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When Should a Mistake of Fact Excuse?

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WHEN SHOULD A MISTAKE OF FACT EXCUSE?

Stephen P. Garvey*

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I. INTRODUCTION

When should a mistake of fact excuse an otherwise criminal act? Some
might say that the question betrays confusion or anachronism. Confusion,
because mistakes of fact are not excuses. They are so-called failure of proof
defenses. Anachronism, because thinking about mistakes of fact as excuses
harkens back to an older understanding of the guilty mind as mens rea, whereas
modern thinking has replaced mens rea with mentes reae. But the question
does make sense, and the older way of thinking about the guilty mind has its
virtues.

Here I advance two claims. First, a mistake (or ignorance) of fact should
matter only insofar as it causes an actor to be ignorant of the law. Mistakes of
fact should have exculpatory force if and only if they cause ignorance of the
law, and ignorance of the law ought to be an excuse to criminal liability.
Second, an actor who should otherwise be excused because he is ignorant of the
law, where that ignorance is the result of some mistake of fact, should not lose
that excuse just because the underlying mistake of fact can, in a plausible and
legitimate sense, be characterized as "unreasonable."

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draft.
Each of these claims can be understood as a plea, or dependent upon a plea, for a broad construal of the excuses. The first presupposes that ignorance of the law should excuse, whereas the law now recognizes only limited exceptions to the maxim that ignorance of the law is no excuse. The second says that an actor whose ignorance of the law is the result of a mistake of fact should be excused, even if that mistake was "unreasonable," whereas the law commonly withholds exculpatory force from mistakes of fact if and when those mistakes are "unreasonable."

II. WHEN SHOULD A MISTAKE OF FACT EXCUSE?

We are accustomed to thinking that mistakes of fact are more or less the legislature's business. A legislature is free within broad constitutional limits to say what mental states the defendant must have with respect to this or that element of an offense. We are not in the habit of asking whether a particular mistake of fact should really matter, or why. Instead, figuring out whether a mistake of fact matters is simply a matter of reading the statute and figuring out what the legislature intended. What, if any, mental state did the legislature want to apply to this or that material element? Having figured that out, has the prosecution discharged its burden of proving the existence of that mental state beyond a reasonable doubt? If not, the defendant has a "defense," which we call a failure-of-proof defense: the state's proof on that point has failed.

This way of thinking about mistakes of fact is of course the right way to think about them as a matter of positive law. Mistakes of fact are indeed failure-of-proof defenses. But for some reason we have stopped thinking about mistakes of fact beyond the way in which the positive law tells us to think about them. We have stopped asking why, if at all, a mistake of fact should preclude criminal liability, apart from the fact that positive law says so. In other words, we have stopped asking why a mistake of fact might, if at all, constitute a genuine excuse. We argue about what, for example, duress and insanity are, and given what they are, why they should deflect criminal liability. But hardly a word can lately be heard about when or why a mistake of fact should afford a defense to liability—other than to say that the legislature says so.¹

No one would say that reading the statutes describing the circumstances under which an actor can state a valid defense of duress or insanity in this or that jurisdiction would provide an adequate theoretical understanding of duress or insanity as defenses to criminal liability. Nor should anyone say that all it

¹. For notable exceptions, see George P. Fletcher, Basic Concepts of Criminal Law 155 (1998) ("Determining the difference between relevant and irrelevant mistakes is, at bottom, a philosophical problem—not one legislators can solve simply as an act of will."); George P. Fletcher, Mistake in the Model Penal Code: A False False Problem, 19 Rutgers L.J. 649, 653 (1988) ("[D]eferring to the legislature does not solve the problem of mistakes as a matter of principle."); Sanford Kadish, Excusing Crime, 75 Cal. L. Rev. 257, 261 (1987) ("[M]istake [is an] excuse[es], despite [its] formal character as definitional mens rea requirements. Indeed, before the clarifying analysis of mens rea by the Model Penal Code, this was how . . . mistake[s] were traditionally thought of.").
takes to gain an adequate theoretical understanding of mistakes of fact is to read the statute describing the mental states a legislature has declared an actor must have with respect to this or that element of the offense. An adequate theory of mistakes of fact would tell us why a mistake of fact matters to an actor's liability to criminal blame and punishment, and once we know why mistakes of fact matter we should be able to tell when this or that mistake does matter.

Most folks say that duress and insanity matter because they excuse. An insane actor or an actor acting under duress has done something the criminal law regards as impermissible, but the law nonetheless withholds its censure. Such actors are not to be blamed. One could of course go on to ask: Why do duress and insanity excuse? The most common answers have something to do with claims to the effect that the insane actor or the actor acting under duress lacked the capacity to conform their conduct to the requirements of law, or lacked a fair opportunity to do so, or did not display through their actions an attitude of malice or contempt or whatnot.

Mistakes of fact should likewise be portrayed as excuses, or more precisely, a mistake of fact should "excuse" if and when it causes an actor to be ignorant of the fact that he is doing something the law does not permit him to do, or fails to do something the law obligates him to do. In other words, mistakes of fact matter only inasmuch as they cause the actor to be in what is a genuine excusing condition; namely, ignorance of the law. Indeed, it seems to me that, with respect to the epistemic side of responsibility, ignorance of law is the only genuine excuse around.

The difference between portraying a mistake of fact as (merely) a potential failure of proof defense and portraying it instead as a potential basis for an excuse is the flip side of the difference between what has been called an elemental approach to assessing an actor's guilty mind and a so-called culpability approach to it, or in other words, between *mentes reae* and *mens rea*. A mistake of fact matters on an elemental approach to the guilty mind if and when the mistake means that the actor did not possess the mental state, if any, that the statute itself requires: if it negates one of the required *mentes reae*. In contrast, a mistake of fact matters on a culpability approach if and when it negates *mens rea*.

Yet what does *mens rea* mean? What does it mean to say that an actor possessed a guilty mind according to the so-called (and sometimes derided)


3. Francis Bowes Sayre, The Present Signification of Mens Rea in the Criminal Law, in HARVARD LEGAL ESSAYS 399, 404 (Roscoe Pound ed., 1934) ("An intelligent understanding of the various states of mind requisite for criminality can be gained only through an intensive study of the substantive law covering each separate group. The old conception of mens rea must be discarded, and in its place must be substituted the new conception of *mentes reae*.")
culpability approach? I suggest that an actor lacks mens rea when he does not realize that his act or omission is one the law categorically forbids. Moreover, he lacks mens rea because, not having realized that his act or omission is a crime, he has not acted in defiance of the law’s legitimate authority. Consequently, a mistake of fact should constitute an excuse if and when it causes the actor to be ignorant of the law: whenever it causes an actor to be unaware that he is acting in a way the law does not permit him to act, or that he is failing to act in a way it demands he act. A mistake of fact gains whatever exculpatory force it has if and only if it renders an actor ignorant of the fact that the law prohibits his conduct, in which case the actor cannot be said to have acted in defiance of the law, in which case it can be said that he acted without mens rea.

But ignorance of the law never excuses, right? Ignorantia legis non excusat. Everyone is presumed to know the law, and that presumption is not open to rebuttal. Moreover, even when the law does permit ignorance of the law to excuse, it does so only when and because it regards the actor’s ignorance as reasonable, and the law is famously stingy in what it regards as reasonable ignorance. Rarely does it meet a claim of ignorance of law it likes. If the criminal prohibition itself makes ignorance a defense; if it is unpublished; if a high-ranking state actor tells you that what you are about to do is not a crime, or if your ignorance stems from mental disease or defect, then and only then will your mistaken belief that you committed no crime protect you from the law’s condemnation.

