Beyond Blame—Mens Rea and Regulatory Crime

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BEYOND BLAME—MENS REA AND REGULATORY CRIME

Arthur Leavens∗

“A VEXATIOUS PROBLEM”

On the surface, the issue seems quite straightforward. Congress enacts a criminal statute that either has no mens rea requirement or, if it has one, is unclear about its reach. It thus falls to the courts to decide if Congress meant for the statute to impose strict liability or to provide some level of mens rea, an interpretive task for which courts seem to be well suited. Yet, judges continue to be confounded by what one has called this “vexatious problem.”1

In its century-long effort to provide guidance regarding this recurring issue, the Supreme Court has only confused matters, swinging from an almost cavalier endorsement of strict liability at the beginning of the twentieth century to a current willingness to find a mens rea element in virtually every statute without regard to its language, purpose or history. The problem stems from the Court’s inattention to the very different role that mens rea plays in regulatory crime as opposed to traditional crime. Traditional mens rea, a blame-based component of common law crimes, has no role to play in regulatory crimes. For regulatory crimes, mens rea serves a notice function which is quite distinct from that of its blame-oriented cousin. The failure to account for this conceptual difference has resulted in an interpretive jurisprudence that ranges from murky to incoherent.

Conventionally, mens rea is the vehicle for attributing blame and thus suitability for criminal conviction and punishment. As such, it is conceptually a part of crime, at least crimes meant to stigmatize and punish wrongful

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1 See, e.g., United States v. Bronx Reptiles, Inc., 217 F.3d 82, 83 (2d Cir. 2000) (Judge Sack begins the court’s opinion interpreting such a statute by observing, “We return in this appeal to a vexatious problem.”).
conduct. As we were taught in our first year of law school, "Actus non facit reum nisi mens sit rea—an act does not make one guilty unless his mind is guilty." But for well over a century, criminal law has reached beyond this traditional notion of crime to include a different genre, so-called regulatory crimes that are intended to provide incentives for extra care among those engaged in facially legitimate but potentially harmful activities. Because these crimes do not have moral content and thus are not predicated on moral blameworthiness, traditional blame-oriented mens rea has no conceptual role to play. However, this does not mean that all regulatory crimes should be crimes of strict liability. By requiring proof that those who may be subject to regulatory criminal statutes understand the nature of their conduct or the circumstances in which it occurs, mens rea can ensure constructive notice of this potential criminal liability. For particular statutes, such notice can be the difference between acceptable hardship and unfair surprise.

The background principles are familiar. If a statute is one codifying or creating a traditional crime, that is, one that prohibits and punishes morally blameworthy conduct (as the common law was said to do), then it is black-letter law that the crime includes a mental element, mens rea, and any omission of such an element on the face of the statute is taken to be inadvertent. The legislature is presumed to have intended mens rea, and it is judicially inserted into the statute absent clear legislative intent to omit it.

On the other hand, no such presumption applies if the crime is not of the traditional sort but is instead a regulatory, public welfare crime, enacted to protect the public rather than to punish wrongdoing. As to such regulatory crimes, many courts leave the analysis at taking the statute's omission of mens rea at face value and interpreting the crime to be one of strict liability. But, there is, or should be, another step, and that is to consider whether under the principles of notice—not blame—mens rea ought to be inferred to guard

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3 This may sound like the timeworn distinction between mala in se and mala prohibita and some have so described it. See, e.g., Henry M. Hart, Jr., The Aims of the Criminal Law, 23 Law & Contemp. Probs. 401, 419 (1958). Hart uses the distinction as descriptive shorthand in his discussion of blameworthiness as the foundation for criminal punishment. This distinction has long been criticized for its employment as a litmus test in deciding which crimes are ones of strict liability and which require proof of mens rea. See, e.g., Jerome Hall, General Principles of Criminal Law 340–41 (2d ed. 1947).
against unfair surprise. Mens rea should not in this analysis be presumed; the notice analysis presumption runs the other way.

In gleaning the legislature's unarticulated intent concerning notice-based mens rea, a court should engage in the same balancing of interests that informs other notice issues. This analysis should be prospective and general, comparing the protective, societal needs advanced by the statute, on the one hand, with the concern that the statute might create a "trap for the innocent," on the other. Such analysis might lead a court to conclude that the potential for unfair surprise outweighs the need for excuse-free enforcement, an imbalance that for some statutes could be corrected by requiring proof that the actor was aware of some aspect of the conduct in question. Inferring a mens rea element in such a case, to serve the assumed interest of the legislature in a reasonable balance of societal need for strict enforcement against fair warning to individuals likely affected, would be entirely appropriate. It would not, however, be based on the blame-based presumption of mens rea that applies in traditional crimes.

The Supreme Court has recognized and even employed, although not explicitly, such notice-based mens rea. In a series of cases that included its landmark decision in Lambert v. California, the Court moved toward an interpretive theory utilizing notice-based mens rea. However, this emerging construct abruptly ended with Liparota v. United States, a case in which the Court ignored the distinction between notice and blame as a basis for mens rea, reverting to the traditional but inapt presumption of blame-based mens rea to address the notice problems of a regulatory statute. This mix-and-match approach to mens rea remains with us today, and the result is a jurisprudence marked by confusion and, inevitably, arbitrary decision making.

Two fairly recent circuit court cases interpreting the Federal Archaeological Resources Protection Act (ARPA) provide good examples of this conceptual confusion. Enacted in 1979, ARPA was designed to protect against the plundering of America's archaeological resources, principally Native American artifacts in the West. As is here relevant, the Act makes it a crime to "knowingly . . . excavate, remove, damage, or otherwise alter or deface . . . any

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5 355 U.S. 225 (1957).
archaeological resource located on public lands . . . unless such activity is pursuant to a [federally issued] permit.9 Violators may be fined up to $10,000 and/or imprisoned up to a year unless the value of the resource in question exceeds $500, in which case the potential fine and imprisonment are doubled.10 On its face, the statute requires proof that one charged with this crime must have "knowingly" excavated, removed, damaged or altered some object, but what other knowledge, if any, must be proven to convict? This is the question to which the Ninth and Tenth Circuits respectively turned in United States v. Lynch11 and United States v. Quarrell.12

Lynch was first and in some sense presented the more compelling facts. Ian Lynch was a young man who went deer hunting with two friends on an uninhabited island in southeast Alaska.13 While exploring the island, he saw, half-buried in the ground, what appeared to be the back of an old human skull.14 Lynch picked it up, saw that it indeed was a skull, and took it home to try to learn more about it.15 Somehow the regional Forest Service learned of his discovery and confiscated the skull.16 After its initial examination did not reveal whether the skull was sufficiently old to be a protected "archaeological resource" under ARPA, the Service sent it out for carbon dating, which showed that the skull was some 1400 years old.17 Lynch was indicted for, and ultimately convicted of, a felony violation of ARPA.18 He defended by claiming quite credibly that he did not know the age or the value of the skull and was thus unaware that it was either an "archaeological resource" or valued at more than $500.19 Of course, for this to be a cognizable defense, the statute's "knowingly" mens rea had to reach beyond the prohibited conduct and apply to "archaeological resource" and to a value "exceeding $500."

Without deciding whether the crime was regulatory or traditional in nature,20 the Ninth Circuit focused its interpretive analysis on the felony penalty

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10 Id.
11 233 F.3d 1139 (9th Cir. 2000).
12 310 F.3d 664 (10th Cir. 2002).
13 Lynch, 233 F.3d at 1140.
14 Id.
15 Id.
16 Id.
17 Id.
18 Id. at 1140–41.
19 Id. at 1141.
20 The court observed, "Picking up a skull is not in every case 'malum in se,' nor does every case 'involve the public welfare.'" Id. at 1143. Putting aside the fact that the statute
involved and on the potential unfairness of its application to “casual visitors” looking for souvenirs on public lands.\textsuperscript{21} The court’s concern that the statute may set a trap for unwary offenders is a classic notice concern, but it is only half of the inquiry. Full notice analysis would also ask whether in enacting the statute Congress had identified particular threats to archaeological resources that called for strict, excuse-free enforcement. Only then would the court be in a position to weigh the special need for particularized warning to potential violators against the apparent need for strict enforcement, all in an effort to decide what Congress intended to be the reach of the statute’s “knowledge” requirement. However, the Ninth Circuit engaged in no such notice analysis. Having identified what it believed to be the potential for unfair surprise, the court simply stated that “the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.”\textsuperscript{22} The court thus addressed its notice concern through the application of the common law, blame-based \textit{mens rea} presumption, holding that the statute required proof that Lynch knew, or should have known, that the skull was an “archaeological resource” as a predicate to his conviction.\textsuperscript{23}

That this was a notice-driven decision seems underscored by the court’s imposition of an objective limitation to the statute’s “knowingly” provision, including within its reach not only those proven to have known of the artifact’s character but also those who “should have known,” thereby addressing enforcement concerns. This extension of “knowingly” to the archaeological character of the object in question, limited by an objective overlay, may be the appropriate way to read the statute if all of the notice factors had been considered. However, one is left to wonder whether, had Lynch been a back-hoe-operating poacher at whom the legislation was aimed rather than a curious visitor to the island, the court would have been so quick to afford a mistake-of-fact defense through its \textit{mens rea} analysis. By employing the inapt presumption of \textit{mens rea} instead of openly engaging in the appropriate notice analysis, the court leaves us to guess at the factors that ultimately drove its decision.

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prohibits more than “picking up a skull,” in the end one has to decide whether the prohibition is regulatory or traditional, given the very different \textit{mens rea} presumptions that depend on that distinction. The focus should be on the statute as a whole, not on the single act at issue in the matter at hand. Picking up a human skull might look very different than picking up a stray arrowhead or shard of pottery when trying to decide the nature of the prohibition which applies equally to both.

\textsuperscript{21} \textit{Id.} at 1142–46.
\textsuperscript{22} \textit{Id.} at 1144.
\textsuperscript{23} \textit{Id.} at 1145–46.
Quarrell,\textsuperscript{24} \textsuperscript{24} decided by the Tenth Circuit two years later, presents a little different twist to interpreting this statute. In Quarrell, the issue was not whether the statute's requirement of "knowingly" applied to whether the object taken or disturbed was an "archaeological resource," but whether it applied to the circumstance that the act occurred on "public land."\textsuperscript{25} After determining that neither the language of the statute nor its legislative history definitively answered that question, the court turned to what was essentially notice analysis, considering issues of both fair warning and governmental enforcement needs.\textsuperscript{26} The court then concluded that Congress intended the "public land" element to be primarily jurisdictional, and thus that Congress did not intend for the statute's knowledge requirement to apply to it.\textsuperscript{27} Jurisdictional elements are ordinarily strict liability, and so it would seem that the defendant could not defend by claiming a mistake concerning the character of the land from which he took the artifacts.\textsuperscript{28}

This analysis is quite defensible even if not explicitly a notice-based construct. However, the opinion did not end there. The court went on to hold that the defendant could nevertheless present a mistake-of-fact defense based on his belief (1) that he was excavating on private, not public, land and (2) that he had permission to do so.\textsuperscript{29} In the words of the court:

> After the government establishes an ARPA violation, the defendant should be allowed to argue a mistake-of-fact defense based on his reasonable belief that he was excavating on private land \textit{with permission}. The defendant must establish that he reasonably believed that he was \textit{lawfully} excavating on private land because such "an honest mistake of fact would not be consistent with criminal intent." However, if a defendant merely argues that he thought he was excavating on private land, such a mistake of fact would not negate criminal intent because such conduct is unlawful.\textsuperscript{30}

\textsuperscript{24} United States v. Quarrell, 310 F.3d 664 (10th Cir. 2002).
\textsuperscript{25} Id. at 668.
\textsuperscript{26} Id. at 670–74.
\textsuperscript{27} Id. at 674.
\textsuperscript{28} See United States v. Yermian, 468 U.S. 63, 68–70 (1984) (holding that the statutory terms "knowingly" and "willfully" in 18 U.S.C. § 1001 (1948) (current version at Pub. L. No. 109-248, 120 Stat. 603 (2006)), forbidding false statements to federal agents, were not intended by Congress to apply to the element "in any matter within the jurisdiction of any department or agency of the United States" because the "primary purpose [of this element] is to identify the factor that makes the false statement an appropriate subject for federal concern").
\textsuperscript{29} Quarrell, 310 F.3d at 675.
\textsuperscript{30} Id. (citations omitted) (emphasis in original).
This is classic common law analysis. Having decided that the specified mens rea requirement of "knowingly" did not apply to the element of "public land," the court nevertheless presumed the existence of general criminal intent, which flows from the notion that to be punished one must be proven to be blameworthy. Under the common law, only a reasonable mistake which would, as an objective matter, leave the actor believing that he was acting lawfully, that is, within the shared moral code, would relieve him of that blame and thus ineligible for moral censure or punishment.31

Both cases, then, end with the same result, although the ostensible holdings vary, Lynch holding that "knowingly" applies to the element of "archaeological resource,"32 and Quarrell holding that "knowingly" does not apply to the element of "public lands."33 Yet, in both the bottom line is that the defendant can successfully defend through—but only through—a reasonable mistake concerning the element in question. If these cases and their respective analytic flaws were anomalies, they would not be worthy of mention, but they are not. Rather, they are representative of a more general tendency to conflate blameworthiness and notice issues. The result has been confusion at best, manipulation at worst.

The goal of this Article is to unravel this skein. In the first part, I will briefly outline the conceptual underpinnings of the common law approach to mens rea, with its blame focus, and the Supreme Court's early efforts to develop a different approach in interpreting regulatory criminal statutes. The second part begins with Lambert v. California, in which the Court staked out the constitutional limits for the employment of strict liability in public welfare or regulatory crimes, and, more importantly for our purposes, first employed notice-based mens rea.34 This part goes on to examine the ensuing cases in which the Court, at least implicitly, fleshes out the notice analysis that should guide the courts in deciding whether Congress intended strict liability or some level of mens rea in enacting regulatory criminal statutes. The third part begins with Liparota v. United States, the case in which the Court departed from the emerging construct, which had distinguished blame-based and notice-based mens rea.35 This part then charts the doctrinal confusion that has resulted from this conflation of blame and notice in the Court's mens rea analysis, confusion

31 See infra pp. 8–11.
32 United States v. Lynch, 233 F.3d 1139 (9th Cir. 2000).
33 Quarrell, 310 F.3d at 664.
34 355 U.S. 225 (1957).
that is apparent not only in its own cases but also those of the circuit courts as they confront this "vexatious problem."

**THE LIMITS OF BLAME**

Any attempt to determine the limits of blame in our criminal law must begin with the common law and its understanding that criminal punishment was reserved for the morally blameworthy. This fusion of moral and legal norms may seem an anathema to twenty-first century lawyers, but eighteenth-century English judges and lawyers understood "moral" as a normative concept based on a society's secular sense of the divide between the "virtuous [and the] criminal . . . such as is known or admitted in the general business of life."

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36 *Samuel Johnson, Dictionary of the English Language* (Times Books, London 1979) (1755). In his authoritative, then-contemporary Dictionary of the English Language, Johnson went on to amplify this definition of "moral" thusly:

Relating to the practice of men towards each other, as it may be virtuous or criminal, good or bad.

Keep at least within the compass of moral actions, which have in them vice or virtue. Hooker, b. ii.

... In moral actions divine law helpeth exceedingly the law of reason to guide man's life, but in the supernatural it alone guideth. Hooker, b. i.

... Popular; such as is known or admitted in the general business of life.

... Mathematical things are capable of the strictest demonstration; conclusions in natural philosophy are capable of proof by an induction of experiments; things of a moral nature by moral arguments, and matters of fact by credible testimony. Tillotson's Sermons.

A moral universality is when the predicate agrees to the greatest part of the particulars which are contained under the universal subject. Watts's Logick.

*Id.*

In his influential treatise, Blackstone sounded a similar note. In writing about crimes "against private subjects," the core of what we regard as common law crimes, Blackstone distinguished them from purely private wrongs for which compensation could be sought: [T]he wrongs, which we are now to treat of, are of a much more extensive consequence; 1. Because it is impossible they can be committed without a violation of the laws of nature; of the moral as well as political rules of right: 2. Because they include in them almost always a breach of the public peace: 3. Because by their example and evil tendency they threaten and endanger the subversion of all civil society. Upon these accounts it is, . . . the government also calls upon the offender to submit to public punishment for the public crime.

When common law judges applied and thus elaborated the criminal law through the adjudicative process, they saw themselves as doing nothing more than giving formal recognition to behavioral norms already operative as a matter of societal consensus.\(^\text{37}\) Those who acted contrary to those norms were

\(^{37}\) So, in his treatise, *The History of the Common Law*, Sir Matthew Hale first notes that all matters criminal "are determinable by common law, and not otherwise." 1 MATTHEW HALE, THE HISTORY OF THE COMMON LAW 64 (5th ed. 1794). Turning to "the formal constituents, as I may call them, of the common law," Hale points to "USAGE AND CUSTOM" (relating principally to civil and canon law), parliamentary authority (which he here limits to "those constitutions and laws being made before time of memory, [which] do now obtain, and are taken as part of the common law and immemorial customs of the kingdom"), and "JUDICIAL DECISIONS." Id. at 139-41. In expounding on the role of judges in crafting the common law, Hale is careful. He writes:

It is true, the decisions of the courts of justice, though by virtue of the laws of this realm do bind, as a law between the parties thereto, as to the particular case in question, till reversed by error or attainder; yet they do not make a law, properly so called, for only the king and parliament can do; yet they have great weight and authority in expounding, declaring, and publishing what the law of this kingdom is; especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times. And though such decisions are less than law, yet they are a greater evidence thereof that the opinion of any private persons.

Now judicial decisions, as far as they refer to the laws of this kingdom, are for the matter of them of three kinds.

First, they are either such as have their reasons singly in the laws and customs of the kingdom. And in these things, the law or custom of the realm is the only rule and measure to judge by; and in reference to those matters, the decisions of courts are the conservatories and evidences of those laws.

Secondly, or they are such decisions, as by way of deduction and illation upon those laws, are framed or deduced. And herein the rule of decision is, first, the common law and custom of the realm, which is the great substratum that is to be maintained; and then authorities or decisions of former times, in the frame or the like cases; and then the reason of the thing itself (Note p: This force of decision is called 'praeteritorum memoria eventorum.').

Thirdly, or they are such as seem to have no other guide but the common reason of the thing, unless the same point has been formally decided. Id. at 142-43.

Two centuries later, in what by then may have been the beginning of a rear-guard action, influential American commentator Joel Bishop defended the common law against the emerging suggestion that it reflected no more than the "individual fancies" of judges. So, Bishop wrote:

But, said a learned judge, "every nation must of necessity have its common law, let it be called by what name it may; and it will be simple or complicated in its details as society is simple or complicated in its relations." (citing Justice Turley in Jacob v. S. in 22 Tenn. 3 Hum. 493, 514–15 (1842) (Turley, J.).) And however some deprecate what they term arbitrary power in judges, who decide causes upon laws not written in
behaving at once immorally and unlawfully; the common law made no distinction between these two concepts.\textsuperscript{38} One who breached such a norm was by definition morally blameworthy and thus merited the formal censure of criminal conviction and punishment.\textsuperscript{39} It naturally followed that if the actor was mistaken concerning the circumstances that made the actor's conduct immoral and thus illegal—for example, a man mistakenly believed that his sexual partner consented to sexual intercourse in what otherwise was a rape—he would not be morally blameworthy, at least if his mistake was reasonable\textsuperscript{40} and the circumstances as he believed them to be did not make his act morally blameworthy.\textsuperscript{41} To modern ears, limiting the doctrine of mistake with reference to the statute-books, such justice is necessary among every people, whether calling themselves free or not.

Our tribunals commit many more errors by refusing to deal out the justice which the general principles of our jurisprudence and the collective conscience of mankind confessedly demand—alleging in excuse the want of a statute or a precedent—than in all other ways combined. Not thus was it anciently, when the courts of our English ancestors decided controversies with but few statutes and precedents to aid them; deriving principles for their decisions from the known usages of the country, and from what they found written by God in the breasts of men. And because it was not thus formerly, it should not be now. For by admitted doctrine, the judges should not decide from their individual fancies, but by the law as they find it; and we see that the law, as judges find it, commands them to go in proper cases outside the statutes and prior decisions, for principles on which to adjudicate the particular matter before them.

