

Excusing Mistakes of Law

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<www.philosophersimprint.org/009002/>

EVEN A CURSORY LOOK AT THE CRIMINAL LAW will lead one to realize that despite the old adage, a person who has a mistaken belief about the law can, in our system at least, be excused from criminal liability on those grounds. There are whole categories of legal mistake that can, at least under certain conditions, excuse a defendant from criminal liability. To give just one example, consider the British case of *Regina v. Smith* (1974 (2 Q.B. 354)). With his landlord's permission, the defendant installed some speaker wire behind a wall in an apartment he was renting. When it came time to move out, he disconnected the wire. He was charged with the crime of damaging property belonging to another, a crime that requires the defendant to intend such damage, or to be reckless with respect to it. He falsely believed that the speaker wire belonged to him, when in fact the law granted it, in such cases, to the landlord. Things attached *to* a wall belonged to the tenant; things installed behind them, to the landlord. But Smith was mistaken about the legal rule. After an appeal, the defendant was acquitted; his mistaken belief about the law was enough to excuse him. So, when understood as a descriptive claim, the slogan that ignorance of the law is no excuse is simply false. Further, when the slogan is understood normatively — as a claim to the effect that no one who is ignorant of the law *should*, on those grounds, be excused — it is false as well. After all, the right verdict was reached in *Smith*, and for the right reason. But *Smith*, and other cases like it, does not seem to invalidate the thought that lies behind the slogan. Smith's mistake was not quite of the sort that we think it is attractive but mistaken to take as excusing him from criminal liability. There still seems, that is, a grain of truth to the slogan. This paper's aim is not to defend the claim that mistakes of law never excuse; that claim is simply false. Rather, the paper aims to vindicate the claim by identifying the truth that is groped for but not grasped by those who assert that ignorance of law is no excuse.

The theory of excuses is notoriously fraught with difficulties. In fact, it is not clear that there can be a true theory of excuses. It seems possible that there are many sufficient conditions for excuse but only messy disjunctive necessary conditions. Still, say that we could identify a principle of the form "If defendant *D* has a false belief that *p*

and _____, then D is excused”, and that the principle had the following feature: it is true whenever p is a non-legal proposition, but it is false quite often when p is a proposition about the law. Then it would follow that there is an asymmetry in the excusing force of mistakes of fact and law. If there is a principle like this, then although there may be other principles of excuse that apply promiscuously to mistakes of fact and law, there is at least one way in which mistakes of fact can excuse that doesn’t stretch naturally to mistakes of law. Providing such a principle is this paper’s aim. However, the issue that is raised by mistakes of law is of broad importance to moral philosophy. At its heart, the question concerns the conditions under which a person with false normative beliefs — beliefs concerning, for instance, what one is permitted to do — is excused on those grounds, and what the relationship is between such conditions and those under which false beliefs about non-normative matters excuse. And like any question concerning excuses, the underlying and driving issue concerns the nature of responsibility itself. To identify a valid principle of excuse that serves to explain the asymmetry between the excusing force of mistakes of fact and law is to identify something fundamental about the nature of responsibility, something that is illuminated by its asymmetrical relation to normative and non-normative error.

Section 1 describes and to some degree defends assumptions that are made in the ensuing discussion. Among other things, Section 1 discusses the relevance of the degree to which a defendant is responsible for making a mistake to the explanation of the asymmetry in the excusing force of mistakes of fact and law, concluding that it is not relevant to our purposes here. Section 2 examines the merits of the theory of excuse, and the accompanying explanation of the asymmetry, underlying the *Model Penal Code’s* treatment of mistakes of fact and law, an account which has a profound influence on the treatment of mistakes in the criminal law in the United States and elsewhere. Section 2 offers an argument against the *Model Penal Code’s* approach, an approach that is flawed despite the fact that the principle of excuse to which it appeals is valid.

Section 3 offers a principle of excuse that can be used to explain the asymmetry in the excusing force of mistakes of fact and law and discusses the relation between that principle and the principle discussed in the preceding section. In Section 3, it is argued that some excuses operate by indicating that the defendant deliberated in an acceptable manner — by indicating, that is, that the defendant was committed to acceptable principles for extracting reasons from facts and acceptable principles for weighting the reasons he recognizes. It is then shown that false normative beliefs, such as false beliefs about the law, often corrupt, or reflect corruption in, the deliberative process itself by corrupting, or reflecting corruption of, the very principles for recognizing and responding to reasons that constitute the agent’s deliberative processes. By contrast, false factual beliefs often lead agents to the wrong conclusions about what to do by serving as corrupted *inputs* to deliberation impeccable in itself. The result is that a false belief about a factual matter can excuse by exhibiting that the agent was deliberating properly, while false normative beliefs are rarely capable of excusing in that way, since the mere fact that the agent has them often shows that his deliberation was, in itself, corrupt. The resulting explanation of the asymmetry in the excusing force of mistakes of fact and law shows what is true in the false slogan about ignorance of the law, but it shows something also about the centrality to both moral and legal responsibility of the fundamental principles governing the deliberative process of the responsible agent. Finally and importantly, the explanation goes some of the way towards vindicating an answer to one of the most fundamental questions about responsibility: why is the actor’s mental state of such importance to responsibility? Although it is not a complete answer, what emerges here is that mental states are often of importance to responsibility because they are either implicated by or incompatible with commitment to particular principles for the recognition and response to reasons for action. In the conclusion, however, another closely related reason why mental states matter to legal responsibility, in particular, is proposed.

1. Preliminaries

There are several concepts that will be employed in the ensuing discussion and that are in need of clarification.

What is a Mistake?

The discussion to follow equates mistakes with false beliefs. This is a departure, although a harmless departure, from the ordinary usage of the term 'mistake'. In ordinary usage, for instance, a person who reverses the digits of a phone number while dialing has made a mistake. But such a person might have no false belief: he has a true belief about what his friend's number is, a true belief about what he needs to do to dial that number, etc.; he simply fails to execute. Conversely, in ordinary usage, a person who weighs the evidence very carefully and reaches a warranted but false belief may have made no mistake; in ordinary usage, the term 'mistake' connotes some degree of inadvertency missing in such a case. It is quite possible that mistakes in the ordinary sense excuse under certain circumstances. But elucidating the conditions under which this is so is not the task here. The aim here is, rather, to determine conditions under which false beliefs about non-legal matters excuse and under which false beliefs about legal matters do not or rarely do.

Further, and importantly for our purposes here, mistakes are individuated in the same way that beliefs are individuated: by their content. Different false belief, different mistake, and conversely. So, the defendant in *Regina v. Smith* made two mistakes of law. He made a mistake about property law, in falsely believing that the speaker wire belonged to him; and he made a further mistake about criminal law, in falsely believing that the act of ripping the wire from the wall was legal. It is true that his mistake of criminal law arose from his mistake of property law — he thought what he was doing was legal because he thought that the wire was *his* — but, nonetheless, these are two different mistakes and they might have different excusing force. It is possible, for instance, that the first excuses only because it gives rise to the second — in which case, it is the second that really undermines the

defendant's desert of punishment for the crime. Or it could be that the second does not excuse at all, but that the first does for some independent reason.¹

What is the Difference Between a Legal and a Factual Mistake?

A false belief that *p* is a mistake of fact if *p* is a factual proposition, and it is a mistake of law if *p* is a legal proposition. If the law would need to say something or other for a proposition to be true, then the proposition is legal; if not, then it is factual. So, propositions concerned with what is legally prohibited, permitted, or required are legal propositions; prohibition, permission, and requirement are determined at least in part by what the law says. Propositions not concerned with what is prohibited, permitted, or required are often legal as well, as when they employ a predicate that applies to a particular in virtue of what the law says, such as the predicate 'belongs to Smith', which applies to a thing attached to a wall in virtue of what the law says, and which therefore fails to apply to the speaker wire. Often, especially when a person has a false belief about the application of a legally defined predicate, the person makes a mistake of law only because he has made some mistake of fact. The person who picks up the wrong bag at the airport, simply because it is identical to the one he owns, has the false legal belief that the bag is his. He makes this mistake of law because he has another, distinct, false factual belief to the effect that the bag he picks up is the same one that he checked.

One who equates mistakes with false beliefs, individuates beliefs by content, and at the same time classifies mistakes as factual or legal on the basis of the classification as legal or factual of the believed proposition, must be very careful in identifying the false belief that a

1. The discussion to follow does not distinguish between mistake and ignorance. There is a distinction here: it is possible to be ignorant of some matter without having any belief one way or another about it, but a mistake about a particular matter requires a false belief. It is possible that the mere absence of a certain belief excuses; ignorance involving no mistake might excuse. But if a mistake excuses on such grounds it must be because the false belief in question results in the absence of some other belief, an absence that excuses.

particular defendant actually cites in offering an excuse. The relevant false belief is not always the one that the defendant explicitly reports. When a defendant says, of the bag that he took, “I thought it was mine”, he is explicitly reporting a false legal belief, for the predicate “is mine” applies to an object partly in virtue of what the law says. But is this defendant saying in his defense that he should be excused on the grounds that he falsely believed the legal proposition that, say, anything abandoned for an hour has no owner? Or is he saying that he should be excused because, for instance, he falsely believed that it was the same bag that he checked some time earlier? The statement made in offering the excuse — “I thought it was mine” — is ambiguous between these two claims, and so the statement is ambiguous between offering a mistake-of-law excuse and offering a mistake-of-fact excuse. That is, we must be very careful to distinguish the belief the defendant reports in offering his excuse — in this case, a legal belief — from the belief that putatively excuses; the two are often different, and it is often the case that one is factual and the other legal.

