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IGNORANCE AND MISTAKE OF CRIMINAL LAW, NONCRIMINAL LAW, AND FACT

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Ignorance and mistake of criminal law, noncriminal law, and fact

by

Kenneth W. Simons^{*}

Abstract:

After clarifying the distinction between mistakes of fact and mistakes of law, this article explores in detail an important distinction within the category of mistake of law, between mistake about the criminal law itself and mistake about noncriminal law norms that the criminal law makes relevant—for example, about the civil law of property (in a theft prosecution) or of divorce (in a bigamy prosecution). The Model Penal Code seems to endorse the view that mistakes about noncriminal law norms should presumptively be treated as exculpatory in the same way as analogous mistakes about facts. Case law on the matter is more ambiguous.

As a matter of policy, when should mistakes of noncriminal law exculpate? Should they always be treated in the same manner as an analogous mistake of fact? Sometimes? Answering these questions is a complex matter; the article identifies some relevant factors.

Conversely, when should a mistake of noncriminal law inculcate, creating attempt liability? In the parallel scenario of factually impossible attempts, liability is frequently imposed. But I suggest caution before recognizing attempt liability here.

Classifying a mistake as one of criminal or noncriminal law is especially difficult in three scenarios: the incorporation of a civil schedule of prohibited items within a criminal law, the criminalization of acts that violate a civil regulatory prohibition, and criminal law terms whose meaning draws from both criminal law and civil law.

A final section questions the view that we should always give symmetrical treatment to (1) exculpatory mistake and ignorance (precluding liability for the completed crime) and (2) inculpatory mistake and ignorance (producing liability for the attempt). This view is especially implausible when applied to categories of mens rea other than belief or knowledge. Ignorance, for example, will often exculpate, but it will rarely inculcate.

^{*} Professor of Law, The Honorable Frank R. Kenison Distinguished Scholar in Law, Boston University School of Law. Copyright 2011. All rights reserved. I thank Larry Alexander, Mitch Berman, Russell Christopher, Joshua Dressler, Stanley Fisher, Gerald Leonard, Peter Low, Paul Robinson, Robert Sloane and Peter Westen for helpful comments, and Joseph Cooper, Ariel Greenstein and Caitlin Melchior for their valuable research assistance.

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Introduction

The complexities of ignorance and mistake of fact and 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 just as significant for inculpatory mistakes (potentially resulting in attempt liability) as for exculpatory ones (potentially resulting in acquittal of the completed crime)?

In a recent article, I explain and defend the distinction between mistake of fact and mistake of criminal law.¹ This article is a companion piece. It explores further dimensions of the distinction, especially the troublesome concept of mistake of "noncriminal" or "civil" or "different" or "other" law, which legislatures and courts often treat the same as mistake of fact.

¹ Kenneth W. Simons, Mistake of Fact or Mistake of Criminal Law? Explaining and Defending the Distinction, 3 *Crim. L. & Phil.* 213 (2009).

Consider a famous example of the distinction. In the British case of Regina v. Smith (David),² the Court of Appeal permitted a defendant's mistake of law to excuse his violation of the Criminal Damage Act. The defendant, when leaving his rental apartment, damaged wall panels and floor boards that he had originally installed in the apartment. He believed that in so doing, he was damaging only his own property.³ However, he misunderstood the relevant property law: actually, when he installed the panels and boards, they became the landlord's property. Thus, when he damaged them, he was damaging the property of another. The court held that he lacked the required mens rea as to the actus reus of "destroying or damaging any property belonging to another" if he honestly believed that the property was his own.

Now consider another famous criminal law case, one that might well raise the same issue as Smith (David), although this aspect of the case is rarely noted. In Morissette v. United States,⁴ the defendant removed from government land some bomb casings that had apparently been abandoned. When charged with knowingly converting government property, he claimed that he did not realize that they were not abandoned. But what kind of mistake did he make—a mistake about the relevant facts or instead about the relevant property law, i.e. about what legally constitutes "abandoned" property? The Supreme Court held that a good faith mistaken belief that the property was abandoned would provide a full defense. In so holding, the Court seemed not to care what kind of mistake he made. Is that position defensible, notwithstanding the usual rule that ignorance or mistake of criminal law is no defense?

Here are six examples that illuminate the fact/law distinction and the criminal law/noncriminal law distinction. In each, the defendant might be prosecuted for the crime (or the attempted crime) of knowingly receiving stolen property. For now, I simply list the examples. Later analysis will explain the doctrinal categories that each represents.

1. Abby

Abby receives property that she honestly believes is not stolen, but actually it is stolen. Specifically, a stranger knocks on her apartment door, and offers to sell her a brand-new DVD player at a huge discount that he says he recently purchased from a retail store. Because she is quite gullible, she honestly believes his false explanation. In fact, the stranger picked up the equipment in the course of a burglary.

² [1974] All Eng. Rep. 632 (CA).

³ He testified: "Look, how can I be done in for smashing my own property. I put the flooring and that in, so if I want to pull it down it's a matter for me." [1974] All Eng. Rep. at 634.

⁴ 342 U.S. 246 (1952).

2. Barney

Barney receives property that he believes is stolen, but actually it is not. Specifically, Barney (like Abby) purchases, at a huge discount, a brand-new DVD player from a stranger who knocks on his door and offers it for sale. Barney asks the stranger why the property is so cheap, and asks him if it is stolen. The stranger (an undercover police officer) says that it is. “Well, we’ve all got to eat,” Barney replies, making the purchase. In fact, the property is not stolen.

3. Cleo

Cleo is not mistaken about the (nonlegal⁵) facts, but she mistakenly believes that it is not a crime knowingly to receive stolen property when the value of the property is less than \$300. (She has recently moved to the state from another state in which one is only prohibited from receiving stolen property when the value of the property is \$300 or more.) Actually, the law in this jurisdiction prohibits receiving stolen property of any value. Cleo purchases a stolen DVD player, knowing that it is stolen, and knowing that its value is \$200.

4. Diego

Diego is not mistaken about the (nonlegal) facts, but he makes the opposite type of legal mistake than Cleo concerning the governing criminal law. He believes that it is a crime to receive stolen property of any value, knowing that the property is stolen. Actually, the law in this jurisdiction (as in Cleo’s previous jurisdiction) only prohibits knowingly receiving stolen property when the value of the property is \$300 or more. Diego purchases a stolen DVD player, knowing that it is stolen and that its value is \$200.

5. Ellen

Ellen buys a DVD player from a stranger who truthfully states that he found the equipment in an abandoned car. She believes that such abandoned property belongs to whoever finds it; she therefore thinks that it is the legal property of the stranger. But she is mistaken: the civil law of her jurisdiction provides that such property belongs to the state, not to the finder. Thus, Ellen has actually received stolen property.

6. Franklin

Like Ellen, Franklin buys a DVD player from a stranger who truthfully states that he found the equipment in an abandoned car. Unlike Ellen, Franklin believes that a stranger has no right to take such abandoned property, but must turn it in to the

⁵ I explain the distinction between nonlegal and legal facts below. *Infra* at notes 18-19=.

police. But Franklin is mistaken: the civil law of his jurisdiction, unlike the civil law of Ellen's, provides that such property belongs to the finder, not to the state. Thus, Franklin has actually received nonstolen property.

This essay explores the distinction between mistakes of fact and mistakes of law, and between different types of mistakes of law, from doctrinal, analytical, and normative perspectives.⁶ Part I of the article sets out the basic framework of modern criminal law, whereby mistakes of fact can be both exculpatory (when they negate the requisite mens rea) and inculpatory (when they supply the requisite mens rea for an attempt). The analytical distinction between mistakes of fact and mistakes of law is explained.

Part II explores in detail an important distinction within the category of mistake of law, between mistake about the criminal law itself (“M Crim Law”) and mistake about noncriminal law norms that the criminal law makes relevant (“M Noncrim Law”)—for example, about the civil law of property (in a theft prosecution) or of divorce (in a bigamy prosecution). When should such a M Noncrim Law exculpate? The Model Penal Code, I believe, endorses the view that mistakes about noncriminal law norms should presumptively be treated in the same way as mistakes about facts. Case law on the matter is sparse, but some cases endorse this general equivalence view, while a larger number endorse the view in particular contexts such as claim of legal right in theft. Confusingly, courts sometimes mislabel this subcategory of exculpatory mistakes of law, calling them mistakes of fact.

As a matter of policy, when should a M Noncrim Law be exculpatory? Should it always be treated in the same manner as an analogous genuine M Fact? Answering these questions is a complex matter; the article explores some relevant factors.

Conversely, when should a M Noncrim Law inculcate, creating attempt liability? This is a neglected question. In the parallel scenario of factually impossible attempts, attempt liability is often imposed. However, I suggest caution before recognizing attempt liability here.

⁶ The essay also provides me with the opportunity to revisit—and to disavow—some of my own earlier views on these topics, offered in Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. Crim. L. & Criminol. 447 (1990). Illuminating criticisms of my views were offered by: Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction*, 12 Law & Philosophy 33, 39-40 (1993); R.A. Duff, *Criminal Attempts* 95-96 (1996); Gerald Leonard, *Rape, Murder, and Formalism: What Happens if We Define Mistake of Law?*, 72 U. Colo. L. Rev. 507, 543-547, 552-553 (2001); and Peter Westen, *Impossible Attempts: A Speculative Thesis*, 5 Ohio St. J. Crim. L. 523, 534 (2008).

A final section of Part II identifies three scenarios in which it is difficult to classify a mistake as M Crim Law or M Noncrim Law: (1) the incorporation of a civil schedule of prohibited items within a criminal law, (2) the criminalization of acts that violate a civil regulatory prohibition, and (3) criminal law terms whose meaning draws from both criminal law and civil law.

Part III questions the simple view that we should always give symmetrical treatment to (1) exculpatory mistake and ignorance (precluding liability for the completed crime) and (2) inculpatory mistake and ignorance (producing liability for the attempt). This view is especially implausible when applied to categories of mens rea other than belief or knowledge. Ignorance, for example, will often exculpate, but it will rarely inculcate.

Appendix A addresses two problems in classifying mistakes as M Fact or M Law, and clarifies that one can make a M Fact as well as a M Law about explicit legal criteria (such as “legally valid divorce” or “authorized by law”). Appendix B provides a detailed background to the controversy over the proper way to interpret the Model Penal Code's treatment of M Noncrim Law. Appendix C analyzes, but rejects, another approach to identifying which mistakes of law exculpate: distinguishing between mistakes about the governing criminal law and mistakes about a legal element of an offense.

I. Mistake of fact (M Fact) v. mistake of law (M Law) in general

Let us begin with the modern doctrinal framework, which explains how ignorance and mistake of fact and law are relevant under modern criminal law.⁷ 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).

⁷ Some clarifications:

- By “modern criminal law,” I mean the Model Penal Code, statutory revisions following the MPC, and the contemporary academic consensus on these issues.
- By “mistake” of law or fact, I mean both mistake and ignorance of law or fact, except where the context indicates otherwise.
- Whether a mistaken belief or a state of ignorance will excuse depends, of course, on what mens rea is required for the offense element in question. For simplicity, the draft will usually discuss a mens rea requirement of knowledge, but analogous arguments would apply if the requirement were recklessness or negligence.

Recall the first four illustrations, involving the crime of knowingly receiving stolen property.⁸ Assume that “knowledge” applies to all the material elements of the offense.

1. Abby is not guilty. Her mistake of fact is exculpatory, negating the requisite culpability, that she must know (or, more precisely, believe⁹) that the property is stolen.

