ACCOMMODATING LEGAL IGNORANCE

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INTRODUCTION

A hoary criminal law maxim provides that "ignorance of the law is no excuse." The maxim's apparent premise is that people should know (and abide by) the law. When the content of a law reflects deeply ingrained social norms, the premise is uncontroversial. A criminal defense predicated on ignorance of prohibitions on murder, theft, assault, or sale of narcotics would—and should—fail for multiple reasons. First, the assertion of ignorance is implausible. Second, even if it happens to be true, a defendant bears moral culpability for failing to absorb such basic social norms.[1] Moreover, the principle extends beyond the realm of

[1] *See* Dan M. Kahan, *Ignorance of the Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 144 (1997) (noting that a person who engages in immoral conduct is blameworthy even if the person believes the conduct to be legal). Douglas Husak has recently questioned the prevailing wisdom, arguing that a killer who does not believe killing innocent people is wrong "is not blameworthy for failing to be responsive to a moral proposition of which he is unaware." DOUGLAS HUSAK, IGNORANCE OF LAW: A PHILOSOPHICAL INQUIRY 153 (2016). Husak concedes, however, "no contemporary penal theorist openly embraces [his] subjectivist theory of rationality to undermine conventional wisdom" about ignorance of law. *Id.* at 154.

criminal law. An employer who fires an employee because of the employee's race or religious faith similarly violates both legal proscriptions and moral norms; whether the employer actually knows of the legal prohibition is and should be irrelevant to the discharged employee's claim.

Not all legal obligations, however, are so readily apparent to the general citizenry. States and the federal government have criminalized a dizzying array of obscure activities. Private law—the law of contracts, property, and torts—imposes an even broader range of legal rules known primarily to lawyers, not to the general public. How many resources should people expend to learn the content of legal rules and to learn how those rules apply to concrete situations?

Acquiring legal information requires time and money. Many legal rules require more than a reading of the relevant statutes, regulations, and court decisions; they require judgments about how courts would apply those rules to particular sets of facts. The skills necessary to make those judgments are the bread and butter of the legal profession. If every consumer, entrepreneur, police officer, and author attempted to acquire perfect information about the legal rules that might have an impact on their life activities, they would have little time and few resources left to conduct those activities. Ignorance of the law, at some level, is an entirely sensible and rational strategy.

All people absorb some law as a byproduct of engaging in ordinary life activities. In deciding how much additional law to learn, potential consumers of legal information make judgments based on their own assessment of the costs and benefits of acquiring additional information. The costs are typically time and money; the primary benefits are securing legal rights, avoiding legal liability, or, especially for the risk-averse, obtaining peace of mind.

Most potential consumers of legal information do not think to conduct a cost-benefit analysis of the value of legal investigation. Indeed, many potential consumers of legal information have no idea that legal information will generate any benefits at all. Consider an entrepreneur who opens a shoe repair shop and posts a sign saying "Eddie's Shoe Repair" above the front entrance. The entrepreneur, whose first name is Eddie, may have no idea that legal advice could reduce or eliminate his

liability for trademark infringement.[2] Some legal knowledge is often a prerequisite to recognition that acquiring more information about law would be valuable.

When a potential consumer of legal information does engage in cost-benefit analysis, the consumer's concern is with the private benefit associated with obtaining that information—which may not be equal to its social benefit. For instance, if a copyright holder were entitled to recover all of a publisher's profits from a profitable but possibly infringing work, a potential publisher would derive significant benefit from obtaining legal information about the likelihood of a successful infringement claim, even if the infringing work would have no impact on sales of the original. Although the social harm caused by infringement would be negligible, the private cost of infringement might induce the publisher to expend resources investigating the infringement claim.

The likelihood that laypeople will overestimate the usefulness of legal information exacerbates the problem. Consider a publisher concerned about whether publishing a particular novel will result in a successful copyright infringement claim. If the publisher knew that seeking legal advice would result in an unambiguous yes-or-no answer, the advice would have considerable value. If, however, the advice were "fair use doctrine is so uncertain that any prediction would be unreliable," the advice would leave the publisher only marginally better off than before. But, of course, the publisher was not in a position to assess the value of the advice until after expending time and money obtaining it.

Legal rules themselves play an indirect but significant role in shaping the search for legal information. By establishing consequences for acting without full information, statutes and court decisions have the potential to influence the decision-making process of potential information consumers who engage in cost-benefit analysis. The influence operates only at the margins because many potential consumers of information about law do not know enough law to appreciate the incentives legal rules create. But legal rules have an impact on these consumers as well: they establish when and to what extent the legal system should, as a matter of fairness or reasonableness, excuse people who act in ignorance of the law.

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2 For litigation over competing uses of the name "Dick's" in connection with sporting goods, see Dick's Sporting Goods, Inc. v. Dick's Clothing & Sporting Goods, Inc., 188 F.3d 501 (4th Cir. 1999).

The criminal law literature has long grappled with the appropriate treatment of ignorance of law.[3] In recent years, scholars in other areas have developed subject-specific discussions of the problems associated with legal ignorance.[4] Absent from the literature has been any systematic treatment of legal ignorance across legal disciplines. This Article attempts to fill that void.

Part I explores the fairness and efficiency concerns generated by a rigid application of the maxim that "ignorance of law is no excuse." Part II explores three strategies legal doctrine can and does employ to account for reasonable ignorance of law. First, where feasible, doctrine provides incentives for those with better access to legal information to transmit that information to otherwise ignorant parties. Second, when incentives are not feasible, doctrine often excuses reasonably ignorant actors—so long as their actions do not significantly interfere with the private rights of others. Third, in circumstances where excusing the reasonably ignorant actor would affect victims in ways that might generate unfairness or inefficiency, doctrine limits the remedies available to those victims in ways that reduce incentives for inefficient legal investigation. Doctrine employs these strategies across a wide range of legal issues, but not universally. Part III explores outliers—areas where reform remains necessary to take adequate account of the problems associated with legal ignorance.

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3 *See, e.g.*, Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611 (2011); John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999); Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341 (1998); Kahan, *supra* note 1; Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 650 (1941); Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35, 41 (1939); Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 20 (1957).

4 *See, e.g.*, John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 243–46 (2013) (constitutional torts); J. H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 WM. & MARY L. REV. 899 (2015) (contracts); Adam B. Badawi, *Harm, Ambiguity, and the Regulation of Illegal Contracts*, 17 GEO. MASON L. REV. 483 (2010) (contracts); Matthew A. Seligman, *The Error Theory of Contract*, 78 MD. L. REV. 147 (2018) (contracts); David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CAL. L. REV. 917 (2001) (environmental law); Peter S. Menell & Michael J. Meurer, *Notice Failure and Notice Externalities*, 5 J. LEGAL ANALYSIS 1 (2013) (intellectual property); Oren Bracha & Patrick R. Goold, *Copyright Accidents*, 96 B.U. L. REV. 1025 (2016) (copyright); Douglas A. Melamed & William F. Lee, *Breaking the Vicious Cycle of Patent Damages*, 101 CORNELL L. REV. 385, 404–05 (2016) (patent).

I. WHY WORRY ABOUT LEGAL IGNORANCE?

A. *Introduction*

Ignorance of the law rears its head across a broad spectrum of doctrinal areas. The most familiar examples are those in which an individual claims ignorance of a public law proscription—a criminal statute, an environmental regulation, or a securities law prohibition. For instance, a person accused of carrying an unregistered automatic firearm might contend that he did not know of the ban or that he knew of a ban but did not know that its scope extended to his semi-automatic weapon. Many of these public law proscriptions attempt to regulate the relationship between the state and the individual or firm and do not affect the private rights of other actors. In general, they create no private right of action.

Sometimes, however, individuals act in ignorance of a legal prohibition that does interfere with private rights. Prohibitions on employment discrimination are illustrative. A small employer might contend that she was unaware that she might be liable for violating Title VII by excluding job applicants who had not earned high school diplomas[5] or who had been convicted of a crime.[6] Similarly, an employer might not understand that firing an employee for absenteeism could constitute a violation if the employee was absent to pursue treatment for infertility.[7]

Moreover, within the context of private law, rights arise from a variety of sources. Hohfeldian analysis teaches that each right is accompanied by a correlative duty.[8] Private rights are often created by the interaction between private behavior on the one hand and statutes and case law on the other. As a result, private behavior can create duties that did not previously exist. Intellectual property law provides examples. Return to an example in the introduction. By opening a chain of Eddie's Shoe Repair shops, an entrepreneur may create a legal duty that precludes

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5 *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

6 *See* Lee v. Hertz Corp., 330 F.R.D. 557 (N.D. Cal. 2019).

7 *See* Hall v. Nalco Co., 534 F.3d 644 (7th Cir. 2008).

8 WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 36–38 (Walter Wheeler Cook ed., 1923).

other people named Eddie from putting their first name on shoe repair shops.[9] To avoid breaching a legal duty and violating a legal right, an actor must learn first that the intellectual property holder has taken actions that create intellectual property rights, and second, the scope of those rights. If the actor does not obtain adequate legal assistance (and, often, even if she does), the actor may well infringe in ignorance of her legal duties.

In other circumstances, ignorance of law arises within the context of a contractual relationship. Creation of a contract, in conjunction with the law of contracts, creates legal duties that did not previously exist, and one or both parties to the contract may be ignorant about the scope of those duties. As a result, when a party acts based on a mistaken belief about a contract's meaning, the party is acting in "ignorance of law."[10]

Legal ignorance is most commonly at issue when a party seeks to escape liability for breach of an apparent duty. In some circumstances, however, a party who acts in ignorance of law may seek affirmative relief based on her reasonable ignorance. For instance, rules governing the practice of law may preclude lawyers from contracting to pay referral fees[11] and from tying the compensation of expert witnesses to the ultimate success of the lawyer's case.[12] A layman reasonably ignorant of the prohibition might seek enforcement of the agreement despite the legal prohibition. Similarly, a party who improves property in reasonable ignorance of the state of legal title may seek restitution for the value of the improvement.[13]

B. *Fairness Concerns*

No reasonable person consults lawyers or law books each time she takes an action that might have legal consequences. The decision to act in

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9 *See, e.g.*, Henegan Constr. Co. v. Heneghan Contracting Corp., 63 U.S.P.Q.2d 1984 (S.D.N.Y. 2002); David B. Findlay, Inc. v. Findlay, 218 N.E.2d 531, 534 (N.Y. 1966).

10 Courts often treat interpretation of contracts as a question of law; *see, e.g.*, FDIC v. Fisher, 292 P.3d 934, 937 (Colo. 2013); Tufail v. Midwest Hosp., LLC, 833 N.W.2d 586, 592 (Wis. 2013); MacKinnon v. Truck Ins. Exch., 73 P.3d 1205, 1212 (Cal. 2003).

11 *See, e.g.*, Danzig v. Danzig, 904 P.2d 312 (Wash. Ct. App. 1995); Plumlee v. Paddock, 832 S.W.2d 757 (Tex. App. 1992).

12 *See, e.g.*, Reich & Binstock, LLP v. Scates, 455 S.W.3d 178 (Tex. App. 2014).

13 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10 (AM. LAW. INST. 2016).

ignorance of law (if it is a decision at all) is rarely accompanied by a formal cost-benefit analysis. Some actors do not recognize that their actions present a legal issue. Others make the snap judgment that legal consequences are unlikely to ensue. Consumers, for instance, may sign credit card agreements or cell phone contracts without reading them because they deem the risk of disputes to be small. For people who do not recognize legal issues, or who believe legal risks are not worth considering, the legal significance attached to ignorance of the law is unlikely to have any effect on behavior.

Nevertheless, excusing persons from the consequences of actions taken in reasonable ignorance of law is often consistent with principles of fairness and justice.[14] Law imposes duties for a variety of reasons. Sometimes, a duty is designed to deter behavior that causes diffuse harm to the public at large, but minimal identifiable harm to particular individuals. The duty may be enforced by government-imposed civil or criminal sanctions, or by private rights of action. When deterrence is the primary objective of a legal duty, the case for excusing reasonable ignorance is especially compelling. If an actor's failure to learn of the legal prohibition was reasonable under the circumstances (taking into account the diffuse harm caused by the violation and the cost of legal learning necessary to avoid that harm), fairness concerns do not justify holding an actor liable for violations of duty that caused no significant harm to any other individual.

When law imposes duties to protect private rights, the situation becomes more complex. First, however reasonable the actor's ignorance, the intrusion causes harm to another innocent party. Second, if the ignorant actor obtains benefit from that intrusion, excusing the actor constitutes a form of unjust enrichment.[15]

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14 *Cf.* Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 19 (1992) (observing that legal complexity can be both inefficient and unfair and disproportionately burdens the poor).

15 Excusing the actor enables the actor to obtain rights for free when she would have had to pay for those rights if she had acted with complete legal information and negotiated to purchase those rights. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40, cmt. b (noting that restitution is justified against innocent wrongdoers "because the advantage acquired by the defendant is one that should properly have been the subject of negotiation and payment."); *see also* Hanoch Dagan, *Mistakes*, 79 TEX. L. REV. 1795, 1804–05 (arguing, in the context of restitution for mistake, that the primary concern should be protection of reliance interests, not frustrated expectations).

Nevertheless, one might take the position that even in this situation the reasonably ignorant actor has not acted wrongfully and we should therefore invoke the corrective justice principle that a victim has no claim to compensation against a person who causes an injury unless the injurer took an action that was wrongful.[16] That is, if the actor has not intentionally or negligently caused a harm, the actor should bear no liability for the harm.

C. *Efficiency Concerns*

1. Introduction

Institutional actors and individuals making significant decisions often think about whether to obtain legal advice—and how much. For actors who do engage in some form of cost-benefit analysis, however informal, poorly calibrated legal rules governing legal ignorance threaten to generate inefficient expenditures of time and money in the quest for additional legal information. The potential for inefficiency arises because the cost of acquiring more legal information might exceed any possible social benefit the legal information will produce—either because obtaining the information is costly or ultimately unhelpful, or because better information will avoid little harm.

Of course, many prohibitions will be evident to anyone who has lived within the legal culture. Examples include prohibitions on creation and distribution of child pornography, or on creation and distribution of "pirated" copies of movies. The cost of ascertaining the existence and scope of these prohibitions is near zero—making it implausible that a violator was ignorant of the prohibition. Whenever the cost of ascertaining the existence and scope of a legal prohibition is low relative to the harm a violation would cause, efficiency concerns suggest that the potential violator should investigate legal constraints before engaging in harm-causing activities.

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16 *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS 361 (1992) ("A loss falls within the ambit of corrective justice only if it is wrongful."); *see also* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 184 (1995) ("Fault, consisting in either intentional or negligent harm, is the organizing principle of the common law.").

More serious problems arise when legal information is costly. Intuitively, legal investigation is inefficient when its cost exceeds the harm it avoids. For instance, it would be inefficient to spend $1,000 investigating whether an action violates a legal duty when the harm caused by the action is only $500. But, of course, an actor has no private incentive to spend $1,000 to avoid liability of $500. A rule excusing ignorance of law would have no effect on that actor because the actor would abstain from legal investigation whether legal doctrine excused him or not.

In at least three circumstances, however, rigid enforcement of the "ignorance of law is no excuse" maxim would lead to inefficient expenditures on information. First, when the private value of legal information is greater than its social value, private actors will sometimes have an inefficient incentive to invest in that information. Second, risk aversion will sometimes lead to inefficient investment in legal information. Third, potential consumers of legal information are likely to overvalue the likely output of legal investigation, leading to overinvestment in legal information.

2. Private Value Exceeds Social Value

The private benefits associated with legal investigation are not always aligned with the social benefits. Sometimes, a rule holding an actor liable for actions taken in reasonable ignorance of legal prohibitions would generate private incentives to engage in legal investigation even though the cost of that investigation exceeds its social value.[17] Legal investigation might enable a potential actor to avoid significant liability even when the potential action would cause little social harm. The misalignment between private and social benefit of legal investigation is most serious when doctrine entitles a party whose rights have been infringed to standard property law relief, an injunction, or statutory

[17] Landes and Posner have explored the similar disparity between private and social incentives to resolve uncertainty through litigation. William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 692–98 (1994).

damages that might exceed the harm suffered by the victim of infringement.[18]

Consider an example. Suppose an actor contemplates an action which will generate a benefit to the actor of $1,000, will cause harm to another party in the amount of $500, but will generate liability of $1,500. The example is not farfetched; consider copyright's statutory damage remedy, which assesses liability for damages largely independent of the harm caused by infringement.[19] Suppose further that the actor does not know whether the action violates any legal duty; imagine that the actor's a priori guess is that the probability of violation is 50%. In this case, legal investigation of the actor's rights and duties would be socially inefficient; the actor's potential action would generate benefits that exceed any harm the actions would cause. But in a strict liability regime, legal investigation could generate significant private benefit to the actor. In the absence of legal investigation, the actor will take the action because the expected benefit from taking the action is $250: a 50% chance of a gain of $1,000 minus a 50% chance of a loss of $500 (liability of $1,500 minus gain of $1,000). If, however, the actor could eliminate the uncertainty about liability, the actor's expected benefit would increase to $500, because the actor would abstain from acting if the action would generate liability. As a result, the actor would find it worthwhile to invest $250 in legal information that would resolve the uncertainty. In this case, the investment in legal information is clearly inefficient. The investigation generates costs that produce no social benefit.