Yet despite the law’s de facto reluctance to entertain pleas of excuse based on ignorance of law, the idea that everyone is conclusively presumed to know the law gives the game away. It reveals that the law, far from being indifferent as to whether or not those subject to its sanctions are aware of its demands,
The legal fiction that everyone knows the law might have made some sense in days gone by, when the criminal law’s jurisdiction extended only so far as *malum in se*. But today’s criminal law has expanded its jurisdiction. It now extends well beyond *malum in se* and deep into *malum prohibitum*, and the number of malum prohibitum offenses is large. Indeed, no one really knows, for example, how many federal regulations have the backing of the criminal law. In a world so full of *malum prohibitum* crimes, the presumption makes considerably less sense. Refusing to have sympathy for the sound-of-mind robber who claims that he was unaware of the law’s prohibition against using violence to take someone else’s property, never again to return it, is one thing. Refusing to have sympathy for the guy who claims not to have realized that selling “Woodsy Owl” T-shirts for a quick buck was a federal crime (unless he had gotten permission from the Chief of the Forest Service to do so) is another.

If the law refuses to have sympathy for the Woodsy Owl entrepreneur, it would likely defend its hard-heartedness by appeal to cold calculation. The most common defense of the law’s de facto no-mistake maxim is utilitarian, a defense usually associated with Holmes: The rule achieves benefits or avoids costs that would otherwise result, and those achieved benefits or avoided costs are worth the injustice done when an actor is punished for a crime he had no clue he was committing. “[J]ustice to the individual,” said Holmes “is rightly outweighed by the larger interests on the other side of the scale.” But notice again how this defense of the no-mistake maxim presupposes that, but for its supposed costs and benefits, ignorance of the law would be an excuse: an excuse that justice to the individual would require the law to recognize. Of
course, it should come as no surprise that utilitarianism is no friend of ignorance of the law as an excuse: utilitarianism is no friend of any excuse.\(^{15}\)

In any event, if one begins from the premise that *mens rea* consists in defiance of the law's legitimate authority, then the conclusion that ignorance of law should be an excuse is hard to resist. Indeed, it seems tautologically true. Moreover, if an actor's ignorance of the law can be traced to a mistake of fact, then his mistake of fact should then constitute what might, for want of a better term, be called a "derivative excuse." An actor can of course be ignorant of the law without being ignorant of any of the elements of the crime with which he is charged. But sometimes a mistake of fact can cause an actor to be ignorant of the law, and when it does, it should form the basis upon which the actor is excused.

**A. From Mistake of Fact to Ignorance of Law**

The simplest way in which a mistake of fact can cause an actor to be ignorant of the law arises when the mistake is the cause but for which the actor would have at least suspected he was committing a crime. Consider *Staples v. United States.*\(^{16}\) The defendant Harold Staples was charged with possessing an "unregistered firearm" in violation of the National Firearms Act. The weapon he possessed, which was in fact unregistered, was an AR-15 that had been modified to enable it to fire automatically. Indeed, the capacity to fire automatically was what made it a "firearm" within the meaning of the statute. Staples insisted that he had made a mistake of fact: He mistakenly believed that the unregistered weapon he possessed could *not* fire automatically.\(^{17}\)

But why should his mistake matter? It should matter if and because, had he not made it, he would have realized, or at least suspected, that the law prohibited him from continuing to possess his AR-15, or at least that it required him to register it.\(^{18}\) Had he been aware of the fact that his AR-15 could fire automatically, he would have done some asking around, as a result of which he might have come to realize that weapons capable of firing automatically must be registered in order to be lawfully possessed. His mistake of fact therefore

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\(^{15}\) See, e.g., Kadish, *supra* note 1, at 263-64.

\(^{16}\) *Staples v. United States,* 511 U.S. 600 (1994). The line of cases into which *Staples* falls can be read for the general proposition that, wherever possible, the federal courts should interpret federal criminal statutes so as to require the government to prove that the defendant was aware of those material elements of the offense sufficient to warrant the inference that the defendant at least suspected that he was committing a crime in acting or not acting as he did. Cf. John Shepard Wiley, *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation,* 85 VA. L. REV. 1021, 1023, 1029 (1999) ("When reading [federal criminal] statutes, the Justices['] . . . interpretive method makes moral culpability mandatory for criminal conviction," where "moral culpability" means that the actor has broken a "law[ ] about which [he] knew or should have known.").

\(^{17}\) *Staples* argued that the statute should be interpreted so as to require the government to prove that he knew the weapon could fire automatically. He prevailed on that argument. See *Staples,* 511 U.S. at 602.

\(^{18}\) If *Staples* realized that the AR-15 could fire automatically but still had no suspicion that its unregistered possession was a crime, I would continue to say that he should be excused.
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A mistake of fact gains exculpatory force because, having failed to realize that the weapon in his possession could fire automatically, he failed in turn to realize, or even suspect, that his continued possession of it (without registering it) was illegal. An actor whose mistake of fact leaves him with not even a suspicion that he might be acting as the law says he ought not to act should be excused for so acting.

On the other hand, if an actor does suspect that ϕ-ing is illegal, then he is obligated to take reasonable steps that, had he taken them, would have confirmed his suspicion, resulting in the formation of the belief that ϕ-ing is a crime. If he fails to take those steps, such that he continues to suspect that ϕ-ing is illegal, he should refrain from ϕ-ing. An actor who suspects that the law prohibits ϕ-ing but ϕ’s all the same is nonetheless defiant, even if he is less defiant than one who fully realizes that the law prohibits ϕ-ing. Indeed, if he can be characterized as “willfully ignorant” of the law’s demands, he might fairly be regarded as equally defiant.19

Now imagine an actor who suspects that ϕ-ing is a crime and who accordingly sets out to confirm or dispel his suspicion. Based on his investigation, he dispels his suspicion and ends up believing that the law permits him to ϕ. He turns out to be wrong, such that when he ϕ’s he acts in ignorance of the law’s demand not to ϕ. One such case is People v. Marrero.20

The defendant Julio Marrero was a guard at a federal prison in Connecticut. He was charged with possessing an unlicensed pistol outside a New York City nightclub in violation of New York law. Marrero’s pistol was in fact unlicensed, but he believed federal prison guards weren’t required to license their pistols. Why not? Because under New York law, “peace officers” were not subject to the licensing requirement,21 and a “peace officer” included a “guard of any state prison or of any penal correctional institution.”22 As a prison guard at a federal prison, Marrero believed that he was a “guard . . . of [a] penal correctional institution,” and as such, exempt from the licensing requirement. He turned out to be wrong. The language on which he relied was

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19. The idea here would be to apply the willful ignorance doctrine, which ordinarily applies to ignorance of facts, to ignorance of law. The proper formulation of the willful doctrine is controversial, but having said that, I believe it is best understood as follows: An actor will be treated as if he believed (or knew) that p if he suspected that p, could easily have gathered additional information or evidence to confirm his suspicion (i.e., he could easily have done something to confirm his suspicion), and had no reason sufficient to justify not having done so. In other words, the willful blindness doctrine is a forfeiture rule based upon an actor’s omission: an actor who would otherwise have a failure-of-proof defense based on the fact that he did not know of a particular fact’s existence will forfeit that defense if he fails to act under the circumstances the willful blindness doctrine specifies.

Similarly, an actor can fairly be treated as if he realized that ϕ-ing was a crime if he suspected that ϕ-ing was a crime, could have taken reasonable steps to confirm his suspicion, and had no reason sufficient to justify not having taken those steps. I would add, however, that the actor must realize or at least suspect that he is obligated to take reasonable steps, that any steps he has taken fall short of the steps he should have taken, and that his reasons for not taking those additional steps are not enough to justify not taking them.


22. Id. (citing N.Y. CRIM. PROC. LAW § 1.20(33)(h)).
later construed such that the exemption for “peace officer[s]” included only guards of “any state prison or of any [state] penal correctional institution.” Marrero was a guard at a federal prison. As such, he was not “peace officer,” and not being a peace officer, his pistol was not lawfully possessed unless and until it was licensed.  

Unlike Staples, Marrero was well aware of the language of the law he was charged with having violated. He had read the statute. Unfortunately for him, it turned out that he had misread it. One might therefore say that Marrero was not like Staples: Marrero made a mistake of law regarding the law he was charged with violating, whereas Staples was ignorant of the law under which he was charged. Perhaps, but any such distinction is one without a difference. What matters is that Marrero was ignorant of the fact that his possession of the unlicensed pistol was something the law did not permit, just as Staples was ignorant of the fact that his possession of an unregistered firearm (i.e., a weapon that could fire automatically) was something the law did not permit. Just like Staples, he did not act in defiance of the law, and just like Staples, his violation of the law should have been excused for lack of mens rea. He violated the law, but he did not defy it.  

But perhaps that conclusion is too quick. Perhaps Marrero is not quite as sympathetic as he might first appear. He appears at first blush to have been someone who tried in good faith to obey the law. But if we imagine that Marrero believed in his heart of hearts that it was wrong to carry an unlicensed pistol outside a nightclub in the City, but did so anyway because he also believed the law permitted him to do so, a different Marrero emerges: Marrero the loopholer. His reason for looking so closely into the law was not so much to honor it, but to find a gap in it that he could exploit. Moreover, one might say that the law should not tolerate, let alone encourage, the search for loopholes. Refusing to excuse an actor who believes, even reasonably, that the law permits him to engage in conduct he otherwise believes to be wrongful (or believes that most others believe to be wrongful), is one way to discourage it.

23. Marrero argued in the Court of Appeals that the trial court erred when it refused to permit him to raise a mistake of law defense under New York Penal Law § 15.20. The Court of Appeals rejected that argument. See Marrero, 507 N.E.2d at 1068.  

24. Marrero was in fact convicted and his conviction upheld on appeal against various challenges. See id.  


26. See, e.g., id. at 139. See also Livingston Hall & Selig J. Seligman, Mistake of Law and Mens Rea, 8 U. CHI. L. REV. 641, 647 (1940) (arguing that any general defense of ignorance of law should not extend to an actor who realizes that his act “was morally wrong according to the mores”); Peter Westen, Two Rules of Legality, 26 LAW & PHIL. 229, 258-59 (2007); Douglas Husak, Culpability and Mistake of Law 3 (Sept. 9, 2008) (unpublished manuscript, on file with author). Bear in mind that insofar as Marrero was a loopholer, he was a failed one: He believed that he had discovered a loophole where none existed. A successful loopholer is one who finds what is indeed a loophole in the law. The successful loopholer is no less lacking in virtue than is the failed one, but he is nonetheless immune to criminal liability thanks to the principle of legality. His act or omission is not a crime, even though we are prepared to agree that it should be.
When should a mistake of fact excuse?

Now, most actors who believe that pq-ing is wrong are also apt to suspect that pq-ing is a crime. Indeed, that suspicion is what launches the loopholer on his search for the hoped-for loophole, as a result of which he confidently concludes, mistakenly but much to his satisfaction, that he can indeed pq without getting into trouble with the law. So what should the law do with the loopholer? Should it excuse him, as it ordinarily should when someone acts in ignorance of the law, or should it create an exception for him, censuring him despite his ignorance?

On the one hand, one might say that the loopholer is the “bad man” Holmes made famous, keeping in mind that the bad man could for Holmes nonetheless be a good citizen, because he obeyed the law, and obedience is all that good citizenship required. On the other hand, one might insist that the loopholer is not only a bad man, he’s also a bad citizen, because he disobeys his conscience or defies prevailing social norms, doing what he believed was wrong, or what he believed others believed was wrong. Who’s right depends on course on what it takes to make a citizen good. If a good citizen is, as some have said, a virtuous citizen, then Holmes’ detractors are on the side of the angels. But if, as Holmes said, a good citizen is an obedient citizen, even if not a virtuous one, then surely a bad man can be a good citizen, and if defiance inculpates, as the defiance account of the guilty mind supposes, then obedience—and obedience alone—should excuse. Indeed, can a liberal state legitimately insist that good citizenship demands not just good-faith obedience, but virtue as well?

Now consider Cheek v. United States. The defendant John Cheek was a pilot for American Airlines. He doubtless made a respectable living on the wages he earned in that job. He nonetheless failed to pay income tax on those wages, and he was duly prosecuted for tax evasion. The reason he gave for not paying his taxes was simple. The wages he earned as a pilot were not, he insisted, “income” within the meaning of the Internal Revenue Code, and having no other source of “income,” he defied no law when he failed to file a tax return. He had no “income” to declare.

27. Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 459 (1897).
28. Kahan argues that defining crimes in vague terms and refusing to recognize ignorance of the law as an excuse are both ways of deterring loopholers. See Kahan, supra note 25, at 139; see also Samuel W. Buell, The Upside of Overbreadth, 83 N.Y.U. L. REV. 1491, 1546-53 (2008). That may well be true, but I would prefer a world in which the law recognized ignorance of the law as an excuse while continuing to use vague language to define criminal prohibitions. An actor who encounters a criminal prohibition he believes to be vague—maybe it prohibits pq-ing or maybe it does not—will at least suspect that the law prohibits pq-ing, and if he does so suspect, he proceeds at his own risk if he decides to pq and in fact it turns out that the law does not permit pq-ing. But an actor who encounters a prohibition he believes without doubt permits pq-ing, but which in fact prohibits pq-ing, should be excused on the basis of his ignorance.
29. Cheek v. United States, 498 U.S. 192 (1991). Cheek also raised the following problem: What should happen to a defendant who realizes that pq-ing is a crime but believes that Congress lacked the constitutional authority to make pq-ing a crime, such that it should not have been a crime at all? See id. at 204-07. Such an actor admits to having acted in defiance of one authority, albeit in allegiance to what he believes is a higher one.
Cheek did not claim to have made any factual mistake on the way to his belief that his pilot wages were not income. Indeed, Cheek knew, or so it would seem, all the facts he needed to know in order to form the belief that his pilot wages were indeed "income" within the meaning of the Internal Revenue Code, including the "relevant provisions of the Code or regulations, of court decisions rejecting his interpretation of the tax law, of authoritative rulings of the Internal Revenue Service, . . . [and] of the personal income tax return forms and accompanying instructions," 30 all of which "made it plain that wages should be returned as income." 31 But then how could it be that Cheek nonetheless believed that his wages were not "income?" Maybe he was simply lying. But what if he was telling the truth? What sense, if any, could we make of his state of mind then?