2. Barney is not guilty of the crime, but he is likely guilty of an attempt to receive stolen property. His mistake of 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.¹⁰

3. Cleo is guilty of knowingly receiving stolen property. Her mistake about the criminal law will not be exculpatory.¹¹

4. Diego is not guilty of either the crime or the attempt. His mistake about the criminal law will not be legally inculpatory. “True” or “pure” legal impossibility is a defense.

Notice that in these examples, the criminal law is symmetrical in how it treats mistakes that are relevant to exculpation and those that are relevant to inculpation. Abby’s mistake of fact exculpates, while Barney’s inculpates. Subjective culpability (either its absence or presence) is decisive. When we turn to the mistakes about the criminal law that Cleo and Diego make, again the criminal law treats the cases symmetrically—but in precisely the opposite way that it treats Abby’s and Barney’s mistakes of fact.

Why do subjective culpability principles not lead to the same treatment here that Abby and Barney received? Why don’t we exculpate Cleo and inculpate Diego? Because the legality principle trumps concerns about the absence or presence of culpability.¹² So Cleo is guilty, even though she might seem less culpable than an otherwise similar defendant who did not share her mistaken belief that the criminal law does not prohibit knowing receipt of stolen

⁸ The examples are revised versions of those in an earlier article. Simons, *supra* note 6. The analysis is taken from a more recent article. Simons, *supra* note 1.

⁹ A requirement of “knowledge” actually combines a mens rea requirement of belief with an actus reus requirement, that the proposition believed is true.

¹⁰ Some courts and commentators might balk at an attempt conviction here, since Barney’s conduct is consistent with both an inculpatory and an innocent belief. But few would balk if his conduct more strongly corroborated an inculpatory belief—for example, if he subsequently contacts the stranger and attempts to enlist him in an ongoing stolen-goods ring.

¹¹ More precisely, it will not be exculpatory absent her reasonable reliance on official advice, or some other special defense. No such defense is likely to apply.

¹² However, Cleo and Diego implicate different aspects of the legality principle, so the symmetry between them is a bit overstated. See Simons, *supra* note 1, at 217, 220.

property. Ignorance or mistake of the criminal law is ordinarily no excuse.¹³ But Diego is not guilty of an attempt, even if he might seem more culpable than an otherwise similar defendant who did not share his mistaken belief that the criminal law prohibits knowing receipt of stolen property worth less than \$300.¹⁴

The symmetry argument is analytically revealing, as teachers of first year criminal law recognize. It also has some normative weight. But as we will see, it is less powerful and less general than first appears.

This modern framework depends on our ability to distinguish between a mistake of fact (henceforth, “M Fact”) and a mistake of law (“M Law”). I believe that this distinction is an important and coherent one, notwithstanding the claim of some skeptics to the contrary.¹⁵ But how exactly do we draw it? In a recent article, I suggested this criterion:

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.¹⁶

As Professor Peter Westen helpfully explains in his recent article on impossibility:

An actor makes a mistake of law ... 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 ... 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.¹⁷

¹³ The qualification is important. Reliance on official but erroneous advice about the criminal law is often recognized as a defense in contemporary criminal law. Moreover, on rare occasions, ignorance or mistake as to the criminal law is a defense when the legislature clearly intends it to be a defense, see MPC §2.02(9), or in other special circumstances. (For example, the “corrupt motive” doctrine requires proof in a conspiracy that the actors know that they are acting illegally.)

¹⁴ Diego might be morally blameworthy, but he has neither done nor attempted anything that the criminal law considers blameworthy. Simons, *supra* note 1, at 217, 231.

¹⁵ See Alexander, *supra* note 6; Larry Alexander, Facts, Law, Exculpation, and Inculcation: Comments on Simons, 3 *Crim Law & Philos* 241 (2009).

¹⁶ Simons, *supra* note 1, at 220.

¹⁷ Westen, *supra* note 6, at 535. Westen is here investigating the distinction in the context of impossibility and potentially inculpatory mistakes, but his analysis also illuminates in the context of a M Fact or M Law that a defendant claims warrants exculpation.

To be sure, what the law is, and how it has been authoritatively interpreted, are in one sense questions of fact¹⁸--insofar as "fact" is contrasted with a purely subjective opinion or judgment about the matter at hand. But the important point is that legal "facts" (in this sense) can be reliably distinguished from nonlegal "facts."¹⁹

Moreover, in order to identify a particular M Fact as legally relevant, obviously we must take into account the criminal law provision to which the M Fact is relevant. Suppose D1 is charged with having sexual intercourse with a person knowing that the person is under the age of sixteen. If D1 believes that his sexual partner V1 is seventeen, his M Fact exculpates, but only in light of that legal norm. (D2's M Fact hardly exculpates if he believes that V2 is fifteen rather than sixteen, or if he incorrectly believes that she is male.) So in an important sense, we cannot truly say that an actor has made a M Fact until we identify what makes that mistake legally relevant. Still, the nature of D1's mistake is purely factual. His factual mistake is entirely consistent with D1 making no M Law about whether the age of consent is sixteen or eighteen, or about what "under the age of sixteen" means.

I do not deny that there are borderline cases where it is sometimes difficult to classify a mistake as M Fact or M Law. Appendix A addresses two of these borderline categories: where the actor makes a mistake about an explicit legal criterion, such as "authorized by law," a mistake that seemingly must be a M Law, but can sometimes be a M Fact; and where the classification requires the actor to grasp a relevant concept, such as "serious bodily injury," that is not so obviously a legal criterion.

II. Mistake of noncriminal law (M Noncrim Law)

Although it is ordinarily easy to distinguish M Fact from M Law, the latter category includes important subcategories. The most significant subcategory is where the criminal law itself incorporates legal norms from "outside" the criminal law, as it were, an issue to which we now turn. (Another possible subcategory of M Crim Law is those mistakes that relate

¹⁸ See Alexander, *supra* note 6, at 37 (pointing out that the existence or meaning of a legal norm is a question of fact, at least for a legal positivist), and at 57-58.

¹⁹ As Gerald Leonard explains, we should, when drawing the distinction, first provide 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. Leonard, *supra* note 6, at 529-531.

The account given in the text rejects George Fletcher's view that the "application of law to facts" is an intermediate category, neither a question of law nor a question of fact. This category actually qualifies as a subcategory of questions of law. Simons, *supra* note 6, at 470-471. Similarly, some scholars recognize an intermediate category of "mixed" questions of fact and law, but this category can readily be "unmixed" into law and fact. *Id.* at 471.

only to a material legal element of a crime, not to the “governing criminal law” (i.e., the full definition of the crime). This approach to the problem, which I once endorsed, is not fruitful, for reasons explained in Appendix C.)

This essay employs the term “M Law” for all mistakes of law that might be relevant to criminal liability, and subdivides M Law into “M Crim Law” (mistake of criminal law) and “M Noncrim Law” (mistake of noncriminal law). Most examples of M Law discussed thus far involved only M Crim Law. We now examine M Noncrim Law.

A. M Crim Law v. M Noncrim Law

It is time for the fifth scenario. Recall Ellen, from the introduction. She has satisfied the actus reus of the crime, knowingly receiving stolen property. But has she satisfied the mens rea? How should she be treated? Like Abby, who made an exculpatory M Fact and thus is not guilty? Or like Cleo, who arguably made an exculpatory M Law but will still be found guilty?

To answer these questions, let us take a closer look at the Model Penal Code’s approach to the issue, at the case law, and then at the relevant policies.

B. Exculpatory M Noncrim Law

1. The Model Penal Code equivalence view

The MPC would exculpate Ellen, treating her like Abby, not like Cleo. Although this much is clear, the language and commentary of the MPC give less certain guidance about the scope of the relevant principle. I believe that the most plausible understanding of the principle that the MPC and Commentaries intend to announce here is what I will call the equivalence view: a M Noncrim L should presumptively be treated in the same way as an analogous M Fact. Let me briefly explain this view. (Appendix B explains in greater depth why this is the best, though not the only plausible, interpretation.)

Section §2.04(1)(a) of the MPC provides that “[i]gnorance or mistake as to a matter of fact or law is a defense if ... the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense.”²⁰ But what does “or law” encompass? Does it mean that mistakes about the meaning of the

²⁰ Emphasis added.

terms of the criminal offense will frequently provide an excuse? No, because §2.02(9) recites the usual presumption that no mens rea is required as to “the existence, meaning or application” of the criminal law.

On the other hand, is the language “or law” in §2.04(1)(a) a mere truism? Does it merely allow a defense of mistake of law when the statute otherwise clearly so provides, as in theft statutes that explicitly recognize a defense of claim of right? (An example of a claim of right: the actor honestly believes, due to a mistaken understanding of property law, that she owns the property she is charged with stealing.)

In my view, the MPC does more than recognize a truism, for the MPC approach is not limited to statutes that explicitly recognize certain mistakes of law as exculpatory. Rather, the MPC presumptively treats every M Noncrim Law like a M Fact. In other words, in Ellen’s case, it is crucial that the source of the legal definition of “property” is the state’s civil law. Suppose instead that “property” is specifically and fully defined elsewhere in the state’s criminal law. Then this equivalence rule (treating M Noncrim Law the same as M Fact) would not apply; rather, we would apply the usual presumption in §2.02(9) that ignorance or M Crim Law is no excuse.

Both the equivalence view and the truism view address the situation in which a material element of a statute has a legal dimension whose meaning depends on a noncriminal law source. But the approaches critically differ in how they treat a statute that does not clearly afford a defense to an actor who makes a mistake about that issue of noncriminal law.

Thus, although the two views produce the same results under theft statutes that explicitly recognize a mistake of civil property law as exculpatory, they produce different results in many other cases. Suppose a statute provides that one is guilty of false imprisonment for knowingly restraining another unlawfully.²¹ And suppose that shopkeeper S believes that under the civil law, he has a privilege (immunizing him from tort liability) to detain a shoplifter in the store for several hours until the police arrive; but actually, the law of the state provides no such privilege. Under the truism view, S is guilty: because the statute does not clearly afford a defense for a mistaken belief that the civil law privilege applies to his conduct, the general rule that “ignorance or mistake of law is no defense” governs. But

²¹ See MPC §212.3. For other examples of MPC statutes that the two approaches would treat differently, see discussion *infra* at notes 121-128=.

under the equivalence view, S is not guilty: his M Noncrim Law is presumptively treated like a M Fact.²²

What counts as an “express” recognition that a M Noncrim Law is exculpatory? Two clear instances are (1) MPC §224.13, prohibiting disposing of entrusted property “in a manner which he knows is unlawful”; and (2) MPC §230.5, prohibiting persistent failure to provide support to a dependent, which the actor “knows he is legally obliged to supply.” What does not count? The mere recitation in a statute of a mens rea requirement as to a material element. Thus, (3) the language “marries or contracts to marry a person who one knows is already married” does not, by itself, expressly recognize a M Noncrim Law, based on a misunderstanding of the jurisdiction’s civil law definition of marriage, as to whether the person is “already married,” even though the language clearly would permit a defense of M Fact as to whether the person is “already married.” And similarly, (4) the language “takes what one knows is the property of another” does not, by itself, expressly recognize a M Noncrim Law as to whether the jurisdiction’s civil property law entitles the actor to the property.

Thus, if applied honestly, the truism view exculpates for M Noncrim Law in cases such as (1) and (2), but not in cases such as (3) and (4).²³ Nothing on the face of the statutes in (3) and (4) clarifies that the mens rea requirement extends, not only to a relevant M Fact, but also to a relevant M Law. And even if we concluded that it did so extend, nothing in the language clarifies that the mens rea requirement extends only to a M Noncrim Law but not to a M Crim Law.²⁴ In short, the equivalence view really does have different implications than the truism view in such cases. So we must decide, on the merits, which is the better view.

2. The case law

It is difficult to gauge the extent to which courts endorse the MPC’s equivalence approach, the truism approach, or some other approach. Some states have explicitly adopted

²² Because the relevant mens rea is knowledge, any honest M Noncrim L will excuse, as would any honest and relevant M Fact.

²³ For some examples of decisions dubiously concluding, despite opaque statutory language, that a defense of M Noncrim Law simply follows from that language, see notes 34-36= *infra*. See also Wayne LaFave, *Modern Criminal Law* 300 (5th ed. 2010) (asserting, implausibly, that “intent to steal the property of another” is necessarily negated by a M Noncrim Law as to the ownership of the property).

²⁴ Of course, it would be extraordinary if all statutes so worded were understood to excuse for mistakes about how the criminal law itself defines the material element in question. See text at notes 139-143= *infra*.

the language “mistake of fact or law” employed in §2.04(1)(a) or comparable language.²⁵ Indeed, in Alabama, not only does the statute recognize that a mistake of law is relevant to disprove a mental state requirement, but the commentary to the statute supports the equivalence approach: “[D]efendant’s mistake or ignorance as to some other non-penal law is tantamount to mistake of fact.”²⁶ And Wisconsin’s statute provides: “An honest error,

²⁵ Consider:

Arkansas: A.C.A. §5-2-206 (e): “A mistake of law other than as to the existence or meaning of the statute under which the defendant is prosecuted is relevant to disprove the specific culpable mental state required by the statute under which the defendant is prosecuted.”

Illinois: §720 ILCS 5/4-8 (a): “A person’s ignorance or mistake as to a matter of either fact or law, except as provided in Section 4-3(c) [720 ILCS 5/4-3] above, is a defense if it negatives the existence of the mental state which the statute prescribes with respect to an element of the offense.”

Iowa: §701.6 (2006): “Evidence of an accused person’s ignorance or mistake as to a matter of either fact or law shall be admissible in any case where it shall tend to prove the existence or nonexistence of some element of the crime with which the person is charged.”

Kansas: Stat. Ann. §21-3203(1) (2006): “A person’s ignorance or mistake as to a matter of either fact or law, except as provided in section 21-3202, is a defense if it negatives the existence of the mental state which the statute prescribes with respect to an element of the crime.”

Kentucky: KRS §501.070 (1) “A person’s ignorance or mistake as to a matter of fact or law does not relieve him of criminal liability unless: (a) Such ignorance or mistake negatives the existence of the culpable mental state required for commission of an offense.”

Maine: REV. STAT. ANN. 17-A §36 (West 2011): “Evidence of ignorance or mistake as to a matter of fact or law may raise a reasonable doubt as to the existence of a required culpable state of mind. Ignorance or mistake as to a matter of fact or law is a defense only if the law provides that the state of mind established by such ignorance or mistake constitutes a defense.”

Missouri: Ann. Stat. §562.031. “A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief of fact or law unless such mistake negatives the existence of the mental state required by the offense.”

New Jersey: N.J. Stat. §2C: 2-4 (2007) “a. Ignorance or mistake as to a matter of fact or law is a defense if the defendant reasonably arrived at the conclusion underlying the mistake and: (1) It negatives the culpable mental state required to establish the offense; or (2) The law provides that the state of mind established by such ignorance or mistake constitutes a defense.”

Delaware recognizes a common law rather than statutory defense of mistake of law, encompassing both M Law and M Noncrim Law, if the mistake is reasonable. See *Bryson v. State*, 840 A.2d 631 (Del. 2003); *Long v. State*, 65 A.2d 489 (Del. 1949).

²⁶ The relevant statute is Alabama Code 1975 §13A-2-6:(d) (“A mistake of law, other than as to the existence or meaning of the statute under which the defendant is prosecuted, is relevant to disprove the specific state of mental culpability required by the statute under which the defendant is prosecuted.”). The relevant commentary states:

Matters of “collateral mistake of law” are also relevant in the context of theft and other particular crimes. Subsection (d) provides that mistakes of law other than as to the existence or meaning of the statute under which the defendant is prosecuted are relevant to disprove a specific state of mental culpability required by the statute under which defendant is prosecuted. Thus, defendant’s mistake or ignorance as to some other non-penal law (not the statute under which he is being prosecuted) is tantamount to a mistake of fact. This is in accord with *Reed v. State* ... where it was held that evidence that defendant had consulted a lawyer with respect to his rights to remove corn from complainant’s crib should have been admitted to disprove the felonious intent required in a prosecution for larceny of the corn. Subsection (d) would also avoid the confusion inherent in the talk of “mixed questions of law and fact” that has been used by some courts.

whether of fact or law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime.”²⁷ Some states, despite being influenced by the Model Penal Code in other respects, have rejected the “or law” language.²⁸ Yet even some of the latter have recognized M Noncrim Law in particular contexts.²⁹

Outside of the jurisdictions directly influenced by the Model Penal Code, the case law concerning which mistakes of law will exculpate is not plentiful, and generalizations are hazardous.³⁰ The cases recognizing a M of Noncrim Law as exculpatory often focus on the language or policies underlying a particular offense. Occasionally, however, courts purport to generalize the relevant principle. Thus, some assert the principle that a “collateral mistake of law” should be treated the same as (or even characterized as) a mistake of fact³¹; and others, that the “ignorance or mistake of criminal law is no excuse” principle does not apply to mistakes of nonpenal law.³² But more often they simply recognize the legal relevance of a M Noncrim Law in a particular context without tendering a general standard.

Ala Code §13A-2-6 cmt. (LexisNexis 2005).

²⁷ Wis. Stat. Ann. §939.43(1) (emphasis added).

²⁸ See Paul Robinson, *Criminal Law Defenses* §62(d), pp. 262-266 (1984).

²⁹ See, e.g., *State v. Rabalais*, *infra* at note 36=.

³⁰ In his treatise, Dressler asserts that for “different-law” mistakes, i.e. M Noncrim Law, (1) the mistake exculpates if it negates specific intent, but (2) it does not exculpate with respect to a general intent offense or element, even if it is reasonable. Joshua Dressler, *Understanding Criminal Law* 178 (5th ed. 2009). However, Dressler cites only one case supporting the second assertion, and that case involved a “same-law” mistake (or M Crim Law), not, as Dressler asserts, a “different-law” mistake. See *People v. Snyder*, 652 P 2d 42 (Cal 1982), discussed in note 33= *infra*. To be sure, Dressler’s general characterization of the legal effect of M Noncrim Law in jurisdictions that recognize the specific/general intent categories is shared by some authorities. See, e.g., Rollin Perkins, *Ignorance or Mistake of Criminal Law*, 88 U. Pa. L. Rev. 35, 41-45 (1939). However, I have found few judicial decisions relying on that general characterization.

³¹ See, e.g., *People v. Meneses*, 82 Cal. Rptr. 3d 100, 112 (Cal. App. Ct. 2008).

³² California seems to take this approach. See *People v. Meneses*, *id.* In a general discussion of mistakes of fact and law, the court pointed to *People v. Flora*, 279 Cal. Rptr. 17 (Cal. App. Ct. 1991), in which a defendant sought exculpation for violating a foreign child custody order, claiming he mistakenly believed that the custody order was unenforceable in California, and the court held that that claim constituted a possibly exculpatory mistake of law. The court in *Meneses* was uncertain whether to classify the mistake in *Flora* as one of fact or law, it agreed that such a mistake should exculpate:

Arguably, the claim could be understood as a mistake of fact defense—defendant claimed he was mistaken about the fact of the legal status of the custody order, not the existence of a law requiring compliance with court orders. It has been suggested that “[a]lthough concerned with knowledge of the law, a mistake about legal status or rights is a mistake of fact, not a mistake of law.” (Bench Notes to Judicial Council of Cal.Crim. Jury Instns. (2008) CALCRIM No. 3407....)

Even if the claimed mistake in *Flora* was rightly construed as a mistake of law, the mistake was a collateral mistake about the nonpenal legal status of the foreign child custody order. Such mistakes are distinguishable from the strict understanding of a mistake of law where the defendant is mistaken about the penal law he is charged with violating. [D]efendant is not guilty ... if the offense charged requires any special mental element . . . and this element of the crime was lacking because of some mistake of nonpenal law.

Often, when courts permit a M Noncrim Law to exculpate (to the same extent that a M Fact would exculpate), they characterize the mistake as one of “fact.”³³ Such language is

In this case, a defendant charged with the theft of police reports claimed that he mistakenly believed that the reports were open to the public and that he legally purchased the reports. *Id.* at 114. The Meneses court noted that this claim “could be considered a cognizable defense, either as a mistake of fact or a mistake of law concerning the collateral matter of the nonpenal legal status of police records.” *Id.* However, the court rejected the defense because it was not raised at trial and was unsupported by the evidence.

³³ Consider three examples:

(1) *U.S. v. Fierros*, 692 F.2d 1291 (9th Cir. 1982). The court identifies as one category of mistake of law “instances where the defendant is ignorant of an independently determined legal status or condition that is one of the operative facts of the crime,” and cites a case in which the actor claimed that he reasonably believed that the person from whom he bought the property was legally authorized to sell it. “In such a case,” the court says, “the mistake of the law is for practical purposes a mistake of fact.” *Id.* at 1294.

(2) *United States v. Currier*, 621 F.2d 7, 9 n. 1 (1st Cir. 1980):

Appellant cites *United States v. Behenna*, 552 F.2d 573 (4th Cir. 1977) and *United States v. Squires*, 440 F.2d 859 (2d Cir. 1971). In both cases, however, an apparent “mistake of law” was actually a “mistake of fact” in that the mistake pertained to a question of status which was determined by a law other than the one under which the defendant was prosecuted. Thus, in both cases, where defendants were charged with making false statements concerning their residencies, they were allowed to defend on the grounds that they mistakenly thought their residencies to be other than what they in fact were as a matter of state law.

(3) *People v. Bray*, 52 Cal. App. 3d 494 (Cal. App. 4th Dist. 1975). Bray’s conviction for possession of a concealable firearm by a convicted felon was reversed because he did not know whether his Kansas conviction was classified as a felony or a misdemeanor. The court classifies his mistake as one of fact, not law:

Here, even the prosecution had substantial difficulty in determining whether the offense was considered a felony in Kansas. In arguing to the court the necessity of a Kansas attorney’s expert testimony, the district attorney said, “. . . in even our own jurisdiction, let alone a foreign jurisdiction such as the State of Kansas, it’s extremely difficult to determine whether a sentence was a felony or a misdemeanor.” Although the district attorney had great difficulty in determining whether the Kansas offense was a felony or a misdemeanor, he expects the layman Bray to know its status easily. There was no doubt Bray knew he had committed an offense; there was, however, evidence to the effect he did not know the offense was a felony. Without this knowledge Bray would be ignorant of the facts necessary for him to come within the proscription...

52 Cal. App. 3d at 498-499 (emphasis added). The underlined characterization is clearly incorrect. Bray knew all the relevant nonlegal facts. His mistake concerned the criminal law in another jurisdiction. At the same time, it is a debatable question of statutory interpretation and criminal law policy whether this type of legal mistake as to “another law” should be treated in the same way as a mistake of non-penal law in the same jurisdiction, e.g. presumptively treated like a M Fact.

In a later case, the California Supreme Court clarified that Bray has little precedential significance, holding that a mistake about whether a prior conviction is legally classified as a felony or misdemeanor is ordinarily irrelevant to conviction under the statute. *People v. Snyder*, 652 P 2d 42 (Cal 1982). After pointing out that the defendant had made a mistake of law, about how “felon” is defined in California criminal law, the court then simply relied on the principle that ignorance or mistake of the criminal law is no excuse. (Of course, the defendant in Bray also made a mistake about the criminal law, but his mistake was about how Kansas criminal law defines “felon.”) The court distinguished Bray on the ground that in

probably meant only to emphasize that the mistake should be treated in the same way as a M Fact. But it is erroneous to classify the mistake as one of “fact” in the sense of nonlegal fact that we have been employing, and that the Model Penal Code employs. Rather, the mistake is one of law, albeit of noncriminal law.

Although the case law is not easily summarized, this much is clear: it does not uniformly support the “mere truism” interpretation. For in many of the cases in which courts require the state to prove defendant’s knowledge of Noncrim Law, the statute does not explicitly require such knowledge.³⁴ For example, as we have seen, legislatures and courts very commonly permit a defense of claim of right, including mistake as to the civil law of property, when a defendant is charged with a theft crime.³⁵ But they often permit such a defense even absent an explicit “claim of right” defense to this effect, i.e. even absent a provision such as the Model Penal Code’s §233.1(3).³⁶

that case, defendant made repeated inquiries with government officials in which he fully disclosed the circumstances of his prior conviction, and obtained their advice regarding his correct legal status.

³⁴ See, e.g., *In re Luis C.*, 66 Misc.2d 907, 323 N.Y.S.2d 267 (N.Y. Crim.Ct. 1971). The law provided: “A person is guilty of criminal trespass ... when he knowingly enters or remains unlawfully in a building.” The court found the language ambiguous, but upheld a requirement that the actor know his entry was illegal, based on some evidence of legislative intent and on the historical recognition of such a requirement in trespass laws.

³⁵ See LaFave, *supra* note 23=, at 988 (claim of right defense prevents conviction of larceny if one makes a mistake, even an unreasonable mistake, that the property one is taking is one’s own, is no one’s property, or is the property of another but the other has given permission to take it).

English and Canadian criminal law similarly provide a defense for even unreasonable mistake of law as to property rights in theft offenses. See A.P. Simester & G.R. Sullivan, *Criminal Law Theory and Doctrine* 538-540 (4th ed. 2010); Don Stuart, *Canadian Criminal Law* 353-356 (5th ed. 2007).

Simester & Sullivan note that the rule exculpating for mistakes of law in property offenses is not limited to statutes with explicit language to that effect, citing the famous case of Smith (David), discussed above. But they suggest that the civil law/criminal law distinction is not always decisive in English law:

Another way of categorizing the appellate ruling in Smith is to say that a mistake of civil law was in issue and questions of civil law are equivalent to questions of fact. But while it is true that courts are far readier to allow mistakes of civil law to exempt than they are to exculpate for mistakes of substantive criminal law, there is no hard and fast rule.

Id. at 681-682.

³⁶ Thus, a Connecticut opinion recognized that a M Law that negatives the specific intent of the crime charged could exculpate a defendant who seized his tenant’s computers under the mistaken belief that he was entitled to resell the items as a means of recovering unpaid rent. *State v. Varszegi*, 635 A.2d 816 (Conn. App. 1993). The larceny statute required that a defendant “with intent to deprive another of property . . . wrongfully take, obtain, or withhold property from an owner.” C.G.S.A. §53a-119. Varszegi claimed he was mistaken about his entitlement to impound the computer equipment, a claim that was supported by the fact that he did not attempt to conceal his seizure of the property from law enforcement officials. 635 A.2d at 819. Without relying on any general mistake provisions in its criminal statutes concerning M Law, the court concluded that Varszegi’s mistake about his entitlement to his tenant’s property negated the mens rea required for the offense. *Id.*, at 820.

Similarly, in *State v. Rabalais*, 759 So. 2d 836 (La. Ct. App. 2000), the court found Rabalais’ reasonable belief about her legal entitlement to a jointly owned truck sufficient to set aside her conviction

Finally, consider a very famous case that might illustrate the category of M Noncrim Law, although it is not usually thought of in these terms. In *Morrisette v. United States*,³⁷ the defendant took spent and apparently abandoned bomb casings from government property and was charged with knowingly converting government property. The critical issue in the case, of course, was whether the statute imposed strict liability with respect to the status of the property, i.e., whether a mistake of any sort about his legal right to take the property would exculpate. But the case is also a useful vehicle for exploring the distinction between M Fact and M Noncrim Law. For it is tantalizingly unclear whether Joe Morrisette was mistaken about the relevant facts or instead about the relevant property law.

Morrisette's mistake was a M Fact if the legal criterion of abandonment was that the government did not object to anyone taking the property, and if he was factually mistaken in believing that the government did not actually object to his collecting the scrap metal (which he did openly, after seeing that others had done the same). But his mistake was a M Noncrim Law if, as the trial court appeared to conclude, property found on government land is never considered legally abandoned by the government, not even if the government fails to express its objection to the property's removal; and if Morrisette was unaware of this legal rule. For on this understanding of abandonment, he would not have made any legally relevant M Fact. After all, he knew that he was taking the casings from government land.

In the actual case, the Supreme Court did not clarify what, in law, counts as "abandoning" property for purposes of the statute. However, in the appellate decision in *Morrisette* that the Supreme Court reversed, the U.S. Court of Appeals for the Sixth Circuit defined "abandonment" as follows:

Abandonment of property, in order to exculpate one taking it, must include both intention to abandon and an act or acts carrying such intention into effect. As was held in [an earlier Michigan case] (an action of replevin), both the intention to abandon and actual relinquishment must be shown.³⁸

Suppose this is the correct legal definition of abandonment. And suppose, as seems quite likely, that Morrisette knew all of the relevant (nonlegal) facts: he knew full well that the government had not both (1) intended to abandon the bomb casings and (2) taken acts that objectively evidenced that intent, such as by granting him individual permission or posting a

for larceny, even if that belief was mistaken. Defendant's "honest belief she owned an interest in the truck and reasonable ignorance of the law on donations *inter vivos* precludes a finding that she intended to take the property of another." *Id.*, at 841-842. Yet the Louisiana criminal statutes explicitly permit a mistake defense only for mistakes of fact. La. R.S. 14:16 (2011).

³⁷ 342 U.S. 246 (1952). For further discussion, see Leonard, *supra* note 6, at 538-539.

³⁸ 187 F.2d 427, 430 (6th Cir. 1951).

sign to that effect (“Help yourself to this scrap metal!”). Then if Morissette honestly believed that the property was abandoned, he must have made a M Noncrim Law.³⁹ And yet, the Supreme Court pays no attention to the question whether defendant’s mistake was a M Fact or a M Noncrim Law, and thus seems to consider the answer legally irrelevant.⁴⁰ Of course, the answer is irrelevant under the prevailing approach to mistake as to property law in theft offenses.

3. The better view?

How should courts treat exculpatory M Noncrim Law? The answer has two aspects. First, how should courts interpret statutes that are not explicit about this question? Second, apart from the interpretive question, what is the better policy—to treat M Noncrim Law like M Crim Law, like M Fact, or in some other way? Why?

Consider why a judge might (sometimes or usually) treat M Noncrim Law differently from M Crim Law, but the same as M Fact. Although courts and commentators have said little by way of rationale, I believe the most plausible reasons are these:

- (1) Courts should presume that the legislature intends to treat M Noncrim Law the same as M Fact;
- (2) The civil law is more complex and less accessible than the criminal law;
- (3) Citizens have a greater duty to understand the criminal law than to understand the civil law;

³⁹ On the other hand, the dissenting opinion in the Court of Appeals appears to interpret “abandonment” more narrowly, as requiring only element (1), not both (1) and (2). 187 F.2d at 442.

⁴⁰ To be sure, the Supreme Court reversed the conviction because the trial court applied a strict liability rule and failed to instruct about the excusatory effect of a mistaken belief that the property was abandoned. The Court did not explicitly discuss the question whether a M Noncrim Law as well as a M Fact would be an excuse.

One passage in the opinion suggests that a M Noncrim Law would not be an excuse: “He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion.” 342 U. S. at 271. But other language in the opinion could be read otherwise:

[I]t is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was, in fact, abandoned, or if he truly believed it to be abandoned and unwanted property.

Id. at 271 (emphasis added). Moreover, in a footnote the Court distinguishes civil conversion (which does not require knowledge that the property belongs to another) from criminal conversion: “It has even been held that one may be held liable in [civil] conversion even though he reasonably supposed that he had a legal right to the property in question.” Id. at 270, n. 31 (emphasis added).

Finally, the concluding paragraph mentions that there was evidence to support the jury’s conclusion of “lack of any conscious deprivation of property or intentional injury.” Id. at 276. Whether this means a M Noncrim Law would exculpate is ambiguous.

(4) Those acquitted due to a M Noncrim Law will often still be subject to civil law sanctions;

(5) For a particular offense, we have good reason to treat M Noncrim Law like M Fact.

Are these reasons persuasive?

First, as a matter of statutory interpretation, perhaps we can presume that whenever mens rea is required as to an element of an offense that has both factual and legal dimensions (“knowing that the property is stolen,” or “knowing that the prior divorce is invalid”), the legislature means to permit both factual and legal errors about the element to excuse. But this rationale, by itself, proves too much: it would entail that even legal mistakes about how statutory terms are defined elsewhere in the criminal code itself would excuse as readily as factual mistakes—for example, even where “stolen” or “abandoned” is fully defined elsewhere in the criminal statute.⁴¹ It is not plausible to presume that every legislative decision to insert a culpability requirement for a particular element of a crime, thereby demanding culpability as to the facts that satisfy the element, was intended to have the far-reaching effect of also demanding culpability as to the meaning of that element under the governing criminal law.

To be sure, the Model Penal Code does seem to endorse a general equivalence rule between M Noncrim Law and M Fact. Perhaps a court should treat this rule as the default understanding of what a legislature probably intended. However, we have seen that non-Code jurisdictions, and even jurisdictions that employ most of the Code’s culpability provisions, do not always follow this equivalence approach. So this default presumption seems empirically unwarranted.

Consider the second reason, one emphasized by Glanville Williams: it is unfair to expect the average citizen to know, not only the entire content of her jurisdiction’s criminal statutes (including how courts have definitively interpreted those), but also the jurisdiction’s civil law.⁴² The expectation is unfair both because the civil law rules can be more complex

⁴¹ Consider, for example the well-known case of *People v. Marrero*, 507 N.E.2d 1068 (1987), where the critical definition of “peace officer” about which defendant was mistaken was found elsewhere in the criminal statute (indeed, in the criminal procedure code). Under this rationale, whatever mens rea would be required as to the facts that made the defendant in that case a “peace officer” (probably negligence, see McKinney’s Penal Law §15.15(2)) would also be required as to whether, in law, defendant was a peace officer. But the latter question is quite different from the former, and is treated by the New York Court of Appeals as quite different. See Leonard, *supra* note 6, at 558.

⁴² Glanville Williams, *Criminal Law: The General Part* 334 (2nd ed. 1961).

than criminal law rules, and because they are even less accessible to ordinary citizens than are criminal law rules.

This rationale does have some force. In some categories of cases, such as larceny and bigamy, the underlying civil law principles (e.g., those defining property rights or specifying when divorces are legally valid) are indeed subtle. As a broad and imperfect generalization, it is considerably easier for a dutiful citizen to “look up” the terms of a criminal statute than to “look up” the doctrines of civil law that the statute makes relevant. More realistically, it is often reasonable to expect citizens who conscientiously try to conform to the jurisdiction’s legal requirements to be aware of most of its important criminal law requirements, but much less reasonable to expect them to develop a similar degree of familiarity with their jurisdiction’s various and extensive civil law requirements (including contract, property, and family law and regulatory requirements).

Yet we should not give this rationale too much weight. After all, if these considerations were decisive, it might be more sensible simply to recognize, for both M Crim Law and M Noncrim L, an exception to the strict liability rule (that ignorance or mistake of criminal law is no excuse) when the relevant law is unusually complex or is highly inaccessible.⁴³ To some extent, of course, modern cases interpreting complex criminal laws do precisely this, sometimes requiring mens rea as to the criminality of defendant’s conduct when punishment is likely to burden “otherwise innocent conduct.”⁴⁴ Nevertheless, this judicial palliative is quite modest. Contemporary criminal law remains forbiddingly complex and impenetrable to the average citizen. As Gerald Leonard wryly notes, “the criminal law does not need to look to civil law to import a complexity that it would otherwise lack.”⁴⁵

⁴³ See Leonard, *supra* note 6, at 553-559. Conversely, Williams’ argument also implies that when civil law is not complex, defendant should not be entitled to a mistake of law excuse; here, too, Williams’ rationale does not fully explain the civil/ criminal law distinction. (I thank Peter Westen for this observation.) See also Alexander, *supra* note 6, at 41-42 (pointing out that many violations of criminal statutes are due to nonculpable ignorance, while many mistakes regarding civil matters that result in criminal violations are culpable).

⁴⁴ See, e.g., *Arthur Anderson LLP v United States*, 544 U.S. 696 (2005); *Bryan v. United States*, U.S. 524 U.S. 184 (1998) (holding that the term “willfully” in § 924(a)(1)(D) of the Firearms Owners’ Protection Act requires proof that the defendant knew his conduct was unlawful, but not that he also knew of the federal licensing requirement); *Liparota v. United States*, 471 U.S. 419 (1985); *Ratzlaf v. United States*, 510 U.S. 135 (1994).

⁴⁵ Leonard, *supra* note 6, at 558. Leonard also points out that the meaning of a criminal statute sometimes depends on common usage or a dictionary, not on unambiguous language; he wonders why a citizen’s mistake about such usage should be treated differently from a M Noncrim Law. *Id.* at 552. A partial answer is that the burden to a defendant of examining a dictionary or consulting other members of the community about common usage is often significantly less than the burden of researching the minutiae of the applicable civil law.

Third, arguably citizens have a greater moral duty to understand the criminal law than to understand the civil law. A legislature's decision to crystallize a norm of conduct in the criminal law is a judgment that that conduct is especially blameworthy and dangerous. Citizens therefore ought to be especially careful to acquaint themselves with criminal law norms.⁴⁶ An important variant of this argument is asserted by Jerome Hall: (1) A general defense of ignorance or M Law must be rejected, to ensure that the authoritative meaning of criminal legislation is determined by legislators and other legal actors with authority to interpret the law, rather than by private actors. (2) However, permitting an excuse for mistake of civil law (e.g. mistake about property law in a larceny case) normally does not similarly "challenge the moral norms represented in the criminal law," such as "the ethical principles that it is wrong to steal another's chattel."⁴⁷

This third argument provides only weak support for distinguishing M Noncrim Law from M Crim Law, and even weaker support for treating M Noncrim Law like M Fact. In the first place, in the cases we are considering, the criminal statute itself does include a legal term (such as "property" or "married") that refers to a noncriminal legal norm. So even if we indulge the fiction that citizens are spending their spare time searching the web or visiting the local library in order to peruse the terms of criminal statutes, they will come across these terms, and should (on this view) inquire into their meaning. The argument does have more force with respect to malum in se rather than malum prohibitum offenses, insofar as it is more plausible to expect all citizens to be familiar with the former. Still, even malum in se offenses are uncertain at the boundaries, and it is precisely those boundaries (such as the meaning of "property" in a malum in se theft offense) that are at issue here. Hall's variant of this argument is no better, since it relies on the dubious assumption that recognizing a mistake of criminal law would undermine the authority of designated legal actors to announce the meaning of the law.⁴⁸ And again, insofar as the criminal statute relies for its meaning on

⁴⁶ Here is a blunt, overstated version of the argument: "While the criminal law represents a moral code, the nonpenal law does not." Rollin Perkins, *Ignorance or Mistake of Law Revisited*, 1980 Utah Law Rev. 473, 475.

⁴⁷ Jerome Hall, *General Principles of Criminal Law* 394 (2nd ed. 1961). Hall does qualify his argument. Not all claims of ignorance or mistake of non-penal law should be allowed, he says, because "parts of torts and family law, like the law defining the major crimes, also reflect simple moral values." *Id.*; see *id.* at 410. This qualification is similar to my point above that complexity and inaccessibility are only crude proxies for noncriminal rather than criminal law.

⁴⁸ See Fletcher, *Rethinking Criminal Law* 733-735 (1978). The assumption is even more doubtful if only a reasonable M Noncrim Law is recognized as a defense. Although an initial group of (reasonable) mistaken actors may get a "free bite," so to speak, it is more likely that the mistakes of later actors—whose conduct occurs after the rejection of the first group's mistake claim—will not be deemed reasonable.

noncriminal law sources, this supposed moral duty not to “challenge” the criminal law’s authority should, it seems, extend to a duty not to “challenge” those sources as well.

Nevertheless, this third argument has some weight in particular contexts. Insisting on a citizen’s obligation to know the law is much more defensible if she has engaged in a type of activity that should put her on notice of her legal responsibilities. Although some such activities (e.g. entering a business or profession) arguably trigger comparable duties to investigate both the criminal law and the civil law dimensions of the activity, others (e.g. simply becoming a tenant, or marrying, or purchasing used goods) might trigger a more stringent duty to investigate the criminal law requirements than to investigate the civil law requirements.

Fourth, if a M Noncrim Law were a presumptive criminal law excuse, civil remedies often will still be available,⁴⁹ but if a M Crim Law were widely recognized as an excuse, an alternative remedy will be available much less often. This argument has some force, though its weight is lessened by the socioeconomic reality that the perpetrators of many crimes are likely to be impecunious and unable to satisfy a civil damages judgment.

Fifth, in lieu of recognizing a general presumption of equivalence, we might instead focus on the particular offense. Does the nature of that offense give us distinctive reasons for treating M Noncrim Law as we treat M Fact? For certain offenses, it is especially plausible to endorse the first, interpretive argument—that the legislature meant to require a uniform level of culpability both as to fact and as to a question of noncriminal law. And for some offenses, the second, third, or fourth arguments have greater weight. These rationales, however, are sometimes offense-specific. They turn on a contextual understanding of the policies and principles justifying punishment for a particular type of conduct accompanied by a particular mens rea as to particular elements. Claim of right in property offenses can be justified in this way. The crime of theft imposes potentially serious sanctions and justifiably triggers special opprobrium, beyond the regulatory and compensatory remedies for violating civil property law rights. Arguably these features demand that the actor charged with theft be

⁴⁹ Consider, for example, *Morissette v. United States*, discussed above. If *Morissette* were exculpated because of a M Noncrim Law as to the definition of “abandoned” property, he would probably still be liable in tort for knowing conversion of the property, since tort liability does not require proof that defendant knew that he had no right to the property. Restatement (Second) of Torts §244. See also *State v. Rabalais*, supra note 36, 759 So.2d at 842 (Peters, J., concurring) (“It appears simply that this dispute between Steven Rabalais and the defendant belongs in civil and not criminal court.”).

The commentaries to some Model Penal Code provisions note the availability of civil remedies as a reason to permit mistakes of civil law to excuse. See, e.g., Commentary to §224.13, p. 362 (“These culpability limitations were thought essential to avoid the intrusion of the criminal law into a field that is more appropriately the subject of civil treatment.”).

culpable as to the underlying civil law property rights he is violating (e.g., that he know he has no legal right to the underlying property), and not just as to the relevant facts. This fifth rationale is limited, however; it need not support a broad presumption that a M Noncrim Law as to any issue should be treated the same as a M Fact as to that issue.

A final point deserves emphasis. Even if, in a particular context, it is clear that a M Noncrim Law should be treated differently than a M Crim Law, it hardly follows that that M Noncrim Law should be treated just like a M Fact. Rather, we should at least contemplate whether to require a different level of culpability for each of the three categories. Consider, for example, this relatively neglected question: when an actor is charged with homicide by omission, what mens rea, if any, is he required to possess with respect to whether he had a legal duty of affirmative action or rescue? That legal duty is often based on civil law principles from tort and contract law; it is rarely defined in the homicide statute or elsewhere in the criminal code.⁵⁰ Suppose a neighbor allegedly agreed to care for a young child for a few minutes, and the child wanders into the road and is killed by a passing car. Or suppose a bicyclist negligently (or even non-negligently) strikes but does not kill a pedestrian, who is then killed by a car. The neighbor or the bicyclist might claim that she was unaware of the facts that grounded the duty to aid, or that she did not know that such facts give rise to a legal duty to aid. What culpability is required as to those factual and legal questions?⁵¹ We should not necessarily require the same culpability as to both the facts and the civil law question (just as we should not necessarily require the same culpability both as to causing death and as to whether, as a matter of fact and civil law, defendant had a duty to act). Knowingly causing a death, whether by action or by omission accompanied by a duty to act, is murder; but it does not follow that in a prosecution for murder by omission, the state should have to prove that the defendant knew the facts that grounded the legal duty, nor that the state should have to prove that as a matter of civil law, those facts amounted to a legal duty. It might be more sensible to require, say, recklessness as to both the facts and the noncriminal law rules establishing the duty. Alternatively, perhaps the latter rules are, for the most part, sufficiently

⁵⁰ This conventional practice, of not clearly defining the criteria for a legal duty of affirmative action in the criminal statutes themselves, is indeed objectionable on fair notice and legality grounds. See Paul Robinson, *Criminal Law* 195-196 (Aspen 1997).

⁵¹ See Graham Hughes, *Criminal Omissions*, 67 *Yale L.J.* 590, 603-605 (1957) (arguing that one must have some level of culpability as to whether, in law, he has a duty of affirmative action, and rejecting the contrary argument of Glanville Williams). But compare LaFave, *supra* note 23=, at 337 (stating that mistake as to existence of legal duty “would seem to” be no excuse, because of general principle that ignorance of the law is usually no excuse); Robinson, *id.* at 196 (arguing that no culpability is required as to whether the law imposes an affirmative duty but noting that the MPC might be interpreted as requiring such culpability). I have found no relevant case law.

straightforward (“Carefully monitor the safety of one you have agreed to take sole responsibility for”) that in justice we need only require negligence as to these rules, while we should (in order to guarantee the actor's blameworthiness) require recklessness or knowledge as to the facts underlying the duty.⁵²

One illustration of such a highly differentiated approach to these various types of mistake is the Model Penal Code's treatment of bigamy. The Code, as we have seen, seems to endorse the equivalence approach, at least as a presumptive rule. But §230.1 offers a more refined approach. It provides that a married person is guilty of bigamy if he contracts another marriage “unless at the time of the subsequent marriage” one of four things is established:

- (1) He “believes that the prior spouse is dead,” or
- (2) He and the prior spouse lived apart for five years and during that period he did not know that the spouse was alive, or
- (3) A court has issued a divorce decree and he “does not know that judgment to be invalid,” or
- (4) He “reasonably believes that he is legally eligible to remarry.”

Two things are striking about this list. First, these four defenses differ, quite explicitly, in the extent to which they recognize the relevance of legal as well as factual mistakes. Factual mistakes are most relevant in the first two categories, legal mistakes (about noncriminal law) in the second two. (However, a legal mistake would still exculpate in rare situations in the first two categories,⁵³ and factual mistakes in rare situations in the second two.⁵⁴) Second, the four defenses also differ in the mens rea that they require: apparently any mistake, even an unreasonable one, provides a defense under (1), while only a reasonable mistake provides a defense under the omnibus “mistake of divorce law” provision, (4).⁵⁵ In

⁵² See also Simons, *supra* note 6, at 497-502 (arguing that “legal mistakes as to offense elements,” a category I now reject in favor of M Noncrim Law, should indeed normally be treated as an intermediate category between M Crim Law (for which culpability is least often required) and M Fact (for which culpability is most often required); the presumptive intermediate treatment, I there argue, should be that only reasonable mistakes excuse).

⁵³ Suppose, under (1), the actor believes that his former spouse is dead because he mistakenly believes that being in a permanent vegetative state satisfies the civil law definition of death.

⁵⁴ Suppose, under (3), the actor's first spouse informs him that she has obtained an ex parte divorce from state X, and such divorces are indeed legally valid in the actor's new state; but the first spouse is lying about the facts; she never even tried to obtain a divorce in state X.

⁵⁵ Provisions (2) and (3) are subtly different. These provisions do not require an affirmative exculpatory mens rea (of belief, (1), or reasonable belief, (4)), but instead permit exculpation simply because the actor lacks an inculpatory belief.

This question, whether to frame the mens rea “excuse” in terms of (a) an affirmative exculpatory mens rea or instead (b) the lack of an inculpatory mens rea, arises regularly in the standard defenses, such as self-defense or lesser evils. We ordinarily do require a person asserting a justification defense to act for the relevant purpose (e.g., to protect himself from imminent death), or at least with the belief that he will

short, the Code here explicitly differentiates fact from noncriminal law, and then makes subtle further culpability differentiations. This is a far cry from a simple, inflexible equivalence approach.

What, then, is the best approach? In a significant range of situations, the equivalent treatment of M Fact and M Noncrim Law does make sense. If the underlying harm is sufficiently modest that a high level of culpability such as knowledge should be required with respect to the relevant facts (as is the case with some theft offenses), then that culpability should often be required as to Noncrim Law as well. On the other hand, in some contexts differential culpability is more defensible. Thus, as we have seen, and simplifying a bit, the MPC's bigamy provisions limit the defense for many legal mistakes about divorce law to reasonable mistakes, while permitting a defense for relevant factual mistakes even when the mistake is unreasonable. This more demanding standard for excusing mistakes about the civil law of divorce arguably is justified insofar as parties contemplating remarriage should be alert to the relevance of these legal issues and should be especially careful to investigate them. Or consider a theft offense committed by a commercial party. For such a party, usually it is not especially burdensome to investigate the legal validity of a debt or the legal scope of the relevant property rights; accordingly, it does not seem unjust to permit conviction of such parties merely for negligence with respect to the noncriminal law but to require a higher level of culpability, recklessness or knowledge, with respect to facts.

C. Inculpatory M Noncrim Law

How should we analyze inculpatory rather than exculpatory M Noncrim Law?

Recall the final scenario from the introduction. How would and should the law treat Franklin? He cannot be convicted of the crime, because he has not actually received stolen property. If the law adopts the equivalence view and treats exculpatory M Noncrim Law like exculpatory M Fact, then it will treat Ellen like Abby. Does it follow that the law should also treat Franklin equivalently to Barney, and thus treat him, like Barney, as guilty of an impossible attempt? After all, if the incorporated noncriminal law definition of "property"

secure that benefit. But perhaps we should not always require such affirmative beliefs. One acting in self-defense, I recently argued, can be justified even if she lacks some of the conventionally required beliefs (for example, in the severity of the threat, the proportional severity of her planned response, and the lack of reasonable alternatives), so long as she exercises reasonable self-control. See Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control?*, 11 New Crim. L. Rev. 51 (2008).

meant what Franklin thought it meant (even though he was incorrect about this legal issue), he would be committing the crime.

Analogously, suppose this variation on the Morissette facts and law: Morissette believed that the spent bomb casings were not legally abandoned and were still government property, and was willing to steal them; but this belief was incorrect, not because he was mistaken about the nonlegal facts, but because he erroneously thought that any property left on government land is always the government's property. He would not be guilty of the crime of knowing conversion of government property, because it was not actually government property when he took it. But if his belief about property law had been correct, then he would have committed that crime. So perhaps this hypothetical Morissette should be guilty of attempt.

We might adopt a symmetrical approach here: just as the equivalence view treats M Noncrim Law in the same way as M Fact for purposes of exculpation from liability for the completed crime, perhaps it should treat both types of mistake the same way for purposes of inculcation for the corresponding attempt. Ellen's mistaken belief that, under the relevant civil law, the finder and subsequent recipient of abandoned property becomes its legal owner exculpates her from the crime of receiving stolen property. Perhaps, then, Franklin's mistaken belief that, under the civil law of his state, he is not the legal owner of abandoned property that he later receives would inculpate him for attempting to commit the crime of receiving stolen property.

Case law on this issue is sparse,⁵⁶ as is commentary.⁵⁷ Paul Robinson does recognize the issue and suggests that attempt liability here would be proper. "Assume a woman marries, mistakenly believing that her previous divorce is invalid. The legality principle would not bar a subsequent prosecution for attempted bigamy."⁵⁸ Moreover, some language in the Model Penal Code commentary supports this interpretation, though the language is ambiguous.⁵⁹

⁵⁶ See Simons, *supra* note 6, at 459-462.

⁵⁷ Commentary on the issue includes Alexander, *supra* note 6, at 50-51; R.A. Duff, *Criminal Attempts* 94-96 (1996); Simons, *supra* note 6, at 459-462, 478-483 (and commentary cited therein).

⁵⁸ Robinson, *supra* note 28, §85(d), at 433.

⁵⁹ The Commentary states: "If, according to his beliefs as to relevant facts and legal relationships, the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal." MPC §5.01 commentary, Part I at 318 (emphasis added). The negative implication is: the actor is guilty of attempt if according to his beliefs as to legal relationships the result would be a crime. But it is not entirely clear that this passage means that attempt liability can be founded on a purely legal (as opposed to a factual) mistake about a legal "relationship" (e.g., a purely legal mistake about property ownership or about the validity of a divorce). As Alexander notes, the footnote to the

As a matter of policy, is it wise to press symmetry this far? One argument in favor of attempt liability for actors such as Franklin is that punishment would not directly implicate the legality principle,⁶⁰ for if the facts and the noncriminal law were as Franklin believes them to be, he would indeed be committing a crime. His situation is thus unlike an impossibility case (such as Diego) in which the criminal law does not prohibit what the actor believes himself to be doing. Nevertheless, we should be very cautious here. Often, we will lack reliable proof that the defendant honestly made an error of noncriminal law such that, if that law were as he believed it to be, he would have committed a crime.⁶¹ Punishing even factually impossible attempts raises serious concerns,⁶² so we should hesitate before extending attempt liability this far.

Finally, note that the question of whether to punish inculpatory M Noncrim Law is quite distinct from the question whether to punish inculpatory mistakes that fall within the common law category of “legal impossibility.” The latter category almost always embraces straightforward mistakes of fact, not of law.⁶³

D. Three problems distinguishing M Crim Law from M Noncrim Law

Even if we abjure an offense-specific approach to M Noncrim Law, and instead employ the Model Penal Code’s equivalence rule presumptively treating M Noncrim Law like M Fact, a serious characterization issue sometimes arises. In certain categories of cases, determining whether the case falls within M Noncrim Law or within M Crim Law is especially difficult. This section discusses three special problems.

1. The criminal law incorporates a civil schedule of prohibited items

The first problem arises where the criminal law incorporates a schedule of prohibited items. Consider Idaho v. Fox,⁶⁴ in which defendant was charged with possessing a “controlled substance” without a prescription. He knew that he possessed a large quantity of

quoted passage from the commentary “refers to such mistakes as involving essentially factual questions.” Alexander, *supra* note 6, at 49 n. 41, discussing *id.*, 318 n. 92. See Simons, *supra* note 6, at 462 n. 42.

⁶⁰ I thank Russell Christopher for suggesting this point.

⁶¹ See Simons, *supra* note 6, at 490-492.

⁶² See, e.g., Dressler, *supra* note 30, at 409-410; Westen, *supra* note 6.

⁶³ See Dressler, *id.* at 408-410 (noting that the traditional “legal impossibility” category is sometimes also described as “hybrid” legal impossibility).

⁶⁴ 866 P.2d 181 (Idaho 1993), discussed in Leonard, *supra* note 6, at 516-517; see also *id.* at 557-558.

ephedrine, but claimed that he did not know that this drug was on the state's list of controlled substances for which a prescription was required. The court held that this was a M Crim Law, and therefore the defendant's mistake was legally irrelevant. But couldn't the mistake that defendant allegedly made be classified instead as a M Noncrim Law? After all, the schedule of controlled substances has legal significance for purposes other than criminal punishment.⁶⁵ On the other hand, it does seem that a primary function of a schedule of controlled substances is to provide content to the criminal prohibition. The same is not true of the civil law of property (which serves a variety of functions including tort liability and assignment of property rights) or of the civil law of divorce (which primarily functions to determine how marriages will be terminated for purposes of family law, including parental rights and duties and post-divorce property assignments). Moreover, reading a schedule of controlled substances to see what is on the list is not a burdensome or complex endeavor, compared to the burden of investigating the scope of the jurisdiction's law of property or of divorce. Accordingly, it is more plausible to treat this kind of case as M Crim Law, not as M Noncrim Law.⁶⁶

⁶⁵ Pharmacists are subject to noncriminal regulatory sanctions, including nonrenewal, suspension, revocation, or restrictions of their license, if they sell substances on the schedules without a prescription. Idaho Code §54-1726 (2010).

⁶⁶ The classification of a good as subject to duty should probably be analyzed similarly to the classification of a drug as a controlled substance. Alexander offers such an example, drawn from the famous hypothetical of Lady Eldon's mistake about whether it is a crime to import French lace. There is, Alexander plausibly argues, no significant difference between Lady Eldon knowing that the criminal law prohibits failing to declare dutiable items, but mistakenly believing that French lace has been taken off the list of dutiable items; and mistakenly believing that there is no law that declares "it is a crime to fail to declare ... French lace." Alexander, *supra* note 6, at 37. And it is implausible, he points out in his recent comment, to conclude that an actor "has made a mistake of other law when there is a separate list [of dutiable items] but a mistake of criminal law when there is a statute for each item." Alexander, *supra* note 15, at 244.

However, the controlled substances example is not always straightforward: whether a drug is on the state's list cannot always be determined just by reading, or inquiring about, the official list. As Kahan points out, under the Uniform Controlled Substances Act, a drug can be added to the list not only by statute or administrative regulation, but also "by what amounts to legal osmosis—the automatic inclusion of any substances controlled by federal law." Dan Kahan, *Ignorance of Law Is an Excuse -- But Only For the Virtuous*, 96 Mich. L. Rev. 127, 137-138 (1997). As a result, in one case a defendant was convicted for possessing a particular drug that the state legislature itself did not realize one could not legally possess, because it was unaware that federal law had automatically added the drug to the state's list. *Id.*, discussing *State v. King*, 257 N.W.2d 693, 695 (Minn. 1977). In such a case, it is more defensible to classify a mistake about whether the drug is on the list as a (possibly excusable) M Noncrim Law than as an (inexcusable) M Crim Law.

2. The criminal law simply criminalizes acts that violate a civil regulatory prohibition

The second problem is where the criminal law merely criminalizes behavior that violates a civil prohibition. Thus, suppose a criminal statute makes it a crime to “knowingly” or “willfully” violate a specific civil prohibition, such as a prohibition on emitting specified environmental pollutants or on violating worker safety regulations. Such a statute would at least require the defendant to know the facts that, as a matter of law, constitute violation of the prohibition. But sometimes courts will interpret such a statute as requiring knowledge of unlawfulness, especially if, absent such a requirement, “otherwise innocent conduct” would be punished.⁶⁷

Should this category be understood as M Crim Law or M Noncrim Law? The answer is unclear. For example, consider the well-known case of Cheek v. United States.⁶⁸ Cheek was convicted of “willfully” failing to file a required tax return, despite his claim that he sincerely believed that under the tax laws he owed no taxes because he had been advised by an anti-tax group that wages are not income. The Court held that if the jury accepted that he honestly believed that wages are not income, he should be acquitted, even if that belief was unreasonable. The government must prove his knowledge of his legal duty to pay taxes on income, the Court concluded.⁶⁹

Joshua Dressler classifies Cheek as involving a mistake of “different law”⁷⁰—that is, a M Noncrim Law—but the Court itself and most commentators treat the alleged mistake in the case as a M Crim Law (albeit an unusual M Crim Law case in which certain legal mistakes excuse).⁷¹ In one sense, Dressler’s characterization of Cheek as an instance of a

⁶⁷ See note 44= *supra*. For a useful general discussion, see Sharon Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 *Duke L.J.* 341 (1998).

⁶⁸ 498 U.S. 192 (1991).

⁶⁹ At the same time, however, the Court also held that an honest but unreasonable belief that the tax laws are unconstitutional is not a defense. *Id.* at 205-206.

⁷⁰ Dressler, *supra* note 30=, at 177.

⁷¹ See Leonard, *supra* note 6, at 555; LaFave, *supra* note 23=, at 311. The Court justifies this unusual requirement on the basis of the unusual complexity of the tax laws. (At the same time, the Court does not permit a M Crim Law defense based on a belief that the tax laws are unconstitutional.)

On the other hand, the California Supreme Court has characterized Cheek as involving a mistake of “nonpenal law” rather than of penal law, in a case permitting a M Law defense to a charge of tax evasion under state law. After describing the reasoning in Cheek, the court says:

We agree malefactors cannot be permitted to redefine the criminal law by their own subjective misconceptions of that law. For that reason, mistake or ignorance of the penal law is almost never a defense. There are a number of circumstances, however, in which violation of a penal statute is premised on the violator’s harboring a particular mental state with respect to the nonpenal legal

claim of ignorance or M Noncrim Law is plausible; for the civil tax law requirements have their own distinct rationales (including collecting revenue, redistributing income and wealth, encouraging investment, and creating incentives for particular types of economic and social activities), just as property law and divorce law serve purposes independent of the criminal law. And when criminal sanctions are added to such a civil prohibition, and an additional mens rea requirement is imposed through a term such as “willfully,” arguably it is not enough that the defendant is simply aware of the facts that make his conduct a civil violation; sometimes, at least, the legislature means to require more culpability than that, and specifically mens rea as to the illegality of the underlying conduct.⁷² On the other hand, this type of case is quite different from larceny or bigamy, where the civil law (property or family law) that is made relevant by the criminal law is the source of a wide range of legal obligations and remedies.⁷³ In the end, perhaps this category, of criminalization of a civil prohibition, should be treated, not as a typical instance of M Noncrim Law, but as a sui generis category, taking into consideration the policy factors mentioned above.⁷⁴

status of a person, thing, or action. In such cases, the principle is “firmly established that defendant is not guilty if the offense charged requires any special mental element, such as that the prohibited act be committed knowingly, fraudulently, corruptly, maliciously or *wilfully*, and this element of the crime was lacking because of some mistake of nonpenal law.” (Perkins & Boyce, Criminal Law (3d ed.1982) pp. 1031–1032, italics added.) As Perkins and Boyce emphasize, the mistake must be one of *nonpenal* law. ... Thus, a taxpayer may defend against a section 19405(a)(1) charge on the basis, for example, that he mistakenly believed certain deductions were proper under the tax laws, but not on the basis that he was unaware it was a crime to lie on one's tax return.

People v. Hagen, 19 Cal.4th 652, 967 P.2d 563, 568 n. 4 (1998).

⁷² On the other hand, “willfully” might coherently be understood to reflect a more stringent requirement for criminal prosecution, not as to law, but only as to fact. For the term normally at least requires knowledge of the relevant facts, and knowledge sometimes will be a higher mens rea as to the facts than the civil prohibition alone would require.

⁷³ Moreover, the Commentary to §2.02(9) of the Model Penal Code appears to classify this category of cases as involving culpability as to the governing criminal law, i.e., as a case governed by the final “unless” clause in §2.02(9):

[T]here may be special cases where knowledge of the law defining the offense should be part of the culpability requirement for its commission, i.e., where a belief that one's conduct is not a violation of the law ... ought to engender a defense. Such a result might be brought about directly by the definition of the crime, e.g., by explicitly requiring awareness of a regulation, violation of which is denominated as an offense.

Commentary, p. 252 (1985).

⁷⁴ Another example that seems to belong to this second category (and perhaps to the first as well) is posed by Larry Alexander: defendant knows that he is not allowed to hunt an animal that is on the endangered species list, but does not realize that polar bears have just been added to that list. Alexander, *supra* note 15, at 243. On the one hand, the list exists for purposes other than criminal punishment; on the other, it is not terribly burdensome for a hunter to check the list before acting.

3. A criminal law term draws its meaning from both the criminal law and the civil law

The third problematic category is where the definition of the relevant legal term derives both from the state's criminal law and from its civil law. For example, even in the paradigm M Noncrim Law category of theft offenses, "property" for purposes of theft is sometimes explicitly defined in the criminal code, at least in part.⁷⁵ How much of the ultimately specified legal definition of the relevant property right must come from the noncriminal law, and how little from the criminal code, in order for the equivalence rule to apply? Moreover, Leonard points out that criminal and civil law often develop in an interactive way, and not just in the direction of the criminal law incorporating civil law concepts. Thus, the criminal law definition of "property" for purposes of theft offenses can affect civil law definitions.⁷⁶ In the end, it is not at all obvious how this third category should be classified, but perhaps we should presumptively require proof of the actor's culpability with respect to that portion of the legal definition that derives from noncriminal law sources.=

These three problematic categories reveal that the M Noncrim Law category has uncertain boundaries. On the other hand, such uncertainty does not make the category entirely formalistic and meaningless. Compare a typical larceny statute that incorporates by reference the state's independently operative body of property law, with a hypothetical larceny statute that simply codifies, within the criminal code itself, all of the details of the state's property law at that time. On first impression, the two statutes seem identical, and it then seems arbitrary to treat mistakes about the content of the civil property law incorporated within the first statute as exculpatory (because they are M Noncrim Law) but to treat mistakes about property law in the second as not exculpatory (because they are M Crim Law).⁷⁷ But a

⁷⁵ See, e.g., NJ Stat. §2C:20-g:

"Property" means anything of value, including real estate, tangible and intangible personal property, trade secrets, contract rights, choses in action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric, gas, steam or other power, financial instruments, information, data, and computer software, in either human readable or computer readable form, copies or originals.

⁷⁶ Leonard, *supra* note 6, at 550.

⁷⁷ See Alexander, *supra* note 6, at 49; Leonard, *id.* at 550. As Alexander explains:

The criminal law against taking the property of another (theft) could be thought to incorporate all of the law of property that determines what is the property of another, in which case the mistake of defendants in *Smith/David* would be a mistake of criminal law.

Alexander, *supra* note 15, at 244.

different approach to the two types of mistake is not arbitrary. The legislature's decision, in the hypothetical statute, to enact such a codification has legal significance: it freezes a particular legal definition as of that moment in time, and it places that definition within the criminal code, which all citizens are on notice that they are obliged to know. To be sure, this is a mild form of bootstrapping. Although the simple fact that the norm is crystallized in the criminal law has some weight in legitimizing the expectation that citizens will know the law,. It is not a sufficient reason for the civil/ criminal distinction, because such a criminal code is, at least initially, as complex and obscure as the civil code that it codifies. But one would hope and expect that the criminal code definition would, over time, be adapted and simplified in order to provide more realistic notice to potential offenders of what it prohibits. Or try this thought experiment: a legislature annually reenacts its criminal code, and in so doing, expressly specifies within the criminal code every single one of the noncriminal law rules that are relevant to the criminal law. In this imaginary world, every M Noncrim Law has indeed been converted into a M Crim Law. But this statutory approach would also impose a considerably greater burden on citizens to understand the law than does our current set of criminal codes (obscure as some of them already are). In such a world, we would indeed have a compelling reason to recognize much broader excuses for M Crim Law.

III. Failures of symmetry between exculpatory and inculpatory states of mind

The analysis thus far identifies an elegant symmetry in the legal treatment of exculpatory and inculpatory mistakes in many scenarios. Beauty and simplicity are splendid things, especially in the murky bogs of criminal law mistake and impossibility doctrine. Alas, on closer inspection, the symmetry principle needs substantial qualification.

A. Mens rea other than belief or knowledge

The analysis thus far suggests that we should often treat exculpatory and inculpatory mistakes in a symmetrical manner. Abby, who makes an exculpatory M Fact, is not guilty of the crime, while Barney (who makes a symmetrical, but inculpatory type of M Fact) is guilty of an attempt. Cleo is guilty of the crime, despite an ostensibly exculpatory M Crim Law, while Diego (who makes a symmetrical, but ostensibly inculpatory M Crim Law) is not guilty of an attempt; for in each cases, the actor's ostensibly relevant mistake is ignored in order to respect a legality principle. Ellen, who makes an exculpatory M Noncrim Law, is treated like

Abby, and is not guilty of the crime, under the equivalence view; while Franklin (who makes a symmetrical, but inculpatory M Noncrim L) is treated like Barney, and is guilty of an attempt, at least if we decide to extend the equivalence view to attempts.

On closer inspection, however, the symmetry principle is not fully persuasive.⁷⁸ Sometimes a mental state is sufficient to exculpate but not to inculcate. And sometimes there is more to the question of exculpation and inculcation than the actor's mental state.⁷⁹

The symmetry approach is intuitively powerful in these six cases (especially the first two), where the relevant mens rea requirement is knowledge, and where the actor has definite beliefs such that, if the beliefs were true, the actor's conduct would or would not be criminal. But the argument is much less persuasive when the mens rea requirement is recklessness or negligence or strict liability, or when the actor's actual mens rea is recklessness or negligence rather than belief. = Consider some of the problems with extending the symmetry approach here. I focus on how that approach might be extended to culpable states of mind (other than belief or knowledge) with respect to nonlegal facts.⁸⁰

First, if knowledge is the requisite mens rea, ignorance obviously should not be treated symmetrically, i.e. as both exculpating from the crime and inculcating for the attempt. Either mistake of fact or ignorance of fact can negate the requisite mens rea for the crime of knowingly receiving stolen property. Suppose Abby* gives no thought at all to whether the goods are stolen (which they are). She is not guilty of the crime, even if her ignorance is negligent and she should have realized that they were stolen, because she lacks the required culpability of knowledge. But ignorance, even if negligent, cannot supply the requisite mens rea for attempting this crime.⁸¹ Suppose Barney* gives no thought to whether the goods are stolen (which they are not). He is not guilty of attempting the crime, because he lacks the mens rea of the completed crime, viz., believing that they are stolen. Ignorance, even if negligent, exculpates Abby* but does not inculcate Barney.* To put the point more generally: a mental state is exculpatory when it is less culpable than is required for the crime,

⁷⁸ For a powerful critique of this principle, and of my earlier efforts to defend it (which I now largely disavow), see Alexander, *supra* note 6, at 54-60. For my earlier acknowledgement of limits to the principle, see Simons, *supra* note 6, at 478-483, 502.

⁷⁹ As Alexander explains, "just because a belief that one is doing X is necessary for criminal liability does not mean that it should be sufficient, especially in the absence of a harmful *actus reus*." *Id.* at 59.

⁸⁰ Extending the symmetry approach to other culpable states of mind with respect to Noncrim Law will be even more problematic, since it is controversial whether symmetry should exist with respect to Noncrim Law even when the actor possesses knowledge or belief.

⁸¹ See Simons, *supra* note 6, at 462-463, 477.

and is inculpatory when it is at least as⁸² culpable as is required for the crime. Although the beliefs of Abby and Barney are symmetrically exculpatory and inculpatory in this sense, the states of ignorance of Abby* and Barney* are not.⁸³

Second, if the mens rea for a material element is negligence rather than knowledge/belief, then ignorance can sometimes satisfy the mens rea requirement. Nevertheless, even here, ignorance will not always be treated symmetrically when it is offered to exculpate or to inculpate.

A complication here is that it is difficult to identify a coherent sense of what counts as “symmetry” in the exculpatory/inculpatory significance of a mental state such as ignorance.⁸⁴ Perhaps the best candidate, the one most analogous to Abby’s belief that the goods are not stolen and Barney’s belief that they are, is this. Abby_I is ignorant, and a reasonable person in her position would also be ignorant of the relevant facts (or would believe that the facts are innocent); by contrast, Barney_I is ignorant, but a reasonable person in his position would believe the facts were such that his conduct would be criminal. Thus, suppose it is a crime to receive stolen property, negligent about whether it is stolen. Abby_I receives goods that are stolen, unaware that they are stolen; and a reasonable person in her shoes also would be unaware (or would affirmative believe that they were not stolen). Barney_I receives goods that are not stolen, and does not believe that they are stolen; but a reasonable person in his shoes would believe that they are stolen. Clearly Abby_I should be exculpated for the completed crime, since she lacks the mens rea of negligence. What is much less clear is whether Barney_I will be or should be convicted of the attempt. On the one hand, he does possess the mens rea of negligence, and he has completed every act that, if the property really were stolen, would have sufficed to convict him of the completed crime. But on the other hand, notice that Barney_I does not actually believe that the goods are stolen; and indeed, they are not. Is it really just to punish him for attempt? It is also doubtful that the

⁸² The language “at least as” encompasses the possibility that the jurisdiction imposes a heightened mens rea for attempt relative to the mens rea required for the completed crime.

⁸³ Accordingly, if Abby_R and Barney_R each is reckless rather than ignorant—i.e., if each suspects, but is insufficiently confident to believe, that the goods are stolen—then Abby_R should be acquitted of the completed crime but Barney_R should be acquitted, not convicted, of the attempt. Thus, this case is, in a sense, a failure of symmetry. However, it is difficult to give a coherent account of symmetry here that is analogous to that of the original Abby and Barney. If Barney_R is culpable for suspecting that the goods are stolen, the symmetrical version of Abby would seem to be: she suspects that the goods are not stolen. Yet, if she believes there is, say, a 10% chance that the goods are not stolen, must she not also believe there is a 90% chance that they are stolen? If so, she is actually more culpable than Barney_R, who believes there is only a 10% chance the goods are stolen.

⁸⁴ For further discussion, see Simons, *supra* note 6, at 477-483; Larry Alexander & Kimberly Kessler, *Inchoate Crimes*, 87 J. Crim. L. & Criminology 1138, 1163-1165 (1997).

law would punish him.⁸⁵ Thus, symmetry appears to break down here: ignorant and nonculpable Abby_I will be acquitted, but ignorant and culpable Barney_I will not be convicted.⁸⁶ A similar issue arises at the borderline of Noncrim Law and Crim Law: even if we grant D1 a defense if he was reasonably unaware that a particular drug had been added to the list of drugs that it is a crime to possess, it does not follow that D2 should be guilty of attempt if he was unreasonably unaware that a particular drug had been removed from the list of prohibited drugs.

Even more clearly, the law will not give symmetrical treatment to ignorance offered to exculpate and offered to inculcate when the ignorance relates to a result rather than a circumstance element.⁸⁷ The law typically requires a heightened mens rea for attempt liability with respect to result elements. Thus, if another Barney, Barney_{II}, is culpably ignorant about the result of his conduct, he cannot be guilty of an attempt crime, such as attempted negligent homicide.⁸⁸

⁸⁵ See MPC §5.01(1)(a) (requiring, for completed attempts, that he engage in conduct “which would constitute the crime if the attendant circumstances were as he believed them to be” (emphasis added)); MPC §5.01(1)(c) (requiring, for incomplete attempts, that he engage in conduct or an omission “which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step...” (emphasis added)). The main function of the emphasized language is to clarify that factual impossibility is no defense—thus, D1 can be guilty of attempted theft if the pocket he tried to pick was empty, and D2 can be guilty of attempted knowing receipt of stolen property if the property that he received and that he believed was stolen was actually not stolen but was part of a police sting operation.

On its face, the emphasized language in §5.01(1)(a) also seems to require, for completed attempts, that the actor believe the circumstances were such that his conduct would be criminal, even when the completed crime requires merely negligence. However, the first clause in the MPC attempt provision (“with the culpability otherwise required”) and the commentary suggest that a heightened mens rea is not required for circumstance (as opposed to result) elements. See Dressler, *supra* note 30=, at 414. This does give some support to the view that Barney_I, noted in the text, could be guilty of an attempt.

⁸⁶ Notice that the injustice or absurdity of punishing Barney_I is even clearer if we imagine a variation in which he does not merely lack any belief about whether the property is stolen, but instead affirmatively believes that the property is not stolen (but, again, is negligent in failing to believe that it is stolen). If the property actually is stolen, he can be guilty of the completed crime. If the property is not stolen, should he be guilty of attempt? It might seem absurd to convict someone of an attempt crime when he honestly and correctly believes a set of facts which, if true, would render his conduct noncriminal. For further discussion, see Simons, *supra* note 6, at 478-483; Alexander & Kessler, *supra* note 84=, at 1163-1165.

⁸⁷ When the requisite mens rea is knowledge, however, the circumstance/result distinction will probably not make a difference; in either case, the actor can be guilty of an attempt if he believes that the circumstance exists or if he believes that the result will occur, at least under the Model Penal Code. §5.01(1). However, that distinction could make a difference at common law, if the common law jurisdiction requires no heightened attempt mens rea for a circumstance element but does require a heightened attempt mens rea of purpose for a result element. (At common law, a belief that the result will occur is usually insufficient for attempt liability, even if it would suffice for completed crime liability; to be liable for attempt, the actor must act with purpose to achieve that result.)

⁸⁸ Here is the explanation. Negligent homicide requires that the actor negligently cause a death. Suppose Annie accidentally collides with V1, who falls down a flight of stairs to his death. Suppose she gives no thought to the risk of death, and suppose she is not culpable in not realizing that her conduct creates a substantial risk of causing death. She should be acquitted of negligent homicide.

To be sure, although current legal norms are much more likely to treat symmetrically an exculpatory or inculpatory mental state of ignorance when the mens rea issue pertains to a circumstance rather than a result element, one might sensibly respond that the way the law currently treats the mens rea for attempt elements—requiring a heightened mens rea for results—is unjustifiable. I am sympathetic to the response. Still, there are rational reasons for that requirement. And the more basic point is that the symmetrical treatment of exculpatory and inculpatory states of mind is not a first principle of criminal law, but one that needs defense and that is often in tension with other criminal law principles and policies.

B. Other failures of symmetry

Other asymmetries exist between exculpatory and inculpatory doctrines. Thus, although ignorance or mistake of the criminal law is generally no excuse, jurisdictions have created some exceptions, such as where defendant relies on an official interpretation of the law by an agency charged with the law's enforcement, assuring defendant that his conduct is legal. But it hardly follows that if the administrator informs the defendant that what he intends to do is illegal, and defendant nevertheless goes forward with his plan, the defendant is guilty of an attempt if the administrator is incorrect and the plan turns out to be perfectly lawful.⁸⁹

Or consider the legal relevance of highly irrational beliefs that explain the actor's mistake. These should exculpate, if they demonstrate that defendant lacks the requisite mens rea, such as a belief that he will cause harm. (Suppose Abe honestly believes that when he pulls the trigger of a loaded gun, his "mind over matter" special powers will permit him to stop the bullet from leaving the gun.⁹⁰) But a symmetrical irrationally founded inculpatory belief need not result in attempt liability. Suppose that Ben has a belief as irrational as Abe's: Ben believes that because of his "mind over matter" special powers, he can place a bullet in

Now suppose Barry pushes V2, who falls down a flight of stairs but does not die. And suppose Barry also give no thought to the risk of death, but is culpable in not realizing that his conduct creates a substantial risk of death. Barry cannot be guilty of attempted negligent homicide, since that crime requires a heightened mens rea, under both the MPC and common law.

Again, we have a failure of symmetry: the acquittal/acquittal disposition of Annie and Barry differs from the symmetrical acquittal/guilt disposition of the original Abby and Barney.

⁸⁹ In this last scenario, for example, there is a special concern about not encouraging government entrapment. See also Alexander, *supra* note 6, at 59.

⁹⁰ Cf. *People v. Strong*, 338 N.E.2d 602 (NY 1975), where D claimed to have special powers whereby he could stop a person's heartbeat, then stab that person in the chest without causing harm. The Court of Appeals found reversible error in failing to instruct the jury on negligent homicide as well as reckless manslaughter, because the jury "could have found that the defendant failed to perceive the risk inherent in his actions." *Id.* at 604.

his palm and then mentally will the bullet to accelerate into another's body. There are plausible reasons to conclude that Ben's belief should not result in attempt liability, because of valid concerns about punishing "inherently unlikely" attempts.⁹¹

IV. Conclusion

A question lurking in the background of this paper is whether its analysis matters, if we were to modify significantly the general presumption that ignorance or M Crim Law provides no excuse. I do favor a general requirement of fault as to the content of the criminal law (as well as those noncriminal law rules that the criminal law incorporates), or at least a general defense of reasonable ignorance of both categories of law. If other jurisdictions were to follow the lead of Delaware⁹² and New Jersey⁹³ in this direction, the analysis of this paper would be less consequential. But the analysis would still matter.

If a jurisdiction were to adopt the general approach that "reasonable" M Law should be a defense, what would that mean for the distinction between M Crim Law and M Noncrim Law? On the exculpatory side, there are at least three possibilities. First, we might treat both types of mistake identically, i.e., excuse the defendant if his mistake was reasonable, regardless of the type of mistake. This appears to be the simplest solution. However, without more, it would not entirely resolve the difficult policy issues, but would instead conceal them within the opaque "reasonableness" standard. Second, courts (or legislatures) might, over time, specify what kinds of factual and legal mistakes are reasonable. And perhaps that specification would give some weight, though not decisive significance, to whether the mistake concerned Crim Law or instead Noncrim Law. