Crim Law and Philos (2009) 3:213–239
DOI 10.1007/s11572-009-9071-z

ORIGINAL PAPER

Mistake of Fact or Mistake of Criminal Law? Explaining and Defending the Distinction

Kenneth W. Simons

Published online: 19 February 2009
© Springer Science+Business Media B.V. 2009

Abstract This article makes six points. First, under any plausible normative perspective, the distinction between mistake (and ignorance) of criminal law and mistake of fact must at least sometimes be drawn. Second, the fundamental distinction is between a mistake about the state's authoritative statement of what is prohibited ("M Law"), and a mistake about whether that prohibitory norm is instantiated in a particular case ("M Fact"). Third, when an actor makes a mistake about an evaluative criterion whose content the fact-finder has discretion to elaborate, it is impossible both to allow this discretion and to faithfully realize a jurisdiction's policy of treating M Fact and M Law differently. Fourth, the claim that every unreasonable M Fact is really a M Law elides important differences between the two kinds of mistake. Fifth, various borderline objections, such as the famous Mr. Fact/Mr. Law example, do not undermine the fundamental distinction, although in rare instances, they do constitute genuine counterexamples that do not effectuate the principles and policies that the distinction ordinarily serves; and even here, they are exceptions that prove (the rationale for) the rule. Sixth, specification or evolution of a criminal law norm, such as the criterion for nonconsent in rape law, can convert a legally relevant M Fact into a legally *irrelevant* M Law. This phenomenon does not undermine the fundamental distinction between these types of mistake; to the contrary, it reveals the significance of that distinction.

Keywords Mistake of law · Mistake of fact · Crime · Punishment · Mistake

Introduction

The complexities of ignorance and mistake of fact and of law in criminal law doctrine and theory are legion. How do we distinguish fact from law? Is it worth drawing the distinction? Is the distinction equally significant for exculpatory mistakes (potentially resulting in

K. W. Simons (✉)
The Honorable Frank R. Kenison Distinguished Scholar in Law, Boston University School of Law, Boston, MA 02215, USA
e-mail: ksimons@bu.edu

acquittal of the completed crime) and for inculpatory ones (potentially resulting in attempt liability)?

Contemporary criminal law draws a firm distinction between fact and law for purposes of both exculpation and inculpation. Moreover, as we will see, all of the major normative perspectives on the proper scope of a defense of ignorance or mistake of criminal law agree that the law/fact distinction should at least sometimes be preserved.

Yet some have objected that the distinction is incoherent or misguided. These objections are serious. In my effort to defuse them, I hope to demonstrate how we should draw the distinction in the particular context of criminal liability, why the distinction matters, and why it is sometimes especially treacherous.

To set the stage, I begin with four problems or conundra.

First consider the problem of evaluative criteria. Suppose a defendant uses marijuana to relieve a medical condition, and asserts the necessity defense as a defense to prosecution for illegal drug possession. And suppose his defense is rejected. Was it rejected because he misunderstood the legal standard that the fact-finder applied in judging what counts as a lesser evil? (Perhaps the jury believed that urgent medical need can never justify use of marijuana.) Or because the fact-finder rejected his *factual* claims? (Perhaps the jury believed that his medical problem was not sufficiently serious to be an urgent medical need.) If the jurisdiction requires the jury to apply a more demanding standard when excusing for mistakes of law than when excusing for mistakes of fact, yet we do not know the basis of the jury's rejection of his claim, how can we determine whether the jury acted lawfully?

Second, consider the question of how to characterize an unreasonable mistake of fact—for example, a defendant's unreasonable assessment of the facts about the victim's age, where the crime forbids sexual intercourse with a person younger than a particular age. The determination that such a mistake is "unreasonable" is, in an important sense, a *legal* judgment. Does that mean that the distinction between mistakes of law (about the governing legal norm) and mistakes of fact (about whether defendant's actual conduct instantiates that norm) is, at least in this category of cases, misguided?

Third, the evolution of criminal law standards seems to magically convert mistakes of fact into mistakes of law. Consider the dramatic recent transformation of actus reus and mens rea standards concerning nonconsent in rape law. A number of jurisdictions have not only rejected stringent resistance requirements; they have also, roughly speaking, moved from "NO means NO" to "Only YES means YES." That is, only an affirmative expression of willingness to engage in the act of intercourse suffices as legal consent in these jurisdictions. Suppose a defendant, unaware of this new legal requirement, has intercourse with a victim who does not affirmatively express such willingness, but who does not verbally or physically protest. Has he made a mistake of fact or law about her nonconsent? Does the law care which kind of mistake he made? Should it care?

Finally, consider the fact/law distinction in a different context, inculpatory mistakes. Under the modern consensus, the distinction matters a great deal in deciding what types of "impossible" attempts warrant attempt liability:

(1) A defendant can be guilty even if the attempt is "*factually* impossible" (i.e., the actual facts are such that it was impossible for him to commit a crime). Suppose D1, while hunting out of season, shoots at what he believes is a live deer, but he is actually shooting at a stuffed deer. He is guilty of the attempt to hunt out of season.

(2) But a defendant cannot be found guilty if the attempt is truly "*legally* impossible" (i.e., if, had the facts been as he believed them to be, he would not be committing a crime). Suppose that D2 knows that he is shooting at a live deer, but he incorrectly believes that the state prohibits all hunting of deer, when actually the state permits deer hunting.

Yet this modern consensus is challenged by a famous example from Sandy Kadish, Mr. Fact/Mr. Law. The example seems to demonstrate that the fact/law distinction should make *no* difference to attempt liability.

Mr. Fact and Mr. Law

> Mr. Fact and Mr. Law both set out independently to get a jump on the bow-hunting season by sneaking out a day before the season begins. For technical reasons, the exact date of the state's bow-hunting season for deer tends to change from year to year, but [the] date this year is Friday, October 15. Ironically, Messrs. Fact and Law each make a mistake that results in their stalking and killing deer on what they mistakenly believe to be the day *before* the hunting season but is actually the first day *of* the season itself (Friday, October 15). Mr. Fact makes the factual mistake of thinking, "Today is Thursday, October 14." Mr. Law makes the legal mistake of thinking, "The season begins on Saturday, October 16." While each is butchering his deer carcass, he is each approached by a game warden who intends to congratulate him. Instead, Mr. Fact and Mr. Law both confess, thinking they have been caught red-handed while hunting out of season.[1]

Under the modern consensus, which rejects the defense of factual impossibility but accepts the defense of "true" legal impossibility, Mr. Fact is guilty of attempt, while Mr. Law is not. But is this tenable? Is there really any good reason to convict one but not the other?

In this essay, I will try to show the following. First, under any plausible normative perspective, the distinction between mistake (and ignorance) of criminal law and of fact must at least sometimes be drawn. Second, the fundamental distinction is between a mistake about the state's authoritative statement of what is prohibited ("M Law"), and a mistake about whether that prohibitory norm is instantiated in a particular case ("M Fact"). Third, when an actor makes a mistake about an evaluative criterion whose content the fact-finder has discretion to elaborate, it is impossible both to allow this discretion and to faithfully realize a jurisdiction's policy of treating M Fact and M Law differently. Fourth, the claim that every unreasonable M Fact is really a M Law elides important differences between the two kinds of mistake. Fifth, various borderline objections, such as the Mr. Fact/Mr. Law example, do not undermine the fundamental distinction, although in rare instances, they do constitute genuine counterexamples that do not effectuate the principles and policies that the distinction ordinarily serves; and even here, they are exceptions that prove (the rationale for) the rule. Sixth, specification or evolution of a criminal law norm, such as the criterion for nonconsent in rape law, can convert a legally relevant M Fact into a legally *irrelevant* M Law. This phenomenon does not undermine the fundamental distinction between these types of mistake; to the contrary, it reveals the significance of that distinction.

[1] Westen (2008, pp. 536–537) (offering his own version of the famous example).

Current Doctrine: Mistake of Fact ("M Fact") v. Mistake of Criminal Law ("M Law")

Let us begin with the basic doctrinal picture, which depicts how ignorance and mistake of fact and law are relevant under modern American criminal law.[2] Sometimes they are potentially exculpatory (even though the actor has satisfied the actus reus of the crime), and sometimes potentially inculpatory, i.e. they potentially warrant attempt liability (even though the actor has not satisfied the actus reus of the crime).

Suppose it is illegal knowingly to sell a cigarette to a person under the age of eighteen. And assume that the mens rea requirement of "knowledge" applies to all the material elements of the offense. Here are four scenarios that illustrate the modern approach.

Adam

> Adam, owner of a convenience store, sells a cigarette to Vicky, who is seventeen. Because she appears to be older than seventeen and presents a phony identification card indicating that she is nineteen, Adam believes that she is nineteen.

Adam is not guilty; his mistake of fact ("M Fact") is exculpatory, negating the requisite culpability, that he know or, more precisely, believe,[3] that the recipient is under the age of eighteen.

Boris

> Boris, owner of a convenience store, sells a cigarette to Vicky, who is nineteen. Because she appears to be younger than nineteen and presents an identification card (indicating that she is nineteen) that seems to be forged, Boris believes that she is seventeen.

Boris is not guilty of the crime, but he is guilty of attempt. His M Fact is inculpatory, establishing the requisite culpability for attempt, because if the facts were as he believes them to be, he would be committing the crime. Factual "impossibility" is no defense.

Connie

> Connie sells a cigarette to Vicky, who is seventeen. Connie mistakenly believes that it is perfectly *legal* to sell a cigarette to any person over the age of sixteen.

Connie is guilty. Her mistake about the criminal law ("M Law") will not be exculpatory (absent her reasonable reliance or some other special defense; but no such defense is likely to apply).

Daniela

> Daniela sells a cigarette to Vicky, who is nineteen. Daniela mistakenly believes that it is *illegal* (and in violation of the criminal law) to sell a cigarette to any person under the age of twenty.

[2] By "modern criminal law," I mean the Model Penal Code, statutory revisions following the MPC, and the contemporary American academic consensus on these issues.

[3] A requirement of "knowledge" actually combines a mens rea requirement of belief with an actus reus requirement, that the proposition believed is true. See Simons (1992, p. 541).

