NORMATIVE IGNORANCE: A CRITICAL CONNECTION BETWEEN THE INSANITY AND MISTAKE OF LAW DEFENSES

KEN M. LEVY*

ABSTRACT

This Article falls into three general parts. The first part starts with an important question: is the insanity defense constitutionally required? The United States Supreme Court is currently considering this question in the case of Kahler v. Kansas.

The Court actually refused to answer this question in 2012 when it denied certiorari to an appeal brought by John Joseph Delling, a severely mentally ill defendant who was sentenced to life in prison three years earlier for two murders. Delling never had the opportunity to plead the insanity defense because his home state, Idaho, had abolished it in 1982.

By depriving Delling of the right to plead insanity, Idaho violated Delling's Fourteenth Amendment right to due process and his Eighth Amendment right against "cruel and unusual" punishment. Naturally, the same is true for many other mentally ill and disabled defendants who have been prosecuted in Idaho and in the other three states that have abolished the insanity defense: Kansas, Montana, and Utah.

The second general part of this Article notes an insight that I stumbled upon in the course of researching the first part: the insanity defense and the mistake of law defense both require ignorance of the law, what I refer to as "normative ignorance." Indeed, normative ignorance is what makes both of these defenses exculpatory in the first place.

Given this critical connection, there is a way for Idaho, Kansas, Montana, and Utah to resume compliance with the Constitution. Instead of reinstating the insanity defense per se, which might be politically unpopular, they should just broaden their mistake of law defense to include normative ignorance caused by cognitive incapacity that is itself caused by mental illness or disability.

Still, this Article is not merely directed at these four western states. It is directed at the other forty-six states as well. Because they already

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have an insanity defense, they need not incorporate it into their mistake of law defense. But in the third general part, I will argue that they should still expand their mistake of law defense to cover defendants who either lack a reasonable opportunity to learn the law or reasonably but mistakenly infer from widely accepted norms or ethics that their conduct is lawful.

I. INTRODUCTION

Between 1979 and 1995, four states—Idaho,[1] Kansas,[2] Montana,[3] and Utah[4]—abolished the insanity defense.[5] One question that the

1. *State v. Fisher*, 398 P.3d 839, 841 (Idaho 2017) ("In 1982, the Idaho legislature repealed former Idaho Code section 18-209, which made mental disease or defect an affirmative defense in a criminal proceeding.").

2. *State v. Van Hoet*, 89 P.3d 606, 613 (Kan. 2004) ("In 1995, the Kansas Legislature amended [K.S.A. 22-3428] to abolish the defense of insanity and replace it with a mental disease or defect defense.").

3. *State v. Korell*, 690 P.2d 992, 996 (Mont. 1984) ("In 1979 the Forty-Sixth Session of the Montana Legislature enacted House Bill 877. This Bill abolished use of the traditional insanity defense in Montana and substituted alternative procedures for considering a criminal defendant's mental condition.")

4. *State v. Herrera*, 895 P.2d 359, 361 (Utah 1995) ("When John Hinckley was found not guilty by reason of insanity for shooting President Ronald Reagan and Press Secretary James Brady, public outrage prompted Congress and some states to reexamine their respective insanity defense laws. As a result, in 1983 Utah abolished the traditional insanity defense in favor of a new statutory scheme.").

5. *See* Walter Sinnott-Armstrong & Ken Levy, *Insanity Defenses*, *in* THE OXFORD HANDBOOK ON THE PHILOSOPHY OF CRIMINAL LAW 299, 316–17, 320–21, 324 (John Deigh & David Dolinko eds., 2011).

United States Supreme Court has never directly addressed is whether such abolition is constitutional—specifically, whether it violates either the Fourteenth Amendment's requirement of due process for criminal defendants[6] or the Eighth Amendment's prohibition against "cruel and unusual" punishment.[7] Fortunately, however, the Court is now addressing this question in *Kahler v. Kansas*.[8]

The primary purpose of the insanity defense is to prevent injustice.[9] A person who suffers from a serious mental illness or disability that undermines her rationality or self-control is no more responsible for her criminal act than a young child or animal would be and therefore cannot justly be punished for committing it. The two underlying assumptions here are that insanity negates responsibility and responsibility is a necessary condition of just punishment.[10] Whether, then, the insanity defense is constitutionally required depends on whether both of these assumptions are represented in the Constitution.

One problem is that the Constitution does not explicitly state these assumptions. It does not even mention the words "responsible" or "responsibility." So on a purely textualist interpretation of both the Eighth and Fourteenth Amendments,[11] the abolition of the insanity defense is constitutional.

Abolitionists might further argue that even if a non-textualist theory of interpretation were applied to the Eighth and Fourteenth

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6. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

7. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

8. *Kahler v. Kansas*, 410 P.3d 105 (Kan. 2018), *cert. granted*, 139 S. Ct. 1318 (2019).

9. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("As Foucha was not convicted, he may not be punished. Here, Louisiana has by reason of his acquittal exempted Foucha from criminal responsibility as [Louisiana's insanity statute] requires." (citations omitted)); Grant H. Morris, *Placed in Purgatory: Conditional Release of Insanity Acquittees*, 39 ARIZ. L. REV. 1061, 1113 (1997) ("As we approach the new millennium, a frightened public's cry for vengeance is deafening. Insanity acquittees, however, are not criminally responsible and may not be punished."); Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 827 (1985) ("We should be clear that it is unjust to *punish* someone who is not responsible. The argument that insanity acquittees who are released early do not receive their just deserts is simply illogical and improper because nonresponsible persons do not deserve to be punished.").

10. See Ken M. Levy, Free Will, Responsibility, and Crime: An Introduction 111 (2020) ("Underlying the insanity defense are three assumptions: (a) people who are insane are not morally responsible for their actions, (b) moral responsibility is a necessary condition of criminal responsibility, and (c) criminal responsibility is necessary for just criminal punishment. Therefore, by transitivity, people who are insane may not be justly criminally punished.").

11. *See* Ken Levy, *Why the Late Justice Scalia Was Wrong: The Fallacies of Constitutional Textualism*, 21 LEWIS & CLARK L. REV. 45, 47 (2017) (" 'Constitutional Textualism'—more commonly referred to as just 'Textualism'—[is] Justice Scalia's (and many of his followers') theory that the meaning of the Constitution lies entirely in its words.").

Amendments, and even if this interpretation entailed that the insanity defense is constitutionally required, abolition would still be constitutional as long as the state provided an adequate substitute for the insanity defense. And, they argue, this is precisely what the four abolitionist states did. All of them replaced their insanity defense with a diminished capacity defense.[12]

While the insanity defense says that the defendant's mental illness or disability is so debilitating that it is fully exculpatory—that is, fully negates responsibility for her crime—the diminished capacity defense says that the defendant's mental illness or disability is not fully exculpatory.[13] Instead, it negates only the defendant's capacity to form the mens rea, usually specific intent or knowledge, required for the offense.[14] But the result is not therefore acquittal; instead, it is mitigation to a lesser crime, a crime whose mens rea is not negated by the defendant's diminished capacity—for example, manslaughter instead of murder.[15]

Unfortunately, however, the diminished capacity defense is a constitutionally (and morally) inadequate substitute for the insanity defense. Most defendants who would otherwise qualify as insane are perfectly capable of forming the mens rea required for the crime with which they are charged. As a result, if they are afforded only the diminished capacity defense, they are being effectively deprived of both their constitutional right to due process, which includes the right to offer a fully exculpatory defense against criminal charges, and (if convicted and punished) their Eighth Amendment right against cruel and unusual punishment.[16]

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12. *See* IDAHO CODE § 18-207 (2019); KAN. STAT. ANN. § 21-5209 (2011); MONT. CODE ANN. § 46-14-102 (2015); UTAH CODE ANN. § 76-2-305 (West 2016).

13. *See* MICHAEL N. GIULIANO ET AL., 22 C.J.S. CRIMINAL LAW: SUBSTANTIVE PRINCIPLES § 128 (Sept. 2019) ("The defense of insanity requires absolute inability, whereas the mitigating factor of diminished capacity only requires the lack of substantial capacity."). *But see* Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 175 (2016) ("[T]here is uncertainty about whether diminished capacity ought to be treated as a mitigating factor. Diminished capacity is a cognitive or psychological defect that limits a person's ability to appreciate the wrongfulness of her crimes or her ability to avoid committing them. On the one hand, diminished capacity should be treated as a mitigating factor because it lessens a defendant's culpability. On the other hand, it should be treated as an aggravating factor because diminished capacity makes the defendant more likely to commit crimes in the future.").

14. *See* GIULIANO ET AL., *supra* note 13, § 128.

15. *Id.*

16. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *cf. Atkins v. Virginia*, 536 U.S. 304, 304 (2002) (holding that execution of the mentally disabled constitutes cruel and unusual punishment); *Ford v. Wainwright*, 477 U.S. 399, 399, 401 (1986) (holding that executing insane individuals is cruel and unusual punishment).

It follows that the insanity defense is constitutionally required[17] and therefore that Idaho, Kansas, Montana, and Utah have been violating the Constitution for the past few decades. So they should reinstate it as soon as possible. And if these four states are worried about political resistance, I offer a solution: sneak a version of the insanity defense into their mistake of law defense. I also propose two other additions to the mistake of law defense: lack of a reasonable opportunity to learn the law and a reasonable but mistaken inference from widely accepted norms or ethics that one's conduct is lawful.

At first, my solution (sneaking the insanity defense into the mistake of law defense) may seem preposterous; criminal law scholars will understandably ask what one defense has to do with the other. It turns out that the two defenses, which are normally regarded as entirely distinct and unrelated, are actually very closely connected. Specifically, they overlap in one critical respect: what makes both excuses excuses is that they both involve what I dub "normative ignorance," the kind of moral or legal ignorance that an individual must suffer at the time of her crime in order to be eligible for the insanity defense. While the mistake of law defense says that a defendant should be excused from criminal wrongdoing because she honestly and reasonably believed that her conduct was legal,[18] the insanity defense says that a defendant should be excused from criminal wrongdoing because her mental illness or disability prevented her from knowing or understanding the law.[19]

II. DELLING V. IDAHO

The U.S. Supreme Court has never decided whether the insanity defense is constitutionally required, but it did come close. In *Delling v.*

17. *See, e.g.*, *State v. Lange*, 123 So. 639, 642 (La. 1929); *Sinclair v. State*, 132 So. 581, 581–82 (Miss. 1931); *Finger v. State*, 27 P.3d 66, 66, 68 (Nev. 2001); *State v. Strasburg*, 110 P. 1020, 1021, 1024 (Wash. 1910).

18. *See* Ken Levy, *It's Not Too Difficult: A Plea to Resurrect the Impossibility Defense*, 45 N.M. L. REV. 225, 243 (2014) ("Normally, ignorance of the law is no excuse. But ignorance of the law can be an excuse when the ignorance is honest and reasonable." (emphasis omitted)).

19. *See Leland v. Oregon*, 343 U.S. 790, 800 (1952) ("Knowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions."). It should be mentioned that the insanity defense does not always involve normative ignorance; occasionally it involves *factual* ignorance. On the M'Naghten Rule insanity may involve ignorance of the the nature and quality of the act as a result of a defect of reason, from disease of the mind. *Infra* Part IV. Because most successful pleas of the insanity defense involve normative ignorance rather than factual ignorance—which would explain why the highly influential Model Penal Code simply eliminated factual ignorance from its definition of insanity—this exception should not disrupt my analysis. *See* MODEL PENAL CODE § 4.01(1) (AM. LAW INST., Official Draft and Revised Comments 1985).