1 Joel Prentiss Bishop, \textit{New Commentaries on the Criminal Law Upon a New System of Legal Exposition} 8–9 (8th ed. 1892) (internal citation omitted).


\textsuperscript{39} \textit{See} Mueller, \textit{supra} note 38, at 1058.

\textsuperscript{40} Jerome Hall noted and criticized this objective limitation to the availability of the mistake-of-fact defense in Anglo-American criminal law. \textit{Hall, supra} note 3, at 366–72. \textit{See also} Edwin R. Keedy, \textit{Ignorance and Mistake in Criminal Law}, 22 \textit{Harv. L. Rev.} 75, 83–85 (1908).

\textsuperscript{41} \textit{See}, e.g., Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1875). \textit{Prince}, of course, is the oft-cited case in which the English Court for Crown Cases Reserved denied a mistake-of-fact defense to the accused, not because his mistake was unreasonable but because his act—in the circumstances as he mistakenly believed them to be—was morally wrong. \textit{Id}. Prince had been convicted for taking an unmarried girl under the age of sixteen out of the possession of her father, in violation of a statute forbidding such conduct. \textit{Id}. Although the girl was at the time fourteen, Prince mistakenly, reasonably so according to the jury, believed her to be eighteen, thus, outside the reach of the statute. \textit{Id}. Such a reasonable mistake of fact would ordinarily exculpate, but the court affirmed Prince's conviction on the ground that it was morally wrong, though not forbidden under the statute, so to act. \textit{Id}. Moral norms, even those not formally
moral standards violates the concept of legality, but at a time in which there was no practical distinction between moral norms—understood as behavioral norms supported by societal consensus—and legal rules, such absolution made perfect sense. A mistaken actor who, because of his reasonable mistake (a mistake anyone could make), did not appreciate the normative content of his or her conduct was not blameworthy, and thus could not fairly be subjected to condemnation and punishment for that conduct.

reduced to “law” by statute or judicial precedent, nevertheless marked the bounds between criminality and lawful behavior. See also Keedy, supra note 40, at 83–84.

43 In addressing the question of who should be punished and who should be excused for committing an act forbidden by the criminal law, Blackstone reduces this issue to:

[T]his single consideration, the want or defect of will... The concurrence of the will, when it has its choice either to do or to avoid the fact in question, [is] the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws there must be both a will and an act.

4 BLACKSTONE, supra note 36, at 20–21 (emphasis in original).

Blackstone identified six defects of will that could be said to affect an actor’s culpability—infancy, lunacy, drunkenness, misfortune or chance, ignorance or mistake, and necessity. As to instances in which “a man commits an unlawful act by misfortune or chance, and not by design... [h]ere the will observes a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime.” Id. at 20–21 (emphasis in original). He refines the point, distinguishing between “accidental mischief [that] happens to follow the performance of a lawful act,” which excuses the actor, and the case in which “a man be doing anything unlawful, and a consequence ensues which he did not foresee or intend, as the death of a man or the like,” which “shall be no excuse; for, being guilty of one offense, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour.” Id. at 26–27 (citation omitted). Turning to “ignorance or mistake,” Blackstone writes

when a man, intending to do a lawful act, does that which is unlawful... [T]he deed and the will act[] separately, [and] there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, an not an error in point of law.

Id. at 27. See also 1 HALE, supra note 37, at 14–16, 38–39, 42.

Similarly, Bishop wrote:

If a case is really criminal, if the end sought is punishment and not the redress of a private wrong, no circumstances can render it just, or consistent with a sound jurisprudence, for the court or a jury to condemn the defendant unless he was guilty in his mind. As the laws of the material world act uniformly, never knowing exceptions, so do those of the moral world. It is never right to punish a man for walking circumspectly in the path which appears to be laid down by the law, even though some fact which he is unable to discover renders the appearance false... And a court should in all circumstances so interpret both the common law and the statutes as to avoid this wrong.

BISHOP, supra note 37, at 164.
Moral blameworthiness, the necessary, common law predicate to criminal conviction and punishment, thus boiled down to a failure to conform one's conduct to consensus behavioral norms in circumstances in which the average person would understand that the behavior was wrong. Since the reach of such criminal laws was thus intuitive to judges and citizens alike, concerns about notice and knowledge of the law were nonexistent. The notion of mala in se had meaning. A sensible corollary of this approach limited this blame-based punishment to common law crimes. Moral blame had no application to

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44 This moral blameworthiness was the minimum level of culpability necessary to criminality. Many common law crimes, of course, had the added requirement of a specific intent that must have animated the criminal act, the ordinary effect of which was to increase the severity of the crime. So, burglary required not only a nighttime breaking and entering of a dwelling house, but also the intent to commit a felony therein. 1 HALE, supra note 37, at 549. Larceny required the taking and carrying away of the personal goods of another, with felonious intent, id. at 504, felonious intent meaning the intent to convert to one's own use the goods so taken. Id. at 508–09. Otherwise, the taking was “at most a trespass.” Id.

46 It is worth repeating that this approach to an actor's mens rea, his “vicious will” in Blackstone's words, 4 BLACKSTONE, supra note 36, at 21, was not purely subjective but was instead a somewhat limited, objective measure of the actor's state of mind. As Professor Gerald Leonard points out, “vicious” (or, “vitiuous”) did not in Blackstone’s time “have the modern connotation that ‘vicious’ now bears, reflecting the savage malignity or cruelty of an act.” Gerald Leonard, Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code, 6 BUFF. CRIM. L. REV. 691, 713–14 (2003). Rather, Leonard suggests that Blackstone sought only to describe a state of mind that reflected a departure by the actor from social norms as a basis for attributing fault to the actor for indulging his private interests “in derogation of the exacting discipline of public virtue,” not some more evil state of mind that we might associate with the word “vicious.”

Similarly, in setting out what he called the “universal” requirement of culpability as a predicate to criminal punishment, Bishop wrote “[i]t is never right to punish a man for walking circumspectly in the path which appears to be laid down by the law, even though some fact which he is unable to discover renders the appearance false.” 1 BISHOP, supra note 37, at 164. More broadly, our criminal law has a long tradition of departing from a purely subjective standard of blame, even in very serious offenses. Quite beyond the effective imposition of strict liability for felonies such as statutory rape and bigamy, defenses to homicide such as necessity, self defense, insanity and intoxication are routinely excluded or limited in availability for reasons of policy or expediency. See Louis Bilionis, Process, the Constitution, and Substantive Criminal Law, 96 MICH. L. REV. 1269, 1279–82 (1998) for an excellent discussion of this issue and the larger question of the constitutional status of substantive criminal law.
violations of decrees of a “rightful authority” independent of the moral code, that is, “positive” prohibitions deemed to be *mala prohibita.*

As quaint as this construct seems today, its core remains with us. Crimes are now, of course, creatures of statute, but much of our criminal law has descended from the common law. And while we are a far more heterogeneous society than was eighteenth-century England, these common law prohibitions—e.g., murder, rape, arson, theft, assault—for the most part still represent the core of our moral norms. The traditional view that such crimes have moral content thus continues, and one who violates such norms is morally blameworthy—and for that reason a fit subject for censure and punishment—so long as he understood, or should have understood, the circumstances that made his act criminal. In this view, *mens rea* is as critical to proof of criminality as the act itself; only through its proof can a harmful act be regarded as blameworthy.

While eighteenth-century criminal law included utilitarian decrees prohibiting conduct that was not regarded as immoral, today there are many,

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47 *I Blackstone, supra* note 36, at 57–58. Crimes that are “*malum prohibitum*” are without “moral offense, or sin” and involve no “moral guilt.”

48 See *Hall, supra* note 3, at 338–42, and 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, 1570–74 (1997) for criticisms of this *mala in se/malum prohibitum* distinction.

49 Over fifty years ago, Justice Jackson's classic opinion in *Morissette v. United States* made this point. In affirming that federal criminal law presumed an element of *mens rea,* at least in those crimes rooted in common law, Justice Jackson wrote:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

342 U.S. 246, 250 (1952). Even a committed consequentialist such as Oliver Wendell Holmes famously conceded that blameworthiness is a necessary predicate to criminal punishment, stating 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.” *Oliver Wendell Holmes, Jr., The Common Law* 50 (1881). Much, much has been written in the fifty or so years since *Morissette* about the central role of blameworthiness in American criminal law, not the least of which has been the work of Henry Hart, Herbert Wechsler and Herbert Packer, and, of course, the ALI's Model Penal Code that grew out of that work and the work of others. *See generally* Sanford Kadish, *Fifty Years of Criminal Law: An Opinionated Review, 87 Cal. L. Rev.* 943 (1999) for an incisive summary of that impossibly large field of scholarship. For the modest purposes of this paper, it is enough here to say that blame lies at the heart of traditional notions of crime and punishment.

50 See *I Blackstone, supra* note 36, at 57–58 (citing as examples of such laws “which enjoin only positive duties . . . without any intermixture of moral guilt” statutes for preserving
many more, particularly at the federal level. With the coming of the industrial revolution and the advent of both relatively dangerous manufacturing processes and anonymous, mass distribution of foodstuffs and drugs, legislatures sought to protect the public by enacting a genre of crime characterized first as "public welfare" or "regulatory" crimes, later broadened to include what some have described as "public danger" or "public menace" crimes. Others have written extensively, and often critically, about this phenomenon, and I will not duplicate that effort here. Although there is substantial variation among these crimes, it seems fair to describe them as regulatory measures designed preemptively to avoid possible widespread harms perpetrated by persons generally in control of potentially dangerous processes or items. Early on, these crimes were for the most part discrete legislative efforts to prevent potential harm, but increasingly they have been enacted as part of broad regulatory programs, designed to put teeth into the regulatory effort by allowing either administrative or criminal sanctions against the offender. For example, the federal criminal code includes or has included crimes that forbid shipping in interstate commerce food that has been exposed to rodent contamination and thereby
"may have been rendered injurious to health,"\textsuperscript{56} shipping in interstate commerce any drug "that is adulterated or misbranded,"\textsuperscript{57} possessing an un­registered "firearm" (defined in the statute as a limited class of highly dangerous military weapons, such as automatic rifles and hand grenades),\textsuperscript{58} "structuring" cash deposits in a bank in amounts less than $10,000,\textsuperscript{59} and acting in violation of Interstate Commerce Commission regulations\textsuperscript{60} and in violation of food stamp regulations.\textsuperscript{61}

Concerns about nationwide grocery chains with warehouses in which there are mice, drug wholesalers that repackage and ship drugs (including over-the-counter drugs) with incorrect labels, persons who possess unregistered automatic rifles, persons who break up bank deposits into smaller amounts to avoid reporting requirements, companies or persons who ship chemicals with incorrect labels or shippers of toxic chemicals who do not take the safest route, and persons who possess food stamps without federal authorization are real. However, none of these acts seem to be "wrongful" as a matter of societal consensus.\textsuperscript{62} Putting aside the legal prohibition, it thus does not seem that one who so acts is morally blameworthy and therefore properly subject to formal condemnation and punishment. The essence of such crimes is not harm caused but conduct—conduct that could result in widespread harm, by persons or entities that are best positioned to reduce or eliminate that possibility of harm through use of proper care. These crimes are purely preventive, their aim being generally to impose a heightened duty of care on such actors and thus prevent

\textsuperscript{62} See Hart, supra note 3, at 420; Green, supra note 48, at 1573 (quoting Hart for the proposition that for such crimes, "the moral standards of the community’ are simply not relevant").
the harm or reduce the likelihood that it will occur. These are not crimes imbued with blame. 63

To be sure, if harm actually occurs, harm that can be linked back to such conduct, the actors may be subject to recrimination and blame. Then the conduct becomes the act of causing that harm, which may well constitute an element of a crime with moral content. For example, there may be some level of homicide if someone dies from contaminated food or mislabeled drugs distributed by the actor, or fraud if the unauthorized possessor of food stamps cashes them in. The so-called regulatory crime is the act, or failure to act, in particular circumstances; actually causing the harm guarded against is not an element of these crimes. 64 Given that blame plays no conceptual role in such purely

63 See Alan Brudner, Agency and Welfare in the Penal Law, in Action and Value in the Criminal Law 21, 43 (Stephen Shute et al. eds., 1993) ("Accordingly, the doctrine of mens rea has no role to play in the theoretical account of punishment within the welfare paradigm; it is not part of an account of the inner necessity and deservedness of punishment, because there is here no inner necessity or deservedness to comprehend."); Kyron Huigens, The Dead End of Deterrence, and Beyond, 41 WM. & MARY L. REV. 943, 945 (2000) ("Fault is an irreducibly retrospective concept, and the ineradicable prospective orientation of deterrence theory's underlying consequentialism cripples its efforts to give an adequate account of fault."); See also Green, supra note 48, at 1547 (setting out a "roadmap to moral content in the criminal law"). Green's purpose, however, is to evaluate the moral content of violating a formal norm, that is, whether it is immoral to violate a criminal statute. I make the different point that there is a set of crimes—regulatory or "public welfare" in nature—that forbid conduct that is not as a matter of consensus societal norms immoral. I do not claim that all regulatory crimes can be so characterized—conduct which violates the Clean Water Act, to take an example, may well be immoral—but there are criminal laws which forbid and punish conduct which is not otherwise wrong, and is in Sayre's words, "a new type of twentieth century regulatory measure involving no moral delinquency." Sayre, supra note 51, at 67; Hart, supra note 3, at 420 (characterizing such crimes as not involving the "moral standards of the community").

64 Sayre characterized this preventive approach to public protection by criminally enforcing regulations as "wholesale" criminal enforcement, as opposed to what he called "true crimes," with their emphasis on individual guilt for intentional harm doing. Sayre, supra note 51, at 68–69. The common law, of course, did not always require harm as an element of crime. Although slow to "take the will for the deed," and thus to punish attempts as if successfully accomplished, Theodore F. T. Plucknett, A Concise History of the Common Law 453–54 (5th ed. 1956), the common law recognized the crime of attempt. See Bishop, supra note 37, at 438–39. But such inchoate common law crimes required proof of the specific intent to cause the attempted harm and an act "toward the doing, sufficient both in magnitude and in proximity to the fact intended, to be taken cognizance of by the law that does not concern itself with things trivial and small." Bishop, supra note 37, at 439. One may be punished at common law for unsuccessfully attempting a harm, but the harm must itself must be a criminal wrong against another, and the actor must have tried to do the harm and come close to success. In contrast,
prophylactic measures, there is no call for proof of mens rea to reflect blameworthiness.

In a series of much-criticized decisions, the Supreme Court early on recognized this distinction between traditional, common law crime and blameless regulatory crime, holding in United States v. Balint\(^65\) that the Federal Narcotic Act of 1914 required no proof that a seller of enumerated narcotics knew the character of the item(s) sold\(^66\) and in United States v. Dotterweich\(^67\) that the Federal Food and Drug Act similarly required no proof that one who was involved in the distribution of misbranded drugs knew or should have known that they were misbranded.\(^68\) Whatever quarrel one may have with this acceptance of strict liability as a basis for a criminal conviction or with the quality of the Court’s analysis,\(^69\) the basis for the Court’s holdings is clear. Both Chief Justice Taft in Balint and Justice Frankfurter in Dotterweich recognized Congress’s power to enact criminal prohibitions the purpose of which was to advance particular regulatory interests, even if it meant punishing “innocent,” and thus blameless, persons.\(^70\) Both recognized that this approach was a departure from traditional common law principles in which “scienter was a necessary element in the indictment and proof of every crime,”\(^71\) but held that the Due Process Clause did not forbid such imposition of criminal

regulatory crime might punish the careless grocer for distributing potentially harmful foodstuffs, even though that was not his intent and the possibility of harm was remote and impersonal.

\(^{65}\) 258 U.S. 250 (1922).

\(^{66}\) Id. at 254.

\(^{67}\) 320 U.S. 277 (1943).

\(^{68}\) Id. at 284–85.

\(^{69}\) Compare Hart, supra note 3, at 431–33 (surveying the Supreme Court’s mens rea jurisprudence through the first half of the twentieth century, Hart observes, “[f]rom beginning to end, there is scarcely a single opinion by any member of the Court which confronts the question in a fashion which deserves intellectual respect.”) with Bilionis, supra note 46, at 1288–95 (defending the Court’s much-maligned decisional line from Balint through Lambert, arguing that, although perhaps “careless with its craft,” the Court had “valid and weighty concerns on its mind ha[ving] everything to do with process”).

\(^{70}\) See Balint, 258 U.S. at 254 (“Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.”); Dotterweich: Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

320 U.S. at 284–85.

\(^{71}\) Balint, 258 U.S. at 251. See Dotterweich, 320 U.S. at 281.
penalty without regard to blameworthiness. The limits of criminal liability without fault were up to the legislature.

In *Morissette v. United States*, the Court provided an important qualifier, making it clear that strict liability remained the exception and not the rule and that statutes codifying crimes with common law roots should be presumed to have an element of *mens rea* even in the absence of explicit provision for such a term. In so holding, Justice Jackson, writing for the Court, went to great lengths to distinguish the faultless regulatory or "public welfare" offenses from the traditional, common law offenses such as larceny, a variation of which was there at issue. As to the latter, Jackson left little doubt as to the blameworthiness of such traditional crimes, observing that:

> [T]hey are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony, which, says Maitland, is "... as bad a word as you can give to man or thing."

With blame thus at the conceptual core of such crimes, the Court held that more than mere omission of a *mens rea* term from their codification was necessary to infer legislative intent to impose liability without fault. For traditional crime, an element of *mens rea* is presumed.

Although it may have taken the better part of a half century for the Court to draw the distinction between traditional crime and regulatory crime and to point out the implications of this difference on the interpretation of criminal statutes, at least after *Morissette* the conceptual importance and limits of blameworthiness were clear in the Court's interpretive work. The Court explicitly affirmed the continuing importance of blame, and thus *mens rea*—the basis for attribution of blame—as a conceptual part of traditional crime. Conversely, these early decisions implicitly recognized that blame (and blame-based *mens rea*) had no role to play in regulatory crime. What remained for the Court was the more difficult task of identifying the appropriate role of scienter in regulatory crime, that is, the notice role of *mens rea*. It is to that inquiry that we turn.

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72 342 U.S. 246 (1952).
73 *Id.* at 263.
74 *Id.* at 260 (citation omitted).
75 *Id.* at 263.
PRINCIPLES OF NOTICE

To say that "blame" has no conceptual place in regulatory crimes does not mean that all such crimes should necessarily be ones of strict liability or that strict liability must necessarily apply to each element of such a crime.\(^{76}\) It certainly lies with the legislature to provide an explicit scienter element which would require proof that the accused understood the nature of her conduct and, if the legislature wished to go further, that she intended to engage in it. Such a mental element and its correlative mistake-of-fact defense, given the lack of a retributive basis for the crime, should not, however, be presumed under traditional *mens rea* analysis. Rather, as developed below, the reason in such offenses to require that the prosecution prove that an accused knew or should have known the nature of her conduct is to ensure that she was adequately warned of the possibility of criminal sanction; that is, that she had adequate notice.

Any such notice-based *mens rea* would not conceptually be an element of the crime, proof of which is necessary to show that the crime was committed. The notice claim is rather that, in spite of the accused's commission of a crime, the legal prohibition should not be enforced and punishment should not be imposed because the law which the actor violated did not give adequate warning of the potential for criminality. The judicial willingness to imply such a notice-based scienter element in a regulatory crime should thus be subject to the same caution which informs the judicial approach to other notice-based defenses, like mistake of law and void-for-vagueness. With notice claims, the presumption runs against, not in favor, of a mistake or ignorance defense.

The principle that the state must provide fair warning of what is prohibited, of course, has a constitutional dimension, operating through the *Ex Post Facto* and Bill of Attainder Clauses, which together require crimes to be defined prospectively and generally,\(^{77}\) and through the Due Process Clause, which requires

\(^{76}\) See *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994).

