Mistake of Law in Mala Prohibita Crimes

Michael L. Travers†

As the scope of criminal law has expanded over the last hundred years, one of its basic premises has been gradually and subtly eroded: it is no longer realistic to presume that every person knows the law. The criminalization of ostensibly innocent behavior has created situations in which people may be convicted of serious crimes without having had any idea they were doing something illegal. Simply knowing the dictates of a statute is not enough: one must also understand the nuances of its judicial interpretation to know precisely where the boundary between criminal and noncriminal behavior lies. These circumstances have weakened the basis for the traditional background rule that ignorance of the law is no excuse.¹

Responding to this situation, federal courts in recent years have carved out exceptions to this background rule, holding that for particular crimes a defendant cannot be convicted unless he knew that his conduct was illegal.² Although the majority of the cases creating these exceptions involve federal mala prohibita³ crimes requiring willfulness as the mens rea for violation, the reasoning behind these exceptions extends to other levels of mens rea as well. The most recent decision in this series is Ratzlaf v United States, in which the Supreme Court interpreted the word “willfully” in a federal money laundering statute to require that the government prove knowledge of illegality as an element of the offense.⁴

† B.S. 1993, Virginia Polytechnic Institute; J.D. Candidate 1996, The University of Chicago.

¹ See, for example, Barlow v United States, 32 US 404, 411 (1833); Shevlin-Carpenter Co. v Minnesota, 218 US 57, 68 (1910).


³ Mala prohibita ("wrongs that are prohibited") criminal offenses proscribe conduct that is wrongful simply because a legislature has chosen to criminalize it; examples of such crimes include speeding and disposing of hazardous waste without the appropriate permit. In contrast, mala in se ("wrongs in themselves") crimes are those that traditionally have been regarded as inherently evil; examples include rape and larceny.

⁴ 114 S Ct 655, 658 (1994).
Taken collectively, these decisions create a logical framework in which mistake of law should be a viable defense—that is, accepted as exculpatory—to all mala prohibita crimes requiring a mens rea of recklessness or higher. Ratzlaf in particular has significant implications for other criminal statutes that require willfulness, and may signal a broader change in courts' previous reluctance to consider motive in determining whether an individual has committed a crime. Ratzlaf's rationale arguably creates a mistake of law defense for criminal violations of federal banking laws, firearms regulations, and other crimes that are not, in Justice Ginsburg's words, "obviously 'evil' or inherently 'bad.'" Though the lower federal courts could easily have limited Ratzlaf to its facts, many have instead extended the Supreme Court's interpretation of "willfully" to other mala prohibita offenses, reaching a result to which it appears they may have been predisposed.

This Comment argues that, in the absence of a clear legislative command to the contrary, mistake of law should be a defense to all mala prohibita crimes that require a mens rea of recklessness or higher for violation. Part I summarizes the series of recent cases that have expanded the mistake of law defense and attempts to outline its current status in federal criminal law. Part II analyzes mistake of law on a theoretical level and argues...
that concerns of lenity, moral culpability, and due process justify
the expansion of this defense. Part III outlines a proposal for
the mistake of law defense that limits its applicability to a relatively
narrow class of offenses and provides examples of how criminal
statutes would be interpreted under this new approach.

I. THE EVOLUTION OF THE MISTAKE OF LAW DEFENSE

A. The Pre-Ratzlaf Case Law

At common law, criminal defendants who asserted a mistake
of law defense had a formidable obstacle to overcome: the famil-
 iar maxim *ignorantia legis neminem excusat*, meaning "ignorance
of the law excuses no one." Oliver Wendell Holmes's approach
typified the traditional common law position: "[E]very one must feel
that ignorance of the law could never be admitted as an
excuse, even if the fact could be proved by sight and hearing in
every case." Early theorists justified the rule's inflexibility by
asserting that the law was "definite and knowable." Though
now clearly a fiction, the common law presumption that every
person knows the law bears primary responsibility for the
doctrine's inveteracy in our criminal jurisprudence.

Over the last century, however, American criminal law has
gradually shifted away from the position that mistake of law is
never a defense, and a number of exceptions to this general rule
have evolved. The first major incursion against the common

---

10 See, for example, *Barlow v United States*, 32 US 404, 411 (1833).
11 Oliver Wendell Holmes, Jr., *The Common Law* 48 (Little, Brown, 1881). See also
Judge Learned Hand's opinion in *American Surety Co. of New York v Sullivan*, 7 F2d 605,
606 (2d Cir 1925) ("The word 'willful,' even in criminal statutes, means no more than that
the person charged with the duty knows what he is doing. It does not mean that, in
addition, he must suppose that he is breaking the law.").
12 John Austin, 1 *Lectures on Jurisprudence* 497 (John Murray, 3d ed 1869), translating
Pandects, *Digest* xxii 6, 2. See also William M. Blackstone, 4 *Commentaries* *27*
(1854). Although this statement seems facetious in our modern regulatory state, it was
substantially accurate until about two hundred years ago. The early criminal law was
closely intertwined with the mores and customs of medieval England, which is no longer
the case with regard to mala prohibita crimes. See Livingston Hall and Selig J. Seligman,
14 See *Lambert v California*, 355 US 225, 228 (1957) (noting that the traditional rule
regarding ignorance "is deep in our law").
15 Compare *Shevlin-Carpenter Co. v Minnesota*, 218 US 57, 68 (1910) (asserting
broadly that "ignorance of the law will not excuse"), with *Cheek v United States*, 498 US
192, 200 (1991) (noting that exceptions have "softened the impact of the common-law
presumption" that mistake of law does not excuse). See also American Law Institute,
Model Penal Code and Commentaries § 2.02 comment 11 (Tentative Draft No 4, 1955) ("It
law rule occurred in a 1933 case, *United States v Murdock*, in which the defendant had been charged with willful failure to supply certain information about deductions on his income tax returns.\(^{16}\) Prior to that time, the term "willfully" had generally been interpreted to mean "knowingly and voluntarily," without regard for the actor's awareness of a legal duty.\(^{17}\) The *Murdock* Court, in contrast, interpreted "willfully" to mean "an act done with a bad purpose" or "evil motive" and reversed the conviction.\(^{18}\) Congress, the Court reasoned, did not intend that a person should become a criminal by reason of a bona fide misunderstanding of the tax laws, especially in light of their complexity.\(^{19}\) Consequently, *Murdock* was entitled to a jury instruction on whether he had acted in good faith based on his actual beliefs about what the law required.\(^{20}\)

*Murdock* marked the birth of the "tax crimes" exception to the general rule on mistake of law, an exception courts have sustained and refined during the last sixty years.\(^{21}\) In *Cheek v United States*, the Supreme Court reaffirmed this exception, holding that evidence of any belief—no matter how objectively unreasonable—could be introduced to show that the defendant was ignorant of his legal duties under the tax laws.\(^{22}\) Until very recently, however, attempts to expand this exception beyond tax crimes and into other areas of federal criminal law were universally unsuccessful.\(^{23}\) The line of cases interpreting "willfully" in the

---


\(^{17}\) See, for example, *New York Central & H.R.R. Co. v United States*, 165 F 833, 841 (1st Cir 1908).

\(^{18}\) 290 US at 394-95.

\(^{19}\) Id at 396.

\(^{20}\) Id.

\(^{21}\) See, for example, *United States v Bishop*, 412 US 346, 360 (1973) (within criminal tax statutes, "willfully" connotes a "voluntary, intentional violation of a known legal duty"); *United States v Pomponio*, 429 US 10, 11 (1976) (willful violation requires a specific intent to violate the law).


\(^{23}\) See *United States v Caming*, 968 F2d 232, 240-41 (2d Cir 1992) (collecting cases
Mistake of Law

Internal Revenue Code thus delineated a narrow exception to the mistake of law rule, which the Supreme Court made great effort to limit to tax crimes.\textsuperscript{24}

Nonetheless, courts have recently expanded the mistake of law defense beyond the tax offense context. In \textit{Liparota v United States},\textsuperscript{25} the defendant was charged with violating a federal statute which provided that "whoever knowingly uses, transfers, acquires, alters, or possesses [food stamps] ... in any manner not authorized by ... the regulations" shall be guilty of a criminal offense.\textsuperscript{26} At issue was whether the word "knowingly" modified only the series of verbs immediately following it, or whether it extended further and also modified the phrase "in any manner not authorized." The difference is crucial: Under the first interpretation, a defendant fulfills the mens rea requirement of the offense if he is aware of what he is doing when he undertakes the prohibited transaction. The second interpretation, however, requires that the defendant know his conduct is illegal.