Idaho,[20] John Joseph Delling argued that Idaho had deprived him of his constitutional right to present an insanity defense. For better or worse, the Court denied certiorari.[21]

Still, Justice Breyer issued a dissent from the denial of certiorari that Justices Ginsburg and Sotomayor joined. In his dissent, Justice Breyer argued that the Constitution does indeed require the fifty states to provide an insanity defense.[22] Justice Breyer's central argument involved a comparison between two situations, which he referred to as "Case One" and "Case Two."[23]

In Case One, "The defendant, due to insanity, believes that the victim is a wolf. He shoots and kills the victim."[24] In Case Two, "The defendant, due to insanity, believes that a wolf, a supernatural figure, has ordered him to kill the victim."[25] Neither defendant seems guilty of murder. The defendant in Case One does not seem guilty of murder because, as a result of his insanity, he did not intend to kill a human being. The defendant in Case Two does not seem guilty of murder because, as a result of his insanity, his reason for killing another human being was delusional.

The problem is that a state that recognized only the diminished capacity defense and not the insanity defense would be forced to reach unjust results. Specifically, the State would have to acquit only the defendant in Case One, not the defendant in Case Two, because only the defendant in Case One lacked the requisite mens rea for murder (intentionally killing another human being).[26] For this reason, the defendant in Case Two would suffer a serious injustice; he would be convicted of a crime, whether second degree murder or manslaughter, when he was not, in fact, responsible for it.

Actually, it is more precise to say that the Case One defendant would suffer *less* injustice, as opposed to *no* injustice. Diminished capacity is generally considered to be only a mitigating factor, not a full excuse like insanity.[27] So if the Case One defendant, who is deprived of the insanity defense, is acquitted of murder on the basis of diminished capacity, he will still most likely be convicted of a lesser crime, like manslaughter or negligent homicide. And because, ex hypothesi, the Case One defendant is insane, this result is still unjust—only less unjust than if he had been convicted of murder, as the Case Two defendant would be.

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20. *Delling v. State*, 267 P.3d 709, 711 (Idaho 2011), *cert denied*, 568 U.S. 1038 (2012).
21. *Id.*
22. *Id.* at 1041.
23. *Id.* at 1040.
24. *Id.*
25. *Id.*
26. *See id.*
27. *See supra* note 10 and accompanying text.

III. WHY DIMINISHED CAPACITY IS NOT AN ADEQUATE SUBSTITUTE FOR THE INSANITY DEFENSE

Once we dig a little deeper into Justice Breyer's Case One/Case Two argument, we can better understand why the diminished capacity defense is an inadequate substitute for the insanity defense.

Some background is necessary. The two main types of defenses are justifications and excuses.[28] A justification says that the apparent crime (for example, murder) was not, in fact, a crime; once the full context is considered, the surface-level appearance turns out to be quite distinct from reality.[29] For example, while a killing may initially appear to be a murder, this appearance would be false if the defendant were engaging in (perfect) self-defense or defense of others. So it would be completely unjust to convict and punish him.

An excuse, on the other hand, says that the defendant did indeed commit the crime but cannot justly be blamed for it because she could not reasonably have been expected, given particular circumstances, to have avoided it.[30] There are several circumstances that qualify: involuntariness (the automatism defense), entrapment, severe mental illness or disability (the insanity defense), serious threats (the duress defense), youth (the infancy defense), involuntary intoxication, mistake of fact, and mistake of law.[31] Each of these circumstances would make blaming and punishing the defendant for a given criminal act (much) more unjust than acquitting her.[32]

Underlying both justifications and excuses is the "Responsibility Axiom": even if a defendant commits an act that satisfies all the elements of a crime, the circumstances surrounding the act would make it more unjust to hold her responsible—that is, to blame and

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28. *See* David O. Brink, *The Nature and Significance of Culpability*, 13 CRIM. L. & PHIL. 347, 353 (2019) ("[T]he two main kinds of affirmative defense a defendant can offer [are] justifications and excuses.").

29. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 759 (2000) ("Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; . . . . A justification speaks to the rightness of the act . . . .").

30. *See* LEVY, *supra* note 10, at 139 ("[W]hat ties all of the currently recognized excuses together is not the defendant's normative incompetence (or hard choice) but society's normative expectations. They all point to conditions or circumstances that make it unreasonable for society to expect the defendant to have behaved otherwise—that is, to have avoided committing the criminal act that she committed."); *cf.* FLETCHER, *supra* note 29, at 759 ("[C]laims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor. . . . [A]n excuse, [speaks] to whether the actor is accountable for a concededly wrongful act.").

31. *See* LEVY, *supra* note 10, at 35, 136, 140.

32. *See id.* at 139–40 ("[T]he excuses as a whole embody this fundamental point: it is more just that we refrain from punishing somebody whom we cannot reasonably expect to have avoided committing a crime than that we simply vent our perfectly natural and understandable punitive impulses against her for committing this crime.").

punish her—for committing this act than to acquit her.[33] In the criminal justice system, the Responsibility Axiom is foundational. Causal responsibility for a crime is simply insufficient; the defendant must be *morally* responsible for the crime as well.[34] And moral responsibility means not merely satisfying all of the elements of the crime (as defined in the statutes) but also *failing to satisfy* circumstances that would render performance of the crime reasonable, understandable, or unavoidable.[35]

There are two reasons to think that the diminished capacity defense sometimes conflicts with the Responsibility Axiom. First, diminished capacity is merely mitigating, not fully exculpatory (like the insanity defense);[36] it merely reduces the crime charged or the sentence. So the defendant is still being blamed and punished, just to a lesser degree. And blame and punishment *to any degree* is unjust if the defendant was *not at all* responsible for her crime, which is the case if she was insane. As Justice Breyer argued in the *Delling v. Idaho* dissent, such undeserved punishment is cruel and unusual.[37]

Second, the diminished capacity defense often does not "scratch" where it "itches." Again, the diminished capacity defense says that the defendant was, for some reason, unable to form the mens rea required for the crime charged. But, as in Justice Breyer's Case Two example, the defendant *was* able to form the mens rea—in that case, intentionally killing another human being. So it is simply wrong—a factual mistake—to find him eligible for the diminished capacity defense. Of course, many defendants are entitled to mitigation rather than full exculpation. But the reason for mitigation should be accurately captured by the defense. In Case Two, it is not. By preventing the defendant from offering a more accurate defense of his criminal act, the state is depriving him of fundamental due process.

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33. *See id.* at 57 ("It is a foundational axiom of criminal law—call it the 'Responsibility Axiom'—that criminal punishment requires or presupposes responsibility."); *id.* at 136 ("Criminal responsibility, and therefore just criminal punishment, are almost universally thought to require moral responsibility.").

34. *See* Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 754 (2012) ("Convicting a morally blameless party . . . brings the criminal justice system into disrepute and dilutes the effect of society's communal condemnation of his actions."); *id.* at 768 ("[I]mprisoning a person who is morally blameless not only violates longstanding principles of fairness, not only engenders disrespect for the criminal law, and not only fails to promote the retributive or deterrent purposes of the criminal law, but it also creates a risk of a haphazard or lottery-like system of enforcement . . . ."). *But see* LEVY, *supra* note 10, at 119–25, 145–52 (arguing that criminal responsibility does not require moral responsibility).

35. *See* LEVY, *supra* note 10, at 34–35, 104–10 (discussing the four conditions or elements of moral responsibility).

36. *See supra* note 10 and accompanying text.

37. *See Delling v. State*, 267 P.3d 709, 711 (Idaho 2011), *cert denied*, 568 U.S. 1038, 1040 (2012) (Breyer, J., dissenting on the denial of certiorari).

IV. NORMATIVE IGNORANCE: THE CRITICAL CONNECTION BETWEEN THE INSANITY AND MISTAKE OF LAW DEFENSES

While Part III may seem to lead directly to the conclusion that the insanity defense is constitutionally required, I will argue in this Part that this conclusion does not follow. As long as a jurisdiction provides for both a diminished capacity defense *and a broad mistake of law defense*, it need not also provide for an insanity defense per se. But to get to this conclusion, I first need to explain what the insanity defense is all about.

The two main versions of the insanity defense are the M'Naghten Rule and the Model Penal Code (MPC) rule.[38] According to the former, insanity consists of three elements:

(1) a mental illness or disability
(2) causes
(3) the individual to lack knowledge either
  (3a) of the nature of his criminal act or
  (3b) that his criminal act is wrong.[39]

According to the latter, insanity consists of three elements:

(1) a mental illness or disability
(2) causes
(4) the individual to "lack [the] substantial capacity" either
  (4a) "to appreciate the criminality [wrongfulness] of his conduct" or
  (4b) "to conform his conduct to the requirements of law."[40]

While (1) and (2) are identical for both definitions, (3) in the M'Naghten Rule and (4) in the MPC Rule are not. Still, (3) and (4a) both concern the insane individual's ignorance. While (3) more narrowly concerns the individual's inability to acquire cognitive knowledge that the act is wrong, (4a) more broadly captures the individual's inability to acquire a cognitive or emotional understanding of why the act is wrong.[41]

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38. *See* LEVY, *supra* note 10, at 112-13.

39. *See* LEVY, *supra* note 10, at 112 (citing M'Naghten's Case, [1843] 8 Eng. Rep. 718 (H.L. 722)).

40. *See* MODEL PENAL CODE § 4.01(1) (AM. LAW INST., Official Draft and Revised Comments 1985); LEVY, *supra* note 10, at 112–13 (citing MODEL PENAL CODE § 4.01(1) (AM. LAW INST., Official Draft and Revised Comments 1985)).

41. I will briefly discuss (4a)—that is, the volitional prong of the insanity defense—in Section X. For a fuller discussion of the volitional prong, *see* LEVY, *supra* note 10, at 61, 112–13, 117; Sinnott-Armstrong & Levy, *supra* note 5, at 306–12.

Let's use the term "normative ignorance" to capture the legal ignorance that an individual must suffer at the time of her crime in order to be eligible for the insanity defense. By "legal ignorance," I mean ignorance not just of particular statutes and common law but also of natural law or commonly accepted morality, which informs and motivates many criminal laws. What very few realize is that this normative ignorance is precisely what the *mistake of law defense* is all about as well. So the insanity defense and the mistake of law defense intersect in a surprising, intriguing way.[42] I will use this point of intersection to argue that the mistake of law defense may serve as an adequate substitute for the insanity defense.

Suppose that Clyde suffers from paranoid delusions and murders Bonnie in Kansas, a jurisdiction that has abolished the insanity defense, because he believes that Bonnie is the devil. The diminished capacity defense, which is only mitigating, applies if Clyde was unable to form the mens rea required for murder. In Kansas, the required mens rea for first degree murder is intent plus premeditation.[43] Clearly, Clyde was able to form this mens rea; he was able to premeditate Bonnie's death and then act on this premeditation.[44]

Given Kansas' abolition of the insanity defense in 1995, diminished capacity is the best defense available to Clyde. But what if he pleaded the mistake of law defense instead? What if he argued that, because of his mental illness or disability, he lacked the ability to know that, or appreciate why, killing another human being, no matter how evil he believes her to be, is a serious violation of Kansas's criminal law? Would this mistake of law defense serve just as well as the insanity defense?

We simply do not know how a typical Kansas jury would receive the mistake of law defense in this situation. But, first, there is no reason to think that they would be any less receptive to it than they would be if Clyde had pleaded insanity, were the insanity defense still available. Second, even if the jury were less receptive to the mistake of law defense in this context, he would still be receiving full due process, which is what really matters here. Kansas' severely mentally ill defendants deserve due process just as much as all other defendants. And if Kansan legislators are worried, correctly or not, that reinstating the insanity defense would be politically unpopular, my suggestion here is that they could minimize political damage simply by inserting

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42. Doug Husak also recognizes this point of intersection. DOUGLAS HUSAK, IGNORANCE OF LAW: A PHILOSOPHICAL INQUIRY 87 (2016).