Daniela is not guilty of the crime *or* of the attempt. Her M Law will not be inculpatory, even though, in a sense, she would be guilty of a crime if the "circumstances" were as she believed them to be—namely, if the jurisdiction made it a crime to sell a cigarette to a person under the age of twenty. "True" or "pure" legal impossibility *is* a defense.[4]

We can draw an important lesson from these four examples. In these examples at least,[5] the criminal law is *symmetrical* in how it treats mistakes that are relevant to exculpation and those that are relevant to inculpation. Adam's M Fact exculpates; Boris's inculpates. Subjective culpability (either its absence or presence) is decisive. When we turn to the M Law made by Connie and Daniela, again the criminal law treats the cases symmetrically—but in precisely the opposite way that it treats Adam's and Boris's M Fact.

Why don't subjective culpability principles lead us to treat Connie like Adam, and Daniela like Boris? Why don't we exculpate Connie and inculpate Daniela? The conventional answer: different aspects of the legality principle trumps concerns about the absence or presence of culpability. So Connie *is* guilty, even if she might seem less culpable than an otherwise similar defendant who did not make Connie's mistake in believing that the criminal law does not prohibit sales to persons over sixteen. Citizens have a duty to know the law; ignorance or M Law is ordinarily no excuse. But Daniela is *not* guilty of an attempt, even if she might seem *more* culpable than an otherwise similar defendant who did not make Daniela's mistake in believing that the criminal law prohibits sales to persons under twenty. Daniela might deserve moral blame, but she has neither done nor attempted anything that *the criminal law* considers blameworthy.

Overview of Normative Perspectives

Is this basic doctrinal approach defensible? In this paper, I do not attempt to answer that question. Rather, my focus is on a related set of issues: If it is normatively desirable to draw a distinction between fact and law in the criminal law, how should we do so? What problems does such a distinction pose? Which of these difficulties can, and which cannot, be overcome?

Let us begin with a schematic overview of different possible normative positions on the question of when, if ever, ignorance or mistake of criminal law should be a defense. The overview will identify four general positions on the question, "To what extent should M Law be a defense, *relative to* how the law treats M Fact?" The first position is most favorable to criminal defendants, while each successive positions is less favorable.

The Equivalence View

Under this approach, M Law is treated in precisely the same way as M Fact. If the crime of drug possession requires knowledge of the fact that one is in possession of marijuana, it also should require knowledge that marijuana is on the list of controlled substances that it is illegal to possess. If murder requires knowledge that one has in fact caused the death of a

[4] See Dressler (2006, pp. 434–436). Confusingly, many courts employ the term "legal" impossibility for a much broader category of cases, many of which involve only M Fact. See Dressler (2006, pp. 436–437).

[5] The law is not always symmetrical, however, in how it treats the exculpatory and the inculpatory implications of a state of mind. If Adam is simply ignorant (rather than mistaken) about Vicky's age, this might still exculpate him; but it hardly follows that if Boris is ignorant (even unreasonably ignorant) about her age, Boris's unreasonable state of mind inculpates him and permits attempt liability.

human being, it also should require knowledge of how the homicide statute defines "human being"; so if Carlos mistakenly believed that killing a fetus inside a woman's womb is not killing a human being (while the law provides that this does count as homicide), he would be acquitted of knowing murder.[6]

The Liberal View

Under this approach, ignorance or M Law is always a defense if it is based on reasonable grounds.[7] But the requisite culpability *as to the facts* that satisfy the elements of an offense is an entirely separate matter: the required culpability might be negligence, and thus equivalent to the culpability required as to whether the actor is violating the law, but it also might be a higher (or lower) mens rea. So Carlos can be convicted of murder (defined as knowingly causing a person's death) even if he honestly believed that a fetus is not a human being, so long as that belief was negligent or unreasonable.

The Moderate View

Under this approach (or family of approaches), M Law is *sometimes* a defense if it is based on reasonable grounds; but once again, a higher (or lower) mens rea might be required as to the facts that satisfy the elements of the crime. By "sometimes" I mean to embrace a variety of different approaches. The Model Penal Code, for example, does not provide a general defense of reasonable M Law, but does provide a narrower defense of reasonable reliance on official interpretations of the law by judges and administrative officials.[8] Some commentators, and a few courts, suggest that a defense of reasonable M Law should be accepted in the case of malum prohibitum offenses but not in the case of malum in se offenses. And one might endorse a defense of reasonable ignorance of law but not a defense of reasonable mistake of law, on the theory that an actor who is aware that the law exists should make absolutely certain that he gets its content right.

The Conservative View

Under this approach, M Law is never a defense. Whether the law should require low or high levels of culpability as to the facts constituting the offense is treated as a completely distinct issue.

Notice that under all views but the first, we need to distinguish M Fact from M Law in at least some cases. Although the first view does not demand such a distinction, that view itself is highly implausible. Consider two clear implications of this view, each of which is very difficult to accept:

[6] Some jurisdictions endorse a *partial* equivalence approach, applying not to mistakes of criminal law but only to mistakes of *non*criminal law that the criminal law makes relevant. Under this approach, if a defendant is charged with a theft offense, and if even an unreasonable mistaken belief about the facts of ownership would be a defense, then even an unreasonable mistake belief about the civil law of property ownership would also be a defense. See Dressler (2006, pp. 186–187).

[7] Some nations endorse this approach, as do many commentators. For a discussion of Germany's approach, see Schumann (2005, pp. 399–400). In the United States, New Jersey comes close to endorsing this approach. N.J. Stat. Ann. tit. 2C, §2–4(c)(3).

[8] Model Penal Code §2.04(3).

(1) If we retain the current high culpability requirements for serious offenses (e.g., requirements that the actor knowingly or purposely bring about the harm), then we must permit even an unreasonable M Law to serve as a defense in a significant number of cases (e.g., whenever an offense such as theft or murder permits a defense for an unreasonable M Fact).
(2) But if we believe that only a *reasonable* M Law should provide a defense, the approach requires that only a reasonable M Fact will be a defense (thus precluding any mens rea requirement greater than negligence).[9]

Moreover, the state often has good reason to impose *different* mens rea requirements (with respect to the factual issues) for different elements of offense. (Rape statutes require that the defendant intended to engage in intercourse, but often only require that he be negligent or reckless as to the victim's nonconsent.) We then face a problem. When pegging the culpability required with respect to the illegality of the conduct to "the" culpability required with respect to the facts, we actually might have two or more options for the latter. But how do we choose? If the accused rapist asserts a credible M Law claim that he did not know that nonconsensual *oral* intercourse is rape, should he be acquitted because he does not intend to be committing rape, or convicted because he is negligent or reckless as to whether rape includes this form of intercourse?

Furthermore, when we turn to the analysis of inculpatory mistakes and attempt liability, rejecting the M Fact/M Law distinction is even more implausible. First, notice that whichever of the four positions we take on the exculpatory side, a symmetrical position with respect to inculpation hardly follows. "Liberals," for example, believe that a reasonable M Law always excuses from liability, but it hardly follows that they must endorse the position that D's unreasonable M Law in believing that his conduct *is* criminal should always result in attempt liability. Second, it is difficult to defend the view that true legal impossibility should *never* be a defense. Such a view would permit attempt convictions for purely imaginary crimes, and might even require imposition of whatever type and duration of punishment that the actor fantasized. If we wish to reject attempt liability for imaginary crimes yet preserve liability for factually impossible attempts, we must sometimes treat M Fact and M Law differently.

In actual criminal codes, drafters often employ some combination of the four approaches mentioned above, requiring equivalence for some elements of some crimes, and treating fact and law quite differently in other contexts. And under any conceivable version of a criminal code, I have tried to show, M Fact and M Law must sometimes be distinguished, unless we are willing to swallow some very bitter pills.

What principles or policies *justify* this differential treatment? This is not the occasion for a full explication of the question. But it is worth briefly noting some plausible rationales for a distinction. On the exculpatory side, for some offenses, we have good reason to require a high level of culpability (such as knowledge) as to facts but a lower level of culpability (such as negligence) as to the criminal law. Thus, to convict someone of arson, with serious penalties, we might wish to require her to know that she started the fire, and know that she was likely to seriously damage a building, but we might be content if she was merely negligent as to the legal question whether the crime of arson extends to an unoccupied as well as an occupied building. If instead we required only that the actor be negligent as to all of these elements, or that she be negligent as to the factual elements but

[9] For some additional arguments against the equivalence approach along similar lines, see Husak and von Hirsch (1993, pp. 157, 160–165).

knowing as to all of the legal aspects of her conduct, the culpability she would thereby express would be too modest to warrant severe punishment.[10]

On the inculpatory side, an actor who knowingly or purposely takes a risk of endangering the interests that (as he correctly recognizes) the state means to protect through its criminal law, but who turns out to have selected a factually impossible means, may deserve a serious penalty. (Suppose D1 aims at V1 but his gun jams.) He is certainly more deserving of punishment than an actor who knowingly or purposely takes a risk that he erroneously *believes* endangers interests or values that the state means to protect through its criminal law. (Suppose D2 has consensual sex with V2 outside of marriage, mistakenly believing that fornication is a crime.) An actor who believes that the criminal law protects interests that it does not, or who believes that it protects interests more stringently than it does, might be morally blameworthy for nevertheless flouting "the law" as he sees it, but he does not deserve serious punishment. We can explain this conclusion as flowing either from the principle of legality, or from the principle that culpability *for purposes of the criminal law* is only meaningful if it is understood and defined with reference to the type of harms and wrongs that the law actually prohibits.[11]

The Fundamental Distinction between M Fact and M Law

If under any plausible normative view the criminal law does need to draw a distinction between a M Fact and a M Law, how should it do so? I suggest a general approach, drawing on recent accounts by Gerald Leonard and Peter Westen.[12] The fundamental distinction is between:

(1) *M Law*: a mistake about what the state prohibits (including a mistake about how state officials, including judges, authoritatively interpret the prohibition);

and

(2) *M Fact*: a mistake about the instantiation of that prohibitory norm in a particular case, where the mistake does *not* flow from the first type of mistake.

Thus, I largely agree with the analysis that Peter Westen recently suggested in an article on impossibility and attempt liability:

[10] Or reconsider Adam (who was mistaken about the cigarette buyer's age and thus believed that she was above the legal age of eighteen) and Connie (who was not mistaken about the buyer's age of seventeen but mistakenly believed that the legal age for such sales was sixteen). It is plausible to require knowledge for a M Fact such as Adam's (thus excusing even for unreasonable mistakes) but to require at most negligence for a M Law such as Connie's (thus excusing only for reasonable mistakes). Imposing a duty on all sellers to assure themselves of the governing legal rules is not very burdensome, but imposing a duty on pain of criminal liability to find out the relevant facts about a buyer's age is more burdensome and arguably is unduly harsh unless we require a higher level of culpability as to facts—knowledge or at least recklessness.