\(^{77}\) The Constitution forbids the federal government, U.S. Const. art. I, § 9, cl. 3, and the state governments, id. § 10, cl. 1, from enacting any bill of attainder or *ex post facto* law. The former consists of special legislation providing that a particular person is criminally punishable without trial or conviction. See *Cummings v. Missouri*, 71 U.S. 277, 325 (1867). The latter consists of a law which retroactively criminalizes conduct and/or aggravates punishment for a crime. See *Calder v. Bull*, 3 U.S. 386, 390 (1798).
these prospective general commands to be relatively clear in their meaning.\textsuperscript{78} Two interrelated concerns underlie this basic notice concept. First, individuals who are potentially liable for criminal punishment must be able to fairly predict what the law forbids so that they can avoid punishment if they wish. Second, law enforcement officials need clear guidance concerning the content and purpose of the prohibitions which they must enforce in order to avoid arbitrary enforcement. The concern in this Article is for statutes that satisfy this constitutional requirement but nevertheless might catch violators by surprise.\textsuperscript{79} The focus, then, is on the fair-warning aspect of notice, which some have dismissed as a relatively unimportant or abstract concern\textsuperscript{80} but which seems resurrected at least as a subconstitutional concern with the advent of widely applicable regulatory statutes.

As the concerns that they address would suggest, these notice issues\textsuperscript{81} differ markedly from those of blameworthiness. Since the purpose is to provide guidance to prospective offenders, and enforcers too, notice concerns are—or at least should be—general and prospective rather than individualized and retrospective in their focus. While blameworthiness concerns mandate a retributive judgment of a particular individual based on what that person chose to do, the notice inquiry asks whether, in the context of its likely application, a criminal prohibition gives reasonable warning of what conduct it prohibits. Answering this notice question requires balancing society’s need for the prohibition as articulated against the general likelihood that the prohibition, so articulated, will either unfairly take potential violators by surprise or give rise to arbitrary enforcement of its command.


\textsuperscript{79} Professor Jeffries points out the gap between the minimal fair-warning protection actually provided by conventional void-for-vagueness analysis and that facially suggested by the rhetoric of this doctrine. See Jeffries, supra note 78, at 205–12. See also Dan M. Kahan, Some Realism About Retroactive Criminal Lawmaking, 3 ROGER WILLIAMS U. L. REV. 95, 99–101 (1997).

\textsuperscript{80} See DRESSLER, supra note 42, at 47; see also Jeffries, supra note 78, at 195–96 (discussing the void-for-vagueness doctrine as the “operational arm of legality”); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79–80 (1968). See, e.g., Connally, 269 U.S. at 390.

\textsuperscript{81} The focus of this article is on statutory interpretation and thus the discussion of notice will focus on statutory clarity and availability, not \textit{ex post facto} and bill of attainder issues.
At least under traditional analysis, this notice balance favors the needs side, presuming, though not irrebuttably, that ignorance of the law is no excuse. Criminal law, both as a deterrent and as a retributive response to wrongdoing, requires uniform application to be effective. Allowing excuses for ignorance or misunderstanding of a prohibition undercuts that uniformity of response, and does so for reasons unrelated to either blame or deterrence. Moreover, recognizing a mistake-of-law defense would reduce the incentive to learn what the law prohibits, further undercuts the law's value as a deterrent. The rational actor presupposed by a deterrence theory might well, in a close case, prefer to act in ignorance, understanding that such ignorance may be a defense, rather than to inquire into the law's provisions, thereby running the risk of learning that the desired conduct is prohibited. In contrast, the fairness side of the notice balance when applied to traditional crimes seems to raise minimal concerns. Since these crimes by and large reflect a shared behavioral, if not moral code, the possibility seems insubstantial that an individual who commits such a crime could legitimately claim surprise at the prospect of punishment or that law enforcement officers could play on the law's ambiguity in order to enforce it in an arbitrary manner. Thus, the principle that ignorance of the law does not excuse runs deep in traditional criminal law, applying to both the existence of a prohibition and its meaning.

82 Additionally, some have argued that a claimed ignorance-of-the-law defense would be particularly difficult to overcome by proof. Unlike "mistakes of fact," which arise in external circumstances that provide objective benchmarks against which to measure their bona fides and reasonableness, the argument posits that asserted mistakes of law are more internal and thus more difficult to controvert. See, e.g., 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 498 (R. Campbell ed. 1875). But see HOLMES, supra note 49, at 48 (disputing this difficulty of proof point and arguing that the law’s unwillingness to allow an “ignorance of the law” defense rests solely on the need to discourage rather than encourage such ignorance).

83 See, e.g., United States v. Int'l Minerals & Chem. Co., 402 U.S. 558, 563 (1971) (holding that a statute making it a crime to knowingly violate [I.C.C.] regulations permitted conviction even though the accused was ignorant of those regulations); Rose v. Locke, 423 U.S. 48, 49-50 (1975) (upholding against a vagueness challenge conviction for cunnilingus under a statute forbidding “crimes against nature,” observing that “[e]ven trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid”); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 345 (1952) (Jackson, J., dissenting) (observing, with regard to a statute criminalizing knowing violations of I.C.C. regulations, “I do not suppose the Court intends to suggest that if petitioner knew nothing of the existence of such a regulation its ignorance would constitute a defense”); Rex v. Bailey, 168 Eng. Rep. 651 (1800) (L.R.C.C.R.) (upholding conviction even though accused was at sea both when the statute was enacted and when he violated its prohibition); Rex v. Esop, 173 Eng. Rep. 203 (1836) (upholding conviction even
The strength of the traditional presumption that the criminal law is known
is reflected in the narrow way in which traditional criminal law responds to a
claim that the meaning of a prohibition is unclear, that is, the void-for-
vagueness doctrine. In deciding whether a criminal statute is acceptably clear
in its command, courts have never required actual notice; the inquiry is not
retrospective, focused on the understanding of the accused.84 The inquiry is
instead prospective, deciding whether the criminal prohibition in question is
sufficiently clear by balancing potential unfairness85 against the apparent need
for such a provision as written.86 In its vagueness analysis, the Supreme Court
has thus considered the nature and importance of the governmental interest ad-
vanced by the statute in question,87 the feasibility of greater precision in the

84 See, e.g., Rose, 423 U.S. at 49–53; Grayned v. City of Rockford, 408 U.S. 104, 108–14
(1972); Lanzetta v. New Jersey, 306 U.S. 451, 453–58 (1939). In none of these decisions,
respectively reviewing vagueness challenges to statutes forbidding “crimes against nature”
(applied to the act of cunnilingus), “willfully mak[ing] ... any noise or diversion which disturbs
or tends to disturb the peace or good order of [a] school session or class thereof,” and being
“known [as] a member of any gang consisting of two or more persons,” did the Supreme Court
make any reference in its notice analysis to the individual circumstances of the defendant or the
likelihood that he or she had actual notice of the meaning of the statute or ordinance in question.
See Jeffries, supra note 78, at 206–12.

85 Included in this notion of unfairness is the concern that the statute may be creating a trap
for the unwary by “criminaliz[ing] a broad range of apparently innocent conduct,” see, e.g.,
Liparota v. United States, 471 U.S. 419, 426 (1985), as well as setting up the possibility of
antigang loitering ordinance because of the virtually unlimited discretion it afforded police in
determining its reach).

(Frankfurter, J., dissenting) provides about as thoughtful yet concise a description of this tension
between concern for fair notice and need for broad enforcement as exists. See also Jeffries,
supra note 78, at 196–97.

(observing that the challenged I.C.C. regulation was the result of longstanding congressional
concern for “protecting the public against the hazards involved in transporting explosives”) with
Papachristou v. City of Jacksonville, 405 U.S. 156, 161–62 (1972) (observing that the
statute’s provisions, as well as the possibility that the statute’s uncertain provisions might be discriminatorily applied, or have an adverse impact on fundamental rights. When analyzing vagueness claims aimed at statutes codifying traditional crimes, the Court has tolerated considerable ambiguity, relying on the common law origins of these prohibitions and their longstanding and continuing utilization in holding that their terms are acceptably clear. Even here, the Court’s tolerance for lack of clarity has limits, and the Court has thus struck down vagrancy laws when faced with considerable evidence of their arbitrary and discriminatory enforcement. However, absent a compelling showing that an apparently vague traditional crime is unfair or arbitrarily enforced, the Court seems comfortable with the presumption that the command of crimes rooted in the common law is understood.

This presumed knowledge of the criminal law is more problematic when applied to regulatory crime. If the question is whether the accused knew that

Elizabethian social conditions which gave rise to vagrancy laws such as the ordinance there in question “no longer fit the facts”).

Compare United States v. Petillo, 332 U.S. 1, 7–8 (1947) (stating “[c]learer and more precise language might have been framed by Congress to express what it meant by ‘number of employees needed.’ But none occurs to us . . . effectively to carry out what appears to have been the congressional purpose.”) with Connally v. Gen. Constr. Co., 269 U.S. 385, 393–95 (1926) (noting, in holding “current rate of wages” unduly vague as a criminal mandate, that “the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the legislature meant one thing rather than another . . . .”).

Compare Kolender v. Lawson, 461 U.S. 352, 355–58 (1983) (striking down as unconstitutionally vague a statute requiring loiterers and wanderers to provide “credible and reliable” identification on demand of the police, noting that a person stopped under the statute is entitled to continue to walk the public streets “only at the whim of any police officer who happens to stop that individual . . . .”) with Grayned, 408 U.S. at 108, 113 (upholding ordinance forbidding the making of noise which “tends to disturb the peace or good order of [a] school session,” noting that the “antinoise ordinance does not permit punishment for the expression of an unpopular point of view, and it contains no broad invitation to subjective or discriminatory enforcement”).

Compare Smith v. Goguen, 415 U.S. 566, 572–73 n.10 (1974) (observing, in striking down statute punishing one who “treats contemptuously the flag of the United States,” that when a prohibition “is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts”) with Rose v. Locke, 423 U.S. 48, 50 n.3 (1975) (observing, in upholding statute forbidding “crimes against nature,” that “[t]his is not a case in which the statute threatens a fundamental right such as freedom of speech so as to call for any special judicial scrutiny” (citation omitted)).

See, e.g., Rose, 423 U.S. at 50–53, discussed supra notes 83, 84 & 90.

the regulatory crime existed, this presumption of knowledge has raised few problems, given that with very few exceptions modern laws, ordinances and regulations which provide for criminal sanctions are published. However, the meaning and application of such regulatory crimes present more compelling notice issues, and virtually from the beginning of their widespread enactment, they were challenged as unduly vague.

The claim was that in criminalizing the violation of regulations, many of which couched their mandates in such relative terms as "unjust or unreasonable," "usual," "practicable and ... feasible," and "fair ... and ... normal," Congress enacted a standard of criminality that was too indefinite. In responding to these vagueness claims, the Supreme Court explicitly recognized the balance between fairness to those likely subject to these laws and the need to prevent the harms at which they were aimed. When the Court upheld such statutes, for the most part it relied either on the inclusion in the statute of terms with accepted common law meaning or on the rules' application to entities engaged in specialized activities. Given such a basis for under-

93 See LaFave & Scott, supra note 2, at 416, for a concise discussion of this issue.
94 See, e.g., United States v. Cohen Grocery Co., 255 U.S. 81, 89–93 (1921). In Cohen Grocery, defendant's argument was couched as a violation of its right to be informed of "the nature and cause of the accusation" under the Sixth Amendment, but the claim was essentially one of statutory vagueness and was so treated by the Court. Id.
95 See, e.g., Omaechvarria v. Idaho, 246 U.S. 343, 348 (1918).
98 See, e.g., Omaechvarria, 246 U.S. at 346, 348 (in upholding against a vagueness challenge a statute criminally forbidding sheep to graze "upon any range usually occupied by any cattle grower," the Court observed that "[m]en familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it."); Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502 (1925) (noting, in upholding against a vagueness challenge a statute criminally punishing the failure to label or mislabeling of kosher meat, that "the evidence, while conflicting, warrants the conclusion that the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing"). See also, Connally v. Gen. Constr. Co., 269 U.S. 385 (1926). The Court in Connally summarized the vagueness approach thusly:

The precise point of differentiation in some instances is not easy of statement; but it will be enough for present purposes to say generally that the decisions of the court, upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, or, as broadly stated by Mr. Chief Justice White in United States v. Cohen Grocery Co., that, for reasons found to result either from the
standing, either through the language of the common law or through terms with meaning to those choosing to participate in the regulated activity, the Court reasoned that the lack of certainty in the regulatory terms was not unfair to those regulated. Central to this constructive notice analysis, of course, was the obvious but not clearly articulated premise that the persons subject to such criminal laws appreciated the nature of their conduct, that they knew they were engaging in a particular field of activity. Indeed, the Court in these decisions took particular note if the statute which criminalized violation of a regulation required that the violation be "knowing" or in some manner intentional. It was careful, however, to be clear that in this notice analysis it was not reading the statutes to require proof that the law was actually known. Such a reading would run afool of the ignorance-of-the-law principle.

A good example is Boyce Motor Lines, Inc. v. United States, decided the same year as Morissette. If in Morissette the Court made plain its continuing fidelity to blame-based mens rea as a presumptive component of traditional crimes, in Boyce the Court reaffirmed its commitment to the opposite presumption regarding knowledge of the law, even in the face of a relatively compelling void-for-vagueness, fair notice claim arising out of a regulatory crime. In doing so, the Court laid the groundwork for scienter as an instrument of notice.

Defendant Boyce Motor Lines was a trucking company indicted for knowingly violating an Interstate Commerce Commission regulation requiring that truckers hauling dangerous cargo such as explosives "avoid, so far as

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99 See, e.g., Boyce, 342 U.S. at 341-42 (noting that the trucking industry, which was subject to the regulations in question, had "participated extensively" in their formulation and drafting).

100 See, e.g., Omaechevarria, 246 U.S. at 346, 348 (holding that persons "familiar with range conditions" would have sufficient notice as to what is meant by "range usually occupied by any cattle grower"); Nash v. United States, 229 U.S. 373, 376-77 (1913) (holding that the "common law as to the restraint of trade" was incorporated into, thereby helping to narrow and clarify, the Sherman Act's criminal provisions).

101 See, e.g., Boyce, 342 U.S. at 342.

102 See, e.g., Hygrade, 266 U.S. at 501 (1925) (rejecting vagueness challenge to a statute forbidding fraudulent sale of non-kosher meat as "kosher," noting that any uncertainty in the term "kosher" casts no unfair burden on meat sellers "since [the statutes] expressly require that any representation that a product is kosher must not only be false but made with intent to defraud").

103 See, e.g., Boyce, 342 U.S. at 342 n.15.

104 342 U.S. 337.
practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." Boyce's drivers on three occasions had driven loads of explosives from upstate New York to Brooklyn via the Holland Tunnel, in which the last of these trips terminated with an explosion. The defendant trucking company argued that the regulation had no ascertainable meaning, at least in the context of driving explosives into Brooklyn, located as it is on Long Island. In rejecting that claim, the Court looked to the criminal statute's knowledge requirement, observing that, to convict, the government would not only have to prove there was a practicable safer route than that driven, but also that the trucking company either (1) knew of that safer alternative and deliberately chose the tunnel or (2) "willfully neglected to exercise its duty under the Regulation to inquire into the availability of such an alternative route." 

Although the Court was not explicit as to why this knowledge requirement should matter, its relevance in answering a vagueness claim is apparent, and it says much about the Court's approach to notice and the relationship of that approach to the ignorance-of-the-law principle. Certainly, proof that the accused trucking company knew the specific violative character of its act, i.e., that there was a practicable safer route which it deliberately declined to take, would undercut an argument that the trucking company was unfairly surprised when the regulation was interpreted to forbid driving the more dangerous route. This point is straightforward; the act itself, the character of which the accused knew, bespeaks its potential criminality. However, the analysis is less straightforward if the prosecution seeks to prove a knowing violation of the regulation by showing that the defendant willfully neglected a duty imposed by that regulation. In such a case, it would seem that ignorance of the duty "willfully neglected"—a duty imposed by the criminal law—would be a defense; that is, that ignorance of the law would excuse.

But there is another way to read the Court's reference to a trucking company's "duty under the Regulation to inquire into the availability of such an

105 Id. at 339.
106 Id. at 342.
107 Justice Jackson made this point in his dissent, an argument which the Court sought to counter in a footnote by pointing out that "[t]he officers, agents, and employees of every motor carrier concerned with the transportation of explosives and other dangerous articles are required [by I.C.C. regulations] to 'become conversant' with this and other regulations applying to such transportation." Id. at 342 n.15.
alternative route,"108 and that is to see that duty as the formal recognition of a norm in the industry. Any trucker hauling explosives in interstate commerce should know the safest routes and the duty to use those routes, not because the criminal law or I.C.C. regulations require it, but because as an empirical and normative matter it is part of trucking to know the safest route for hauling explosives. Thus, in the same way that a trucking company that knew of a safer route and deliberately avoided it must—empirically and normatively—understand the possible criminality of its act, so too for the trucking company who did not bother to see if there was a safer route. Both trucking companies, by nature of their specialized activity, were on notice that their conduct verged on criminal, and neither could complain that the regulation was not crystal clear in its prohibition.

The Court’s constructive notice analysis in Boyce says much about the strength of the ignorance-of-the-law principle even with regulatory crimes. It would have been a more straightforward response to the vagueness argument if the Court had read the statute to require the government to prove that an accused was aware of the regulation and its meaning.109 Certainly the wording of the statute imposing criminal penalties was amenable to such an interpretation, providing that “[w]hoever knowingly violates any [pertinent I.C.C.] regulation shall be [fined and/or imprisoned].”110 But as Justice Jackson said in his dissent, “I do not suppose the Court intends to suggest that if petitioner knew nothing of the existence of such a regulation its ignorance would constitute a defense.”111 Rather, the Court read “knowingly violates any such regulation” to mean that the prosecutor must prove the accused knew the facts which constituted the violation—knew the character of his conduct—not the law which prohibits that act.112

That was the way such language in the past had been read,113 that is, consistent with the principle that ignorance of the law is no excuse. In such specialized contexts, where knowledge of “the rules” is fairly attributable to those regulated, the principle makes sense. The notice provided by the actor’s conduct is sufficient to give warning of its potential criminality, even for “regulatory crimes,” and as long as the actor is at some level aware of the nature of

108 Id. at 342.
109 This, indeed, is the reading which Justice Jackson in his dissent accused the majority of adopting. See id. at 345 (Jackson, J., dissenting).
110 Id. at 339 n.3 (majority opinion).
111 Id. at 345 (Jackson, J., dissenting).
112 See id. at 342 (majority opinion), 345 (Jackson, J., dissenting).
113 See id. at 345.
that conduct, sufficient notice of the prohibition follows. Where, however, the accused could not be said to be aware of the nature of his conduct, at least insofar as it relates to the criminal regulation, fair warning becomes a real issue, not just concerning the meaning of a regulatory crime’s provisions but ultimately concerning its very existence. Such circumstances are surely rare, but the Court found them in *Lambert v. California*, the one case in which the Court held that due process required proof of the defendant’s actual notice of the criminal prohibition as a predicate to her conviction.

*Lambert* – The Emergence of Notice-Based Mens Rea

In *Lambert*, the Supreme Court reviewed the conviction of Virginia Lambert for failing to comply with a Los Angeles city ordinance that required any person with a prior felony conviction to register with the police if present in Los Angeles for a period of more than five days. Ms. Lambert, a seven-year resident of Los Angeles, concededly had a prior felony conviction and had not registered as required by the ordinance. Her defense was not that the ordinance was too vague to understand but that she was completely unaware of it and its requirement that she register—an ignorance-of-law defense which the trial court summarily rejected. The Supreme Court reversed the conviction, holding that, in the circumstances presented by that case, due process required proof that Ms. Lambert had actual knowledge of her duty to register before she could be convicted.