43. KAN. STAT. ANN. § 21-5402 (2019).

44. *See* State v. Cowan, 861 P.2d 884, 887 (Mont. 1993) ("The existence of a mental disease or defect in a person does not necessarily preclude the person from acting purposely or knowingly.").

it into a broadened mistake of law statute, which—because of its less sensational, more recondite nature—is much less likely to arouse the public's hostility.

V. THE MAIN RATIONALE FOR THE MISTAKE OF LAW DEFENSE: CRIMINAL RESPONSIBILITY REQUIRES KNOWLEDGE OF CRIMINAL LAW

My central thesis is that an expanded mistake of law defense can adequately substitute for the insanity defense. But why think that the mistake of law defense has any validity in the first place?

Suppose four things. First, the government passes a particular law—*L*—prohibiting a particular act—*A*—and prescribes a certain range of punishment for individuals who perform *A*. Second, an individual—again, Clyde—intentionally performs *A*. Third, Clyde claims that he never knew or heard about *L*. His claim is not that the prosecution or the government is violating the legality principle, which "forbids punishing an individual for committing an act that the state had not designated as criminal at the time that the individual performed the act."[45] The government did, after all, announce the passage of *L*. Instead, his claim is that, even if this is true, he never received this information and therefore cannot be blamed and punished for performing *A*. Fourth, we have proof beyond a reasonable doubt that Clyde is not lying about his ignorance of *L* at the time that he *A*-ed.

This is a strange situation. On the one hand, (a) Clyde satisfies all of t he elements of the crime. Again, he knowingly and intentionally *A*-ed. On the other hand, (b) he is making a very plausible claim that he is still not responsible for the crime. The reason: while he knowingly *A*-ed, he did not know that *A*-ing was illegal.

Together, (a) and (b) raise some difficult questions. Is mere knowledge of the facts, especially what action one is performing and what harms it will cause, sufficient for criminal culpability?[46] Or is the additional knowledge that the action itself is criminal also necessary? How can Clyde think that,

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45. Levy, *supra* note 18, at 230-31.

46. *See* MODEL PENAL CODE § 2.02 cmt. 11 (AM. LAW INST., Official Draft and Revised Comments 1985) ("[T]he conventional position [is] that knowledge of the existence, meaning or application of the law determining the elements of an offense is not an element of that offense . . . . The proper arena for the principle that ignorance or mistake of law does not afford an excuse is thus with respect to the particular law that sets forth the definition of the crime in question. It is knowledge of *that* law that is normally not a part of the crime, and it is ignorance or mistake as to *that* law that is denied defensive significance . . . by the traditional common law approach to the issue."); Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 683 (1976) ("At common law, the *mens rea* necessary to convict generally required that the government show the defendant to have acted purposefully to bring about a harm, to have known facts indicating that the harm would be a likely result of his action, or to have acted without concern for whether the harm would follow.").

despite his commission of the crime, it is still unjust to punish him for it? More specifically, why does Clyde think that his ignorance of the law excuses him? What exactly seems exculpatory about his ignorance? Conversely, why think that criminal culpability requires knowledge of the law?

Clyde's response to these questions is that he is blameless for the same reason that he would have been blameless had the government never passed *L* to begin with. If *L* had not passed before Clyde *A*-ed, then punishing Clyde for *A*-ing would be wrong because he never received fair notice that *L* was prohibited.[47] But, ex hypothesi, Clyde never *did* receive fair notice of the fact that *L* passed.

So it would be equally unjust to blame and punish Clyde.[48] The two situations are subjectively identical. And it is this subjective state, specifically his state of mind at the time he performed *A*, that determines whether he is culpable for *A*-ing.

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47. *See* C. Antoinette Clarke, *Law and Order on the Courts: The Application of Criminal Liability for Intentional Fouls During Sporting Events*, 32 ARIZ. ST. L.J. 1149, 1182–83 (2000) ("By restricting punishment to the violation of existing legal rules, the principle of legality promotes fair notice, which in turn facilitates individual autonomy. By denying officials the discretion to punish conduct that the officials—but not any existing law—deem criminal, it assures that society is governed by the rule of law rather than the will of men. One of the rationales advanced for the legality principles and related doctrines is 'the perceived unfairness of punishing conduct not previously defined as criminal.' . . . This notice or fair warning is considered essential to fundamental fairness." (citations omitted)); Levy, *supra* note 18, at 230–31 ("The principle of legality forbids punishing an individual for committing an act that the state had not designated as criminal at the time that the individual performed the act.").

48. *See* Stephen P. Garvey, *Authority, Ignorance, and the Guilty Mind*, 67 SMU L. REV. 545, 547–48 (2014) ("An actor possesses a guilty mind if and only if he freely chooses to φ, where φ-ing is contrary to the demands of the criminal law, and where the actor's choice to φ manifests a quality of will inconsistent with that of a law-abiding citizen. Unless an actor freely decides to φ with a guilty mind the state cannot legitimately find him guilty of criminal wrongdoing. Absent such a finding, the state has no permission to subject him to the criminal law's repertoire of responses, not the least of which is punishment." (citations omitted)); Meese & Larkin, *supra* note 34, at 762 ("[W]here the law forbids conduct that [is not injurious, dangerous, or wrongful] . . . it is no less unfair to impose a criminal sanction upon a party who reasonably, albeit mistakenly, believes that his conduct is lawful than it is to punish someone whose conduct violates an unduly vague statute. Neither party has the evil or nefarious intent that is the hallmark of culpability and that the criminal law seeks to curb, so neither person should be subject to condemnation and sanction. Neither one purposefully chose to break a known law because neither one knew what the law in fact prohibited. Neither one, therefore, deserves to be criminally punished."); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 123–24 (1962) ("If a man does an act under circumstances that make the act criminal, but he is unaware of those circumstances, surely he has not had fair warning that his conduct is criminal. . . . . [I]f he is unaware that his conduct is labeled as criminal by a statute, is he not in much the same position as one who is convicted under a statute which is too vague to give 'fair warning'? In both cases, the defendant is by hypothesis unblameworthy in that he has acted without advertence or negligent inadvertence to the possibility that his conduct might be criminal. If warning to the prospective defendant is really the thrust of the vagueness doctrine, then it seems inescapable that disturbing questions are raised . . . about the whole range of criminal liabilities that are upheld despite the defendant's plea of ignorance of the law.").

Clyde's claim is that criminal responsibility requires not just satisfaction of the mens rea for *L*, whatever that may be: intentionally, knowingly, or recklessly *A*-ing. It also requires *knowledge that A-ing is indeed illegal*. So if Clyde did not know about *L*, and if his ignorance of *L* was not deliberate or willful,[49] then he cannot justly be held responsible for violating it.[50] And the reason, once again, is that it is unjust to blame and punish somebody for committing an act that he did not know was prohibited.[51]

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49. Willful ignorance (or willful blindness or conscious avoidance), which involves (a) knowledge of a high probability that one's conduct is illegal, and (b) deliberate efforts to avoid confirmation of this knowledge, is considered to be sufficient for knowledge. Global-Tech Appliances v. SEB S.A., 563 U.S. 754, 769 (2011); *United States v. Giovannetti*, 919 F.2d 1223, 1226 (7th Cir. 1990); *United States v. Jewell*, 532 F.2d 697, 704 (9th Cir. 1976).

50. Consider another example: conspiracy. Conspiracy requires three mens reas (mentes reae): an intention to enter into an agreement, knowledge that the agreement involves illegal objectives, and an intention that these illegal objectives be realized. *See, e.g.*, *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943) ("[The] intent [to further, promote, and cooperate in an illegal act] . . . is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist."). But what if a person intentionally enters into an agreement, knows the objectives of the agreement, intends to realize these objectives, does *not* know that the objectives are illegal, and her ignorance of the illegality of the objectives is not deliberate or willful? Is she still guilty of conspiracy? The Supreme Court has stated that knowledge of illegality is *not* necessary for culpability. *See United States v. Feola*, 420 U.S. 671, 687 (1975) ("The general conspiracy statute, 18 U.S.C. § 371, offers no textual support for the proposition that to be guilty of conspiracy a defendant in effect must have known that his conduct violated federal law." (footnote omitted)); *Ingram v. United States*, 360 U.S. 672, 677–78 (1959) ("It is fundamental that a conviction for conspiracy under 18 U.S.C.A. § 371 cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.' There need not, of course, be proof that the conspirators were aware of the criminality of their objective, . . ." (citation omitted)); *see also United States v. Campa*, 529 F.3d 980, 1023 (11th Cir. 2008) ("The defendant need not know that the conduct is unlawful, but the conspirators must agree to commit unlawful conduct." (citing Feola, 420 U.S. at 687)); *State v. Peterson*, No. 40550, 2014 WL 6092420, at *3 (Idaho Ct. App. 2014) ("For example, a person is guilty of conspiracy to deliver a controlled substance under Idaho Code section 37–2732(f) when she and another person agree to deliver a controlled substance. The statute does not require the State to prove that the defendant knew it was illegal to deliver a controlled substance. Under this analysis, then, to be convicted of conspiracy, a defendant must have simply intended to engage in the acts necessary to commit the underlying substantive offense. Thus, whether the defendant knows the acts are illegal is irrelevant."). *But see* People v. Meneses, 82 Cal. Rptr. 3d 100, 113 (Cal. Ct. App. 2008) ("Ignorance that a penal law prohibits one's conduct may . . . provide a defense where one is charged with conspiracy to commit a crime that is not malum in se."); *People v. Urziceanu*, 33 Cal. Rptr. 3d 859, 875 (Cal. Ct. App. 2005) ("Defendant's good faith mistake of law, while not a defense to the crime of selling marijuana, was a defense to the conspiracy to commit that crime.").

51. *See* FLETCHER, *supra* note 29, at 732 ("Assuming that everyone who violates the law does so in disregard and disrespect of the law is obviously outdated. Maintaining that policy today verges on blindness to the problem of individual justice."); Meese & Larkin, *supra* note 34, at 764 ("[I]t is fundamentally unfair to punish someone who acted without knowledge that his conduct was illegal or inherently wrongful. That is, uncritically applying the common law ignorance rule today often can lead to results that are unjust. . . . Unjust, because imposing the stigma of a criminal conviction and allied punishments on someone morally blameless cannot be justified on retributive grounds. A person unaware of what the law forbids or what custom deems blameworthy by definition harbors neither ill intent nor

VI. WILLFULNESS

Not everybody agrees with Clyde that knowledge of illegality is necessary for criminal culpability. Indeed, the Supreme Court has stated on several occasions that it is not necessary.[52]

One argument against Clyde involves the concept of *willfulness*. Some white-collar criminal statutes require willfulness, usually in addition to intent, for culpability. Courts generally interpret willfulness to mean knowledge that one's act is illegal.[53] But given this general interpretation, it would seem to follow that criminal statutes which *omit* the willfulness requirement do *not* require knowledge that one's act is illegal. If the legislatures wanted this "knowledge-of-illegality"—as opposed to just "knowledge-of-act-and-consequent-harms"—element in addition to the other applicable mens rea(s), they would have included it.

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any purpose to violate a known legal duty." (footnotes omitted)); *id.* at 783–84 ("The proposition that a defendant should be able to raise a mistake of law defense to a charge that he committed a *malum prohibitum* crime sensibly balances society's strong interest in enforcement of the law and society's even more powerful interest in not punishing morally blameless parties. Allowing the courts to filter out the phony from legitimate claims of mistake will separate the blameworthy from the blameless and protect the latter. The cost of making that distinction likely will prove minimal and, in any event, is worth it. Punishing someone who is blameless is unjust, and that cost must be weighed, too."). *But see* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 38 –83 (2d ed. 1960) ("If [the mistake of law defense] were valid, the consequence would be: whenever a defendant in a criminal case thought the law was thus and so, he is to be treated as though the law were thus and so, *i.e., the law actually is thus and so*. But such a doctrine would contradict the essential requisites of a legal system.").