Consider the problem in algebraic terms. Suppose avoiding an action causes a loss to the actor of avoidance cost A. In many circumstances, A represents the gain to the actor from taking the contemplated action. Assume that the harm the actor will cause by taking the action is H, but the actor will bear liability L if liable for the harm. L

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18 *Cf.* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 943–44 (2007) (noting that in intellectual property law, supracompensatory relief, particularly injunctive relief, is responsible for unnecessary licenses because of the fear of excessive liability). As the example in the text illustrates, the same fear may generate excessive legal investigation. *See also* Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1304–19 (2008).

19 17 U.S.C. § 504(c)(1)–(2) (2018) (providing for minimum and maximum statutory damages, with the amount between the minimum and maximum to be determined "as the court considers just.").

may be larger than H because of the structure of damage remedies, as in the example above. Let p represent the actor's best guess about the probability that the action will generate legal liability. Finally, let C represent the cost of legal investigation to resolve the liability question.

Assuming ignorance of the legal prohibition is not a defense to liability for the harm caused, consider the payoffs to the actor of the three alternatives: taking the action, abstaining from the action, or conducting legal investigation. If the actor abstains from the action, the actor's payoff is 0; the actor generates no benefit, but incurs no liability, and no investigation cost. If the actor takes the action without any legal investigation, the actor gains A if the action violates no legal duty and incurs cost of (L-A) if the action does violate the legal duty. Algebraically, the actor's payoff is:

$$(1\text{-}p)A - p(L\text{-}A)$$

This reduces to A-pL. Therefore, when $A < pL$, the actor's payoff is larger if the actor avoids the harm-creating action, but when $A > pL$, the payoff is larger if the actor takes the action.

Now consider the third alternative: legal investigation. The actor has incentives to conduct legal investigation whenever two conditions are met. First, the cost of investigation must be smaller than the actor's expected gain from engaging in the activity when it violates no legal duty. The actor has no reason to conduct the investigation if the fruits of the investigation will be smaller than the benefit from taking the action. Therefore, the inequality $C < (1\text{-}p)A$ must hold. Second, the cost of the investigation must be smaller than the loss the actor would suffer from acting without legal investigation. That is, the inequality $C < p(L\text{-}A)$ must also hold. But recall that L may be larger than H. In circumstances where $H\text{-}A < C < p(L\text{-}A)$, the actor has an economic incentive to engage in inefficient legal investigation. Where $H < A$, the investigation will lead the actor to abstain from efficient action; where $H > A$ the investigation will sometimes lead the actor to avoid inefficient action, but at an investigation cost greater than the social harm avoided.

On some occasions, a fourth alternative may avoid inefficient legal investigation: negotiation with the party who would suffer the harm, H.[20] Often, however, legal investigation will be necessary to identify that party. For instance, a publisher concerned about whether an article or book constitutes copyright infringement would have to identify all of the potential works the article or book might infringe, and then trace potential assignments to determine who currently holds rights in those works. Moreover, even when the party harmed is readily identifiable, the strategic position of the parties, combined with the cost of the negotiation, may make negotiation less attractive than legal investigation.

3. Risk Aversion

The analysis in the preceding section assumes a risk-neutral actor making her best a priori assessment about the probability of liability (p) and the harm caused by the contemplated action (H). In practice, a corporate manager is the decisionmaker most likely to evaluate the costs and benefits of obtaining more legal information. The corporate literature has abundantly documented the incentives that lead to risk aversion among corporate managers.[21] It is reasonable to expect, therefore, that managers systematically overestimate the values of p and H in deciding whether to obtain legal advice. As a result, decisionmakers are likely to engage in inefficient investigation even when potential liability does not exceed the harm the action would cause.

When potential liability does exceed actual harm, risk aversion heightens the risk of inefficient legal investigation. Within the realm of intellectual property, risk aversion often leads actors to obtain unnecessary licenses from copyright holders.[22] James Gibson has

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20 *See generally* Sterk, *supra* note 18, at 1311–13 (discussing factors that will lead to negotiations before investigation of the scope of property rights).

21 *See, e.g.*, Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 864 (1984) (explaining how managers are undiversified risk bearers who "will tend to evaluate firm projects with a risk-averse bias unless they are paid to do otherwise."); Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1247–48 (2002) (discussing "the well-documented phenomenon of managerial risk aversion").

22 *See* Gibson, *supra* note 18, at 891–92.

emphasized that production of intellectual property works often requires the input of multiple parties, and if any of them is risk-averse, the work will not be produced without obtaining unnecessary licenses.[23] Risk-averse actors may seek insurance against potential liability, but insurers will require legal investigation before issuing policies.[24]

4. Errors in the Ex Ante Assessment of the Value of Legal Advice

The analysis so far has proceeded on the premise that the expenditure C on legal information will resolve any uncertainty an actor faces. In many circumstances, however, a proposed action's legal status will remain uncertain even after the actor obtains legal advice. Even a criminal procedure expert may be unable to predict with certainty whether a proposed high-tech search infringes on a citizen's Fourth Amendment rights. When a magazine article or musical composition borrows from earlier work, a copyright lawyer may be unable to hazard more than an educated guess about whether a fair use defense will succeed in a potential infringement action.[25]

Lay actors have little basis for estimating, ex ante, the likelihood that expenditures on legal advice will yield determinate answers. If, as appears likely, most lay actors underestimate the scope of indeterminacy in law, they will overestimate the private benefit associated with an investment in legal information, exacerbating the inefficiency resulting from legal investigation.

II. STRATEGIES FOR DEALING WITH REASONABLE IGNORANCE OF LAW

The preceding Part identifies two difficulties with rigid enforcement of the maxim that ignorance of law is no excuse. First, application of the maxim may be unfair to actors who cannot reasonably perceive that their actions might bring adverse legal consequences, or to actors who

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23 *Id.* at 893.

24 *Id.* at 893–94 (noting that the typical errors and omissions policy for a film "presumes that the applicant has already paid an attorney to obtain clearances, but also requires the preparation of a copyright report setting forth a detailed history of the work and any related works.").

25 *See id.* at 887–89 (discussing difficulties a lawyer would face in advising a filmmaker client on whether background features of the film would constitute fair use).

recognize that the cost of legal investigation would be disproportionate to any risk they do perceive. Second, with more sophisticated legal actors who do perceive that their potential action creates some legal risk, application of the maxim generates incentives to engage in inefficient legal investigation.

This Part explores alternatives to enforcement of the maxim. Legal doctrine has developed three distinct strategies for dealing with reasonable ignorance of law. First, where feasible, doctrine has developed information-forcing default rules that reduce the cost of obtaining information about legal rules. Second, where reducing the cost of information is not feasible, but the legal rule an actor violates was designed primarily to deter behavior rather than to compensate individuals for harm, doctrine frequently excuses actions taken in reasonable ignorance of law. Third, when the legal rule the actor violates is designed to compensate individuals for harm, doctrine has adjusted the remedies available to minimize the adverse effect on a reasonably ignorant actor.

A. *Information-Forcing Default Rules, with a Focus on Illegal Contracts*

Minimization of information costs plays an important role in shaping contract and property doctrine. Contract law, for instance, employs a regime of majoritarian default rules designed to reflect what contracting parties generally anticipate, reducing the need for parties to investigate and specify legal rules governing their relationship.[26] Property law sometimes goes further, reducing information costs to the universe of potential buyers by limiting the discretion of property owners to individualize property interests.[27] In particular, property rules tend to concentrate rights in a single owner who enjoys the right to exclude

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[26] *See, e.g.*, Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 886 (1992) (noting that it is often rational for contracting parties to remain ignorant of background legal rules, and that in those circumstances, the default rules that make sense are conventionalist default rules that reflect the commonsense expectations of most parties).

[27] For the now-classic treatment of the subject, see Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property; The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 24–42 (2000).

others. By delegating control over resource use to owners, property law's exclusion strategy reduces the need for potential resource users (and courts) to inform themselves about the value of competing resources.[28]

These general doctrinal mechanisms for reducing information costs do not, however, reliably ensure that parties know when their contemplated actions would fall afoul of contract law prohibitions. In particular, a party to a contract may be unaware of a statute or common law rule making particular contract provisions illegal or unenforceable. In that situation, information-forcing default rules might reduce the cost of legal investigation by providing a party with more incentive to educate her counterparty.

Consider parties who enter into contracts in ignorance of statutory prohibitions or judge-made policy. These prohibitions are often designed to avoid harm to third parties. For instance, a prohibition on hiring unlicensed plumbers or electricians supposedly safeguards third-party consumers against shoddy workmanship. Without a sanction, however, the prohibition might have little effect. The common law's standard sanction has been withdrawal of judicial relief: non-enforcement of the illegal contract.[29] Without the prospect of judicial relief, one or both parties have an incentive not to enter into the unlawful contract.[30]

The problem with the standard sanction is that it does not account for information asymmetries between the contracting parties. Suppose, for instance, a state prohibits lawyers from contracting to pay referral fees to nonlawyers. The prohibition is designed to protect consumers of legal services. Lawyers are likely to know of the prohibition; laymen are not. If the goal is to deter the making of illegal contracts, imposing a sanction on

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28 *See* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 793–95 (2001) (noting that complex societies recognize in rem rights to reduce information costs); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 984–85, 1024–27 (2004) (explaining that the exclusion strategy allows courts to focus on whether a right to exclude was violated rather than the more complex issues of proper usage of land). Merrill and Smith concede that exclusion rules work less well when resources are "difficult to package into easily measured and monitored parcels." Merrill & Smith, *supra,* at 798.

29 *See, e.g.*, Stella v. Wilmington Sav. Fund Soc'y, FSB, C.A. No. 91C-11-31, 1993 WL 138697 (Del. Super. Ct. March 30, 1993); McCauley v. Michael, 256 N.W.2d 491, 498 (Minn. 1977); Woodward v. Jacobs, 541 P.2d 691 (Colo. App. 1975); RESTATEMENT (SECOND) OF CONTRACTS § 178(1).

30 *See generally* Badawi, *supra* note 4, at 490–502; Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 138–40 (1988).

the lawyer does not require the lawyer to make inordinate expenditures on learning about the prohibition. By contrast, imposing a sanction on nonlawyers does generate significant investigation costs.[31] Refusing to enforce a referral contract at the behest of either party—the standard sanction—disproportionately affects the layman who is ignorant of the prohibition, especially when the layman provides services first and then seeks to recover for those services. Consider, for instance, a hypothetical contract by an ambulance company to provide referrals to lawyers in return for a percentage of the fees the lawyer receives from referred clients. The referrals come first, followed by the fees, so the party seeking to enforce the contract will typically be the ambulance company, not the lawyer. If the ambulance company cannot enforce the contract, the lawyer obtains the benefit of the prohibited contract even though the lawyer was in the best position to know of the prohibition and to avoid it; the ambulance company, however, forfeits compensation for services already rendered.

When additional legal information would be valuable to two parties contemplating a contract, legal doctrine can reduce the cost of that information by inducing the parties to share that information rather than investigating the same legal requirements independently. Doctrine can accomplish that result by applying an information-forcing default rule that places a burden to share on the party who already has information, or who has superior access to information.[32] For instance, in the ambulance referral hypothetical, consider a rule that disables a party from relying on illegality as a defense if, at the time of contracting, the party

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31 *See* Kostritsky, *supra* note 30, at 137–38.

32 Ian Ayres and Robert Gertner introduced the concept of "penalty default" rules designed to encourage better-informed parties to share information with less informed parties. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97 (1989). Ayres and Gertner emphasized that rather than applying default rules that approximate the result the parties would have selected with full information, courts should apply a default rule that the informed party does not want, in order to encourage disclosure by the informed party. *Id.* at 103–04. J. H. Verkerke has demonstrated how, in a number of contexts, legislatures have adopted information-forcing, or "penalty default," rules to deal with asymmetric knowledge about legal rules. Verkerke, *supra* note 4, at 904–05 (criticizing the approach). Alan Schwartz and Robert Scott have criticized the penalty default model on the ground that drafters of penalty default rules will generally have too little information about the parties and their preferences to generate efficient default rules. Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1560–66 (2016).

knew of the illegality and did not disclose it to a counterparty when they knew or should have known that the counterparty did not know of the illegality. The rule would protect a reasonably ignorant party against loss, while reducing the incentive to engage in duplicative and inefficient investigation of legal rules.[33]

Only when the informed party has reason to know of the other party's ignorance should failure to disclose provide an excuse for the ignorant party. Because contracts are typically drafted against many assumptions about background legal principles, imposing on a party with information about those principles a duty to disclose all of them would create significant transaction costs[34]—especially when a "reasonable" counterparty would know or investigate those legal principles in any event.

This approach is consistent with the treatment of ignorance of law in the Restatement (Second) of Contracts. Section 180 permits a promisee "excusably ignorant" of "legislation of a minor character" to obtain damages for breach of the contract against a promisor who is not

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33 In a classic article, Anthony T. Kronman explored a similar question: the obligation of a contract party to disclose facts when the party in possession of facts knows that the other party is unaware of those facts. Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978). Kronman noted "the principle of efficiency is best served by a compound liability rule which imposes initial responsibility for the mistake on the mistaken party but shifts liability to the other party if he has actual knowledge or reason to know of the error." *Id.* at 8. Kronman, however, qualified his conclusion in cases where one party made a significant investment in acquiring information rather than acquiring that information casually. His concern was that a rule requiring disclosure would deter initial investment in information that might be valuable. *Id.* at 13–14. In many cases, however, the private value of that investment will be far greater than the social value, which may be negligible. Jeffrey Harrison has recognized that rewarding investment in this circumstance encourages wasteful investment in information. Jeffrey L. Harrison, *Rethinking Mistake and Nondisclosure in Contract Law*, 17 GEO. MASON L. REV. 335, 338 (2010). Investment in legal information will often have the same characteristic: if the party considering an investment in legal information can reap private value that exceeds the cost of the information, the party may invest in that information even if the social value of the information is far smaller than the private value. A disclosure rule removes some of the incentive to make inefficient investment in legal information.

34 Kronman made a similar point to explain why a seller should not be obligated to disclose patent defects to a buyer—defects the seller assumes the buyer has seen or should have seen. Kronman, *supra* note 33, at 23.

excusably ignorant.[35] Similarly, section 153 permits a contracting party to escape from a contract when the party seeking to escape, but not the counterparty, entered into the contract in ignorance of a legal provision that would have had a material adverse effect on the ignorant party's decision to enter into the contract.[36]

Case law on the issue is divided. Some courts have adhered to the traditional position that neither party may enforce an illegal contract. For instance, in *Plumlee v. Paddock*,[37] a Texas court awarded summary judgment to a law firm in an action by an operator of an ambulance company seeking to recover on a contract for a referral fee the law firm agreed to pay him. Emphasizing that Texas rules of professional conduct prohibited such contracts to prevent solicitation by lay persons of clients for lawyers, the court held that the operator's ignorance of the prohibition was irrelevant.[38]

Other courts, however, have afforded relief to the party ignorant of the illegality. In *Danzig v. Danzig*,[39] a Washington court, citing the Restatement,[40] held that a "runner" stated a claim for breach of a contract with a lawyer to provide referral fees, even though the agreement violated Washington's barratry statute. Moreover, even without enforcing illegal contracts, some courts have provided equivalent redress by holding that the ignorant party holds a fraud claim against the party with knowledge

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35 RESTATEMENT (SECOND) OF CONTRACTS § 180 (AM. LAW. INST. 1981). The Restatement would preclude the ignorant party from recovering damages "for anything that he has done after he learns of the . . . legislation." *Id.*

36 *Id.* § 153. Although section 153 never explicitly mentions mistake or ignorance of law, section 151, which defines mistake, makes it clear that the provision is designed to apply to mistakes of law. *Id.* § 151, cmt. b.