The Relevant Principle of Excuse

In general, we decide whether or not to honor a particular mistake excuse by first identifying the false belief that the defendant is hoping will serve to excuse him and then by invoking a valid principle of excuse the antecedent of which is true when employed by appeal to the false belief identified. As noted already, the term ‘principle of excuse’ will be used to refer to any statement of the form “If defendant *D* has a false belief that *p* and _____, then *D* is excused”. Some of these principles are true, some are false, depending on how one fills in the blank. Different principles of excuse are distinguished from one another by the way in which the blank is filled in. What we are searching for here is a way of filling in the blank that results in a statement the antecedent of which is true more often when *p* is factual than when *p* is legal. Call this requirement “Asymmetry”. But a principle that meets this demand is not all that we are searching for; some principles of excuse that meet Asymmetry will not serve.

First, the relevant principle of excuse must be both true and justified. Further, it will be assumed that a principle of excuse is justified only if it identifies in its antecedent a condition the satisfaction of which undermines the agent’s desert of punishment. A principle that says, “If a defendant has a false belief that *p* and *it would result in chaos to convict him*, then he’s excused” is not justified in this sense for it fails to connect the having of the false belief with anything of relevance to an assessment of the defendant’s desert of punishment.² In short, the aim here is to identify some way in which those with false factual beliefs can be undeserving of punishment that does not extend to those with false legal beliefs.³ Call this requirement “Desert-Relevance”.

Further, the connection between the truth of the antecedent of the relevant principle of excuse and the absence of desert of punishment must be conceptual and intrinsic. To see this, consider a principle of excuse that fails to meet this criterion:

If defendant *D* has a false belief that *p* and *D* has held this belief since he was a child, then *D* is excused.

2. The effort to explain why ignorance of law does not excuse offered by John Austin falls into this category and is acknowledged as such by Austin. See John Austin, *Lectures on Jurisprudence*, New York: Burt Franklin Press, 1970, 169–77. Oliver Wendell Holmes’ approach also falls into this category, although the goods that Holmes takes to outweigh punishment of the undeserving are different from those appealed to by Austin. See Oliver Wendell Holmes, *The Common Law*, Boston: Little, Brown, 1881, Lecture 2, 48–9. However, Holmes offers particular, and flawed, accounts of “justice” and “desert” under which a punishment that results in more good than harm is just, and under which every just punishment is deserved. Thus, he would characterize himself as meeting the criterion for the truth of a principle of excuse imposed here. But, since his analyses of justice and desert are so clearly flawed, his view fails to meet this criterion regardless of what he would think.
3. Jerome Hall’s well-known effort to explain the asymmetry in the excusing force of mistakes of fact and law depends on showing that mistakes of law are necessarily irrelevant to desert of legal punishment, given the nature of a legal system. See Jerome Hall, *General Principles of Criminal Law*, New York: Bobbs-Merrill, 1960, pp. 376–414. Were it successful, Hall’s explanation would satisfy the demand on a solution made here. However, Hall’s argument has been successfully refuted by George Fletcher. See George Fletcher, *Rethinking Criminal Law*, Oxford: Oxford University Press, 2000, pp. 733–4.

It's a fact that children have many fewer beliefs about the law than adults. Thus, given this further fact, many fewer mistakes of law than mistakes of fact excuse under this principle. But this is clearly not the sort of principle that we are looking for; it simply cannot be that, if we think there's something right in the false slogan that ignorance of law never excuses, we have, in the background of our thoughts, the idea that children don't make many legal mistakes. The problem is that the condition added by the principle — that the belief have been held since childhood — bears no *intrinsic conceptual relation* to desert of punishment. This isn't to say that it bears no relation to desert: beliefs held since childhood are less likely to have been questioned than those formed when one's capacity to question is more fully developed, and that might have some relevance to what one deserves. The point is that we need to appeal to something else besides the fact that the belief was held since childhood — in this case, the idea that such beliefs haven't been subject to skeptical reflection — in order to explain why the condition cited by the principle is relevant to desert. What this suggests is that it is that other thing that is doing the work, and not the condition mentioned in the principle. The principle that we seek cannot be like this. Rather, the principle itself must identify something that is fundamentally undermining of desert and not undermining simply because it tends to be found together with something else that undermines desert. Call this requirement "Explanatory Power".⁴

And, finally, the asymmetry of application of the relevant principle of excuse to mistakes of fact and law must not be a trivial result of the content of the relevant principle's antecedent. Consider, for instance, principles of excuse of the following form:

If defendant *D* has a false belief that *p* and *p* is not a legal proposition and _____, then *D* is excused.

4. It is possible that what is being demanded here is a synthetic a priori principle. However, for those who think that there can be no such principles, it is sufficient that the principle in question should be explanatory in itself and not explanatory because something else provides the explanation for why the condition cited in the principle undermines desert.

Even if we were to fill in the blank here with something that met the criteria of Desert-Relevance and Explanatory Power, the principle would still fail to solve our problem. If the principle of excuse is to serve, the conditions under which a mistaken belief excuses that are specified by the principle must be logically compatible with the believed proposition's being either factual or legal. Principles of excuse that specify that the believed proposition is not legal violate this criterion. Call this requirement "Non-Triviality".

Only Inculpable Mistakes?

A principle of excuse that meets these four criteria will serve to identify the grain of truth in the false slogan that ignorance of law never excuses and will, at the same time, illuminate the different roles that factual and normative beliefs play in indicating and constituting the facts in virtue of which particular agents are responsible for wrongdoing. Now consider the following difficult question: Is a person who is responsible for *having* a false belief that would excuse, other things being equal, thereby justifiably denied an excuse? This question is important; for we often find ourselves faced with judging the responsibility of people with false beliefs who are at fault for having those false beliefs. However, we only need to answer this question if answering it is necessary to identifying a principle of excuse that meets our four criteria. And, in fact, it is not. Consider the following pair of principles of excuse:

X-Principle: If defendant *D* has a false belief that *p* and *X*, then *D* is excused.

Inculpable Mistake X Principle: If defendant *D* has a false belief that *p* and *D* is not responsible for having that false belief and *X*, then *D* is excused.

Would it be possible for *both* the *X-Principle* and the *Inculpable Mistake X-Principle* to meet our four criteria? Logically speaking, yes. For this to be the case, it would have to be that none of those criteria are met

in virtue of the clause saying that *D* is not responsible for having the false belief, or by virtue of the conjunction of that clause and *X*, but are met only in virtue of *X* itself. It must be, that is, that *X* is true less often when *p* is legal than when *p* is factual and not simply because *X*'s truth logically entails such an asymmetry; and it must also be the case that when *X* is true, *D*, for intrinsic and conceptual reasons, is undeserving of punishment. What this shows is that in order to meet our four criteria, we need not determine whether or not responsibility for making a mistake undermines that mistake's excusing force. To see the point, say that *X* were "D is a police officer". In determining if the *X*-Principle, with this value of *X*, serves to solve our problem, we have to ask if *X* is true less often when *p* is legal than when *p* is factual. (Perhaps police officers have fewer false beliefs about the law than the rest of us.) And we have to determine if there is an intrinsic and conceptual connection between being a police officer and being undeserving of punishment. (There probably isn't, but that, in any event, is what we need to determine). Now, it seems perfectly possible that we can answer both of these questions without knowing whether or not *D* is responsible for having the false belief that *p*. Perhaps the answers are "yes", perhaps "no", but the questions do not turn, necessarily, on the answer to the question of responsibility for having the false belief. Thus, *for the sake of determining if the X-Principle meets our four criteria (where X = "D is a police officer")*, we do not need to know if *D* is responsible for having the false belief that *p*.

Still, notice that a principle of excuse could meet the four criteria even if it is false. And, of course, it won't serve to solve our problem if it is false; to solve our problem we need a true principle that meets all four criteria. So imagine that the *X*-Principle is false while the Inculpable Mistake *X*-Principle is true, although both principles meet all four criteria. In that case, we still need not determine whether or not only inculpable mistakes excuse, in order to solve our problem here. We need only find a principle of excuse that meets the four criteria and which could be made true by adding the requirement that the defendant not be culpable for having made the mistake; it might be

true without that addition, in which case it solves our problem without any help. But so long as it is true with that addition, we need not answer the question of whether or not it is true without it.

To emphasize the point: this is not to say that even culpable mistakes excuse. It is to say only that so long as we can identify a principle of excuse that meets our four criteria without consideration of the question of culpability for making the mistake, and that is true when supplemented with a requirement of inculpability, our problem is solved. The principle of excuse appealed to in Section 3 meets this demand and so no position is taken here as to the relevance or irrelevance of responsibility for making the putatively excusing mistake.