52. *See supra* note 50; *see also Bryan v. United States*, 524 U.S. 184, 193 (1998) ("[I]n *Staples v. United States*, 511 U.S. 600 (1994), we held that a charge that the defendant's possession of an unregistered machinegun was unlawful required proof 'that he knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun.' It was not, however, necessary to prove that the defendant knew that his possession was unlawful. Thus, 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." (footnote and citations omitted)); *see also* Paul Savoy, *Reopening Ferguson and Rethinking Civil Rights Prosecutions*, 41 N.Y.U. REV. L. & SOC. CHANGE 277, 314 (2017) ("[C]riminality requires a culpable state of mind known as *mens rea* or 'guilty mind.' This does not mean, however, that a defendant must have known that his conduct was illegal for him to be found guilty. It is generally sufficient to prove that the defendant intentionally or knowingly inflicted harm on the victim, even if the defendant did not know that doing so was unlawful." (footnotes omitted)).

53. *See Bryan*, 524 U.S. at 191–92 ("As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.' " (footnote omitted) (citing *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994))). *But see id.* at 198–99 ("[W]hile disregard of a known legal obligation is certainly sufficient to establish a willful violation, it is not necessary . . . ."); Meese & Larkin, *supra* note 34, at 773 ("[T]he courts could require the prosecution to prove that the defendant knew that his conduct was illegal or at least blameworthy. That result, while unusual, is not unheard of. The Supreme Court generally has read federal statutes to require the government to prove that the defendant purposefully broke the law whenever it forbids conduct that is done 'willfully.' ").

While initially persuasive, this objection fails. Willfulness has been inserted into only a relatively small number of criminal statutes, and—as stated above—these statutes all fall into the area of white-collar crime.[54] The absence of this mens rea from all *other* (*non*-white-collar) statutes does not necessarily imply that these statutes do not require knowledge of illegality. Instead, as Clyde argues, this requirement is generally implicit; willfulness is merely added to some of the more complicated crimes, generally *malum prohibitum* rather than *malum in se*, in order to make this normally implicit requirement explicit.[55]

VII. WHY IGNORANCE OF THE LAW IS GENERALLY NO EXCUSE

If Clyde is right and knowledge of the law is necessary for culpability, it would seem to follow that ignorance of the law is an excellent defense. But then how do we square this inference with the well-known maxim that ignorance of the law is no excuse?[56]

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54. *See* Savoy, *supra* note 52, at 314–15. ("Another exception, which excuses even an *unreasonable* mistake of law, has been recognized in a relatively small but growing number of cases where federal criminal statutes that use the term 'willfully' have been construed to manifest a congressional intent to require proof that the defendant knew he was acting unlawfully. However, these cases have been confined to tax laws and to regulatory statutes prohibiting conduct not generally known to be criminal.").

55. *See id.* at 315 ("The rationale for requiring knowledge of illegality in federal tax cases has been based on the complexity of the Internal Revenue Code, which has the potential for criminalizing the errors of 'the well-meaning, but easily confused mass of taxpayers.' Other cases construing willfulness to require consciousness of wrongdoing have expressed a concern with criminalizing conduct that is 'apparently innocent' or 'not inevitably nefarious,' like the unauthorized possession of food stamps or the 'structuring' of banking transactions by making cash deposits in amounts of less than 10,000 dollars to avoid bank reporting requirements." (footnotes omitted)). *But see* Meese III & Larkin, Jr., *supra* note 34, at 773 ("The Court reads statutes literally and has been unwilling to construe them to include additional elements not found in the text of the law. The Court, therefore, is unlikely to read a statute as requiring proof of purposeful illegality if the text of the law lacks the term 'willfully.' " (footnote omitted)).

56. *See Cheek v. United States*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law." (citations omitted)); *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) ("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation."); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910) ("[I]nnocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse."); *Utermehle v. Norment*, 197 U.S. 40, 55 (1905) ("We know of no case where mere ignorance of the law, standing alone, constitutes any excuse or defense against its enforcement. It would be impossible to administer the law if ignorance of its provisions were a defense thereto."); *United States v. Hodson*, 77 U.S. 395, 409 (1870) ("Every one is presumed to know the law. Ignorance standing alone can never be the basis of a legal right."); *Barlow v. United States*, 32 U.S. 404, 411 (1833) ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally . . . ."); *United States v. Baker*, 197 F.3d 211, 218 (6th Cir. 1999) (" '[I]gnorance of the law is no excuse.' This

There are three main explanations for the maxim. First, there is an obvious policy reason against recognizing ignorance of the law as an excuse: individuals would be disincentivized to learn the law.[57] Obviously, we want just the opposite: to incentivize knowledge of, and thereby compliance with, the law.[58]

Second, many defendants would plead the mistake of law defense *even though* they *were* aware of the law. In other words, many defendants would lie. And because it is usually difficult to prove otherwise—that is, to prove that they did, in fact, know the law—too many defendants would escape accountability and punishment

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maxim, deeply embedded in our American legal tradition, reflects a presumption that citizens know the requirements of the law."); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 27 (1769) ("For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris*, *quod quisque tenetur scire*, *neminem excusat*, is as well the maxim of our own law, as it was of the Roman." (footnotes omitted)); Paul J. Larkin, Jr., *Taking Mistakes Seriously*, 28 BYU J. PUB. L. 71, 73 (2013) ("It is settled law that no one can defend against a criminal charge on the grounds that he did not intend to flout the law and, at worst, made only a reasonable, honest mistake as to what he was free to do."); Meese & Larkin, *supra* note 34, at 726–27 ("The ignorance-of-the-law rule traces its lineage back to Roman law. The English common law courts adopted the rule, from whence it came to America. In this country, state and federal courts, including the Supreme Court of the United States, as well as criminal law treatise writers, have long endorsed that rule. The proposition that ignorance or mistake of the law is no excuse therefore has an ancient pedigree." (footnotes omitted)); Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 999 (2017) ("[W]hile criminal violations typically carry mens rea requirements that might in principle make good-faith compliance efforts exculpating, courts have generally rejected wide-ranging mistake of law defenses even in the criminal context." (footnote omitted)).

57. *See* Larkin, *supra* note 56, at 77 ("[O]ver time [defendants' successful use of the mistake of law defense] would discourage people from learning the law." (footnote omitted)); *id.* at 105 ("A mistake-of-law rule would create a disincentive to keep abreast of developments in the law due to the fear that knowledge would sink this defense and, what is worse, would promote (and shelter) willful blindness. The result would allow phony defenses to perpetuate themselves. Surely, we want to encourage corporations to know what they may and may not do, especially given the potential catastrophes that a modern industrial society can wreak on public health and the environment. A mistake-of-law rule, therefore, would lead to far more cases of injustice than are created by the no-mistake rule." (footnotes omitted)).

58. *See* O.W. HOLMES, JR., THE COMMON LAW 48 (1881) ("It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales."); Kit Kinports, *Heien's Mistake of Law*, 68 ALA. L. REV. 121, 133 (2016) ("[T]he maxim serves the utilitarian function of providing an incentive to become familiar with the dictates of the law. Allowing a mistake of law defense, the argument goes, would encourage ignorance . . . and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.' " (footnote omitted)); Larkin, *supra* note 56, at 105 ("Defenders of the common law no-mistake rule will argue . . . that the rule has an added benefit: encouraging people to learn what the law forbids. Perhaps every individual cannot know every statute, regulation, and judicial decision defining the parameters and content of the penal code, but every person should be encouraged to learn those metes and bounds."); Meese & Larkin, *supra* note 34, at 755 ("A third, related justification for the [no-mistake] rule is that it promotes deterrence by encouraging members of the public to make themselves aware of what the law prohibits and facilitates enforcement of the criminal law by disallowing a defense that otherwise could be widely used." (footnote omitted)).

for their crimes,[59] a result that would work against the retributive, consequentialist, and expressivist purposes of the criminal justice system.[60]

Third, even if a particular defendant was genuinely ignorant of the law at the time of her crime, we generally presume that this is her fault, that she was *culpably* ignorant.[61] (Of course, this presumption can be rebutted by proof that the defendant is severely mentally ill or disabled.) While the defendant genuinely did not know that she was

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59. *See Hamling v. United States*, 418 U.S. 87, 123 (1974) ("To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law."); Kinports, *supra* note 58, at 133 ("[T]he adage is based on the concern that knowledge of the law is not readily susceptible to proof and fraudulent mistake of law claims are not easily disproven."); Larkin, *supra* note 56, at 76–77 ("A second justification for the no-mistake rule rests on the fear that a mistake-of-law defense would cripple law enforcement. . . . [A] rogue defendant (or his crafty lawyer) could use a phony mistake-of-law defense to raise a reasonable doubt of guilt and snooker the jury into an acquittal. . . . A mistake-of-law defense, therefore, could be widely, repeatedly, and fraudulently used." (footnotes omitted)); Meese & Larkin, *supra* note 34, at 749 ("The second justification for the ignorance-is-no-excuse rule is expediency. A contrary rule, the argument goes, would place on the prosecution the inordinately difficult burden of showing what knowledge of the law a person had at the time of the charged offense. In [John] Austin's words, 'if ignorance of the law were a ground of exemption, the administration of justice would be arrested.' " (footnotes omitted)); *id.* at 752–53 ("A more serious objection is that allowing a mistake of law defense will cut deeply into the government's ability to prosecute white-collar offenders for regulatory crimes, such as environmental offenses. . . . The only way to prosecute someone successfully for such crimes, the argument would go, is to reduce the government's burden by lowering the mental state necessary for a conviction. Requiring the government to prove willful wrongdoing effectively would render the environmental laws, for example, incapable of criminal enforcement." (footnotes omitted)); *id.* at 770 ("It also is not unreasonable to deny a defendant the right to offer a mistake of law defense when he is charged with a crime that is inherently blameworthy, such as murder. In that case, the defendant . . . is hoping to seat a feckless or civilly disobedient jury, and the Constitution guarantees him neither one."); *cf.* Savoy, *supra* note 52, at 314 n.196 ("Requiring consciousness of wrongdoing for violent crimes would have intolerable legal and moral consequences for prosecuting individuals generally regarded as some of our most dangerous and evil offenders. For example, terrorists, religious extremists, war criminals, and other morally committed killers, all of whom act without appreciating the wrongfulness of their conduct, would fall outside the scope of the criminal law.").

60. *See Tapia v. United States*, 564 U.S. 319, 325 (2011) ("These four considerations—retribution, deterrence, incapacitation, and rehabilitation—are the four purposes of sentencing generally, and a court must fashion a sentence 'to achieve the[se] purposes . . . to the extent that they are applicable' in a given case." (citation omitted)); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." (footnote omitted)); Meese & Larkin, *supra* note 34, at 753 ("The criminal law expresses the community's condemnation of certain conduct as blameworthy, and that consideration always has been an important part of the type of antisocial conduct that we label a crime." (footnotes omitted)); Robert L. Misner, *Limiting Leon: A Mistake of Law Analogy*, 77 J. CRIM. L. & CRIMINOLOGY 507, 509 (1986) ("A major purpose of the substantive criminal law is to induce external conformity to rules. The purpose of the law is to force compliance with a set of norms. The criminal law achieves this standard setting function mainly through notions of retribution and deterrence." (footnotes omitted)).