Although the basis for and limits of its holding are anything but clear, the Court appeared to rely on three circumstances in reaching its conclusion that

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115 Id. at 226.
116 Id. at 227.
117 Id. at 229–30.
118 For a sampling of commentator reaction to *Lambert*, see, e.g., Dressler, supra note 42, at 184–86 (focusing on the Court’s concern that “there was nothing to alert Ms. Lambert or a reasonable person to the need to inquire into the law”); George P. Fletcher, *Rethinking Criminal Law* 424–25 (2000) (analyzing *Lambert* as a mistake-of-law case in which, because the statute punished conduct which did not carry with it notice of criminality, knowledge of the law was required); Hall, supra note 3, at 355–56, 404 (suggesting that in certain petty offenses which would otherwise be strict liability and for which normal moral or cultural understandings do not provide adequate notice, *Lambert* holds that “knowledge of the law is essential to culpability; hence the doctrine of *ignorantia juris* should not be applied there”); LaFave & Scott, supra note 2, at 208 (focusing on the omission aspect of *Lambert*, reading the case to require knowledge of the legal duty to act only in “omissions involving duties of a highly unusual and unforeseeable nature” and not in “all other [omission] cases”); Williams, supra
knowledge of the law was constitutionally required: (1) that Ms. Lambert’s conduct was “wholly passive—mere failure to register[,]”\(^{119}\) (2) that “circumstances which might move one to inquire as to the necessity of registration were completely lacking[,]”\(^{120}\) and (3) that unlike the typical registration statute, which is part of a regulatory scheme applicable to some sort of business, “th[is] ordinance is but a law enforcement technique designed for the convenience of law enforcement agencies . . . .”\(^{121}\) The Court used the rhetoric of both fair notice and blameworthiness—observing that such circumstances combined to deny Ms. Lambert “an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it”\(^{122}\) and, quoting Holmes, 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”\(^{123}\)—in holding that knowledge of the law must be proved before a conviction consistent with due process could be had.

The case is usually cited as an example, admittedly rare, of the constitutional limits of the ignorance-of-the-law principle.\(^{124}\) So viewed, however, its

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\(^{119}\) Lambert, 355 U.S. at 228.

\(^{120}\) Id. at 229.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) Id. Forecasting its later blurring of blame and notice, or perhaps continuing this analytic imprecision, see Packer, supra note 118, at 133, the Court went on to identify the severity thus imposed as “the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it.” Lambert, 355 U.S. at 229.

\(^{124}\) See sources cited supra note 118. See, e.g., United States v. Menteer, 350 F.3d 767, 772 (8th Cir. 2003) (characterizing Lambert as the application of “a narrow exception to the general maxim ‘ignorance of the law is no excuse,’” grounded in “the defendant’s wholly passive conduct . . . .”); United States v. Emerson, 270 F.3d 203, 216 (5th Cir. 2001) (noting “that [t]he sweep of the Lambert case has been limited by subsequent decisions of the Supreme
limits are not apparent. As Justice Frankfurter pointed out in a forceful dissent, the Court's heavy reliance on the passive nature of Ms. Lambert's conduct would seem to call into question the constitutionality of applying the ignorance-of-the-law principle to many, if not all, crimes which punish failures to comply with statutory or regulatory obligations. Although the Court explicitly stated that it was not suggesting that ignorance of the law was a constitutionally required excuse in registration statutes which "pertain to the regulation of business activities," its assertion that this statute "is entirely different [because its violation] is unaccompanied by any activity whatever . . ." is elusive as a constitutional boundary between valid and invalid applications of the ignorance-of-the-law principle.

The problem is not with the Court's conclusion that convicting Ms. Lambert absent proof of her awareness of her statutory duty to register violates due process—it surely does. As a conceptual matter, however, the case is less about the constitutional limits of punishing someone unaware of the criminal prohibition than it is about the due process limits on punishing a person who has no awareness, constructive or actual, of the nature or character of her conduct.

The unique situation which Lambert addresses is the one at which the notice aspects of choosing to engage in conduct of a particular character and of choosing to break the law intersect. As noted above, mens rea, or more accurately an actor's awareness of the nature of her conduct which mens rea requires, has a notice dimension. Blame, as developed above, is attributable to an actor for two reasons: (1) the evil nature of the conduct and (2) her choice, at some level, to engage in such conduct. Any requirement that mens rea be proven as the vehicle by which blame is attributed to an actor for her conduct carries with it a guarantee that the actor has elected to some extent to engage in conduct which is antisocial. Those crimes without a mens rea requirement, public welfare or regulatory crimes, typically occur in a highly regulated context, and the actor's choice to engage in that field of conduct carries a similar guarantee. Either way, the choice to act provides a fundamental baseline of notice without which punishment for conduct is unacceptable. So much seems required by the free-will basis of criminal punishment, whether primarily utilitarian or retributivist in perspective. Similar concerns seem to underlie the fundamental requirement of a voluntary act as a prerequisite to criminal

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125 Lambert, 355 U.S. at 229.
126 Id.
punishment.\textsuperscript{128} There is, however, a conceptual difficulty with characterizing a failure to act as chosen conduct unless we have some sense that the "actor" understands, constructively or actually, she has a duty to so act. To be sure, at the time of such a failure to take a particular course of action, the "actor" presumably is engaging in some course of chosen conduct which does not include the required action. However, it is difficult to say, absent her appreciation of at least the possibility that she should be doing some particular thing, that her failure to do it is in any meaningful sense chosen.

That does not mean that every criminal omission requires proof that the "actor" knew of the duty to act before we can characterize her conduct as chosen for constitutional purposes. In most such cases we can fairly presume such awareness. Where the statutory duty to act is tied to some specialized or focused activity in which a person is engaged, as in \textit{Boyce}, it is not unfair or violative of our fundamental notions of choice as a basis for criminal punishment to charge her with constructive knowledge of that duty and then to punish her failure to comply as a chosen act, even if she did not actually know of the duty. Her choice to engage in the related, and often closely regulated, field of activity is enough to satisfy this basic requirement of chosen conduct.\textsuperscript{129}

\textsuperscript{128} While this core predicate to criminal liability has been the subject of renewed interest and thoughtful analysis, see, e.g., MICHAEL S. MOORE, \textit{ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW} (1993); Mueller, \textit{supra} note 38, at 1104 (celebrating, prematurely as it turns out, Lambert as the Court's signal that "[a]bsolute criminal liability is beginning to end in America"); Ron Shapira, \textit{Structural Flaws of the "Willed Bodily Movement" Theory of Action}, 1 BUFF. CRIM. L. REV. 349 (1998); A.P. Simester, \textit{On the So-Called Requirement for Voluntary Action}, 1 BUFF. CRIM. L. REV. 403 (1998). Symposium, \textit{On the Moral Irrelevance of Bodily Movements}, 142 U. PA. L. REV. 1443 (1994). Professor Dressler makes the point succinctly: "Criminal punishment, with its attendant pain, stigma and formal condemnation of the offender, should only be imposed on those who deserve it, i.e., on those who act as the result of free choice. In the absence of a voluntary act, there is no basis for social censure." DRESSLER, \textit{supra} note 42, at 99.

\textsuperscript{129} In a similar vein, omission cases in which the duty to act arises from the "actor's" status and the criminal liability is based on her failure to prevent a criminal harm to another, as in the case of the parent who fails to care for her child with the result that the child dies, presents no problem of notice even absent a showing of actual awareness of the duty to act. The offending parent will not be permitted to defend the ensuing homicide charge on the basis that she was ignorant of her legal duty to care for the child. Such cases, properly understood, are not omission cases at all. Rather, in the example above, the parent is being punished for causing the prohibited harm because her course of conduct as a parent expectably includes, from both a normative and empirical perspective, protecting the child from that harm. When her parenting results not in protection but in death, then she is criminally punishable under the homicide prohibition for causing it. See \textit{Arthur Leavens, A Causation Approach to Criminal Omissions},
The same cannot be said for Ms. Lambert or others subject to a statutorily imposed duty to act which bears no relationship either to basic societal norms of conduct or to a specialized field of activity in which she chose to engage and about which she presumably had some particularized knowledge. Absent such a connection between "actor" and duty to act, it is impossible to fairly say that her failure to comply with the duty was in any sense chosen unless some actual awareness of the duty is shown. The duty, then, becomes a conceptual part of the conduct, and the actor's awareness of that duty is necessary to a finding that the punishable conduct was "chosen."

This is the analytic thread which connects the three factors noted by Justice Douglas in Lambert and which at the same time limits the due process principle which the Court articulates. The ordinance in Lambert was entirely different from registration statutes that are part of a regulatory scheme applicable to a business because the latter statutes impose duties of registration on persons or entities engaged in specialized activities connected to the duty of registration. Such persons presumably have, or ought to have, some awareness of those duties. The Los Angeles ordinance applied to Ms. Lambert had no such connection to her or to anyone to whom it might be applied. Rather, it was a tool of police convenience. In the absence of such a connection between the duty and the persons subject to it, Ms. Lambert's failure to register was, as the Court

76 CAL. L. REV. 547, 572–77 (1988). But even if we characterize such cases as omission cases in which the failure to act is punishable because of a violation of the legal duty of a parent to care for her child, presuming an awareness of that duty on the part of a parent does not offend basic notions of fair notice. Quite simply, a parent ought, again both normatively and empirically, to appreciate that she is responsible for the basic welfare of her child.

130 See Graham Hughes, Criminal Omissions, 67 YALE L.J. 590 (1958). Although Professor Hughes does not characterize duty as a part of "omissive conduct" for purposes of the voluntariness inquiry, he does point out the importance of the actor's awareness of statutorily imposed duties to the question of whether punishment can be fairly imposed for their violation. Id. at 601–11. See also LAFAVE & SCOTT, supra note 2, at 208.

stated, "wholly passive . . . . It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." Unfortunately, the Court did not speak explicitly in terms of lack of "conduct notice," that is conceptually what the Court’s use of the term "passive" implicates. So seen, the Court’s holding that Ms. Lambert’s knowledge of the legal duty must be proven before she may be convicted is important not simply as a due process limit on the ignorance-of-the-law principle, but more fully as a conceptual means of ensuring that her conduct of omitting to act satisfied the fundamental notice requirement that it in some sense be chosen.

_Lambert_, then, is not in derogation of the presumption that the criminal law is known. It is rather a part of the Supreme Court’s constructive notice approach to notice problems presented by non-traditional crimes, an approach which goes to great length to preserve the presumption that the criminal law is known and its correlative principle that ignorance of the law does not excuse. Such constructive notice depends, of course, on actors’ awareness of the conduct in which they are engaging. When the conduct from which notice flows is a broad activity, such as trucking in _Boyce_ or retailing kosher meats in _Hygrade Provision Co._, _mens rea_ is not implicated. However, when the notice flows from the particular conduct being punished, such as stealing or converting government shell casings in _Morissette_, this constructive notice depends on the actors’ awareness of the nature of their conduct. Such awareness, in turn, is assured by the requirement that _mens rea_ be proved as the blameworthiness element of the crime.

This overlap of blame and notice in the _mens rea_ requirement causes no tension in traditional crime. Blame is an intrinsic part of these crimes, and _mens rea_ is presumed to exist even if the legislative enactment of the crime does not provide for it. Constructive notice thus automatically flows, and the presumed knowledge of the law and its correlative principle that ignorance of it does not excuse causes no rub. However, nontraditional regulatory crimes do not necessarily impart blame, and thus _mens rea_ is not presumptively a part of those crimes. If a legislature is concerned about providing for notice beyond the modest constitutional baseline implicit in _Lambert_, it can do so in two ways. It can provide for actual notice, that is, that knowledge of the law must be proven and thus that ignorance of the law is an excuse. Alternatively, a legi-

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slature can provide for constructive notice, requiring proof that the actor had some specified level of awareness concerning the nature of her conduct and its circumstances, thus providing assurance that she should have understood that she "sail[ed] close to the shore of questionable conduct."

Fidelity to the above-outlined paradigm, in which courts presume legislatures operate, dictates that such legislative intent to provide for actual notice—i.e., for a mistake-of-law defense—must be manifest. Legislative silence or even ambiguity concerning a mistake-of-law defense points away from, not toward, such a requirement of actual notice. The question of when a legislature can be said to have intended to provide for constructive notice through a notice-based scienter element is more difficult as a practical matter, although the conceptual guidelines are relatively clear. Statutory silence concerning such notice-based mens rea is not entitled to the presumption of mens rea accorded traditional crimes. By definition there is no blame to support such a presumed scienter requirement, and thus more is needed. The question is what.

In the two decades following Lambert, the Supreme Court fleshed out, if somewhat unevenly, this limited but important role of scienter in addressing notice concerns with respect to regulatory crimes. The conceptual distinction in these opinions between blame and notice as a basis for scienter remained firm, even if the Court's rhetoric was occasionally somewhat more loose.

FREED, INTERNATIONAL MINERALS, PARK AND GYPSUM—FLESHING OUT NOTICE-BASED MENS REA

After thirteen years of silence on the issue of scienter in regulatory crimes, in 1971, the Court decided two important cases, United States v. Freed, involving a mistake-of-fact defense, and United States v. International Minerals & Chemical Corp., involving an ignorance-of-the-law defense. Justice Douglas wrote for the Court in each, and, although his opinions were less clear than one might have wished, in each he adhered to the doctrinal construct which distinguished between notice and blame as a basis for interpreting scienter provisions.

In Freed, defendant was charged with possessing hand grenades in violation of the National Firearms Act, which by its terms required that specified, mostly military weaponry, including hand grenades, be registered in the

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National Firearms Registration and Transfer Record\textsuperscript{139} and made it unlawful for a person "to receive or possess [such a weapon] which is not registered to him."\textsuperscript{140} Although the Act did not explicitly require proof of any intent or knowledge, Freed claimed that the government was required not only to prove that he knowingly possessed the weapon but also that he knew that it was not registered to him.\textsuperscript{141}

In addressing Freed's claim that an implicit knowledge requirement should apply to the element of nonregistration,\textsuperscript{142} Justice Douglas began by noting the difference between statutory silence concerning \textit{mens rea} in a prohibition with common law roots and one "in the expanding regulatory area involving activities affecting public health, safety and welfare."\textsuperscript{143} While the former carried with it "[t]he presence of a 'vicious will' or \textit{mens rea}," the latter "was in a different category."\textsuperscript{144} Within this nontraditional category of crimes, Douglas made a further distinction. At one extreme he put cases such as \textit{Lambert}, in which the prohibition punished acts that by their nature or the circumstances in which they occurred could not be said to "alert the doer to the consequences of his deed."\textsuperscript{145} In such cases, knowledge of the act's nature, which in \textit{Lambert} translated to knowledge of the duty to act, must be proven in order to assure the minimal notice required by due process. \textit{Freed} did not, in Douglas's view, present such a case. Rather it was in that category of regulatory crimes which, like adulterating or misbranding drugs or selling narcotics, punish violators

\textsuperscript{139} Freed, 401 U.S. at 603 n.3 (citing 26 U.S.C. § 5812 (1968) (current version at 26 U.S.C. § 5812 (2000))).

\textsuperscript{140} Id. at 607 (citing 26 U.S.C. § 5861(d) (1968) (invalidated by United States v. Vest, 448 F. Supp. 2d 1002 (S.D. Ill. 2006))).

\textsuperscript{141} Freed, 401 U.S. at 607.

\textsuperscript{142} The focus of the case was on the registration element. Although as noted the Act contained no term of intent or knowledge, the government accepted that the statute required proof that an accused knew that he possessed a firearm before he could be convicted. \textit{Id}. at 607. The case thus proceeded on the unexamined assumption that the government had to prove that Freed knowingly possessed the items in question and that he knew they were hand grenades. \textit{Id}. at 612 (Brennan, J., concurring). The precise content of that knowledge requirement was not at all clear. Did the Act require proof that an accused knew he possessed a generic firearm, that is some kind of weapon, or that he knew he possessed a firearm which had the characteristics bringing it under the Act's registration requirement? This issue, which was the crux of \textit{Staples v. United States}, 511 U.S. 600 (1994), discussed \textit{infra} at pp. 58–66, was not important in \textit{Freed} because the hand grenades which Freed was charged with possessing were plainly recognizable as such.

\textsuperscript{143} Id. at 607–08.

\textsuperscript{144} Id. at 607.

\textsuperscript{145} Id. at 608 (citation omitted).
“though consciousness of wrongdoing be totally wanting.” Lack of mens rea in such cases was acceptable in Justice Douglas’s view because the character of the prohibited conduct carried with it adequate notice of potential criminality and thus no further mens rea requirement need be inferred. That Justice Douglas, and the Court, was premising its mens rea analysis for regulatory crimes on notice concerns is plain from his words:

The present case is in the category neither of Lambert nor Morissette, but is closer to Dotterweich. This is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons, no less dangerous than the narcotics involved in United States v. Balint, where a defendant was convicted of sale of narcotics against his claim that he did not know the drugs were covered by a federal act.

The Court accordingly held that no knowledge should be inferred in the absence of an explicit statutory requirement of knowledge applicable to the element that the hand grenades were unregistered. Although Justice Douglas was characteristically offhand in his analysis, the basis for the holding falls right in line with the blame/notice distinction developed above. He reasoned in essence that the common law presumption of such mens rea was not applicable to this crime and notice concerns neither required nor suggested such a mens rea term for this statute.

While Freed was a mistake-of-fact case, thereby at least facially subject to the traditional blame paradigm with its presumption of mens rea,

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146 Id. at 609 (quoting United States v. Dotterweich, 320 U.S. 277, 284 (1943)).
147 Id. at 609 (citation omitted).
148 The fact, or attendant circumstance, about which Freed was assertedly mistaken was that the grenades were not registered under the National Firearms Act. Id. at 605. Freed’s ignorance of their nonregistration was not ignorance “of the law,” notwithstanding the fact that it was the Act which required their registration in the first place. Id. at 606. His claim was not that he was ignorant of the law’s command to him—that he not possess an unregistered firearm. Such ignorance of the law defining the offense could not excuse, at least absent an explicit provision providing for such a defense. Id. Rather, his potential claim was that he did not know that the grenades had the characteristics of being unregistered, an intrinsic albeit legal characteristic of the grenades which he as a possessor was powerless to alter given that the statute required the grenades’ registration before he possessed them. Id. Because the mistake which he argued the government must disprove was one “of fact,” Freed did not run headlong into the ignorance of the law is no excuse principle. Id.
International Minerals involved an ignorance-of-the-law defense. International Minerals and Chemical Corporation was charged by information with shipping sulfuric and hydrofluosilic acid in interstate commerce without indicating on the shipping papers that what it was shipping was a “corrosive liquid” in violation of an Interstate Commerce Commission regulation requiring such labeling. Congress, by statute, had authorized the I.C.C. to formulate such regulations to safeguard the transportation of dangerous liquids, and provided that anyone who “knowingly violates any such regulation” was subject to imprisonment or a fine. Defendant argued that the language of the statute—“knowingly violates any such regulation”—explicitly provided for an ignorance-of-the-law defense. The Supreme Court disagreed, a decision that underscored the continuing, post-Lambert viability of the traditional presumption that the law is known to all.

Defendant’s argument had appeal. Although ignorance of the law is ordinarily not a defense, Congress can override that presumption and require proof of a violator’s knowledge of the law as an element of the offense. By providing that whoever “knowingly violates any such regulation,” the argument went, that is exactly what Congress intended to do.