[11] For an analysis along these lines, see Westen (2008). For the argument that such an actor deserves modest criminal punishment, for attempting to violate (what he took to be) the criminal law, see Fletcher (1986, p. 59); for the contrary argument, see Duff (1996, pp. 156–159).

[12] I concede that this approach might need modest qualification depending on one's underlying normative perspective, and depending on whether the question is the relevance of mistake to exculpation or instead to inculpation.

The question before us is how to distinguish law from fact for purposes of these exculpatory and inculpatory criminal law doctrines. The law/fact distinction obviously is drawn differently for other legal purposes, such as allocating decision-making authority between judges, juries, and administrative agencies.

> An actor makes a mistake of law in an impossibility case and, hence, has a defense, if he is in need of the services of a good lawyer—that is, if, although he knows what he is empirically doing, he mistakenly believes that the state has officially declared acts of that type to be punishable. An actor makes a mistake of fact in an impossibility case, and, hence, has no defense, if he is in need of the services of a good private investigator—that is, if, although he knows what act-types the state officially declares to be punishable, he mistakenly believes that his conduct is an act-token thereof.[13]

More precisely, Westen elucidates the distinction this way:

> The "law," for the purposes of the test [distinguishing attempts that are factually impossible from attempts that are legally impossible], consists of a full specification of the act-types that the state officially declares to be punishable. The "facts" consist of the empirical features that determine whether conduct is an act-token of what is acknowledged to be a prohibited act-type. It follows, therefore, that no middle ground exists between law and fact, and there are no "mixed" mistakes that consist of neither one nor the other.[14]

Although Westen is here investigating the distinction in the context of impossibility and potentially inculpatory mistakes, his characterization also applies to a possibly *exculpatory* M Fact or M Law that a defendant will try to claim warrants acquittal.

In one respect this analysis is too simple. What the law is, and how it has been authoritatively interpreted, are indeed questions of fact,[15] at least insofar as "fact" is contrasted with an actor's purely subjective perception, opinion, or judgment about the matter at hand. But the important point is that nonlegal "facts" (in this sense) can be reliably distinguished from legal "facts." As Gerald Leonard explains, a M Law "is a

[13] Westen (2008, p. 535).

[14] Westen (2008, p. 535) (citations omitted).

In his comment on an earlier draft of this article, Alexander argues that the type/token distinction does not illuminate the law/fact distinction. I agree with him in part. He is correct that legal categories vary in their generality, so that, at least on a plausible understanding of the type/token distinction, what Westen and I characterize as a mistake of "law" could be classified as a mistake either of a law-type or of a law-token. See Wetzel (2008). As Alexander says, the EPA's designation of polar bears as an endangered species is in a sense a token of the legal type, "the EPA's general authority to designate such species" (and, I would add, the EPA's general authority is itself a token of the legal type, "legal authority that Congress has delegated," and so forth).

But I still find Westen's use of the type/token distinction enlightening. In my view, a M Fact can always be understood as a token relative to the type* of conduct prohibited by the criminal law. That type* could, to be sure, be a broad generalization of the kind of conduct that is prohibited (a *law-type*, e.g. any species designated by the EPA), or instead a relatively specific instantiation of such a generalization (and thus, perhaps, a *law-token*, e.g. polar bears, which the EPA has designated as protected). Still, no matter how specific the relevant legal criterion is, it is apt to characterize the questions (a) whether defendant's actual conduct (e.g., shooting a particular bear) instantiates that criterion, and (b) whether defendant is correct or incorrect in believing that his conduct is or is not an instantiation, as expressing the relationship of token (factual instantiation) to type (legal criterion). Put differently, a defendant who makes a mistake about whether his conduct falls within the legal prohibition, but who fully understands the scope and meaning of the prohibition, is making a M Fact, a mistake that in an important sense is a "token" of the "type" given by that definition (no matter how specific the definition is).

[15] See Alexander (1993, pp. 37, 57–58) (pointing out that the existence or meaning of a legal norm is a question of fact, at least for a legal positivist); Lawson (1992, pp. 862–865).

failure to recognize and understand the meanings of the statutory terms that govern one's case."[16] By contrast, a M Fact is a mistake "untainted by an incorrect understanding of what characteristics or circumstances the court takes to be equivalent in meaning to a statutory term."[17] As Leonard's explanation suggests, we should, when drawing the distinction, begin with an account of ignorance or mistake of *law*, and then treat all *other* claims that ignorance or mistake is relevant to criminal liability as involving ignorance or mistake of (nonlegal) *fact*.

Larry Alexander has challenged the fact/law distinction, claiming that because application of law is part of its meaning, factual mistakes are ultimate legal ones; and, in the context of impossibility, factual impossibility ends up being a species of legal impossibility.[18] But if "legal impossibility" here refers to true legal impossibility of the sort exemplified by Daniela, Alexander is incorrect. "Application of the law" can readily be sorted into cases where that mistaken application is based on a mistake of nonlegal fact and cases in which the mistaken application is based on misunderstanding of the legal norm.[19] To be sure, we need to understand the *possible* applications of legal standards in order to understand their meaning; but it hardly follows that a mistake about the facts is just a mistake about the law. In the earlier examples, Adam does not know that the person to whom he sold a pack of cigarettes is seventeen, not nineteen; and Boris does not know that his buyer is nineteen, not seventeen. But the factual mistakes of Adam and Boris do not reflect any confusion on their part about the legal meaning of "eighteen" in the relevant law.

The basic distinction between law and fact is straightforward and defensible, notwithstanding the claim of some skeptics, such as Alexander, that it is incoherent. But in particular contexts, it seems, the distinction either is very difficult to draw, or fails to serve the criminal law principles that it ordinarily effectuates.[20] Let us take a closer look, then, at how the distinction plays out in these more problematical contexts.

[16] Leonard (2001, p. 529).

[17] Leonard (2001, p. 531). For other accounts of the criminal law distinction between law and fact, see Stuart (2007, pp. 366–370); Williams (1961, pp. 287–289).

[18] Alexander (1993, pp. 48–53). Alexander gives a number of supposed examples of this skeptical thesis, some of which I discuss below.

[19] See Westen (2008, p. 534 n. 32):

> Larry Alexander denies that any "nonarbitrary line" exits between law and fact in impossibility cases. … He argues that, "If [the] application [of a law] is part of [its] meaning—and consider whether one 'knows' the meaning of a law if he cannot identify any actual extension of it in the world—then factual mistakes are legal ones, and factual impossibility is a species of legal impossibility." [Alexander (1993, p. 52)]…I think Alexander confuses "application of law" qua a state's full specification of the act-types it prohibits and "application of the law" qua actual act-tokens thereof. Yes, every criminal event is an act-token of an act-type that the state has declared to be prohibited. But mistakes regarding what act-types are prohibited (law) differ from mistakes regarding whether conduct is an act-token thereof (fact). Both mistakes can result in a person thinking that he has violated the law when he has not, but the sources of the mistakes differ.

[20] Doctrinally, an important difficulty is how to treat ignorance or mistake of noncriminal law—where the criminal law itself incorporates legal norms from "outside" the criminal law. In theft law, for example, criminal law often incorporates by reference the civil property law definition of "property," and the question arises whether a requirement that the defendant "know that he has taken the property of another" requires acquittal if defendant makes a mistake (even an unreasonable mistake) about who owns the property in question. Because the issue is of less interest to criminal law theorists and philosophers, I do not address it in this paper.

The Distinction Elaborated

Difficulties Locating the Boundary Between Fact and Law

Mistake as to an Evaluative (Rather Than Descriptive) Criterion

Many instances of M Law are straightforward mistakes about an unambiguous, specific, rule-like legal criterion. Recall Connie, who mistakenly believes that it is legal to sell a cigarette to any person over the age of sixteen, and Daniela, who mistakenly believes that it is illegal to sell a cigarette to any person under the age of twenty. In this type of crime, it is unlikely that anyone would make a legally relevant mistake about what counts as being age twenty. ("Mr. Law" in the introduction makes a similarly straightforward mistake about a rule-like criterion.)

Many other legal errors are about how complex statutory provisions are to be read together. Others concern the precise definitions of elements of an offense. And still others are about how courts will later interpret an ambiguous provision. Judicial dockets are replete with examples of all of these categories.

But one significant category of possible error about the law has received relatively little notice in this context[21]: where the legal element about which the defendant might be mistaken is explicitly defined by evaluative criteria, criteria that will be given ultimate content only by the trier of fact. When an evaluative criterion is an actus reus element of an offense,[22] it can be extraordinarily difficult to distinguish a M Fact from a M Law. But, as we have seen, jurisdictions commonly differentiate the two, usually treating a M Fact more leniently than a M Law. And then it is difficult or impossible to determine whether the trier of fact has properly applied that differential approach.

Consider four examples.

(1) In some jurisdictions, an essential element of criminal liability for a theft offense is the defendant's "dishonesty." English law imposes such a requirement, though the statute says little about what the element means. English courts initially gave the element content by exculpating any defendant who subjectively believed that what he was doing was honest.[23] But this approach was later rejected in favor of a more objective approach.

> …Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider those actions to be dishonest.[24]

[21] The examples that follow raise a number of problems, including vagueness. But they are rarely analyzed as possible illustrations of M Law. For an illuminating discussion of the varieties of vagueness, and of the distinctive vagueness problems with evaluative criteria, see Endicott (2001, Ch. 3.9, 3.10, & 5.4).

[22] Similarly, when an evaluative criterion is employed as a mens rea or culpability element—for example, "negligence" or "extreme indifference to the value of human life"—it is very difficult to specify the content of the criterion. See Simons (2003a). But the special problem of distinguishing M Fact from M Law does not arise here, because the criminal law does not require an actor to possess mens rea as to his own mens rea. However, whether "negligence" is a mens rea or actus reus element is itself disputed. See footnote 43 infra.

[23] Simester and Sullivan (2007, pp. 489–495).

[24] Regina v. Ghosh, [1982] QB 1053.

The new test requires proof both that what was done was "dishonest according to the ordinary standards of reasonable and honest people," and that defendant "[realized] that reasonable and honest people would regard what he did as dishonest."[25]

But notice a serious problem that even this new test poses. The trier of fact still retains substantial discretion to define the operative standard, "ordinary standards of reasonable and honest people." If a defendant is convicted under this standard despite his claim of mistake, he cannot tell why the jury rejected his claim. Did they believe he made an unconvincing claim of M Fact? Or did they conclude that he made a convincing, but legally irrelevant, claim of M Law?

Thus, suppose Cynthia is charged with conducting a fraudulent business scheme. She believes that "dishonesty" (according to "ordinary standards") means (1) violating customary standards of business behavior. Another possible meaning is (2) violating ideal standards of business behavior, as defined by a consensus of leading experts (or as defined by the most ethically rigorous behavior actually found in the marketplace). Suppose her allegedly fraudulent scheme is clearly criminal under (2) but not so clearly criminal under (1), because she offers some factual evidence suggesting that she did not actually violate customary standards. Cynthia is then convicted under an instruction simply asking the jury to consider whether her conduct was "dishonest according to the ordinary standards of reasonable and honest people." Cynthia cannot know the basis of her conviction. She cannot know whether she was convicted because the jury chose standard (2) rather than (1), even though it accepted her factual claim that she did not violate standard (1); or instead because, although it applied (1), it rejected her factual claim that she did not violate custom.

Cynthia's inability to determine why she was convicted is especially troubling because, under most jurisdictions' rules, a M Law is treated much less favorably than a M Fact. So at most Cynthia might obtain a defense of M law if her mistake was reasonable, while even an *unreasonable* M Fact might excuse. If this were the jurisdiction's approach (i.e., if fraud requires knowledge of the facts but only negligence as to the legal criterion of "dishonesty"[26]), then Cynthia should receive the benefit of an acquittal if the jury was persuaded that she made an unreasonable M Fact, but should not receive an acquittal if it was persuaded that she made an unreasonable M Law. Yet there is no way to determine the basis of the jury's decision. Accordingly, there is a risk—a risk that neither Cynthia's attorney nor the courts can readily correct—that the M Fact and M Law rules will be improperly applied.

In short, the policy of permitting the trier of fact discretion to give content to an evaluative criterion such as "dishonesty" conflicts with the policies that justify a distinction between M Fact and M Law. Not only is the defendant unable to know precisely what conduct is prohibited, but *no one* can know whether a defendant's proffered mistake defense is properly characterized as a (legally relevant) M Fact or a (quite possibly legally irrelevant) M Law. Perhaps the vagueness problem is soluble—for example, by insisting that a reasonably law-abiding person would not be surprised to learn that the type of

[25] Regina v. Ghosh, [1982] QB 1053.

[26] Although the English courts have created a two-part test of dishonesty, the second part of which is more subjective, this is insufficient to remedy the problem. That second part requires defendant to have subjectively realized that "reasonable and honest people" would regard what he did as dishonest. But this does not resolve the question of how we should specify what he must realize. Is interpretation (1), or (2), or yet some other interpretation, the correct specification?

conduct he engaged in did violate the statute. But such a solution does not resolve the second problem, of how to classify mistakes as "law" rather than "fact" in this context.[27]

(2) The problem arises for a wide variety of evaluative criteria. As a second example, recall the discussion in the introduction of the defense of lesser evils. The explicit requirement that the actor choose the "lesser evil" inevitably must be stated without detailed elaboration, since the criterion needs to be broad enough to apply to any crime.

Consider two more illustrations.

(3) Defendant is charged with knowingly selling "obscene" materials, a term that requires that the materials violate community standards of decency. Must defendant know what those standards are, or is it enough that he knows the relevant facts about those materials (facts showing that, as a matter of law, the materials violate community standards)?[28]

(4) To be negligent or reckless, as this is understood in many jurisdictions, an actor must, among other things, create a "substantial" risk of harm. But the fact-finder might have unreviewable discretion to determine how great a risk counts as "substantial." Suppose the defendant believes that a 1% risk of harm can never be "substantial," and also believes that he has only created a 1% risk of harm.[29] But suppose the jury finds that he did create a substantial risk of harm. Has he made a M Fact? A M Law? It seems impossible to say.[30] Yet, because most jurisdictions treat a M Law less favorably than a M Fact, this characterization could determine whether it is proper to convict him.[31]

To be sure, a defendant can always request an instruction specifying the legal standard more precisely. But in many situations, it is legitimate for the judge to demur, and to conclude that the jury should have the discretion to employ a more opaque, evaluative, relatively unspecified norm. In determining what counts as dishonesty in fraud, we might want the jury to apply its moral judgment; an alternative approach, specifying by very explicit, narrow criteria those practices that are illegal, will inevitably be incomplete and might encourage more creative frauds that are not on the official "list."[32] It might be desirable for juries, or at least judges, to balance lesser evils case by case without having to provide a full specification of the criteria for lesser evils. And perhaps we want "substantial and unjustifiable risk" in negligence to be evaluated according to the moral sense of the jury.[33]

[27] This is only a problem, of course, insofar as the evaluative criterion is not further specified by the jurisdiction's legal authorities. If the state supreme court resolves the question whether the first or second interpretation is correct, then the difficulty I have identified does not arise.

[28] Canadian courts have given the latter answer. See Stuart (2007, p. 369).

[29] Imagine that a passenger railroad switches to a new, cheaper method of storing luggage that increases by 1% the risk that a piece of luggage will fall and injure a passenger.

[30] The jury might have concluded that he actually created a 5% risk of harm, but might have agreed with him that a 1% risk is always legally insufficient. In that case, he has made a mistake of fact. Or the jury might have instead concluded that (a) he was not factually mistaken about having created a 1% risk of harm, yet (b) he was legally incorrect in believing that a risk greater than 1% is always necessary for criminal liability.

[31] Another set of examples come from international criminal law. See Eser (2002, pp. 921–925, 936–937) (discussing, inter alia, war crimes by "inhumane" treatment and environmental damage "excessive" in relation to military advantage).

[32] See Buell (2006, pp. 1987–1996).

[33] Another possible solution is to instruct the jury conditionally, taking into account the jurisdiction's differential legal treatment of M Fact and M Law. For example: "If you find that the defendant made a mistake of fact, you must find for the defendant, whether or not the mistake was reasonable; but if you find that the defendant made a mistake of law, you should ignore that mistake." [Or, in place of the last clause: "you must find for the defendant if you conclude that his mistake of law was reasonable"]. But this solution does not seem realistic.

These difficulties posed by evaluative criteria can arise, not just with exculpatory mistakes, but with inculpatory mistakes as well. If the defendant believes that he has committed forgery but does not realize that he has altered a legally immaterial part of the check, what kind of mistake has he made? In the well-known case *Wilson v. State*, the defendant changed the figure "$2.50" to "$12.50," but did not change the written words "two and 50/100."[34] Although he believed that he was committing forgery when he changed the numbers, he was legally mistaken, for forgery requires a material alteration that could cause injury, and a "material" alteration in turn requires that the forger change the words on an instrument. Is defendant guilty of attempted forgery if he believes that changing numbers but not words counts as a "material" alteration? No; this is a mistake as to the scope of the criminal law of forgery, as that law has been authoritatively specified. True legal impossibility here precludes attempt liability. But notice that a subtly different mistake would permit attempt liability. Suppose "material alteration" is defined by a less precise, evaluative criterion: "an alteration that would cause a significant proportion of ordinary persons who view the check to believe that the altered terms of the check are the actual terms." Then the defendant could either make a M Fact or a M Law in believing that he has committed forgery, corresponding to the mistakes made by corporate executive Cynthia, above. And again, there is no way to know which type of mistake the defendant made. In this inculpatory context, of course, if the defendant makes a M Fact, he can be *convicted* (for an attempt), while if he makes a M Law, he cannot be convicted.

In conclusion, there is an irreconcilable tension between (1) the policies and principles that jurisdictions endorse when they require M Fact to be treated differently from M Law, and (2) the policies that both empower a trier of fact to give substantive content to an indeterminate, evaluative legal criterion such as "dishonesty," and at the same time permit the trier not to precisely specify that content. Perhaps granting that discretion to define evaluative criteria is a sufficiently important policy that it trumps the policies behind differential treatment of M Fact and M Law. However, I strongly suspect that lawmakers who establish evaluative criteria for criminal liability have barely noticed this problem.

Is Every Unreasonable M Fact Really a M Law?

In a strikingly original argument, Gerald Leonard reaches a radical conclusion: whenever an actor has made an *unreasonable* M Fact, he has really made a M Law. More precisely: "Whenever the law requires a person to make the inferences that a reasonable person would have made in the situation,…any mistake resulting from a failure to draw those inferences is [a M Law]."[35] Leonard's argument is quite intriguing: a reasonableness requirement (even as to what would conventionally be described as a M Fact) simply expresses the law's judgment of what inferences an actor is legally obligated to make in the relevant context. If the law (through the fact finder) says that a reasonable person would, in the actor's circumstances, realize (a) that he was creating an unjustifiable risk of death, or (b) that the rape victim was not consenting, or (c) that the actor was not really facing a threat of deadly force when he used defensive force, then the actor's mistaken belief

[34] 85 Miss. 687, 38 So. 46 (1905). *Wilson* is discussed in Alexander (1993, p. 46), and Simons (1990, pp. 466–467). See also People v. Teal, 89 N. E. 1086, 196 N.Y. 372 (1909) (where D tried to suborn false testimony, but the testimony concerned a matter that was legally immaterial to the proceedings), discussed in Alexander (1993, p. 46); Duff (1996, pp. 96–98); and Simons (1990, pp. 467–468).

[35] Leonard (2001, p. 564).

otherwise is, in each case, "unreasonable" because of a failure to draw an inference that the law requires.