The \textit{Liparota} Court chose the second interpretation, holding that "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct."\textsuperscript{27} Although the majority was careful to assert that it was not creating a mistake of law defense,\textsuperscript{28} the opinion almost certainly does precisely that, at least within the context of the specific statute at issue.\textsuperscript{29} The \textit{Liparota} Court relied not only on the statutory text in reaching its decision, but also on the presumption that criminal offenses require a mens rea,\textsuperscript{30} the harshness of criminalizing actions that inadvertently violate the law,\textsuperscript{31} and the rule of lenity.\textsuperscript{32}

---

\textsuperscript{24} See \textit{United States v Aversa}, 984 F2d 493, 500 (1st Cir 1993) ("This repeated qualification makes clear that the Court has crafted a narrow exception, limited to tax cases ... .").

\textsuperscript{25} 471 US 419 (1985).

\textsuperscript{26} 7 USC § 2024(b)(1) (1988).

\textsuperscript{27} 471 US at 426.

\textsuperscript{28} Id at 425 n 9.

\textsuperscript{29} See Note, \textit{Ignorance of the Law as an Excuse}, 86 Colum L Rev 1392, 1399-1400 (1986).

\textsuperscript{30} 471 US at 425-26.

\textsuperscript{31} Id at 426-27.

\textsuperscript{32} Id at 427-28. For a discussion of the rule of lenity, see text accompanying notes 105-08. See also \textit{Rewis v United States}, 401 US 808, 812 (1971); \textit{United States v United States Gypsum Co.}, 438 US 422, 437 (1978).
There was no disagreement within the Liparota Court that the word “knowingly” at least applied to the statutory phrase “uses, transfers, acquires, alters, or possesses.”\(^{33}\) That is, the statute did contain a mens rea requirement with regard to the defendant’s physical conduct. Therefore, the Court must have meant that a mens rea regarding the defendant’s awareness of a legal duty is to be inferred in every case when the Court stated that “the failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure”\(^{34}\) from the general rule that criminal offenses do require mens rea. Taken literally, this implies that mistake of law should be a defense to any crime in which the statutory text does not specifically exclude it: if even a minimal mens rea of negligence were read into such a crime, mistake of law would have to be accepted as a defense for reasonable mistakes. But the Liparota Court could not possibly have meant to sweep away centuries of jurisprudence by implication. The extreme breadth of this proposition illustrates the need for a clear delineation of the limits of the mistake of law defense.

B. Ratzlaf v United States

The Supreme Court’s recent decision in Ratzlaf v United States may represent the most significant inroad against the common law mistake of law rule. By holding that willful violations of certain federal money laundering statutes require knowledge of illegality,\(^ {35}\) the Supreme Court not only fundamentally altered the legal requirements of these provisions, but also set forth a standard of statutory interpretation that reaches beyond money laundering to other criminal offenses.

The specific statutory provisions at issue in Ratzlaf were a complex set of regulations collectively known as the “antistructuring” statutes.\(^ {36}\) These provisions authorize the Secretary of the Treasury to require that certain monetary transactions be reported to the IRS. In particular, 31 USC § 5313 requires domestic financial institutions to report cash transactions above

\^33\ See Liparota, 471 US at 435 (White dissenting).
\^34\ Id at 428.
\^35\ 114 S Ct at 663.
Mistake of Law

$10,000. A separate provision, 31 USC § 5324, makes it unlawful to structure one's transactions with the purpose of evading this reporting requirement. For example, one may not make a series of five $9,000 cash deposits rather than a single $45,000 deposit in order to avoid having a report sent. At the time Ratzlaf was decided, 31 USC § 5322(a) set forth criminal penalties for persons “willfully violating” other antistructuring provisions, including up to five years in federal prison.

Waldemar Ratzlaf was a gambler who, in a single evening, ran up a $160,000 debt playing blackjack at a Nevada casino. When Ratzlaf attempted to pay his debt in cash, the casino informed him that the transaction would have to be reported to the federal government because it was in excess of $10,000. In order to circumvent the reporting requirement, Ratzlaf attempted to pay his debt with a series of cashier's checks, each from a different bank and in an amount slightly less than $10,000.

On the basis of these transactions, Ratzlaf was charged with violating 31 USC §§ 5322(a) and 5324. Although there was virtually no dispute at trial that Ratzlaf knew he was structuring transactions, the defense argued that he had not known that structuring was illegal. To satisfy the willfulness requirement of § 5322(a), the defense contended, the government needed to prove that Ratzlaf actually knew structuring was illegal when he made the transactions. Ratzlaf was convicted after the district

---

37 See 31 USC § 5313 (1988). See also 31 CFR § 103.22(a)(2) (1994) (setting threshold amount to trigger reporting requirement at $10,000). Other provisions in the antistructuring statutes impose similar reporting requirements on different types of cash transactions. See, for example, 31 USC § 5314 (1988) (monetary transactions with foreign financial agencies); id § 5316 (1988) (international transportation of United States currency).


39 See id §§ 5322(a), 5324 (1988). In response to the Supreme Court's decision in Ratzlaf, Congress removed the willfulness requirement from the antistructuring statutes. See Community Development Banking Act of 1994, HR Rep No 103-652, 103d Cong, 2d Sess 98 (1994). Consequently, the government need no longer prove knowledge of illegality to secure a structuring conviction; the mens rea requirement for this offense can now be met simply by showing an intent to evade the currency transaction reporting requirements. See id; 31 USCA §§ 5322, 5324 (West Supp 1994). Although changes to the antistructuring statutes have thus superseded Ratzlaf's specific holding, the Court's rationale and reasoning retain their broader precedential value.

40 Ratzlaf, 114 S Ct at 657. Casinos are considered “financial institutions” for purposes of the antistructuring statutes, and are thus subject to the reporting requirements. 31 CFR § 103.11(i)(7)(i) (1994).

41 The casino graciously provided Ratzlaf with a limousine and placed one of its employees at his disposal to help him purchase the checks. Ratzlaf, 114 S Ct at 657.

42 Id.
judge ruled that knowledge of illegality was not an element of structuring and instructed the jury accordingly. The Ninth Circuit affirmed, rejecting the defense's argument that it should interpret “willfully” under the standard set forth in Cheek and instead equating willfulness with mere knowledge of the reporting requirements.

The Supreme Court reversed, holding that the failure to differentiate knowledge of illegality from mere knowledge of the requirements “treat[s] § 5322(a)’s ‘willfulness’ requirement essentially as surplusage—as words of no consequence.” While acknowledging that the meaning of “willful” is generally ambiguous and context dependent, the Court nonetheless found the text of the antistructuring statutes clear and therefore refused to consult their legislative history. Justice Ginsburg’s majority opinion instead rested on two principal arguments: that “willfully” read in the context of the antistructuring statutes must necessarily include knowledge of illegality, and that structuring is not so inherently bad as to permit an inference of willfulness whenever it occurs.

First, the Court noted that § 5322(a)’s willfulness requirement had to be interpreted in light of the way it had been applied to two other provisions of the antistructuring statutes: one which requires the filing of reports for monetary transactions with foreign financial agencies, and another which requires reports on transportation of currency across U.S. borders. Because § 5322(a)’s willfulness requirement had always been interpreted to include knowledge of illegality when applied to these provisions, to avoid inconsistency it had to be similarly interpreted when applied to 31 USC § 5313. The Court reasoned that just as a single term appearing multiple times in a statute should be interpreted consistently, the word “willfully” in §

43 Id.
45 Ratzlaf, 114 S Ct at 659.
46 Id at 659, 662-63.
47 Id at 659.
48 As examples of § 5322(a)’s application to other antistructuring provisions, the Court cited United States v Sturman, 951 F2d 1466, 1476-77 (6th Cir 1991) (holding that “willful violation” of § 5314 requires knowledge of illegality), and United States v Warren, 612 F2d 887, 890 (5th Cir 1980) (finding that “willful violation” of § 5316 requires the defendant to have “intentionally violated [a] known legal duty”). Ratzlaf, 114 S Ct at 659-60.
Mistake of Law

5322(a) must be construed "the same way each time it is called into play."49

Second, the Court held that currency structuring is not the sort of "inevitably nefarious" behavior that by its very nature evinces a purpose to do wrong and thereby demonstrates willfulness.50 For example, one could structure transactions to avoid having reports sent with the innocent purpose of reducing the likelihood of a burglary or an IRS audit.51 Indeed, there is nothing inherently wrong with adapting and adjusting one's transactions to avoid the impact of a particular government regulation or tax; such behavior is in fact quite common in tax and estate planning contexts.52

In addition to these two principal bases for its decision, the Court also noted that even if § 5322(a)'s willfulness requirement had been ambiguous, the rule of lenity would have mandated that the ambiguity be resolved in favor of the defendant.53 Although lenity did not play a direct role in Ratzlaf, the Court's discussion of it has significant implications for future cases. Lower courts are often hesitant to apply the rule,54 and some scholars have even suggested that it be dispensed with altogether.55 That the Ratzlaf Court went out of its way to assert the rule's potential applicability, however, strongly supports the use of lenity in interpreting criminal statutes that employ ambiguous incarnations of the word "willful" or its grammatical variants.