Id. at 559 (noting 49 C.F.R. § 173.427 (1960)).
Id. (citing 18 U.S.C. § 834(a) (1964) (repealed 1979)).
Id. (citing § 834(f)).
Id. at 565.
While there are certainly parallels between International Minerals and Boyce, International Minerals was not just Boyce redux. First, as the Court in International Minerals pointed out, Boyce involved a constitutional void-for-vagueness claim whereas International Minerals turned on the interpretation of the statute. Int’l Minerals, 402 U.S. at 560–61. Second, on the interpretative question, there was language in International Minerals legislative history that arguably supported the defendant’s reading of the statute. Several courts of appeals had so interpreted the statute, holding that it provided for an ignorance-of-the-law defense, id. at 565 (Stewart, J., dissenting), and in response to these decisions the I.C.C. had asked Congress to amend the statute, either deleting the term “knowingly” altogether or replacing it with the phrase, “being aware that the Interstate Commerce Commission has formulated regulations for the safe transportation of explosives and other dangerous articles.” Id. at 567. The Senate passed the latter version of the suggested amendment, but the House did not, expressing concern that removing “knowingly” from the statute and instead requiring proof only of a broader awareness of the I.C.C.’s regulatory activity would in effect make the statute one of absolute liability. Id. at 568. This it was unwilling to do, and “knowingly” was thus restored to the statute. The argument that the statute meant what it seemed to say, i.e., that to be guilty one must know that one’s conduct is in violation of an I.C.C. regulation, thus had apparent though indirect support in the statute’s then most recent legislative history.
Douglas and the five other justices rejected this argument, reading the statute’s “knowingly” term to require proof only that a violator knew that it was shipping dangerous materials. In Douglas’s eyes, such knowledge of the prohibited act’s character—shipping dangerous acids—provided ample notice to those engaging in that conduct that they risked criminal regulation. As with the possession of narcotics in *Balint* and of hand grenades in *Freed*, Douglas reasoned that “[t]he probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.”

For the majority, then, the ignorance-of-the-law principle was too strong to be overcome by statutory language (supported by legislative history) which, although susceptible to an interpretation providing for an ignorance-of-the-law defense, could also be read to provide for a more conventional term of scienter applicable to conduct and its circumstances as opposed to the law itself. This latter interpretation assured proof that violators knew the nature of their conduct—shipping corrosive chemicals. Such a reading of “knowingly violates any such regulation” had no roots in blame but rather addressed Congress’s apparent notice concerns by assuring conduct notice while at the same time providing the relatively strict enforcement necessitated by the potential danger to the public that the shipment of hazardous substances involves.

In a concern that reverberates in the Court’s later opinion in *Liparota*, Justices Stewart, Harlan and Brennan pointed out in the dissent that for commercial shippers like International Minerals, such notice would probably suffice. However, for the little guy—the one time “casual shipper”—it would not. It was to protect these potential violators that, in the dissenters’ view, Congress meant to create an ignorance-of-the-law defense. Of course, the punishment of blameless conduct always carries the possibility of convicting the unwarned; however, that is only part of the notice question. Unaddressed by the dissenters’ concern for the casual shipper is the assessment of the need for a broad net, that is, a prohibition without nettlesome excuses difficult to overcome by proof. Congress, in dealing with a potential harm, might decide

155 *Id.* at 560. The legislative history, as Douglas read it, marked not an endorsement of an ignorance-of-the-law defense but rather a rejection of the strict liability which would follow the deletion of the term “knowingly.” *Id.* at 563. Although he recognized that Congress could, as it had in the past, *id.* at 564, carve out an exception to the ignorance-of-the-law principle, in his view the legislative intent to so depart from this basic principle had to be more explicit before he was prepared to recognize such a defense. *Id.*

156 *Id.* at 565.

that protection of the public welfare requires it to impose through a regulatory crime a duty of absolute liability, i.e., a duty that tolerates no mistakes or ignorance, even the reasonable ones that a negligence standard would recognize as an excuse. This would be true strict liability, something which neither Freed nor International Minerals approached.\(^{158}\)

Such a categorical approach to blameless criminality would have to find its constructive notice in the field of activity which was the subject of regulation and in which the actor was engaged, notice that is more problematic. Without proof that the accused knew, or even should have known, he was engaged in the prohibited conduct, there must be some assurance that the activity in which the accused engaged was sufficiently discrete and connected to the ultimate potential for harm that those involved can fairly be said to appreciate the possibility of criminal regulation. As noted, the Court in Balint\(^{159}\) and

\(^{158}\) Freed's holding that the National Firearms Act provided for strict liability on the element of registration was expressly premised on the actor's assumed knowledge that he possessed a dangerous piece of military weaponry (there, hand grenades), an understanding that seems fairly attributable to persons covered by the Act, whether or not they actually understood the nature of the particular forbidden weapon possessed. United States v. Freed, 401 U.S. 601, 606 (1971). And the statute at issue in International Minerals required proof that the shipper knew the nature of that which it was shipping, i.e., potentially hazardous chemicals. Int'l Minerals, 402 U.S. at 565. In Staples, the case in which the Court returned to the National Firearms Act thirty-three years after Freed to consider whether Congress intended strict liability concerning the nature of the weapon possessed, Justice Thomas made this point. Staples v. United States, 511 U.S. 600, 607 n.3 (1994) (discussed infra pp. 50–55). Certainly, neither statute approaches the point at which a plausible claim could be made that strict liability violates due process. See Alan C. Michaels, Constitutional Innocence, 112 HARV. L. REV. 828, 835–36 (1999).

Professor Michaels argues that strict liability is constitutional so long as the state constitutionally can punish the "non-strict-liability" elements of a crime. Id. at 835. Bigamy is Michaels's example. Surely after Lawrence v. Texas, 539 U.S. 558 (2003), a legislature could not constitutionally forbid simply getting married. More is required before the state can punish that conduct. Bigamy, of course, adds the element of being married to another. Michaels asserts that it would violate due process to impose strict liability for bigamy's element of "married to another"—that is, to punish for bigamy even if the actor exercised "perfect care," as much care as is possible, with respect to that element—because without that element, the legislature would be punishing no more than the act of getting married. Michaels, supra, at 836. There could be no valid claim of unconstitutional punishment in spite of "perfect care," i.e., of constitutional innocence, for either Donald Freed or International Minerals & Chemical Corporation. The legislature could constitutionally choose to punish, in the case of Freed, possession of designated military weaponry, and, in the case of International Minerals, transportation of hazardous chemicals in interstate commerce.

Dotterweich\textsuperscript{160} had apparently approved of such “field-of-activity” notice (as opposed to the “conduct notice” provided by notice-based scienter), but it was not clear after Lambert that the Court was prepared to continue to endorse such strict liability. In both Freed and International Minerals the Court had begun its analysis by observing that those respective cases did not involve true strict liability. \textit{United States v. Park,}\textsuperscript{161} on the other hand, did.

In Park, the Court revisited its controversial holding in Dotterweich,\textsuperscript{162} decided thirty-two years earlier. In Dotterweich, the Court held that the president of a corporate jobber that inadvertently mislabeled drugs purchased from the manufacturer and offered them for resale under its own label could be convicted for this mislabeling under the Food, Drug and Cosmetic Act\textsuperscript{163} simply upon proof that he, the president, had a “responsible share in the furtherance of the transaction which the statute outlaws.”\textsuperscript{164} The Dotterweich holding was based on the Court’s view of the Federal Food, Drug and Cosmetic Act as:

[A] now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.\textsuperscript{165}

So read, the Act imposes strict liability, relying on a violator’s participation in the regulated activity and that activity’s relation to the prohibited harm to provide notice that the violator is behaving criminally. As noted above, the Dotterweich court recognized that this reading of the statute would “doubtless” create hardship in cases in which “consciousness of wrongdoing be totally wanting,” but it deferred to what it saw as the congressional “balancing of relative hardships” between the potential for punishment of unknowing vio-

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\textsuperscript{160} United States v. Dotterwich, 320 U.S. 277 (1943).
\textsuperscript{161} 421 U.S. 658 (1975).
\textsuperscript{162} See, e.g., Hart, supra note 3, at 431–33 & nn.70, 73 (attacking Dotterweich as among those early, slip-shod mens rea opinions that do not “deserv[e] intellectual respect”). \textit{But see} Bilionis, supra note 46, at 1291–94 (defending Frankfurter’s opinion in Dotterweich as “reflect[ing] a strongly process-oriented understanding of the Constitution’s relationship with the criminal law”).
\textsuperscript{164} Dotterweich, 320 U.S. at 284.
\textsuperscript{165} \textit{Id.} at 280–81 (citing United States v. Balint, 258 U.S. 250 (1922)).
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lators and the need to protect "the innocent public" from mislabeled drug products.\textsuperscript{166}

Park was the chief executive officer of a nationwide retail food chain that had a warehouse in which federal inspectors found rodent droppings. Park was charged under the same Food and Drug Act with the interstate shipping of food that had been exposed to rodent contamination and thus "may have been rendered injurious to health."\textsuperscript{167} Although Park's conviction was based solely on his position as the CEO—there being no evidence that he was aware of the rodent contamination—the Court upheld his conviction. In his opinion for the Court, Chief Justice Burger reiterated the perceived public necessities which gave rise to this regulatory prohibition with its provisions which punished even those without consciousness of wrongdoing.\textsuperscript{168}

The Court again held that the Act imposed vicarious liability on corporate employees or officers who, by virtue of their relationship to the subordinate who actually committed the prohibited act or omission, were also deemed responsible for it.\textsuperscript{169} The Act, the Court held, imposed on such responsible corporate officials "not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur."\textsuperscript{170}

The Act thus imposed on corporate officials a positive duty of perfect care with respect to potentially harmful conditions wherever they may be, punishing failures to find and to remedy such conditions without any showing that these officials knew, or even should have known, that they existed. Three members of the Court, Justices Stewart, Marshall and Powell, dissented to this seemingly stark reading, arguing that the Act required proof that an accused such as Park was at least negligent with respect to the offending conditions.\textsuperscript{171} However, there was no requirement on the face of the statute that an offender be proven negligent in causing the contamination, and given the Act's regulatory nature, there was no basis to presume any level of scienter in the face of this statutory silence. A requirement that negligence, or any level of awareness concerning the nature of the forbidden conduct, be proven would have had to be inferred

\textsuperscript{166} Id. at 284–85.
\textsuperscript{168} Park, 421 U.S. at 668.
\textsuperscript{169} Id. at 670–71.
\textsuperscript{170} Id. at 672.
\textsuperscript{171} Id. at 658 (Stewart, J., dissenting).
out of a concern for notice. The presumption, however, runs against such an inferred constructive notice requirement, a presumption overcome only by the express or plainly inferable intent of Congress to correct the need/fairness balance.

Although the Chief Justice conceded that the Act’s absolute requirements of “vigilance and foresight . . . are beyond question demanding, and perhaps onerous,” the Court found no evidence of a congressional desire to require a notice-based element of negligence. The Act as written was not in the Court’s eyes overly unfair. Mr. Park was not in a position similar to Ms. Lambert, subject to criminal liability for failing to fulfill a statutory obligation—there, to register as a felon with the police—the existence of which she had no reason to suspect. Rather, as the Chief Justice pointed out, Park was a corporate executive who voluntarily assumed a position of responsibility and authority in an industry at the heart of legitimate public concern for its health and well-being. The need for the highest vigilance on the part of corporate officers like Park was great, and due to his voluntary participation in this field of endeavor, he stood fairly warned of the risks. The need/fairness balance suggested no reason to require the further notice to him which proof of negligence would have provided. Congress apparently chose not to provide for it, and the Court was willing to so read the statute, harsh though it seemed.

Three years later in United States v. United States Gypsum Co., the Court provided the counter balance, holding that the Sherman Act, at least in its criminal application, was intended by Congress to include a mens rea element—knowledge of the prohibited conduct’s likely anticompetitive effect. In reaching this result, the Court openly employed notice analysis (although occasionally cloaked in the rhetoric of blame), balancing fairness concerns against societal needs in antitrust enforcement.

In Gypsum, six major corporate producers of gypsum board, which together accounted for the vast majority of the national sales of this important building material, along with several executives of these companies were indicted and convicted of combining and conspiring to “restrain[ ] . . . interstate trade and commerce in the manufacture and sale of gypsum board,” in violation of section One of the Sherman Act. Specifically, indictments charged that the

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172 Id.
174 Id. at 444.
175 See id. at 427.
defendants and their unindicted co-conspirators engaged in a conspiracy to fix prices as well as the terms and conditions of sales and the methods of packaging and handling gypsum board. The core of the case was the charge that the conspirators contacted one another to fix and then specifically to verify prices and terms and conditions of sales. Although they disputed the extent of these contacts, particularly their price verification efforts, the defendants maintained that the price verifications which did occur were legal exchanges of price information the purpose of which was not to restrain trade but to enable them (1) to “meet the competition” as permitted under the Robinson-Patman Act and (2) to prevent customer fraud. The district court’s instructions to the jury purportedly recognized the Robinson-Patman “meet-the-competition” defense, but went on to charge that:

The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.

Such a legal presumption of intent, of course, amounts to strict liability.

In an opinion again by Chief Justice Burger, the Court reversed. The Court began with what it characterized as the criminal law’s “generally inhospitable attitude to non-mens rea offenses,” recognizing the common law tradition as the basis for this presumption of mens rea. However, once the Chief Justice turned specifically to the Shennan Act, his mens rea analysis was almost exclusively notice-based, even if his rhetoric was not.

At the core of the Chief Justice’s analysis was his recognition that the Sherman Act, even as judicially narrowed, punished conduct for the most

176 The two remaining major manufacturers of gypsum board, along with the Gypsum Association were named as unindicted co-conspirators. ld. at 427 n.2.
177 Id. at 427.
178 Id. at 428–29.
180 Id. at 429.
181 Id. at 430.
182 Id. at 438. The apparent reason for this analytic jump was the Court’s conflation of regulatory crime and strict liability. See id. at 442 n.18. The Court may also have been seeking the benefit of the traditional presumption of scienter, but its careful notice-based reasoning in support of its holding belies such an instrumental approach.
183 Section One of the Sherman Act provides in relevant part:
part by the economic results which it engendered. As the Chief Justice pointed out, on the facts of *Gypsum* the exchange of price data among competitors is not invariably anticompetitive in effect. Such conduct is only a violation of the Act when, as there occurred, it has that result. 184 Imposing criminal sanctions on the basis of such hindsight, while hardly unprecedented in criminal law, 185 creates difficulties on both the need and fairness sides of the notice balance. If conduct that is potentially justifiable because it might foster increased competition turns out to be criminal because of its actual anticompetitive impact, fair warning concerns seem obvious. True, they may be no greater than those applicable to executives like John Park, whom the Food and Drug Act punish without even a showing of negligence if a warehouse in their respective corporate empires turns up infested with mice. However, it would seem to be a fair legislative judgment that the need for sanitation in the food industry may require the extra vigilance thought to flow from the duty of perfect care imposed by strict liability. Whether the imposition of such an unforgiving standard of care actually results in more sanitary warehouses may be open to question, but there seems to be no compelling social benefit that might be chilled or foregone due to such heavy-handed deterrence.

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Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .

15 U.S.C. § 1 (1955) (current version at Pub. L. No. 108-237, title II, § 215(a), 118 Stat. 668 (2004)). Since by design all contracts and commercial combinations restrain trade through their mutually agreed limitations in the participants' future commercial behavior, the Act was judicially narrowed to forbid "only such contracts and combinations . . . [which] by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restraining competition or unduly obstructing the course of trade." *Nash v. United States*, 229 U.S. 373, 376 (1913).

184 *Gypsum*, 438 U.S. at 440–41 & n.16.

185 As Justice Holmes pointed out in *Nash v. United States*, holding that the Sherman Act's "rule of reason" was not unconstitutionally vague as a standard of criminality:

"[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. . . . The very meaning of the fiction of implied malice in [criminal homicide] cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw. The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct."

*Nash*, 229 U.S. at 237 (citations and internal quotations omitted).
In contrast, the line of criminality under the Sherman Act marks the difference between meeting the competition in a highly competitive market—a congressionally endorsed activity, and fixing prices to reduce competition—a crime. Imposing absolute criminal liability for economic conduct falling in such a "gray zone" of potential benefit or harm may be socially harmful in that it may chill "salutary and pro-competitive conduct lying close to the borderline of impermissible conduct."\(^{186}\) The notice balance thus overcame the presumption that Congress did not intend to create a specific notice defense, and the Court held that the Sherman Act, in its criminal application, required proof of criminal intent.\(^{187}\)

In deciding what level of intent it ought to infer, the Court continued with its application of the fairness/needs balance in the context of business decision-making to which the antitrust laws apply. The Court dismissed negligence and recklessness as inappropriate standards of criminality in this gray area of possible anticompetitive effect.\(^{188}\) As between "knowledge" and "purpose," the Court reasoned that requiring proof of the "knowledge of likely effects" would appropriately balance the fairness and deterrence concerns in an activity involving "conscious behavior normally undertaken after a full consideration of the desired results and a weighing of the costs, benefits, and risks"\(^{189}\) whereas requiring proof of the "conscious desire to bring [those likely effects] to fruition... particularly in such a context, [would be] both unnecessarily cumulative and unduly burdensome."\(^{190}\) The Court thus concluded that

\(^{186}\) _Gypsum_, 438 U.S. at 441-43 & n.17 (expressly distinguishing its decision in _Park_ on this social-impact basis). _See also_ Dan M. Kahan, _Is Ignorance of Fact an Excuse Only for the Virtuous?_, 96 MICH. L. REV. 2123, 2126 (1998) (noting that strict liability can "overdeter" and arguing that strict liability is inappropriate when applied to a factual element that marks "the boundary line between morally desirable and morally undesirable behavior"). Because of these concerns, as the Court noted, both the Attorney General's National Committee to Study Antitrust Laws and the Antitrust Division of the Justice Department had concluded that criminal prosecution should be reserved for cases in which it is clear, both in law and in fact, that the conduct was a flagrant violation of the Act. _Gypsum_, 438 U.S. at 439–40. The Court noted that the Antitrust Division of the Justice Department adopted guidelines emphasizing that only willful violators of the Act should be prosecuted, thus seeming to reserve liability only for those who had actual notice of their unlawfulness. _Id_.

\(^{187}\) _Id._ at 443-44.

\(^{188}\) Although the Court here gave no reason, this rejection of a level of scienter less than knowledge or purpose seems appropriate given that the statute is marking the line between criminal business conduct and justifiable business conduct that Congress has encouraged through passage of the Robinson-Patman Act. _See_ Kahan, _supra_ note 186, at 2126.

\(^{189}\) _Gypsum_, 438 U.S. at 445–46.

\(^{190}\) _Id._ at 446.
"[w]here carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator’s knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent."191

After Lambert, Freed, International Minerals, Park and Gypsum, the Court had laid out the four corners of notice-based scienter, even if it had not filled in all the blanks or even explicitly recognized it as a concept distinct from traditional, blame-based mens rea. Lambert recognized the importance of scienter as an instrument of notice,192 but Freed and International Minerals demonstrated the Court’s continuing commitment to the presumption that fair notice flows from the nature of the conduct regulated, a presumption that remains unrebutted as long as it seems apparent that potential violators would likely be aware of the nature of their offending conduct.193 Park extended this reasoning to the field of activity regulated as an instrument of notice, declining to infer notice-based mens rea even if the actor was almost certainly unaware of the offending conduct in question.194 Gypsum, however, staked out the limits of this fair-notice presumption, inferring congressional intent to provide for notice-based mens rea where both the activity regulated and the conduct in question left a serious question concerning the notice provided to potential violators.195 However, no sooner had this construct emerged than it began to fall apart as the Court disregarded its own teachings in a series of cases that began with Liparota v. United States.196

LIPAROTA—CONFLATION OF BLAME AND NOTICE

In Liparota, the Supreme Court reviewed the conviction of a Chicago restauranteur who had been convicted of the unauthorized acquisition and possession of federal food stamps in violation of section 2024(b)(1) of the Federal Food Stamp Act. Mr. Liparota operated a sandwich shop which was not authorized to accept food stamps, and he was not individually eligible under the statute to use or acquire them. Nevertheless, on three occasions he purchased a quantity of food stamps from an undercover federal agent, each time paying a heavily discounted price for the stamps.197

191 Id.
197 Id. at 421.
Section 2024(b)(1) provides, in relevant part, "whoever knowingly . . . acquires . . . or possesses coupons . . . in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall . . . be guilty of a felony . . . ."\(^{198}\) Looking to the statutory term "knowingly," Mr. Liparota sought to defend by asserting he did not know his acquisition and possession of the stamps was unauthorized, an ignorance-of-the-law defense seemingly foreclosed by the Court's decisions in Boyce and International Minerals.\(^{199}\) In an unacknowledged departure from this line of precedent, the Supreme Court chose to frame the issue differently and reversed. Justice Brennan, writing for a six-justice majority, held section 2024(b)(1) required proof that an accused "knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations."\(^{200}\) This result, as Justice Brennan explained, was "particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct."\(^{201}\) If by "innocent conduct" Justice Brennan meant not blameworthy, that would seem to be an analytic non-sequitor because the statute in question was plainly part of a regulatory scheme intended to ensure proper use of food stamps, themselves a creature of statute. There is no suggestion that the Court considered the criminal provisions of the Food Stamp Act to outlaw conduct that, as a matter of societal consensus, was harmful or wrongful. This is a classic regulatory crime, and the Court's opinion made it clear that the concern was not blame but notice.