37 Plumlee v. Paddock, 832 S.W.2d 757 (Tex. App. 1992).

38 *Id.* at 759; *see also* McCormick v. Life Ins. Corp. of America, 308 P.2d 949 (Utah 1957) (holding that a salesman engaged to sell shares of a company's stock at a 20% commission cannot recover more than the statutory maximum of 15%, even though the salesman was ignorant of the statutory restriction; the court did hold that despite the illegality, the salesman was entitled to recover the statutorily permitted 15%).

39 Danzig v. Danzig, 904 P.2d 312 (Wash. Ct. App. 1995); *see also* American Buying Ins. Serv., Inc. v. S. Kornreich & Sons, Inc., 944 F. Supp. 240, 245 (S.D.N.Y. 1996) (citing the Restatement for the proposition that if a jury concluded that insurance brokers knew of the illegality of the contract to share commissions with non-licensed brokers, and the intended recipients of those commissions did not know, the contracts might be enforceable).

40 *Danzig*, 904 P.2d at 315.

of illegality.[41] Still, other courts have provided the ignorant party relief by holding that even if the illegal contract is not enforceable, recovery is available on a *quantum meruit* theory. For instance, in *Reich & Binstock, LLP v. Scates*,[42] the court held that an expert witness could recover for the value of his services to a law firm even though the contract between the parties was unenforceable because it tied the expert's compensation to the lawyer's success in the case.[43]

Information-forcing default rules are designed to provide a baseline that induces an informed party to include contract provisions about issues on which the party would otherwise remain silent.[44] They are not designed to dictate a particular resolution of those issues. The Restatement reflects that approach by qualifying the right of an ignorant party to escape the adverse consequences of a contract with a more informed party: if the agreement allocates the risk of a mistake to the ignorant party, or if the ignorant party knows that she has incomplete knowledge and decides to proceed anyway, the ignorant party bears the risk of her ignorance.[45]

Information-forcing rules can address the problem of legal ignorance in a significant subset of contract cases, but not all of them. As

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41 *See, e.g.*, Defender Indus., Inc. v. Nw. Mut. Life Ins. Co., 938 F.2d 502, 508 (4th Cir. 1991) (holding that South Carolina's statutory prohibition on rebates of insurance premiums did not preclude an insurer from bringing a fraud claim premised on the insurer's promise to pay rebates).

42 Reich & Binstock, LLP v. Scates, 455 S.W.3d 178 (Tex. App. 2014).

43 The court emphasized that the law firm had conceded that the expert's billing rates were reasonable, supporting the expert's contention that he was entitled to the amount billed on a *quantum meruit* theory. *Id.* at 184.

44 Verkerke, *supra* note 4, at 904; Ayres & Gertner, *supra* note 32, at 99.

45 Restatement (Second) of Contracts § 153 applies if the ignorant party "does not bear the risk of the mistake under the rule stated in § 154." Section 154 provides that:

> A party bears the risk of a mistake when:
>
> (a) the risk is allocated to him by agreement of the parties, or
>
> (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
>
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

RESTATEMENT (SECOND) OF CONTRACTS § 154.

J. H. Verkerke has demonstrated, disclosure is no panacea.[46] In particular, disclosure by an informed party is of little value to an ignorant party if processing the disclosed information is prohibitively expensive—as it may be for many consumers.[47] And in those cases where both parties are reasonably ignorant of the governing legal rules, disclosure is not an option. Other strategies are better suited to dealing with these problems of ignorance. But in a circumscribed set of cases, information-forcing rules have the potential to reduce unfairness to a party who acts in reasonable ignorance of legal prohibitions when a counterparty could easily have relieved her of that ignorance.

B. *Relieving the Reasonably Ignorant from Liability: Emergence of a Quasi-Negligence Standard*

Many legal prohibitions are designed not to vindicate private rights but instead to deter or punish "wrongful" actions. Public regulatory regimes, including the criminal law, often prohibit behavior that does not intrude on private rights. Other legal doctrines (some constitutional torts furnish examples) confer rights on private parties more to deter wrongful behavior than to compensate victims for harm suffered.

Recall that situations in which the actor's liability for taking a wrongful action exceeds the harm caused by the action are those that create the greatest potential to induce inefficient legal investigation.[48] Prohibitions that are designed largely to deter rather than to compensate for harm often fall into that category. On a more basic level, situations in which penalizing actions taken out of ignorance appears particularly unjust when the harm caused by those actions is small relative to the cost of investigation necessary to discover the scope of the legal prohibition.

It should not be surprising, then, that the impetus to excuse reasonable ignorance appears strongest in areas where the legal prohibition is primarily designed not to vindicate private rights, but instead to deter or punish wrongful actions. Rarely does legal doctrine apply an explicit negligence standard to excuse reasonably ignorant

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46 Verkerke, *supra* note 4, at 931–33.

47 *Id.* at 932.

48 *See supra* Section I.C.2.

actors. But in a number of doctrinal areas, a combination of statutory limits, judge-made rules, and prosecutorial discretion have effectively shielded reasonably ignorant actors from the consequences of their actions.

Paradoxically, criminal law—the birthplace of the maxim that ignorance of the law is no excuse—is the doctrinal area in which courts have been the most forthright about excusing reasonable ignorance. By contrast, other areas of regulatory law have relied on statutory limits or prosecutorial discretion to protect the reasonably ignorant.

1. Criminal Law: The Emergence of Reasonable Ignorance as an Excuse

Although the maxim that ignorance of law is no excuse originated in the criminal law, doctrine has evolved to excuse defendants whose ignorance of the law was reasonable under the circumstances.[49] In effect, the maxim has become a prime example of acoustic separation in criminal law: the maxim exalts the importance of obedience, while officials who administer the system excuse ignorant defendants.[50] Ultimately, the maxim only applies when failure to know the law would itself be a species of negligence or recklessness.

As criminal law has moved towards greater complexity, its treatment of mistake of law has effectively and sensibly abandoned the goal of promoting greater knowledge of law. The time and effort people can devote to accumulating information about law, like the time and effort they can devote to accumulating other information, is limited. From an efficiency perspective, punishing an ignorant defendant is problematic when the cost to potential defendants of acquiring information about the prohibition's scope and existence exceeds the social harm the prohibition is designed to avoid. It should not be surprising, then, that as the content of criminal law began to diverge from community moral norms, courts

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49 Criminal law scholars have long recognized the tendency of courts to refrain from prosecution when defendants acted in unwitting violation of the law and where social harm is slight, or to impose nominal penalties, or on occasion, to recommend pardons. *See, e.g.*, Hall & Seligman, *supra* note 3, at 650; Perkins, *supra* note 3, at 41.

50 Meir Dan-Cohen coined the term "acoustic separation." Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

became more willing to recognize ignorance as a defense to criminal liability.[51]

a. Historical Application and Justifications for the Maxim

Nineteenth-century courts routinely recited the maxim in dicta, but applied it less often to uphold criminal convictions. Relatively few criminal convictions tested the maxim; most crimes were variants on common law crimes, and few defendants were in a position to argue that they were ignorant of legal prohibitions on murder, larceny, burglary, or assault.[52]

Judges and scholars developed a variety of sometimes-overlapping justifications for the maxim. The California Supreme Court emphasized the interminable fact questions courts would face if ignorance of law were an excuse.[53] Holmes argued that the maxim promoted knowledge of and compliance with the law.[54] Somewhat later, Henry Hart contended that people who engaged in intrinsically wrongful actions without knowing that they were prohibited were blameworthy for not recognizing that their actions were prohibited.[55]

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51 Kahan, *supra* note 1, at 149.

52 *See generally* Hall, *supra* note 3, at 20 ("[N]o sane defendant has pleaded ignorance that the law forbids killing a human being or forced intercourse or taking another's property or burning another person's house."). Nevertheless, courts did regularly apply the maxim to uphold convictions of defendants who pleaded ignorance of statutory offenses. For instance, the North Carolina Supreme Court upheld the conviction of a physician who violated a statutory prohibition on the sale of intoxicants to minors, despite his contention that he thought he was entitled to sell intoxicants as medicines. State v. McBrayer, 2 S.E. 755 (N.C. 1887). Courts also rejected the "advice of counsel" defense. A New Hampshire court, for example, upheld the jury's conviction of a defendant who had, in violation of a statute, fraudulently mortgaged personal property to prevent its attachment, despite defendant's protestations that he had been advised by counsel that he could not be convicted for his behavior. State v. Marsh, 36 N.H. 196 (1858). The court emphasized that "the fact being found that he made the mortgage with that criminal intent, his ignorance that he was liable to be punished for the crime is no legal excuse." *Id.* at 199.

53 People v. O'Brien, 31 P. 45, 47 (Cal. 1892) ("The plea would be universally made, and would lead to interminable questions incapable of solution. Was the defendant in fact ignorant of the law? Was his ignorance of the law excusable?"); *see also* 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 498 (4th ed. 1873).

54 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 48 (1881).

55 Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 413 (1958); *see also* George P. Fletcher, *The Fault of Not Knowing*, 3 THEORETICAL INQUIRIES IN L. 265, 278–79 (2002).

Courts developed exceptions for crimes that required a mental element when ignorance of the law negated that mental element. Larceny and robbery, for instance, typically require a specific intent to steal.[56] If a criminal defendant, because of a mistake of law, believed property to be his own when in fact it belonged to someone else, he could not be guilty of larceny or robbery. He did not have the requisite intent.[57]

If the defendant's mistake was of fact rather than law, courts did treat the mistake as a defense. If the crime included no particular mental element, mistake of fact was a defense only if the mistake was reasonable. If, however, the mistake negated the mental element, the mistake was a defense whether or not the mistake was reasonable.[58]

With some modifications, the system largely continues to operate with respect to state crimes, which tend to be rooted in community norms. The Model Penal Code (MPC) starts with the broad proposition that "[n]either knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides."[59] The MPC then qualifies that broad statement by recognizing ignorance of law and mistake of fact as defenses when the crime requires a mental element.[60] In other circumstances, the MPC provides that ignorance of law is a defense only when the statutory prohibition "has not been published or otherwise reasonably made available,"[61] or when the violator has acted in reasonable reliance upon an

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56 *See, e.g.*, N.Y. PENAL LAW § 155.05 (McKinney 2020) ("A person steals property and commits larceny when, *with intent to deprive another of property or to appropriate the same to himself or to a third person*, he wrongfully takes, obtains or withholds such property from an owner thereof.") (emphasis added).

57 *See generally* Perkins, *supra* note 3, at 46.

58 For instance, the Texas Supreme Court overturned a defendant's conviction for theft of a cow when the defendant introduced evidence to show that he had an honest belief that the cow belonged to his father, not to the complainant. The court held that the trial court had erred in giving an instruction that for mistake to be a defense, it must be "such a mistake as does not arise from the want of proper care on the part of the person committing the offense." Bray v. State, 41 Tex. 203, 204 (1874).

59 MODEL PENAL CODE § 2.02(9) (AM. LAW INST. 2020).

60 *Id.* § 2.04(1).

61 *Id.* § 2.04(3)(a).

"official statement of the law."[62] Similarly, many state statutes expressly preclude an ignorance of law defense unless the defendant can establish reliance on one of a defined class of "official" interpretations of law.[63]

In state court, ignorance of law defenses have been raised—and rejected—most frequently with respect to offenses that a defendant should have understood were the subject of regulation. For instance, in *People v. Marrero*,[64] the New York Court of Appeals affirmed the weapons possession conviction of a corrections officer at a Connecticut federal prison. The officer, who carried a loaded pistol into a Manhattan social club, had argued that he mistakenly believed he qualified as a "peace officer" exempt from the possession statute. The court, however, concluded that the officer's misconstruction of the statute did not constitute a defense.[65] In gun possession cases like these, however, court decisions are undoubtedly shaped by the notion that everyone should be aware that guns are highly regulated and that there is no excuse for failure to comply with applicable regulations.[66] The same rationale applies in cases involving possession of child pornography[67] or failure to register as a convicted sex offender:[68] because defendants in these cases should have been aware that they were operating in areas of heavy regulation, ignorance of those regulations would not serve as an excuse.

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62 *Id.* § 2.04(3)(b) (providing that the "official statement" may be contained in "(i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.").

63 *See, e.g.*, N.Y. PENAL LAW § 15.20(2) (McKinney 2020) (requiring reliance on a statute, administrative order, judicial decision, or interpretation made by a public servant charged with enforcement); TEX. PENAL CODE ANN. § 8.03(b) (West 2020) (requiring reliance on an official statement contained in a written order of an administrative agency charged with interpretation or a written interpretation contained in an opinion of a court of record or made by a public official charged with interpretation of the law in question).

64 People v. Marrero, 507 N.E.2d 1068 (N.Y. 1987).

65 For a similar example, see *De Nardo v. State*, 819 P.2d 903 (Alaska Ct. App. 1991).

66 *See, e.g.*, *In re* Two Seized Firearms, 602 A.2d 728, 730 (N.J. 1992) (observing that the probability that dangerous devices will be regulated is so great that those in possession must be presumed to be aware of the regulation, and that "[i]n the context of gun-control laws courts have held that ignorance of the law is no defense to even a statute requiring that the defendant have 'knowingly' violated the law.").

67 People v. Fraser, 752 N.E.2d 244, 249–50 (N.Y. 2001).

68 Lawson v. Commonwealth, 425 S.W.3d 912 (Ky. Ct. App. 2014).

The premise behind this system—every upright citizen is presumed to know the criminal law, but anyone can make an innocent mistake about facts—made sense as long as most crimes were also sins.[69] When the cost of learning about a criminal prohibition is low, as it is with most sin-like common law crimes and their statutory progeny, considerations of justice and efficiency support the traditional rule: ignorance of the law should not constitute an excuse. From the perspective of a retributivist or a virtue ethicist, violation of deeply ingrained moral and social norms merits punishment whether or not the actor knows of the criminal prohibition.[70] From a deterrence perspective, when the cost of learning about a criminal prohibition is near zero, that cost is not a countervailing factor to be weighed against the importance of deterring future violations. Finally, judicial economy concerns militate in favor of punishing the allegedly ignorant killer or thief: to recognize the defense would require evaluation of implausible claims of ignorance by every defendant who chooses to raise the defense.

b. Modern Treatment: Ignorance as an Excuse for *Malum Prohibitum* Offenses

The system began to disintegrate with the rise of regulatory crimes.[71] With the proliferation of *malum prohibitum* crimes, particularly at the federal level, notice of the criminal prohibition becomes more critical. From a justice perspective, a person is not morally culpable for violating a law unless she knew or should have known that her conduct violated a legal prohibition.[72] From an efficiency perspective, punishment is problematic when the cost of ascertaining the existence and scope of the prohibition exceeds the harm caused by the violation.

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69 HOLMES, *supra* note 54, at 125 ("[T]he fact that crimes are also generally sins is one of the practical justifications for requiring a man to know the criminal law.").

70 *See, e.g.* Kahan, *supra* note 1, at 144 (noting that a person who engages in immoral conduct believing it to be both legal and moral is blameworthy for her indifference to moral obligations); *but see* HUSAK, *supra* note 1, at 181 (arguing that a person is not morally culpable for "mere negligence" in failing to inquire).

71 Kahan, *supra* note 1, at 150.

72 *See* Wiley, *supra* note 3, at 1027–28 (1999) (noting that moral culpability arises either from breach of consensus of community norms or from violating a law about which a person knew or should have known).

Courts, including the United States Supreme Court, have avoided imposing liability on criminal defendants who act in ignorance of *malum prohibitum* crimes by construing statutory willfulness requirements to require that a defendant knew or should have known that her conduct was wrongful. In the Supreme Court, this practice started with a series of tax cases in which the Court held that the word "willfully" in statutes criminalizing various acts relating to the filing (or failure to file) of tax returns[73] required "an act done with a bad purpose"[74] or "a voluntary, intentional violation of a known legal duty."[75] Mere mistake or negligence in preparing tax returns does not subject a person to criminal penalties.[76]

The Court has taken the same approach in a variety of other contexts. For instance, in *Liparota v. United States*,[77] the Court overturned a conviction for "knowingly" acquiring and possessing food stamps in a manner not authorized by statute, holding that the government was required to prove that "the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations."[78] And in *Ratzlaf v. United States*,[79] the Court overturned a conviction for "willfully violating" a federal anti-structuring statute. Federal law required banks to report cash transactions in excess of $10,000, and also prohibited structuring a single transaction into two or more transactions in order to evade the bank's reporting requirement. After running up a $160,000 debt playing blackjack, the defendant went to a number of local banks and obtained cashier's checks in amounts less than $10,000 to pay off the debt. Although the defendant had been informed of the $10,000 reporting limit, the Court overturned his conviction, holding that to establish "willfulness," the government had to

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73 The Internal Revenue Code imposes felony penalties on any person who "[w]illfully makes and subscribes any return . . . which contains . . . a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . ." 26 U.S.C. § 7206(1) (2018). The misdemeanor statute similarly requires willful action. 26 U.S.C. § 7207 (2018).