Perhaps he was self-deceived. He wanted to believe that his wages were not income, and so despite everything the evidence was telling him, his reason failed to reach that conclusion, or his mind failed to register it, with desire being the culprit either way. If so, did Cheek possess a "guilty mind"?

It depends on the depth of his self-deception. If his self-deception slipped into delusion, then despite all the evidence available to him, he would have experienced nothing to alert him to the possibility that his wages were indeed income, and such full-blown ignorance of law should excuse. On the other hand, run-of-the mill self-deception is an irrational state of mind, and as such, constitutes a nagging source of anxiety. The self-deceived actor, we say, "knows the truth in his heart," and if he does, then he has some dim awareness of the truth, and assuming that he could have become fully aware of it, perhaps through the exercise of a little critical self-reflection, he should have. If Cheek honestly believed that his wages were not "income," but was at the same time dimly aware that they were, then his mind was still guilty, and he should have paid his taxes.

Mistakes of fact sometimes cause an actor to be ignorant of the law, and when they do, such ignorance should, all else being equal, constitute an excuse. An actor who acts in ignorance of his legal obligations does not defy the law and thus lacks a guilty mind. An actor's ignorance of the law can of course be attributable to causes other than ignorance of fact. Moral obtuseness and ignorance of prevailing social norms are two other causes that come quickly to mind. Should an actor be excused if his ignorance of the law traces its origin, not to a mistake of fact, but to these failings?

I'm inclined to say yes. An actor who commits a crime in complete ignorance of the law should be excused, period. If the cause of the actor's ignorance—whether that cause is ignorance of fact, morality, prevailing social norms, or whatnot—is itself a result of the actor having done or having failed to do something in defiance of the law's demands, then the actor can fairly be

30. Id. at 205.
31. Id.
punished for that defiant act or omission, assuming the law makes that act or omission a crime. Indeed, he might also be punished for any foreseen consequence that proximately results from that act or omission, assuming that we can rightly be held responsible for such consequences. But he cannot fairly be punished for the act or omission he does in ignorance of the law’s demands (unless that ignorance happens itself to be a foreseen consequence). With respect to that act or omission, he lacks a guilty mind.

B. From Mistake of Fact to Ignorance of Some Law

A mistake of fact might cause an actor, not to be ignorant of the fact that he is committing a crime, but ignorant instead of how great a crime he is committing. Consider Regina v. Prince. English law made it a crime to take a girl under sixteen out of the possession and against the will of the girl’s father or mother. The defendant Henry Prince believed that Annie Phillips, the girl he was taking out of the possession and against the will of her father or mother, was eighteen. It turned out she was fourteen, and as such, Prince did what the law demanded he not do: take an under-sixteen girl away from her parents without their consent.

Everyone agreed that Prince’s mistake as to the girl’s age was reasonable, and ordinarily such a mistake would have been a defense. Unfortunately for Prince, most of the judges hearing his appeal believed that he was nonetheless guilty of doing something he realized was wrong (albeit apparently not criminal); to wit, taking any girl out of the possession and against the will of her father or mother. As such he lost whatever exculpatory force his mistake of fact would otherwise have had. Taking an eighteen year-old girl might be less serious than taking a fourteen year-old, but it was still wrong, as Prince presumably realized. Prince chose to cross the line into wrongdoing (albeit not criminal wrongdoing), and having decided to take that step, he was on the line for the more serious (and criminal) wrong he committed.

Prince is commonly cited for what has become known as the “moral wrong” doctrine, which also comes in a legal variety, known appropriately enough as the “legal wrong” doctrine. Both doctrines are really canons of construction. If the mental state associated with an element of an offense is
uncertain, the fact that the elements with respect to which the actor is aware add up to a lesser wrong, either moral or legal, then (all else being equal) it matters not that the actor is unaware (even reasonably so) of the element in question, where that element makes his wrong a greater wrong. With respect to that element, strict liability applies. 35 Thus, although the statute under which Prince was charged would ordinarily have been read such that an honest and reasonable mistake with respect to the girl’s age would have precluded liability, the fact that anyone in Prince’s situation would (in the majority’s view) be doing wrong despite being reasonably mistaken about the girl’s age meant that the statute would instead be read to impose strict liability with respect to that element.

The moral and legal wrong doctrines reflect the idea that if you skate on thin ice, and you know the ice is thin, then don’t complain if you are unlucky enough to fall through. 36 Inasmuch as the doctrines provide support for strict liability, they have few modern-day defenders. 37 Most contemporary observers reject the doctrines because they lead to punishment disproportionate to culpability, where an actor’s culpability depends on what, if any, cognitive mental states he possessed with respect to each of the material elements of the offense charged. An actor who believes that all the elements exist is more culpable than one who believes that only some of them exist, and their respective punishments should reflect their differential culpability. Of course, this criticism begs the question: it presupposes a mentes reae conception of the

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36. See Kneller v. Dir. of Pub. Prosecutions, [1973] A.C. 435, 463 (Lord Morris) (“Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in.”); see also Douglas Husak, Strict Liability, Justice, Proportionality, in APPRAISING STRICT LIABILITY 81, 98-99 (A.P. Simester ed., 2005). This thin-ice principle bears some resemblance to the canon-law doctrine of versanti in re illicitea imputantur omni guae sequentur ex delicto, i.e., one acting unlawfully is held responsible for all the consequences of his conduct, which some commentators identify as the historical source of the felony murder rule, see Martin R. Gardner, The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present, 1993 UTAH L. REV. 635, 656-57, although not equivalent to it. See Guyora Binder, The Origins of American Felony Murder Rules, 57 STAN. L. REV. 59, 74 (2004).

guilty mind. But what if we say that an actor’s culpability consists simply in
the possession of mens rea, and mens rea consists in defiance of the law? Are
the moral and legal wrong doctrines defensible then?

It depends on what the actor must defy before he can be said to have acted
with a guilty mind. Must he defy the particular law he is charged with defying,
or does it suffice that he defy, as we might say, the Law? If culpability consists
in defiance of law, then Prince was punished more harshly than he deserved.
He was punished as if he had culpably defied the law against taking girls under
sixteen from the custody of their non-consenting parents, when in fact he
(merely) defied the moral law against taking girls of any age from the custody
of their non-consenting parents. In contrast, if culpability consists in defiance
of the Law, then Prince may or may not have gotten what he deserved. It
depends on what anyone who defies the Law deserves for such defiance, no
matter what particular law they defy. Without more, the defiance account of
culpability and the guilty mind lacks the resources to resolve this question one
way or the other.

The problem reflected in Prince persists to this day. Take, for example,
Bryan v. United States. The defendant Sillasse Bryan bought handguns from
people who had in turn purchased them from legitimate dealers in Ohio. After
filing off the serial numbers so the guns could not be traced back to the original
purchasers, Bryan sold them illegally on the streets of Brooklyn. He was
charged with “willfully” violating 18 U.S.C. § 922(a)(1)(A), which made it
unlawful to do so to engage, without a license, “in the business . . . of dealing in
firearms.” Everyone agreed that the government was required to prove that
Bryan realized he was violating the law when he sold the guns. But what law?
Was it enough to prove that he realized he was doing something—anything—
unlawful, or was the government required to prove that he realized he was
acting unlawfully because he was dealing in firearms without a license?

