.

32. Undoubtedly, the *malum in se* and *malum prohibitum* distinction only imperfectly represents the difference between crimes derived from the common law and regulatory crimes. Certain crimes that are regulatory in nature because they serve to promote the public welfare or exist as a part of a regulatory scheme may be categorized as having intrinsic moral value as well. See *United States v. Freed*, 401 U.S. 601, 609 (1971) (arguing that while the possession of grenades violated a “regulatory measure,” it was “not an innocent act” because grenades are “highly dangerous offensive weapons”).

33. 36 C.F.R. § 261.1b, .16 (2012).

34. 16 U.S.C. §§ 703, 707 (2012).

excavating arrowheads without a permit in certain places³⁵ would be illegal. The relevant question then becomes: To what extent do people know that their action falls under regulatory criminal statutes and is illegal? Obviously, some regulatory crimes, such as the requirement to stop at a red traffic signal, are known to all. However, more obscure statutes may not be widely known, especially by those people engaged in conduct at the edges of the laws' scope.³⁶ Accordingly, due to the rise in the number of federal criminal statutes that are regulatory in nature,³⁷ and the range of conduct prosecuted,³⁸ this Article proceeds on the premise that criminal statutes cover a wide variety of conduct and many of the people violating these laws do not know the criminal nature of their action.³⁹

B. Presumed Knowledge of the Law

For centuries, the notion that ignorance of the law will not excuse a crime has been a central tenant of criminal law,⁴⁰ often referred to in Latin as "*ignorantia legis neminem excusat*" or shortened to "*ignorantia legis*."⁴¹ However, like many such principles, courts and commentators have recognized several exceptions to the general rule. At the most basic level, a person's lack of knowledge of the law will prevent conduct from being criminal when the relevant statute requires awareness of the conduct's illegality.⁴² In certain crimes of omission, such as

35. *Id.* § 470ee(a).

36. Consider Lawrence Lewis's violation of the Clean Water Act. *See* Fields & Emshwiller, *supra* note 11. Most manufacturing institutions would likely know of the Act's requirements or at least that their conduct may fall within the scope of the Act. However, Lewis, operating at the edge of what the Act covers, did not know that his conduct could be subject to the Act. *Id.*

37. *See* Baker, *supra* note 21, at 1.

38. *See* Fields & Emshwiller, *supra* note 16.

39. *See* SILVERGLATE, *supra* note 4, at xxxvi ("[I]t is only a slight exaggeration to say that the average busy professional in this country . . . [is] unaware that he or she likely commit[s] several federal crimes [each] day.").

40. *See* Cass, *supra* note 5, at 685 (arguing that the principle of *ignorantia legis* came from Roman law).

41. *Id.* at 671 n.4; *see also* BLACK'S LAW DICTIONARY 1917-18 (10th ed. 2014) (providing alternate constructions of the same principle: "*Ignorantia excusatur non juris sed facti*." "*Ignorantia facti excusat, ignorantia juris non excusat*." "*Ignorantia juris non excusat*." "*Ignorantia juris quod quisque scire tenetur neminem excusat*." "*Ignorare legis est lata culpa*.").

42. *See* Ratzlaf v. United States, 510 U.S. 135, 138 (1994); Liparota v. United

registration requirements, a lack of knowledge or notice of the law may serve to defeat a conviction.⁴³ Certain mental handicaps, such that a defendant did not appreciate the wrongfulness of his or her conduct, may provide an excuse.⁴⁴ Also, if a person relies on certain official statements of the law, ignorance that the law differs from the statement may excuse otherwise criminal conduct.⁴⁵ However, apart from these limited circumstances, the general rule remains: A lack of knowledge of the illegality of conduct will not prevent a person from being found guilty.⁴⁶

Many justifications have been given for the principle of *ignorantia legis*, mostly reflecting utilitarian concerns.⁴⁷ One can imagine the difficulty of proving knowledge of the illegality of conduct, at least beyond a reasonable doubt. Accordingly, the maxim often receives an evidentiary formulation—a person is presumed to know the law.⁴⁸ However, this presumption has been criticized as entirely at odds with reality.⁴⁹ Further, the utilitarian rationale does

States, 471 U.S. 419, 424–26 (1985).

43. See *Lambert v. California*, 355 U.S. 225, 229–30 (1957) (overturning on due process grounds a conviction for failing to register as a felon where the defendant had no notice of the duty to register).

44. See 18 U.S.C. § 17(a) (2012).

45. See *Cox v. Louisiana*, 379 U.S. 559, 568–71 (1965).

46. Of course, this is to be distinguished from a mistake about the actual conduct engaged in. Often referred to as a “mistake of fact,” this sort of mistake works as an excuse when it negatives the mental requirement of the crime. See *United States v. Fulcher*, 250 F.3d 244, 252 (4th Cir. 2001) (“[M]istake of fact [is] a cognizable defense negating intent when the *mens rea* requirement for a crime is at least knowledge.”). However, even this sort of mistake will not excuse strict liability crimes or crimes with corresponding strict liability elements, including many regulatory crimes. See *Kennedy v. Louisiana*, 554 U.S. 407, 423 (2008) (holding that mistake of age would not negative the mental requirement in a statutory rape case where age was a strict liability element).

47. See, e.g., *Gordon v. State*, 52 Ala. 308, 309 (1875) (“If [*ignorantia legis*] should be abandoned, the administration of justice would be impossible, as every cause would be embarrassed with the collateral inquiry of the extent of legal knowledge of the parties seeking to enforce or avoid liability and responsibility.”); *People v. O’Brien*, 96 Cal. 171, 176 (1892) (“[*Ignorantia legis*] rests on public necessity. . . . If a person accused of crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result.”).

48. See Cass, *supra* note 5, at 691.

49. See, e.g., *id.*; Meese & Larkin, *supra* note 5, at 738 (“The problem is that this principle is no longer a sensible one, at least not when considered as an across-the-board rule.”). Indeed, the formulation of *ignorantia legis* as a presumption raises

not account for areas where, by statute, prosecuting authorities must prove a defendant's knowledge of the illegality of his or her conduct, as in the criminal provisions of the tax code.⁵⁰ If proving knowledge of the law is too onerous, why is it sometimes written into statutory language?

Another common justification for *ignorantia legis* concerns the perverse incentives that may arise in the absence of the rule.⁵¹ Under this rationale, if people could not be found guilty of a crime without knowledge of the law criminalizing the conduct, then there would be an incentive to remain ignorant of laws, thereby undermining the efficacy of all laws.⁵² Alternatively, this justification is sometimes phrased in the contrapositive—*ignorantia legis* incentivizes people to learn about the law, supporting the goal of effective deterrence.⁵³ Indeed, to effectuate the policy behind certain white-collar crimes, *ignorantia legis* may be necessary.⁵⁴ Assuming that sophisticated parties will only comply with law to the extent that compliance costs less than the cost of the sanction multiplied by the risk of detection, a complete lack of *ignorantia legis* in this context would reduce the cost of technical compliance to nearly zero while not changing any behavior.⁵⁵ However, this justification does not account for other incentives, some of them also perverse, that arise when criminal law applies *ignorantia legis* in the context of a vast panoply of criminal laws.⁵⁶ As one example, the

an interesting point regarding the fairness of the principle. One could argue that there would be no need for a presumption of knowledge of the law if, at some basic level, we did not consider it unfair to punish someone for conduct that he or she did not know was criminal.

50. See *Cheek v. United States*, 498 U.S. 192, 201 (1991) ("Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.").

51. See, e.g., *Barlow v. United States*, 32 U.S. 404, 411 (1833) ("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.").

52. See Meese & Larkin, *supra* note 5, at 755–57.

53. See *id.* at 755.

54. See *id.* at 752–53.

55. See *id.*

56. Some commentators argue that this rationale for *ignorantia legis* is better understood as a defense of the principle's constitutionality rather than as a justification for the principle because it does not address why the criminal justice ought to favor potential deterrence gained over the alleviation of unjust outcomes that result from the application of the principle. See *id.* at 755–57.

application of *ignorantia legis* in a system that has a multitude of laws imposing criminal sanctions may discourage would-be economic actors who cannot afford comprehensive legal advice.⁵⁷

A similar justification for *ignorantia legis* imports moral value to a person's failure to know the law.⁵⁸ That is, the fact that a person is ignorant of the law governing his or her conduct is, in itself, a reason to consider that person culpable.⁵⁹ The thinking is that responsible citizens inform themselves of the legal duties and requirements that govern their conduct.⁶⁰ It seems doubtful at best, however, that this rationale remains acceptable in the face of the proliferation of regulatory crime. How can people be expected to know all the laws governing their conduct when no one even knows exactly how many criminal laws exist?⁶¹ Indeed, if one accepts a choice-based morality—that is, that one can only act immorally through a voluntary act—then there can be no moral obligation to do something impossible, such as know every criminal law.

Despite the shortcomings of the justifications for *ignorantia legis*, the principle likely worked as an integral, rational piece of the system in which it arose. Issues relating to the ability of individuals to discern criminal conduct diminish when there are relatively few crimes, and they align with common notions of morality.⁶² Further, as there are fewer crimes, the perverse-incentive justification carries more weight. If the individuals in the community could know the vast majority of criminal sanctions, then a general imposition of *ignorantia legis* would likely reinforce the criminal system; when knowledge of the law is possible, people can actually be incentivized to attain it. The low number of crimes and their relation to moral norms would also support the argument for the intrinsic wrongfulness of ignorance of the law. Able people who fail to learn of the criminality of theft or murder could be said to have shirked an independent moral duty. Analogously, in a system of few criminal

57. For a further discussion of the potential perverse incentives of *ignorantia legis*, see *infra* section III.B.

58. See Meese & Larkin, *supra* note 5, at 758–59.

59. See *id.*

60. See *id.* at 758 (noting that, under this rationale, “[t]he failure to learn where the line is drawn justifies punishing whoever crosses it”).

61. See Fields & Emshwiller, *supra* note 19 (noting many unsuccessful attempts to quantify federal criminal laws).

62. See Meese & Larkin, *supra* note 5, at 738 (arguing that *ignorantia legis* “was reasonable in Blackstone’s days, when the penal code was small and reflected community mores”).

laws, a person exercising his or her minimal duty of political participation would learn what conduct was considered criminal.⁶³

The issue is that we do not live in a world of few criminal laws.⁶⁴ Instead of changing to meet new circumstances, however, the principle of *ignorantia legis* has remained largely static.⁶⁵ As stated above, insofar as the doctrine applies to crimes adopted from the common law, presuming that people know the law makes sense. Problems arise, however, when the principle applies to regulatory crimes. Although the Supreme Court seemed to back away from *ignorantia legis* in the context of certain regulatory crimes in *Lambert v. California*,⁶⁶ it has subsequently reaffirmed the principle.⁶⁷ In *Lambert*, the Court held that a defendant who had no notice of an ordinance requiring felons present in Los Angeles for more than five days to register with the city could not be convicted consistently with due process.⁶⁸ Knowledge of the law, or at least "proof of the probability of such knowledge," was required.⁶⁹ However, the decision, by its terms, only applied to crimes of omission,⁷⁰ and the Court has declined to extend the decision further.⁷¹ Indeed, when the Court has invalidated regulatory crimes

63. See *id.*

64. See Baker, *supra* note 21, at 1 (estimating the number of federal criminal statutes, exclusive of regulations imposing criminal sanctions, at 4,450); Fields & Emshwiller, *supra* note 19 (noting the great number of federal criminal laws).

65. See *United States v. Duval*, 865 F. Supp. 2d 803, 808 (E.D. Mich. 2012) (noting that ignorance of the law will not excuse a crime except where knowledge of the crime is an "express element of the offense" (quoting *United States v. Javaherpour*, 524 U.S. 184, 194 (1998))).

66. *Lambert v. California*, 355 U.S. 225, 243-44 (1957).

67. See, e.g., *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) ("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation.").

68. *Lambert*, 355 U.S. at 229-30.

69. *Id.*

70. See *id.* at 229 (noting that violation the ordinance does not require "any activity whatever").

71. See *Texaco, Inc. v. Short*, 454 U.S. 516, 537 n.33 (1982) (characterizing *Lambert* as an outlier); *United States v. Freed*, 401 U.S. 601, 608-09 (1971) (declining to extend *Lambert* because it dealt with an omission rather than an act). Although the Court has declined to extend *Lambert*, its reasoning that "a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear," *Lambert*, 355 U.S. at 229 (quoting OLIVER W. HOLMES, JR., *THE COMMON LAW* 50 (1881)) (internal quotation marks omitted), could just as easily apply to selling bird parts, excavating arrowheads, or dumping waste into a storm drain to avoid flooding a retirement

based on the lack of a mental requirement, it has generally done so based on the defendant's state of mind as to the criminalized conduct, not as to the law.⁷² Indeed, the principle of *ignorantia legis* appears to be alive and well in the context of regulatory crime.

III. CONTRASTING CRITIQUES

The disconnect between the traditional justifications for *ignorantia legis* and the current state of regulatory criminal enforcement⁷³ necessitates a reevaluation of the principle. This section will use two disparate frameworks, Lon L. Fuller's conception of the "internal morality of the law"⁷⁴ and the general principles of economic analysis of law.⁷⁵ By using two systems with arguably very different ends—moral validity in the case of Fuller⁷⁶ and efficiency in the case of economic analysis⁷⁷—I aim to call into question the continuing rationality or soundness of *ignorantia legis* as it is applied in our system of regulatory crime.⁷⁸ By using these two systems, I do not propose that either, at least for all purposes, is a valid or complete way of analyzing law. I merely suggest that if two major, yet disparate, methods of criticizing law come to the

home.

72. See, e.g., *Staples v. United States*, 511 U.S. 600, 609 (1994) (invalidating a conviction based on defendant's lack of knowledge that an illegally possessed gun was an automatic weapon). Where the Court has overturned convictions based on defendants' lack of knowledge of the law, it has tied such a knowledge requirement to the language of the statute, not on general due process principles as it did *Lambert*. See *Ratzlaf v. United States*, 510 U.S. 135, 138 (1994); *Liparota v. United States*, 471 U.S. 419, 424–26 (1985). Presumably, Congress can draft its legislation around these decisions and retain *ignorantia legis*.

73. See *supra* Part II.

74. LON L. FULLER, *THE MORALITY OF LAW* 33–94 (rev. ed. 1969).

75. I rely on several sources for the principles of economic analysis, but Judge Posner's *Economic Analysis of Law* is a key source. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007).

76. FULLER, *supra* note 74, at 4 (noting the project "of clarifying the directions of human effort essential to maintain any system of law").

77. POSNER, *supra* note 75, at 26 (noting that economic analysis of law may "hypothesize[] a specific economic goal, that of economic efficiency in the Kaldor–Hicks sense, for a limited subset of legal rules, institutions, and so forth").

78. In the spirit of Holmes, I hope to "get the dragon out of his cave on to the plain and in the daylight, . . . count his teeth and claws, and see just what is his strength." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

conclusion that a principle ought not to be a part of the law, then a serious reconsideration of that principle should take place.

A. Fuller's "Internal Morality of the Law"

In *The Morality of Law*, Fuller provides a method of analyzing law that addresses characteristics that a legal system must possess to be considered valid.⁷⁹ That is, if law does not meet certain requirements, it cannot be considered law at all.⁸⁰ Fuller lays out "eight distinct routes to disaster" for systems of law:

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.⁸¹

These metrics do not deal with ends that law ought to achieve. Rather, they focus on the features of legal systems themselves, identifying attributes that law must have in order to be considered moral.⁸² In this regard, Fuller's system is process-based. Further, the internal morality of law has both primary and secondary implications for *ignorantia legis*. Under a primary analysis, the actual rule of *ignorantia legis*, as applied in the context of regulatory crime, may fail to meet law's internal moral requirements. Under a secondary analysis, if the existing criminal law system fails to be internally moral or is weak under several of the eight metrics, then

79. FULLER, *supra* note 74, at 33-94.

80. *Id.* at 39 ("A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.").

81. *Id.* at 39.

82. Compare *id.* at 33-94 (discussing the "the morality that makes law possible") with *id.* at 152-86 (discussing "the substantive aims of law").

ignorantia legis may be called into question as an auxiliary of that system.

1. Primary Analysis

On a primary level, applying Fuller's rubric to *ignorantia legis* itself, the principle immediately becomes suspect under the sixth requirement—it commands impossible action. Presuming that individuals know the law governing their conduct carries the requirement that they inform themselves of the relevant law. Effectively, *ignorantia legis* works as a positive law that requires people to inform themselves of all the laws governing their actions.⁸³ At a minimum, the principle tells individuals, "You who fail to learn all the laws do so at your own peril." But knowing the entirety, or even the majority, of criminal law that one could violate is factually impossible. The array of criminal sanctions is far too vast for an individual to completely know the law governing his or her conduct.⁸⁴ Therefore, *ignorantia legis* imposes a duty that cannot be met and thus fails to comport with the internal morality of law.

For Fuller, the utilitarian justifications of a positive deterrent effect or prosecutorial expediency for imposing an unbending *ignorantia legis* would not quell moral concerns where knowledge of at least a sizable portion of the relevant law is impossible.⁸⁵ He

83. Cf. Cass, *supra* note 5, at 693 ("Failure to know the law is not punished unless it leads to a violation of the law; this coincidence, not mere ignorance, is punished to the same extent as knowing and willful violation of the law. . . . As presently applied, however, *ignorantia legis* makes no allowance for the possibility that ignorance of the law is not always blameworthy.").

84. See SILVERGLATE, *supra* note 4, at xxxvi ("[I]t is only a slight exaggeration to say that the average busy professional in this country . . . [is] unaware that he or she likely commit[s] several federal crimes [each] day."); Baker, *supra* note 21, at 1 (estimating the number of federal criminal statutes at 4,450, not including regulations that provide for criminal sanctions); Fields & Emshwiller, *supra* note 19 (noting the inability of legal researchers to count the number of federal code provisions imposing criminal sanctions).

85. Fuller addresses the utilitarian argument attempting to justify laws that are impossible to comply with by contrasting the social function of law with that of pedagogic methodology:

The technique of demanding the impossible is subject to more subtle and sometimes even to beneficent exploitation. The good teacher often demands of his pupils more than he thinks they are capable of giving. He does this with the quite laudable motive of stretching their capacities. Unfortunately in many human contexts the line can become blurred between vigorous

openly derides the attempted justification of impossible laws by "[t]he conveniences of what has been called 'jawbone enforcement.'"⁸⁶ In a system where criminal law is vast and complicated to the point of being incomprehensible to an ordinary person, the idea that the law presumes an individual knows the law—and is therefore blameworthy when he or she inadvertently violates it—gives the prosecutor too much power.⁸⁷ Although the prosecutor promises "selective enforcement," what results is the potential for "enforcement by blackmail."⁸⁸

2. Secondary Analysis

A secondary analysis of *ignorantia legis* under Fuller's internal morality of law can be viewed in at least two ways. If one accepts Fuller's natural law view that laws failing, at some basic level, to meet the eight requirements lack validity,⁸⁹ then *ignorantia legis* would not apply to an invalid system because there would be no actual law an individual could be presumed to have knowledge of. On the other hand, even under a positivist approach,⁹⁰ one can still accept the argument that we ought not apply *ignorantia legis* to a system that is not internally moral because it frequently changes, is not well published, and is not comprehensible.⁹¹ In either case, if our

exhortation and imposed duty. The legislator is thus easily misled into believing his role is like that of the teacher. He forgets that the teacher whose pupils fail to achieve what he asked of them can, without insincerity or self-contradiction, congratulate them on what they did in fact accomplish. In a similar situation the government official faces the alternative of doing serious injustice or of diluting respect for law by himself winking at a departure from its demands.

FULLER, *supra* note 74, at 71.

86. *Id.* at 78.

87. *Id.* at 77-78.

88. *Id.* at 78 (internal quotation marks omitted).

89. *Id.* at 39 ("A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all.").

90. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 140 (2d ed. 1994) ("The most important of these factors which show that in acting we have applied a rule is that if our behaviour is challenged we are disposed to justify it by reference to the rule: and the genuineness of our acceptance of the rule may be manifested not only in or past and subsequent general acknowledgements of it and conformity to it, but in our criticism of our own and others' deviation from it.").

91. While this argument is not internally proven in a positivist system, it takes

system of criminal justice does not comply with the internal morality of law, especially in ways that have a nexus with the individuals' ability to know when their conduct is subject to criminal sanction,⁹² then *ignorantia legis* becomes questionable as a principle.

Many of the ways Fuller identified that a legal system can fail primarily address the public's capability of knowing the law.⁹³ Further, they are practical-minded. That is, they are concerned not merely with conceptual categories but with peoples' actual ability to shape their actions so as to avoid the power of the state. For example, the requirements that law be understandable, sufficiently promulgated, and not frequently changed all deal with people having a fair opportunity to know and understand the law. Our current scheme of regulatory crime, however, fails to meet at least these three requirements of law that Fuller lays out, and it may be susceptible to criticism under others as well.⁹⁴

First, the criminal laws governing individuals in our society, especially regulatory criminal laws, are not promulgated well enough to avoid "a failure to publicize."⁹⁵ Fuller, in discussing this requirement, quickly points out that "[i]t would in fact be foolish to try to educate every citizen into the full meaning of every law that might conceivably be applied to him."⁹⁶ Indeed, from a practical perspective, this would require every person to be a lawyer, and a talented one at that, a result hardly feasible or even desirable. Fuller argues, however, that as criminalized conduct further "depart[s] from generally shared views of right and wrong," the necessary level of education on the law rises.⁹⁷ At common law,

only a small inferential leap to reach the conclusion that we should not punish people for things they cannot accomplish.

92. See *infra* notes 95–96 and accompanying text.

93. Indeed, Fuller illustrates the internal morality of law through an allegory illustrating the effect that law's failure to meet the eight requirements has on the individuals subject to its jurisdiction. See FULLER, *supra* note 74, at 33–38.

94. For example, it is possible that the substance of much of our criminal law is contradictory or that our criminal provisions are being enforced in a manner inconsistent with "the rules as announced." See *id.* at 39; SILVERGLATE, *supra* note 4, at xli ("[A]s these bodies of law expanded, federal prosecutors grew more inclined to bring criminal charges for deeds that, at most, constituted arguable (sometimes barely arguable) civil offenses."). However, exploration of these aspects of our criminal justice system has less of an obvious nexus with *ignorantia legis* and is therefore beyond the scope of this article.

95. FULLER, *supra* note 74, at 39.

96. *Id.* at 49.

97. *Id.* at 50.

Fuller notes, the fact that the law and popular notions of morality aligned made the relative difficulty of accessing the law tolerable.⁹⁸ Supplementing this, the law also has a powerful norming effect—people tend to imitate those whom they believe know the law.⁹⁹ The law, then, affects social behavior, which can in turn affect the law.¹⁰⁰ However, the relative obscurity of many of our criminal laws¹⁰¹ and the wide range of conduct covered under each law, enforced rarely but significantly at the outer edges,¹⁰² undercuts the law's ability to influence popular morality.¹⁰³ Who could say that the majority of people think that selling bird parts is morally objectionable?¹⁰⁴ Who finds inadvertently driving a snowmobile onto protected land in the midst of a snowstorm morally wrongful?¹⁰⁵ When commonly held values or social norms do not align with criminalization, the need for the government to inform individuals about the content of the criminal laws heightens.¹⁰⁶ Regardless, people remain largely

98. *Id.*

99. *See id.* at 51 (“[I]n many activities men observe the law, not because they know it directly, but because they follow the pattern set by others whom they know to be better informed than themselves.”). Fuller also makes this point, perhaps in a more nuanced way, in his 1934 article, *American Legal Realism*. *See* L. L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 452 (1934) (“In the relation of law and society, neither element is wholly determinative, neither wholly determined.”). This, in turn, returns us to the *malum in se* and *malum prohibitum* “chicken-and-egg” problem. *See supra* notes 31–39 and accompanying text.

100. *See* Fuller, *supra* note 99, at 452.

101. *See, e.g.*, 16 U.S.C. § 470ee(a) (2006) (criminalizing the attempted excavation of arrowheads on federal land); 16 U.S.C. §§ 703, 707(b)(2) (criminalizing selling or bartering with migratory bird parts).

102. *See, e.g.*, Fields & Emshwiller, *supra* note 11 (discussing Lawrence Lewis’s prosecution under the Clean Water Act for directing overflowing waste water from a retirement home into a storm drain that flowed into a shallow creek, which Lewis believed emptied into the city’s sewage treatment system instead); Fields & Emshwiller, *supra* note 16 (discussing the conviction of Bobby Unser under the Wilderness Act for driving his snowmobile onto protected land in the midst of a snowstorm).

103. Admittedly, there are some regulatory crimes that may reflect notions of popular morality, such as certain environmental provisions or certain crimes relating to drugs. However, this does not undermine the general thrust of the argument, especially considering the number and effect of regulatory crimes that may not reflect common notions of right and wrong.

104. *See* United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985).

105. *See* Fields & Emshwiller, *supra* note 16.