74 United States v. Murdock, 290 U.S. 389, 394 (1933).

75 United States v. Bishop, 412 U.S. 346, 360 (1973).

76 *Id.* at 361 (noting that negligence gives rise to civil penalties).

77 Liparota v. United States, 471 U.S. 419 (1985).

78 *Id.* at 433. The trial judge had refused to instruct the jury that "specific intent" was required, leading the Court to overturn the conviction.

79 Ratzlaf v. United States, 510 U.S. 135 (1994).

prove that the defendant knew that structuring his transaction to avoid the limit was unlawful.[80]

In these cases, unless the Court interpreted the statute to excuse errors of law, the statute could ensnare defendants who had little reason to believe they were engaging in unlawful activity.[81] Even though the Court was faced, in each case, with an unsympathetic defendant, the Court construed the respective statutes to impose mens rea requirements that would protect more sympathetic defendants.[82]

By contrast, an actor is negligent or reckless for acting in ignorance of a statutory prohibition when the actor engages in activity whose inherent danger subjects it to pervasive regulation, even if the regulatory scheme is a complex one. In this instance, the great potential for harm should put the actor on notice that he or she is obligated to abstain from the dangerous conduct unless he or she is certain that the activity violates no legal prohibition.[83] Gun offenses present the most obvious example, where both state and federal courts have rejected ignorance-based defenses.[84] In *Bryan v. United States*,[85] for instance, the Supreme Court upheld the conviction of a defendant for "willfully" engaging in the sale of firearms without a federal license, despite the trial judge's rejection of

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80 *Id.* at 138.

81 *See generally* Wiley, *supra* note 3, at 1036–41. Wiley notes the Court's use of hypotheticals to demonstrate how a broad reading of each statute could subject blameless individuals to liability. *Id.* at 1035.

82 Other federal courts have also used statutory construction to shield unsuspecting defendants from liability. For instance, in *United States v. CITGO Petroleum Corp.*, the Fifth Circuit rejected a construction of the Migratory Bird Treaty Act that would have made it a crime to kill migratory birds even without taking any "deliberate acts done directly and intentionally to migratory birds." United States v. CITGO Petroleum Corp., 801 F.3d 477, 488–89 (5th Cir. 2015). In rejecting the government's position, the court recognized the burden the government's construction would place on parties who have given no thought to migratory birds: "If the MBTA prohibits all acts or omissions that 'directly' kill birds, where bird deaths are 'foreseeable,' then all owners of big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church steeples may be found guilty of violating the MBTA." *Id.* at 494.

83 Dan M. Kahan has noted that a negligence standard would make it safer for actors to engage in marginal conduct, because they could seek protection if they took "reasonable" steps to find the line between permitted and prohibited conduct. By contrast, he has argued, strict liability makes it more hazardous for an actor to seek legal loopholes while engaging in morally questionable conduct. Kahan, *supra* note 1, at 139–40.

84 Bryan v. United States, 524 U.S. 184 (1998); *In re* Two Seized Firearms, 602 A.2d 728, 730 (N.J. 1992); People v. Marrero, 507 N.E.2d 1068 (N.Y. 1987).

85 *Bryan*, 524 U.S. 184.

the defendant's request for a charge that the defendant could be convicted only if he knew of the federal licensing requirement.[86] The Court distinguished *Ratzlaf* as a case concerned with the danger of convicting innocent individuals;[87] by contrast, any dealer in firearms has reason to understand that his activity is a dangerous one likely to be the subject of regulation.

Outside the firearms context, *McFadden v. United States*[88] reaffirms the Court's focus on a defendant's knowledge that his activity was likely to be the subject of regulation. In overturning McFadden's conviction of "knowingly" distributing controlled substance analogues, the Court held that the statute required the government to prove either that McFadden knew he was distributing a prohibited substance (but not the identity of the substance) or that he knew the identity of the substance (but not that it was prohibited).[89] If the defendant met either requirement, the defendant should have known that his behavior was a target of government prohibition. To adapt Justice Thomas's example, if a defendant knew he was distributing heroin, he should have known his activity was a target of regulation. In this context, ignorance of the law would be no excuse.[90]

Even when an activity may not appear inherently dangerous to the public at large, if criminal penalties for that activity are directed at a particular industry, actors within that industry should not be able to rely on innocence. The absolute cost of compliance may be high, but industry actors, as repeat players, should be able to incorporate those costs into a business model in a way that one-shot actors cannot.[91] Indeed, criminal regulations directed against a particular industry are generally designed to require industry players to bear those compliance costs.[92] But the basic

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86 *Id.* at 189.

87 *Id.* at 195.

88 McFadden v. United States, 135 U.S. 186 (2015).

89 *Id.* at 192.

90 *Id.*

91 *Cf.* Kahan, *supra* note 1, at 150–51 (noting the expectation that repeat players in a regulated industry familiarize themselves with rules of the game).

92 *Cf. id.* (noting, from a non-economic perspective, that ignorance does not connote bad character when the actor has fleeting and irregular contact with law, but that the situation is different with repeat players).

point remains: when ordinary individuals violate complex regulations, reasonable ignorance increasingly permits them to escape sanction.

2. Regulatory Offenses

Similarly, when administrative agencies are faced with enforcing regulatory prohibitions, they do and should distinguish between industry professionals who can reasonably be expected to be familiar with the prohibitions and outsiders who would find legal investigation more burdensome. When insiders are involved, ignorance of law is rarely reasonable. Securities law and environmental law furnish two prominent examples. The federal securities laws have traditionally focused on mandating disclosure of information.[93] The parties with information to disclose have primarily been industry professionals who are expected to be familiar with the applicable statutes and regulations. Although environmental law's prohibitions sometimes have a broader reach,[94] the primary regulatory targets are sophisticated entities. In each case, recognizing ignorance of law as a defense could undermine enforcement: if the defense were available, even the primary targets of regulation would invoke it, citing the complexity of the regulatory scheme. It should not be surprising then, that courts have rejected the ignorance of law defense even under complex environmental statutes that require "knowing" violations of the law.[95]

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93 *See, e.g.*, Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1523 (2005) (noting that Sarbanes-Oxley moved away from the traditional focus on disclosure requirements).

94 Critics have complained that an ordinary citizen could commit a criminal violation of the Clean Water Act by throwing an apple core into the Potomac River. *See, e.g.*, David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENVTL. L. REV. 159, 174 (2014) (noting the "oft-repeated rhetorical claim that throwing an apple core into the Potomac River would be a criminal violation" of the Clean Water Act).

95 *See, e.g.*, United States v. Wilson, 133 F.3d 251, 262 (4th Cir. 1997) (ignorance of law is not a defense to a criminal prosecution for a knowing Clean Water Act violation); United States v. Buckley, 934 F.2d 84, 88 (6th Cir. 1991) (ignorance of law is not a defense to prosecution for a knowing Clean Air Act violation). The Clean Water Act imposes more serious criminal sanctions for "knowing" violations than for "negligent" violations. *Compare* 33 U.S.C. § 1319(c)(1) (2018) (negligent violations of the Clean Water Act), *with* 33 U.S.C. § 1319(c)(2) (2018) (knowing violations). Civil liability under the Act is strict. *See* Kelly v. EPA, 203 F.3d 519 (7th Cir. 2000).

Often, however, a combination of doctrinal rules and prosecutorial discretion ameliorates the ignorance problem for industry outsiders. The Martha Stewart case illustrates how doctrine and prosecutorial discretion can combine to insulate outsiders from "tippee" liability, one of the few securities prohibitions that could potentially extend beyond industry professionals. Stewart sold stock in ImClone after her broker informed her that ImClone's CEO had been selling his shares.[96] Although Stewart was a sophisticated investor who had once worked as a stock broker, the SEC did not prosecute her for insider trading, instead seeking (and obtaining) a conviction for obstruction of justice and lying to federal investigators.[97] If the SEC would not proceed against Stewart for insider trading, the chances that it would prosecute an investor ignorant of insider trading laws would appear miniscule.

Part of the reason for not prosecuting Stewart was rooted in legal doctrine making it difficult to convict an outsider who trades on inside information. Unless a customer who acts on a broker's tip knows that the tip is based on inside information, and also knows that the insider shared the information in return for some benefit (a "quid pro quo"), the customer is not liable as a tippee.[98] This doctrinal limit essentially precludes liability for a casual investor uninformed about the scope of the securities laws.

Prosecutorial discretion also operates to weed out environmental law cases in which potential violators had little reason to know of their violations.[99] Even for industry professionals, compliance presents

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The Clean Air Act also differentiates between "knowing" and "negligent" violations. *Compare* 42 U.S.C. § 7413(c)(4) (2018), *with* § 7413(c)(5).

96 United States v. Stewart, 433 F.3d 273, 282–83 (2d Cir. 2006); *see generally* Jeanne L. Schroeder, *Envy and Outsider Trading: The Case of Martha Stewart*, 26 CARDOZO L. REV. 2023 (2005).

97 *Stewart*, 433 F.3d at 279.

98 *See* Salman v. United States, 137 S. Ct. 420, 427 (2016) (noting government's concession about limited scope of tippee liability).

99 In addition, courts sometimes use statutory construction to excuse relatively innocent parties from environmental violations. For instance, in *United States v. CITGO Petroleum Corp.*, the court reversed a conviction for violations of the Migratory Bird Treaty Act based on the alleged "taking" of birds who happened to fly into open oil tanks. United States v. CITGO Petroleum Corp., 801 F.3d 477 (5th Cir. 2015). The court concluded that the statute "only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds." *Id.* at 494. The court observed that if the statute were construed to prohibit all acts or omissions that directly kill birds, "then all owners of big windows, communication towers,

challenges because the regulations are numerous, difficult to find, difficult to understand, and fluid in content.[100] David Uhlmann's study of federal environmental prosecutions over a six-year period revealed that ninety-six percent of all criminal prosecutions involved defendants whose behavior included at least one of four "aggravating factors," while seventy-four percent involved more than one aggravating factor.[101] Although Uhlmann's study focused on criminal prosecutions, not on civil or administrative enforcement, it would be surprising if the factors leading government officials to take action were vastly different. In a world of limited government resources and many knowing violators, there is good reason to believe that officials will not focus on those with little reason to know of, or to learn about, their potential environmental violation.[102]

An additional protection of unwilling violators comes at the sanctions stage. In criminal prosecutions for environmental offenses, federal judges depart downward from sentencing guidelines with greater frequency than in other criminal cases.[103] Those departures tend to be most common when low culpability defendants are involved.[104] What evidence there is suggests that, even in civil or administrative proceedings, a violator faces reduced sanctions if the violator did not

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wind turbines, solar energy farms, cars, cats, and even church steeples" might become liable for violating the statute. *Id.* The court noted, however, that two other circuits had read the statute more broadly. *Id.* at 491. Although not phrased in terms of ignorance of the law, the *CITGO* court's construction of the statute largely insulates from liability a large class of potential defendants who have little reason to know about the existence or scope of the protection afforded to migratory birds.

100 *See generally* David B. Spence*, The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CAL. L. REV. 917, 931 (2001).

101 Uhlmann, *supra* note 94, at 204. Uhlmann's aggravating factors are (1) cases involving significant environmental harm or health effects; (2) deceptive or misleading conduct; (3) operating outside the regulatory system; and (4) repetitive violations. *Id.* at 179–81.

102 In a study that focused primarily on agency imposition of penalties, Max Minzner observed that the Nuclear Regulatory Commission focuses on willfulness of the violator "not only in setting penalties but also in the exercise of its prosecutorial discretion to seek penalties in the first place." Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 893 (2012).

103 Michael M. O'Hear, *Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime*, 95 J. CRIM. L. & CRIMINOLOGY 133, 207 (2004).

104 *Id.* at 210–11 (noting that sentencing judges rely on basic culpability considerations in justifying departures). Again, although data is less readily available with respect to sanctions in civil proceedings, one would expect culpability to be a relevant factor in civil sanctions as well.

know of the violation and did not act in reckless disregard of the law.[105] Max Minzner's study of agency behavior suggests that, in practice, agencies consider those factors in meting out punishments for violations.[106]

3. Constitutional Torts

Section 1983 creates a private right of action against any state or local government officer who causes a deprivation of federally protected rights.[107] The statute appears to impose strict liability for federal constitutional and statutory deprivations. The Supreme Court's decision in *Bivens v. Six Unknown Narcotics Agents*[108] created similar liability for at least some federal officials.

Within this nominal strict liability regime, immunity doctrine has become a potent force for excusing violations committed in reasonable ignorance of the law. Some government officials—legislators and prosecutors, for instance—enjoy absolute immunity from suit for actions taken in their legislative or prosecutorial capacities.[109] Most other officials, including police officers,[110] school officials,[111] and employee

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105 Max Minzner's study of the penalty practices of four different federal agencies revealed that a violator's state of mind plays a critical role in determining the sanction imposed on the violator. Minzner, *supra* note 102, at 890–95. For instance, he notes that the Office of Foreign Assets Control considers "whether the subject knew the violation violated the law or demonstrated reckless disregard with respect to the violation of the law." *Id.* at 891.

106 *Id.* at 891–95 (emphasizing that the mental state of the violator—and particularly whether the violator knew or should have known that its activity violated the law—plays an important role in actual sanctions).

107 42 U.S.C. § 1983 (2018). The statute creates an action against every person who acts "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia," which effectively permits actions against government officers.

108 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

109 On legislative immunity, see *Bogan v. Scott-Harris*, 523 U.S. 44, 48–56 (1998); Tenney v. Brandhove, 341 U.S. 367 (1951). On prosecutorial immunity, see *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009).

110 *See, e.g.*, Stanton v. Sims, 571 U.S. 3 (2013).

111 *See, e.g.*, Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364 (2009).

supervisors,[112] enjoy qualified immunity.[113] Supreme Court doctrine establishes that to overcome qualified immunity, a plaintiff who alleges a violation of federally protected rights must establish that the government officer violated "clearly established" federal law. For a law to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate."[114]

The Supreme Court's formulation has been criticized for its impact on enforcement of constitutional rights.[115] Although the doctrine may be overbroad in several respects, it has one salutary effect: it safeguards government officials from liability for violation of vague constitutional and statutory norms.[116] The Court has also made it clear that courts must view vagueness and clarity in context: to overcome a qualified immunity defense, a victim of unconstitutional action must establish not only that a Court of Appeals articulated a constitutional norm, but also that it was clear that the norm would be applicable in the fact situation facing the government officer.[117]

The Supreme Court's decision in *Wood v. Moss*[118] illustrates the principle. Demonstrators protesting against President George Bush's policies brought an action against Secret Service agents for violating their First Amendment rights. The demonstrators alleged that the agents engaged in unconstitutional viewpoint discrimination by permitting

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112 *See, e.g.*, Lane v. Franks, 573 U.S. 228 (2014).

113 Qualified immunity of state officials under section 1983 is generally equivalent to the qualified immunity enjoyed by federal officials sued under the federal Constitution pursuant to *Bivens*. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 n.30 (1982).

114 Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

115 *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814–20 (2018); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015).

116 James Pfander has suggested that doctrine could accomplish the same result without dismissing meritorious constitutional claims by permitting suits for nominal damages and eliminating qualified immunity only for those claims. James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601 (2011).

117 In the Supreme Court's words, "[w]e have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Ashcroft*, 563 U.S. at 742.

118 Wood v. Moss, 572 U.S. 744 (2014).

demonstrators supportive of President Bush to congregate one block closer to the President than the demonstrators opposing the President. Reversing the Ninth Circuit, the Court held that qualified immunity sheltered the agents from liability, emphasizing that the dispositive inquiry was "'whether it would [have been] clear to a reasonable officer' in the agents' position 'that [their] conduct was unlawful in the situation [they] confronted.'"[119]

Reading judicial opinions is outside the job description for many government officials.[120] Courts have dealt with the problem by finding that a violation of federal law was not "clearly established" whenever reasonable officials in the violator's position could have believed that his conduct was lawful.