Finally, the Ratzlaf Court carefully noted that its decision did not alter the background rule "that ignorance of the law generally is no defense to a criminal charge."56 By using the word "willfully," the Court reasoned, Congress has signified that the government must prove knowledge of illegality in prosecutions for currency structuring.57 That rationale effectively limits the scope of the Court's decision and forecloses the argument that the

49 Ratzlaf, 114 S Ct at 660.
50 Id at 660-61.
51 Id at 661.
52 Id.
53 Id at 662-63.
54 See, for example, United States v Anderson, 39 F3d 331, 356-57 (DC Cir 1994) (insisting that federal firearms statute had clear meaning and refusing to apply rule of lenity even though other courts had disagreed as to the statute's interpretation).
55 See, for example, American Law Institute, Model Penal Code and Commentaries § 1.02(3) (1985). See also Joshua Dressler, Understanding Criminal Law § 5.04 at 30 (Matthew Bender, 1987).
56 114 S Ct at 663.
57 Id.
opinion has opened the floodgates to a mistake of law defense for all crimes. But it does not explain why Ratzlaf's reasoning cannot be applied to any other crime requiring willfulness as the mens rea for violation.

That possibility seemed to lurk beneath the surface of Justice Blackmun's dissent.\(^5^8\) Blackmun argued that the Ninth Circuit's view did not render § 5322(a)'s willfulness requirement surplusage because § 5322(a) applies to all provisions of the antistructuring statutes, including some that do not require knowledge of the reporting requirements.\(^5^9\) The majority's view that willfulness includes "actual knowledge," said the dissent, "strays from . . . our precedents interpreting criminal statutes generally and 'willfulness' in particular."\(^6^0\) Moreover, Blackmun asserted, the majority's interpretation of "willfully" made prosecution under the antistructuring statutes substantially more difficult and left those who formerly would have been convicted "laughing all the way to the bank."\(^6^1\)

The implication of the dissent's view, however, is that no significant problem arises from reading § 5322(a) one way as applied to § 5324 and an entirely different way as applied to other antistructuring provisions. Under this interpretation, "willfully violates" would have a different meaning not only for different statutes, but also for different fact patterns arising under the same statute. For example, 31 USC § 5316 requires the filing of a report when more than $10,000 in cash is transported into or out of the U.S.; § 5324 prohibits structuring to avoid this requirement. The dissent would read the "willfully violates" language of § 5322(a) as requiring knowledge of illegality for structuring movements of currency into or out of the U.S., but as not requiring such knowledge for structuring currency transactions at a financial institution. This approach would leave citizens guessing as to the requirements of similarly worded statutes that the courts had not yet interpreted. By equating willfulness with knowledge of the reporting requirements, this view also effectively collapses two levels of mens rea into one.

---

\(^5^8\) Justice Blackmun was joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas.

\(^5^9\) Id at 665 (Blackmun dissenting). This argument tacitly concedes, however, that under the dissent's interpretation, § 5322(a)'s willfulness requirement would be surplusage as applied to § 5324.

\(^6^0\) Id.

\(^6^1\) Id at 669-70.
C. Post-\textit{Ratzlaf} cases

\textit{Ratzlaf} overruled the decisions of ten of the eleven circuit courts of appeals that had interpreted § 5322(a)'s willfulness requirement, necessitating reversal of virtually every structuring case in the federal court system at that time.\textsuperscript{62} Of far greater significance, however, are a number of recent decisions that extend \textit{Ratzlaf}'s reasoning to statutes other than the antistructuring provisions. This extension is noteworthy because courts could have easily read \textit{Ratzlaf} narrowly and limited it to its facts. The \textit{Ratzlaf} majority took great pains to indicate that it was not creating a universal new definition of willfulness, calling "willful" a "word of many meanings," the construction of which is often "influenced by its context."\textsuperscript{63} The Court also rested its decision in part on the fact that lower courts had uniformly interpreted "willfully" to require knowledge of illegality as applied in other antistructuring provisions\textsuperscript{64}—a rationale that does not necessarily carry over to other statutes. Finally, the Court specifically stated that it was leaving intact the traditional background rule concerning ignorance of the law.\textsuperscript{65} Although each of these limitations in the decision could independently justify a refusal to extend \textit{Ratzlaf}'s reasoning beyond 31 USC § 5322(a), a number of lower federal courts have nonetheless already extended it.

The best example of such an extension is \textit{United States v Curran}, which held that mistake of law is a defense to the crime of willfully causing campaign treasurers to submit false reports to the Federal Election Commission ("FEC").\textsuperscript{66} In that case, the defendant asked his employees to make donations to the campaign funds of various candidates for political offices. Curran then reimbursed the employees for these donations, thereby exceeding the $1,000 limitation on contributions to individual candidates for federal office. Curran was charged with and convicted of three counts of causing false reports to be filed with the FEC, in violation of 18 USC §§ 2(b) and 1001.\textsuperscript{67}

\begin{itemize}
  \item \textsuperscript{62} See id at 665 & n 3. At the time \textit{Ratzlaf} was decided, only the First Circuit had adopted an interpretation of "willfully" that required an instruction on knowledge of illegality. See \textit{United States v Aversa}, 984 F2d 493, 502 (1st Cir 1993) (en banc), vacated and remanded, \textit{Donovan v United States}, 114 S Ct 873 (1994).
  \item \textsuperscript{63} 114 S Ct at 659, quoting \textit{Spies v United States}, 317 US 492, 497 (1943).
  \item \textsuperscript{64} 114 S Ct at 659-60.
  \item \textsuperscript{65} Id at 663.
  \item \textsuperscript{66} 20 F3d 560, 569 (3d Cir 1994).
  \item \textsuperscript{67} Id at 563. These statutes are not specific to election offenses. 18 USC § 2(b) (1988)
\end{itemize}
On appeal, Curran argued that the "knowingly and willfully" language of § 1001 required the government to prove two separate facts to secure a conviction: that he knew the campaign treasurers had a legal duty to file accurate reports with the FEC, and that his actions were undertaken with both knowledge of illegality and the specific intent of causing the treasurers to submit inaccurate reports. The Third Circuit agreed, analogizing the case to Ratzlaf and reasoning that three significant similarities between the Election Campaign Act and the antistructuring statutes dictated a similar result: first, the Election Campaign Act imposes disclosure obligations that parallel the reporting requirements of the antistructuring statutes; second, the conduct criminalized in both statutes is not inherently bad or evil; and third, both sets of provisions are "regulatory." Particularly noteworthy was the Curran court's statement that it found "nothing in [Ratzlaf's] discussion of willfulness that would confine the rationale to the currency reporting statute." The court asserted that in this respect Ratzlaf was unlike Cheek, which had been "carefully limited . . . to circumstances governed by the complexities of the Internal Revenue Code." Yet Curran does not track Ratzlaf as closely as it purports. Although both courts interpreted willfulness similarly, the only basis for decision that the cases truly shared is the second similarity noted in Curran, that the conduct at issue is not "obviously 'evil' or inherently 'bad.'" The first similarity, that both statutes impose reporting or disclosure requirements, was not relied upon in Ratzlaf. And the third similarity—that the statute at issue is "regulatory"—is really just a restatement of the second similarity, that the proscribed conduct is not inherently bad. Moreover, Curran, unlike Ratzlaf, did not suggest that the "willfulness" language of the statute would be surplusage if it did not include knowledge of illegality. The Curran court's failure to use such reasoning, which it certainly could have used given the text of § 1001, indicates that a potential surplusage problem is not a

makes it an offense to deliberately cause another person to perform an act that would violate federal criminal law. 18 USC § 1001 (1988) prohibits making false statements to federal officials and provides that "[w]henever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies . . . any false writing or document . . . shall be fined . . . or imprisoned . . . ."

66 Curran, 20 F3d at 566-67.
67 Id.
70 Id at 568.
71 Id at 568-69.
72 See Ratzlaf, 114 S Ct at 662; Curran, 20 F3d at 569.
necessary precondition to finding that willfulness requires knowledge of illegality.

In *United States v Obiechie*, the Seventh Circuit also extended *Ratzlaf*'s reasoning, holding that the government must prove knowledge of illegality to secure a conviction under certain federal firearms statutes.\(^7\) In *Obiechie*, the defendant was charged with dealing in firearms without a license.\(^7\) The court interpreted the mens rea requirement of the statute in light of *Ratzlaf*, holding that “willfully” must encompass knowledge of illegality for it to be anything other than duplicative of the term “knowingly,” which appeared elsewhere in the statutory language.\(^7\) Far from believing that *Ratzlaf* should be confined to its facts, the *Obiechie* court stated that it had a “duty under *Ratzlaf*” to interpret “willfulness” by considering “the context of the term’s use within the overall structure of the statute.”\(^7\)

*Obiechie* follows *Ratzlaf*'s reasoning closely. In both cases, the courts ignored legislative history that they perceived to be inconclusive or ambiguous in favor of an analysis of statutory text.\(^7\) Similarly, both courts reasoned that unless willfulness were interpreted to include knowledge of illegality, it would be meaningless or redundant.\(^7\) But the courts part ways over whether the conduct at issue was so “inevitably nefarious” as to be inherently willful. This argument could just as easily be made for the crime of dealing in firearms without the appropriate license as for the crime of structuring currency transactions, and the *Obiechie* court’s omission of the argument indicates that it is not a prerequisite to finding that knowledge of illegality is required.

---

\(^7\) 38 F3d 309, 310 (7th Cir 1994).

\(^7\) Id. The indictment specifically charged violations of two provisions of the Firearm Owners’ Protection Act of 1986: 18 USC § 922(a)(1)(A) (1988), which makes it unlawful “for any person except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of... dealing in firearms...”; and 18 USC § 924(a)(1)(D), which describes the mens rea requirement for violations of § 922(a)(1)(A) and provides that “[whoever] willfully violates any other provision of this chapter, shall be fined not more than $5,000, imprisoned not more than five years, or both.”

\(^7\) 38 F3d at 313-15. See, for example, 18 USC § 924(a)(1)(C) (1988) (“[whoever] knowingly imports or brings into the United States... any firearm”).

\(^7\) 38 F3d at 313-14.

\(^7\) Compare *Ratzlaf*, 114 S Ct at 662 (“We do not resort to legislative history to cloud a statutory text that is clear.”), with *Obiechie*, 38 F3d at 313 (“The conflicting signals sent by FOPA’s legislative history are of lesser importance...”).

\(^7\) Compare *Ratzlaf*, 114 S Ct at 659 (willfulness must include knowledge of illegality if it is to have any meaning), with *Obiechie*, 38 F3d at 315 (the difference between willingly and knowingly violating the statute is knowledge of illegality).
In *United States v Rogers*, the Fourth Circuit also extended *Ratzlaf* beyond its immediate context, applying it to an antistructuring statute that was not addressed in the Supreme Court’s decision. 79 *Rogers* concerned the willfulness requirement of 26 USC § 7203,80 which imposes criminal penalties for evading a requirement that businesses report to the IRS cash payments in excess of $10,000.81 With scant discussion of why *Ratzlaf*’s holding should or should not apply to a separate statute, the *Rogers* court simply concluded that under *Ratzlaf*, “the failure to instruct on the defendant's knowledge of illegality of his own conduct [was] an erroneous omission of an essential element of the offense charged . . . .”82

Although the trend is clearly to expand the mistake of law defense, a few courts have refused to apply *Ratzlaf*’s reasoning beyond the antistructuring statutes.83 Courts have distinguished *Ratzlaf* by citing textual variations in the statutes involved,84 differences in the nature of the offenses,85 or the still widely held view that “willfully” means nothing more than knowingly and voluntarily.86 Some of these decisions are clearly correct: *Ratzlaf*’s reasoning does not apply to every criminal statute, and when the statutory provisions at issue are markedly different, it is properly distinguished. Others, however, ignore both the implications of *Ratzlaf* and more fundamental justifications for expanding the mistake of law defense.

---

79 18 F3d 265, 267 (4th Cir 1994).
81 See 26 USC § 6050I (1988). This statutory scheme is similar to the antistructuring statutes considered in *Ratzlaf*, but has a broader scope because it applies to any "trade or business" rather than just financial institutions. Id.
82 18 F3d at 268. In *United States v Langley*, 1994 WL 518394 (4th Cir), a panel of the Fourth Circuit tacitly agreed with the *Obiechie* court, applying *Ratzlaf*’s reasoning to the Firearm Owners’ Protection Act and holding that “willfully” means “undertaken in violation of a known legal duty” within the context of 18 USC § 924(a). Id at *8. The decision was subsequently vacated and a rehearing en banc ordered. *United States v Langley*, 1994 US App LEXIS 29385 (4th Cir).
83 See, for example, *United States v Zehrbach*, 1995 US App LEXIS 1304, *29 (3d Cir) (en banc) (refusing to extend *Ratzlaf* to crime of bankruptcy fraud); *United States v Rodriguez-Rios*, 14 F3d 1040, 1048 n 21 (5th Cir 1994) (declining to apply *Ratzlaf* to a statute that, unlike the antistructuring provisions, contains a willfulness requirement but not a purpose requirement); *United States v Weitzenhoff*, 35 F3d 1275, 1285 (9th Cir 1993), as amended on denial of reh’g and reh’g en banc (refusing to extend *Ratzlaf* to a felony violation of the Clean Water Act because *Ratzlaf* did not concern a “public welfare offense”); *United States v Santos*, 20 F3d 280, 283 n 2 (7th Cir 1994) (declining to extend *Ratzlaf* to a money laundering statute that lacked a willfulness requirement).
84 See, for example, *Rodriguez-Rios*, 14 F3d at 1048 n 21.
85 See, for example, *Weitzenhoff*, 35 F3d at 1285.
86 See, for example, *Zimberg v United States*, 142 F2d 132, 138 (1st Cir 1944).
D. The Current Status of Mistake of Law

The cases described above indicate that the scope of the mistake of law defense has broadened in the last ten years and continues to broaden today. Whereas *Cheek* merely reaffirmed the well-established tax crimes exception to the background rule, *Liparota*, *Ratzlaf*, and recent lower court cases have created new exceptions and based them on grounds different from those relied upon in *Murdock* and *Cheek*. Even read narrowly, these cases intersperse a variety of exceptions into the background rule. The pattern to these exceptions, however, is not readily discernible. Although the boundary of the tax crimes exception is definite, neither *Liparota* nor *Ratzlaf* is clearly confined to its statute. On the contrary, both decisions were justified at least in part by reasoning that readily applies in other contexts.

It is thus difficult to delineate the collective scope of these decisions. All involved mala prohibita crimes, and all involved the interpretation of criminal statutes that could be described as “regulatory.”

In other words—notwithstanding the artificial distinctions drawn by some courts—all of these cases involved statutes criminalizing conduct that is not, as expressed in *Ratzlaf*, “obviously ‘evil’ or inherently ‘bad’.”

Beyond this starting point, however, the cases diverge. *Ratzlaf*, *Curran*, *Obiechie*, and *Rogers* involved the interpretation of the single word “willfully” or one of its grammatical variants; *Liparota* did not. *Ratzlaf*, *Obiechie*, and *Rogers* also involved statutes where a word or phrase would have been superfluous if not interpreted to mandate a mistake of law defense; *Liparota* did not, and *Curran* ignored the issue altogether. These problems are compounded by the minority of cases that, for various reasons, have refused to extend *Ratzlaf*’s reasoning to other contexts.

Particularly unclear in the aftermath of *Ratzlaf*, *Curran*, *Obiechie*, and *Rogers* is the meaning of willfulness. Although these cases held that “willfully” means “with knowledge of illegality,” a number of other cases in different statutory contexts have held that it does not.

---

87 Of course, the extent to which this is true depends on what is meant by “regulatory.” Although that term lacks a precise definition, “regulatory” offenses almost surely are not limited to violations of rules promulgated by administrative agencies. *Liparota*, for example, involved a statute that regulated food stamps, and *Ratzlaf* one that regulated currency transactions. But because one could similarly describe almost any statute that does not define a malum in se crime, “regulatory” may be nothing more than a synonym for malum prohibitum.

88 *Ratzlaf*, 114 S Ct at 662.

89 See Note, *An Analysis of the Term “Willful” in Federal Criminal Statutes*, 51 Notre
The meaning of willfulness is variable and context dependent. Consequently, no clear rule emerges from these cases for determining whether this term encompasses violation of a known legal duty. Ratzlaf and its progeny do, however, create a precedential framework in which mistake of law may be a viable defense in certain circumstances. Given the extent to which the traditional mistake of law rule is ingrained in our criminal law, it is understandable that courts will hesitate to follow the lead of cases such as Curran and Obiechie, which read Ratzlaf broadly. Lower courts will likely seek further Supreme Court guidance before extending the mistake of law defense to the logical limits implied by Liparota, Cheek, and Ratzlaf.

II. JUSTIFICATIONS FOR THE MISTAKE OF LAW DEFENSE

Although Ratzlaf and the other cases described above provide precedential authority for expanding the mistake of law defense, there are more fundamental reasons to include knowledge of illegality as an element of certain crimes. This Part identifies the theoretical underpinnings of the mistake of law defense and provides a rationale for its expansion beyond the statutes described in Part I. Three issues are paramount: the role of the rule of lenity, the importance of determining moral culpability, and the implications of the constitutional requirement of due process.

A. Statutory Construction, Lenity, and Legality

1. Statutory construction and the problem of ambiguity.

Notwithstanding the background rule that mistake of law is generally no excuse, Congress may of course decree that mistakes of law will exculpate defendants in particular contexts. A few criminal statutes do explicitly require proof of an intentional violation of a known legal duty for conviction, and there is no dispute regarding their interpretation. Conversely, where the legislature is silent as to mistake of law and the statutory text is

Dame Law 786, 796-97 (1976).

See 114 S Ct at 659.

The Supreme Court is probably more favorably disposed toward the mistake of law defense now than at the time Ratzlaf was decided. Justice Blackmun, one of the dissenters in Ratzlaf, has been replaced by Justice Breyer, who appears to be sympathetic to the mistake of law defense. See United States v Aversa, 984 F2d 493, 502-03 (1st Cir 1993) (Breyer concurring) (arguing that the Cheek standard should be applied to structuring). See note 15.
clear, it is safe to assume that the background rule remains applicable. But in cases where the statutory text makes the viability of mistake of law unclear, rules of statutory construction will determine whether knowledge of illegality is an element of the crime.

It is in these situations that *Ratzlaf* and its progeny expand the mistake of law defense. From a textualist viewpoint, the statutes interpreted in these cases fall into two general categories: in the first, the word “willfully” appears before a description of the proscribed conduct; in the second, a mens rea term is followed immediately by the word “violates” and language describing the provisions to which the criminal penalty attaches.

The precise meaning of willfulness was unclear long before *Ratzlaf* was decided. Compared to terms like “negligently” and “purposefully,” “willfully” has never been accorded a consistent meaning. Although in the past “willfully” was most often construed to mean “knowingly and deliberately,” rather than “with awareness of illegality,” the awkwardness of this interpretation and the syntactic sleight of hand sometimes needed to reach it have evoked open hostility from jurists and commentators. Inconsistency developed when a few courts began to hold that, in certain statutes, willfulness requires the intentional violation of a

---

53 *Cheek, Ratzlaf,* and the other cases expanding mistake of law in recent years have all purported to retain the background rule, even as they created exceptions to it. See, for example, *Cheek,* 498 US at 199; *Ratzlaf,* 114 S Ct at 663 (“We do not dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge.”).

54 See, for example, *Curran,* 20 F3d at 566 n 3, quoting 18 USC § 1001 (“[w]hoever . . . knowingly and willfully falsifies, conceals or covers up . . . a material . . . shall be fined . . . or imprisoned”).

55 See, for example, *Obiechie,* 38 F3d at 311-12, quoting 18 USC § 924(a)(1)(D) (“whoever . . . willfully violates any other provision of this chapter”).

56 As the Supreme Court noted over fifty years before *Ratzlaf,* “willful” is inherently a “word of many meanings,” whose “construction [is] often . . . influenced by its context.” *Spies v United States,* 317 US 492, 497 (1943). See generally Note, 51 Notre Dame Law 786 (cited in note 89).

57 Compare, for example, *United States v Fierros,* 692 F2d 1291, 1294 (9th Cir 1982) (holding that provisions requiring willfulness “do not by their terms require knowledge that the actions engaged in violate the statute”), with *United States v Garcia,* 751 F2d 1033, 1035 (9th Cir 1985) (“In a criminal statute, ‘willfully’ generally means a voluntary, intentional violation of a known legal duty in bad faith or with evil purpose.”).

58 See, for example, *American Surety Co. of New York v Sullivan,* 7 F2d 605, 606 (2d Cir 1925); *Zimberg v United States,* 142 F2d 132, 137-38 (1st Cir 1944).

59 When discussing how the Model Penal Code should treat the term, Judge Learned Hand remarked, “[Willfully is] an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, ‘willful’ would lead all the rest in spite of its being at the end of the alphabet.” American Law Institute, Model Penal Code and Commentaries § 2.02 n 47 (1985).
known legal duty. But most courts, even when faced with alternate interpretations of the term, simply refused to infer that Congress intended to create a mistake of law defense with language such as “willfully violates.”

Ratzlaf compounded this problem by interpreting “willfully” more expansively and failing to explicitly limit its reasoning to the antistructuring statutes. Cases like Curran and Obiechie, which extended Ratzlaf’s reasoning to other contexts, indicate that Ratzlaf can be broadly applied to other statutes requiring a mens rea of willfulness. Conversely, cases both before and after Ratzlaf that have held that willfulness does not require knowledge of illegality still provide significant authority for courts inclined to follow the more restrictive view. In the aftermath of Ratzlaf, therefore, two very plausible interpretations of “willfully” exist in federal criminal law: “knowingly and voluntarily,” the old interpretation, and “knowingly and voluntarily in violation of a known legal duty,” the new meaning.

But why should this analysis stop with the term “willfully”? The Liparota Court posed a similar question and concluded that the language “knowingly . . . in any manner not authorized” also requires knowledge of illegality. Although the mere presence of the word “knowingly” does not automatically create ambiguity in a statute, language such as “knowingly violates any provision of this subchapter” is susceptible to more than one interpretation. Indeed, the more literal and natural interpretation—even if not the traditionally favored one—may be that awareness of the law is required. In the proper statutory context, “knowingly violates” is no less ambiguous than “willfully violates.”

This is particularly true when failure to require knowledge of illegality would render a mens rea term superfluous. That was the case in Ratzlaf, for example, where on the dissent’s view §5322(a)’s willfulness requirement added nothing to §5324’s requirement that transactions be structured with the purpose of evading the reporting requirements. Congress does not often use redundant terms in criminal statutes, and courts must scrutinize language that at first blush appears unnecessary. In

---

100 See, for example, Murdock, 290 US at 394-96; United States v Bishop, 412 US 346, 360 (1973); United States v Lizarraga-Lizarraga, 541 F2d 826, 828 (9th Cir 1976).
101 See text accompanying notes 25-34. A federal district court in the Eleventh Circuit recently reached the same conclusion when interpreting a statute that proscribes actions performed “knowingly and willfully.” See United States v Waters, 850 F Supp 1550, 1563-64 (N D Ala 1994).
102 Ratzlaf, 114 S Ct at 659.
103 See, for example, Pennsylvania Department of Public Welfare v Davenport, 495 US
acknowledging that "willfully" can have many meanings, and in choosing the one that avoided surplusage, the Ratzlaf Court implied that this is the proper analysis.\textsuperscript{104} Widely accepted rules of statutory construction thus indicate that courts should read statutes in a way that gives every term meaning, which usually will lead to the conclusion that knowledge of illegality is required.

2. Lenity.

The rule of lenity's mandate to resolve "ambiguity concerning the ambit of criminal statutes" in the defendant's favor is applicable to statutes of the sort described above.\textsuperscript{105} The interpretation of willfulness in a criminal statute bears directly on its "ambit." In a case like Ratzlaf, for example, such interpretation would determine the fate of a hypothetical defendant who purposely structured transactions but had no idea that structuring transactions was illegal. Where there is significant doubt about their meaning, therefore, statutory phrases such as "willfully violates" or "knowingly violates" should be interpreted to require knowledge of illegality.