2. The Model Penal Code's Approach

An argument purporting to show that a particular principle of excuse is true must do two things: it must identify a necessary condition of criminal liability, and it must show that the conditions specified in the antecedent of the principle of excuse entail that that condition is not satisfied. What is "criminal liability"? For our purposes, the following definition will serve:

A defendant *D* is *criminally liable* for a type of action *A* if and only if

- (1) *D* engaged in an act of type *A* in circumstances of type *C* with results of type *R*,
- (2) A valid statute specifies a criminal punishment for acts of type *A* in circumstances of type *C* with results of type *R*,
- (3) *D* was culpable for his conduct, and
- (4) *D* had no justification for his conduct.

The necessary conditions of criminal liability, then, are (1)–(4) and any other propositions that are entailed by (1)–(4). The entailed propositions will include propositions of both of the following forms: "*D* had a belief that not-*p*" and "*D* did not have a belief that *p*". That is, to be criminal liable there are both things that one must believe, and there

are beliefs that one must not have; some beliefs are part of the guilty mind, others are sufficient for innocence of mind. According to one appealing line of thought, a false belief that p excuses if a belief that not- p is necessary for criminal liability. This line of thought involves asserting, in other words, the following principle of excuse:

Mental State Principle: If D has a false belief that p , and if a belief that not- p is one of the necessary conditions for criminal liability for A -ing, then D is excused for A -ing.⁵

One of the legal mistakes made by the defendant in *Regina v. Smith*, but not the other, provides him with an excuse under this principle. Smith's false belief that the speaker wire was his provides him with an excuse because the belief that the speaker wire was not his is a necessary condition of culpability for the crime and is, therefore, a necessary

5. The Mental State Principle fails to accommodate cases in which a particular mental state is sufficient for innocence, even though no mental state excluded by it is necessary for guilt. The *Model Penal Code* makes provisions for cases of this sort in, among other places (*e.g.* MPC §230.1(1)), its account of the lesser evils defense. If the defendant believed, for instance, whether truly or falsely, that A -ing was necessary to avoid some very great evil, then (with some caveats) he is not criminally liable for what he did (§3.02). This is so even though such a defendant might very well have had all the beliefs that are necessary for desert of punishment. A defendant who destroys a shed while believing that it belongs to another and that he lacks consent to destroy it—the beliefs necessary for desert of punishment for destruction of property—is undeserving of punishment because his belief that he had to destroy it to prevent the spread of a fire is sufficient to block desert of punishment. Further, and importantly for our purposes, the *Model Penal Code* quite rightly allows that certain beliefs about the law, even false beliefs, are sufficient to block criminal liability even though they do not exclude any belief that is necessary. In particular, if the defendant believed that he was positively required by the law to A —that he had a legal duty to do so—then (with some caveats) he is not criminally liable for A -ing, even if he was mistaken (§3.03). In fact, even a belief that one's act is merely legally permissible can provide one with what's needed to avoid criminal liability if (with some further caveats) that belief was formed on the basis of reliance on some official legal proclamation (§2.04(3)). However, there is little reason to think that we find an asymmetry between mistakes of fact and law when it comes to conditions of this kind, hence these kinds of cases will not be discussed in detail in this section. However, the excusing force of legal mistakes in such cases is explained by the principle proposed in the next section of this paper.

condition of criminal liability for it. However, Smith's false belief that his act of tearing out the wire was not prohibited provides him with no excuse under the Mental State Principle. The reason is that the belief that what one is doing is prohibited is not a necessary condition of criminal liability for the crime. Imagine someone who knows that the speaker wire is not his but who has no beliefs one way or the other about the legality of what he is doing; he has given the question no thought at all and is not even disposed one way or the other concerning the legality of his conduct. Such a person is still deserving of punishment, for what matters to desert in this instance is just the awareness that one is damaging another's property.

Necessary conditions of responsibility generally, and not just of the species of responsibility that is criminal liability, fall into two broad categories. There are those that all responsible agents satisfy, regardless of what they are being held responsible for — perhaps certain basic capacities to recognize reasons for action fall into this category — and there are those that are particular to the acts for which the agent is being held responsible. In the latter category, think, for instance, of the peculiar form of wanton disregard for the value of human life characteristic of the worst kinds of murders. Such an attitude might be necessary to be deserving of the special forms of abhorrence that we save for those who commit such murders, but such an attitude is not a necessary condition of responsibility generally; many a thief, worthy of every form of censure that we reserve for thieves, grants human life the value that it deserves.

We find a parallel distinction in a legal context. A belief that not- p could be one of the necessary conditions of criminal liability for A -ing either because it is thought generally to be required for desert of punishment (it could be what might be called a "general condition of liability") or, because it is specified expressly or tacitly by a statute defining a crime (it could be a "statutorily-specified condition of liability"). The intention to commit a felony, which is required for burglary, is an example of a statutorily specified condition of criminal liability; sanity is an example of a general condition. A mistake of law could undermine

criminal liability by showing that one of the statutorily specified conditions fails to be satisfied; for that to occur, some statute simply has to require for punishment some belief that a person mistaken about the law lacks. But it is not plausible to think that a mistake of law could undermine criminal liability by showing that one of the general conditions for criminal liability is unsatisfied. The only plausible contender for a belief about the law that could be a general condition of liability is the belief that what one is doing is legally prohibited. Does every single person who is deserving of criminal punishment believe himself to be acting illegally? It does not seem likely. A person committing a murder, again, is doing something worth prohibiting in part because he disregards the value of another person's life, placing his good above the life of another. To say that he also needs to believe himself to be acting illegally if he's to be doing something deserving of criminal punishment is to elevate a reverence for the law beyond morally tolerable bounds. Further, some crimes, such as crimes of negligence, require no beliefs on the part of the defendant at all, much less the particular belief in the illegality of his conduct; often in cases of negligence, what matters to desert of punishment is what a reasonable person would have believed, not what the defendant actually believed.⁶ More often than not what is objectionable about conduct that deserves punishment isn't even in part that it is believed to be illegal by the actor. There are exceptions: many tax offenses, for instance, require that the defendant intended to evade taxes, an intention that would have required him to believe that what he was doing was not what the law required of him. And there are often good reasons for the exceptions: in the case of tax evasion, the complexity of the tax code virtually assures that many well-meaning tax payers will, every year, fail to pay as much as they owe. Precisely what distinguishes the person who underpays and who does not deserve punishment from the person who does deserve it is

6. At least under the *Model Penal Code* §2.02(2)(d), the fact that a reasonable person would have believed something is not sufficient for negligence. It must also be the case that a failure to have the belief marks a "gross deviation" from the standard of care of a reasonable person.

the awareness of the illegality of the act. But these exceptions are just that: as a general rule, desert of punishment does not require awareness of the illegality of what one is doing.⁷

It is important to see that what was just offered is not an *argument* for the claim that desert of criminal punishment does not require a belief that one is acting illegally; it was, rather, a set of considerations that make that claim seem plausible. (As we'll see, the claim will seem even more plausible by the end of the next section of this paper.) However, under the assumption that this claim is true, it appears that the Mental State Principle is true, meets the criterion of Non-Triviality, and meets the other three criteria that a principle of excuse must meet to solve our problem. It meets the criterion of Asymmetry since, as just indicated, at least one type of legal belief — the belief that what one is doing is illegal — is rarely a statutorily specified condition of criminal liability and is (probably) not a general condition. By contrast, there are always factual beliefs among the statutorily specified conditions and there are surely some among the general conditions. And, further, over a large class of cases, it meets the criteria of Desert-Relevance and Explanatory Power. While not all the beliefs that are required for criminal liability bear directly, and in obvious or reconstructable ways, on desert of punishment, the vast majority do. (Think, for instance, of the beliefs that accompany the felonious intent required for burglary, or those involved in the knowledge that one is underpaying required for tax evasion.) Most of the time, a belief is required for liability because defendants who lack that belief fail to exemplify the distinctively objectionable attitude involved in offenses of the sort in question. Since

7. In addition, absence of a belief that what one is doing is legal is not a general condition of criminal liability. Someone who falsely believes that the law allows him to physically injure another in order to express his religious beliefs is not thereby excused. The cases in which a belief in the legality of one's conduct is sufficient for excuse, even though it excludes no belief that is necessary for criminal liability, all involve stringent additional conditions. A person who derives his belief that he is acting legally from an official but faulty proclamation of the law, for instance, will be excused, but not a person who derives that belief from mistaken advice given to him by a lawyer. (More on official reliance in the next section of this paper.)

the vast majority of such beliefs are factual rather than legal, we find in these cases an asymmetry between the excusing force of mistakes of fact and law under the Mental State Principle, and we find an intrinsic conceptual connection between the belief that is excluded by the defendant's mistaken belief and desert of punishment.