Armstrong v. City of Melvindale[121] illustrates the point. Police officers did not know whether, on the facts they knew, probable cause existed for a search warrant, so they consulted a local prosecutor. Based on the prosecutor's advice, the officers sought and obtained a warrant, and executed the search.[122] In a Section 1983 action against the officers, the Sixth Circuit concluded, based on Supreme Court case law, that the search was unconstitutional, but the search victim's right was not "clearly established" because "reasonable officers in [the] [d]efendants' position might have believed that the warrant should have issued . . . ."[123]

Doctrine, then, largely insulates officials from liability when, like the officers in *Armstrong,* they are reasonably ignorant of constitutional, statutory, or treaty mandates. The "clearly established" formulation provides courts with a doctrinal basis for dismissing claims against ignorant officials. In the Supreme Court's words, the doctrine protects

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119 *Id.* at 2067 (quoting Saucier v. Katz, 533 U.S. 194 (2001)) (alteration in original).

120 Edward C. Dawson has noted that immunity law's presumption that officers know decisional law of the Supreme Court and the officers' home circuit is a fiction. Edward C. Dawson, *Qualified Immunity for Officers' Reasonable Reliance on Lawyers' Advice*, 110 NW. U. L. REV. 525, 542–43 (2016). Joanna C. Schwartz has studied police department behavior and concluded that many police departments collect no data about lawsuits, and that even departments that do collect data engage in problematic analysis of that data. Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010).

121 Armstrong v. City of Melvindale, 432 F.3d 695 (6th Cir. 2006).

122 *Id.*

123 *Id.* at 702.

"all but the plainly incompetent or those who knowingly violate the law."[124]

The use of immunity doctrine to insulate officials from liability leaves victims of unconstitutional behavior without an effective remedy for the harm they have suffered. Although damage claims against government officials supposedly rest on the twin pillars of compensation and deterrence,[125] the relative importance of the two objectives varies with context. In many cases, the damage remedy is designed primarily to deter unconstitutional behavior and prevent erosion of constitutional norms, not to remedy tangible harm. Although the victim must prove some harm to recover more than nominal damages, the amount the constitutional tortfeasor must pay—through attorney's fees or punitive damages—typically exceeds the harm to the victim.[126] That excess operates primarily to deter unconstitutional conduct.[127] Search and seizure cases provide a prime example. Using immunity as a device for excusing officers reasonably ignorant of legal doctrine poses little threat to valuable rights of innocent parties.

In other cases, section 1983 claims do involve serious physical or other harm. For instance, section 1983 provides relief to suspects and

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124 Malley v. Briggs, 475 U.S. 335, 341 (1986).

125 The same two objectives supposedly apply both with respect to claims against state officials and against federal officials. *See, e.g.*, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 952 (2014) (identifying compensation and deterrence as goals of section 1983 liability); Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 814 (2010) (identifying twin goals of *Bivens* litigation).

126 Most circuits have held that if the plaintiff's complaint sought only nominal, but not compensatory, damages, the plaintiff may recover attorney's fees. *See, e.g.*, Grisham v. City of Fort Worth, 837 F.3d 564, 569 (5th Cir. 2016) (nominal damage awards do not justify the complete denial of fees when monetary relief was not the primary object of the lawsuit); Klein v. City of Laguna Beach, 810 F.3d 693, 699 (9th Cir. 2016) (a fee award is appropriate when the recovery of compensatory damages was not the primary purpose of the litigation). By contrast, when the plaintiff seeks actual damages but is awarded only nominal damages, the plaintiff may be entitled to no fee because the plaintiff is not a prevailing party. Farrar v. Hobby, 506 U.S. 103 (1992).

127 *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 367–68 (2000) (arguing that providing compensation to victims for harm suffered may not have any deterrent effect if the social value of the unconstitutional behavior exceeds the harm to the victim).

inmates against beating and other use of excessive force.[128] But those are typically the cases in which officers cannot plausibly argue that their actions were justified by their reasonable ignorance of law. When the action of the officers was objectively unreasonable, qualified immunity is unavailable.[129]

The qualified immunity defense is not available to municipalities.[130] The Supreme Court has made it clear that municipalities remain liable for at least some constitutional violations even when those violations preceded judicial articulation of the constitutional right.[131] The rejection of immunity raises the prospect that municipalities might engage in ineffective policing or might expend too many resources ascertaining constitutional limits. Justice Brennan's opinion in *Owen v. City of Independence*[132] includes an implicit answer to that prospect: the prospect of liability will incentivize municipalities to err on the side of protecting constitutional rights.[133] In other words, if the cost of avoiding harm is lower than the cost of obtaining legal information, the municipality has

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128 The Supreme Court has held that the standard to be applied to an excessive force claim may vary with the constitutional provision that the officer violated by using excessive force. Graham v. Connor, 490 U.S. 386, 394 (1989) (indicating that in most instances the source of the excessive force claim will either be the Fourth Amendment's prohibition on unreasonable seizures or the Eighth Amendment's prohibition on cruel and unusual punishment); *see also, e.g.*, Porro v. Barnes, 624 F.3d 1322, 1325 (10th Cir. 2010) (noting that excessive force claims can be maintained under the Fourth, Fifth, Eighth, or Fourteenth Amendments, each with different legal tests).

129 *See, e.g.*, Drummond v. City of Anaheim, 343 F.3d 1052, 1059 (9th Cir. 2003) (denying qualified immunity because officers "should have known that squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable."); Raiche v. Pietroski, 623 F.3d 30, 39 (1st Cir. 2010) ("An objectively reasonable police officer would have believed that tackling Raiche from his motorcycle and slamming him into the pavement would violate his constitutional right to be free from excessive force.")

130 Owen v. City of Independence, 445 U.S. 622, 650 (1980).

131 In *Owen*, for instance, a discharged employee asserted a violation of his due process rights when the city denied him the right to a name-clearing hearing. The Court of Appeals emphasized that the Supreme Court had not crystallized the right to a hearing until after the employee was discharged and opined that the city "should not be charged with predicting the future course of constitutional law." Owen v. City of Independence, 589 F.2d 335, 338 (8th Cir. 1978). The Supreme Court reversed, holding that municipalities are not entitled to immunity for constitutional violations. *Owen*, 445 U.S. 622 (1980).

132 *Owen*, 445 U.S. 622 (1980).

133 *Id.* at 652.

no reason to engage in legal investigation. Instead, the municipality will simply refrain from constitutionally questionable behavior.[134] As a result, liability will result in no inefficient legal investigation.[135] Moreover, no unfairness will result to innocent actors, because taxpayers, rather than government officials acting in good faith, will bear liability.[136]

Owen itself would support municipal liability even when avoidance costs are high. Subsequent decisions, however, limit the scope of municipal liability in those cases where avoidance costs are likely to be highest: cases where the constitutional violation is committed by low-level officials making seat-of-the-pants decisions without the opportunity to reflect on alternative courses of action. First, the Court has made it clear that municipal liability attaches only for decisions made by municipal officials with policymaking authority.[137] Second, when a victim of municipal action alleges that policymakers failed to train or supervise lower-tier officials most directly responsible for the constitutional violation, a number of courts have required "deliberate indifference" to potential constitutional violations, which, in turn, requires that the constitutional right be "clearly established."[138] Taken together, these limitations reduce the likelihood that municipalities will bear liability for actions taken in reasonable ignorance of legal prohibitions.

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134 *See supra* Section I.C.

135 The discussion of the impact of municipal liability assumes, to some degree, that municipalities respond to incentives in the same way individuals and private entities do. That assumption remains controversial. *Compare* Levinson, *supra* note 127 (arguing that government does not internalize costs in the same way as private firms), *with* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 858–67 (2001) (emphasizing the deterrent effect of municipal liability). Justice Brennan's opinion in the *Owen* case takes both sides of the issue, arguing first that municipal liability will create incentives to protect constitutional rights, *Owen*, 445 U.S. at 652, and later, that the inhibiting effect of liability is "significantly reduced, if not eliminated . . . when the threat of personal liability is removed." *Id.* at 656.

136 *Owen,* 445 U.S. at 654–58.

137 *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986) (Municipal liability attaches only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.").

138 *See, e.g.*, Arrington-Bey v. City of Bedford Heights, 858 F.3d 988, 995 (6th Cir. 2017); Szabla v. City of Brooklyn Park, 486 F.3d 385, 393 (8th Cir. 2007).

4. Employment Law

Over the last half century, legislation designed to combat various forms of employment discrimination has displaced market regulation of the employment relationship. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, sex, religion, and national origin.[139] The Age Discrimination in Employment Act (ADEA) prohibits discrimination based on age.[140] The Americans with Disabilities Act (ADA) provides comparable protection to persons with disabilities.[141]

Despite these statutory incursions, employment at will remains the dominant paradigm in American employment law; in the absence of an employment contract, an employer is free to discharge an employee for any reason or for no reason.[142] The employee has no property right in continued employment.[143] Deterrence, then, is the primary animating force behind statutory provisions giving employees claims for employment discrimination.[144] Compensation is the mechanism for achieving optimal deterrence.[145]

The core prohibitions of employment discrimination statutes embody widely shared and easily understood social norms. Even employers who might want to limit their workforce to young white males without disabilities cannot help but recognize that the law prohibits their

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139 42 U.S.C. § 2000e-2(a)(1) (2018).

140 29 U.S.C. § 623(a)(1) (2018).

141 42 U.S.C. § 12112(a) (2018).

142 *See generally* Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 78 (2007).

143 *See* Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1384 (2014) (noting that under an employment at will regime, an adverse employment action, even if unjustified, is not, in and of itself, a legally cognizable injury).

144 *See id.* at 1404 (asserting that the goal of antidiscrimination law "is to make the predicted frequency of unjustified decisions roughly equal for all groups in society").

145 The Court has made this most clear in hostile work environment cases, where an employer is liable for a supervisor's harassment, but can assert as a defense that the employer exercised reasonable care to prevent and correct harassing behavior, and that the employee did not take advantage of the employer's corrective action. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). The employee suffers the same injury at the hands of the supervisor whether or not the employer has a reasonable anti-harassment policy in place, but the Court denied compensation when the employer has behaved appropriately.

preferred course of action, and violation of the statutory prohibitions would not be reasonable. Other statutory prohibitions, however, are less intuitive. Although the "Me Too" movement has heightened awareness of sexual harassment in the workplace, legal boundaries remain fuzzy. Even lawyers may have difficulty determining what constitutes a prohibited hostile work environment.[146] And an ordinary employer might not recognize statutory limitations on discharging a heavy equipment operator after a medical diagnosis indicating that the operator "should not work around moving machinery where sudden loss of consciousness would endanger either himself or others."[147]

A number of doctrines limit potential liability for employers ignorant of the law, or of relevant facts. First, with respect to hostile work environment claims, the Supreme Court has held that employers are vicariously liable for harassment by employees only when the employer has empowered the harassing employee "to take tangible employment actions against the victim,"[148] or when the employer has been negligent in permitting the harassment to continue. The Court's standard reduces the prospect of liability for an employer whose managers are unaware of the fact of harassment by coworkers, but the standard incidentally operates to excuse many employers whose managers are reasonably ignorant of the scope of the doctrinal prohibition on harassment.

Second, although employers prefer that hostile work environment claims be resolved on motions for summary judgment, the jury system provides some protection to the employer who is reasonably ignorant of the scope of hostile work environment doctrine. As Justice Scalia noted

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146 The Supreme Court has indicated that "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (internal citation omitted). The Court conceded, however that "[t]his is not, and by its nature cannot be, a mathematically precise test." *Id.* In applying the test, the First Circuit has held that a supervisor's staring at an employee's breasts would allow a reasonable jury to find a hostile work environment, Billings v. Town of Grafton, 515 F.3d 39 (1st Cir. 2008) (reversing a grant of summary judgment to an employer), while the Sixth Circuit has held that a battery and offensive remarks by a personnel manager were insufficient to create a hostile environment. Burnett v. Tyco Corp., 203 F.3d 980 (6th Cir. 2000).

147 *See* Dark v. Curry County, 451 F.3d 1078, 1081 (9th Cir. 2006). The issue involved whether the ADA required the employer to make a reasonable accommodation to the machinery operator's condition. The court held that the employer was not entitled to summary judgment on that issue. *Id.*

148 Vance v. Ball State Univ., 570 U.S. 421, 424, 450 (2013).

in concurring in a leading hostile work environment case, "today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages."[149] Juries, however, bring community standards to the hostile work environment determination. If a reasonable employer would not recognize the work environment as hostile, a reasonable jury is unlikely to find the employer liable.[150]

Third, statutory limits on the amount employees can recover provide considerable protection to employers who are reasonably ignorant about the scope of employment discrimination law. Until 1991, Title VII did not authorize any damage awards for employment discrimination other than awards of back pay. In 1991, Congress authorized damage awards for other losses, but capped those losses at amounts calibrated to the size of the employer. For employers with fewer than 101 employees—those most likely to be ignorant about the scope of federal law—the statute caps damages at $50,000.[151] Moreover, that cap includes any award of punitive damages,[152] which are not to be awarded unless the employer engaged in a discriminatory practice "with malice or with reckless indifference to the federally protected rights" of the employee.[153] The ADEA makes it even more difficult for employees to recover damages; the statute authorizes recovery of back pay,[154] but does not authorize damages for pain and suffering or other losses.[155] The ADEA makes no provision for punitive damages, although it does permit

149 *Harris*, 510 U.S. 17, 24 (1993) (Scalia, J., concurring).

150 *See generally* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1279–80 (2012) (noting psychological studies indicating that most people, including jurors, tend to see merit, rather than discrimination, as the more likely explanation for failure of members of minority groups).

151 42 U.S.C. § 1981a(b)(3)(A) (2018). The statute caps damages for other employers at higher amounts, culminating with a cap of $300,000 for employers with more than 500 employees. *Id.* § 1981a(b)(3)(B)–(D).

152 42 U.S.C. § 1981a(b)(3) (2018).

153 42 U.S.C. § 1981a(b)(1) (2018).

154 29 U.S.C. § 626(b) incorporates the remedies in 19 U.S.C. § 216(c), the Fair Labor Standards Act. The statute provides for recovery of unpaid minimum wages and overtime.

155 *See, e.g.*, Collazo v. Nicholson, 535 F.3d 41, 44–45 (1st Cir. 2008) (ADEA does not allow damages for pain and suffering); Villescas v. Abraham, 311 F.3d 1253 (10th Cir. 2002) (noting that when Congress amended Title VII to enlarge the range of available remedies, it had the opportunity to do the same for the ADEA, but did not do so).

recovery of "liquidated damages"[156]—measured in an amount equal to unpaid back wages[157]—for "willful violations."[158]

Finally, federal statutes insulate small employers from proscriptions on employment discrimination. Employers with fewer than fifteen employees are largely exempt from the mandates of Title VII, including the ADA,[159] while employers with fewer than twenty employees are exempt from the ADEA.[160] In part, these exemptions reflect a judgment that deciphering doctrinal nuances and developing compliance procedures would be particularly difficult for smaller employers, whose payrolls do not justify employing or contracting with human resources professionals.[161] In many states, however, the exemptions provide incomplete insulation; state employment discrimination statutes often have coverage thresholds lower than the federal statutes, or no thresholds at all.[162]

5. Consumer Contracts: Mandatory Rules Excusing Consumer Ignorance

Parties who sign contracts are typically bound to the contract's terms. Law effectively presumes that the parties know what legal obligations they have assumed. Most consumer contracts—insurance contracts, sales of consumer goods, residential leases—fall outside that paradigm. Often, the consumer is entirely ignorant of the legal obligations the contract purports to impose because first, the consumer has not read the contract and second, even if the consumer has read the contract, the consumer has not understood its terms. Doctrine has

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156 29 U.S.C. § 626(b) (2018).

157 29 U.S.C. § 216(c) (2018).

158 § 626(b).

159 42 U.S.C. § 2000e (2018); 42 U.S.C. § 12111(2018) (definitions of employer include persons with fifteen or more employees).

160 29 U.S.C. § 630 (2018) (definitions of employer include persons with twenty or more employees).

161 *See* Papa v. Katy Indus., Inc., 166 F.3d 937, 940 (7th Cir. 1999); Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995).

162 *See* Daniel Lewallen, Note, *Follow the Leader: Why All States Should Remove Minimum Employee Thresholds in Antidiscrimination States*, 47 IND. L. REV. 817, 821–22 (2014) (cataloguing state statutes).

increasingly excused consumers from the consequences of those contracts, at least in circumstances when no reasonable consumer would have agreed to the disputed terms.