61. *See* Meese & Larkin, *supra* note 34, at 758 ("[One] justification for the ignorance-is-no-defense rule is that ignorance of the law itself is blameworthy. The failure to learn where the line is drawn justifies punishing whoever crosses it." (footnotes omitted)).

committing a crime, she *should have known*. And this "constructive" knowledge—this legal knowledge that she easily could have acquired had she only made the effort—is sufficient for guilt.[62] So requiring knowledge of the law for criminal culpability is actually too strong. Beyond satisfying the elements of the crime itself, a person can still be culpable even if she did not know the law as long as she had the cognitive ability to acquire this legal knowledge.

Putting the second and third reasons together, ignorance of the law is generally no excuse because the defendant either knew the law (and is lying) or did not know the law but should have. Underlying this disjunction are two assumptions: (a) most defendants know basic moral principles, and (b) this moral knowledge tends to be an accurate guide through the criminal law.[63]

VIII. WHEN IGNORANCE OF THE LAW *CAN* EXCUSE

Much like the diminished capacity defense, ignorance of the law *is* generally recognized as a valid excuse when it negates the mens rea required for the crime.[64] Most crimes require either specific intent or

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62. *See* Kinports, *supra* note 58, at 133 ("[T]he maxim is premised on the idea that 'the law is definite and knowable,' and everyone it governs has 'the opportunity . . . to find out' what conduct is prohibited." (footnotes omitted)); Larkin, *supra* note 56, at 76 ("The oldest rationale [for the maxim that ignorance of the law is no excuse] is that everyone knows the criminal law because it grows out of and conforms to the customs, mores, and morals of the community."); Meese & Larkin, *supra* note 34, at 738 ("[E]very person is presumed to know the law. The rationale for the presumption is that people generally know what the law forbids in whatever jurisdiction they live. Even if they do not, the knowledge is easy to acquire, so anyone who does not learn what is outlawed is, at least, guilty of negligence." (footnotes omitted)).

63. *See* Meese & Larkin, *supra* note 34, at 733–34 ("The common law recognized a limited number of crimes. Treason, murder, rape, robbery, larceny in some form, and a small number of additional offenses were the corpus of the common law of crimes. . . . [T]his moral code was called by some 'the rules of natural justice,' which would have been known to all. The result was that an offense against a neighbor or the king already was a crime against God. As John Salmond put it: 'The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right.' For that reason, '[i]f not to his knowledge lawless, he is at least dishonest and unjust.' . . . Lastly, even if mores and ethics did not alert someone to forbidden conduct, a reasonable person would avoid committing a 'mischievous' act as a matter of common sense." (footnotes omitted)).

64. *See, e.g.*, MODEL PENAL CODE § 2.04(1)(a) (AM. LAW INST., Official Draft and Revised Comments 1985); MARY K. THERESE FITZGERALD, 4 SUMMARY OF PENNSYLVANIA JURISPRUDENCE 2D CRIMINAL LAW § 5:21 (2d ed. 2019); LEWIS R. KATZ ET AL., BALDWIN'S OHIO PRACTICE OF CRIMINAL LAW § 91:10 (3d ed. 2018); Garvey, *supra* note 48, at 575 ("Ignorance of the law does excuse. Except when the actor's ignorance can be traced to a prior breach itself committed with a guilty mind, or when his ignorance itself manifests the ill will that marks the presence of a guilty mind, ignorance of the law entails the absence of mens rea."); Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 145 (1997) ("When a person makes the kind of error that even a morally virtuous person could make, then her ignorance of the law *should* be an excuse.").

knowledge. Specific intent means a conscious purpose to commit a particular act or omission,[65] and knowledge means awareness of a particular fact—either the act itself, a circumstance occasioning the act, or a practically certain consequence of the act.[66] Ignorance of a particular law will negate either of these—conscious purpose or factual knowledge—when the purpose or factual knowledge itself requires some legal knowledge.[67] As a result, it is generally recognized that mistake of law can be exculpatory or mitigating, sometimes as a standalone affirmative defense, and other times applicable only to particular crimes (such as statutory rape).[68]

Consider, for example, the crime of receiving stolen property. In order to commit this crime, one must know that she is receiving stolen property.[69] This knowledge breaks into two parts: one must know not only that the property was appropriated from another person but also that this appropriation was unlawful. And the latter itself requires

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65. *See Specific Intent*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The intent to accomplish the precise criminal act that one is later charged with."); Michael M. Blazina, *"With the Intent to Inflict Such Injury": The Courts and the Legislature Create Confusion in California Penal Code Section 12022.7*, 28 SAN DIEGO L. REV. 963, 971 (1991) ("[S]cholars have suggested that the label of specific intent designates that an offense requires the defendant to possess the mental state of 'purpose.' This approach classifies the varying degrees of intent according to their definitions. The meaning of specific intent is narrowed to 'purpose' or 'conscious desire' and occupies the top position of this ascending vertical scale of mental culpability." (footnotes omitted)).

66. *See Knowledge*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An awareness or understanding of a fact or circumstance . . . ."); Christopher Slobogin, *Experts, Mental States, and Acts*, 38 SETON HALL L. REV. 1009, 1013 n.17 (2008) ("For many crimes, the mens rea is knowledge or recklessness, which requires an awareness of the result and circumstances of the crime." (citation omitted)).

67. *See* Emily Edwards, *But I'm Just a Kid: Juvenile Adjudications and Sentencing Enhancements*, 51 S. TEX. L. REV. 205, 216 n.89 (2009) ("At common law, an honest or reasonable mistake of either law or fact may negate a crime's intent or knowledge requirement." (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 357 (1972)); Levy, *supra* note 18, at 242–43 ("Like the mistake of fact defense, one version of the mistake of law defense states that the defendant is not guilty of a crime because she did not possess the required mens rea. Specifically, she did not possess the required intent or knowledge." (footnote omitted)).

68. *See United States v. Chavez-Diaz*, 444 F.3d 1223, 1230 (10th Cir. 2006) ("[C]ircumstances may arise where a defendant's ignorance of the law may constitute a mitigating sentencing factor"); *United States v. Barker*, 546 F.2d 940, 965 n.31 (D.C. Cir. 1976) ("[I]gnorance of law may be considered by the court in mitigation of punishment"); MODEL PENAL CODE § 2.04(1)(b) (AM. LAW INST., Official Draft and Revised Comments 1985); Douglas Husak, *"Broad" Culpability And The Retributivist Dream*, 9 OHIO ST. J. CRIM. L. 449, 478 (2012) ("Existing law acknowledges the exculpatory significance of ignorance of law . . . ."); Douglas Husak, *Mistake of Law and Culpability*, 4 CRIM. L. & PHIL. 135, 137 (2010) ("[I]gnorance of law *is* exculpating under various circumstances.").

69. *See, e.g.*, GA. CODE ANN., § 16-8-7(a) (2019) ("A person commits the offense of theft by receiving stolen property when he receives, disposes of, or retains stolen property which he knows or should know was stolen unless the property is received, disposed of, or retained with intent to restore it to the owner."); N.J. STAT. ANN. § 2C:20-7(a) (West 2013) ("A person is guilty of theft if he knowingly receives or brings into this State movable property of another knowing that it has been stolen, or believing that it is probably stolen.").

basic knowledge of the law of theft. So if the recipient of stolen property is ignorant of the law of theft, then she cannot be guilty of this crime.

The obvious response to this example is that any defendant who claims ignorance of the law of theft is either lying or insane.[70] Conversely, we may *presume* that a defendant charged with receiving stolen property knew the law of theft at the time of receipt absent the extraordinary circumstance of severe mental illness or disability. This much is true given the relative simplicity of the law of theft. But as criminal laws become more complicated, this presumption of legal knowledge is correspondingly weakened. Ignorance of these more complicated laws, which are generally white-collar crimes, *can* serve as a valid excuse as long as the defendant can plausibly establish that her ignorance was both honest (she genuinely did not know or understand the law) and reasonable (a reasonable person in her situation might or would not have known or understood the law).[71] In

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70. *See* Meese & Larkin, *supra* note 34, at 751 ("Anyone who grows up in America today (or enters from elsewhere) is likely to know that the criminal law prohibits thievery and homicide. A defendant who claims ignorance of those laws probably should be committed as insane (or given an award for having world-class chutzpah)" (footnote omitted)).

71. *See Bryan v. United States*, 524 U.S. 184, 194–95 (1998) ("Both the tax cases and *Ratzlaf* involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct. As a result, we held that these statutes 'carv[e] out an exception to the traditional rule' that ignorance of the law is no excuse and require that the defendant have knowledge of the law." (citation and footnotes omitted)); *Cheek v. United States*, 498 U.S. 192, 199–200 (1991) ("The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses."); FLETCHER, *supra* note 29, at 731–32 ("Various efforts have been made to defend the principle that even a reasonable mistake of law should not constitute an excuse for wrongdoing. In the early stages of the criminal law, when the range of offenses was limited to aggression against particular victims and other obvious moral wrongs, it was more plausible to assume that everyone knew the law. . . . In a pluralistic society, saddled with criminal sanctions affecting every area of life, one cannot expect that everyone know what is criminal and what is not."); JEREMY HORDER, EXCUSING CRIME 276 (2004) ("*Ignorantia juris neminem excusat* is a maxim perhaps appropriately regarded as exception-less in a system of criminal law composed wholly or largely of *mala in se*. But, a legal system that persists in a belief in the absolute character of that maxim in a world of ever more far-reaching, ever more technical and specialized, and ever more inaccessible regulatory criminal laws, is a legal system that has simply failed to adapt its moral thinking to modern circumstances."); John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165, 181 (2001) ("In our study (holding Texas aside), the citizens showed no particular knowledge of the laws of their states."); Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 646 (1941) ("[N]o one *can* know the law, and of course no one *does* know the law on all points."); Kinports, *supra* note 58, at 133 ("[T]he maxim has long had its detractors. Some critics have pointed out, quite persuasively, that its presumption is 'far-fetched' and an 'obvious fiction' because contemporary laws are so numerous, complex, and intricate that the average citizen cannot realistically be expected to be familiar with all of them." (footnote omitted)); Larkin, *supra* note 56, at 78–79 ("[R]egardless of what was true at common law, it no longer is credible to claim

this way, reasonableness acts as an "anchor."[72] It helps counter the slippery-slope argument that, by accepting the mistake of law defense in at least some situations, jurisdictions will 'open the floodgates' for defendants seeking to get away with their crimes.[73]

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that everyone knows the law, particularly since '[t]he tight moral consensus that once supported the criminal law has obviously disappeared.' Those scholars also maintain that it is fundamentally unfair, and in many cases unconstitutional, to stigmatize and punish (let alone imprison) morally blameless parties for engaging in conduct that no reasonable person would have thought a crime. A few in that group are concerned that the proliferation of criminal statutes has made the penal code arcane, unwieldy, unknowable, and unjust, a phenomenon colloquially known as 'overcriminalization.' Those critics of the no-mistake rule believe that the criminal law must evolve in light of the legislative decision to enforce through the criminal process the increasingly technical and recondite rules promulgated by the modern regulatory state." (footnotes omitted)); *id.* at 102 ("[L]awyers and law professors do not know all of the criminal laws, so it is unreasonable to expect the average layman to know them." (footnote omitted)); Meese & Larkin, *supra* note 34, at 729 ("[T]he criminal justice system has undergone a complete transformation since the days of Blackstone. Legislatures and courts have made vast changes to the structure of the criminal justice system, to the officials who comprise that system, and to the procedures that govern how those actors play their roles. Those developments may have greatly altered the landscape that gave rise to the common law mistake of law rule—so much so, in fact, that it might no longer make sense to follow the rule. If so, the courts should own up to the responsibility of 'retiring' it."); *id.* at 734 ("The offenses found in federal law today reach far beyond what common sense and generally accepted moral principles would forbid. There is an ever-increasing number of crimes that are outside the category of inherently harmful or blameworthy acts . . . ."); *id.* at 738–39 ("As the late-nineteenth-century jurist John Austin wrote, even then the proposition 'that any actual system is so knowable, or that any actual system has ever been so knowable,' in his colorful words, is 'notoriously and ridiculously false.' In this century, Jerome Hall described the rule as 'an obvious fiction.' Other critics concluded that 'even though the ignorance rule may have been justified in the early days of the criminal law in England,' over time that presumption has become 'indefensible as a statement of fact.' Edwin Keedy was even less kind; he called the presumption 'absurd.' " (footnotes omitted)); *id.* at 770 ("[W]hen the accused is charged with a regulatory *malum prohibitum* offense, his claim that he made an honest mistake is fully consistent with the purposes that the mens rea requirement serves and does not offend any constitutional value."); *see also* Levy, *supra* note 14, at 243–44 n.34-35.