106. FULLER, *supra* note 74, at 50–51.

uninformed of the governing criminal law.¹⁰⁷ The current system of regulatory crime suffers, therefore, from a “failure to publicize.”¹⁰⁸

Second, our criminal justice system fails to be “understandable” so as to comport with the internal morality of law—especially because of the highly technical nature of regulations.¹⁰⁹ Fuller argues that “clarity represents one of the most essential ingredients of legality.”¹¹⁰ At a basic level, “understandable” must mean understandable to a person who is not a legal expert in a particular area. “Clarity” must refer to the ability of an ordinary person to comprehend the basic requirements of a law. If this were not the meaning, then the requirement of understandability would be rendered hollow—clarity could be achieved if the person who wrote the rule understood it. Filled with terms of art, legalese, and unexpressed assumptions, regulatory text is notoriously hard to understand.¹¹¹ Even from a structural perspective, the uninitiated would likely find it quite difficult to navigate regulations and find positive law.¹¹² Further, even if the requirement of understandability could be met if non-lawyers who were unable to understand the statutes and regulations themselves could get adequate legal advice, clarity would still not be achieved. Moreover, most individuals simply cannot afford this type of legal advice.¹¹³

107. See SILVERGLATE, *supra* note 4, at xxxvi (“[I]t is only a slight exaggeration to say that the average busy professional in this country . . . [is] unaware that he or she likely commit[s] several federal crimes [each] day.”); Baker, *supra* note 21, at 1 (estimating the number of federal criminal statutes at 4,450, not including regulations that provide for criminal sanctions); Fields & Emshwiller, *supra* note 19 (noting the inability of legal researchers to count the number of federal code provisions imposing criminal sanctions).

108. See FULLER, *supra* note 74, at 39.

109. See *id.*

110. *Id.* at 63.

111. Compounding the confusion are the various interpretations given in cases and agency opinions.

112. Again, as an added layer of difficulty, a true understanding of the meaning of a statutory or regulatory text requires case law research.

113. See generally Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 J. PROF. LAW. 79 (2012) (noting the lack of availability of affordable legal advice). Further, even if people had the requisite access to counsel, it is still unclear whether attorneys could adequately advise them. See Baker, *supra* note 21, at 1 (estimating the number of federal criminal statutes at 4,450, not including regulations that provide for criminal sanctions); Fields & Emshwiller, *supra* note 19 (noting the inability of legal researchers to count the number of federal code provisions imposing criminal sanctions).

Our system of criminal justice leaves, therefore, much to be desired with regard to understandability and clarity.¹¹⁴

Third, our system of regulatory crimes changes frequently and therefore does not meet the "constancy" requirement of the internal morality of law.¹¹⁵ The importance of constancy in the law arises from individuals' reliance.¹¹⁶ In the context of criminal law, however, people rely not only on legislative and regulatory enactments, but also on the lack of legislative or regulatory action in a certain area. Being informed of the content of criminal law is important because it allows one to know what has not been criminalized. While modern jurisprudence has protected this reliance interest through limitations on retroactive laws,¹¹⁷ the ability to rely can be undermined just as much through the too-frequent promulgation of new criminal penalties as previously innocent conduct becomes subject to sanction. In our system, new criminal laws often get enacted.¹¹⁸ This lack of constancy, coupled with other defects such as a lack of clarity¹¹⁹ and a lack of publicity,¹²⁰ undercuts the public's ability to know and rely on the law. Therefore, our system of criminal law changes too frequently to meet the constancy contemplated by the internal morality of law.

In addition to failing to meet the publicity, clarity, and constancy requirements of the internal morality of law, Fuller identifies another problem area of our scheme of regulatory crime—the strict

114. In many ways, the requirement of clarity trumps that of adequate publicity. What good does publicity do if the law is incomprehensible? Further, Fuller notes the danger of giving prosecutors control over the enforcement of unclear laws. See FULLER, *supra* note 74, at 78 (noting the danger of "selective enforcement"); see also SILVERGLATE, *supra* note 4, at xxxix (comparing the operation of modern "vague federal statutes" to that of "vague state breach-of-the-peace laws" used in the Jim Crow era South).

115. See FULLER, *supra* note 74, at 79.

116. See *id.* at 80 ("The affinity between the problems raised by too frequent or sudden changes in the law and those raised by retrospective legislation receives recognition in the decisions of the Supreme Court. The evil of the retrospective law arises because men may have acted upon the previous state of the law.").

117. *Id.* (noting the use of restrictions on *ex post facto* laws to protect reliance on the law).

118. According to one study, Congress passes nearly sixty new criminal statutes each year. Baker, *supra* note 21, at 1. This does not include the number of regulations imposing criminal sanctions promulgated each year. Tellingly, no good estimate of the number of new regulations imposing criminal sanctions each year exists. See Fields & Emshwiller, *supra* note 19.

119. See *supra* notes 109–14 and accompanying text.

120. See *supra* notes 95–108 and accompanying text.

liability crime.¹²¹ To Fuller, strict liability crimes represent one of “the most serious infringement[s]” of the internal morality of law.¹²² Strict liability in a criminal context, especially when rationalized by prosecutorial convenience, poses serious threats to the rule of law.¹²³ The existence of strict liability crime “should be a source of concern to everyone who likes to think of fidelity to law as respect for duly enacted rules, rather than as a readiness to settle quietly any claim that may be made by the agencies of law enforcement.”¹²⁴ For Fuller, the fact that strict liability “serve[s] mightily the convenience of the prosecutor” is not a feature but a grave problem.¹²⁵ The opening created for “selective enforcement” ends up allowing “enforcement by blackmail.”¹²⁶ Although Fuller, writing in 1964, remained hopeful that criticism of strict liability crime by Jerome Hall, H.M. Hart, and the drafters of the Model Penal Code would be effective,¹²⁷ he made it clear that the “abuses that go with strict criminal liability” were an affront to the internal morality of law.¹²⁸ Contrary to Fuller’s hopes, strict liability crime survives and thrives in our current system of regulatory crime.¹²⁹ Consequently, one cannot say that this system entirely comports with the internal morality of law.

Although Fuller acknowledges that each requirement of the internal morality of law is, in some sense, aspirational¹³⁰ and that the requirements may interact with one another,¹³¹ he also

121. FULLER, *supra* note 74, at 77–78. Although Fuller includes his criticism of strict liability crimes in his discussion on impossibility, it can also be read as a general criticism of over-criminalization. *See id.* (“When absolute liability is coupled with drastic penalties—as it often is—the position of the prosecutor is further improved. Usually he will not have to take the case to trial at all; the threat of imprisonment or a heavy fine is enough to induce a plea of guilty, or—where this is authorized—a settlement out of court.”).

122. *Id.* at 77.

123. *See id.* at 78.

124. *Id.*

125. *Id.*

126. *Id.* (internal quotation marks omitted).

127. *Id.* at 78 n.33.

128. *See id.* at 78.