The principal legal information cost facing consumers is in processing readily available information, a problem disclosure will not solve. In particular, imposing on consumers a duty to read and understand all of the legal terms applicable to their transactions would incentivize consumers to engage in inefficient and irrational behavior in light of the relatively small risks involved. Of equal or greater importance, incentives are unlikely to be effective in any event: even if consumers knew that a contract boilerplate buried significant and unanticipated legal risks, they would still not read the boilerplate, because they might reasonably assume that the likelihood that those risks would eventuate is too small to justify the investment in attempting to understand the contract's terms.[163] Imposing dire consequences on parties for acting appropriately raises significant questions of fairness, especially when excusing legal ignorance would cause minimal harm to others.

Nevertheless, the traditional approach to so-called contracts of adhesion paralleled public law's rejection of the "ignorance of the law" defense. Courts held that parties to a contract have a "duty to read" the contract and focused on the four corners of the signed document to determine the parties' obligations.[164] In Todd Rakoff's words, adherents to form contracts were "treated as if they had read and understood the document presented to them, even if that conclusion is false and known by the other party to be so."[165]

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163 Ian Ayres and Alan Schwartz have argued that consumers learn about the contents of their contracts not from the contracts themselves, but from a variety of other sources, including past experience, friends, and internet sources. Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 550–51, 600, 606 (2014). This learning reduces the expected value of reading the contract. Ayres and Schwartz also demonstrate that the incomplete information consumers have about their contracts is combined with an optimism bias that leads them to believe the terms are more favorable than they actually are. *Id.* at 600–01.

164 *See id.* at 548–49 (2014).

165 Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1187 (1983).

Scholars of all stripes have long agreed that consumer ignorance of the terms of standard form contracts is ubiquitous and entirely rational.[166] Rakoff has argued that failure to read form contacts "cannot be dismissed as mere laziness," and that the "rational course is to focus on the few terms that are generally well publicized and of immediate concern, and to ignore the rest."[167] Avery Katz concludes that signing form contracts without knowing or understanding their terms "is individually rational, since the cost of reading and considering each term is high, and many of the terms deal with improbable contingencies."[168] Margaret Radin, after conceding that she signs form contracts without reading them,[169] offers seven reasons why people don't read them.[170] Randy Barnett acknowledges that "[e]veryone reading these words, including yours truly, has at one time clicked the 'I agree' box of a software license agreement without reading the terms in the scroll-down box."[171] Perhaps Omri Ben-Shahar says it best: "Spending effort to read and to process what's in the contract boilerplate would be one of the more striking examples of consumer irrationality and obsessive behavior."[172]

Academic commentary has almost universally agreed that when standard form contracts include terms that no rational consumer would have anticipated, those terms should not be enforced against the consumer.[173] Section 211 of the Restatement (Second) of Contracts, entitled "Standardized Agreements," takes the same position:

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166 Ayres and Schwartz contend that if search were costless, the rational consumer would search every term in the consumer contract, but they quickly recognize that most consumers will not incur the cost of reading all terms. Ayres & Schwartz, *supra* note 163, at 574–75.

167 Rakoff, *supra* note 165, at 1226.

168 Avery Katz, *Your Terms or Mine? The Duty to Read the Fine Print in Contracts*, 21 RAND J. ECON. 518, 520 (1990).

169 MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 9 (2013).

170 *Id.* at 12.

171 Randy E. Barnett, *Consenting to Form Contracts,* 71 FORDHAM L. REV. 627, 629 (2002).

172 Omri Ben-Shahar, *The Myth of the 'Opportunity to Read' in Contract Law*, 5 EUR. REV. CONT. L. 1, 15 (2009).

173 Karl Llewellyn, for instance, concluded that consumers who sign form contracts provide blanket consent "to any not unreasonable or indecent terms . . . which do not alter or eviscerate the reasonable meaning of the dickered terms." KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960). Randy Barnett argues that a consumer who clicks "I agree" to a form does not manifest assent to "radically unexpected" terms. Barnett, *supra* note 171, at 639. Others would go further. Todd Rakoff, for instance, would reverse the presumption

> Where the other party has reason to believe that the party manifesting [assent to a standardized contract] would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.[174]

Because efforts to educate consumers about the content and meaning of complex contract provisions will generally be futile, the Restatement approach represents a sensible second-best solution to the problem. By informing the agreement's drafter that contract provisions will be unenforceable when she has reason to believe they would be unacceptable to the consumer, the Restatement puts the drafter to a choice: decide whether the contract is worth making without the onerous provision. The effect is to ensure that the contract leaves both parties at least as well off as they would be if they did not enter into the contract.[175]

Judicial decisions have increasingly reached the same conclusion as the Restatement and the academic commentary. Courts have declined to enforce provisions in standard form consumer contracts that are substantively unconscionable. The D.C. Circuit pioneered the doctrine in *Williams v. Walker Thomas Furniture*,[176] rejecting the position that courts lack authority to invalidate unconscionable contract provisions.[177] In recent years, courts have applied the doctrine to invalidate mandatory arbitration provisions in consumer contracts, especially when the provision leaves the consumer with no practical forum[178] or when the

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that form terms are enforceable and place on the drafting party the burden of affirmatively justifying enforcement of those terms. Rakoff, *supra* note 165, at 1245. Margaret Radin would deem unenforceable form contract provisions that a consumer signs in "sheer ignorance." RADIN, *supra* note 169, at 181. Ian Ayres and Alan Schwartz contend that "courts should not enforce terms that a substantial number of consumers believe are more favorable to them than the terms actually are." Ayres & Schwartz, *supra* note 163, at 605.

174 RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 1981).

175 Matthew Seligman has noted that even if courts fail to enforce onerous provisions, those provisions still have an effect if the ignorant party falsely believes that the provisions are binding. Seligman, *supra* note 4, at 183.

176 Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

177 The court below had taken that position. *See id.* at 448.

178 *See, e.g.*, Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds, 14 So. 3d 695 (Miss. 2009) (invalidating a provision in a nursing home contract requiring arbitration before the AAA when the AAA had adopted a policy refusing to provide a forum for enforcement of

provision permits judicial recourse by the form's drafter while denying the same recourse to the consumer.[179] In addition, a number of states have applied a "reasonable expectations" doctrine to insurance contracts—declining to enforce policy provisions that are inconsistent with the expectations the insurance company has created about the coverage the insured has purchased.[180]

The problem is more complicated with respect to other terms buried in standard form consumer contracts—those slanted in favor of the form's drafter, but to which a rational consumer might have agreed if the consumer had read and understood them. Todd Rakoff, Margaret Radin, and others have argued that the consumer has never signaled meaningful consent to these "invisible" provisions.[181] As a result, they argue, these terms should not be enforced against the consumer. Rakoff argues that when disputes arise, they should be resolved by a set of background, legally-implied principles reflecting, at least in part, what most parties to

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pre-dispute arbitration clauses in nursing home agreements; the court declined to enforce the entire agreement in order to deter provisions of this sort). The United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, limits the flexibility of state courts to apply unconscionability doctrine to refuse enforcement to arbitration agreements in consumer contracts. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011). Although *Concepcion* indicates that the Federal Arbitration Act preempts state unconscionability doctrine if that doctrine operates to disfavor arbitration, *id.* at 341, the Court's opinion concedes that that the statutory savings clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration." *Id.* at 339. In a number of cases, state courts have held that Supreme Court doctrine does not bar claims of unconscionability when a consumer contract includes an arbitration clause. *See, e.g.*, Narayan v. Ritz-Carlton Dev. Co., Inc., 400 P.3d 544, 551–53 (Haw. 2017); Keller v. Geneva-Roth Ventures, Inc., 303 P.3d 777, 780 (Mont. 2013).

179 *See, e.g.*, Global Client Solutions, LLC v. Ossello, 367 P.3d 361 (Mont. 2016); Caplin Enter. Inc., v. Arrington, 145 So. 3d 608 (Miss. 2014) (both refusing to enforce unilateral arbitration clauses).

180 *See, e.g.*, Darner Motor Sales, Inc. v. Universal Underwrites Ins. Co., 682 P.2d 388 (Ariz. 1984); Tonkovic v. State Farm Mut. Auto. Ins. Co., 521 A.2d 920 (1987). The doctrine found its first academic exposition in Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970). Recent commentary suggests, however, a narrowing of doctrine in most states to cases of ambiguous policy language. *See generally* Max N. Helveston, *Judicial Deregulation of Consumer Markets*, 36 CARDOZO L. REV. 1739, 1763–70 (2015).

181 *See* Rakoff, *supra* note 165, at 1219–20 (noting that the fact that a consumer reads and understands the form he signs is irrelevant because the consumer is largely helpless); RADIN, *supra* note 169, at 30; *see also* Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1265 (1993).

the form contract would have expected.[182] Randy Barnett, by contrast, argues that the consumer can and does consent to terms the consumer has not read; in effect, the consumer delegates to the form's drafter the authority to fill in terms that would be too expensive or bothersome for the parties to negotiate.[183]

The Restatement largely reflects the Barnett position: it would only excuse the consumer from a contract provision if the drafter had reason to know that the consumer, if fully informed, would not have agreed to the provision.[184] If a provision tilted in favor of the drafter, but an informed consumer would have agreed to the provision nevertheless, the consumer's redress is limited to establishing that the provision is ambiguous and should be construed against the drafter.

By and large, case law, too, reflects the position that a contract provision should be enforced unless no rational consumer who read and understood the form would have agreed to its terms. In the language of some courts, procedural unconscionability (the fact that the contract was an adhesion contract leaving the consumer no option but to take it or leave it) does not justify departing from the contract's terms unless those terms are also substantively unconscionable.[185] For instance, in *Sanchez v. Valencia Holding Co., LLC*,[186] the California Supreme Court has recently enforced an arbitration clause included in a pre-printed automobile sales contract, emphasizing that although the adhesive nature of the contract established some degree of procedural

182 *See* Rakoff, *supra* note 165, at 1269–70. Radin discusses a host of potential approaches to the problem without endorsing any single one. *See* RADIN, *supra* note 169, at 121–243; *see also* Katz, *supra* note 168 (arguing that presumptive minimum standards are Pareto inferior to a rule that imposes a duty to read on the consumer).

183 Barnett, *supra* note 171, at 636; *see also* Michelle E. Boardman, *Consent and Sensibility*, 127 HARV. L. REV. 1967, 1978–79 (2014) ("[O]ne agrees to a trade if (a) one prefers it to *not* trading, (b) one has not been coerced or deceived, and (c) *one makes the trade*.")

184 The Restatement provides little guidance about how, in any individual case, a court would decide whether the drafter knows that a fully informed consumer would not have agreed to any particular provision. The result is to confer considerable discretion on courts, but to provide ammunition for the reasonably ignorant consumer when the contract's drafter attempts to enforce onerous terms.

185 Wattenbarger v. A.G. Edwards & Sons, Inc., 246 P.3d 961, 974 (Idaho 2010); Hayes v. Oakridge Home, 908 N.E.2d 408 (Ohio 2009).

186 Sanchez v. Valencia Holding Co., 353 P.3d 741 (Cal. 2015).

unconscionability,[187] the standard for substantive unconscionability requires unfairness beyond a bad bargain for the consumer.[188]

Neither position—enforcement of the contract as written or rewriting the contract to reflect consumer expectations—would lead to inefficient consumer investment in legal information; consumers (correctly) perceive the contract risk as too small to justify the investment. Moreover, by hypothesis, the consumer would have agreed to the unfavorable provision even if fully informed about its meaning, limiting any unfairness to the consumer.[189] The merits of the respective positions may ultimately depend on the monopoly power of the consumer's counterparty. If the consumer's commercial supplier enjoys monopoly power, enforcing the terms as written increases the supplier's monopoly profits, because, in a world of consumer ignorance of terms, the consumer will pay the same price whether the terms are favorable or unfavorable. By contrast, if the consumer's supplier is operating in a competitive market in which consumers are unaware of contract terms, but sensitive to price, the market will force suppliers to compete on price. If courts decline to enforce unexpected terms unfavorable to consumers, prices will rise, foreclosing some sales that would have benefited both supplier and consumer.

From the perspective of searches for legal information, the basic point remains: the Restatement approach, which declines enforcement of

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187 *Id.* at 751.

188 *Id.* at 748–49. Many courts, including the California courts, have embraced a "sliding scale" for procedural and substantive unconscionability. *See, e.g.*, Basulto v. Hialeah Auto., 141 So. 3d 1145, 1160 (Fla. 2014); James v. Nat'l Fin., LLC., 132 A.3d 799, 815 (Del. Ch. 2016); Magno v. College Network, Inc., 204 Cal. Rptr. 3d 829, 835 (Cal. Ct. App. 2016); Eaton v. CMH Homes, Inc., 461 S.W.3d 426, 432–33 (Mo. 2015). As *Sanchez* demonstrates, however, a finding that a contract is an adhesion contract does not lead courts to relieve consumers from unfavorable terms. *Sanchez*, *supra* note 186; *see also, e.g.*, Mansfield v. Vanderbilt Mortg. & Fin., Inc., 29 F. Supp. 3d 645 (E.D.N.C. 2014).

189 Consumers might accede to unfavorable terms because they misperceive the risks presented by the ex-ante risk of dispute, or because they accurately perceive the risks and recognize that they are small. Consumers might also conclude, rationally, that the availability of judicial remedies is of little value, given the cost of litigation. As a result, in many cases, a fully informed consumer would not be willing to pay more for more favorable terms, even if that option were available. Indeed, Omri Ben-Shahar argues that a rational consumer should prefer less favorable terms, because most consumers will never take the time to benefit from more favorable terms, so expenditures a seller might make on providing more favorable terms will be distributed to a small subset of consumers. Ben-Shahar, *supra* note 172, at 16.

contract provisions if and only if a fully informed consumer would have declined to agree to those provisions, leaves all parties no worse off than if the contract had never been signed. The consumer who acts out of legal ignorance suffers no adverse consequences as a result of that ignorance.

C. *Limiting Remedies for Harm Caused by Actions Taken in Reasonable Ignorance of Law*

When an action taken in reasonable ignorance of law causes significant harm to an identifiable victim, insulating the actor from all liability has several potential adverse consequences. First, a regime that excuses persons who act in reasonable ignorance of law creates incentives for potential victims to invest in precautions beyond those that are efficiency-promoting. If an actor could effectively, if innocently, appropriate rights belonging to a victim by acting in reasonable ignorance of law, the actor could, in effect, unilaterally redistribute valuable rights. A potential victim has an incentive to take precautions in order to avoid that redistribution, even when the redistribution would generate no social harm. This potential for excessive precaution is an inefficiency generated by a reasonable excuse regime.[190]

In addition, potential victims might invest less in a resource or activity that receives less legal protection. If, for instance, reasonable ignorance is a defense to a patent infringement claim, a prospective patent owner has less incentive to develop a patented product. If the incentive available in a strict liability regime is calibrated to generate optimal investment in the resource or activity, a reasonable excuse regime would generate suboptimal investment.[191]

From a fairness perspective, the case for allowing the reasonably ignorant actor to appropriate value from an innocent victim is less than compelling. Moreover, doctrine could avoid the inefficiencies associated with a strict liability regime without entirely excusing reasonable

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190 *See generally* Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1313 (2010) (noting that uncertainty about the scope of property rights may lead to inefficient investment in self-help).

191 *See id.* at 1311–12 (emphasizing that uncertainty about ownership reduces the overall size of the pie, because the decrease in investment by probable owners will not be offset by additional investment by low-probability owners).

ignorance. Another route to avoiding those inefficiencies would be to limit the reasonably ignorant actor's liability to the harm actually suffered by the victim of the action. This limit on liability would preserve the incentive to engage in legal investigation in cases where C < H-A, but remove the incentive when H-A < C < p(L-A)—the cases most likely to generate inefficient investigation. Although limiting liability generates different distributional consequences from a rule excusing ignorance altogether, a rule limiting liability should be equally effective in deterring inefficient legal investigation.

In effect, this strategy limits the victims of actions taken in reasonable ignorance of law to "liability rule" protection rather than "property rule" protection. That limitation is significant because the areas in which courts have applied the limitation are in doctrinal areas usually reserved for property rule protection.

1. Real Property

Many real property interests are clearly demarcated, reducing the prospect of ignorant infringement or encroachment. Even with respect to real property, however, ascertaining the scope of legal rights often requires investment that ordinary lay people choose not to make.[192] With respect to real property, the issue arises most frequently when a party improves the land of another because of a mistake about title. Doctrinal rules reflect the basic principle that an innocent infringer should have to do no more than make a rights holder whole.