72. *See* Meese & Larkin, *supra* note 34, at 774 ("[A] mistake of law defense would exculpate only when the defendant's mistake was reasonable. One result of that limitation would be to render the defense inapplicable as a standalone defense to a crime of violence, because the average person would know that such conduct is illegal or, at a minimum, questionable." (footnotes omitted)). Still, it is important to note that mere honest (subjective) ignorance, even if *unreasonable*, is still sometimes accepted as a legitimate defense. *See, e.g.*, *Cheek v. United States*, 498 U.S. 192, 202–03 (1991) ("In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable. . . . We thus disagree with the Court of Appeals' requirement that a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue.").

73. *See* Larkin, *supra* note 56, at 107–08 ("[T]he law excuses errors by police officers, government employees, and judges only if they are reasonable. A mistake-of-law defense should have the same limitation. A properly defined mistake-of-law defense would exonerate a defendant only if he reasonably and honestly believed that the law did not make his conduct a crime. No jury would find that a defendant reasonably and honestly believed that he could murder, rape, rob, steal, and swindle others. In fact, the laws prohibiting that conduct

Some courts have determined that reasonableness is satisfied in a few limited situations[74]: when the defendant (a) did not receive fair notice of the law;[75] (b) relied on a law or official statement of law that is later invalidated;[76] (c) relied on a law or official statement of law that is ambiguous but later clarified;[77] or (d) is a police officer.[78] For the most part, only these four situations have been thought to make the defendant's legal ignorance reasonable.

The first three exceptions to the general ignorance-of-the-law-is-no-excuse maxim are a great start.[79] (By contrast, the fourth exception, recently endorsed by the Supreme Court in *Heien v. North Carolina*, is highly problematic.[80]) But several more exceptions need to be added.

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are so deeply entrenched into American mores that no judge or jury could find such a claim credible. As a result, a trial judge would not be obliged even to instruct the jury on that defense in such a case. A 'reasonableness' requirement would go a long way toward cutting off fraudulent use of a mistake-of-law defense." (footnotes omitted)).

74. *See* KATHRYN CHRISTOPHER & RUSSELL CHRISTOPHER, CRIMINAL LAW: MODEL PROBLEMS AND OUTSTANDING ANSWERS 47 (2012) ("Three principal exceptions to the general rule [denying mistake of law defenses] have emerged: (i) reasonable reliance on an official statement of law that is afterward determined to be invalid or erroneous, (ii) ignorance or mistake of law that negates the mens rea of the charged offense, and (iii) lack of fair notice.").

75. *See Lambert v. California*, 355 U.S. 225, 228 (1957) ("The rule that 'ignorance of the law will not excuse' is deep in our law . . . . On the other hand, due process places some limits on its exercise. Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." (citations omitted)); MODEL PENAL CODE § 2.04(3)(a) (AM. LAW INST., Official Draft and Revised Comments 1985); BALDWIN'S OH. PRAC. CRIM. L. § 91:10 (3d ed. 2018); Larkin, *supra* note 45, at 113 ("[T]he mistake-of-law defense also serves the purpose of ensuring that the criminal law affords parties adequate notice of what the law forbids.").

76. *See, e.g.*, *State v. Guice*, 621 A.2d 553, 557 (N.J. Super. Ct. Law Div. 1993) ("[W]hen individuals rely on an official but erroneous representation of law they cannot be expected to know the law is otherwise, and thus can have no notice or fair warning of what the law actually requires or proscribes." (citation omitted)); MODEL PENAL CODE § 2.04(3)(b) (AM. LAW INST., Official Draft and Revised Comments 1985); 1 FEDERAL TRIAL HANDBOOK: CRIMINAL § 12:38 (4th ed. 2018); BALDWIN'S OH. PRAC. CRIM. L. § 91:10 (3d ed. 2018); 21 TEX. JR. 3D CRIMINAL LAW: DEFENSES § 91 (2019).

77. This is basically the rule of lenity: "The judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." *Rule of Lenity*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see, e.g.*, 24 TEX. JUR. 3D CRIMINAL PROCEDURE: TRIAL § 429 (2019).

78. *Heien v. North Carolina*, 574 U.S. 54, 55 (2014).

79. Indeed, some or all of the first three exceptions might even be constitutionally required. *See* Meese & Larkin, *supra* note 34, at 765, 768–69.

80. *See also* United States v. Chanthasouxat, 342 F.3d 1271, 1280 (11th Cir. 2003) ("We also note the fundamental unfairness of holding citizens to 'the traditional rule that ignorance of the law is no excuse,' while allowing those 'entrusted to enforce' the law to be ignorant of it." (quoting Bryan v. United States, 524 U.S. 184, 196 (1998))). *See generally* Madison Coburn, *The Supreme Court's Mistake on Law Enforcement Mistake of Law: Why States Should Not Adopt Heien v. North Carolina*, 6 WAKE FOREST J.L. & POL'Y 503, 503 (2016); Kinports, *supra note* 58, at 122; Larkin, *supra* note 56, at 72 (complaining that the law is

In other words, the mistake of law defense needs to be expanded.[81] Again, given that the ignorance in all cases must be reasonable, we need not worry that such expansion will suddenly open the floodgates to thousands of bogus mistake of law claims.

IX. PROPOSAL FOR A BROADER MISTAKE OF LAW DEFENSE

The first exception that should be added: the defendant lacked the cognitive capacity to know or understand the law. Normative ignorance is generally covered by the insanity defense. But four states—Idaho, Kansas, Montana, and Utah—have abolished it. So defendants in those four states who lack the cognitive capacity to know or understand the law have no defense. This omission constitutes a violation of their constitutional right to due process and, if they are convicted and punished, their constitutional right against cruel and unusual punishment.[82]

By folding the insanity defense into the mistake of law defense, a state would effectively "re-brand" it. This incorporation would be perfectly appropriate because what is exculpatory about insanity is not merely severe mental illness or disability per se but also what this severe mental illness or disability *causes*: ignorance of the law. Forty-six states capture this essential feature of the insanity defense, which tends to be overshadowed by the causal element (again, mental illness or disability).

Importantly, if any states followed my suggestion here to incorporate the insanity defense into their mistake of law defense,

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much more forgiving to "law enforcement officers, prosecutors, or judges [who] make mistakes" than to "private parties"); *id.* at 103 ("[T]here is an obvious tension between the propositions that (1) every private party knows every criminal law in whatever form it may take, and (2) no law enforcement officer can be expected to know all of the laws governing his job."); Meese & Larkin, *supra* note 34, at 772 ("A person should not be convicted, let alone go to prison, for making a reasonable mistake. If we are willing to pardon the unavoidable flaws of the people who enforce our laws, we should be willing to extend the same grace to the remainder of the people, who suffer from the same shortcomings."); Eang L. Ngov, *Police Ignorance and Mistake of Law Under the Fourth Amendment*, 14 STAN. J. C.R. & C.L. 165, 165 (2018).

81. *See* Larkin, *supra* note 56, at 114 ("[T]he proper remedy is to grant private parties the same forgiveness that we already afford government officials. The reasonable-mistake, qualified-immunity, and harmless-error doctrines serve important social goals. The law is sounder today than it was before the Supreme Court created those doctrines. We do not need to scuttle any one of them, and we should not take that step. The soundest remedy is simply to recognize that private parties deserve the same mercy that our government officials already enjoy."). Meese and Larkin propose an exception that I will not consider here:

> There also is a case where the decision to apply a mistake of law defense should be easy to recognize: namely, to the charge that a person has violated the law of a foreign country. In that case, refusing to allow a defendant to raise a mistake of law defense is utterly irrational, so irrational, in fact, that the refusal clearly should be held unconstitutional.

Meese & Larkin, *supra* note 34, at 775.

82. *See infra* Part III.

they should also include a provision requiring automatic civil commitment for defendants who are acquitted on this basis. This provision is necessary for two reasons. First, public safety. If a defendant commits a crime, especially a violent crime, as a result of mental-illness or disability-induced normative ignorance, he constitutes a danger to society unless and until his mental illness is successfully treated. Second, public approval. For public safety reasons, insanity statutes include provisions establishing post-acquittal commitment procedures.[83] Without requiring post-acquittal commitment, insanity acquittees might be prematurely released, and such early release would pose a danger both to the acquittee himself and to the larger community.[84] There is no good reason, then, why a mistake of law statute that incorporates the insanity defense should not also require the same post-acquittal commitment procedures.

The second exception that should be added: the defendant lacked a reasonable opportunity to learn the law. Generally, this opportunity is thought to be satisfied if the government publishes its criminal laws.[85] The government need not also make sure that every citizen takes advantage of this opportunity and absorbs this information; that obligation falls on each individual citizen. But even if the state has published a particular law, *L*, the defendant lacks the opportunity to learn *L* when something outside her control in effect *blocks* her from accessing this publication. If the state deliberately or negligently fails to make a given law accessible to a particular person (for example, a prisoner), and if she proceeds to violate *L*, she probably has a

83. *See, e.g.*, 18 U.S.C. § 4243 (2012); CAL. PENAL CODE § 1026.5 (West 1994); MISS. CODE ANN. § 99-13-7 (2010); N.C. GEN. STAT. § 15A-1321 (2018); N.C. GEN. STAT. § 122C-268.1 (2019).

84. *See Kansas v. Hendricks*, 521 U.S. 346, 347 (1997) ("[P]otentially indefinite duration [of confinement of the dangerously mentally ill] is linked, not to any punitive objective, but to the purpose of holding a person until his mental abnormality no longer causes him to be a threat to others."); *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992) (" 'The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous,' . . . *i.e.*, the acquittee may be held as long as he is both mentally ill and dangerous, but no longer." (quoting and citing Jones v. U.S., 463 U.S. 354, 368 (1983)).

85. *But see* Meese & Larkin, *supra* note 34, at 742–43 ("The promulgation of implementing regulations can lead to an avalanche of positive criminal laws in one form or another. That approach . . . ill serves the interests of regulated parties, who need clearly understandable rules defining criminal liability in order to avoid winding up in the hoosegow. Worse still is the prospect that the government has interpreted its regulations in nonpublic guidance documents that, in effect, create 'secret law.' " (footnotes omitted)); *id.* at 747–48 ("Worse still than the fact that the federal criminal code is generally unruly and incoherent is the fact that the penal code no longer can be said to give the average person notice of what the law prohibits. . . . We are gradually heading toward the prospect that everything not expressly permitted is forbidden, as was said of the former Soviet Union. If so, everyone can be charged with some crime regardless of the effort that he or she makes to learn where the line is drawn and to stay far away from it. Pushing the presumption of knowledge of the law to reach every nook and cranny of today's penal code would lead to an unsound and irrational result." (footnotes omitted)).

valid mistake of law claim. Still, arguably, lack of opportunity is not sufficient to establish that the ignorance was reasonable. The defendant must also establish that *L* was too difficult or complicated to be "guessable"—that is, knowable or presumable through pure moral intuition.[86]

The third exception that should be added: the defendant reasonably but mistakenly inferred from widely accepted norms or ethics that her conduct was lawful.[87] This kind of situation might occur when two conditions converge: the individual is not legally sophisticated, and the law is complicated, unsettled, or varies from jurisdiction to jurisdiction.