The Court seemed concerned that under the Act a large class of relatively unsophisticated persons—food stamp users—faced potential felony liability based on violations of technical, and sometimes administratively defined, categories of authorized acquisition, possession and use of something which was a vital part of their lives—food stamps. Liparota thus differed from both Boyce and International Minerals, each of which dealt with criminalizing violations of a regulatory scheme applicable to industries accustomed to regulation. Notice in cases like Boyce and International Minerals was augmented by the field of activity in which likely violators had chosen to engage. While the dissenters in International Minerals expressed concern that the occasional "casual shipper" might stumble into the web of regulation—and a criminal

\(^{200}\) Liparota, 417 U.S. at 433.
\(^{201}\) Id. at 426.
conviction—in *Liparota* there seemed to be a more significant danger of such unwitting criminality. The Court responded to this notice concern by reading the statute to impose the buffer of an ignorance-of-the-law defense between such “innocents” and their conviction. 202

As a matter of social policy, the Court may have reached the right result in *Liparota*, however, it did so not by careful notice balancing, but instead by disregarding the blame-notice distinction altogether. Justice Brennan began his scienter analysis by going straight to *Morissette*, citing its recognition of the background assumption that *mens rea* is a part of every crime. 204 *Morissette*, of course, owes its importance to its refusal to extend to federal crimes with common law roots the “strict liability” which the Court earlier in the century began to apply in regulatory crimes such as the narcotics laws in *Balink*205 and the Food, Drug and Cosmetic Act in *Dotterweich*. 206 However, unlike *Morissette*, *Liparota* dealt not with a federal codification of a common law offense or its modern analog but with the criminal enforcement provisions of a regulatory scheme which governed the operation of the federal food stamp program, which is, as noted, entirely a creature of the Food Stamp Act and its

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202 *Id.* at 425–27. The majority refused to characterize this holding as one which permitted an ignorance-of-the-law defense. *Id.* at 425 n.9. Justice Brennan vigorously insisted that on the contrary this approach represented no more than the application of the traditional *mens rea* doctrine which presumes the existence of some scienter element and thus permits a mistake defense. *Id.* at 425. But, as Justice White pointed out in dissent, the question of what is and is not authorized regarding food stamps is set forth in the statutes and regulations of which section 2024 is a part, i.e., in the law defining the offense. *Id.* at 438–39 (White, J., dissenting). That question of authorization, in other words, is answered by the very criminal prohibition which Mr. Liparota was accused of violating, and his mistake or ignorance in that regard is one of law which is not a defense unless the legislature explicitly so provides.

Justice Brennan, of course, was no stranger to this ignorance-of-the-law principle. He also appreciated that the reach of “knowingly” in the statute was ambiguous, *id.* at 424–25 (majority opinion), thus undercutting any argument that Congress plainly meant to provide for an ignorance-of-the-law defense. Justice Brennan sought to avoid these doctrinal obstacles by characterizing the mistake concerning authorized use of the stamps as implicating issues of culpability and blame. *Id.* at 425 n.9. With the element of unauthorized use so characterized, Brennan held the doctrinal presumption in favor of scienter required the ambiguity concerning the reach of “knowingly” be resolved in favor of requiring proof the defendant knew his possession of the stamps was unauthorized. *Id.* at 425.

203 Justice White, in his dissent, argued with some force that if one assumes responsible prosecution, the trap for the unwary, which concerned the Court, was not nearly as large or troubling as Justice Brennan suggested. *Id.* at 437 & n.3 (White, J., dissenting).

204 *Id.* at 425–26 (majority opinion).

205 258 U.S. 250 (1922).

206 320 U.S. 277 (1943).
ensuing regulations. 207 And unlike Morissette, the Court's explicit concern in Liparota was not that proof of mens rea was a necessary part of proving the criminal act. Rather, although couched in the rhetoric of blame, Justice Brennan's concern was one of notice to unwary putative violators of the Food Stamp Act.

The Court's insistent resort to the inapt blameworthiness analysis seems attributable to its dissatisfaction with the legislative response to the notice concern. While the Food Stamp Act expressly provided that to be criminal the regulatory violation had to be "knowing," as the Court itself had pointed out in Boyce and again in International Minerals, such a knowledge provision had always been understood to require proof that an accused violator was aware of the nature of his or her conduct, but not to require proof that the accused knew such conduct was criminally prohibited. 208 Ignorance of the law is no excuse. Lest this analysis appear wooden and insensitive to the difference between food-stamp users on the one hand and interstate shippers on the other, the knowledge that had to be proved in Mr. Liparota's case was that he possessed food stamps and knew what they were, that is, coupons issued by the Federal Department of Agriculture to be used by low-income persons to purchase food, generally at retail food stores. 209 Although Justice Brennan, foretelling an approach in subsequent opinions of the Court, identified possible hypothetical applications of the statute to "innocents," proof of such particular conduct awareness and the constructive notice of the conduct's criminality thus imparted would seem to go far in addressing concerns that the statute created a trap for the unwary. Moreover, Justice Brennan completely ignored the needs side of the notice balance, a potentially weighty congressional concern when dealing with the prevention of abuses in a vast and expensive program for providing important assistance to the nation's poor.

207 While in part the food stamp regulations forbade the fraudulent use of these coupons, and thus could be said to impart a traditional criminal law focus to the Act, as noted, it was not this aspect of the regulatory prohibitions which concerned the Court. Rather, the Court was concerned with what it characterized "a broad range of apparently innocent conduct" forbidden by the regulations, such as the use of food coupons to purchase food items at prices above prevailing prices from participating retailers. Liparota, 471 U.S. at 426. Perhaps even more so than the antitrust laws at issue in Gypsum, the Food Stamp Act was a pure regulatory criminal provision without, at least in the applications of concern to the Court, any blameworthiness content.


209 Liparota, 471 U.S. at 422 n.2.
In the end, it was the result that mattered. Apparently dissatisfied with the presumption of restraint which conventionally attends notice analysis, requiring statutory ambiguity to be resolved by limiting the reach of "knowingly" to the nature of the offending conduct, Justice Brennan and his colleagues short-circuited the interpretive process. The result was a curious analytic hybrid in which under the rubric of blameworthiness—and its inapt *mens rea* presumption—they read this regulatory statute to require proof of actual notice of its command, providing for an ignorance-of-the-law defense.

*Liparota’s Legacy—Ratzlaf and Staples*

Rather than being an aberrant departure from principled analysis in response to a pocket of apparent unfairness in the federal criminal code, *Liparota* has become the fulcrum of the Court’s emerging scienter analysis. The distinction between traditional *mens rea* (with its presumption grounded in the blameworthiness characteristic of common law crime) and the concept of notice-based scienter (in which the presumption runs the other way) seems lost in the Court’s interpretive work. In its place is an undifferentiated presumption of scienter flowing from a broad concern that without a requirement that conduct be animated by a "wrongful purpose"—that is, a purpose imbued somehow with blame—a "broad range of apparently innocent conduct" would be made criminal.\(^{210}\) This confluence of blameworthiness and notice concerns prompted the Court in *Staples v. United States*\(^ {211}\) to require proof that the accused know the nature of his conduct in a regulatory offense where no such scienter requirement was suggested by the text or legislative history of the statute\(^ {212}\) and in *United States v. Ratzlaf*\(^ {213}\) to require proof that the accused know the illegality of his conduct where no such departure from the ignorance-of-the-law principle was suggested by the statute or its history.

**Ignorance of Law: Ratzlaf**

*Ratzlaf* involved violations of the Federal Money Laundering Control Act, a statute enacted in part to facilitate effective enforcement of the Currency and Foreign Transactions Reporting Act, more familiarly known as the Bank Se-


\(^{211}\) *Id.*


crecy Act.\textsuperscript{214} The Bank Secrecy Act was designed to combat the use of banking and financial institutions by criminals such as drug dealers, and it required reports to the Treasury Department of a variety of financial transactions including, as here relevant, reports by domestic financial institutions of any cash deposit totaling $10,000 or more.\textsuperscript{215} Because it turned out to be relatively simple to avoid this requirement by breaking such deposits into lesser amounts, Congress subsequently passed the so-called antistructuring provision of the Money Laundering Control Act,\textsuperscript{216} which provided:

No person shall, for the purpose of evading the reporting requirements of [the above noted provision of the Bank Secrecy Act] with respect to such transactions . . . (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.\textsuperscript{217}

This antistructuring provision thus became part of the web of federal regulations concerning currency transactions. Each such regulatory requirement was criminally enforced under a single provision, section 5322(a) of title 31, which authorized fines of up to $250,000 and imprisonment for up to five years for any person “willfully violating” that statute or its regulations.\textsuperscript{218}

Waldemar Ratzlaf was charged with violations of the antistructuring provision when he paid off a $100,000 casino-gambling debt with cashier checks in amounts of less than $10,000.\textsuperscript{219} Ratzlaf defended by arguing that his acts were not “willful” under section 5322 because, while he knew of and sought to avoid the reporting requirement, he did not know that it was unlawful so to structure his currency transactions.\textsuperscript{220} In support of this argument, he cited Cheek v. United States,\textsuperscript{221} a criminal tax case in which the Court had relied on longstanding but narrow precedent to hold that “willfully,” as used in the

\begin{itemize}
\item \textsuperscript{215} Ratzlaf, 510 U.S. at 138–39 n.3.
\item \textsuperscript{216} Id. at 138 (citing 31 U.S.C. § 5324 (1993) (current version at Pub. L. No. 108-458, title VI, § 6203(g), 118 Stat. 3747 (2004))).
\item \textsuperscript{219} Ratzlaf, 510 U.S. at 137.
\item \textsuperscript{220} Id. at 138.
\item \textsuperscript{221} 498 U.S. 192 (1991).
\end{itemize}
criminal provisions of the Internal Revenue Code, provides for an ignorance-of-the-law defense. The lower courts in Ratzlaf rejected this extension of Cheek beyond the tax code, holding that Congress did not intend for the Bank Secrecy Act to provide for a similar defense. 222

The Supreme Court reversed and held that to act "willfully" under section 5322, a person must know that his conduct is illegal. 223 The Court attempted to fit its analysis into the conventional doctrinal framework, implicitly recognizing that a departure from the principle that ignorance of the law is no excuse requires clear and explicit legislative direction. The Court saw the term "willfully" in section 5322 as providing that mandate. However, an examination of that term, both as conventionally understood and as used in section 5322, does not support the Court's conclusion.

Starting with the term itself, the word "willfully" traditionally has been construed as meaning that an actor must know the nature of his or her conduct. While "willfully" can mean more, including, as the Court held in Cheek, imposing a specific intent to act unlawfully, 224 such expansion of the conventional interpretation of the term must be clear from either its use in the statute or the legislative history of the statute in question. 225

The Court purported to find support for its construction in the statutory framework, reasoning that to read "willfully" conventionally—that is, requiring only that Ratzlaf knew he was acting to circumvent the Bank Secrecy Act's reporting requirements but not that he knew that it was illegal—would render "willfully" surplusage. That was so according to the Court because the anti-structuring provision itself required proof that Ratzlaf and others like him act "for the purpose of evading the reporting requirements of [the Bank Secrecy Act]." 226 proof which necessarily entailed establishing Ratzlaf's knowledge of the financial institution's reporting requirement. 227 This argument, however,

222 Ratzlaf, 510 U.S. at 138.
223 Id.
225 See, e.g., Model Penal Code § 2.02(8) (Official Draft 1985) (providing that "[a] requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears"). See also Spies v. United States, 317 U.S. 492, 497 (1943) (observing that "willful" is "a word of many meanings"); Bryan v. United States, 524 U.S. 184, 191 (1998).
227 Ratzlaf, 510 U.S. at 140.
overlooks the application of section 5322, the Bank Secrecy Act’s enforcement provision, to the Act’s other regulatory requirements, many of which impose reporting or record-keeping obligations. As to them, the requirement of “willful” conduct, conventionally understood—that is, that a person act with full awareness of the nature of his conduct—is hardly surplusage. Rather, it is exactly the kind of notice-based scienter, requiring proof of “conduct awareness,” to which legislatures traditionally have looked to answer their concern for fair notice in regulatory crime. The fact that the Bank Secrecy Act’s overall criminal enforcement provision, with its requirement of willful behavior, also applies to the later added antistructuring provision, which by its terms requires that the actor act with a purpose independently satisfying the willfulness requirement, does not make that overall willfulness requirement surplusage. Section 5322’s “willfully” requirement ensures that all violators of the Bank Secrecy Act have full “conduct notice” as a predicate to conviction.

Moreover, the purpose requirement of the antistructuring provision, section 5324, does more than simply duplicate the requirement of willful conduct. This purpose requirement limits criminality to only those structuring efforts which have no purpose other than avoiding a transaction report. That Congress’s effort to narrowly define a regulatory offense, through the time-honored practice of providing for an element of specific intent, has the ancillary effect of satisfying the Act’s overall “willfulness” requirement does not make either statutory term surplusage.

228 As the Court recognized, there may well be reasons to structure one’s cash transactions other than to avoid a report to Treasury. Id. at 144–45.

229 As part of its argument that Congress intended “willfully” to provide for an ignorance-of-the-law defense, the Court also asserted that courts of appeals had so read the term in its application to sections of the Bank Secrecy Act other than the antistructuring provision. Id. at 141–42. However, as Justice Blackmun again pointed out, id. at 153–54 n.4 (Blackmun, J., dissenting), the Court overstated its case. Although many of the lower court decisions do interpret “willfully” to require knowledge of the law coupled with a “specific intent to commit the crime,” id. at 141 (majority opinion) and cases cited, most of these cases stand for the conventional proposition that when applied to a crime of omission, such as failing to file a required report, “willfully” requires proof that the actor knew of the reporting requirement and intended to disobey it. They do not, however, further require proof that the actor knew his conduct was illegal. See, e.g., United States v. Granda, 565 F.2d 922, 926 (5th Cir. 1978) (cited in Ratzlaf, 510 U.S. at 141). Those few that go farther and read “willfully” to require proof that the actor knew also that his or her conduct was illegal mistakenly rest on Cheek, see, e.g., United States v. Sturman, 951 F.2d 1466, 1476–77 (6th Cir. 1991) (cited in Ratzlaf, 510 U.S. at 142), which as discussed is expressly limited to the tax laws. See supra notes 221 & 222 and accompanying text. The Court’s concern, then, that unless section 5322’s “willfully” includes an ignorance-of-the-law defense as applied to the antistructuring provision it will have a
The legislative history was no more helpful to the Court's reading of "willfully," revealing that to the extent Congress focused on this issue it intended the opposite result. The Court's answer to this contrary legislative history—that when statutory text is clear, there is no occasion to resort to legislative history—is hard to take seriously given its tortured reading of the statute. If the statute is clear, it is in the opposite direction. Moreover, in the next breath the Court appeared to retreat from its suggestion of textual clarity when it invoked the lenity principle as support for resolving the statute's textual ambiguity in favor of the defendant.

Why, then, in the face of contrary indications at every turn, did the Court insist on reading an ignorance-of-the-law defense into the enforcement provisions of the Bank Secrecy Act? The majority's opinion provides no clear answer, but a careful reading suggests that the Court's post-Liparota fusion of blame and notice lies at the heart of its analysis. In its brief, the government had argued that it was unnecessary to take the extraordinary step of ensuring actual notice to putative offenders through an ignorance-of-the-law defense, asserting that "structuring is not the kind of activity that an ordinary person would engage in innocently." Although couched in the language of "innocence," this is a straightforward application of the constructive notice analysis on which cases like International Minerals and Boyce Motor Lines are premised. Persons knowingly engaged in the conduct forbidden by the statute or in activity regulated by it ordinarily have sufficient notice of potential criminal liability and need not be afforded the actual notice which an ignorance-of-the-law defense would ensure. This analysis has nothing to do with blameworthiness, although to be sure if the conduct in question is blameworthy then constructive notice of illegality seems assured.

different meaning than it has when applied to the other provisions of the Bank Secrecy Act was misplaced. By interpreting "willfully" to provide for an ignorance-of-the-law defense the Court ensured a uniform construction for that term within the Bank Secrecy Act. However, it did so by abandoning the conventional interpretation of "willfully" which courts had long used without apparent difficulty, an interpretation rooted in the fundamental principle that ignorance of the law is no excuse.


231 Id. at 148-49. This is, first, a curious application of the lenity principle since the ambiguity seemed to be of the Court's own making. Moreover, it completely ignores the more fundamental principle that statutory ambiguity is to be resolved against, not in favor of, providing an ignorance-of-the-law defense. See supra pp. 19-23, 27-28, 34, 38-39.

232 Id. at 144 (quoting Brief for United States at 29, Ratzlaf v. United States, 510 U.S. 135 (1994) (No. 92-1196)).

233 See supra pp. 22-24, 31-33.
The Court nevertheless responded to this notice argument in the framework of blameworthiness, pointing out that currency structuring is not the exclusive province of "bad men". To demonstrate that "currency structuring is not inevitably nefarious," the Court cited three hypothetically "non-nefarious" violators, then concluded:

In light of these examples, we are unpersuaded by the argument that structuring is so obviously "evil" or inherently "bad" that the "willfulness" requirement is satisfied irrespective of the defendant's knowledge of the illegality of structuring. Had Congress wished to dispense with the requirement, it could have furnished the appropriate instruction.

This argument reveals how dramatically Liparota and its fusion of blameworthiness and notice concerns have altered the Court's scienter analysis. The presumption that the contours of the criminal law are known—and thus that ignorance of the law does not excuse—is not, as the Court in Ratzlaf assumes, limited to crimes committed exclusively by "bad" or "nefarious" people. People who commit regulatory crimes are not necessarily "bad" people. Mr. Dotterweich, whose company may inadvertently have mislabeled some over-the-counter drugs, was not thereby a "bad" person; Mr. Park, whose company had mice in one of its food storage warehouses, was not for that reason "nefarious." But that is quite beside the point when the question is whether Congress, in enacting the respective regulatory statutes under which each was charged, intended a particular level of scienter, the proof of which would ensure a particular level of notice. In the cases of Mr. Dotterweich and Mr. Park, the Court held that Congress meant to impose something close to absolute liability, not because they were "bad actors" but because, due to the fields of activity in which these men were engaged and to the societal need for widespread "no excuses" enforcement, Congress was apparently satisfied that they had sufficient notice of criminal liability without proof that either knew or should have known of the violations, much less the law forbidding those violations.

The proper question regarding Mr. Ratzlaf, as well as those persons in the examples cited by the Court, is whether Congress was satisfied that by acting "willfully"—i.e., mindful of the Bank Secrecy Act's reporting requirement and with a purpose to evade that requirement—they had sufficient notice of

234 Ratzlaf, 510 U.S. at 144.
235 Id.
236 Id. at 146 (footnote omitted).
possible criminality. The motives of the individual actors for their conduct are here irrelevant, as is their apparent moral culpability. The only relevant question is whether Congress believed something more than the constructive notice which would flow from proof that violators knew exactly what they were doing—hiding from the government something which the law required them to report—should be a part of the criminal enforcement of the Bank Secrecy Act. Nothing in the text or history of the statute remotely suggests such a congressional concern.