Like the court in Prince, the Court in Bryan was divided. The majority
held that the government was required to prove only that Bryan realized he was
violating the Law, and Bryan had conceded that point. The dissent, having
finally been forced to make resort to the rule of lenity, would have required the
government to prove that Bryan realized not only that he was violating the Law,

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38. If the relevant object of defiance is the Law, it would seem to follow that an actor who kills another
knowing that the law forbids so doing should be (retributively) punished the same as an actor who commits a
malum prohibitum offense knowing the law forbids so doing, since both commit the same crime: defiance of
the Law. Indeed, if mens rea consists in defiance of the Law, then defiance of the Law is the only “real”
crime anyone can commit.

39. For what it’s worth, Hampton apparently believed that Prince was not defiant, and so lacked mens
rea, see HAMPTON, Mens Rea, supra note 4, at 105 (“[I]t seems improper to claim that . . . a person [such as
Prince] is defiant of the law.”), which would in turn suggest that she took the object of defiance to be the law,
not the Law.


41. Id. at 196 (“[T]he willfulness requirement of § 924(a)(1)(D) does not carve out an exception to the
traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is
required.”).

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but also that he realized the law he was violating: it would have required the
government to prove that he realized his sales on the streets of Brooklyn were
illegal because they constituted dealing in firearms without a license.\footnote{Id. at 205 (Scalia, J., dissenting). The commentators also disagree on the proper resolution. Compare Wiley, supra note 16, at 1134 (arguing that Bryan was correctly decided), with Sharon L. Davies, The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance, 48 DUKE L.J. 341, 383-86 (1998) (suggesting that Bryan was wrongly decided).} Again, without more, the defiance account of \textit{mens rea} cannot settle the question, and for now, I too will leave it unsettled.\footnote{Wiley, supra note 16, at 1134.}

\section*{III. Should an “Unreasonable” Mistake of Fact Lose Its Exculpatory Force?}

An actor acts with \textit{mens rea} if and when he acts in defiance of the Law or law, as the case may be. A mistake of fact should therefore provide the basis for an excuse, all else being equal, if and when it causes an actor to act without such defiance. One might nonetheless insist that an actor who would otherwise be excused because he acts without defiance should forfeit that excuse if and because the mistake of fact causing his ignorance of the law is “unreasonable.” In other words, a mistake of fact should lose any exculpatory force it would otherwise possess if and because it is “unreasonable.”

Here I examine three accounts of the conditions under which an actor can fairly be held responsible for forming what is admittedly an “unreasonable” belief. I conclude that although we sometimes form unreasonable beliefs, we are never responsible for those beliefs, or to be more precise: we are never responsible for them when being responsible means being liable to censure in the form of state punishment. If so, then the fact that a mistake of fact can be characterized as “unreasonable” should give no reason to withdraw from that mistake any exculpatory force it would otherwise possess. But let me begin with some background on the law of mistakes of fact.

\footnote{42. Id. at 205 (Scalia, J., dissenting). The commentators also disagree on the proper resolution. Compare Wiley, supra note 16, at 1134 (arguing that Bryan was correctly decided), with Sharon L. Davies, The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance, 48 DUKE L.J. 341, 383-86 (1998) (suggesting that Bryan was wrongly decided).}

\footnote{43. I was asked at the symposium at which this paper was presented how the approach I offer would deal with the facts of the notorious Morgan case. See Dir. of Pub. Prosecutions v. Morgan, [1976] A.C. 182. My answer is that it depends on what those facts were. First, as for Morgan (the victim’s husband) he seems clearly to have realized that his wife was not consenting, and so was properly convicted of rape as an accomplice. Second, as for the three allegedly unwitting airmen, the answer would depend on whether they really did lack any suspicion that the victim was not consenting. If they harbored some doubt as to her consent, they were properly convicted of rape. But if not, they should have been acquitted, for insofar as they genuinely believed that the victim was (despite her resistance) consenting, they presumably harbored no suspicion that they were acting contrary to the law’s demands. Third, having said that, I would note that, despite their disagreement as to the applicable law, none of the Law Lords hearing the appeal believed that the three airmen would have been acquitted had the jury been told, not (as it was told) that it should acquit if its members believed that the victim believed (reasonably or not) that the victim was consenting. In other words, none of the Law Lords believed that the mistake in the jury instruction made any difference to the verdict in the case. See id. at 204 (opinion of Lord Cross); id. at 215 (opinion of Lord Hailsham); id. at 221 (opinion of Lord Simon); id. at 235 (opinion of Lord Edmund-Davies); id. at 239 (opinion of Lord Fraser).}
A. Mistake of Fact and Mentes Reae

Consider *People v. Navarro*.\(^{44}\) The defendant in the case took four wooden beams from a construction site, and he intended to keep them. He was charged with larceny, which makes the trespassory (i.e., non-consensual) taking and carrying away of the personal property of another, with the intent permanently to deprive the other of that property, a crime. The beams Navarro stole were in fact someone else’s, but Navarro believed that they were abandoned. As such, he did not believe that he was taking and carrying away the personal property of another. He believed that he was taking and carrying away no one’s personal property. Does his mistake afford him a defense to the charge?

The orthodox view is that it depends: it depends on what the statute under which he was prosecuted says with respect to what, if any, mental state the state must prove he possessed as to the fact that the beams were in fact the personal property of another. The court said that the State was required to prove that Navarro knew the beams were stolen, such that if in fact he believed that the beams had been abandoned, he was not guilty of the crime. His ignorance of the fact that the beams were in fact the property of another would have meant that the State had failed to carry its burden of proof with respect to a material element of the offense for which it was required to carry that burden. Consequently, Navarro would have had a valid failure-of-proof defense.

But what if the court had read the statute differently? What if some other mental state, instead of knowledge, had been the mental state the State was required to prove? If we look to the options the Model Penal Code provides, one possibility would have been that Navarro was “reckless” with respect to the fact that the beams were another’s property.

Yet figuring out precisely what it means to say that an actor recklessly believes that \(p\) is not so simple. Based on the Code’s definition of recklessness with respect to an attendant circumstance, an actor is reckless “when he consciously disregards a substantial and unjustifiable risk that the material element exists.”\(^{45}\) Such an actor is presumably one who actually believes that not-\(p\) (or at least does not believe that \(p\)) while at the same time believing that a substantial and unjustifiable risk exists that \(p\). As it turns out, what it means to say that an actor holds a reckless belief depends on whether one emphasizes the substantiality of the risk that \(p\), or its unjustifiability.

If we emphasize the substantiality of the risk that \(p\) and think about substantiality in terms of the actor’s confidence in the truth of \(p\), or conversely in terms of his doubts about \(p\), it makes perfectly good sense to say that an actor believes that not-\(p\) but at the same time harbors some doubt and suspects that

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An actor need not wait until he is absolutely certain about something before he can intelligibly be said to believe it. Thus, Navarro would have been reckless with respect to the fact that the beams were another’s property if he believed that they were in fact abandoned, but nonetheless harbored some doubt with respect to that fact, though not so much so that it would no longer make sense to say that he believed that they were abandoned.