Suppose, for example, the following:

1. After overhearing two business executives talking loudly at a restaurant about a tender offer, Clyde traded on the companies and made a killing.
2. Clyde honestly believed that he was not doing anything morally wrong for two reasons. First, he had a right to be where he was, the executives were speaking loudly in his presence, and overhearing loud conversations is very common in modern society (especially with the ubiquity of cell phones). Second, his eavesdropping was at least partly involuntary. He could not help overhearing them, and he was not at all obligated to change his location for this (or any other) reason.

86. *See* Larkin, *supra* note 56, at 106 ("A mistake-of-law defense seeks to enable morally blameless individuals honestly trying to comply with the law from being convicted and punished for actions that no reasonable person would know to be a crime without having a lawyer at his elbow. The average person does not have the luxury of such readily available legal advice. . . . The law must be clear to 'men of common intelligence'—not *lawyers* of common intelligence—in order for it to be valid. The law assumes that the average person lacks legal training. By contrast, some corporations have large legal departments staffed with lawyers who can offer advice if and whenever the company needs it. Individuals need a mistake-of-law defense. Corporations may not." (footnotes omitted)); Meese & Larkin, *supra* note 34, at 747 ("Blameworthiness used to serve as a criterion that distinguished those who were evil-minded from those who were morally innocent, or just negligent. But we no longer can rely on the legislature to draw that line.").

87 *See* Meese & Larkin, *supra* note 34, at 762 ("The rationale underlying . . . [the void-for-vagueness] doctrine is that the government must supply everyone with 'fair notice' of forbidden conduct before someone can be criminally punished for having committed it. That rationale applies equally to the person who, acting in good faith and consistent with contemporary mores, is unaware that his conduct is unlawful. He, too, has little or no opportunity to conform his conduct to the requirements of the criminal law; in fact, that is precisely what he thought he was doing. Yet, he was mistaken because the law has moved so far beyond what an average person reasonably can be deemed to know that it becomes unreasonable to attribute to him knowledge of where the law has wound up.").

3. Clyde inferred from his beliefs in (2) above that his trading on the information he overheard was perfectly legal.

4. According to 17 C.F.R. § 240.14e-3,[88] trading on material nonpublic information in the context of tender offers, even as a "remote tippee," qualifies as insider trading and therefore as a form of securities fraud.[89]

Given (1) through (4), should Clyde be prosecuted for, and convicted of, insider trading? The answer mostly depends on whether Clyde's erroneous belief in the legality of trading on material nonpublic information gleaned not through any obviously illegal means or inside connections but rather through pure serendipity, simply being in the right place at the right time, was reasonable. And the arguments can cut either way.

On the one hand, it might be argued that Clyde's belief in the legality of his conduct—trading on material nonpublic information that he accidentally overheard—was *not* reasonable given society's belief that insider trading is obviously unfair. On the other hand, it might be argued that his belief in the legality of his conduct *was* reasonable given that not all (seemingly) immoral conduct is illegal—for example, gossiping or lying (in most circumstances).

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88. The statute reads in relevant part:

(a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the 'offering person'), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from:

(1) The offering person,

(2) The issuer of the securities sought or to be sought by such tender offer, or

(3) Any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise.

17 C.F.R. § 240.14e-3(a) (1982).

89. *See* Kathleen Coles, *The Dilemma of the Remote Tippee*, 41 GONZ. L. REV. 181, 191 (2005/2006) (The SEC "adopted Rule 14e-3 in the tender offer context to preclude trading securities of an acquiring company or a target company on the basis of material, non-public information that the trader knew or had reason to know came from either company." (footnotes omitted)); Thomas Lee Hazen, '*Insider Trading' Under Rule 10b-5*, SC20 ALI-ABA 377, 382–83 (1997) ("[F]ollowing the [decision in Chiarella v. U.S., 445 U.S. 222 (1980)], the SEC adopted Rule 14e-3 which makes it unlawful for anyone other than the tender offeror who has knowledge of a planned tender offer to trade on that information. Rule 14e-3 is not based upon misappropriation but rather upon possession of nonpublic material information.").

Morality, after all, is largely subjective.[90] So it would be both foolish and arrogant for any one person to think that the law perfectly tracks his own particular moral beliefs. Conversely, then, it would be equally foolish—and unfair—for the criminal justice system to expect people to rely entirely on their moral beliefs, which (again) differ from person to person, to determine what does and does not qualify as a crime in their jurisdiction.

While both arguments are compelling, the latter is slightly stronger than the former. Reasonable belief is a tricky concept, both in terms of meaning and application.[91] This is why we have courts; we need judges and juries, maximally objective third parties, to make this determination. Some factfinders will lean in one direction (reasonable), some in the other direction (unreasonable). Either way, the judgment must be made; it does not mechanistically follow from a combination of the facts and the law. If it did, if Clyde's ignorance were automatically deemed to be unreasonable no matter what the circumstances, then insider-trading laws would effectively become strict liability crimes.

Now, strict liability is not out of the question. Both the federal government and the states recognize strict liability for regulatory

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90. *See* Alina Ng Boyte, *Picking at Morals: Analytical Jurisprudence in the Age of Naturalized Ethics*, 26 S. CAL. INTERDISC. L.J. 493, 496–97 (2017) ("[B]ranches of the natural sciences, such as cognitive science, suggest that moral decisions and moral actions are simply manifestations of our emotional frames and that these emotions, which give rise to moral decisions and moral actions, do not necessarily track objective aspects of reality. Our moral reactions are rather emotional predispositions to various situations that confront us . . . . If moral decisions and moral actions are a product of our subjective emotional states, morality as a whole lacks objective truth and would therefore be unique to communities, socially constructed, and produce pluralistic societies." (footnote omitted)); Patrick N. Leduc, *Christianity and the Framers: The True Intent of the Establishment Clause*, 5 LIBERTY U. L. REV. 201, 250 (2011) ("With the rise of secularism, assisted by court decisions that promoted neutrality at the expense of religious expression, there has been an increasing belief that all morality is a subjective value. This view of subjective morality holds that moral issues should not and cannot be imposed by government, as all views and actions have equal value and claim.").

91. Eric Citron, *Sentencing Review: Judgment, Justice, and the Judiciary*, 115 YALE L.J. POCKET PART 150, 150 (2006) ("[W]ith circuit courts hesitant to destroy old paradigms or dive into new ones, the criteria for reasonableness have remained elusive to say the least."); Christian M. Halliburton, *Race, Brain Science, and Critical Decision-Making in the Context of Constitutional Criminal Procedure*, 47 GONZ. L. REV. 319, 334 (2011/2012) ("Reasonableness is an elusive concept, combining both subjective and objective elements that are measured against the specifics of the particular encounter.").

offenses and some torts.[92] But, with very few exceptions,[93] strict liability is frowned upon in criminal law.[94] And for good reason—criminal convictions bring the most serious consequences: stigma, loss of reputation, hefty fines, imprisonment, and sometimes even death. So, if justice and fairness are to be maximized, culpability must be established. In order to establish culpability, mens rea must be established. And, as I have argued in this article, in order to establish mens rea, the defendant's knowledge of the relevant law must be established. This chain of reasoning helps to explain why honest and reasonable ignorance of the law should be recognized as a powerful excuse.

One big exception to the no-strict-liability-in-criminal-law principle is statutory rape. Over thirty states (and the federal government) do

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92. Lena E. Smith, *Is Strict Liability the Answer in the Battle Against Foreign Corporate Bribery?*, 79 BROOK. L. REV. 1801, 1827–28 (2014) ("In the U.S., the strict liability penalty scheme is typically found in certain criminal offenses, civil public welfare offenses, products liability, and tortious conduct involving ultrahazardous activities."). *But see* Garvey, *supra* note 48, at 548–49 ("No state's authority is without limit. One such limit disables a state from rendering criminally liable those who choose to φ but who do so without a guilty mind. A legitimate state has permission to punish those who choose to φ with a guilty mind, but enjoys no such permission with respect to those who choose to φ without a guilty mind." (footnotes omitted)). Garvey's quotation here is descriptively inaccurate and normatively radical. It basically implies either that there are no strict liability crimes (or negligence crimes or possibly even recklessness crimes), which is contrary to fact, or that there should not be such crimes, which is contrary to common practice and common wisdom.

93. One such exception is knowledge of a certain circumstance. For example, many bigamy statutes require knowledge that one is already married. *See, e.g.*, TEX. PENAL CODE ANN. § 25.01 (West 2019) ("(a) An individual commits an offense if . . . (2) he knows that a married person other than his spouse is married . . ."); *see also* MODEL PENAL CODE § 2.02 cmt. 11 (AM. LAW INST., Official Draft and Revised Comments 1985) ("Claim of right is a defense because . . . the defendant must have culpable awareness of [the fact that the property belongs to someone else] . . . . [T]he legal element involved is simply an aspect of the attendant circumstances, with respect to which knowledge, recklessness, or negligence, as the case may be, is required for culpability . . . ."). *But see* United States v. Feola, 420 U.S. 671, 684 (1975) ("We conclude . . . that in order to effectuate the congressional purpose of according maximum protection to federal officers by making prosecution for assaults upon them cognizable in the federal courts, [18 U.S.C.A.] § 111 cannot be construed as embodying an unexpressed requirement that an assailant be aware that his victim is a federal officer."); *id.* at 693 ("[F]or the purpose of individual guilt or innocence, awareness of the official identity of the assault victim is irrelevant. We would expect the same to obtain with respect to the conspiracy offense . . . .").

94. *But see United States v. Park*, 421 U.S. 658, 676 (1975) (holding that corporate superiors can be found criminally liable for subordinates' crimes even if the former did not commit any wrongdoing, conscious or negligent); Larkin, *supra* note 45, at 80 ("There has been a proliferation of regulatory laws backed up by criminal penalties in the last 40 years."); Meese & Larkin, *supra* note 34, at 744–45 ("[T]he 'knowledge' necessary to establish a violation [of some environmental laws] can be imputed to a person from the knowledge of others in his company. As far as the necessary criminal acts go, a person can be held liable not only for his own actions, but also for the conduct of others under his supervision because of his position in the company." (footnotes omitted)).

not recognize mistake of age as a defense for at least some of their statutory rape offenses.[95] The main reason for this exceptional policy: to protect children from sexual assault.[96]

Of course, homicide statutes are also designed in part to protect children. But the reason that many jurisdictions drop the mens rea element only for statutory rape and not for homicide is probably because they believe that the mistake of fact defense for statutory rape will lead to many more unjust acquittals. The idea, which is not implausible, is that many male jurors will at least empathize with, and possibly even envy, defendants who engaged in sexual relations with females at or above what they (the male jurors) take to be a "normal" age for beginning sexual relations, somewhere between 14 and 17.[97]

Still, the risk of unjust acquittals is not a sufficiently good reason to make statutory rape a strict liability crime. First, many states already permit a mistake of age defense for some kinds of statutory rape (such as when the adult is only two or three years older than the victim),[98] and there is no evidence that these states have undergone a

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95. *See* Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 317 (2006).