This claim, if true, would mean that all reasonableness criteria in the criminal law (including both criteria of offense elements, such as "unreasonable risk" manslaughter standards or requirements that mistake as to nonconsent in rape be reasonable and also criteria for defenses, such as reasonable belief requirements in self-defense) are really just requirements that the defendant understand "the law." And any unreasonable M Fact about whether one has satisfied an offense element, or whether the legal criteria for a defense have been satisfied, would be a M Law. The practical upshot of this argument is a bit unclear, for Leonard does insist that a *reasonable* M Fact is not a M Law.[36] Leonard is thus able to avoid the disturbing implication that if a jurisdiction retains the venerable "ignorance or mistake of law is no excuse" strict liability approach, then strict liability (rather than negligence or recklessness) is also the presumptively appropriate standard of criminal liability for (what are conventionally called) mistakes of fact. Still, his argument has provocative and unsettling implications. First, instances of M Law are far more prevalent than we had thought. Second, widespread academic objections that M Law often unfairly imposes strict liability are overstated, insofar as *this* (unreasonable M Fact) category of M Law clearly does demand that the actor be unreasonable. And third, the very fact that this category of M Law is unproblematic suggests that other, more conventional categories of M Law are less problematic than usually believed; for these other categories also can be understood to demand only what "unreasonable M Fact" categories demand—that the actor interpret legal meaning in the way that the law requires.[37]

Let us take a closer look at Leonard's argument, focusing (as he does) on the famous case of *Regina v. Morgan*.[38] The law, almost all would agree, properly views as unreasonable the defendants' beliefs in that case that the female victim was consenting, since their beliefs were based only on her husband's assurances that she was consenting notwithstanding her clear protests and violent struggle when three of them had intercourse with her. Leonard reads the case essentially as involving a mistaken belief by the defendants about the *meaning* of consent: the defendants thought that consent could exist under such circumstances, when the law declares otherwise.[39] Leonard points out that, although the House of Lords concluded that (a) an unreasonable but honest mistake of fact about nonconsent does (and in a different case would) preclude punishment for rape, it also determined, based on the egregious facts, that (b) no reasonable jury could have believed that the defendants in the actual case were honestly mistaken about nonconsent. But Leonard characterizes the second determination, like the first, as a judgment that the defendant has actually made a M Law! In his view, when the court finds insufficient evidence for a jury to conclude that defendant could have genuinely subjectively believed that the victim was consenting, it is really pointing out that the defendant could only hold such a belief if he misunderstood what "consent" means.

I find the argument illuminating, but in the end unpersuasive. Leonard treats as analytically identical the following two kinds of honest mistakes: (1) an unreasonable mistake about how "consent" is legally defined (the "legal criterion" of consent), and (2) an unreasonable mistake, given the facts available to the actor, about whether the victim

[36] Leonard (2001, p. 569).

[37] See Leonard (2001, pp. 573–575).

[38] [1976] A.C. 182 (House of Lords).

[39] Leonard (2001, pp. 569–572).

"consented" in the sense required by that legal criterion. Leonard is correct that on the facts of *Morgan*, it is difficult to imagine how an actor could satisfy (2), so if the defendants in *Morgan* were honestly mistaken, they were mistaken in sense (1). Indeed, it is highly doubtful that the actors were actually mistaken in either sense. But the more general and more important point is that the two inquiries are conceptually distinct, and this distinction makes a practical difference in many other cases that do not present as extreme a set of facts as *Morgan*. Many instances of (2) do not involve the actor's misunderstanding of the law in sense (1). Should such cases really be treated like conventional instances of M Law (i.e., instances of (1))?

Consider a more straightforward example that illustrates the distinction, an example outside the context of forcible rape[40]—the crime of distributing tobacco to a person under age 18 that we examined earlier. Recall Connie, who distributed tobacco to 17-year old Vicky, and who was mistaken about the minimum legal age, believing it to be 16. This would be a classic M Law in sense (1). Now compare Andrew, who recognizes that the legal age is 18 and thus is correct about the law in sense (1), but who makes a "M Law" (in Leonard's sense (2)): he mistakenly concludes that Vicky is 19, and that mistake is unreasonable. (He is very gullible and lacks experience determining the age of teenagers.) The kind of "legal" determination (if it is that) entailed in finding that Andrew's mistake was unreasonable is quite different from the kind of legal determination expressed in a statute establishing the legal age for distributing tobacco to another.

When Leonard says that an unreasonable M Fact is a case in which the defendant is making a "mistake about the meaning of the legal term" or is "misusing the statutory language," given his experience, the rhetoric conflates these two different types of legal mistakes, even if, judged by Leonard's very broad "M Law" definition, they are indeed both instances of M Law. And the rhetoric is a bit misleading. Leonard would presumably say that Andrew's unreasonable mistake represents a "mistake about the meaning of 'under age 18' given the facts available to him." This seems forced. The legal meaning of "under age 18" is not a matter of serious uncertainty. On a more natural characterization, the example is analyzed this way:

(a) The defendant makes a M Fact about whether this legal element is satisfied in his individual case, and
(b) The fact finder makes a subsequent judgment that that mistake was unreasonable.

Even if the latter judgment is properly described as a judgment about "the law" (insofar as it is a normative judgment that the individual fact finder has the authority to make), this type of judgment is very different from a more straightforwardly "legal" mistake about whether 16 or 18 is the minimum legal age for the prohibition on distributing tobacco to a minor. It is not at all clear that the criminal law should treat both types of judgment the same.

At the same time, Leonard's argument, though ultimately unpersuasive, is instructive in two important ways. First, he is correct that we often do not focus on the precise legal meaning of a criminal law term until we need to apply it to a concrete fact pattern; as a

[40] In that context, defendants not infrequently do make honest but unreasonable mistakes about the law in the conventional sense (sense (1)); for example, some defendants might believe that a woman legally consents to intercourse unless she resists to the utmost or to some significant extent, or that "no" means "yes" unless the woman clearly and repeatedly expresses her unwillingness.

result, in practice, we sometimes conflate M Law and M Fact.[41] (The meaning of "consent" in rape law is a good example.) As Leonard points out, a defendant cannot unilaterally determine that his mistake is one of fact rather than law. "A defendant cannot claim [M Fact] just by distorting the meaning of words; he cannot get a [M Fact] defense by asserting a belief that resistance means consent any more than by asserting a belief that red [in the traffic laws] means green."[42] Courts and fact finders indeed have an obligation to parse any claim of mistake and determine on their own whether the type of mistake the defendant made was one of law or one of fact.

Second, there is merit to Leonard's point that when a fact finder finds an actor's mistake "unreasonable," the fact finder is making an *explicitly evaluative* judgment, a judgment that is in this respect similar to the judgment it must make when applying statutes employing explicit evaluative criteria of the sort that we discussed in the previous section—such as "dishonesty" in fraud, choice of "lesser evils" in the necessity defense, or creation of a "substantial" risk in negligence and recklessness doctrine.

Nevertheless, these two types of evaluative judgment also differ in a significant way. The determination that the actor made an unreasonable M Fact is a *second-order* evaluative judgment, which supervenes on a factual belief that the statutory standard makes relevant. By contrast, when the statutory standard itself requires an evaluative judgment, that is a *first-order* determination. When we explored the complexities and ambiguities of such evaluative criteria earlier, we could easily distinguish the criterion itself from the mens rea the actor possessed with respect to the criterion. (We could ask whether "dishonesty" means "violating customary business standards," and then we could separately ask whether Cynthia knew what the legal test was, and also whether she knew facts that, as a matter of law, satisfied the legal test.) But when we conclude that gullible Andrew is "unreasonable" in concluding that in fact Vicky is 19, this evaluative judgment cannot easily be separated into two analogous parts. More to the point, it should not be so separated. Even if we characterize Andrew's incorrect, unreasonable conclusion that Vicky is 19 as, in a loose sense, an "interpretation of law," the criminal law does not, and should not, take an interest in Andrew's mens rea as to that interpretation. In other words, we do not ask, "Did Andrew know that the law would consider unreasonable his conclusion, on this set of facts, that Vicky was 19?" We do not, and should not, require an actor to possess a culpable mens rea with respect to his own mens rea.[43]

[41] As Leonard puts it: "Legal meaning seems to lie in concrete applications, and any materially unreasonable evaluation of a scenario must be a failure to understand legal meaning and thus a mistake of law." Leonard (2001, p. 592). As I have explained, there is merit to the first proposition, but it does not entail the second.

[42] Leonard (2001, p. 574).

[43] Leonard does not endorse such a requirement, but it seems to be an implication of his argument.

When Leonard asserts that an actor's mistake about whether a gun is loaded is in effect a legal mistake about what counts as unjustifiable conduct, Leonard (2001, pp. 580–581), he is treating the actor as analogous to Cynthia, when the actor is arguably more analogous to Andrew. However, there is a genuine dispute about whether to treat the "unjustifiable risk" criterion for manslaughter as providing (1) a short-hand legal criterion of permissible conduct, or instead (2) a mens rea (or mens rea-like) requirement for the causal result, death. If the first interpretation is correct, then it would be more plausible to also require mens rea as to that criterion (for example, to require that the actor know that his conduct is, or might be, unjustifiable, or to require that he should have known this). All risk-creation offenses are ambiguous in this way.

What is the Model Penal Code's view of these matters? My understanding is that the fact finder is to determine as a matter of law what counts as an "unjustifiable risk," and that the Code's definition of recklessness (which requires some form of subjective awareness) does not require awareness or belief that one's conduct is unjustifiable, though it does require awareness (a) that one's conduct poses a substantial

In conclusion, Leonard's argument, if valid, would radically expand the scope of M Law, and would cast doubt on the significance of the distinction between M Fact and M Law. But he has not offered sufficient grounds for such dramatic conclusions.

Three Borderline Cases, Including Mr. Fact/Mr. Law

Three different "borderline" objections to the fact/law distinction deserve attention: Mr. Fact/Mr. Law; factual mistake engendering mistake about the content or scope of the criminal law; and criminal laws that designate a particular object or person. Each objection questions the coherence of the fact/law distinction. Each objection can be answered.

Mr. Fact/Mr. Law The Mr. Fact/Mr. Law bow-hunting example, set forth in the introduction, is often offered as a reductio ad absurdum of the fact/law distinction. The modern legal approach to impossibility would provide that Mr. Fact is guilty of an attempt but Mr. Law is not. Because they reject factual impossibility as a defense, the "moderns" would convict Mr. Fact. Because they continue to endorse "true" legal impossibility as a defense, they would acquit Mr. Law. Yet Mr. Fact and Mr. Law appear to differ not a whit in their dangerousness or culpability. Can we really justify treating them differently?

Yes we can.[44] On closer examination, this famous example does not reveal the absurdity of the fact/law distinction. Rather, it demonstrates that in the rare instance of a criminal statute whose legal categories are perfectly arbitrary, or nearly so, inculpatory M Law is indeed normatively indistinguishable from inculpatory M Fact. For pragmatic reasons, however, it makes sense to apply a uniform rule that no inculpatory M Law, not even this rare type, should result in attempt liability. Let me explain.