Notwithstanding courts' frequent reluctance to employ the rule of lenity, this application does not exceed the bounds of the doctrine.\textsuperscript{106} It is settled that lenity is only to be considered where more conventional techniques of statutory construction fail to clarify a statute's meaning.\textsuperscript{107} But as proposed here, the rule would only be applied when the legislature has not only used a term susceptible of multiple meanings, but has also failed to address the question of mistake of law. Similarly, the requirement that lenity only be applied to statutes in which the ambiguity is

\textsuperscript{552, 562} (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.").

\textsuperscript{104} See 114 S Ct at 659 (noting that judges should resist treating statutory text as surplusage in any situation, particularly when that text describes the elements of a criminal offense).

\textsuperscript{105} See Rewis v United States, 401 US 808, 812 (1971).

\textsuperscript{106} See, for example, Chapman v United States, 500 US 463, 463 (1991). The rule was used much more frequently in the nineteenth century than today. See Note, The Mercy of Scalia: Statutory Construction and the Rule of Lenity, 29 Harv CR-CL L Rev 197, 202 (1994). It may, however, be in the midst of a revival. See United States v Ray, 21 F3d 1134, 1140 (DC Cir 1994) (noting that recent Supreme Court decisions applying the rule of lenity "do not seem to demand such a high level of uncertainty").

The University of Chicago Law Review

substantial poses no great difficulty: the degree of ambiguity produced by uncertainty over whether knowledge of illegality is an element of a crime will nearly always be sufficient to invoke the rule. This proposed application of the rule is entirely consistent with the approach of the Ratzlaf Court.108

3. Legality and due process.

Equally applicable to mistake of law, and closely related to the rule of lenity, is an even more fundamental tenet of criminal law: the principle of legality, which requires that conduct must be criminalized in order to be punishable.109 It is implicit in the principle of legality that if the state does not provide citizens with at least constructive notice of what conduct is illegal, there is no defensible basis for punishing the actor.110 Thus the principles of lenity and legality, according to Justice Holmes, are based upon the idea that “fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”111

Such notice is often absent when the text of a statute fails to delinate clearly the elements of the offense it criminalizes. That is obviously the case with provisions like § 5322(a) of the antistructuring statutes, where the Supreme Court and ten federal courts of appeals disagreed about what the elements of the crime were. The requirement of notice, therefore, dictates that courts should read language like “knowingly violates” and “willfully violates” to require knowledge of illegality when it is unclear whether Congress intended such knowledge to be an element of the offense.

A final justification for a mistake of law defense lies in principles of due process, which argue for ends similar to those required by the doctrines of lenity and legality: notice by the state of what conduct is criminal and limits on the discretion of law enforcement agencies.112 And as with the rule of lenity and the principle of legality, due process in this context carries with it the force of a substantial body of precedent.113

---

108 See text accompanying notes 53-55.
109 See generally Herbert Packer, The Limits of the Criminal Sanction 79-87 (Stanford, 1968).
110 See Lambert v California, 355 US 225, 228 (1957).
112 See Note, 86 Colum L Rev at 1403-04 (cited in note 29).
113 See, for example, Lambert, 355 US at 228-29 (requiring fair notice to convict someone for the “status crime” of being an unregistered felon); Papachristou v City of Jack-
Due process requires that a defendant cannot be convicted unless he had either actual subjective notice or a probability of notice that his conduct was criminal. But because they criminalize potentially innocent behavior, statutes defining mala prohibita crimes sometimes cannot meet either standard. Unlike sanctions for violations of mala in se statutes, punishment for a malum prohibitum crime cannot be justified on the grounds that the defendant’s failure to know the law is in itself blameworthy. Consequently, due process requires that mala prohibita statutes clearly define the scope of conduct that they criminalize, leaving no ambiguity as to whether knowledge of illegality is an element of the crime.

In this sense, due process can be viewed as a stronger version of the rule of lenity, a kind of “constitutional lenity” that only comes into play when statutes are egregiously ambiguous and traditional notions of lenity have failed. For example, a law criminalizing “contemptuous treatment” of the United States flag violates this principle. This is not to say that phrases such as “willfully violates” taint every statute they touch with unconstitutional vagueness. But if due process protections are inapplicable to these statutes, that may in itself be a reason to apply the rule of lenity.

Standard principles of statutory construction and the rule of lenity are thus the first line of defense to such statutes. Failing that, mala prohibita statutes that are read not to require knowledge of illegality may potentially run afoul of due process concerns about ambiguity. Prior to Ratzlaf, for example, the antistructuring statutes were broad enough to ensnare an individual who chose to make multiple bank deposits in amounts just under $10,000, fearful that the transaction reports would fall into the wrong hands and increase the chances of being burglarized. Justice Ginsburg’s majority opinion did not specifically mention due process, instead relying on principles of statutory construction and offering lenity as a possible alternative rationale. But Ratzlaf’s use of the burglary example suggests

---

\[\textit{sonville}, \textit{405 US 156, 170-71 (1972)} \) (holding that excessively vague laws are unconstitutional).

\[\textit{Lambert}, \textit{355 US at 229-30} \) (reversing conviction and noting that “[w]here a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process”).


\[\textit{See Ratzlaf}, \textit{114 S Ct at 661}. \)
that such concerns were part of the Court’s reasoning. The Liparota Court made similar arguments.\footnote{See Liparota, 471 US at 426 (positing that without a knowledge-of-illegality requirement, the statute could ensnare a person who used food stamps “to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants”).}

B. Moral Culpability in Mala Prohibita Offenses

Before the advent of the Industrial Revolution some 150 years ago, the criminal law almost exclusively addressed conduct that was malum in se. Convictions for criminal offenses generally required proof of moral culpability, and the degree to which the criminal law was intertwined with society’s moral and religious values made such proof a substantially lighter burden for the prosecution than it would be today.\footnote{See Hall and Seligman, 8 U Chi L Rev at 644-45 (cited in note 12). Because so few offenses involved conduct that was morally innocent, the finder of fact was usually easily convinced of moral culpability. Prosecutors could, for example, attempt to show such moral culpability by pointing to education designed to inculcate moral values, concealment of the crime, and indications of regret. Even so, many crimes required proof not only of moral culpability, but also of specific intent—knowledge of illegality. Id.} But the Industrial Revolution created pressure on legislatures to pass mala prohibita regulations to protect citizens from the hazards of factory equipment, toxic chemicals, and other products of technological advancement.\footnote{See Francis Sayre, Public Welfare Offenses, 33 Colum L Rev 55, 68-69 (1933).} Lawmakers frequently made the violation of these regulations punishable as a criminal offense.

As the scope of penal law expanded, however, substantive protections for defendants failed to keep pace. The notion that every person is presumed to know the law gradually degenerated from a normative and pseudopositive proposition into a purely normative one, and an entirely unrealistic one at that. Although Congress has expressly made mistake of law a defense to a few scattered regulatory offenses, it is only in tax crimes that the defense has been fully established.