But what if we emphasize unjustifiability? Now we have a problem. If we emphasize the unjustifiability of the risk that \( p \), we are presumably to imagine an actor who believes that not-\( p \) and at the same time believes that an unjustifiable risk exists that \( p \). In other words, we are presumably to imagine that Navarro believes that the beams are abandoned and at the same time believes that an unjustifiable risk exists that the beams are not abandoned. In still other words, we are to imagine that Navarro believes that the beams are abandoned and at the same time believes that he ought to believe (presumably on epistemic grounds alone) that they are not abandoned.

If that sounds like an irrational state of mind in which to find oneself, it is. It describes an actor in a state of what might be called epistemic akrasia. According to some, such a state is merely irrational; according to others, it’s not only irrational: it’s conceptually impossible. For now, I will leave this issue aside, noting only that an actor who is reckless with respect to the fact that \( p \) is probably best understood as one who believes that not-\( p \) while at the same time harboring a suspicion (in contrast to a full-blown belief) that \( p \).

The idea that an actor could be reckless with respect to an attendant circumstance was an innovation of the Model Penal Code, unknown to the common law. At common law the principal distinction was between reasonable mistakes and unreasonable ones. (The Code draws the same distinction in terms of non-negligent mistakes and negligent ones). If a legislature wanted to make an unreasonable mistake a failure-of-proof defense, so be it. But in the absence of such a legislative command, a mistake was a defense only if it was reasonable. The law has ever since been trying to figure out what it means to say that an actor’s mistaken belief that \( p \) was reasonable or not.
B. Responsibility for Unreasonable Beliefs

Let me begin with an assumption: Characterizing an actor’s belief as “unreasonable” is another way of saying that the belief was “unjustified,” or in other words, that the actor ought not to have possessed or formed that belief, and that he should have possessed or formed some other cognitive attitude toward the relevant proposition instead. Thus, if Navarro’s belief that the beams were abandoned, and thus his ignorance of the fact that they were the property of another, was unreasonable, then he ought not have formed that belief: he was wrong to have done so.

Notice that this way of talking presupposes that we have epistemic obligations, i.e., obligations to form this or that cognitive attitude, and that we can be held responsible and subject to blame when we fail to honor those obligations. Indeed, according to one prominent school of thought, we have but one epistemic obligation: to form beliefs that fit our available evidence. An actor who forms a belief that does not fit his evidence breaches this epistemic obligation, and as such, his belief can then, but only then, be characterized as “unjustified” or “unreasonable.”

But if ought implies can, then an actor who ought to believe that \( p \) (because his available evidence fits \( p \)), but in fact believes that not-\( p \), can be held responsible for failing to believe that \( p \) only if he could have believed otherwise than he actually believed. Thus, an actor can be held responsible

53. This school of thought is known as evidentialism. Evidentialism claims that “[d]oxastic attitude D toward proposition p is epistemically justified for S at t if and only if having D toward p fits the evidence that S has at t.” Earl Conee & Richard Feldman, *Evidentialism, in EVIDENTIALISM: ESSAYS IN EPISTEMOLOGY* 81, 81 (2004). Moreover, “being epistemically obligatory is equivalent to being epistemically justified.” *Id.* at 88. See also JONATHAN E. ADLER, BELIEF’S OWN ETHICS (2002); Anthony Robert Booth, *Two Faces of Evidentialism*, 67 ERKENNTNIS 401 (2007); Allen Wood, *The Duty to Believe According to the Evidence*, 63 INT’L J. PHIL. RELIGION 7 (2008).

54. This analysis of epistemic justification is *synchronic*: It is based on the evidence available to the actor at time \( t-1 \). As such, it excludes the possibility of characterizing an actor’s belief at \( t-1 \) as “unjustified” or “unreasonable” because that belief was the result of some prior wrongful choice the actor made for which he might be responsible and blameworthy. See, e.g., Hilary Kornblith, *Justified Belief and Epistemically Responsible Action*, 92 PHIL. REV. 33, 34 (1983); Mark Leon, *Responsible Believers*, 85 MONIST 421 (2002); Holly Smith, *Culpable Ignorance*, 92 PHIL. REV. 543 (1983). These prior choices can range from failing to acquire or develop certain cognitive skills or habits, to failing to gather evidence, to (in the limiting case) failing to exercise what might be called doxastic self-control. See, e.g., Stephen P. Garvey, *What’s Wrong with Involuntary Manslaughter?*, 85 TEX. L. REV. 333 (2006). Yet insofar as the criminal law refuses to recognize an otherwise valid excuse because of some prior choice the actor made, respect for the legality principle would presumably require the law to spell out in advance the content of those forbidden choices.

55. Some arguments to the effect that we can be held responsible for our beliefs reject this principle: responsibility does not require the capacity to believe otherwise. We are responsible for our beliefs even though we could not have believed otherwise than we do because, so the argument goes, the ethics of belief is based on role obligations or aretatic obligations or something similar, and moreover, we bear responsibility for breaching those obligations even if we lack the capacity to believe otherwise than we actually do. See, e.g., Matthew Chrisman, *Ought to Believe*, 105 J. PHIL. 346, 358-66 (2008); Richard Feldman, *Modest Deontologism in Epistemology*, 161 SYNTHSE 339, 351 (2008) (role obligations); Hilary Kornblith, *Epistemic Obligation and the Possibility of Internalism*, in VIRTUE EPISTEMOLOGY: ESSAYS ON EPISTEMIC VIRTUE AND RESPONSIBILITY 231, 238 (Abrol Fairweather & Linda Zagzebski eds., 2001). The only thing I
for believing that not-\(p\), where the evidence available to him at time \(t=1\) supports the formation of the belief that \(p\), if he had at that time the capacity to believe that \(p\). Assuming that the evidence available to Navarro supported the formation of the belief that the beams were not abandoned, but Navarro nonetheless believed that they were, his belief is fairly characterized as unreasonable or unjustified: he was wrong to believe as he did. But Navarro is responsible for that breach of his epistemic obligation only if he could have formed the belief that they were not abandoned. Could he have?

If determinism is true, then the answer is no. Navarro could only have formed the belief he actually formed, at least in the world as it actually existed at the time he formed the belief that the beams were abandoned. Indeed, if we assume that determinism is true, then no one could ever have believed otherwise than he actually believes, and as such, we might say that no one is ever responsible for what he believes. Yet sometimes we do hold people responsible for what they believe when we believe they hold beliefs that they ought not. We blame them for believing this or not believing that. Consequently, if we want to make sense of that practice, we need some other account of what it means to say that an actor could have believed otherwise than he actually believed: an account that permits us to say that an actor could have believed otherwise than he actually believed despite the truth of determinism.