One important feature of the example is the sheer arbitrariness of the dates when hunting is prohibited. Mr. Law is fully aware that a legal rule (prohibiting hunting out of season) covers his conduct, and his only mistake is with respect to a largely arbitrary line-drawing feature of the law. No one seriously thinks it matters whether the entire hunting season is shifted a week earlier or a week later. By contrast, most criminal laws contain categories that bear a nonarbitrary relationship to the relevant harm or wrong that the state is concerned to prevent or denounce. (Obvious examples include gradations of theft depending on the amount knowingly stolen, or gradations of assault and homicide depending on the degree or type of harm intentionally caused.) And even in the examples we have been considering, of Adam, Boris, Connie, and Daniela and the law against selling cigarettes to persons under age eighteen, the line-drawing is not so deeply arbitrary. Younger people are generally less mature, so it is sensible to draw age-specific lines in prohibiting various types of dangerous activities, even though the specific age chosen (18 years vs. 17 years, 10 months) is arbitrary. By contrast, establishing the specific dates when hunting may take place is presumably designed (a) to solve a coordination problem (other citizens have a right to know when it is safe to walk in the woods without having to wear orange or bright clothing) and (b) to manage and limit the total number of prey that

Footnote 43 continued
risk of harm and (b) of the facts that make one's conduct unjustifiable. Simons (2003b, p. 189). But this account of recklessness reveals that it is a mixture of interpretations (1) and (2).

[44] I confess to being a supporter of Barack Obama.

are killed that season. One could serve these purposes by selecting *any* hunting period of equivalent duration, any time of the year.[45]

Why does this matter? In many "true" legal impossibility examples, e.g. when someone erroneously believes that fornication is a crime, or that public criticism of the government is a crime, or that a repealed criminal statute is still in effect, the defendant's view of the interests and values currently protected by the criminal law is seriously at odds with the legislature's. That he or she is willing to violate the criminal law is troublesome, to be sure, but serious criminal punishment for acting on that disposition is unacceptable. Even in the sale-to-minors example, where the age limit is to some extent arbitrary, the legislature has a less arbitrary reason for establishing the age distinction than in the Mr. Fact/Mr. Law example. Recall Daniela, who believed that the law punishes the sale of cigarettes to those under twenty, when actually it prohibits sales only to those under eighteen. It would be at least somewhat troubling to punish Daniela for having a different view of the governing values in the jurisdiction than the jurisdiction actually intends to effectuate, i.e., for believing that the criminal law is more protective of younger persons than it actually is. By contrast, Mr. Fact and Mr. Law seem *equally* willing to violate the law and to defy the values that the law represents (the values of social coordination and protection of wildlife). Mr. Law's mistake about the actual dates of the hunting season hardly reflects a benighted belief that the criminal law is more protective or more rigorous in protecting animals from hunting, or in preserving quiet, than it turns out to be. Rather, the criminal law turns out to be arbitrarily different in its scope than he expected it to be. In such a case, the policy arguments against punishing for legally impossible attempts are considerably weaker.[46]

Still, the distinction between fact and law is a sharp one. And there are good pragmatic and prudential reasons for relying on this distinction in defining the scope of attempt liability. The "law" side of the distinction correlates very well (though not perfectly, given borderline cases like Mr. Fact/Mr. Law) with the policy against punishing actors who believe that the criminal law is more rigorous than it turns out to be. It would be very difficult to identify reliably the small category of cases (such as Mr. Fact/Mr. Law) in which the actor's view of the values protected by the criminal law is no different at all from the legislature's. And, if one is skeptical about the justice or efficacy of attempt liability in

[45] Consider another example—"Ms. Tax Law"—an example even more extreme than Mr. Fact/Mr. Law because it involves a *perfectly* arbitrary law. Suppose that in even-numbered years, individual tax forms must be filed by April 15 if your name ends in A-L, and by May 1 if your name ends in M-Z. In odd-numbered years, the converse. The point is to spread out IRS workload. Here, it seems justifiable to punish "Ms. Tax Law" for an attempt, if she files on May 1, 2008 but incorrectly believes she was supposed to file by April 15. (At least, this seems as justifiable as punishing Ms. Tax Fact who files on May 1 but incorrectly believes, as she files, that the current date is May 5.) To be sure, Ms. Tax Law has made a M Law. But this is not a case where she has a view of the *values* protected by the criminal law that differs in any way from the legislature's view.

The original Mr. Fact/Mr. Law example is less arbitrary, however, if the actual dates are relevant to a social harm—for example, if the no-hunting period is chosen in part because that is when animals give birth. (I thank Stan Fisher for this observation.).

[46] A similar argument can be offered on the exculpatory side. Here, too, the fact/law distinction has much less force if the legal classification is quite arbitrary. Suppose Mr. Fact2 makes an exculpatory factual mistake about what day it is: if his belief were true, he would not have been hunting illegally. Now suppose Mr. Law2 makes a legal mistake about the dates when hunting is permitted: if his belief were true, he would not have been hunting illegally. Should Mr. Law2's belief also exculpate? If the dates of the hunting season are arbitrary, I incline to answer yes, even though, in the analogous cases of Adam and Connie, it is defensible to exculpate Adam (who made a factual mistake) more readily than Connie (who made a legal mistake), e.g., to excuse Adam even for an unreasonable mistake but to excuse Connie only for a reasonable mistake.

general, one would demand a more compelling reason for extending the scope of liability for this category of impossible attempts.

To conclude, in the "Mr. Fact/Mr. Law" example, it is quite easy to distinguish the relevant M Fact from the relevant M Law. While the example initially seems to raise a serious question about whether that distinction should ever be employed to identify which mistakes should result in attempt liability, on closer analysis the example is simply a rare exception that proves (the rationale for) the rule.

M Fact Engenders Mistake About the Content or Scope of the Law The second borderline objection is that a *factual* misperception or mistake can lead to an error about the content or scope of the law. In such a case, the fact/law distinction seems to break down. Alexander gives several examples, including the following:

(1) A woman knowingly imports French lace, but she misreads the word "Flemish" as "French" on the list of dutiable items, and thus erroneously believes that French lace must be declared. She does not declare the lace.
(2) A man knows that the state forbids hunting on days when a red flag is displayed at the Fish and Game Department office but permits hunting on days when a green flag is displayed. He is colorblind, and misperceives the green sign as red. He nevertheless hunts.[47]

In each case, the actor's factual misperception leads to their erroneous belief that what they are doing is a crime. In a sense, then, each is a *factual* impossibility case, so one might think that each actor should be guilty of an attempt. But this conclusion is unwarranted. The M Fact in these cases is unusual: it is not about the nature of the actor's primary conduct or about any other actus reus element of the crime (as in the usual M Fact case, such as believing that the recipient of a cigarette is younger than she actually is, or believing that the victim at which one is shooting is still alive). Rather, the M Fact concerns only the scope or meaning of the criminal prohibition; it concerns what actus reus elements the criminal law actually does require. We should therefore treat each case, for legal purposes, as a M Law, not a M Fact (and thus we should not permit conviction for attempt).[48] And in the converse scenarios, where the actor misreads the word "French" as

[47] Alexander (1993, pp. 49, 50).

[48] Westen agrees with me that the first example should be treated as a M Law. As he explains:

> [The woman] is making a mistake of law, because while she knows the empirical features that her conduct actually possesses, she does not know that the state has declared conduct with such features [not] to be a prohibited act-type.

Westen (2008, p. 535 n. 34). (I have added "[not]" to the passage because this is clearly Westen's meaning, and he has confirmed this interpretation by email. Email from P. Westen to K. Simons, dated May 8, 2008.)

Surprisingly, however, Westen treats the second example as a M Fact, for the following reason:

> [A]n actor who knows that the state declares hunting on days with a red flag to be an act-type of poaching, but who, being colorblind, sees a red flag where there is actually a green flag, makes a mistake of fact because, while he knows what act-types are prohibited, he mistakenly thinks that his conduct possesses one of the empirical features that, if present, constitutes what he knows is the act-type.

I disagree with Westen's treatment of the red flag case in this article. In both this case and the Flemish/French case, the actor does not make a mistake about her primary conduct or about any actus reus element; rather, their mistake (albeit factual) is about the scope of the law. In the red flag case, to be sure, the scope of the law is publicized to the public in an unusual way. But this is no different than, say, a Roman consul announcing the terms of a relevant law orally, and a citizen mishearing the words he spoke, or a

"Flemish" or misperceives a red flag as green, and the actor claims that his mistake is a M Fact that should excuse, we should reject this characterization and apply whatever rule we would otherwise apply to a M Law.

To be sure, one might understandably conclude otherwise: facts are facts, and factual misperceptions as a class arguably should be treated differently than misunderstandings of the law untainted by factual misperceptions. (In terms of Westen's useful suggestion for distinguishing M Fact from M Law, quoted at the outset, in these unusual M Law cases, the actor needs a good private investigator as much as she needs a good lawyer!) Still, treating every factual misperception that results in a misunderstanding of the content or scope of the criminal law as a M Fact would be problematic. Insofar as a jurisdiction has plausible reasons for generally treating a M Law less favorably than a M Fact (e.g., requiring only the former mistakes to be reasonable), it is not at all clear that those reasons warrant special favorable treatment of the unusual cases we are considering. Alternatively, if the better view is that the jurisdiction should more liberally excuse for a M Law, this new principle should be adopted categorically, and not arbitrarily limited to these unusual cases in which a M Fact fortuitously is a partial explanation for a genuine M Law.

Laws that Designate a Particular Object or Person The third and last "borderline" objection concerns laws that pick out a particular object, entity, or person. And the term "borderline" is especially apt here, because one illustration of this category is a mistake about a legal boundary. Cases in this category are indeed sometimes difficult to sort into M Fact or M Law, though in principle, the distinction remains viable here.