129. *See, e.g.,* United States v. Duval, 865 F. Supp. 2d 803, 808 (E.D. Mich. 2012) (noting that ignorance of the law will not excuse a crime except where knowledge of the crime is an “express element of the offense”).

130. *See* FULLER, *supra* note 74, at 41–44 (noting that the “inner morality of law . . . embraces a morality of duty and a morality of aspiration”).

131. *See, e.g., id.* at 92 (“[T]o the extent that the law merely brings to explicit expression conceptions of right and wrong widely shared in the community, the need that enacted law be publicized and clearly stated diminishes in importance.”).

recognizes that certain departures require countervailing admissions.¹³² For example, Fuller posits that "where laws change frequently, the requirement of publicity becomes increasingly stringent."¹³³ Here, however, we have seen that regulation suffers greatly from both changing frequently¹³⁴ and being unpublished,¹³⁵ with no compensation going either way. Further, Fuller identifies a connection between some of the most important aspects of the internal morality of law and the principles behind *ignorantia legis*.¹³⁶ When the pipelines through which people learn of and understand their legal duties—such as publicity, clarity, and constancy—become clogged, the internal morality of the law becomes questionable. This, in turn, illuminates the onerous nature of a strict application of *ignorantia legis* under such circumstances.

Indeed, Fuller recognizes that the morality his method contemplates is primarily aspirational in nature:

Corresponding to [the eight routes to failure in the enterprise of creating law] are eight kinds of legal excellence toward which a system of rules may strive. What appear at the lowest level as indispensable conditions for the existence of law at all, become, as we ascend the scale of achievement, increasingly demanding challenges to human capacity.¹³⁷

Accordingly, even if one rejects the argument as laid out, that our system has severe deficiencies that call its whole internal morality into question, the fact remains that the end goals of clarity, publicity, and constancy ought to be strived for. While endeavoring to avoid striving for the unrealistic "utopia of legality" that Fuller warns against,¹³⁸ we ought to at least attempt to avoid the "abyss."¹³⁹ Fuller notes that "infringements of legal morality tend to become cumulative" and compound on themselves, making law progressively worse.¹⁴⁰ The increase in strict liability crime¹⁴¹ and

132. See *id.* at 104 ("[A] neglect of one desideratum may throw an added burden on another.").

133. *Id.*

134. See *supra* notes 115–19 and accompanying text.

135. See *supra* notes 95–108 and accompanying text.

136. See FULLER, *supra* note 74, at 43, 93 (noting that clear standards for publication can exist and noting the importance of people having notice of their legal duties).

137. FULLER, *supra* note 74, at 41.

138. *Id.*

139. *Id.* at 44.

140. *Id.* at 92.

the dubious application of *ignorantia legis* feed on each other—using the doctrine facilitates broad enforcement of such crimes, which increases their enactment, which leads to even more use of *ignorantia legis*. Heeding Fuller's warning necessitates a rethinking of the doctrine and the characteristics of our system that make it troublesome.

B. Economic Analysis of Law

Although typically justified in terms of its utility,¹⁴² *ignorantia legis*, as applied to regulatory crime, suffers from significant deficiencies when viewed through the lens of the economic analysis of law. Generally, the economic issues with *ignorantia legis* in the context of regulatory crime—especially strict liability regulatory crime—arise in two intertwined areas: the principle's promotion of perverse incentives and its tendency to raise transaction costs.

Proponents of *ignorantia legis* commonly justify the principle, among other ways, by claiming that it properly sets incentives for individuals and firms subject to a system of criminal law by encouraging the actors to inform themselves of the rules that apply to their conduct.¹⁴³ Alternatively, this can be stated as discouraging actors from remaining ignorant about the law.¹⁴⁴ That is, if we excuse people from punishment for committing crimes they did not know the law prohibited, people would not want to learn the law so as to minimize the risk of punishment. This would make the laws less effective, as no one would know what the laws were;¹⁴⁵ therefore fewer people would voluntarily refrain from engaging in the conduct the laws tried to curb. Consequently, government would have no way of effectuating policy through the criminal system, or it would at least have a much harder time of it. What you didn't know couldn't hurt you, but it would hurt everyone else.

141. See *supra* Part II.

142. See, e.g., *Gordon v. State*, 52 Ala. 308, 309 (1875) ("If [*ignorantia legis*] should be abandoned, the administration of justice would be impossible, as every cause would be embarrassed with the collateral inquiry of the extent of legal knowledge of the parties seeking to enforce or avoid liability and responsibility."); *People v. O'Brien*, 96 Cal. 171, 176 (1892) ("[*Ignorantia legis*] rests on public necessity. . . . If a person accused of crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result.").

143. See *Cass*, *supra* note 5, 689–90.

144. See *id.*

145. Except, perhaps optimistically, for those who passed them.

This line of argument, however, relies on at least two premises that may turn out to be false. First, the argument assumes an all-or-nothing approach to *ignorantia legis*—either we must presume that people know all validly enacted laws, or we cannot presume that they know any. Second, the argument presupposes that actors have the ability to learn about the law or at least that there is a low cost of doing so. Any amount of incentive is useless if the person being incentivized cannot take the desired action.¹⁴⁶

The first premise, the assumption of a binary choice between *ignorantia legis* or no presumption of knowledge of any law, is demonstrably false. In some areas of our system of regulatory crimes, we do not presume that actors know the law. To take the most ubiquitous example, in tax evasion and other crimes relating to the enforcement of the Internal Revenue Code, we do not presume that defendants had knowledge of the relevant criminal provision.¹⁴⁷ That is, prosecutors in criminal tax cases must prove—beyond a reasonable doubt—not only that the defendants met the underlying conduct requirements, but also that they knew they were violating the law.¹⁴⁸ As a theoretical matter, however, the problem remains that, in some sense, *ignorantia legis* as a legislative principle still applies to these cases because the legislature defined knowledge of the law as an element of the crime.¹⁴⁹ Stated differently, *ignorantia legis* still exists beneath the elements of tax crimes, but legislative enactment prevents it from surfacing. In relation to the outcome of cases, however, this is a distinction without a difference. The operation of the rules is the same: a defendant can be acquitted on the basis of not knowing the law. Further, insofar as an intermediate application of *ignorantia legis* would promote efficiency, judges may

146. This could be alternatively expressed as the proposition that if the cost of taking certain action is infinite, then one could never incentivize a person enough for them to be able to take it. Also, Judge Posner has argued that crimes imposed on people who had no notice of them act like “traps” instead of “deterrents.” *United States v. Wilson*, 159 F.3d 280, 295 (7th Cir. 1998) (Posner, J., dissenting).