Courts have denied injunctive relief against improvers who have mistakenly built improvements on land they did not own, generally as a result of the improver's failure to ascertain the scope of his legal right by obtaining an accurate survey.[193] In other cases, an improver's mistake may not be about boundaries, but about the state of title. Suppose, for instance, a tax sale purchaser makes a substantial improvement in

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192 *Cf.* Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1071 (2006) (noting that potential encroachers must make an implicit calculation on whether it is worth becoming educated about state of ownership, and that the calculations depend on the costs of being wrong); *see also* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2447 (noting that surveys remain costly).

193 *See, e.g.*, Mannillo v. Gorski, 255 A.2d 258 (N.J. 1969).

ignorance of the fact that the tax sale did not convey good title because of procedural defects.[194] If the improvement increases the value of the owner's land, most states have enacted "betterment statutes" which entitle the mistaken improver to that increase in value.[195] The Restatement (Third) of Restitution entitles the mistaken improver to that increase in value even in the absence of a statute.[196] Because the improver receives only the increase in value to the owner's land, not the cost of the improvement, the owner remains whole. At the same time, the improver's loss is kept to a minimum.

2. Patent Law

Within the domain of intellectual property, ignorant infringers rarely confer benefits on the holder of intellectual property rights. As a result, restitution principles are generally unavailable to adjust the interests of the parties. Nevertheless, in both patent and trademark law, the rights holder's remedies have been crafted to do no more than restore the rights holder to its pre-infringement position.

Patent law has features designed to reduce the risk of mistaken infringement. In particular, because patents, including the scope of the patent claim, become matters of public record, potential users can conduct a patent clearance to ascertain the scope of any patent in order to avoid infringement.

This simple picture, however, is misleading in several respects. As William Lee and Douglas Melamed have recently emphasized, in some industries, search costs make it impossible for potential users to preclear patents.[197] First, patent applications are not immediately published, and the eighteen-month publication delay can be critical in fast-moving

194 *See, e.g.*, Jenkins v. Richmond County, 394 S.E.2d 258 (N.C. Ct. App. 1990).

195 Betterment statutes protect improvers who have built in good faith under color of title that turns out to be defective. *See generally* Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. REV. 37, 43 (1985). These statutes often give the owner a choice of selling the improved land or paying the improver the value of the improvements. *Id.* at 44.

196 Restatement (Third) of Restitution and Unjust Enrichment § 10, provides: "A person who improves the real or personal property of another, acting by mistake, has a claim in restitution as necessary to prevent unjust enrichment. A remedy for mistaken improvement that subjects the owner to a forced exchange will be qualified or limited to avoid undue prejudice to the owner."

197 Melamed & Lee, *supra* note 4, at 417–22.

industries. Second, patent office determinations are not conclusive; the meaning of patent claims remains unclear until a court construes them.[198] Third, the sheer number of patents registered, combined with the number of patents that may be used in producing a single modern device, makes the cost of a comprehensive patent search prohibitive. As a result, mistaken infringement remains a significant possibility.

Doctrine ameliorates the risk of ignorant infringement by limiting the remedies available to patent holders. First, in *eBay, Inc. v. MercExchange, LLC*,[199] the Supreme Court limited the availability of injunctive relief for patent infringement, holding that injunctions should be discretionary, not a matter of right for every patent holder. The decision marked a blow against patent trolls—entities that acquired patents without any intent to develop them, but instead to use them to extract payment from infringers. Patent trolls had previously used injunctive relief as a club against infringers, mistaken infringers among them.

Second, the standard statutory measure of damages in patent infringement cases is a "reasonable royalty."[200] Properly applied, the reasonable royalty standard limits the patent holder's remedy to the amount the infringer would have paid for a license if the parties had negotiated an arms-length license before the infringer started using the patent.[201] That measure of damages protects the reasonably ignorant infringer against the leverage a patent holder would have if awarded injunctive relief, or if damages were measured by the value to the infringer after the infringer started using the patent. Consider the not uncommon potential infringer who would have been able to design around the patent had the infringer known of its existence and scope. Once the infringer has combined the patented technology with other elements, the infringer may be locked in to the patent technology; developing a non-infringing design would now be far more expensive

198 Nearly half of litigated patents are held to be invalid. *See* John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 221–22 (1998).

199 eBay Inc. v. MercExchange, LLC, 547 U.S. 388 (2006).

200 35 U.S.C. § 284 (2018) (Damages should be an amount adequate to compensate for the infringement, "but in no event less than a reasonable royalty for the use made of the invention by the infringer.").

201 *See, e.g.*, Aqua Shield v. Inter Pool Cover Team, 774 F.3d 766, 770 (Fed. Cir. 2014); Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1324 (Fed. Cir. 2009).

than it was at the initial stage.[202] A standard that limits damages to the amount the infringer would have paid before starting to use the patent enables the reasonably ignorant infringer to avoid that expense.

Third, the Supreme Court, in *Halo Electronics, Inc. v. Pulse Electronics, Inc.*,[203] reaffirmed the importance of the infringer's subjective state of mind in determining whether an infringer should be liable for "enhanced damages"—damages greater than those the patent holder has actually suffered. The Court emphasized that enhanced damages should be limited to "egregious cases of misconduct beyond typical infringement."[204] Although the Court's decision expanded the discretion of trial courts to award enhanced damages against knowing infringers,[205] the Court also made it clear that enhanced damages were warranted only for conduct that is "willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate."[206] Justice Breyer's concurrence noted the costs facing a small business trying to ascertain whether a product infringes a valid patent and emphasized section 298 of the Patent Act, which provides that failure of an infringer to obtain the advice of counsel may not be used to prove that the infringement was willful.[207]

Each of these doctrinal rules—the limited availability of injunctive relief, the properly-applied reasonable royalty standard, and the limitation of enhanced damages to cases of egregious infringer behavior—reduces the incentive for potential users to invest in costly and inefficient searches.

Nevertheless, uncertainty in the remedial landscape leaves some remaining pitfalls for ignorant infringers. Although in theory, the reasonable royalty standard limits the patent owner to the amount the

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202 Melamed & Lee, *supra* note 4, at 409–11.

203 Halo Electr., Inc. v. Pulse Electr., Inc., 136 S. Ct. 1923 (2016).

204 *Id.* at 1935.

205 The Federal Circuit, in *In re Seagate Technology, LLC*, had held that a district court could only exercise discretion to award enhanced damages when the patent owner proved "that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent." *In re* Seagate Tech., LLC, 497 F.3d 1360, 1371 (Fed. Cir. 2007). In rejecting the *Seagate* rule, the Court emphasized that an infringer who acted in subjective bad faith might warrant enhanced damages even if his lawyer later establishes that there was a reasonable basis for the infringing activity. *Halo Electr., Inc.*, 136 S. Ct. at 1933.

206 *Halo Electr., Inc.,* 136 S. Ct. at 1932.

207 *Id.* at 1936–37 (Breyer, J., concurring).

infringer would have agreed to pay before starting to use the patent, patent doctrine has developed no mechanical formula for computing that royalty.[208] Cases not involving innocent infringers often take into account facts that arise after infringement—particularly the profits made by the infringer—in computing royalties.[209] In cases where a reasonable investigation would not have revealed any infringement, relief that awards the patentee a share of the infringer's profits would overcompensate the patentee and provide an incentive for inefficient investments in legal information.

3. Trademark Law

As with patent, trademark doctrine presents enough uncertainty that an entrepreneur can easily infringe unknowingly. Although a trademark owner can provide notice to the world by registering a trademark, the scope of protection can sometimes be resolved only in litigation. For instance, although an entrepreneur might design product packaging in a way that the entrepreneur believes, in good faith, does not infringe on a competitor's trademark, a court may disagree, and conclude that the color or design of the packaging was similar enough to engender consumer confusion.[210]

In situations like this, if the infringing entrepreneur acted in good faith, trademark doctrine generally protects the infringer against an award of infringer's profits. Unlike the copyright statute, the Lanham Act explicitly makes the award of money damages and infringer's profits "subject to the principles of equity,"[211] and courts have generally awarded

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208 Courts seeking to capture the hypothetical bargain acknowledge that the reasonable royalty involves approximation and uncertainty and often apply the multi-factor framework derived from Georgia-Pacific Corp. v. U.S. Plywood Corp., 318 F. Supp. 1116 (S.D.N.Y. 1970). *See, e.g.*, Lucent Tech., Inc. v. Gateway, Inc., 580 F.3d 1301, 1325–36 (Fed. Cir. 2009).

209 William Lee and Douglas Melamed have noted that the *Georgia-Pacific* factors themselves lead courts to consider post-infringement factors in determining a "reasonable royalty." Melamed & Lee, *supra* note 4, at 417–22. They also observe that courts often assume the hypothetical negotiation occurs after the infringer has become locked in to using the infringed patent—at a time when the patent holder would be able to extract a lock-in premium. *Id.* at 425–27.

210 *See, e.g.*, George Basch Co., Inc. v. Blue Coral, Inc., 968 F.2d 1532 (2d Cir. 1992).

211 15 U.S.C. § 1117(a) (2018).

infringer's profits only in cases of "willful" infringement.[212] For instance, the Third Circuit has held that Gucci was not entitled to recover infringer's profits from a retailer who sold counterfeit handbags after the retailer had investigated the authenticity of the handbags.[213]

In *Romag Fasteners, Inc. v. Fossil, Inc.*,[214] the Supreme Court, while rejecting a categorical rule requiring proof of willfulness in actions for infringer's profits, reaffirmed that "a trademark defendant's mental state is a highly important consideration in determining whether an award of profits is appropriate."[215] *Romag* essentially embraces the approach in those circuits that have held that willfulness is not an absolute prerequisite, but a critical factor.[216] The issue is important to reasonably ignorant infringers because the award of enhanced damages—either disgorgement of profits or treble damages—would serve as the biggest inducement to inefficient search for legal information. By making it clear that the infringer's mental state is an important factor in determining the availability of infringer's profits, the Court limits the possibility that an infringer who acts in reasonable ignorance will be subject to enhanced damages. And, because the typical trademark owner finds it difficult to prove actual damages with the requisite degree of precision, if the owner cannot recover infringer's profits, the only available remedy may be injunctive relief.

Within the domain of trademark law, appropriately tailored injunctive relief presents the most promising mechanism for protecting reasonably ignorant infringers while vindicating trademark law's primary

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212 Romag Fasteners, Inc. v. Fossil, Inc., 817 F.3d 782, 788-89 (Fed. Cir. 2016) (summarizing the state of the law).

213 Indeed, the retailer had even sent one of the handbags to Gucci for repair, and Gucci repaired and returned the handbag without comment. *See* Gucci Am., Inc. v. Daffy's, Inc., 354 F.3d 228 (3d Cir. 2003).

214 Romag Fasteners, Inc. v. Fossil, Inc., 140 S. Ct. 1492 (2020).

215 *Id.* at 1497; *see also id.* at 1497 (Alito, J., concurring) ("[W]illfulness is a highly important consideration in awarding profits under § 1117(a)"); *see also id.* at 1498 (Sotomayor, J., concurring in result) ("[A] district court's award of profits for innocent or good-faith trademark infringement would not be consonant with the 'principles of equity' referenced in § 1117(a)").

216 *See* Quick Tech., Inc. v. Sage Group PLC, 313 F.3d 338, 349 (5th Cir. 2002) ("[W]illful infringement is an important factor which must be considered when determining whether an accounting of profits is appropriate.").

objective: avoiding consumer confusion.[217] Injunctive relief does not have the same dire consequences for the trademark infringer that it has for the patent infringer. A trademark owner armed with an injunction does not have the same leverage as a patent owner, who can prevent the infringer from distributing an existing device without making changes that would be prohibitively expensive or impractical. Instead, the trademark infringer is free to sell the same goods as before, so long as the goods are marked to avoid consumer confusion (although this may impose costs with respect to alteration of existing stock). And because the typical infringer will not have been using the infringing mark or trade dress for long, the infringer is unlikely to lose its customer base if it adopts new marks or trade dress. At the same time, by prohibiting future use of the mark, an injunction eliminates consumer confusion. Injunctive relief also safeguards the interests of trademark owners by precluding future unauthorized use of their marks. Moreover, if the owner can establish damages from diversion of sales or dilution of the mark, the owner can recover those as well.[218] To the extent the infringer diverted those sales from the owner, an award of damages simply restores the parties to their pre-infringement position. Neither injunctive relief nor compensatory damages would induce a market participant to make inefficient expenditures on legal information.

III. OUTLIERS: AREAS RIPE FOR DOCTRINAL REFORM

In most areas of law, doctrine has accommodated those who act in reasonable ignorance of law in ways that ultimately promote both fairness and efficiency. There are, however, outliers. In these areas, doctrine effectively adheres to the maxim that ignorance of the law is no excuse. In examining two of these areas—one of critical importance and one of

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217 Mark A. Lemley has lamented the trend of some courts to apply the *eBay* rule limiting patent injunctions to the trademark context, noting very real differences between the two areas of law. Mark A. Lemley, *Did eBay Irreparably Injure Trademark Law?*, 92 NOTRE DAME L. REV. 1795, 1796 (2017). On the centrality of avoiding consumer confusion in trademark law, see, for example, Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 414 (2010).

218 Proving lost sales is difficult, and most successful trademark infringement cases result in a denial of damages as a remedy. Lemley, *supra* note 217, at 1807.

fading significance—I hope to highlight their deviation from doctrinal norms in other areas and the need for reform.

A. *Copyright*

Copyright law is an outlier in its treatment of the ignorant infringer. Copyright presents greater potential for infringement borne out of reasonable ignorance than either patent or trademark law yet provides less protection for the ignorant infringer.

Consider why the potential for reasonably ignorant copyright infringement is significant. First, individuals and entities who engage in potentially infringing activity are likely, on average, to be less economically and legally sophisticated than potential patent infringers. The investment in equipment and technology typically required for patent infringement constrains the class of potential patent infringers. By contrast, with copyright, for every Disney production, there are countless budding authors and composers who write and compose without any significant capital investment.[219] For the most part, they have no lawyers at their disposal to advise them on the niceties of copyright doctrine.

Second, because copyright attaches to a work when an author fixes the work in a tangible medium of expression—even if the author attaches no notice to the work and does not register the work with the copyright office—an exhaustive copyright clearance is ultimately impossible.[220] This may not be a problem for an author who knowingly borrows the work of another, but it remains a problem for distributors of potentially infringing work, who will have no way to be sure whether their distribution violates the law.[221]

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219 R. Anthony Reese has observed that until the twentieth century, the scope of copyright doctrine was much narrower, primarily regulating the industry, not the broader public at large. R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 140–44 (2007).

220 Copyright registration is a prerequisite for bringing an infringement action. *See* 17 U.S.C. § 411(a) (2018). But, it is not a prerequisite for obtaining copyright protection. *See* 17 U.S.C. § 102(a) (2018) (providing protection for all original works "fixed in any tangible medium of expression.").

221 The copyright statute includes a narrow exception applicable for innocent infringement of works publicly distributed, without a copyright notice, before the effective date of the Berne Convention Implementation Act of 1988. 17 U.S.C. § 405(b) (2018).

Moreover, copyright law does not prohibit all use of a copyrighted work. Copyright protects only expression, not ideas.[222] Even with respect to expression, fair use doctrine permits a not-clearly-defined range of uses of copyrighted works.[223] As a result, even a lawyer advising an author or composer consciously considering use of a copyrighted work would have difficulty providing reliable guidance.[224]

Subconscious copying exacerbates the potential for mistaken infringement. All of us hold, in the recesses of our minds, familiarity with books we have read or music we have heard. Authors and composers are no exception. If that subconscious familiarity with an existing work finds its way into an author or composer's "new" work, the author bears liability for infringement.[225]

Copyright law prohibits not only copying, but also distribution, display, and public performance of copyrighted works.[226] Courts have also developed robust doctrines of contributory and vicarious infringement.[227] The persons who bear liability under these doctrines may have no first-hand knowledge that the author has engaged in prohibited copying and no easy way to find out.

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222 17 U.S.C. § 102(b) (2018). For a discussion of the difficulty in ascertaining whether the boundaries of an expressive work have been transgressed, see Bracha & Goold, *supra* note 4, at 1034–35.

223 *See* 17 U.S.C. § 107 (2018) (outlining a four-factor approach to fair use). For a discussion of the informational burdens generated by fair use doctrine, see Joseph P. Liu, *Fair Use, Notice Failure, and the Limits of Copyright as Property*, 96 B.U. L. REV. 833, 838–41 (2016).