The framers of the *Model Penal Code* accept roughly the approach to mistake of law involved in appealing to the Mental State Principle. The *MPC* asserts that a belief about the illegality of one's act is not generally an element of a crime:

Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense ... is an element of such offense, unless the definition of the offense or the Code so provides. (*Model Penal Code* §2.02(9))

The "unless" clause here is intended to capture cases in which a statute specifically states that a crime has not been committed unless the defendant knew (or was reckless or negligent) that what he was doing was against the law. According to the *MPC*, within certain limits, the elements of a crime, including the mental states of the guilty, can be stipulated in any way that legislators see fit, but unless the legislature specifically decides to make knowledge of the illegality of one's conduct one of the elements of the offense, it is not an element. Notice that if the framers of the *MPC* believed every person genuinely deserving of criminal punishment to have believed himself to be acting illegally, then they would have insisted that such a belief is an element of every crime, quite independently of the list of elements specified by a statute. By deferring to the legislature on the question of whether or not such a belief is an element of a crime, the *MPC* is accepting the view that a mistaken belief that one's act is legal undermines criminal liability through the exclusion of the belief that one's act is illegal only if that latter belief is made of relevance to the particular crime in question by statute. To use the terminology offered here, the *MPC* asserts that while belief in the illegality of one's conduct might be a statutorily specified condition of criminal liability, it is not a general condition.

This approach does succeed in vindicating the slogan to a large degree, but not entirely and not adequately. Recall that the slogan could be understood either descriptively or normatively, either as the claim that mistakes of law do not, in fact, excuse, or as the claim that they shouldn't. The approach just described, and adopted in the *MPC*, provides a vindication of the slogan understood in its descriptive sense: it appears to be a fact that a belief that one is acting illegally is not one of the general conditions of criminal liability, and it is simply a fact that statutes rarely make a belief that one is acting illegally an element of a crime (at least in the United States). Things are more complicated, however, when we consider the normative interpretation of the slogan. After all, the question of whether or not mistakes of law should excuse is at least in part the very question of whether or not statutes should be drafted in such a way as to make a belief that one is acting illegally into an element of the crime defined. The mere fact that statutes are not drafted that way does not imply that there's anything right about the slogan understood in its normative sense; it would only imply that if there was something right about drafting statutes in the way they are drafted.⁸ However, there is something right about that practice. What the *MPC* approach fails to do is to *articulate* what is right about it.

We should not expect to see what's right about it by reflecting generally on the notion of desert of punishment, although that could take us part of the way. Such reflection might show us that belief that one is acting illegally is not generally required for desert of punishment. But it is a separate question in each case whether or not belief that one is acting illegally is required for desert of punishment for credit card fraud, say, or for fraud through the issuance of a bad check, or for fraud perpetrated by the destruction of business documents, or for fraud involving the fixing of a horse race or some other kind of public contest, and so on for all the other various kinds of crime that one

8. The point is also made in the excellent discussion of mistake of law by Douglas Husak and Andrew Von Hirsch, "Culpability and Mistake of Law", in *Action and Value in Criminal Law*, Shute, Gardner and Horder (eds.), Oxford: Clarendon Press, 2003, pp. 157-74.

might engage in. In each case, the question is whether the particular wrong involved in such conduct when it is deserving of punishment requires the actor to believe that he is acting illegally. Although we cannot hope to know for sure until we do the work of reflecting on each of the many crimes one can imagine, it seems quite likely that we will find an asymmetry: it seems very likely, that is, that more often than not desert of punishment for the particular acts in question will not require the belief in the illegality of what one is doing. What we might hope for, however, is some articulation of the underlying basis of the pattern. Is there some fundamental question the answer to which would guide us in determining, in the case of each type of crime, whether the belief that one is acting illegally is necessary for desert of punishment? The next section of this paper attempts to answer this question and to do so in a way that helps us to see what is right about the practice of only rarely making a belief in the illegality of one's conduct an element of a crime.

3. The Solution

Put simply, the solution to be developed in this section is this: Legal mistakes often, and factual mistakes only rarely, implicate defects in our deliberative mechanisms that ground our desert of punishment. To make a legal mistake is quite often, in other words, to evince a commitment of precisely the sort that makes one deserving of punishment. To cite one's legal mistake in one's defense, then, is analogous, although not perfectly analogous, to citing the fact that one is venal in defense of one's objectionable conduct; venality grounds desert of punishment for objectionable conduct and so citing it cannot excuse. Similarly, commitments that are often implicated by false legal beliefs, and only very rarely by false factual beliefs, ground desert of punishment, and so citing those beliefs cannot excuse. This section will be spent stating this position with precision, defending it, and applying it to some legal cases and hypothetical examples.

It is an obvious and undeniable fact that features of an agent's deliberation are of great importance to her responsibility for her action. In

fact, they serve as the grounds of responsibility. The capacity to deliberate is a distinctive capacity of persons. And of all the various capacities of person that are distinctive, this one seems of particular relevance to moral responsibility. So much so, in fact, that it is quite natural to conclude that to deliberate in some way that one ought not is to qualify oneself for the peculiar forms of censure, particularly forms of moral censure, that are reserved for persons. And to exercise that distinctive capacity as one ought is to deflect responsibility for wrongdoing from oneself. These are controversial claims but they are plausible enough to warrant assuming in what follows that they are true. Under these assumptions it follows that to understand responsibility, we need to understand what the conditions are under which one's deliberations are acceptable and unacceptable. This is neither a new nor a surprising idea. But the central role that it can be made to play in understanding the criminal law has been insufficiently appreciated.

Deliberation will be understood here to be the norm-governed psychological process through which a person reaches a decision and so often forms an intention to act in a particular way. The guiding assumption in what follows is that successful excuses sometimes operate by indicating that the agent's deliberation was uncorrupted in itself. When we offer an excuse of this sort we admit that the agent's conduct was objectionable; we would prefer a world that didn't contain such conduct. But we imply that while something went wrong with the inputs to the deliberative machine, the machine itself worked as it ought. We are claiming that uncorrupted deliberation yielded a corrupted outcome; but since it is corruption in deliberation that is the root of responsibility for wrongdoing, an excuse is warranted in such a case.

Following this line of thought, it is natural to think that a false belief can provide an excuse because of something about its relation to proper deliberation. Under certain conditions, the fact that a person had a false belief, one might think, implies that his deliberation was proper, or uncorrupted, that it was different from the sort that grounds a judgment of blameworthiness or of the propriety of punishment for the act. This is to propose the following principle of excuse:

Uncorrupted Deliberation Principle: If *D* falsely believes that *p* and such a false belief indicates that his deliberations pertaining to *A*-ing were acceptable, then *D* is excused for *A*-ing.

In fact, as will emerge, this principle is the one that we seek; it allows us to identify the grain of truth in the false slogan that ignorance of law never excuses. However, before we can see this, a large gap must be filled. The problem is that we do not, as yet, have any even schematic account of the conditions that an agent's deliberations must meet in order to be acceptable, proper, or uncorrupted. In what follows, a *partial* account will be provided. However, partial as it is, it will be sufficient to allow us to see that the Uncorrupted Deliberation Principle meets the four criteria that a principle must meet to solve our problem.

What does it mean to say that an agent's deliberations were "acceptable" or "uncorrupted", or, more specifically, different from the sort that would ground a conclusion that he is blameworthy, or deserving of punishment, for the conduct that issued from those deliberations? This is, of course, a very difficult question. To provide enough of an answer for our purposes here, start by noting that it cannot be that an agent's deliberations are unacceptable simply because the agent chose, at the conclusion of deliberation, to do something that is objectionable. We can reach the wrong conclusion through acceptable processes if the inputs are problematic in some way. This is often the case in simple mistakes of fact: the hunter who chooses to shoot the person in the woods falsely believing him to be a deer has not necessarily deliberated poorly in the sense of interest. He chose something bad not because there was something wrong with the way his deliberation proceeded, but because there was something wrong with one of the inputs to deliberation: the relevant belief was false. Our interest in deliberation is not with its inputs but with the deliberation itself. So what, of all the various input-independent features of deliberation, is crucial?

It's plausible to think that among the things that matter here are the

principles that guide what reasons one considers — what reasons one places on the scales, as it were — and the principles that guide the kind and degree of weight one gives to the reasons one considers. There may be more of importance than this, but this is all that will matter for our purposes. The question, then, of whether or not one's deliberations were acceptable is in large part the question of whether one followed the right principles in determining what reasons to consider and followed the right principles in granting those reasons weight. By "principles" what is meant here are not formal rules like the means-end principle, but, instead, general rules for extracting reasons from facts and general rules for weighting the reasons one has extracted. A principle of the first sort might be "If an act is likely to cause a person pain, then that is a reason against performing that act." A principle of the second sort might be "If one act is more likely to cause a person pain than another, then weigh the reason against performing the first more heavily than the reason against performing the second." In a legal context, we will be concerned only with principles of this kind confined to legal reasons. We will be interested, that is, in the principles for extracting *legal* reasons from facts, and the principles for weighting *legal* reasons the agent being evaluated is committed to. If the agent's principles for extracting and weighting other kinds of reasons — moral, aesthetic — are relevant, it will be only because those other reasons are, themselves, legal reasons for and against particular actions. (More on this issue shortly.)