One analysis of the language of capacity is a simple counterfactual or conditional analysis. If we assume the truth of determinism, when we say that an actor could have done otherwise, we do not mean that the actor could have done otherwise in the actual world: determinism rules out that possibility. Instead, we mean that he could have done otherwise if \(a\). So, for example, the traditional compatibilist analysis of what it means to say that an actor could have done otherwise, and thus the traditional compatibilist analysis of what is needed to hold an actor responsible for his actions, says that an actor is responsible for \(\phi\)-ing if he could have done otherwise, and he could have done otherwise if he had chosen to do otherwise, i.e., \(a = \) the actor’s choice to do otherwise.\(^5\)

The same analysis applies mutatis mutandis to an actor’s capacity to believe otherwise. An actor is epistemically obligated to believe that \(p\) if and

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\(^5\) This simple counterfactual analysis is too simple, but I believe it suffices for present purposes. For more subtle analyses of what it means to say that an actor could have done (or believed) otherwise, see Michael Smith, Rational Capacities, or: How to Distinguish Recklessness, Weakness, and Compulsion, in ETHICS AND THE A PRIORI 114 (2004); Kadri Vihvelin, Free Will Demystified: A Dispositional Account, 32 PHIL. TOPICS 427 (2004). See also Bernard Berofsky, Ifs, Cans, and Free Will: The Issues, in THE OXFORD HANDBOOK OF FREE WILL 181 (Robert Kane ed., 2002).
because the evidence available to him supports the formation of the belief that \( p \). If an actor believes that not-\( p \) in breach of his epistemic obligation to believe that \( p \), he is responsible for believing that not-\( p \) if and because he could have believed that \( p \), and he could have believed that \( p \) if \( \alpha \), where \( \alpha \) identifies some difference between the actual world in which the actor believes that not-\( p \) and some possible world in which he believes, as he is obligated to believe, that \( p \).

With these preliminaries in place, let me describe three accounts that attempt to explain when and why an actor who believes in breach of his epistemic obligation to form beliefs that fit his available evidence (and who thus forms an unreasonable or unjustified belief) is responsible for that breach, because he could have believed otherwise. What distinguishes these accounts from one another is the difference they describe between the actual world in which the actor believes that not-\( p \) (in breach of his epistemic obligation) and the counterfactual world in which he believes that \( p \) (in conformity with that obligation). In other words, what distinguishes the three accounts is the value that each assigns to \( \alpha \).

1. Choice

One might say that an actor is responsible for failing to form the belief that \( p \), when the evidence available to him supported the formation of that belief, if and because he could have chosen to believe that \( p \). An actor is responsible for what he believes for the same reason he is responsible for what he does: he is responsible because he could have chosen otherwise. Although he could not have believed otherwise than he did in the actual world (just as he could not have done otherwise in that world), he is nonetheless responsible for what he believes because in the relevant counterfactual world he chooses to believe that \( p \). On this account, Navarro is responsible for believing that the beams were abandoned, when the evidence available to him supported the belief that they were not, because in the relevant counterfactual world he chose to believe, and so did believe, that they were not abandoned.

But this account never gets off the ground. It presupposes that we can directly control our beliefs, or that we can directly will what we believe, in the same way that we can choose to act. Yet that presupposition is false.57 Our

57. This claim is in fact a matter of considerable debate in the philosophical literature. Compare Bernard Williams, Deciding to Believe, in PROBLEMS OF THE SELF 136 (1973) (arguing that we cannot choose to believe); William Alston, The Deontological Concept of Epistemic Justification, 2 PHIL. PERSP. 257 (1988) (same); Neil Levy, Doxastic Responsibility, 155 SYNTHESE 127 (2007) (same), with Carl Ginet, Deciding to Believe, in KNOWLEDGE, TRUTH, AND DUTY: ESSAYS ON EPISTEMIC JUSTIFICATION, RESPONSIBILITY, AND VIRTUE 63 (Matthias Steup ed., 2001) (arguing that we can choose to believe); Mark Heller, Hobartian Voluntarism: Grounding a Deontological Conception of Epistemic Justification, 81 PAC. PHIL. Q. 130 (2000) (same); Sharon Ryan, Doxastic Compatibilism and the Ethics of Belief, 114 PHIL. STUD. 47 (2003) (same); Matthias Steup, Doxastic Freedom, 161 SYNTHETE 375 (2008) (same). For responses to those who claim we can directly control our beliefs, see Andrei A. Buckareff, Compatibilism and Doxastic Control, 34 PHILOSOPHIA 143 (2006) (responding to Ryan) [hereinafter Bukareff, Doxastic Control]; Andrei A. Buckareff, Doxastic Decisions and Controlling Belief, 21 ACTA ANALYTICA 102 (2006) (responding to
actions respond directly to our wills, but our beliefs do not. On the contrary, when all goes well, our beliefs respond only to the world, i.e., our evidence, as they usually should. Believing is not like acting. Believing is like vomiting.\textsuperscript{58} We can indeed do things that might induce vomiting (should the need arise), just as we can do things that might cause us to form this or that belief.\textsuperscript{59} Nonetheless, we cannot vomit in the same way that we can raise an arm, nor can we form beliefs in that way. We cannot directly will to vomit, and we cannot directly will to believe.

Navarro did not choose directly to believe that the beams were abandoned. Nor could he have chosen directly to believe that they were not. A possible world might exist in which we do have the will to believe, but if so, that world is very distant from ours. If Navarro is responsible for failing to believe that the beams were the property of another, then the locus of his responsibility must be found somewhere other than in his choice directly to believe that they either were or were not someone else’s property, because he had no such choice.

2. Orthodoxy

Turn now to the law’s own account (such as it is). When jurors are asked to decide if an actor’s belief is reasonable or not, the law gives them little guidance, usually not much more than: “Convict if you believe that a reasonable person in Navarro’s situation would not have believed the beams were abandoned; acquit if you believe that a reasonable person in Navarro’s situation would have believed that they were abandoned.” Students of the criminal law usually say that the answer one gives depends on how far the law should go in “subjectivizing” the reasonable person.

When a subjectivist imagines the reasonable person, he imagines someone more or less like the defendant, and as such, subjectivists are more inclined than objectivists to say that a defendant’s false belief is one for which he should not be held responsible. In contrast, when an objectivist imagines the reasonable person, he imagines someone stripped of whatever properties distance him from some ideal of rationality and vested with whatever properties are needed to bring him closer to that ideal, and as such, objectivists are more inclined than subjectivists to say that the defendant’s false belief is one for which he should be held responsible.

\textsuperscript{58} See Buckareff, Doxastic Control, supra note 56, at 149. Or maybe digesting: An actor’s “responsibility for maintaining her own health means that she is responsible for the type of digester she is, but [s]he is not responsible for this token digestion.” Brian Weatherson, Deontology and Descartes’ Demon, 105 J. Phil. 540, 541 (2008).

\textsuperscript{59} One can also choose to accept a belief one holds, but accepting is not believing. See L. JONATHAN COHEN, AN ESSAY ON BELIEF AND ACCEPTANCE (1992).
Once we conjure the reasonable person, we then ask the counterfactual question: Would the reasonable person have believed that \( p \), assuming the evidence available to him supported the formation of that belief, as did the evidence available to the defendant? The answer might seem obvious: Of course the reasonable person would have formed that belief. The reasonable person always and only forms beliefs that fit his evidence. But the more one subjectivizes the reasonable person, the less “reasonable” the reasonable person may become. In any event, if the reasonable person would have believed that \( p \), then defendant could have believed that \( p \) in the counterfactual world in which he is the reasonable person. The defendant’s belief that \( \neg p \) is therefore “unreasonable,” and labeling his belief “unreasonable” can be understood as the law’s way of saying that the actor should have believed that \( p \) (because the evidence available to him supported its formation), and moreover, that he is responsible for failing to believe that \( p \).