It is tempting, Leonard points out, to think that a mistake about "law" must be about a general criterion or category, such as how "property" is defined or whether the age of consent is eighteen or twenty-one. But actually, a "legal" criterion can refer to a unique object, entity, or person.[49] Thus, if it is a federal crime to assassinate "the President," then the defendant could make either a relevant factual or a relevant legal mistake. In killing the person behind the curtain, defendant could have unknowingly killed a Secret Service Agent rather than (as he believed and intended) the current President George W. Bush. Or defendant could have knowingly killed Martin Sheen, who played fictional President Josiah Bartlet on the TV show West Wing, irrationally believing that because he plays the President on a television show, Sheen is actually the current duly-elected President. Both

Footnote 48 continued
conscientious citizen of Massachusetts today intending to peruse a volume of the Massachusetts General Laws and mistakenly grabbing the Maryland Laws volume instead. None of these cases should count as M Fact. (In a recent email communication, Westen agrees with me that he should have classified the red flag case as a M Law, not a M Fact. (Email from P. Westen to K. Simons, dated May 16, 2008.))

To be sure, some difficult borderline cases remain. Alexander gives the example of Larkin v. Grendel's Den, Inc, 495 U.S. 116 (1982), in which churches were in effect authorized to prohibit bars from locating within a particular distance of the church. "Suppose an establishment owner believes erroneously that a church next door has objected to his opening a bar, but he does so anyway. Has he made a mistake of law (it's illegal to open a bar next to the church) or only of extension [of the law, and thus, a M Fact]?" Alexander (2002, p. 839). This is a borderline case because we do not ordinary treat entities such as churches as authorized to declare the content of the law; their ability to restrict the defendant's property rights (on pain of his criminal liability) seems to express their *private* rights, and thus seems analogous to a person's ability to withhold consent to a physical touching, and therefore within the province of M Fact, not M Law. By contrast, when a government official has the authority to declare today a hunting day by raising a green flag, a mistake about what color flag he has raised is more straightforwardly a mistake about the scope of the criminal law.

[49] See Leonard (2001, p. 527 n. 76, & 535).

of these are mistakes of fact.[50] By contrast, in killing former President George H. W. Bush, defendant might believe that he is killing a "President" and thus committing an assassination, but he would be *legally* incorrect: the law does not provide the same high penalty for killing a former President.[51] In these types of cases, the general principles relating to inculpatory and exculpatory mistakes—principles that might sometimes justify differential treatment of M Fact and M Law—apply with just as much force as in cases where the criminal law extends to a broader category of persons or acts.

But now consider an example (from Paul Robinson[52]) of a mistake relating to a legal boundary, which I elaborate as follows. Defendant does not know whether his liquor store is within Dry Town (where it is illegal to sell liquor) or Wet Town (where it is legal). Has he made a M Fact or M Law? To answer, we need to know more. As Leonard points out, if defendant knows that his store is on the north side of Elm Street, and "[i]f being on the north side of Elm Street necessarily places one within the boundaries of the dry town under the statute, then any failure to draw that inference is a [M Law]."[53] But if defendant is confused about the location of his store and believes it to be on the south side of Elm Street when it is actually on the north side, he has made a M Fact.

In such a boundary mistake case, as in the Mr. Fact/Mr. Law example, the policy reasons that normally support the fact/law distinction are much less compelling. In an attempt case, for example, if Mr. Fact# believes that his property is on the north side of Elm Street when it is not, while Mr. Law# is correct that his property is on the south side but incorrectly believes that the law forbids selling liquor on the south side, both actors defy the values underlying the prohibition on liquor sales to the same extent. As is the case with the dates of hunting season in Mr. Fact/Mr. Law, here the precise location of the legal boundary between Dry Town and Wet Town is probably arbitrary. Pragmatic objections (such as difficult of proof) aside, it would be justifiable to punish both actors for attempt. And it would similarly be justifiable to acquit both Mr. Fact* and Mr. Law* if the two actors made *exculpatory* mistakes analogous to those of Mr. Fact# and Mr. Law#.[54]

Converting M Fact into M Law

M Fact and M Law interact in a number of ways. We have already discussed one aspect of this interaction: in unusual circumstances, a M Fact can engender a M Law.[55] I now turn to

[50] More precisely: if the defendant, fascinated with reality shows, believes that the TV show West Wing is a reality show starring the person whom the people actually elected President, his mistake about Sheen's status would be a M Fact; but if defendant thinks that anyone who plays the President on TV thereby becomes the President under the Constitution, this mistake would be a M Law. (Thanks to Peter Westen for this clarification.).

[51] At the same time, if a defendant believed that in killing President-elect George W. Bush in 2000 he was not committing an assassination, he would again be legally incorrect. The federal crime of assassination applies to the current inhabitant of the Office and to the President-elect, but not to former Presidents. 18 U.S.C. §1751(a).

[52] Robinson (1984, p. 380 & n. 26). See also Leonard (2001, p. 519, 527, 536).

[53] Leonard (2001, p. 536).

[54] See footnote 46 supra.

[55] See section IV.A.3b, above. Another, little-noticed aspect of the interaction is where ignorance of law engenders ignorance or mistake of fact. If I do not know that the law requires me, an ex-felon, to register after residing in a city for five days, cf. Lambert v. California, 355 U.S. 225 (1957), then perhaps I also will not "know" all the facts that make my conduct illegal. Do I "know" that I have resided in the city for five days? Do I "know" that I have not registered if I don't realize I have a duty to do so? Perhaps I have given these matters no thought. But if the statute in question requires knowledge of all these facts, then even if the

a more common phenomenon: specification or evolution of a criminal law norm can convert a M Fact into a M Law.

Criminal law norms change. Two forms of change are especially relevant to the relationship between M Fact and M Law—later specification of a more general, opaque norm; and the evolution of a norm in a way that dramatically limits the types of M Fact that continue to excuse. In both cases, defendants who in the past might have succeeded with a claim of exculpatory M Fact now might be precluded because their mistake has become a M Law.

First, consider specification. Suppose that a jurisdiction employs only this general, opaque criterion for self-defense: "Actors may use only proportionate and necessary force in self-defense, and 'proportionality' and 'necessity' shall be determined case by case by the jury." The jurisdiction then modifies the criterion by endorsing the detailed rules of the Model Penal Code about proportionality (including the rules about when deadly v. non-deadly force may be used) and necessity (including the rules about retreat). Once the new criterion is specified, it becomes much clearer whether an actor has made a M Fact or a M Law. Under the old criterion, this is almost impossible to determine. Defendants are likely to fare much worse under the newer provisions, since defendants now are vulnerable to the government's objection that their mistake (for example, a mistake about whether it was "proportionate" to use force to shoot an escaping rapist) is one of law and thus does not excuse. There is nothing objectionable about such a legal change. After all, the very point of the change is to establish a new and more demanding set of legal requirements.

At the same time, further specification sometimes produces resulting distinctions between M Fact and M Law that seem morally arbitrary. Consider again the law of self-defense. Under the imperfect self-defense doctrine, many states reduce the grade of homicide when a person makes an honest mistake about facts such as the severity of the force threatened, even if that mistake is unreasonable. But, as Gerry Leonard points out, this doctrine has a troubling implication: a defendant who kills an attempted robber is better off arguing that he honestly thought that the victim was trying to kill him, even if his belief is quite unreasonable, than arguing that he honestly (but mistakenly) thought that deadly force is a legally proportionate response to a robbery (even if the robber does not threaten deadly force).[56] Under the older and less specific norm, the jury would have discretion to provide a full defense (or, if imperfect self-defense is allowed, a partial defense) in both cases.

But perhaps this, too, is an acceptable result. Courts and legislators should, when they create detailed rules of proportionality and necessity, and also when they create rules of mitigation such as imperfect self-defense, ensure that the ambit of the rules is principled and justifiable. If Leonard's example *is* troubling, then presumably we should secure equal treatment in the two scenarios and permit partial mitigation for that type of mistake of law.

Second, consider evolution. Criminal law norms can change over time in a way that dramatically alters what counts as a M Fact. A powerful example of the phenomenon is the rapid transformation of the law of rape and sexual assault in the last forty years. In

Footnote 55 continued
jurisdiction endorses the maxim, "ignorance of law does not excuse," it might turn out that ignorance of the law frequently *results* in an excuse because that ignorance can result in a defendant failing to know the legally relevant facts! When this is so, ignorance of the law turns out to ground an excuse, after all. See Simons (2003b, p. 194).

[56] Leonard (2001, p. 590).

particular, it is worth examining the change in actus reus and mens rea standards with respect to nonconsent.

The law in some jurisdictions has seen a remarkable evolution. In broad outline, these jurisdictions first rejected traditional resistance requirements; then rejected any "force or threat of force" requirement, moving instead to the standard of "NO means NO" (i.e., verbal "resistance" suffices); and finally settled on the position that "Only YES means YES." Under New Jersey's *MTS* case, for example, only an affirmative expression of willingness or permission to engage in the act of intercourse suffices as legal consent.[57]

This evolution was designed to be more protective than prior law of a victim's right of sexual autonomy and right to be free of force, coercion, and violence. It has been an evolution of actus reus requirements, not of mens rea requirements, at least as a formal matter. That is, few jurisdictions have expressed their greater solicitude for the rights and needs of victims by lowering the mens rea requirement, or by grading sexual assault crimes by mens rea. Rather, almost all have reduced the *actus reus* requirements, and many have created grades of sexual assault offenses, distinguished primarily by different actus reus requirements.

To be sure, the traditional resistance requirement could *partly* be explained as a crude effort to require an especially culpable *mens rea*. After all, anyone who persisted in intercourse when the woman was actively resisting had an especially blameworthy state of mind. The "threat of force" requirement might be analyzed similarly.

However, the elimination of these traditional requirements does not *simply* lower the required *mens rea* as to nonconsent (defined in an invariant way over time). It also is widely understood to redefine the *harm* of rape—and as a necessary corollary, to redefine what constitutes legally adequate consent. The law of rape now protects not just freedom from violence and from threats of force, but also freedom of choice about sexual intimacy.

But what about the last step, from "NO means NO" to *MTS*, which essentially holds that "only YES means YES"? Arguably, when a jurisdiction takes *this* step, it is really changing the *mens rea* requirement, not the actus reus. The argument goes as follows.

Although formally, *MTS* establishes a different and weaker actus reus requirement, substantively the law is really employing the same underlying conception of consent, and at the same time lowering the mens rea requirement. *MTS* in effect says to the defendant: you are culpable *as a matter of law* if you take "silence" or ambiguous signals as legally valid consent.