When is a principle for extracting reasons from facts, or a principle for weighting reasons, acceptable or unacceptable? What are the right criteria of evaluation for such principles? A partial answer, and the answer which the remainder of our discussion will assume, reduces acceptability to accuracy: a principle for extracting reasons from facts is acceptable if the facts in question do indeed provide the reasons that the principle specifies. Similarly, on this view, a principle for weighting reasons is acceptable if the reasons it advises weighting more heavily than others do indeed provide greater rational support for the actions they recommend than the others. This answer is partial since it

is conceivable that commitment to a particular principle for extracting reasons from facts or a principle for weighting reasons is unacceptable even if accurate; for it might implicate an objectionable commitment of some other sort. Perhaps there are some facts that provide reasons that one should simply never recognize as such. Imagine, for instance, that in choosing whether to adopt loose or stringent safety standards, a corporate executive carefully examines a report that subtracts damages paid in lawsuits brought by injured parties from the level of productivity under each safety standard, noting that productivity increases, as do damages paid, when the safety standards are less stringent. The numbers in such a case do indeed provide reasons for or against each of the two schemes, but perhaps there is something wrong with deliberation in which such aggregate numbers are weighed. Still, for better or worse, problems of this sort (which I believe can be addressed) will be ignored in what follows. We will assume that acceptable principles of the sort that concern us get the facts about reasons and their weight right. Of course, the reduction of acceptability to accuracy leaves difficult questions: what facts provide what reasons and with what weights? But we will not need answers to such difficult questions in what follows but can rest, instead, with the view that whatever reasons certain facts provide, we want our principles for extracting reasons from facts to get them right and we want our principles for weighting reasons to assign weights that align with the rational support those reasons provide. When we can show that the principles to which we are committed are accurate in these ways, we deflect judgments to the effect that we are deserving of punishment.

Using this account of the conditions under which deliberation is acceptable, we can reformulate our principle equivalently, although more illuminatingly, like so:

Uncorrupted Deliberation Principle: If *D* falsely believes that *p* and such a false belief indicates that in his deliberations pertaining to *A*-ing *D* was committed to accurate principles for extracting reasons from facts and accurate principles for weighting reasons, then *D* is excused for *A*-ing.

How does this principle behave when the belief in question concerns the law? (We'll consider how it behaves when the belief is factual shortly.) To answer this question, start by noticing that there is sometimes a sure sign that the principles to which *D* was committed in his deliberations were inaccurate and so *unacceptable*: this is the case if the act *D* chose would not have been favored by the balance of reasons *even if* his belief that *p* had been true. Consider the man who falsely believes the person he shot to have been a trespasser when in fact the person had permission to be where he was. We know that the principles for extracting and weighting reasons to which such a defendant is committed are unacceptable; for it is no more legitimate to shoot a trespasser than it is to shoot one who has permission. Reasoning of this sort can take us fairly far; in quite a few cases, it is not the case that the choice would have been sufficiently supported by reasons even if the false belief had been true.

However, this kind of counterfactual reasoning does not take us all the way, for sometimes it is both the case that (1) had the belief been true, the act would have been supported by reasons, and (2) the belief indicates a commitment to an unacceptable principle for extracting reasons from facts or for weighting reasons. In fact, both of these things are often true when normative beliefs are at issue. When a person has false normative beliefs, his deliberation often yields unacceptable outcomes that would have been acceptable had those beliefs been true; true or false, the same outcomes would have resulted, but they would have been *acceptable* had the beliefs been true and not if they had been false. For instance, say that I (falsely) believe that it is perfectly acceptable to cause pain to people of one particular race, but that it is unacceptable to cause pain to people who are not of that race. Then the fact that a particular act causes pain to people of that race is not treated by me as a reason against performing that act, or, if it is so treated, I don't give it anything like the kind or degree of weight that it deserves. But I would consider the same facts as reason-giving and grant them the same kind and degree of weight even if my belief were true. However, if my belief were true, in considering the reasons I consider and weighting them as I do, I would be deliberating acceptably. What

follows is that no excuse is given under the Uncorrupted Deliberation Principle. The false belief, in this instance, speaks against, rather than for, the acceptability of my deliberations. My false belief indicates that I am committed to faulty principles for extracting reasons from the facts about pain, or faulty principles for weighting the reasons that such facts provide, or both. It not only fails to exculpate; it inculpates.

Consider another example: a man who rapes his wife falsely believing that there is a marital exemption from rape in the jurisdiction in which he lives. From what has been said so far, we can see that this man's false legal belief will not serve as an excuse through appeal to the Uncorrupted Deliberation Principle. But the man's false belief about the law indicates a commitment on his part to the following principle for extracting reasons from facts: his wife's lack of consent provides no legal reason against having sex with her. But given that there is no marital exemption, commitment to this principle is faulty because the principle is inaccurate. In fact: the wife's lack of consent does provide legal reason not to have sex with her.

So, in what is quite clearly the majority of examples, a false belief about the law will not excuse under the Uncorrupted Deliberation Principle. However, this is not to imply that such beliefs never excuse under that principle. They do in a variety of instances. To see this, first consider the case of *Surrey County Council vs. Battersby* (2 W.L.R. 378 (Q.B. 1965)). Battersby entered into an arrangement with a couple who paid her to house and take care of their children five days a week; the children returned to their parents on the weekends. She did not have a license to provide foster care. Battersby was charged under a statute that required a person to be licensed if caring for children for money for more than thirty consecutive days. The court ruled that for the purposes of the statute, Friday and Monday are consecutive days; functionally, the court ruled that thirty consecutive *weekdays* of care required a license. Battersby hoped to be excused on the grounds that she made a mistake of law. In fact, she made more than one: first, she falsely believed that Friday and Monday are not, for legal purposes, consecutive, and, as a result, she made a second legal mistake in

falsely believing that the scheme did not require a license. Battersby was convicted. Notice that had the belief that a license was required, or the belief that Friday and Monday are legally speaking consecutive, been made elements of the crime by statute, then Battersby would have been excused through appeal to the Mental State Principle. But since they were not, that principle supplies her with no relief. What about the Uncorrupted Deliberation Principle?

What do Battersby's false beliefs about the law tell us about the principles for extracting and weighting reasons to which she is committed? They show her to be committed to the following principle for extracting reasons from facts: the fact that one is providing care for more than thirty consecutive weekdays does not provide one with a legal reason to get a license. Is this a faulty principle for extracting legal reasons from facts? Given the view with which we are working, according to which a principle for extracting reasons from facts is acceptable if and only if accurate about what reasons the facts in question provide, we are reduced to the following question: does caring for children for thirty consecutive weekdays, with weekend breaks, provide one with a legal reason to get a license? If so, then Battersby is committed to a faulty principle, but if not, then the principle to which she is committed is not faulty and her deliberation is uncorrupted. So, to know if Battersby has an excuse under the Uncorrupted Deliberation Principle, we need to know what legal reasons were provided by the pertinent facts.

One can appreciate the difficulty of this issue by noting a distinction: the distinction between what rules the law establishes, on the one hand, and what legal reasons the law provides, on the other.⁹ Divergence between these two things is illustrated by criminal prohibitions that are never to be enforced and are publicly acknowledged as such by legal officials. There is a rule that the law establishes in such cases, but there is no legal reason to act as the rule directs. Assuming that the court correctly interpreted the statute in *Battersby*, the rule required a license for care of the sort that Battersby provided. But did

9. For help here, I am heavily indebted to Scott Shapiro.

the law provide Battersby with a reason to seek a license for such care? When a statute uses a common word, in this case ‘consecutive’, in a technical way and without providing notice that the term is to be used in a technical way, what legal reasons are given? Battersby has a legal reason to get a foster care license before embarking on the scheme only if *when given its most natural interpretation* a statute directs her to get one. The fact that the statute *in fact*, as the court rules, directs her to get one does not imply, on this view, that she has a legal reason to get one: the legal reasons on this view are supplied by the most natural interpretation of the statute and not by the facts about what rule the law establishes, when the two diverge. Another way to put it: what legal reasons are supplied by a particular statute depends not just on the facts about what rule the statute lays down but also by the facts about uptake on the parts of ordinary citizens.¹⁰ To say that Battersby makes a legal mistake is to say that she has a false belief about what rule the law establishes, but she is acting from a true belief about what legal reasons she has. It follows that the principle to which Battersby is committed — the principle that directs one to take the undertaking of thirty consecutive weekdays of care with weekend breaks to provide no reason to seek a license — is accurate: it directs one to take there to be no legal reason where there is no legal reason. And since accuracy is being equated here with acceptability, it follows that Battersby’s false belief shows her to be committed to an acceptable principle for the extraction of reasons from facts. Thus, Battersby deserves excuse under the Uncorrupted Deliberation Principle. Correlatively, the crime should be defined in such a way that belief that she is providing care for thirty or more consecutive days is an element.¹¹

10. Ideas in this vein are explored in Stephen Darwall, *The Second-Person Standpoint: Morality, Respect and Accountability*, Cambridge: Harvard University Press, 2006. See also Gideon Yaffe, “Reasonableness in the Law and Second-Personal Address”, in *Loyola Law Review*, v. 40, 2007, 101–38.