That the Court would state, as it did in concluding this part of its opinion, "[h]ad Congress wished to dispense with the requirement [that knowledge of the law be proved], it could have furnished the appropriate instruction," shows just how topsy-turvy the Court's *mens rea* jurisprudence had become. Until *Liparota*, congressional silence concerning scienter was met with the presumption of scienter only when such scienter is blame-based. Here, the Court used the presumption of scienter as a basis for the requirement that knowledge of the criminal law itself be proved. Of course, that is exactly what the Court did in *Liparota*. But in *Liparota*, the Court at least tried to camouflag e the defense it created as one of mistake-of-fact required by blameworthiness considerations so as to stay within the doctrinal use of the presumption.

Nine years later, the blame/notice distinction was so frayed that either such doctrinal distortion no longer mattered or it was not even noticed.

**IGNORANCE OF FACT: STAPLES**

If *Ratzlaf* marked the full impact of the *Liparota* approach to scienter on cases involving ignorance-of-the-law defenses, *Staples v. United States*, decided four months later, was its counterpart in those raising ignorance-of-fact claims. Harold Staples was charged under the National Firearms Act with possessing an unregistered automatic rifle, that is, an assault rifle which fired continuously in response to a single trigger squeeze. This was the same statute

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238 *Ratzlaf*, 510 U.S. at 146.
240 Although Justice Blackmun in his dissent plainly appreciates the notice orientation of the issue before the Court and the irrelevance of the forbidden conduct's inherent "evil," he, too, accepts the decisional axis of innocent/wrongful conduct "in exceptional cases." *Ratzlaf*, 510 U.S. at 155 n.6 (Blackmun, J., dissenting).
242 *Id.* at 609–12.
which the Court had reviewed twenty-three years earlier in United States v. Freed. Section 5861(d) of the Act made it a crime punishable by up to ten years imprisonment for any person "to receive or possess a firearm which is not registered to him," and other sections of the Act defined "firearm" to include an automatic rifle such as the one Staples possessed. In Freed, the Court decided that the Act required no scienter for the registration element, basing its interpretation on the lack of any mens rea term in the statute along with the statute's regulatory nature.

The firearms possessed in Freed were hand grenades, which as Justice Douglas noted by their appearance suggested the possibility of regulation and the attendant requirement of registration. Staples's assault rifle, however, was arguably not so obviously regulated. By its outward appearance, Staples's assault rifle could not be distinguished from a semiautomatic rifle, which was not covered by the Act. Staples claimed that he did not know that his rifle was automatic. This mistake concerning the gun's capacity for automatic fire would constitute a cognizable defense only if the statute required scienter for that circumstance element.

Analysis of Staples's scienter claim would seem to be straightforward. The National Firearms Act was enacted to regulate and restrict the possession of a narrow class of dangerous weaponry. In Freed, the Court had recognized violations of its provisions as regulatory offenses standing on different ground from those rooted in the common law. The statute itself, as noted above, contains no term of scienter, and given the regulatory nature of the statute there is no basis to presume the existence of such an element. If a term of mens rea were to be inferred, it could only come from evidence of congressional concern that proof of heightened "conduct awareness" was necessary to strike the

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247 See supra pp. 35–37.
248 Freed, 401 U.S. at 607–09.
249 Id. at 608.
250 Id. at 607.
251 In his dissent, Justice Stevens carefully reviews the legislative history of the Act, a history which leaves no doubt as to the Act's regulatory character. Staples v. United States, 511 U.S. 600, 626–29 (1994) (Stevens, J., dissenting). Justice Thomas, writing for the majority, does not quarrel with that characterization. Id. at 606–07 (majority opinion).
252 Freed, 401 U.S. at 607–09.
proper balance between the need for broad enforcement of the regulatory provision on the one hand and the potential for unfair or arbitrary enforcement on the other.

Here, the Court was not writing on a blank slate. The district court in Staples's trial, drawing on circuit court decisions, instructed the jury that the government must prove that Staples knew he possessed a gun and "that he was dealing with a dangerous device of a type as would alert one to the likelihood of regulation."254 The question for the Court, then, was whether Congress intended more notice to putative violators than would be assured by such a jury determination.

The language of the statute yields no evidence of such legislative intent. As noted, there is no term of scienter whatsoever, and the Act considered as a whole suggests this omission was an intentional component of an overall legislative scheme strictly to regulate the dangerous weaponry favored by gangsters.255 As was so for the Bank Secrecy Act considered by the Court in Ratzlaf,256 to the extent that the National Firearms Act's legislative history reveals anything concerning the existence of notice-based scienter, the history seems to speak against rather than for it.257 Finally, even if the statute itself and its legislative history were less clear on this point than they appear to be, such legislative ambiguity would not provide any basis to infer the notice-based element of "knowledge" for which Staples argued. A court should not infer that the legislature intended a notice-based mens rea term unless it is apparent from the statutory context that the balance of the need for strict enforcement on the one hand and the potential for unfair impact or arbitrary enforcement on the other suggests it.258

If anything, the notice balance in Staples pointed away from, not toward, requiring proof that offenders knew the characteristics of their weapons which made their possession criminal. On the need side of the balance, strict enforcement of the regulatory regime would appear to be quite important. The point of the legislation was to permit the government to keep track of what was

253 See, e.g., Sipes v. United States, 321 F.2d 174, 179 (8th Cir. 1963).
254 Staples, 511 U.S. at 604.
255 Justice Stevens makes this point well in his dissent. Id. at 626-27 (Stevens, J., dissenting).
257 Staples, 511 U.S. at 626-27 (setting forth pertinent legislative history). It is telling in this regard that Justice Thomas's opinion for the majority did not once mention the legislative history of the Act. See id. 601-10 (majority opinion).
258 See supra pp. 20-23.
essentially military weaponry, thereby limiting its circulation. The Act was not concerned with pistols or guns of the type that might be of legitimate use to householders or sportsmen. Rather, the Act was limited in scope to such weapons as machine guns, hand grenades and artillery pieces, weapons that pose a serious threat to public safety. The need for broad, excuse-free enforcement of the Act thus appears substantial.

On the other hand, the potential for unfair or arbitrary enforcement of the Act in the absence of the “knowledge” element for which Staples argued seems relatively low. To be sure, absolute liability—that is, enforcement in complete disregard of what a possessor might know concerning a weapon regulated by the Act—might work some unfairness. However, the Act had long been interpreted to require proof at least that the possessor knew the item in question was a gun. As noted, the district court in Staples went further, requiring in addition proof that Mr. Staples knew that he possessed “a dangerous device of a type as would alert one to the likelihood of regulation.” Proof of such knowledge, coupled with the type and appearance of the weapons in question—in Staples’s case, an assault rifle identical in appearance to an M-16—would seem to be more than adequate to cabin the potential for unfair enforcement. At the very least it would seem that a congressional judgment so striking the notice balance

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259 Far from being silent on this point, the legislative history of the Act was replete with this concern. Staples, 511 U.S. at 626–28 nn.4–5 (Stevens, J., dissenting).
260 Id. at 604 (majority opinion).
261 Taking his cue directly from Liparota, Justice Thomas reasoned that because the lawful ownership of guns was so widespread their possession was “innocent” conduct from which constructive notice of the Act’s prohibition would not flow. Id. Even assuming, as Justice Thomas did here, that “[g]uns in general are not ‘deleterious devices or products or obnoxious waste materials,’ [which were the subject of regulation in] International Minerals, that put their owners on notice that they stand ‘in responsible relation to a public danger,’” id. at 610–11, “guns in general” were not what the Act prohibited possessing. Rather, the Act prohibited the possession of military weapons, a few of which—including the assault rifle which Staples possessed—were, unless closely examined, indistinguishable from a class of semiautomatic weapons which were lawful to possess. Moreover, in expressing his concern that “innocent” persons might be prosecuted, Justice Thomas chose to ignore that this relevant “notice class” of weapons was further narrowed by the requirement imposed by the district court that Staples “[knew] that he [was] dealing with a dangerous device of a type as would alert one to the likelihood of regulation.” Id. at 604. The question of unfair notice, then, was not whether owning a gun was so “innocent” that gun owners “in general” would not fairly appreciate the likelihood of criminal regulation. The question was instead whether there was a potential for unfair or arbitrary enforcement of the Act given that potential violators must be proven (1) to have possessed a weapon in the subject class, i.e., a piece of military weaponry, and (2) to have actually understood that the weapon possessed was a dangerous device likely to be subject to regulation. Id. at 605. Innocence, with its patina of blamelessness, was not at issue. Id.
would not be so implausible that a further element of notice-based scienter should be inferred in the absence of explicit legislative direction.

Yet this is what the Court did in *Staples*. In an opinion by Justice Thomas, the Court read the statute to require proof that Mr. Staples knew the particular characteristics of his rifle which subjected it to the Act’s regulation, basing its holding on the common law presumption of *mens rea*.\(^2\) The Court here ignored the important difference between common law *mens rea* rooted in blameworthiness and the requirement of scienter intended to assure constructive notice in regulatory crimes. The Court’s discussion of implied *mens rea* instead proceeded on the explicit assumption that the common law presumption of *mens rea* applied virtually across the board, citing *Balint, Morissette, Gypsum*, and *Liparota* for this point.\(^3\)

If the Court meant to underscore the apparent collapse of the blame/notice distinction in its *mens rea* analysis, it could not have chosen four better cases. *Balint*, of course, was the case in which the Court had refused to apply the common law presumption of *mens rea* in interpreting regulatory crimes (such as that created by the National Firearms Act) that had no element of scienter on their face.\(^4\) *Morissette*, at the other end of the spectrum, was the case in which the Court reaffirmed the continuing presumption of *mens rea* applicable to codified common law crimes, making clear in its analysis the distinction between such crimes of blame and crimes of a regulatory nature like the narcotics offense in *Balint*.\(^5\) While *Gypsum* marked the careful employment of notice-based scienter,\(^6\) *Liparota* collapsed the carefully drawn distinction between notice and blame as a basis for inferring *mens rea*.\(^7\)

Justice Thomas did not go so far as to presume *mens rea* for all crimes. He acknowledged that in “limited circumstances”\(^8\) Congress had enacted public-welfare offenses in which it intended that there be no term of scienter.\(^9\) But having said that, he went on to note “the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would ‘criminalize a broad range of apparently innocent conduct.’”\(^10\) This concern

\(2\) Id. at 605–06.

\(3\) Id.


\(8\) Staples, 511 U.S. at 607 (quoting *Gypsum*, 438 U.S. at 437).

\(9\) Staples, 511 U.S. at 606–07.

\(10\) Id. at 610 (quoting *Liparota*, 471 U.S. at 426).
for criminalizing innocent conduct came from *Liparota*, which Justice Thomas noted interpreted the Food Stamp Act to provide for an ignorance-of-the-law defense "largely because dispensing with such a *mens rea* requirement would have resulted in reading the statute to outlaw a number of apparently innocent acts."271

Of course, prohibiting "innocent" acts, i.e., acts not worthy of moral condemnation,272 is precisely what regulatory statutes are designed to do. But after *Liparota* and its progeny, blameworthiness and innocence form the axis about which scienter analysis presumptively revolves.273 The effect, of course, is to all but do away with serious regulatory crimes.274 So, when Justice

271 *Staples*, 511 U.S. at 610.
272 The Court erased any doubt that by "innocent" it meant "blameless" when in the same sentence it reaffirmed *Liparota*’s holding that the Food Stamp Act did not in its eyes create a public welfare offense. *Id.*
273 This focus on blameworthiness as the principal fountainhead of *mens rea* continues in the Court’s post-*Staples* interpretive efforts. See, e.g., *Carter v. United States*, 530 U.S. 255, 269 (2000) ("The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’") (quoting United States v. X-Citement Video, 513 U.S. 64, 72 (1994) and citing *Staples*, 511 U.S. 600). One could argue that the Court’s opinion in *Arthur Andersen v. United States*, 544 U.S. 696 (2005), its most recent foray into the world of *mens rea*, in part was founded on notice principles. In *Andersen*, the Court interpreted the federal obstruction of justice statute, which forbids "knowingly . . . corruptly persuad[ing]" another to destroy documents with the intent to impair their availability at an official proceeding, to require proof that the accused was "conscious of [his or her] wrongdoing," not just that the accused knew the nature of the persuasive act. *Id.* at 706. The Court began its analysis by noting that concerns for fair warning had informed what the Court characterized as its "traditional[] . . . restraint in assessing the reach of a federal criminal statute," *id.* at 703 (quoting United States v. *Aguilar*, 515 U.S. 593, 600 (1995)), and went on to express concern that the act of persuading another to withhold or even to destroy documents that were relevant to an official proceeding was not inherently "corrupt," giving as an example advice of counsel to withhold privileged documents from production in an official proceeding. *Andersen*, 544 U.S. at 704. However, the Court’s reference to "fair warning" was no more than an implicit reference to the rule of lenity, and its interpretation of the statutory terms "knowingly . . . corrupt[]" to mean "conscious of wrongdoing" is hardly a shift away from blameworthiness as the fulcrum of its *mens rea* analysis. *Id.* at 703, 706. Indeed, as the Court surveyed its interpretive work, it observed, "limiting criminality to persuaders conscious of their wrongdoing sensibly allows [the obstruction statute] to reach only those with the level of ‘culpability . . . we usually require in order to impose criminal liability.’" *Id.* at 706 (quoting *Aguilar*, 515 U.S. at 602).

274 In the concluding section of his scienter analysis, Justice Thomas dwelled at some length on the harshness of the penalty involved—particularly a ten year prison sentence. Citing *Morissette v. United States*, 342 U.S. 246 (1952), he suggested that this fact was virtually dispositive on the "public welfare status" of the Act and thus on the issue of scienter. *Staples,*
Thomas in *Staples* observed that "there can be little doubt that, as in *Liparota*, the Government's construction of the [Act] potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of the weapons in their possession—makes their actions entirely innocent," he meant to end the discussion, not to begin it. That regulatory crime is intended to penalize conduct without relation to blame, leaving only the question of what notice seems fair in the context of the regulatory need, is a proposition which the Court seems no longer to accept. Only if the Congress is explicit, presumably on the face of the statute, about such an intention to

511 U.S. at 616–18. Such a sweeping conclusion is unjustified. To be sure, the Court in *Morissette* identified the harshness of punishment as a factor relevant to identifying regulatory offenses. *Morissette*, 342 U.S. at 248. However, it was but a factor, and one which had its primary utility in the absence of clearly articulated legislative intent. *Id.* In other cases, such as *United States v. Balint*, 258 U.S. 250 (1922) and *United States v. Dotterweich*, 320 U.S. 277 (1943), which the Court here ignored, the Court had no difficulty in recognizing the congressional intent to create a regulatory offense which provided for lengthy imprisonment. Moreover, the Court in *Morissette* was speaking in the context of interpreting a statute which codified a traditional common law crime, a distinction which Justice Thomas again overlooked. *Morissette*, 342 U.S. at 249.

In the end, the harshness of the penalty is an important factor in attempting to divine unarticulated legislative intent concerning the quality of notice intended to be assured by a regulatory crime. The harsher the penalty, the greater the degree of notice intended. But, contrary to the Court's suggestion, the penalty should not be dispositive.


276 Nowhere does the Court make this more clear than in the last paragraph of its principal scienter analysis, Part II.B of its opinion. There Justice Thomas concluded:

We concur in the Fifth Circuit's conclusion on this point: "It is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens to a possible ten-year term of imprisonment if... what they genuinely and reasonably believed was a conventional semiautomatic [weapon] turns out to have worn down into or been secretly modified to be a fully automatic weapon." As we noted in *Morissette*, the "purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction." We are reluctant to impute that purpose to Congress where, as here, it would mean easing the path to convicting persons whose conduct would not even alert them to the probability of strict regulation in the form of a statute such as § 5861(d).

*Id.* at 615–16 (citations and footnotes omitted).

Convicting persons of regulatory crimes without proof of *mens rea* is now "unthinkable." The Court went on to say in the footnote accompanying the quoted text that "if Congress thinks it necessary to reduce the Government's burden at trial to ensure proper enforcement of the Act, it remains free to amend § 5861(d) by explicitly eliminating a *mens rea* requirement." *Id.* at 616 n.11. It thus appears that without such explicit textual negation of scienter, serious public welfare crimes no longer exist.
penalize without blame does the Court seem willing to recognize it.\textsuperscript{277} Even then, it seems open to question whether the Court is willing to accept a diminished scienter requirement in federal regulatory crime. Such a revolution in the interpretation of criminal statutes, undoing a conceptual framework which took more than fifty years fully to evolve, seems well beyond what Congress intended. It is thus particularly ironic that the Court claimed as its mandate in \textit{Staples} the interpretation of congressional intent.\textsuperscript{278}

\textbf{THE DOCTRINAL EPILOG}

What has emerged as the lower courts confront this "vexatious problem"\textsuperscript{279} of \textit{mens rea} in federal criminal statutes after \textit{Liparota}, \textit{Ratzlaf} and \textit{Staples} is a wooden and sometimes distorted analytic construct. Gone is the possibility of openly notice-based analysis in considering whether a regulatory statute implicitly provides for some level of \textit{mens rea} or in determining the reach and meaning of a \textit{mens rea} term in such a statute. In its place is a set of seemingly inflexible principles that govern the courts' interpretive efforts in this regard.

First, \textit{Ratzlaf} appears to have opened the door to, if not quite mandated, the interpretation of "willfully" to provide for an ignorance-of-the-law defense.\textsuperscript{280}

\footnotesize
\textsuperscript{277} So, the Court concluded its opinion in \textit{Staples} with the observation that "our holding depends critically on our view that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect." \textit{Id.} at 620 (citation omitted).

\textsuperscript{278} The Court's full commitment to the merger of notice and blame in its scienter analysis continued in \textit{Posters 'N' Things Ltd. v. United States}, 511 U.S. 513 (1994), and \textit{United States v. X-Citement Video, Inc.}, 513 U.S. 64 (1994), although perhaps not as blatantly as in \textit{Staples}. In both \textit{Posters 'N' Things} and \textit{X-Citement Videos}, the Court was asked to determine the level of scienter required by a regulatory or public welfare statute, and in both the Court began with the presumption that scienter was required, the only question being what kind. \textit{Posters 'N' Things}, 511 U.S. at 517-18; \textit{X-Citement Video}, 513 U.S. at 69. In both, there was a strong argument for a narrowly crafted or narrowly based scienter requirement, but in both the Court took the broader presumptive path staked out in \textit{Liparota} and \textit{Staples}. \textit{Posters 'N' Things}, 511 U.S. at 526; \textit{X-Citement Video}, 513 U.S. at 72.

\textsuperscript{279} United States v. Bronx Reptiles, Inc., 217 F.3d 82, 83 (2d Cir. 2000).

\textsuperscript{280} See generally Sharon L. Davies, \textit{The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance}, 48 DUKE L.J. 341–42 (1998). \textit{But cf.} Bryan v. United States, 524 U.S. 184, 193–95 (1998) (holding that to prove "willful" violation of the federal statute forbidding the unlicensed sale of firearms the Government need only prove that the defendant knew that his conduct was unlawful, not that he further knew of the specific law that he violated, i.e., the law requiring a license to sell). While \textit{Bryan} hardly marks a full restoration of the ignorance-of-the-law doctrine, it distinguishes \textit{Ratzlaf}'s reading of "willful," \textit{id.} at 194–99, and marks a step back
There is, of course, the potential for predictability in this interpretive command, although its reach is still far from clear. When coupled with the Court’s refusal in International Minerals to read “knowingly violate any such regulation” to provide for a mistake-of-law defense, this provides a relatively clear demarcation, notwithstanding the contrary holding of Liparota. Absent very explicit indications in the legislative history, courts have declined to read “knowingly” as a specific-intent provision providing for a mistake-of-law defense, reserving that meaning for “willfully.” Although it may not well serve from the general application of the “ignorance-of-this-specific-law” defense suggested by Ratzlaf and its interpretation of “willful.”