That raises the question of why willfulness has been consistently read to include knowledge of illegality in the tax code but not within other statutes. The logic of the tax crimes exception is not so readily limited to the Internal Revenue Code as the Supreme Court has suggested. The exception’s roots lie in the tax code’s Byzantine complexity, which makes it difficult for citizens to understand their legal duties and obligations.\footnote{Cheek, 498 US at 199-200.} Without a knowledge-of-illegality requirement, violations of the tax laws
provide no assurance of the moral culpability on which punishment is normally based.\textsuperscript{121}

In this way the tax code is analogous to other complex areas of federal law, such as regulations governing securities or the environment. The artificial line the Supreme Court has drawn between tax and other offenses is better and more logically placed between complex mala prohibita crimes and the remainder of the criminal code. If the reasoning behind the tax crimes exception is taken seriously, mistake of law should thus be a defense to other similarly complex mala prohibita offenses where it has not been in the past, such as failing to pay employees one and one-half times their normal rate for overtime,\textsuperscript{122} storing hazardous waste materials with an incorrect permit,\textsuperscript{123} and failing to properly slope the sides of a trench in a pipe-laying excavation.\textsuperscript{124}

On a more fundamental level, some interpretations of phrases like "willfully violates" and "knowingly violates" that do not permit a mistake of law defense may be inherently flawed. Several cases have held that, in criminal statutes, "willfully" generally means "done knowingly and with a bad purpose or evil motive," regardless of the defendant's knowledge of illegality.\textsuperscript{125} This interpretation begs the question, insofar as our conception of what is "evil" or "bad" is shaped at least in part by the legislature's decision to criminalize the conduct at issue. An example is failure to file tax returns, which was the basis for one of the charges in \textit{Cheek}. In what sense is failure to file a tax return ever "evil"? Would anyone have considered such conduct evil in the nineteenth century, before the Sixteenth Amendment and the advent of federal income taxation? Over time, as citizens became familiar with the federal income tax, they began to view the prohibited behavior as bad.\textsuperscript{126} Eventually, there was no longer a logical

\textsuperscript{121} See \textit{Murdock}, 290 US at 396-97.
\textsuperscript{122} See \textit{Nabob Oil Co. v United States}, 190 F2d 478, 480 (10th Cir 1951) (affirming conviction for failure to pay overtime and holding that willfulness is satisfied by the defendant's acting deliberately, voluntarily, and intentionally).
\textsuperscript{123} \textit{United States v Dee}, 912 F2d 741, 745-46 (4th Cir 1990) (affirming conviction for knowingly handling hazardous waste without the appropriate permit).
\textsuperscript{124} \textit{United States v Dye Construction Co.}, 510 F2d 78, 81-82 (10th Cir 1975) (affirming conviction for willfully failing to slope a trench). See also Stanley S. Arkin, \textit{'Ratzlaf' and the Meaning of Willfulness}, NY L J 3 (Feb 10, 1994) (suggesting other possible applications of \textit{Ratzlaf}).
\textsuperscript{125} See, for example, \textit{United States v Fierros}, 692 F2d 1291, 1294-95 (9th Cir 1982).
\textsuperscript{126} Although society's recognition of conduct as "bad" may lag behind the legislature's criminalization of the conduct, commentators have recognized that the criminal law plays a substantial role in shaping society's mores. See Hall and Seligman, 8 U Chi L Rev at
leap involved in saying that purposely failing to file a tax return is wrong, irrespective of knowledge of illegality. But trying to make people know the law by enforcing it ignores the injustice and social cost of punishing morally innocent defendants. And even if everyone knows of a duty to file tax returns, failure to file is still not "evil."

Unlike failure to file taxes, however, the great majority of federal mala prohibita crimes may never come to be regarded as criminalizing "bad" behavior. Indeed, with over three thousand federal crimes on the books,¹²⁷ most people will probably never realize that much of the behavior in question is criminal at all. If the words "willfully violates" or "knowingly violates" in a statute that criminalizes such behavior necessarily mean "with bad purpose," they imply that a defendant must act with knowledge of illegality to be guilty. Without such knowledge, the situation is similar to that of tax crimes—there can be no certainty that the defendant is morally culpable, and thus punishment should not be imposed.¹²⁸

III. A PROPOSAL REGARDING MISTAKES OF LAW

Lenity, moral culpability, and due process justify extending the mistake of law defense beyond its current limits. This Part offers a proposal for implementing such an extension in an effective and reasoned manner. Section A explains the proposal and attempts to limit the applicability of the mistake of law defense in three ways. First, the defense should be cognizable only for offenses in which the statutory text has not explicitly foreclosed a claim of mistake of law. Second, only those statutes requiring a mens rea of recklessness or higher for violation should be interpreted to require knowledge of illegality. Third, a mistake of law defense should only be available for mala prohibita offenses, where the problems of absence of notice and lack of moral culpability are most prevalent. Section B presents three examples of

¹²⁷ See Timothy Lynch, Ignorance of the Law: Sometimes a Valid Defense, Legal Times 22 (Apr 4, 1994). This number includes both crimes that are mala prohibita, such as counterfeiting, and crimes that are mala in se, such as intentionally killing a federal poultry inspector.
¹²⁸ The natural retort to this argument is that a legislative decision to criminalize conduct represents the clearest possible reflection of a societal judgment on the culpability of that conduct. But this response seems too simplistic and assumes a legislature that perfectly represents and accurately mirrors our society. Our legislature does neither.
how criminal statutes would be interpreted under this new approach.

A. Redefining and Limiting the Application of the Mistake of Law Defense

The tremendous expansion of criminal law in the last hundred years has made it unrealistic to expect that people will know the law, with the result that individuals may be convicted for ostensibly innocent conduct that they had no idea was illegal. Even if it were possible to know the penal code, the subtleties of statutory interpretation would still blur the line between criminal and noncriminal behavior. To resolve this problem, courts should adopt a rule that, in the absence of a clear legislative command to the contrary, mistake of law will be a defense to any malum prohibitum crime that requires a mens rea of recklessness or higher. This expansion of the mistake of law defense should not be construed as a rejection of the background rule. Rather, courts should strictly limit the application of mistake of law to those circumstances in which it is necessary to address the concerns of statutory interpretation, lenity, legality, and moral culpability.

The first proposed limitation on the mistake of law defense is that it should only be available when the legislature has failed to indicate clearly in the relevant statutory language its position on mistake of law. Canons of statutory construction, the rule of lenity, and the principle of legality should not be used to twist the meaning of clear text. Instead, the proposed approach is designed to address only those situations in which the text of the statute does not resolve whether mistake of law will exculpate.

Second, the defense should extend only to offenses for which the mens rea required for violation is recklessness or higher. The rationales underlying methods of statutory interpretation and the rule of lenity are not equally applicable to every level of mens rea. Language such as “willfully violates” and “knowingly violates” clearly call for the approach described here, but what of other possibilities? “Purposefully violates” implies awareness of a legal duty to at least the same extent as “willfully violates” does. “Recklessly violates” is somewhat more complex: it indicates that the actor has a subjective awareness that some legal duty relevant to his conduct exists, but that he lacks a specific understanding of what that duty entails. A defendant who actually has such a specific understanding violates the statute knowingly; reckless violation, in contrast, might occur where the actor has been informed that a particular activity is heavily regulated, but
has not bothered to determine whether his actions are permissible. It follows that where a statute criminalizes reckless violations, the mistake of law defense would be available only to the extent that the defendant could show that he was not aware of any regulations relevant to his conduct at all.

When a statute punishes negligent violations, however, this analysis changes. The reckless actor is subjectively aware of a risk; the negligent one is not aware of the risk but should be. Awareness of a legal duty will often lead to awareness of a risk, but because the negligent defendant is by definition unaware of the risk, in almost all cases he will also be unaware of the duty. Thus, the imposition of a knowledge-of-illegality requirement in offenses with a mens rea of negligence requires the government to prove the defendant was aware of a legal duty at a time where he was, by definition, unaware of the risk that duty was designed to address. Such a requirement is unrealistic and would exculpate the defendant in nearly every case where it was imposed. Consequently, the mistake of law defense cannot logically be extended to offenses requiring negligence as the mens rea for violation. Similar reasoning applies when the legislature has explicitly imposed strict liability: if no awareness whatsoever of the risk is required, it makes no sense to require awareness of a legal duty before punishment can be imposed.

Statutory silence, in contrast, prompts a two-tiered analysis. First, the statute must be scrutinized to determine whether any mens rea should be read into it. Although the decisions on this issue are not uniform, courts generally read in a mens rea requirement only where the statute imposes a harsh penalty or is based on a common law offense. If some mens rea is read in, it should determine the statute's treatment under the approach proposed here. If instead the statute is construed as dispensing with a mens rea requirement, then it is simply a strict liability offense and should be treated accordingly.

The third limitation on this approach is to restrict its application to mala prohibita crimes. Despite problems associated with classifying a few specific crimes, the distinction between mala prohibita and mala in se works well because their definitions

---

129 See Morissette v United States, 258 US 250 (1922).
130 Certain crimes, such as narcotics offenses, are difficult to classify in one of these two categories, primarily because they proscribe conduct that was not criminal at the time the categories developed. The classification of these offenses could be left either to the legislature, to clarify the statutory text, or to the judiciary, to analogize the problematic crimes to one category or the other.
track notions of moral culpability and, to a lesser extent, due process. Crimes that are "inherently and essentially evil" are invariably immoral, and tend to be well recognized by citizens. This recognition largely eliminates concerns of legality and notice. Additionally, the social costs of allowing a mistake of law defense to mala in se crimes may be unacceptably high.