On this view, *MTS* is open to serious criticism, namely, the criticism that it requires far too little (indeed, perhaps it requires nothing) in the way of substantive mens rea as to nonconsent.[58] For *MTS* seems to ignore the plain fact that someone could reasonably believe that the victim is consenting, yet violate the *MTS* rule. If the victim says nothing, and is passive during the encounter, at least sometimes the defendant might reasonably believe that she is consenting.

Implicit in this argument is the assumption that legally valid "consent" means something like "subjective desire or willingness to have intercourse, not induced by any type of threat." And in the view of such a skeptic, *MTS* is just a sneaky way of converting a negligent or even reasonable M Fact about "nonconsent" (so understood) into a M Law.

[57] State in the interest of M.T.S., 609 A.2d 1266 (N.J. 1992).

[58] Formally, *MTS* requires negligence, not strict liability, as to whether the victim expressed affirmative permission. (The state "must demonstrate beyond a reasonable doubt that a reasonable person would not have believed that there was affirmative and freely-given permission." State in the interest of M.T.S., 609 A.2d 1279 N.J. 1992.) But substantively, according to the argument under consideration, this is, or is close to, a strict liability rule, with respect to the victim's nonconsent.

On this view, *MTS* conceals the fact that it really is imposing rape liability for the most attenuated degree of negligence, or even for a completely faultless mistake, as to "nonconsent."

That is how the argument goes. But there is a counterargument. The counterargument is that *MTS* really is about actus reus, not mens rea. For *MTS* really does mean to require a different *type* of "consent" in order for intercourse to be legal—namely, an actual affirmative expression of permission. So even if a woman is subjectively willing, her *so-called* consent is not legally sufficient if she does not affirmatively *express* this willingness.

This is not a crazy idea. In the context of medical consent, for example, we would not say that a patient legally consents to surgery that he had privately decided to undergo, if he had not yet *expressed* that willingness to the surgeon![59]

At the same time, this approach is controversial. It means a woman (or non-initiating person) cannot legally consent except by affirmatively stating her preferences. This will to some extent diminish the power of individuals to have sexual relations on the terms they most prefer, since some might prefer that they did not always have to express their affirmative permission. But, of course, the reply is that this is not too great a cost to bear, relative to the harms to victims who are genuinely unwilling and silent, and who, for a variety of reasons, are not able to, or do not, clearly say "no."[60]

How, then, would the *MTS* approach apply to the scenario mentioned in the introduction? Suppose a defendant, unaware of this new legal requirement, has intercourse with a victim who does not affirmatively express willingness, but who also does not verbally or physically protest. Is his mistake about her nonconsent a M Fact or a M Law?

Clearly he has made a M Law, one that would ordinarily be irrelevant, even if a fact finder would judge it to be reasonable. He does not realize that the actus reus of rape has changed, and, specifically, that the meaning of "nonconsent" has changed. And there are defensible reasons, we have seen, for this evolution of the legal standard. His claim of unfairness, while not frivolous, is not significantly different from similar claims of unfairness by actors who object to being convicted under other changed legal rules that they claim catch them by surprise.

From a broader perspective, a perfectly commonplace result of a change in the criminal law is this conversion phenomenon: a mistake that previously was a (legally relevant) M Fact becomes a (legally irrelevant) M Law. *MTS* is unusual only insofar as one of the very purposes of the court's new definition of legal consent was to preclude rape defendants from asserting certain kinds of M Fact. More often, the conversion of M Fact into M Law is essentially a byproduct of the legal change. For example, if a state makes it a crime for an adult to serve liquor to an underage person, some previous claims of M Fact (about whether one was thereby contributing to the delinquency of a minor, or whether one knew that the minor would drive drunk and cause harm) are now legally irrelevant. Or if the state enacts a new criminal law forbidding driving while intoxicated, some previous claims of M Fact (e.g., about whether one was recklessly endangering others) again become irrelevant.

Finally, this conversion phenomenon does not undermine the fundamental distinction between M Fact and M Law. To the contrary, it reveals the significance of that distinction. A change in criminal law norms almost always reflects a change in the duties, values, rights or interests that are enforced or protected by the criminal law, or at least a change in the type or degree of their enforcement or protection. Silent victims of rape now deserve protection; adults now owe a more stringent duty to minors not to contribute to their

[59] Schulhofer (1992, pp. 74–75).

[60] Schulhofer (1998, p. 270).

intoxication; adult drivers now owe a duty not to drive intoxicated. It is not surprising that such changes in the law will also change the types of M Fact that are legally relevant.

Conclusion

The arguments in this paper have addressed conceptual and normative issues, but have scanted practical concerns. There are, however, important reasons to hesitate before implementing some of the analysis into legal doctrine, especially when the analysis suggests broader attempt liability than current law provides.[61] For example, even though Mr. Fact/Mr. Law illustrates a context in which liability for a legally impossible attempt is in principle justifiable, there are pragmatic reasons not to recognize this narrow exception, as we have seen.

A final, skeptical question lurks in the background of this discussion. Is the distinction between M Fact and M Law important only because so many jurisdictions hold on to the unjust view that ignorance of or M Law is never, or almost never, a defense? If the answer is yes, then the obvious solution is to remedy the primary injustice. I do favor a general requirement of fault as to the content of the criminal law, or at least a general defense of reasonable ignorance of or M Law. But I deny the skeptic's premise. Even if all jurisdictions were to liberalize in this direction, it is highly unlikely (for reasons that I have explored above) that they would, or should, want to abolish all distinctions between M Fact and M Law, either when exculpating defendants from liability for completed crimes or when inculpating defendants for attempts. This article tries to provide a precise analysis, in a wide range of contexts, of how the distinction should be drawn, why it runs into difficulties in a few narrowly circumscribed areas, and how those difficulties can (and why in some cases they cannot) be overcome.

Acknowledgments I thank Larry Alexander, Joshua Dressler, Stanley Fisher, Doug Husak, Gerald Leonard, Paul Robinson, Robert Sloane and Peter Westen for helpful comments, and Ariel Greenstein and Caitlin Melchior for their valuable research assistance.

References

Alexander, L. (1993). Inculpatory and exculpatory mistakes and the fact/law distinction: An essay in memory of Myke Bayles. *Law and Philosophy, 12*, 33–70. doi:10.1007/BF01000795.

Alexander, L. (2002). The philosophy of criminal law. In J. Coleman & S. Shapiro (Eds.), *Oxford handbook of jurisprudence and philosophy of law*. New York: Oxford University Press.

Buell, S. (2006). Novel criminal fraud. *New York University Law Review, 81*, 1971–2043.

Dressler, J. (2006). *Understanding criminal law* (4th ed.). Newark: LexisNexis.

Duff, R. A. (1996). *Criminal attempts*. Oxford: Oxford University Press.

Endicott, T. (2001). *Vagueness in law*. Oxford: Oxford University Press.

Eser, A. (2002). Mental elements: Mistake of fact and mistake of law. In A. Cassese, P. Gaeta, & J. Jones (Eds.), *The Rome statute of the international criminal court: A commentary, v. 1*. Oxford: Oxford University Press.

Fletcher, G. (1986). Constructing a theory of impossible attempts. *Criminal Justice Ethics, 5*, 53–69.

[61] See Simons (1990, pp. 488–492) (suggesting caution before broadening attempt liability because of concerns about the unreliability of proof); Westen (2008, p. 550) (stating that he would not propose actual adoption of his broader view punishing culpable but legally impossible attempts because adoption would only rarely prevent injustices yet would generate serious difficulties).

Husak, D., & von Hirsch, A. (1993). Culpability and mistake of law. In S. Shute, J. Gardner, & J. Horder (Eds.), *Action and value in criminal law*. Oxford: Oxford University Press.
Lawson, G. (1992). Proving the law. *Northwestern University Law Review, 86*, 859–904.
Leonard, G. (2001). Rape, murder, and formalism: What happens if we define mistake of law? *University of Colorado Law Review, 72*, 507–594.
Robinson, P. (1984). *Criminal law defenses* (Vol. 2). St Paul: West Publishing Co.
Schulhofer, S. (1992). Taking sexual autonomy seriously. *Law and Philosophy, 11*, 35–94. doi:10.1007/BF01000918.
Schulhofer, S. (1998). *Unwanted sex: The culture of intimidation and the failure of law*. Cambridge: Harvard University Press.
Schumann, H. (2005). Criminal law. In M. Reimann & J. Zekoll (Eds.), *Introduction to German Law* (2nd ed.). The Hague: Kluwer Law International.
Simester, A. P., & Sullivan, G. R. (2007). *Criminal law: Theory and doctrine* (3rd ed.). Oxford: Hart Publishing.
Simons, K. (1990). Mistake and impossibility, law and fact, and culpability: A speculative essay. *Journal of Criminal Law and Criminology, 81*, 447–517. doi:10.2307/1143846.
Simons, K. (1992). Rethinking mental states. *Boston University Law Review, 72*, 463–554.
Simons, K. (2003a). Does punishment for 'culpable indifference' simply punish for 'bad character'? Examining the requisite connection between mens rea and actus reus. *Buffalo Criminal Law Review, 6*, 219–315.
Simons, K. (2003b). Should the model penal code's mens rea provisions be amended? *Ohio State Journal of Criminal Law, 1*, 179–205.
Stuart, D. (2007). *Canadian criminal law* (5th ed.). Toronto: Thomson Canada Limited.
Westen, P. (2008). Impossible attempts: A speculative thesis. *Ohio State Journal of Criminal Law, 5*, 523–565.
Wetzel, L. (2008). "Types and Tokens", the Stanford Encyclopedia of Philosophy (winter 2008 edition), E. N. Zalta (Ed.), forthcoming. URL = http://plato.stanford.edu/archives/win2008/entries/types-tokens/.
Williams, G. (1961). *Criminal law: The general part* (2nd ed.). London: Stevens & Sons.

Cases

Regina v. Ghosh (1982) QB 1053.
Lambert v. California, 355 U.S. 225 (1957).
Larkin v. Grendel's Den, Inc., 495 U.S. 116 (1982).
Regina v. Morgan, (1976) A.C. 182.
State in the interest of M.T.S., 609 A.2d 1266 (N.J. 1992).
People v. Teal, 89 N. E. 1086, 196 N.Y. 372 (1909).
Wilson v. State, 85 Miss. 687, 38 So. 46 (1905).

Statutes

Model Penal Code §2.04(3).
N.J. Stat. Ann. tit. 2C, §2–4(c)(3).
18 U.S.C. §1751(a).