11. Similar reasoning helps to explain what went wrong in the celebrated case of *People v. Marrero* (69 N.Y.2d 382, 507 N.E.2d 1068 (1987)) in which the defendant reasonably but mistakenly interpreted a statute to exempt him from the need to carry a permit for his concealed weapon. Marrero was convicted,

As has just been hinted, the discussion so far helps to delineate the relationship between the Uncorrupted Deliberation Principle and the Mental State Principle. In Section 2, an objection was offered to the explanation of the asymmetry between mistakes of fact and law supplied by the Mental State Principle: the normative claim that there ought to be an asymmetry is vindicated through appeal to the Mental State Principle only if the belief that one’s act is illegal ought only rarely to be a statutorily specified condition for criminal liability. But nothing in the Mental State Principle itself explains why this further claim is true. Hence, the explanation is incomplete. The Uncorrupted Deliberation Principle helps to fill the gap: when commitment to a faulty principle for extracting or weighting reasons is both required for desert of punishment for the crime and implicates the possession of a particular belief, then that belief ought to be an element of the crime; perhaps beliefs should be elements of crimes under other conditions also, but they certainly ought to be in these. To be deserving of punishment for burglary, for instance, either one must take the fact that the building one is entering with the intention to commit a felony is a dwelling to provide no legal reason not to enter it with that intent, or one must grant less weight to that reason than it deserves. But a person whom we have adequate reason to believe to have either of these faulty commitments believes that the building is, indeed, a dwelling. So, belief that the building is a dwelling ought to be an element of the crime, as it is in every jurisdiction that criminalizes burglary. A person who thinks the building is a warehouse, say, and not a dwelling, does not give us sufficient reason to believe him to be committed to the particular faulty principle that one must be committed to in order to be deserving of punishment for the peculiar kind of invasion of another’s home that is burglary. Hence when the law gets it right — when a belief is made an element of a crime by statute and that belief is indeed required for desert of punishment because it is

but should not have been, for he had no legal reason to secure a permit even though the law said that he needed one. Hence his mistake was expressive of acceptable principles for the extraction and weighting of legal reasons.

implicated in the faulty commitment that is required for desert of punishment — the Mental State Principle is subsumed by the Uncorrupted Deliberation Principle. In a case like *Battersby*, in which the law gets it wrong by failing to make a belief an element of the crime even though that belief is required for desert of the punishment specified by statute, the Uncorrupted Deliberation Principle provides us with grounds on which to excuse or, equivalently, provides grounds for revising the law appropriately and thereby making it possible to excuse through appeal to the Mental State Principle.

Another sort of case in which the Uncorrupted Deliberation Principle provides for an excuse on the basis of mistake of law are those involving reliance on an official proclamation of the law such as that in *United States v. Albertini* (830 F.2d 985 (1987)). Albertini entered a military base in violation of a bar order in order to participate in a peace demonstration and was convicted of violating the bar order. His conviction was overturned by the Ninth Circuit on the grounds that the First Amendment protected his right to protest on the base. Before the Supreme Court agreed to hear the case, a new bar order was issued and Albertini entered the base again for a protest. Before he came to trial for this second violation of the bar order, the Supreme Court reversed the decision of the Ninth Circuit, convicting Albertini on the first charge. In the trial for the second charge, Albertini offered a mistake-of-law defense, which eventually prevailed, arguing that he entered the base the second time relying on the Ninth Circuit's erroneous pronouncement that he had the right to do so, despite the bar order. Albertini seems to have been claiming that the following false legal belief excuses: It is not illegal to enter contrary to a bar order in order to be in a peace protest. Had this false belief been true, what Albertini decided to do would not have been opposed by the balance of legal reasons. But did Albertini's false belief show him to be committed to unacceptable principles for extracting and weighting reasons?

Through reasoning close to that employed in the discussion above of *Battersby*, there's a strong case for saying that it did not. Albertini is committed to the following principle for extracting reasons from

facts: A bar order gives one no legal reason not to enter a military base if one is entering in order to participate in a peace demonstration. Whether or not this principle is acceptable depends on what legal reasons he actually had in the aftermath of the Ninth Circuit's decision. In a large number of cases — those that are not appealed, or those that the Supreme Court refuses to hear — the Ninth Circuit's opinion about what the law says is not an *opinion* in the ordinary sense of the term; rather, it is constitutive of the facts about what the law says. Quite often there is no gap between the facts about what reasons there are, and what the Ninth Circuit believes about the facts about what reasons there are. Taking this fact seriously leads us to the conclusion that there was no legal reason for Albertini not to enter the base the second time. The Ninth Circuit was mistaken about what rule the law had established, but in being mistaken on that point it caused it to be the case that there was no legal reason against what Albertini did on entering the second time. The landscape of legal reasons was different, although the rule established by the statute did not change at the point that the Supreme Court overturned the Ninth Circuit's opinion, and perhaps even at the point that the Supreme Court agreed to hear the appeal. What this indicates is that Albertini deserves an excuse through appeal to the Uncorrupted Deliberation Principle.

Notice that this supplies us with the tools for distinguishing in a principled way between legal mistakes derived from *official* proclamations and legal mistakes derived from other sources. It is a well known fact about the *Model Penal Code*, for instance, that under it a person who acts in reliance on a mistaken belief derived from mistaken advice from a lawyer is granted no excuse. The reason is that the lawyer's opinion about what the law says is never constitutive of the facts about what legal reasons there are. Hence a person who commits himself to a principle for extracting reasons from facts as a result of talking to a lawyer might still be committed to a faulty principle for extracting reasons from facts: the facts might give him no legal reason even though he thinks they do, or they might give him legal reasons even though he thinks they do not. But in cases of official reliance, the proclamation

from which the mistaken belief arises itself generates legal reasons. This isn't to say that the belief that is formed on its basis — Albertini's belief that his entering the base the second time was not prohibited, for instance — is true. It is not; in Albertini's case, the Ninth Circuit was actually mistaken about the law, and so was Albertini. Rather, the point here exploits the fact noted earlier that there can be a gap between the truth about what rule the law establishes and the facts about what legal reasons there are. In the case of Albertini, he had no legal reason not to enter the base, even though his entry was indeed prohibited. As a result, his belief that it was not prohibited was false, but the principle for extracting legal reasons from facts to which he was committed was acceptable.

The question of whether or not the particular principle for extracting reasons from facts to which a defendant is committed is acceptable turns entirely on what facts do in fact give the defendant legal reasons. This, in turn, depends in part — but, as *Battersby* and *Albertini* illustrate, *only in part* — on the question of what rules are in fact established by the law. So it is no surprise that courts forced to adjudicate difficult mistake-of-law claims find themselves having to wrestle with the question of what legal reasons the defendant actually had. Consider, for instance, the Supreme Court case of *Cheek v. United States* (498 U.S. 192 (1991)). After attending some seminars hosted by groups interested in undoing the American tax system, Cheek (claimed to have) formed two mistaken beliefs. He came to believe that wages are not income for tax purposes, and he came to believe that tax laws are unconstitutional. As a result of these beliefs, he failed to pay any income tax for some years. The Supreme Court ruled that the first of these two beliefs excused Cheek from criminal liability for “willfully evading taxes”, but that the second did not. The first excuses on the grounds that to willfully evade taxes the defendant would have had to believe that he was underpaying, something that Cheek did not believe, assuming he did, indeed, believe that wages do not count as income. Thus, the first belief excuses under the Mental State Principle: the false belief excludes a true belief required for criminal liability. The Uncorrupted Deliberation Principle helps us to see why that belief ought to be

required for liability: that belief would be possessed by someone committed to the unacceptable principles for extracting and weighting reasons that are necessary for desert of punishment for tax evasion.

But what about the second belief, the belief that the tax laws are unconstitutional? The fact that Cheek held this belief indicates that he was committed to the following principle for extracting reasons from facts: The fact that an unconstitutional statute says that a person must do something gives him no legal reason to do it. The question of whether or not this principle is acceptable turns on the question of whether unconstitutional statutes (never judged to be so by any authoritative court) do or do not give legal reasons for action. The court's decision in *Cheek* is compatible with the conclusion that they do. Such a conclusion would lead one to deny that Cheek's belief in the unconstitutionality of the tax statutes provides him with an excuse. It does not provide him with an excuse under the Uncorrupted Deliberation Principle for the reasons adduced here: the belief speaks to the unacceptability of Cheek's deliberations by indicating a commitment on his part to a faulty principle for extracting legal reasons from facts.

So far, we've been looking primarily at the way in which the Uncorrupted Deliberation Principle functions when the false belief in question concerns the law. But how does it function when the belief is factual and not legal? Where false normative beliefs more often than not indicate commitment to a faulty principle for extracting or weighting reasons, false factual beliefs almost never do. It is frequently the case with factual beliefs, as it is with normative, that had they been true, the choice would have been favored by the balance of reasons: had the white powder been sugar and not arsenic, the choice to put it in the coffee would have been supported by reasons. And this must be true if a false belief is to indicate that the principles for extracting and weighting reasons to which the defendant is committed are acceptable. But this is not so for the reason that it is so when false normative beliefs are in question. It is not so because a swap in the truth value of the factual belief would change what facts constitute reasons, or what weight reasons are to be given, as in the case of normative beliefs.