96. *See* Vicki J. Bejma, *Protective Cruelty: State v. Yanez and Strict Liability as to Age in Statutory Rape*, 5 ROGER WILLIAMS U. L. REV. 499, 501 (2000) ("[M]any still insist that the imposition of strict liability as to age in statutory rape and child molestation is a protective cruelty, necessary to protect children and youths from sexual exploitation." (footnote omitted)); Genevieve Pecharka, *Knowledge of Age Is Irrelevant When the Defendant Is Charged with Solicitation to Commit an Act Constituting a Strict Liability Crime: Commonwealth v. Hacker*, 3 DUQ. CRIM. L.J. 1, 10 (2013) ("[T]he purpose of allowing strict liability for statutory rape is also to prevent an assailant from taking advantage of a mentally and physically inferior person, then avoiding culpability by claiming lack of knowledge."); Ranak K. Jasani, Note, *Graves v. State: Undermining Legislative Intent: Allowing Sexually Violent Repeat Offenders to Avoid Enhanced Registration Requirements Under Maryland's Registration of Offenders Statute*, 61 MD. L. REV. 739, 757 (2002) (noting that "the traditional view of statutory rape" is " 'a strict liability crime designed to protect young persons from the dangers of sexual exploitation by adults, loss of chastity, physical injury, and in the case of girls, pregnancy.' " (citation omitted)). Two other reasons, general deterrence and judicial efficiency, are not sufficient; if they were, then—because these justifications could be applied to all other crimes—we would have to abandon the mens-rea requirement entirely, which is absurd. Mens rea is generally required for culpability, and culpability is always required for just punishment.

97. I thank Raff Donelson for this point. Another possible explanation, though not a justification, for applying strict liability only to statutory rape and not to homicide is the archaic sexist notion that females need to remain virginal or "pure" until they have reached adulthood. (I thank Katie Stauss for this insight.) Of course, this explanation fails to account for the fact that statutory rape statutes are generally gender-neutral and so equally apply to male victims. But if this explanation is correct, then we should expect to find that, in practice, many more defendants are prosecuted and convicted for engaging in sexual relations with underage girls than for engaging in sexual relations with underage boys.

98. *See generally* Colin Campbell, Annotation, *Mistake or lack of information as to victim's age as defense to statutory rape*, 46 A.L.R. 5th 499 (1997).

resulting spike in this type of crime.[99] Second, even if they did, this consequence would still not be a very good argument against provision of the mistake of age defense, which fundamental fairness requires. Instead, it would be a good argument for strengthening prosecutorial responses to this defense.

X. OBJECTIONS AND REPLIES

The most powerful objection against my proposal that the insanity defense is a species of the mistake of law defense would show that there are situations in which the insanity defense applies, but the mistake of law defense does not. Even just one example would be sufficient to show that they are two different defenses and therefore need to remain separate. In this Part, I will offer two such examples. My conclusions in both cases, however, will be that neither situation really requires the insanity defense per se after all.

Objection #1: At the time of his crime, Clyde knew that he was committing a crime but could not control his behavior as a result of his mental illness. Because Clyde's problem here is not cognitive impairment but rather *volitional* impairment, the insanity defense would seem to be more applicable than the mistake of law defense.

In response to Objection #1, it is certainly true that the MPC version of the insanity defense would more likely help the defendant than would the mistake of law defense because it excuses "criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity . . . to conform his conduct to the requirements of law."[100] Still, there are many jurisdictions that recognize the insanity defense but not the MPC version of it. Instead, they have adopted the M'Naghten version, which covers only cognitive impairment, not volitional impairment.[101] And few would argue that their failure to cover volitional impairment is

99. *See* Fleming v. State, 455 S.W.3d 577, 612–13 (Tex. Crim. App. 2014) ("Some courts have said that recognizing a reasonable-mistake-of-age defense would 'considerably diminish[ ]' the deterrent effect of child-sex-offense statutes, but such conclusions appear to be mere speculation. . . . [T]wenty states have some form of mistake-of-age defense, and I am unaware of any evidence that those states have a higher incidence of child sex offenses, or a significantly lower incidence of successful prosecutions, than states that provide no such defense." (citations omitted)); Patricia O'Neill, *Criminal Law: Jury Instructions—Mistake Of Fact In Rape Cases*, 86 MASS. CRIM. L. REV. 67, 69 (2001) ("A mistake of fact defense would not . . . increase the risk of the harm done by a sexual assault.").

100. MODEL PENAL CODE § 4.01(1) (AM. LAW INST., Official Draft and Revised Comments 1985).

101. *See supra* Part III.

unconstitutional.[102] So it is difficult to see why the mistake of law defense, as a replacement for the insanity defense, would itself have to cover volitional impairment.

While it may seem unfortunate that most M'Naghten jurisdictions do not consider volitional impairment to qualify for the insanity defense, defendants in these jurisdictions—as well as in all other jurisdictions—still have some decent options. First, they may argue that the prosecution failed to prove beyond a reasonable doubt that their act was voluntary, which is an element of every crime. Second, some defendants may try to establish not a merely a sporadic loss of control but rather a deeper condition, automatism, which says that their body periodically goes into "automatic pilot" and is therefore no more in their control than the bodily motions of a sleepwalker.[103]

Objection #2: Suppose that the defendant's mental illness caused his legal ignorance but was not of a kind or degree that made his legal ignorance unavoidable. In this situation, the mistake of law defense would not work because the defendant's legal ignorance was unreasonable; a reasonable person in his situation, including his mental illness, would have learned the law and complied with it. But the insanity defense still might work because, ex hypothesi, the defendant's legal ignorance was indeed caused by his mental illness. Therefore the mistake of law defense cannot adequately substitute for the insanity defense.

In response to Objection #2, the assumption that the insanity defense might work in this situation is simply false. The insanity defense does *not* apply if the defendant could have overcome his

102. *See Leland v. Oregon*, 343 U.S. 790, 801 (1952) ("[T]he progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law. . . . [I]t is clear that adoption of the irresistible impulse test is not 'implicit in the concept of ordered liberty.' " (footnotes omitted)); *see also* LEVY, *supra* note 10, at 61 ("Because capacities cannot be measured in discrete quantities like pounds and inches, we cannot precisely quantify these thresholds or precisely determine if any particular person whose responsibility we question falls below them. It is for this reason—our inability to precisely measure or fathom threshold capacities, especially control—that some scholars, such as Stephen Morse, argue that the insanity defense should not contain a volitional prong. In other words, we should not allow for the possibility that some defendants might be acquitted on the purported grounds that they fall beneath the volitional threshold required for responsibility as a result of mental illness or disability." (endnotes omitted)).

103. *See generally* Eunice A. Eichelberger, Annotation, *Automatism or Unconsciousness as Defense to Criminal Charge*, 27 A.L.R. 4th 1067 (1984); Mingzhao Xu, *Sexsomnia: A Valid Defense to Sexual Assault?*, 12 J. GENDER RACE & JUST. 687, 687–88 (2009) ("A successful defense of automatism or unconsciousness completely relieves the defendant of liability on the basis that he or she has not committed a voluntary act and/or lacked the mens rea to commit the crime." (footnote omitted)).

mental illness or disability and figured out the law.[104] Instead, the mental illness or disability must be *so debilitating* that the defendant could not have learned the law.

What applies to the insanity defense here applies equally to the mistake of law defense. My thesis that the mistake of law defense can serve as an adequate substitute for the insanity defense assumes that it shares the same threshold for severe mental illness or disability. If a mentally ill or disabled defendant crosses this threshold, then she qualifies for the mistake of law defense, just as she would have qualified for the insanity defense. But if she does not cross this threshold—that is, if her illness or disability is not so severe that it undermines her cognitive capacity to acquire basic legal knowledge—then she is at least somewhat responsible for her failure to do so. Her mental illness or disability is not so debilitating that it completely negates this alternative possibility and, with it, her responsibility for failing to pursue this alternative possibility. At best, her mental illness or disability is a mitigating factor, not (like insanity) a full excuse.

This mitigating-factor defense goes by different names. As discussed above, one such name is "diminished capacity." The other names are "diminished responsibility," "extreme emotional disturbance," and "partial insanity."[105] But whatever term is used, *this* is generally the kind of defense that the defendant in Objection #2 would need. Just as with Objection #1, she would not need the insanity defense.

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104. The one exception to this point is the Durham Rule, which says that the insanity defense applies as long as the defendant's criminal conduct was caused by her mental illness or disability, whatever its nature or severity. But only one jurisdiction, New Hampshire, still follows the Durham Rule, and even this jurisdiction follows it only in name, not in substance. *See* LEVY, *supra* note 10, at 113.

105. *See State v. Doyon*, 416 A.2d 130, 134 (R.I. 1980) ("Sometimes [the defense of diminished capacity] . . . is called 'partial responsibility,' 'diminished responsibility,' 'diminished capacity,' 'partial insanity,' 'diminished capacity through diminished responsibility,' or 'limited capacity.' " (citing Travis H.D. Lewin, *Psychiatric Evidence In Criminal Cases For Purposes Other Than The Defense Of Insanity*, 26 SYRACUSE L. REV. 1051, 1052 n.8, 1054–65 (1975)); Paul H. Robinson et al., Annotation, *Murder—Provocation/extreme emotional disturbance*, 1 CRIM. L. DEF. § 102(d) (2019) ("The defenses of extreme emotional disturbance and diminished capacity (as a form of partial insanity, as described in § 101(c)) are functionally similar in that both serve to reduce murder to manslaughter."). *But see id.* ('Generally, however, [extreme emotional disturbance and diminished capacity] . . . present very distinct defenses. Extreme emotional disturbance applies to mentally healthy, normal persons who kill in part due to special circumstances causing the emotional disturbance. Diminished capacity, on the other hand, applies to mentally abnormal persons. It is designed to take account of persons who are not sufficiently insane to merit a complete insanity defense, but who suffer from sufficient incapacity to merit mitigation in the degree of blameworthiness assigned to them." (citations omitted)).

XI. CONCLUSION

My goal in this article has been to establish three main points. The first point is that the fifty states are constitutionally required to provide defendants with the opportunity to plead the insanity defense. So, Idaho, Kansas, Montana, and Utah—all of which abolished their insanity defenses long ago—are violating the Constitution. Specifically, they have been depriving many defendants of their Fourteenth Amendment right to due process and, when they are convicted and punished, violating their Eighth Amendment right against cruel and unusual punishment.

The second point is that these four states—and any other state that might abolish the insanity defense in the future—may remedy this constitutional violation by providing defendants with a mistake of law defense that explicitly exculpates normative ignorance due to severe mental illness. To date, the mistake of law defense and the insanity defense have been regarded as entirely separate and unrelated. I hope to have shown that this common understanding is mistaken. The two defenses significantly intersect. Both excuse on the basis of normative ignorance—that is, ignorance of the law or the moral basis of the law. If I am right that the insanity defense is indeed constitutionally required, then even states that have abolished it will be fulfilling their constitutional obligations if they provide for a sufficiently broad mistake of law defense.

The third point is that not only Idaho, Kansas, Montana, and Utah but also the other forty-six states should expand their mistake of law defense in two other ways as well. First, all states should add lack of a reasonable opportunity to learn the law, a lack that is generally caused by factors outside the individual's control, such as government interference or ineptitude. Second, all states should add a reasonable but mistaken inference from widely accepted norms or ethics that one's conduct is lawful. I used the example of remote tippees, but there are plenty of other *malum prohibitum* crimes out there, especially complicated white-collar crimes, that would qualify as well. Because they cannot be divined simply through moral intuition, and because not everybody can afford quality legal advice, justice requires that we extend the mistake of law defense to these hapless souls as well.