147. *See Cheek v. United States*, 498 U.S. 192, 201 (1991) (“Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.”).

148. *See id.*

149. *See id.* at 204–06 (distinguishing, based on the “willfulness requirement in the criminal provisions of the Internal Revenue Code,” between defendant’s having knowledge of the law and his belief that the tax code was unconstitutional as applied to him).

be better situated than legislators to make the decision about when and to what crimes the principle ought to be applied.¹⁵⁰

In our system of regulatory crime, the second premise, that individuals and firms can actually gain knowledge of the criminal law applying to their conduct, or at least that they can do so with relative ease, likely does not hold up to close inspection. Of course, the process of socialization gives individuals the knowledge of the illegality of many crimes. When we identify the crimes that most people know of—murder, theft, arson, burglary, and rape, for example—we see that they at least loosely correlate with common law crimes.¹⁵¹ Unsurprisingly then, *malum in se* offenses seem more likely to be generally known than the more esoteric of the *malum prohibitum* offenses.¹⁵² When we consider that things seen as intrinsically bad—the *malum in se* crimes—are seen as morally reprehensible by a majority of people, the fact that people are generally aware of the criminal nature of this conduct can be easily explained by looking to socialization.¹⁵³ In addition to common law crimes, many regulatory crimes in areas that most people participate in are generally known. As a basic example, the crime of failing to stop at a red light is known by virtually all because practically everyone interacts with the traffic system, at least as a passenger. Further, people working in regulated industries are likely to know at least some of the regulatory crimes that could apply to their conduct. For example, a tax preparer would likely know that he or she could be subject to criminal penalties for assisting someone in filing a false return.

150. POSNER, *supra* note 75, at 25, 560–62 (noting the tendency of statutory law be “less likely to promote efficiency” than judge-made law). Further, courts often have the opportunity to read knowledge of the law requirements into statutes. See *Ratzlaf v. United States*, 510 U.S. 135, 138 (1994); *Staples v. United States*, 511 U.S. 600, 618–19 (1994); *Liparota v. United States*, 471 U.S. 419, 424–26 (1985); *Wilson*, 159 F.3d at 293 (Posner, J., dissenting) (noting the ability of the court to read in knowledge of the law as a requirement, the fact that courts frequently do this, and the benefits of reading a knowledge requirement into the statute).

151. Of course, people may be generally aware of many crimes that are not from the common law, such as vehicular manslaughter or, for that matter, running a red light or tax evasion. The link between common law crimes and actions that individuals would know that society finds reprehensible can also be seen as a layer of promoting efficiency, supporting Judge Posner’s “efficiency theory of the common law” insofar as it promotes deterrence. See POSNER, *supra* note 75, at 25.

152. See *Wilson*, 159 F.3d at 294 (Posner, J., dissenting) (noting that *malum prohibitum* offenses are “not the kind of law[s] that a lay person would intuit existed because the conduct [they] forbade was contrary to the moral code of his society”).

153. See *id.*

But what of people whose conduct is criminalized by a statute or regulation that typically governs an area that they do not work in or have frequent contact with? What about Billy, who barterers with his friend using a red-tailed hawk talon?¹⁵⁴ Perhaps more poignantly, what about Lawrence Lewis's prosecution under the Clean Water Act?¹⁵⁵ As we have previously seen, regulatory offenses criminalize a wide range of conduct, even outside of the industries or areas that each regulatory scheme attempts to govern.¹⁵⁶ In many of these cases, defendants are blindsided by strict penalties for conduct they did not know was criminal.¹⁵⁷ Contrary to the assumption of proponents of *ignorantia legis*, and perhaps enabled through regulatory capture, the costs of becoming aware of all regulatory crime that could govern a person's conduct is quite high, especially when strict liability is imposed. One must account for not only the cost of becoming aware of a particular law with no notice—a cost that may be extraordinarily high¹⁵⁸—but also for the high cost of the legal counsel necessary to become informed about the panoply of regulatory sanctions.¹⁵⁹ The addition of strict liability creates another layer of cost in becoming aware of the factual content of all conduct that may be subject to strict liability criminal penalties because a mistake of fact will no longer negative an element of the crime.¹⁶⁰

154. See *supra* Part I.

155. See *supra* notes 11–15 and accompanying text.

156. See *supra* notes 10–39 and accompanying text.

157. See *Wilson*, 159 F.3d at 293 (Posner, J., dissenting) ("Congress created, and the Department of Justice sprang, a trap on Carlton Wilson as a result of which he will serve more than three years in federal prison for an act (actually an omission to act) that he could not have suspected was a crime or even a civil wrong."); SILVERGLATE, *supra* note 4, at xxxvi ("[P]rosecutors can find some arguable federal crime to apply to just about any one of us, even for the most seemingly innocuous conduct."); Fields & Emshwiller, *supra* note 11 (discussing the story of Lawrence Lewis, who was caught off guard by a federal prosecution); Fields & Emshwiller, *supra* note 16 (discussing the similar case of Bobby Unser).

158. See *Wilson*, 159 F.3d at 295 (Posner, J., dissenting) ("We want people to familiarize themselves with the laws bearing on their activities. But a reasonable opportunity doesn't mean being able to go to the local law library and read Title 18. It would be preposterous to suppose that someone from Wilson's milieu is able to take advantage of such an opportunity.").

159. See generally Rigertas, *supra* note 113 (noting the lack of availability of affordable legal advice to much of the population).

160. See *United States v. Fulcher*, 250 F.3d 244, 252 (4th Cir. 2001) ("[M]istake of fact [is] a cognizable defense negating intent when the *mens rea* requirement for a crime is at least knowledge.").

The high information cost of learning the applicable law creates another cost problem with *ignorantia legis*: the higher cost of criminal enforcement. Assuming rational actors, the higher the costs of becoming familiar with the law are, the higher the incentive the system gives people to learn the law must be.¹⁶¹ In the context of criminal law, increased incentives often take the form of more frequent enforcement, harsher penalties, or both.¹⁶² Criminal punishment, however, is itself a social cost, traded for some anticipated societal benefit. To the extent that legislatures and agencies do not account for these compounded costs in enacting or promulgating regulatory offenses, these criminal penalties are inefficient.

These high costs, coupled with the wide scope of regulatory crime, has further, perhaps perverse, effects when combined with *ignorantia legis*. Economic actors who have no notice of applicable criminal penalties cannot factor the possibility of sanctions into their decision-making, yet the law operates as if they had rationally considered in the chance of punishment.¹⁶³ That is, some individuals unknowingly expose themselves to risk and, consequently, do not account for it. Because this increased exposure is, in part,¹⁶⁴ due to the high cost of information, those who are exposed would seem to be those who have fewer resources available to divert to becoming informed. Divergently, those who have greater resources to obtain legal information would better account for risk and, therefore, hold a competitive advantage, promoting their acquiring of new resources. To the extent that legislatures and agencies do not account for this phenomenon, regulatory crime has an unintended distributive effect. Even if we suppose that actors know of the risk but cannot quantify it because of high information costs, the existence of that unquantifiable risk discourages what may be beneficial economic activity, an incentive leading to inefficiencies.¹⁶⁵ To the extent that

161. See POSNER, *supra* note 75, at 219.

162. See *id.* (identifying the typical ways of adjusting the costs of crime to criminals as “tinkering with the level of law enforcement activity and the severity of punishment”). Judge Posner notes that the costs of crime to criminals can also be raised, externally to the criminal justice system, by lowering the unemployment rate, which would raise opportunity costs for those engaged in crime. *Id.* at 219–20.

163. See *Wilson*, 159 F.3d at 295 (Posner, J., dissenting) (criticizing *ignorantia legis* as promoting “a false economy” when applied where defendants had no reason to know that their conduct was criminal).

164. Of course, the exposure to the risk of punishment for unknown crimes is also facilitated by the principle of *ignorantia legis*.

165. See POSNER, *supra* note 75, at 233–34 (noting that one of the main costs of

information costs may outstrip the benefit of being able to reduce risk—a significant possibility given the wide range of conduct criminalized, high information costs, and the added costs imposed by strict liability—the law actually incentivizes people to remain ignorant of it, even where *ignorantia legis* applies. To avoid this, the frequency of punishment, its severity, or both must be raised, driving up the corresponding social costs.¹⁶⁶

Economic analysis, then, seems to suggest that a form of intermediate application of *ignorantia legis* may be beneficial. Of course, *ignorantia legis* applied to crimes that are commonly known promotes efficient outcomes. If almost everyone knows that certain conduct is illegal, assuming that they do for adjudicative purposes does not place a real burden on the risk evaluation process, but it does make prosecution less costly, reducing the transaction costs of criminal enforcement with little other effect.¹⁶⁷ Further, a similar rationale applies in the context of actors heavily involved in the industry that a regulatory scheme primarily addresses: the actors likely know of the relevant law, therefore, no real reduction in cost could be accomplished by withdrawing *ignorantia legis*.¹⁶⁸ However, regulatory crimes with a scope exceeding the industry intended to be governed warrant a different application. Significant reductions in information costs could be accomplished by requiring proof that the actor knew his or her conduct was criminal, and because the action takes place outside the primary industry that the law governs, the detriment to the effective shaping of public policy would be minimized. The government, as the least cost provider, could do more to provide information on which regulations govern specific business activities. The resulting lower information costs for the public would promote rational choices and help minimize perverse incentives to ignore the law.

criminal enforcement is “the social cost[] of steering clear of some lawful activity”).

166. See *id.* at 219 (identifying the typical ways of adjusting the costs of crime to criminals as “tinkering with the level of law enforcement activity and the severity of punishment”).

167. See *id.* at 233–34 (noting that one can reduce the social costs of prosecution by eliminating items of proof “[w]here the social costs of steering clear of some lawful activity because of fear of erroneous criminal punishment are deemed slight”).

168. See Cass, *supra* note 5, at 693 (noting that, in a rethinking of *ignorantia legis*, a stricter standard could be applied to those who “were engaged in some regulated occupation and charged with violation of a law regulating that occupation”).

IV. CONCLUSION

The application of *ignorantia legis* to the current system of regulatory crime creates a situation where a wide variety of conduct is criminal and many people do not know the criminal nature of their action, nor do they suspect it. When people do not have notice that their action may be criminal, like Bobby Unser and Lawrence Lewis, the power of the state can blindsides them when they become subject to the enforcement of obscure laws.

When analyzed under Fuller's framework of the "internal morality of law," application of *ignorantia legis* gives rise to severe implications that a system including rapidly expanding criminal laws, strict liability crime, and a presumption that all people know the law is not internally moral. In such a system, *ignorantia legis* imposes a duty likely impossible to meet.¹⁶⁹ Further, where the law changes frequently, is not well published, and is not clear, *ignorantia legis* as a secondary principle runs afoul of the internal morality of law, either because no law exists to be knowledgeable of or because presuming that people know the law has little basis in reality.¹⁷⁰

Economic analysis of *ignorantia legis* reveals that the principle, as applied to strict liability and other regulatory crimes, creates costs that promote perverse incentives and inefficiencies.¹⁷¹ *Ignorantia legis* raises information costs by requiring individuals to be informed of laws of which they have little or no notice.¹⁷² It drives up the social costs of penalties by requiring more frequent or more draconian punishment.¹⁷³ And it discourages economic actors on the margin from engaging in beneficial activity, or it likely fails to actually incentivize them to become informed.¹⁷⁴

Because analysis under these two disparate methods of evaluating law reaches the same conclusion—that *ignorantia legis* is problematic—a full reconsideration of the doctrine across more metrics is needed. As both methods distinguish between laws that individuals are likely to have knowledge or notice of and those that they are not,¹⁷⁵ further analysis could proceed by working to draw

169. See *supra* Part III.A.1.

170. See *supra* Part III.A.2.

171. See *supra* Part III.B.

172. See *supra* notes 157–61 and accompanying text.

173. See *supra* notes 162–65 and accompanying text.

174. See *supra* notes 162–65 and accompanying text.

175. Compare *United States v. Wilson*, 159 F.3d 280, 295–96 (7th Cir. 1998) (Posner, J., dissenting) (noting the inability of law to incentivize against criminal

lines or create criteria for determining precisely in what circumstances knowledge of law should be presumed. As a baseline, the doctrine is likely appropriate for laws resembling common law crimes and for individuals acting in the core sector applicable to a regulatory crime.¹⁷⁶ Conversely, it is inappropriate for individuals acting outside the area traditionally governed by a regulatory crime.¹⁷⁷ The results of this analysis should guide courts in developing a more nuanced framework for applying *ignorantia legis*.

action that a person has no reason to know is illegal), *with* FULLER, *supra* note 74, at 39 (recognizing that law fails when, among other things, it is not understandable and when it is not well publicized).

176. *See supra* Part III.B.

177. *See supra* Part III.B.