Consider, again, the man who takes a bag that is not his on arrival

at the airport, falsely believing it to have been the bag that he checked on departure. For all we know, he would take the fact that the bag was not the one he checked to give him overriding reason not to take it; that is, for all we know, he is committed to acceptable principles for extracting reasons from facts and granting them weight. It is perfectly possible that he is actually committed to unacceptable principles; perhaps he would have taken the bag even if he had not believed it to have been the one that he checked. But that isn't the point. The point is that the mere fact that he has a false factual belief does not establish that he is committed to faulty principles for extracting reasons from facts or weighting reasons. And given that had his belief been true, his choice would have been in line with the legal reasons, rather than opposed by them, it follows that he has an excuse under the Uncorrupted Deliberation Principle. Most examples of false factual beliefs can be treated similarly.

Plausibly, however, there are exceptions to this rule. Consider, for instance, a person who falsely believes that people of a particular race cannot feel pain. In such a case, if we were to tell the story with care, it might be the case that if his belief were true there might be no more wrong with the defendant's act than there would be in sanding a tabletop. But are the principles for extracting and weighting reasons to which his belief shows him to be committed unacceptable? There is a case for saying "no". We might say that this belief is to be treated just like the belief that the bag picked up at the airport is the one checked some hours earlier. We want people to recognize reasons not to cause pain, and to grant those reasons weight; the person with the false belief that some racial group does not feel pain might remain committed to such principles. To take this line is to further assert that the intuition to the effect that no excuse should be granted here derives from the thought that there is something disingenuous in the claim that this is really what the defendant believed. Assertions of beliefs of that kind are convenient ways of expressing false normative beliefs of a sort that would fail to excuse under the Uncorrupted Deliberation Principle.

Alternatively, and somewhat more plausibly, we might think that

the belief that people of a particular race fail to feel pain can only be held, given other beliefs — such as the belief that such people *act* just like those who feel pain — by someone who is committed to a faulty principle for extracting reasons from facts, such as a principle to the effect that the fact that a person of the race in question is affected by an act *never* gives one a reason to perform or refrain from the act, no matter what the nature of the effect that the act has on such a person. To take this second line is to insist that it is possible for a false non-normative belief to speak to the unacceptability of a person's deliberations. Perhaps this is right. Still, the cases are rare. The Uncorrupted Deliberation Principle excuses for many false non-normative beliefs, and for hardly any false normative beliefs.

So this is the grain of truth in the false claim that ignorance of law never excuses. What is normally an excellent sign that a false belief excuses — namely that had the belief been true the choice would have been supported by reasons — is often not such a sign when the belief in question concerns the law. False beliefs about the law often reflect commitment to inaccurate principles for extracting and weighting reasons. False beliefs about non-normative matters may involve commitments to unacceptable principles for extracting or weighting reasons. But in contrast to false normative beliefs, their falsity much more commonly contributes to our making wrong decisions for reasons that are extraneous to and consistent with the acceptability of the principles to which we are committed in deliberation leading to those decisions. In short, what's true in the claim that ignorance of the law never excuses is only this: the role of normative beliefs in deliberation is different enough from that of factual to give their falsity relevance to the innocence of deliberation in a much narrower range of circumstances.

The Uncorrupted Deliberation Principle meets the four criteria that a principle of excuse needed to meet if it was to serve to explain the asymmetry in the excusing force of mistakes of fact and law. Since many more legal than factual beliefs indicate commitment to unacceptable principles for extracting and weighting reasons, the Uncorrupted Deliberation Principle exhibits the required asymmetry. Further, it

meets the Non-Triviality requirement, for the fact that a belief fails to indicate commitment to an unacceptable principle does not logically entail that the believed proposition is legal. For one thing, the falsity of some beliefs concerning normative propositions that are not legal is sometimes sufficient for the unacceptability of the deliberation in question, and the falsity of a handful of non-normative beliefs — such as the belief that those of a certain race do not feel pain — is also sometimes sufficient. Further, as is illustrated by the cases of *Battersby* and *Albertini*, the falsity of a legal belief does not entail that the principles for extracting reasons from facts or weighting reasons that the person who has that belief is committed to are thereby faulty. And, finally, the Uncorrupted Deliberation Principle meets the criteria of Desert-Relevance and Explanatory Power. It is at least in part because of the fact that a person's powers for recognizing and responding to reasons are misused that she is deserving of punishment. But the misuse of those powers often consists in a commitment to faulty principles for extracting or weighting reasons. And so there is an intrinsic conceptual link between the conditions under which a mistaken belief excuses, as identified in the antecedent of the Uncorrupted Deliberation Principle, and desert of punishment. The grain of truth in the claim that ignorance of law never excuses is, simply, that mistaken beliefs about the law are often, and mistakes of fact are almost never, expressive of the very faulty commitment in virtue of which the person is deserving of punishment.

Conclusion: Strict Liability and Mala Prohibita Crimes

In introductory criminal law courses, legal doctrines concerning mistakes of law are taught alongside consideration of strict liability crimes: crimes in which a defendant can be shown to be guilty without a showing to the effect that he possessed some particular mental attitude with respect to one or more elements of the crime. Speeding, for instance, is ordinarily a strict liability crime since in most jurisdictions the defendant does not need to be shown to have known what the limit was. The assertion that ignorance of the law is no excuse is equivalent to

the assertion that strict liability is properly imposed with respect to all the legal facts that need to be present for criminal liability.

Broadly speaking, there are two possible justifications for the imposition of strict liability with respect to a particular fact. The first approach is to say that strict liability is appropriate if desert is not part of the rationale for drawing a distinction in punishment on the basis of the presence or absence of the fact in question. Strict liability with respect to so-called "jurisdictional elements" falls into this category. A person is not guilty of the federal crime of crossing state lines with the intent to bribe an official unless he did indeed cross state lines. But the crossing of state lines is part of the crime only because it places the crime under federal jurisdiction, not because there is a difference in desert between those who travel within a state with this intent and those who cross state lines. Hence, there is no reason to require the prosecution to show that the defendant knew (or intended, or was reckless, etc.) with respect to the crossing of state lines; we needn't inquire into the defendant's mental state in that respect.

Those who endorse the approach current in the United States of allowing strict liability only for so called "regulatory offenses" explicitly or tacitly adopt this first approach.¹² They hold that the elements of certain offenses do not help us to draw distinctions in desert of punishment but help only to incentivize certain valuable behaviors or disincentivize certain damaging ones. Correlatively, such a rationale for strict liability lies behind the common law suggestion that strict liability is appropriate only if the crime is *mala prohibita*; the thought is that every crime that is *mala in se* is composed of elements that make a difference to desert. It is clear that this approach will not extend generally to justify imposing strict liability with respect to all legal facts: more often than not there are clear differences in desert between defendants when legal facts are present and absent, and those differences in desert justify the corresponding distinctions in punishment. Also, and importantly, this approach has been pushed off the table here by the

12. The Supreme Court maintained such an approach most recently in *Staples v. United States* (511 U.S. 60 (1994)).

assumption that distinctions in punishment are justified only if there are corresponding differences in desert of punishment; if there are certain damaging behaviors that we wish to disincentivize, we ought to adopt other means to do so than the threat of punishment.

Alternatively, strict liability can be justified on the grounds that both the person possessing and the person lacking the relevant mental state are equally deserving of punishment. On such a view, the fact that must be present does make a difference to desert of punishment, but the presence or absence of a mental attitude towards that fact does not. Those who hold, implausibly, that ignorance of the law is no excuse on the grounds that we all have an obligation to know the law take this approach. Their idea is that the defendant who knew the law and acted contrary to it is deserving of punishment because he knew that what he was doing was legally wrong; the defendant who didn't know the law and acted contrary to it is just as deserving of punishment because he violated his obligation to know the law. Since both are deserving of punishment, on this view, there is no reason to inquire whether a particular defendant falls into the first category or the second, and so no reason to require a showing of mental state by the prosecution. Of course, as is well known, both the claim that we have an obligation to know the law, and the claim that there is no difference in desert between the person who violates that (supposed) obligation and the person who does not, are false. And, further, the approach simply pushes the problem back, since we surely don't want to impose criminal liability for a failure to know the law unless the defendant is deserving of punishment for that failure; and so we need to know what he needs to have known to be so deserving, including what legal facts he needs to have known about.

Still, as has been shown here, this second approach to strict liability, when applied to mistake of law and decoupled from its questionable assertions about obligations to know the law, is correct: a mistake of law is no excuse when there is no difference in desert of punishment between the person who knows the law and the person who does not. However, the reason that there is sometimes no difference is not that

there is a general obligation to know the law shirked by anyone who makes a mistake. Rather, the reason is that sometimes both those who make the mistake and those who do not are committed to faulty principles for extracting reasons from facts, or faulty principles for weighting reasons. When that is the case, there is no reason to require a showing of mental state; for, present or absent, we find the very same fault that grounds desert of punishment. It makes sense to impose strict liability with respect to the illegality of marital rape, to use an example from the last section, since both the man who rapes his wife knowing it's illegal and the man who rapes his wife not knowing it's illegal are committed to faulty principles with regard to reasons. The first is committed to a faulty principle for weighting reasons, the second to a faulty principle for extracting reasons from facts, and these are the very faulty principles that ground desert of punishment.

But this summary statement of the fundamental idea of this paper brings out in relief the need for an answer to the following question: Why is it the case that criminal liability is absent when action arises from deliberation involving a commitment to appropriate principles with regard to reasons?¹³ What we want in answer to this question is an articulation of a link between the nature of criminal liability, on the one hand, and on the other, the principles that determine what facts one takes to constitute legal reasons and what kinds and degrees of weight one grants to those reasons. Earlier, in a partial effort to articulate the nature of this link, it was observed that the capacities to recognize reasons and grant them weight are distinctive of persons, as is subjection to moral responsibility. The thought is that if we want to know what makes persons particularly fitting targets of moral censure, we need to look for a capacity that is special to persons and the use and misuse of which corresponds with the appropriateness of moral censure. The capacities exercised in deliberation seem to be a plausible candidate. But notice that this appealing thought is being used in the argument of the previous section of this paper to explain an asymmetry with respect

13. Thanks to Matthew Hanser for pushing me to think harder about this issue.

to legal, not moral excuses. Part of the legitimacy of this use derives from the guiding assumption that criminal punishment is to be issued only to the deserving. But this, by itself, does not provide enough, for it helps to explain, at best, only why there might be an asymmetry between the excusing force of mistakes of fact and law when the conduct in question is of moral relevance. It might explain the asymmetry when the crime in question is *mala in se*, but not when it is merely *mala prohibita*.

To push the point further, it can seem that certain results that are implied by the Uncorrupted Deliberation Principle sit uneasily with the claim that punishment is to be issued only to the deserving. Imagine, for instance, someone like Battersby, although importantly different, who is charged with providing unlicensed foster care after keeping another's child for money for an entire thirty-one-day month. This person falsely believes that she needs a license to care for children for money for more than *a month* when, in fact, the legal standard is *thirty days*, a fact which is unambiguously expressed in a statute in language that an ordinarily-equipped citizen would have no trouble understanding. This imagined person's false belief indicates a commitment to a faulty principle for extracting reasons from facts: she takes the supplying of thirty-one days of care within a single month to provide her with no reason to get a license when, in fact, it does give her a reason to do so. But this person has made a mistake about an arbitrary legal rule. Is she deserving of punishment? Morality, after all, is not so fine-grained as to distinguish between people who knowingly provide care for a month and those who knowingly provide it for thirty days, and so surely there is no difference in desert that can be predicated on that difference.

We can go some of the way in answering this worry by emphasizing the distinction between moral and legal desert. Just as there is a distinction between legal and moral justification for the infliction of the distinctive kinds of pain involved in punishment, there is a distinction also between legal and moral desert of that pain. The degree to which people morally deserve punishment for choosing to act in a

way unfavored by the balance of moral reasons is the degree to which such a choice indicates a commitment to faulty principles for the recognition and weighting of moral reasons. The degree to which people legally deserve punishment for choosing to act in a way unfavored by the balance of legal reasons is the degree to which such a choice indicates a commitment to faulty principles for the recognition and weighting of legal reasons. This by itself should serve to show that the imagined defendant legally deserves the punishment she suffers. This isn't to say that she deserves it morally; she does not given that, for all we know, she is not committed to any relevant unacceptable principles for recognizing and weighting moral reasons.

This is not to say that there is nothing wrong with punishing the defendant in this hypothetical version of the *Battersby* case. There is something wrong with it, but what's wrong is not that she does not deserve the punishment she receives. She deserves it legally and does not deserve it morally, but since it is only legal desert that concerns us when deciding whom to punish under the law, the problem with her punishment does not derive directly from the fact that she does not deserve it morally. The problem which her case points out is this: the fact that she legally but not morally deserves punishment shows that we have fallen short in our aspiration to construct our laws in such a way so as to minimize the gap between legal and moral desert. Our laws are drawing a distinction in punishment where there is no distinction in moral desert. How should the problem be remedied? The easiest solution is to stop drawing a distinction in punishment. This could be done in one of two ways: by punishing both, or by punishing neither. In the first case, we would punish both those who provide unlicensed care for more than a month although less than thirty days (*e.g.*, those who provide such care for the twenty-eight days of February plus one more day) and those who provide it for more than thirty days but no more than a month (*e.g.*, those who provide such care for the thirty-one days of March). In the second case, we would punish neither. The problem is that the thirty day standard serves an important purpose that is undermined by such approaches. The thirty-

day standard makes possible the uniform administration of a vague concept, in this case the concept of “too much” foster care. Since we lack consistent standards for “too much”, we settle on thirty days as marking the line, recognizing that the line that we thereby draw is a *proxy* for a line of moral importance and not the line of moral importance itself.¹⁴ In recognizing that the line that we draw serves a purpose that is worth serving and that it can only serve by implying a distinction in punishment where there is no distinction in moral desert, we have identified an area in which the law cannot hope to perfectly align with morality.

But there is another way of responding to the recognition that the law is drawing a distinction in punishment where there is no distinction in desert: we can require for criminal liability some form of awareness of the fact that one has breached the legal thirty-day standard. What such a requirement does is to give some moral importance to the thirty-day standard independently of the fact of *moral* importance — “too much” — that it is designed to replace. The mental state requirement does that, since a defendant who has the belief that she is violating the law’s thirty-day standard and yet enters into the scheme without getting a license is committed to a faulty principle for extracting *moral* reasons from facts or a faulty principle for weighting moral reasons: she takes the fact that others bear a burden to prove themselves through licensing procedures to be safe caretakers to provide her with no reason, or a reason of insufficient weight, to do the same; she doesn’t take fairness in this domain seriously enough. She does not need to fail in this respect in order to be legally deserving of punishment, but she is closer to being morally deserving when she fails in this way.

To see the point, imagine the gradient of gray where we fade from pure white (people who are not providing too much care without a license) to pure black (people who are providing too much). In the

14. The concept in question here might be only epistemologically vague. But epistemic vagueness is vagueness enough to generate the need that the thirty day standard addresses, and if the concept is vague in some sense deeper than the epistemological, the need is that much greater.

center of this gradient is the law’s bright line. Those who are on the darker side of the line, while still in a gray area, are legally deserving of punishment, just like those in the black area. But they are one step closer to being like those who are in the black area, although still in a gray area, when they are aware of the legal standard that they are transgressing. The reason to make belief (for instance) that one is violating the legal standard an element of the crime is to minimize the number of punished who are just like the morally undeserving of punishment, while at the same time allowing the law to deploy workable proxies for vague moral concepts.

The lesson here can be generalized: there is reason not to impose strict liability with respect to those legal facts that are either irrelevant to desert of punishment or only accidentally relevant because usually conjoined with facts of relevance. The reason, however, is not the reason enshrined in the Uncorrupted Deliberation Principle: it is not that defendants who lack beliefs (or other relevant mental states) about the relevant legal facts fail to give us sufficient reason to think them committed to unacceptable principles for extracting and weighting legal reasons. They can give us sufficient reason to believe this of them even in the absence of such beliefs. Rather, the reason to make the relevant beliefs elements of crimes in such instances is that those who possess such beliefs are a step closer to being morally deserving of punishment even if legally deserving in the absence of them.

Recall that in one class of cases the Mental State Principle is subsumed by the Uncorrupted Deliberation Principle: namely, in those cases in which the law makes criminal liability dependent on a belief that is implicated by those faulty capacities for extracting and weighting reasons which are required for desert of punishment. But we have just learned that in another set of cases the Mental State Principle applies, and ought to, even though the Uncorrupted Deliberation Principle does not: namely, those cases of *mala prohibita* crimes in which a mental state concerned with a legal fact is made an element of the crime by statute even though such a mental state is not implicated by any of the faulty capacities for extracting and weighting *legal* reasons that are

necessary for desert of punishment. There is more than one reason, that is, to take mental states to be necessary for criminal liability and only one such reason is to be found in the Uncorrupted Deliberation Principle.

Our capacity to recognize and weigh legal reasons involves our capacity, generally, to recognize and weigh reasons of all sorts. Some of our legal reasons are also moral reasons. But not all. And it is tempting to think that we are vested with the capacity to recognize our legal reasons, when they are not also moral, only to the degree to which we have knowledge of what the law requires. In fact, this might be so, but it does not follow from that claim that we are only deserving of legal punishment when the legal reasons we have are ones we are capable of recognizing. Precisely what the argument of the last section and this one illustrates is that a certain form of excuse is often unavailable to those who lack such a capacity. It is the very lack of such a capacity, in fact, that makes such people deserving of punishment, for the lack of such a capacity is precisely that in which their failure consists. The same is true in the moral domain: what makes a person willing to trample on others to promote his own trivial whims worthy of moral censure is *precisely that* he weighs his trivial whims more heavily than the real goods of others. This is so even if he does so because of false beliefs about the moral weight of his trivial whims. And so it is in the case of mistakes of law: they result quite often in deformities in the use of our distinctive capacities for the recognition and consideration of legal reasons for action, deformities that ground our desert of criminal punishment.¹⁵

15. Thanks are owed to Michael Bratman, Steve Finlay, Matthew Hanser, Heidi Hurd, Michael Moore, Mark Schroeder, Scott Shapiro, Larry Solum, Ekow Yankah, and audiences from the philosophy departments at UC Santa Barbara and the University of British Columbia and the law school at the University of Illinois at Urbana-Champaign. An anonymous referee for this journal made several invaluable suggestions. Doug Husak is also owed thanks for encouraging me, at a very early stage, to think hard about this issue.