Limiting this approach to mala prohibita crimes also addresses concerns of excessive deterrence. When knowledge of illegality is not required for conviction, mala prohibita statutes may deter lawful and socially valuable conduct. The consequence of ambiguity in such statutes is that people avoid engaging in heavily regulated activities where they might inadvertently commit a crime. Although this may be acceptable for mala in se offenses that criminalize morally repugnant and socially worthless conduct, it is a serious problem for mala prohibita offenses criminalizing conduct that has some degree of social desirability. Although the criminalization of such conduct may represent a legislative determination that the conduct is on balance socially undesirable, it does not mean that the conduct has no social value whatsoever. It is thus logical to restrict the extension of the defense to mala prohibita offenses because it is only in these offenses that overdeterrence of socially desirable behavior is a concern.

This approach therefore yields a three-part test for determining whether the mistake of law defense should be expanded to cover particular situations: First, the statute defining the offense must not address the question of whether mistake of law is a viable defense. Second, the mens rea required for violation of the statute must be recklessness or higher. Third, the statute must define a malum prohibitum crime.

B. Examples of Application

1. Violation of federal fabrics regulations.

Federal regulation of textiles is one of the many areas in which Congress has criminalized potentially morally innocent

---

122 See, for example, United States v Weitzenhoff, 35 F3d 1275, 1286-88 (9th Cir 1993) (affirming conviction where defendants violated the Clean Water Act in an effort to prevent the release of bacteria into a municipal water system).
123 In some antitrust offenses, for example, the judicial determination of guilt actually involves an explicit weighing of social costs and benefits. See, for example, United States v United States Gypsum Co., 438 US 422, 440-41 (1978).
conduct. The Flammable Fabrics Act directs the Consumer Product Safety Commission ("CPSC") to promulgate regulations regarding flammable fabrics, particularly those fabrics so flammable as to be dangerous when worn. Specifically, 15 USC § 1192 prohibits commercial transactions involving fabrics that fail to meet the standards issued by the CPSC; 15 USC § 1197(b) prohibits false guarantees regarding the flammability of particular fabrics. As with the antistructuring statutes in Ratzlaf, a separate provision provides criminal penalties for violation of the other provisions and specifies a mens rea. Under 15 USC § 1196, anyone who "willfully violates" § 1192 or § 1197(b) may be punished by up to a $5,000 fine and a year in prison. Although there are few reported cases interpreting these provisions, it appears that knowledge of illegality is not necessary for a willful violation of § 1196.

Under the approach proposed in this Comment, however, a defendant would have to act with actual knowledge of the relevant regulations—that is, with knowledge of illegality—in order to be criminally liable under 15 USC § 1196. This is true despite the fact that, unlike the antistructuring statutes, the Flammable Fabrics Act does not impose mens rea requirements of knowledge in some places and willfulness in others. Nor are there problems of the word "willfully" being rendered surplusage, or being interpreted inconsistently within the group of statutes at issue. These factors do not affect the outcome because "willfully violates" can be interpreted to require awareness of a legal duty and because § 1196 criminalizes ostensibly innocent conduct. Thus, under the approach proposed here, violation of these regulations requires knowledge of illegality because the crime is malum prohibitum, the mens rea required for violation is willfulness, and Congress has failed to indicate clearly in the statutory text whether such knowledge is required.

---

136 Id § 1197(b) (1982).
137 Id § 1196 (1982).
138 See United States v Sun and Sand Imports, Ltd., Inc., 725 F2d 184, 187 & n 3 (2d Cir 1984) (charging defendant with constructive notice of orders issued by the CPSC and holding that 15 USC § 1196 is not void for vagueness).
2. Securities crimes.

In contrast to the statute described above, the Securities Exchange Act of 1934 would not be read to include a mistake of law defense under the approach proposed here. Willful violation of the 1934 Act or the rules associated with it is a federal crime, generally punishable by up to ten years in prison and a fine of up to $1,000,000. Courts have consistently interpreted the "willfully violates" language of 15 USC § 78ff(a) not to require knowledge of illegality. Section 78ff(a), however, provides a limited "no knowledge" defense to securities crimes that allows defendants to avoid imprisonment if they can prove they had no knowledge of the regulation they are accused of violating. The willfulness requirement of § 78ff(a) is similar to the requirement imposed by 31 USC § 5322(a) in Ratzlaf, and many of the securities crimes in question are mala prohibita. Nonetheless, because Congress has clearly expressed its intention through the text of this statute that mistake of law should not fully exculpate a defendant, the approach proposed in this Comment is inapplicable to this offense.


Under the Clean Water Act ("CWA"), it is unlawful to discharge pollutants into navigable waters without the appropriate permit from the federal government. Criminal violations of the CWA are classified by the mens rea required. Under 33 USC § 1319(c)(1), negligent violations of certain CWA provisions are misdemeanors punishable by a fine of up to $25,000 for each day that the violation occurred and up to a year in prison. A knowing violation, in contrast, is declared by 33 USC § 1319(c)(2) to be a felony punishable by a fine of up to $50,000 per day and up to

---

130 See United States v Dixon, 536 F2d 1388, 1397 (2d Cir 1976) (holding that the government need not prove defendant's knowledge of the 1934 Act to secure conviction for its violation); United States v Schwartz, 464 F2d 499, 509 (2d Cir 1972) (holding that 15 USC § 78ff(a) contemplates willful violation with no knowledge of the rule that was violated).
131 15 USC § 78ff(a). Even if a defendant makes a showing of lack of knowledge he avoids only imprisonment; the stigma of a felony conviction still attaches, and the defendant remains liable for fines and restitution. A true mistake of law "defense," in contrast, would completely exculpate the defendant because it would require the government to prove knowledge of illegality as an element of the offense.
three years of imprisonment. Courts have interpreted the "knowingly violates" language of this latter provision to mean that the defendant need only have knowingly engaged in conduct resulting in the discharge of pollutants; actual awareness of the CWA requirements or the limitations of a particular permit is irrelevant.

Under the proposed approach, mistake of law would be a complete defense to violations of § 1319(c)(2). The mens rea required is knowledge, the offense is malum prohibitum, and the statute criminalizes behavior that in some circumstances may be not only completely innocent but even socially desirable. In this sense, the discharge of pollutants presents a substantially easier case than does the structuring of currency transactions under Justice Ginsburg's "inevitably nefarious" standard. As with the Flammable Fabrics Act, Congress has failed to address the mistake of law issue in the statutory text. Thus all three prongs of the proposed test are met, and the "knowingly violates" requirement of § 1319(c)(2) should be interpreted to include a mistake of law defense.

The "negligently violates" language of § 1319(c)(1), on the other hand, illustrates the need to restrict the mistake of law defense to offenses with a mens rea of recklessness or higher. Because negligence does not require an actual subjective awareness of a risk of harm, it makes no sense to read "negligently violates" as requiring knowledge of illegality. To do so would mean that a defendant must know he is violating the law but need not know he is creating a risk of harm. Thus, courts should not interpret § 1319(c)(1) to require a mistake of law defense.

CONCLUSION

In the last fifty years, legislatures have increasingly used criminal law to regulate behavior that, though seemingly innocent and bereft of moral culpability, poses some danger to society. Many of the statutes regulating such behavior punish those who knowingly or willfully violate their provisions. When the legisla-

---

143 Id § 1319(c)(1)-(2) (1988 & Supp 1993).
144 See, for example, United States v Weitzenhoff, 35 F3d 1275, 1286 (9th Cir 1993).
145 In Weitzenhoff, for example, the defendant sewage treatment plant was under contract to clean waste water of diseases and to discharge waste into the ocean. The defendant was convicted of discharging more waste into the ocean than its permit allowed, even though this was ostensibly an effort to reduce the risk of water-borne bacteria. Id at 1294 (Kleinfeld dissenting).
146 See Ratzlaf, 114 S Ct at 660-61.
ture has not specified the meaning of the mens rea language in such a statute, courts have little guidance as to whether knowledge of illegality is an essential element of the offense. Moreover, when these statutes are interpreted so as to foreclose a mistake of law defense, the government risks punishing individuals who lack moral culpability, discourages citizens from engaging in conduct that is often lawful and socially productive, and fails to provide citizens notice of what is permissible and what is not. Courts should therefore resolve this ambiguity by ruling that, in the absence of a clear legislative command to the contrary, mistake of law is a viable defense to any malum prohibitum crime that requires a mens rea of recklessness or higher.