Courts of appeals have picked up on this distinction. See, e.g., United States v. Bursey, 416 F.3d 301, 308–09 (4th Cir. 2005) (holding that “willfully” as used in 18 U.S.C. § 1752(a)(1)(ii) (2000), punishing one who enters or remains in a restricted area where the President is visiting, requires proof only that the offender knew that his conduct was unlawful but not that he knew of the particular statute or regulation that forbade his conduct); United States v. Whab, 355 F.3d 155, 161–62 (2d Cir. 2004) (holding that “willfully” as used in 18 U.S.C. § 1001 (2000) (current version at Pub. L. No. 109-248, title I, § 141(c), 120 Stat. 603 (2006)), punishing the making of a false statement to a federal agent, required at most proof that the accused knew that his conduct was unlawful, and further suggesting even that proof may not be required); United States v. Henderson, 243 F.3d 1168, 1173 (9th Cir. 2001) (interpreting “willfully” as used in 43 U.S.C. § 1733(a), the statute punishing violations of the Bureau of Land Management regulations, to require proof that the offending conduct was unlawful but reserving on whether there must be further proof that the offender must know of the regulation in question).

Even before Bryan’s apparent pruning of Ratzlaf’s reach, there were circuit courts that, in spite of Ratzlaf, resisted interpreting “willfully” to require proof of knowledge that the conduct was unlawful, at least in crimes that had long been interpreted to require no such proof. See, e.g., United States v. Daughtry, 48 F.3d 829, 831–32 (4th Cir. 1995), vacated on other grounds, 516 U.S. 984 (1995) (holding that “willfully” as used in 18 U.S.C. § 1001 (1976), punishing false statements to a federal agent, required proof that the accused knew that the statement was false but not that such an act was unlawful); United States v. Rodriguez-Rios, 14 F.3d 1040, 1048 n.21 (5th Cir. 1997) (en banc) (dictum) (same).


As noted above, four years after Ratzlaf, the Court in Bryan v. United States, 524 U.S. 184 (1998) endorsed this dichotomy. In Bryan, the Court was called on to interpret “willfully” as used in the Firearm Owners’ Protection Act, which as noted it held to require proof that a
the intentions of Congress with respect to the meaning of the substantial number of statutes in which “willfully” appears, it at least serves as clear guidance to congressional drafters for future regulatory statutes. If one intends to provide for a mistake-of-law defense (or at least to leave the door open), use “willfully,” if not, use “knowingly.”

The impact of Staples is more pernicious. Its only apparent benefit is for those who, as a normative matter, disapprove of strict criminal liability. The Court’s holding serves as an imperfect proxy for the due process requirement of mens rea that the Court refused to find in Balint and that many commentators hoped could be read into Lambert. If one takes the view that mens rea, as a matter of substantive due process, should be a part of every serious crime, say every felony, Staples comes pretty close to that result, albeit on statutory not constitutional grounds. Its mandate, as read by the lower courts, seems clear, uncomplicated by any interest balancing which should attend notice analysis. Except for a limited class of “public welfare” crimes, Morissette’s traditional presumption of mens rea applies to all crimes, requiring scienter for those elements that criminalize otherwise “innocent conduct.” As to the “limited”

person selling a gun without a permit knew that his conduct was unlawful (but not specifically that a permit was required), and so it is not clear that its observation concerning the meaning of “knowingly” constitutes a holding as such. Id. at 193. But the line that the Court drew between the two terms could not have been more clear. In its words,

unless the text of the statute dictates a different result, the term “knowingly” merely requires proof of knowledge of the facts that constitute the offense. . . . More is required, however, . . . [for] “willfully.” The jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful. Id. at 193 n.15.

But see supra note 280, citing a sampling of cases in courts that have declined to read “willfully” to provide for a mistake-of-law defense.


See supra note 118.

Liparota v. United States, 471 U.S. 419, 426 (1985) (“This construction [requiring proof that the accused knew that his sale of food stamps was unauthorized] is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of innocent conduct.”); Staples v. United States, 511 U.S. 600, 614–15 (1994) (“Here, there can be little doubt that, as in Liparota, the Government’s construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state—
class of public welfare crimes not subject to this presumption of *mens rea*, the operative assumption seems to be that they are intended to be crimes of strict liability. ²⁸⁷ There is in this duality no room for *mens rea* as an instrument of notice. Scienter either automatically flows from the blame-based presumption of *Morissette*, even if the concern for criminalizing “otherwise innocent conduct” is one of notice, or it disappears altogether into the black hole of strict liability. To say the least, this all-or-nothing approach is a blunt instrument to deal with the conflicting interests that are implicated in typical notice analysis, and many of the cases struggling to adapt this inapt tool to the often complex interpretive task in question illustrate the analytic distortions that can result.

Take, for example, *United States v. Ahmad*, ²⁸⁸ a case in which the Fifth Circuit reviewed a conviction of a gas station owner under the Clean Water Act for dumping several thousand gallons of gasoline and gasoline-contaminated water into a storm sewer. ²⁸⁹ The Act provides that it is a felony to “knowingly” violate of any of its sections, one of which forbids the discharge, without a permit, of a pollutant into navigable water of the United States. ²⁹⁰ Ahmad sought to defend by claiming that he thought what he was dumping into the

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²⁸⁷ The Court in *Staples* was unclear in this regard, and as seen below, some lower courts have read it to permit some mistake or ignorance-of-fact defenses. See, e.g., *United States v. Wilson*, 133 F.3d 251, 263 (4th Cir. 1997) (citing *Staples* for the proposition that “[e]ven under this public welfare doctrine, however, true or rigid strict liability does not generally follow, as ignorance of the facts usually remains a defense”). The genesis of this notion is a footnote in *Staples* conceding, and explaining away, the Court’s earlier observation in *International Minerals* that so-called public welfare offenses generally are thought “to require at least that the defendant know that he is dealing with some dangerous or deleterious substance” and thus that the Court has “avoided construing criminal statutes to impose a rigorous form of strict liability.” *Staples*, 511 U.S. at 607 n.3. The Court went on to observe, in the same footnote:

[W]e have referred to public welfare offenses as “dispensing with” or “eliminating” a *mens rea* requirement or “mental element” [citing *Morissette* and *Dotterweich*] and have described them as strict liability crimes [citing *Gypsum*]. While use of the term “strict liability” is really a misnomer, we have interpreted statutes defining public welfare offenses to eliminate the requirement of *mens rea*; that is, the requirement of a “guilty mind” with respect to an element of a crime. Under such statutes we have not required that the defendant know the facts that make his conduct fit the definition of the offense.

*Id.* This language is hardly a firm basis for saying, as does the Fourth Circuit in *Wilson*, that in public welfare offenses “ignorance of the facts usually remains a defense,” and most courts have not so read it. See, e.g., *United States v. Figueroa*, 165 F.3d 111, 116–17 (2d Cir. 1998).

²⁸⁸ 101 F.3d 386 (5th Cir. 1996).

²⁸⁹ *Id.* at 388.

²⁹⁰ *Id.*
sewer was water, not gasoline.\textsuperscript{291} Such a mistake-of-fact defense would only be cognizable if the Act requires proof that he was aware of the nature of his discharge.\textsuperscript{292}

The government predictably argued that the Clean Water Act is a regulatory crime and that as such all that was required to satisfy the knowledge element was proof that Ahmad knew he was discharging something into the sewer (as opposed to an accidental discharge). The Fifth Circuit conceded that the Act "[o]n its face . . . does appear to implicate public welfare."\textsuperscript{293} However, apparently concerned about the prospect of strict felony liability, the court resisted this categorization of the Act, citing \textit{Staples} for the ostensible clarification that "[public welfare] offenses involve statutes that regulate potentially harmful or injurious items,"\textsuperscript{294} and then observing that, although gasoline seems "potentially harmful or injurious," it is "certainly no more so than machine guns."\textsuperscript{295} With the escape hatch thus open, the court returned to \textit{Staples} for the "key to public welfare offense analysis," that being "whether 'dispensing with \textit{mens rea} would require the defendant to have knowledge only of traditionally lawful conduct,'"\textsuperscript{296} i.e., the "innocent conduct" concern. The court applied this test to Ahmad's case, finding that it was satisfied because, without proof that Ahmad knew that he was discharging a pollutant, he (and others like him) could be convicted of a felony for pumping what he believed to be water into the sewer. So, the court held that the Clean Water Act is not a public welfare offense—at least insofar as it forbids discharging pollutants into navigable water without a permit—and thus the "usual presumption of a \textit{mens rea} requirement applies."\textsuperscript{297}

However defensible this result may be, or may feel, the logic is tortured. Reduced to its essentials, the reasoning is purely instrumental. The Fifth Circuit ignored what it conceded to be so—that the Clean Water Act is quin-

\begin{footnotesize}
\textsuperscript{291} \textit{Id.} at 388–89.
\textsuperscript{292} \textit{Id.} at 390.
\textsuperscript{293} \textit{Id.} at 391.
\textsuperscript{294} \textit{Id.}
\textsuperscript{295} \textit{Id.}
\textsuperscript{296} \textit{Id.} \textit{See also} United States v. Bronx Reptiles, Inc., 217 F.3d 82, 90–91 (2d Cir. 2000) (taking a similar "innocent-conduct" approach in deciding that the statute in question, there the Lacey Act, which forbids permitting wild animals to be transported into the United States under inhumane or unhealthy conditions, 18 U.S.C. § 42(c) (1952)) (current version at Pub. L. No. 104-332, § 2(h)(1), 110 Stat. 4091 (1996)), requires proof that the accused knew of the offending conditions under which the animals were being transported).
\textsuperscript{297} \textit{Id.}
\end{footnotesize}
tension, essentially a regulatory crime designed to protect the public from potentially hazardous substances. Instead, the court first decided whether it is possible that the applicability of the statute could surprise a person who, like Ahmad, had done what the statute prohibited; that is, does the statute raise a potential notice concern? If that possibility exists (as the Fifth Circuit found to be so in *Ahmad*), then it might be necessary to infer—as a matter of legislative intent—some element of knowledge (in *Ahmad*, knowledge of what he discharged) to address that notice concern. In a pre-*Staples* world, the analysis should then balance this concern for notice against any apparent need for excuse-free enforcement; the regulatory or "public welfare" concern underlying the statute would be but a factor in the balancing. However, if *Staples* means what it says, once a statute is deemed to be regulatory, the inquiry is effectively over. A *mens rea* element is only possible (but is virtually automatic) if the statute is not regulatory, not a crime of "public welfare." So, to address its concern for notice, the Fifth Circuit did what it had to, and held that the Clean Water Act is not a public welfare, regulatory crime but instead a traditional crime, subject to the "usual" presumption of *mens rea*.298

If the court had felt free to recognize the statute's regulatory character and then to further consider the notice issue in light of the statute's text, legislative history, and purpose, weighing the congressional concerns for full enforcement of this important environmental legislation against the concerns relating to its

298 *Ahmad*, 101 F.3d at 391 ("Following *Staples*, we hold that the offenses charged in counts one and two are not public welfare offenses and that the usual presumption of a *mens rea* requirement applies. With the exception of purely jurisdictional elements, the *mens rea* of knowledge applies to each element of the crimes."). As noted, the Fifth Circuit's analysis was focused on the notice concern of a criminal statute reaching the conduct of one who might be unfairly surprised that his conduct was potentially criminal. As developed above, the traditional blame-based presumption of *mens rea* is an inapt way to respond to this concern.

There may be, however, a different argument that would provide a better conceptual fit, at least to this crime. Although enacted as part of a comprehensive regulatory scheme, the Act's prohibition against dumping a pollutant, here gasoline or gasoline-contaminated water, into the nation's water supply may be seen as a consensus norm in our increasingly environmentally conscious society. *See Hall*, *supra* note 3, at 340–41 (arguing that the common law *mala in se/mala prohibita* distinction is an artificial, inflexible guide in determining whether or not *mens rea* is an element of a crime). If that were so, it might be fair to treat it as a crime imbued with blame, one which is thus subject to the traditional presumption articulated in *Morissette*. Put another way, if the judgment of society—expressed in this statute—is that one who empties the polluted contents of his gasoline-storage tank into our water is not just a businessman who violated federal regulations but rather a morally blameworthy person subject to the formal societal censure of a criminal conviction, it is appropriate to require proof of sufficient *mens rea* to merit the judgment of blame that flows from such a conviction.
potential unfairness to those to whom it might apply, the result might well have been the same. Maybe the Fifth Circuit considered those factors in deciding this case; maybe not. We will never know, but what we do know is that its reasoning is thin cover for its apparent goal.

Other courts have avoided this analytic trap by reading a little more leeway into the doctrinal construct that emerged from Staples. In United States v. Lynch,\(^{299}\) the case involving the skull finder prosecuted under the Archaeological Resource Protection Act discussed at the outset,\(^{300}\) the Ninth Circuit side-stepped the question of whether the statute was a public welfare measure, opining that the defendant’s conduct, picking up a human skull, was as a categorical matter neither an act that was *malum in se* nor one that involved public welfare.\(^{301}\) Putting aside whether the defendant’s conduct is an appropriate measure of the statute’s character, the court at least freed itself from the constraints of Staples’s public welfare/traditional-crime duality and thus felt able to address its concern that ARPA might turn a casual souvenir collector such as Lynch into an unwitting felon. It addressed this fair-warning concern by resort to the traditional, blame-based presumption in favor of *mens rea*; the court had no occasion under this approach to consider the possibility that Congress intended strict, excuse-free enforcement of the statute to advance the important societal interest of protecting archaeological treasures.\(^{302}\) Again, this might be the right result under a full notice analysis, but any consideration of the government’s interest in excuse-free enforcement (and there was evidence of just such a concern in ARPA’s legislative history) and the attendant balancing of that interest against the perceived potential for unfairness occurred behind the judicial curtain; Staples and its progeny leave no room for openly notice-based *mens rea*.

If the Ninth Circuit in Lynch avoided pigeon-holing ARPA as either a public welfare or a traditional crime and thus avoided the government’s argument that “knowingly” did not reach the element in question, the Fourth Circuit in United States v. Wilson\(^{303}\) took a more head-on approach, reading International Minerals and Staples to allow for a mistake-of-fact defense even in public welfare crimes.\(^{304}\) To say the least, this overreads Staples.\(^{305}\) The

\(^{299}\) 233 F.3d 1139 (9th Cir. 2000).
\(^{300}\) See supra pp. 3–5.
\(^{301}\) Lynch, 233 F.3d at 1143.
\(^{302}\) Id. at 1144–46.
\(^{303}\) 133 F.3d 251 (4th Cir. 1997).
\(^{304}\) Id. at 263.
basis for this assertion is a footnote in *Staples* in which Justice Thomas conceded, and explained away, the Court's earlier observation in *International Minerals* that so-called public welfare offenses generally are thought "to require at least that the defendant know that he is dealing with some dangerous or deleterious substance." As Justice Thomas explained it, this passage was meant to guard against imposing absolute liability, but he continued in the same footnote:

Nevertheless, we have referred to public welfare offenses as "dispensing with" or "eliminating" a *mens rea* requirement or "mental element" and have described them as strict liability crimes. While the use of the term "strict liability" is really a misnomer, we have interpreted statutes defining public welfare offenses to eliminate the requirement of *mens rea*; that is, the requirement of a "guilty mind" with respect to an element of a crime. Under such statutes we have not required that the defendant know the facts that make his conduct fit the definition of the offense.

This language hardly justifies the Fourth Circuit's broad assertion in *Wilson* that in public welfare offenses "ignorance of the facts usually remains a defense," and most courts have not so read it. One cannot help but think that this overstatement had more to do with the Fourth Circuit's recognition that the Clean Water Act, there at issue, is undeniably a regulatory statute—along with its disinclination to impose strict liability—than the court's inability to fairly read *Staples*. But this is the box in which courts find themselves.

An even more disquieting interpretive development—at least for those committed to some semblance of interpretive consistency—are cases suggesting that statutes can, like a chameleon, change their character depending on their application. Thus, courts have held that the same statute can in some applications be public welfare—and thus impose strict liability—and in others be traditional, subject to the presumption of *mens rea*. This is another legacy of *Staples*, which without explanation held that the National Firearms Act when applied to machine guns (an enumerated "firearm" the unregistered possession

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305 See supra notes 268–69, 277. To be sure, the crimes that Justice Thomas in *Staples* seemed willing to recognize as "public welfare," and thus as a crime that provided for criminal punishment without proof of *mens rea*, seemed quite narrow. But it is this false dichotomy of presumptive, blame-based *mens rea* for all crimes except for this narrow category of public welfare crimes that lies at the bottom of *Staples*.


308 *Wilson*, 133 F.3d at 263.

of which was forbidden by the Act) was not a public welfare measure while conceding that when applied to hand grenades (another enumerated "firearm" and the subject of the Court's opinion in Freed) was a public welfare measure. The idea that the very same statutory term—here "firearm"—in the very same statute can have a different character and thus a different mens rea requirement depending on the particular "firearm" to which it is applied is at least curious, even recognizing that the term "firearm" is not under the statute one weapon but a list of several. But courts unenthusiastic about reading a mistake defense into this regulatory statute, at least as applied to weaponry which is facially "not innocent," have resorted to this way around the Staples dictate. So, the Eighth Circuit most recently in United States v. Erhart\(^{310}\) and the Ninth Circuit in United States v. Imes\(^{311}\) held that the Firearms Act as applied to a sawed-off shotgun (like machine guns and hand grenades, an enumerated "firearm" under the Act) does not require proof that a possessor knew that it had the characteristics which caused it to be deemed a "firearm," that is, an overall length of less than twenty-six inches or a barrel length less than eighteen inches. Other circuits, although presumably no more enthusiastic about allowing a mistake-of-fact defense in such cases, have felt bound by Staples's holding and held that the government must prove knowledge of these defining characteristics.\(^{312}\)

One cannot help but think that such a cavalier disregard of Supreme Court precedent as demonstrated in Erhart and Imes is to some measure the result of the Court's willingness to disregard its own teachings and to impose its overly simplistic, presumptive construct on the federal courts as they work to discern the will of Congress in interpreting the ever growing body of regulatory criminal statutes. To be sure, there are still cases in which the lower courts struggle to stay within the teachings of the Court and yet preserve a meaningful distinction between traditional crime and regulatory crime.\(^{313}\) However, even in

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\(^{310}\) 415 F.3d 965 (8th Cir. 2005).

\(^{311}\) 80 F.3d 1309 (9th Cir. 1996).

\(^{312}\) See United States v. Mains, 33 F.3d 1222, 1229 (10th Cir. 1994); United States v. Starkes, 32 F.3d 100, 101 (4th Cir. 1994).

\(^{313}\) See, e.g., United States v. Weintraub, 273 F.3d 139, 147–51 (2d Cir. 2001) (interpreting the Clean Air Act, 42 U.S.C. § 7413(c) (2000)), to require proof only that the accused knew that he was dealing with asbestos, but not that the asbestos was of the kind or quantity that would trigger the regulatory workplace standard); United States v. Figueroa, 165 F.3d 111, 115–16 (2d Cir. 1998) (interpreting the Alien Re-Entry Act, 8 U.S.C. § 1327 (1996) (current version at 8 U.S.C. § 1327 (2000)) to require proof that the accused knew that the alien whose entry he had facilitated was legally excludable from the United States). Even here, the analysis is crimped, the respective courts being forced by Supreme Court precedent largely to forego a full notice analysis.
these cases, the courts find themselves hamstrung, unable to escape the Court’s short-circuiting of the notice analysis.

If one is of the view that *mens rea* is an essential predicate to all criminal punishment, then *Liparota*, *Staples*, and *Ratzlaf* are more than half of the loaf. Although liability without fault still survives, the Court’s adoption of “innocent conduct” as the principal, if not sole, criterion of statutory construction regarding *mens rea* goes a long way towards eliminating federal strict-liability crimes. Maybe in this era of often draconian sentences under the Federal Sentencing Guidelines, this development is a good thing.\(^\text{314}\) But the possibility that in a particular instance Congress might opt for an excuse-free criminal sanction to protect the public from what it sees as a substantial threat to public safety is effectively lost in this jurisprudence. The Court has simply erected a *mens rea* construct that no longer permits that legislative judgment to take effect, effectively imposing its will over that of Congress, all in the name of statutory construction. At least from the perspective of the democratic process and legislative prerogative, that does not seem to be an altogether good thing.

\(^{314}\) See generally Kennedy, *supra* note 52.