For example, imagine that Navarro has a passion for wooden beams. Collecting them is his life’s one joy. When Navarro came across the beams, all the evidence available to him at the moment he took them supported the formation of the belief that the beams were not abandoned. Navarro nonetheless formed the belief that they were. Perhaps in order to avoid the anxiety he would experience if he did not take the beams, his desire to believe that the beams were abandoned directed his mind to attend to certain features of the situation and ignore others, such that he ended up actually believing that the world was as he wanted it to be: the beams were abandoned, and he could take them for his collection without consequence.

In order to decide whether or not Navarro was responsible for believing that the beams were stolen, the orthodox account instructs us to ask, among other things, whether Navarro’s passion for wooden beams—a passion but for which he would not have believed the beams were abandoned—is a property he shares with the reasonable person. Is the reasonable person a beam-lover? If not, then perhaps the world we are to imagine is one in which Navarro encounters the beams, but with the single difference being that he no longer possesses his passion for them. We then ask whether, stripped of his passion, he would have believed that the beams were abandoned. If not, then his belief that they were abandoned is deemed “unreasonable,” which again is to say that he should not have believed that they were abandoned, and moreover, that he is responsible for forming the belief that they were abandoned.

Unfortunately, the law’s account of the counterfactual world the jury is asked to imagine in order to decide whether or not an actor had the capacity to form the belief he should have formed (but did not) has one big problem: indeterminacy. The law simply does not say which facts in the actual world do not exist in the counterfactual world, nor does it say which facts that do not exist in the actual world exist in the counterfactual one. On the contrary, it avoids the issue. All we know is that the reasonable person in the
In other words, the law assigns no value to \( a \). It punts \( a \) to the jury.

Moreover, according to some, this indeterminacy goes deep indeed. Not only does the law not describe the relevant counterfactual world, it can’t, at least not in any principled way, because no such way exists by which to fix the facts of the counterfactual world. Any proposal to exclude this fact, but not that one, or to include this fact, but not that one, is bound to be arbitrary, or so the argument goes. That leaves only the extremes: the actual world in which the reasonable person is the defendant, and a counterfactual world in which the reasonable person is the model of rationality. Unfortunately, both these extremes lead nowhere.

If the relevant world is the actual world, then no one will ever be held responsible for believing in violation of his epistemic duty to form beliefs that fit the available evidence, because in the actual world no one has the capacity to believe otherwise than he actually believes. That’s why the analysis of capacity needed to proceed in counterfactual terms in the first place. But if the relevant world is a counterfactual one in which the defendant has been transformed into the model of rationality, we will end up having made no progress. We turned to counterfactuals in order to determine if and when an actor who forms beliefs in violation of his epistemic duty to form beliefs that fit his available evidence could be held responsible for that breach because he could have believed otherwise. But if the actor in the counterfactual world is ideally rational, he never breaches his epistemic duty to form beliefs that fit his evidence. As such, a counterfactual world populated with an ideally rational agent cannot help us answer the question we want to answer.

If we want to be able to say that sometimes we should be held responsible when we believe contrary to our evidence, but not all the time, then the truth must lie somewhere in between these two extremes.

3. Indifference

The next account can be understood as an effort to find this middle ground, and so too as a reply to the charge of deep indeterminacy. The challenge is to provide a principled reason for excluding some facts about the actual world from the counterfactual one, but not others; or inserting some facts into the counterfactual world not present in the actual one, but not others. According to what might be called the indifference theory, the one and only difference that exists between the actual world and the counterfactual one is that the actor in the actual world does not care enough about his fellow citizens,
WHEN SHOULD A MISTAKE OF FACT EXCUSE?

whereas in the counterfactual world he does care.\textsuperscript{62} Insofar as the actor in the actual world is indifferent to interests the criminal law protects, he is in the relevant counterfactual world transformed into someone who does care; otherwise, he is the same in both worlds. Furthermore, the difference between caring and not caring is, so the argument goes, a principled one.

For example, if Navarro failed to form the belief that the beams were not abandoned because and just because he could have cared less about the property rights of others, the indifference account asks us to imagine a counterfactual world alike in every respect to the actual world at the moment Navarro formed the belief that the beams were abandoned, except for the fact that counterfactual Navarro does care about those rights. If counterfactual Navarro, now vested with due concern for the property rights of others, would have realized that the beams were not abandoned, then according to the indifference account, Navarro in the actual world could have likewise so believed, and insofar as he should have so believed, he is responsible for not so believing.

The indifference account holds an actor responsible (and prima facie liable to punishment) for forming a belief at odds with his available evidence, and thus in breach of his epistemic duty to form beliefs that fit his available evidence, if and because he formed that belief (and failed to form the belief he should have formed) because he was in the relevant sense indifferent. The problem with this account is that when it ends up holding an actor responsible for what he believes it does so because it holds him responsible for who he is. It ends up punishing him for \textit{being} indifferent. Let me explain.

Go back to Navarro. Navarro is of course punished because he took the beams. Had he not taken them, he would not have found himself in any trouble. But he took the beams only because he believed that they were there for the taking, and he only believed that they were there for the taking because (we are now assuming) he did not care as much about the property rights of others as he should have. Consequently, the indifference theory would say that Navarro was responsible for believing the beams were abandoned because he was indifferent—perhaps characteristically or perhaps on this occasion alone—and for being unlucky enough to find himself in a situation in which his indifference caused the formation of a belief but for which he presumably would not have taken the beams. In the end, therefore, he is punished because

he was indifferent, and unlucky enough to find himself in a situation in which
his indifference blinded him to the truth.

In the final analysis, the indifference account punishes a person for being
indifferent. True, the person must do something that constitutes a crime, but he
remains blissfully unaware of the fact that what he is doing is a crime. If and
when the law condemns him, what is it condemning him for? The honest
answer would seem to be that he is in the end condemned for having been
indifferent, and punishing a person for being indifferent is punishing him for
who he is. But that is something the criminal law of a liberal state should not
do.

We can and properly do in our everyday lives blame and criticize one
another for the vices that corrupt our characters, and corrupt characters can
cause us to form beliefs we would not otherwise form. The indifference
account explains these everyday features of our lives. It constitutes one, and
probably the best, explanation for why we do in fact hold people responsible
and blame them for the beliefs they possess when we believe that they should
have believed otherwise.

But blame and criticism without more is one thing. Punishment is
another. We can and do blame and criticize without intending to cause
suffering, but suffering is precisely what the state intends when it punishes. It
constitutes the medium through which the state conveys its condemnation.
Because punishment ups the condemnatory ante, it should be reserved for the
wrongs we choose to do, not the vices we possess, and we do not directly
choose to form beliefs at odds with our evidence in breach of our epistemic
duty. We directly choose none of our beliefs.

IV. CONCLUSION

Let me reiterate two points in closing. First, a mistake of fact should
excuse if and because it causes an agent to be ignorant of the law he is charged
with having violated, even if that mistake is in some plausible and legitimate
sense unreasonable. We may violate our epistemic duty to form beliefs that fit
our available evidence, but the state should not blame us for any such breach, at
least not where blaming means punishing. Second, even if the immediately
foregoing claim is wrong-headed, criminal law scholars should in any event
stop thinking about mistakes of fact as nothing more than failure of proof
defenses. They should start thinking of them again as excuses, and asking
when and why they excuse, if and when they do.