224 *See* Reese, *supra* note 219, at 178 (emphasizing that "most noninfringing uses of copyrighted works are those allowed under significantly indeterminate doctrines such as the idea-expression dichotomy or fair use—doctrines with extremely uncertain boundaries"). Reese notes that as a result of this uncertainty, it will often be difficult to determine whether infringement has occurred before litigation resolves the issue. *Id.*

225 Famous examples of liability for subconscious copying include *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976) (involving George Harrison's "My Sweet Lord," which infringed on the earlier "He's So Fine"), and *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000) (involving Michael Bolton's infringement of an earlier Isley Brothers song).

226 17 U.S.C. § 106 (2018).

227 In the Supreme Court's words, "[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005) (citations omitted).

In light of this significant potential for reasonably ignorant copyright infringement, consider copyright doctrine's response. With respect to internet service providers, copyright recognizes and addresses the problem of ignorant infringement. The Digital Millennium Copyright Act (DMCA) insulates a service provider from liability for infringing content placed upon the provider's system by a system user if, upon receiving notice of infringement, the provider acts expeditiously to remove or disable access to the infringing material.[228] The safe harbor applies only if the service provider has adopted and implemented "a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."[229] In other words, a service provider who takes the statutorily enumerated reasonable steps to guard against infringement is not liable for what might be deemed innocent infringement.

Outside the context of internet service providers, however, copyright doctrine does not provide comparable protection for innocent infringers.[230] The copyright statute makes injunction a discretionary remedy[231] and, especially in light of *eBay*, which cautions against routine award of injunctions, innocent infringers may not face the prospect of devastating injunctions, which would give copyright holders significant holdout power. But the statute's mandatory damage provisions nevertheless put innocent infringers at significant risk of liability.

First, a copyright holder who cannot prove actual damages is nevertheless entitled to recover statutory damages from the infringer even when the infringement has caused no actual damages and generated no infringer's profits.[232] When a court finds that the infringer had no

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228 17 U.S.C. § 512(c) (2018). The exemption does not apply if the service provider receives a financial benefit attributable to the infringing activity and has the ability to control that activity. 17 U.S.C. § 512(c)(1)(B) (2018).

229 17 U.S.C. § 512(i)(1)(A) (2018).

230 For instance, a saloon owner is vicariously liable for infringement by a disc jockey who has performed infringing works despite the saloon owner's instructions that the disc jockey should play only licensed works. *See* Broadcast Music, Inc. v. Carey-On Saloon, LLC, No. 12–cv–02109–RM–MJW, 2014 WL 503447 (D. Colo. 2014).

231 17 U.S.C. § 502(a) (2018) (providing that a court "may . . . grant temporary and final injunctions").

232 § 504(c).

reason to believe that his or her acts constituted infringement, the statute gives the court discretion to limit statutory damages to $200,[233] but, as the Ninth Circuit has observed, does not require courts to limit the award to that sum.[234] If the court does not exercise that discretion, the court may award any amount between $750 and $30,000 in statutory damages. The availability of statutory damages almost by definition puts the copyright owner in a position better than he or she would have enjoyed before the infringement occurred.

Second, even if a court were inclined to limit statutory damages, the statute entitles a copyright owner to recover infringer's profits "attributable to the infringement"[235] without regard to willfulness.[236] Infringer's profits can far exceed any loss to the copyright holder, especially when the original copyrighted work is no longer realizing significant sales. Indeed, because the copyright owner would always be able to seek actual damages, the primary motivation for seeking infringer's profits is to obtain a recovery in excess of damages.[237] Moreover, an award of infringer's profits will almost inevitably exceed the royalty the parties would have negotiated had the infringer known that the new work required the permission of the creator of the original work.[238]

Although *Williams v. Gaye*[239] did not involve an ignorance of law problem, it illustrates the doctrinal problem facing an author who is reasonably ignorant of copyright law. When Pharrell Williams and Robin Thicke wrote the smash hit "Blurred Lines," Marvin Gaye's relatives and publisher contended that the song infringed Gaye's copyright in "Got to Give it Up," written thirty-seven years earlier. Williams and Thicke

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233 § 504(c)(2). For application of the statute to an innocent infringer, see *Florentine Art Studio, Inc. v. Vedet K. Corp.*, 891 F. Supp. 532 (C.D. Cal. 1995).

234 L.A. News Serv. v. Tullo, 973 F.2d 791, 800 (9th Cir. 1992) (holding that even if the district court had found innocent infringement, the statute does not mandate a nominal award).

235 § 504(b).

236 § 504(b) (making no reference to willfulness in entitling owner to infringer's profits).

237 § 504(b) entitles the owner to profits "that are attributable to the infringement and are not taken into account in computing the actual damages." As a result, if the owner could prove actual harm equal to or greater than the infringer's profits, the owner would have little incentive to seek infringer's profits.

238 A potential user of a copyrighted work would have little reason to negotiate a royalty that relinquishes all of the profits attributable to use of the copyrighted work.

239 Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018).

brought a declaratory judgment action to establish that their song did not infringe, but a jury found infringement after being instructed that Williams and Thicke were liable for infringement "if you find that the Thicke Parties subconsciously copied either or both of the Gaye Parties' songs."[240] Although the District Court reduced the jury's award of actual damages to the Gaye estate from $4,000,000 to $3,188,527.50 because of a mistaken instruction, the court upheld an additional award of $1,768,191.88 in actual profits earned by Thicke—representing 40% of Thicke's royalties on "Blurred Lines"—all without a finding that Thicke and Williams had willfully infringed on Gaye's copyright. To top it off, the court awarded the Gaye parties an ongoing royalty of 50% of songwriter and publishing revenues from "Blurred Lines." The Ninth Circuit upheld each of these awards.[241]

Legal investigation would not have helped Thicke or Williams if they had no consciousness of copying. The *Williams* court's opinion nevertheless illustrates the danger facing an infringer acting on a mistaken belief about the state of copyright law. If an infringer mistakenly but reasonably believes she has taken no copyrightable elements from any copyrighted work, the infringer may still be required to disgorge most of the revenues associated with the infringing work. And, as in *Williams*, liability extends not only to the songwriter, but also to the publisher who publishes the infringing work, even though the publisher may have even less reason to know of the infringement.

Copyright's supercompensatory remedies were designed to ensure an appropriate deterrent to copyright infringement, especially in light of the prospect of underdetection of infringing behavior.[242] But deterrence is not a sensible goal when the infringer's behavior is not deterrable, or when deterrence would incentivize creators to engage in investigation of

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240 *Id.* at 1123.

241 The Ninth Circuit reversed the district court's determination overturning the jury's general verdicts in favor of the author of a rap verse of "Blurred Lines" and the owner of the sound recording. *Id.* at 1130–32.

242 H.R. REP. NO. 106-216, at 3 (1999) (noting the need for increased statutory damages because many computer users "simply believe that they will not be caught or prosecuted for their conduct."); *see also id.* at 6 ("It is important that the cost of infringement substantially exceed the costs of compliance, so that persons who use or distribute intellectual property have a strong incentive to abide by the copyright laws."); *see generally* Bert I. Huang, *Surprisingly Punitive Damages*, 100 VA. L. REV. 1027, 1051–52 (2014).

legal doctrine at a cost higher than the social cost imposed by any infringement they might otherwise commit. Copyright remedies then unduly penalize creators who, in reasonable ignorance of copyright doctrine, engage in behavior that infringes on the rights of a copyright holder.

Other scholars have focused on the plight of infringers ensnared by the uncertain boundaries of copyright doctrine. Joseph Liu, for instance, has questioned the appropriateness of applying a property rights framework to users of intellectual works, suggesting that negligence standards might better govern fair use cases, especially when the alleged infringer is an unsophisticated party.[243] Similarly, Oren Bracha and Patrick Goold have advocated replacing copyright's strict liability regime with a negligence regime, emphasizing the difficulties potential users face in ascertaining whether and when boundaries of a copyrighted work have been transgressed.[244] The approach they propose, which would amount to no liability for infringers who are reasonably ignorant of the law, would effectively remove the incentives for inefficient investigation of legal doctrine. If, however, we make the (heroic) assumption that copyright doctrine is properly calibrated to provide authors with the appropriate incentive to create, depriving authors of compensation for any actual losses would diminish those incentives. By contrast, limiting the copyright holder's remedy to actual damages would preserve those incentives. Moreover, because the party who uses copyright works out of reasonable ignorance generally benefits from that use, requiring the user to compensate for actual harm should not work significant unfairness.[245]

B. *Payments Made in Ignorance of Law: Restitution and the Voluntary Payment Doctrine*

Consider the lease of a store in a commercial shopping center that requires a tenant to pay, in addition to fixed monthly rent, a portion, determined by formula, of any increased real estate taxes imposed on the

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243 Joseph P. Liu, *Fair Use, Notice Failure, and the Limits of Copyright as Property*, 96 B.U. L. REV. 833, 838–41 (2016).

244 Bracha & Goold, *supra* note 4, at 1034–35.

245 Stewart E. Sterk, *Strict Liability and Negligence in Property Theory*, 160 U. PA. L. REV. 2129, 2133 (2012).

shopping center. The landlord, who receives the tax bills, sends monthly rent statements to the tenant, who routinely pays them. Subsequently, the tenant discovers that the landlord's statements miscalculated the tenant's liability for tax increases and seeks return of the excess. The landlord resists, contending that the tenant "voluntarily" paid the higher amount, and should not be entitled to a refund.

From an efficiency perspective, allowing the landlord (or any other payee) to keep the payment would reduce the incentive of the payee to share accurate information with the payor; if the payee gets to keep money paid in error, why not ask for more than the law would allow in the hope that the payee does not invest time doing legal research? And from a fairness perspective, the payor bears little blame for failing to uncover information more readily available to the payee. Neither fairness nor efficiency justifies allowing the payee to retain funds to which it was never entitled. Conversely, allowing the payor-tenant to recover creates a greater incentive for the landlord to share information with the tenant.

The Restatement (Third) of Restitution and Unjust Enrichment would protect the mistaken payor, providing that payment by mistake gives the payor a claim in restitution.[246] The Restatement's sensible position, however, is in tension with the common law voluntary payment doctrine, which would preclude recovery. In the words of the Texas Supreme Court, "money voluntarily paid . . . with full knowledge of all the facts, in the absence of fraud, duress, or compulsion, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability."[247]

A number of courts have applied the voluntary payment doctrine broadly, even in the absence of any equitable reasons to bar the ignorant

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246 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 6 (AM. LAW INST. 2011). The black letter of section 6 provides that "[p]ayment by mistake gives the payor a claim in restitution against the recipient to the extent payment was not due." *Id.* Comment e goes on to provide that "the voluntary payment rule has no application to the payment of a claim that neither party regards as doubtful. Nor does the voluntary payment rule bar a restitution claim to recover a mistaken payment, notwithstanding that payment was made by way of settlement, where the mistake in question is not one of the uncertainties that the parties' transaction was understood to settle." *Id.* § 6 cmt. e.

247 Pennell v. United Ins. Co., 243 S.W.2d 572, 576 (Tex. 1951). For discussion of the nineteenth-century English origins and American adoption of the doctrine, tied to the principle that ignorance of the law is no excuse, see Colin E. Flora, *Practitioner's Guide to the Voluntary Payment Doctrine*, 37 S. ILL. U. L.J. 91, 93–94 (2012).

payor's claim.[248] Several courts have applied the doctrine to bar consumers who have paid late fees or other fees from subsequently challenging those fees as unenforceable penalties.[249]

The voluntary payment doctrine does serve a function in those cases where payment is made to resolve a disputed claim. In that instance, the doctrine operates to avoid inefficient investigation of legal rules; the parties both compromise rather than engaging in search for legal information.[250] The Restatement would apply the doctrine in this circumstance, narrowing its scope to cases in which money is voluntarily paid "*in the face of a recognized uncertainty as to the existence or extent of the payor's obligation to the recipient*."[251] In other words, the Restatement would prohibit recovery by the payor when the payor has consciously made the payment with knowledge of the existence of a legal dispute—that is, when the payor's decision to pay reflects an intent to settle a dispute without expending funds to resolve uncertainty about the obligation.[252]

One hopes that the Restatement provision will hasten a shift in approach to the doctrine, which, in most cases, imposes a significant and inefficient penalty for legal ignorance.[253] Some courts have declined to

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248 *See, e.g.*, Citicorp N. Am., Inc. v. Fifth Ave. 58/59 Acquisition Co., 70 A.D.3d 408 (N.Y. App. Div. 2010) (barring recovery by a commercial tenant of $564,531 in overcharges due to a landlord's miscalculation of rent escalation charges).

249 *See, e.g.*, BMG Direct Mktg., Inc. v. Peake, 178 S.W.3d 763 (Tex. 2005) (holding that doctrine barred claim by customer challenging, in a class action, $1.50 fee for late payment of compact discs sold through membership club; customer had paid the late fees for three years before bringing suit).

250 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 6 cmt. d.

251 *Id.* § 6 cmt. e (emphasis in original).

252 *Id.* The Restatement's comment recognizes that payment sometimes reflects an explicit compromise, but also notes: "[T]here may be settlement even in the absence of compromise. If a disputed claim is paid in full, notwithstanding a recognized uncertainty as to the existence or extent of the payor's liability, the payor has typically made a conscious decision that the anticipated cost of resisting the claim exceeds the amount of the demand." *Id.*; *see also* Nevada Ass'n Serv., Inc. v. Eighth Jud. Dist. Ct., 338 P.3d 1250 (Nev. 2014) (applying the doctrine to payments made with knowledge of a dispute).

253 Even in the absence of the Restatement's payments made in the face of "recognized uncertainty," the doctrine sometimes accomplishes reasonable objectives. For instance, when a payor seeks to recover payment after the lapse of too much time, the doctrine relieves the courts of stale claims and protects payees who have developed a reliance interest on the wrongful payment. *See, e.g.*, Eighty Eight Bleecker Co., v. 88 Bleecker St. Owners, Inc., 34 A.D.3d 244 (N.Y. App. Div. 2006) (barring claim by tenant who, for twenty years, did not inquire about alleged

apply the doctrine when it would interfere with the remedies available for a statutory violation.[254] Legislation in Florida has abolished the doctrine,[255] while a New York statute allows (but does not require) courts to treat mistakes of law like mistakes of fact, potentially ameliorating the doctrine's effect.[256]

CONCLUSION

Ignorance of law is a common and rational response to law's complexity. Strict enforcement of the maxim that "ignorance of law is no excuse" is often unfair to parties who reasonably act without significant legal investigation and, in some cases, will induce inefficient expenditure on legal information.

Examination of a broad range of doctrinal areas reveals that doctrine has developed three strategies to ameliorate the unfairness and inefficiency associated with the maxim. First, doctrine uses information-forcing default rules to incentivize transmittal of legal information to otherwise ignorant parties. Second, when the information-forcing strategy is unavailable, and violation of the legal prohibition does not significantly interfere with the private rights of others, doctrine often excuses the reasonably ignorant party. Third, when excusing the reasonably ignorant actor would significantly interfere with the rights of

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overcharge under lease's tax escalation clause). Those objectives, however, can be accomplished more directly by applying other equitable doctrines like estoppel and laches. *See* Stewart E. Sterk, *The Voluntary Payment Doctrine Strikes Again*, N.Y. REAL EST. L. REP. (December 2015), http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2015/12/31/the-voluntary-payment-doctrine-strikes-again [https://perma.cc/AP66-FJYL].

254 *See, e.g.*, Brutus 630, LLC v. Town of Bel Air, 139 A.3d 957 (Md. 2016) (voluntary payment doctrine does not bar a developer's claim for a return of an erroneously imposed sewer connection charge when state statute provides a claim for a refund of charges wrongfully assessed by a municipality); MBS-Certified Pub. Accountants, LLC v. Wis. Bell, Inc, 809 N.W.2d 857, 869 (Wis. 2012) (doctrine does not bar claim by telecommunications customer because application of the doctrine "would encourage the mischief identified by the legislature and circumscribe the remedy it provided").

255 FLA. STAT. § 725.04 (2019).

256 N.Y. C.P.L.R. § 3005 (McKinney 2020). For construction of the statute to permit, but not require, that mistakes of law be treated as mistakes of fact, see *Dillon v. U-A Columbia Cablevision, Inc.*, 292 A.D.2d 25, 27 (N.Y. App. Div. 2002).

third parties, doctrine adjusts remedies to provide compensation to those third parties while reducing incentives for inefficient legal investigation.

Although these strategies transcend doctrinal boundaries, outliers remain in which doctrine takes inadequate account of the problems associated with legal ignorance. Highlighting both the strategies and the outliers provides a starting point for reform.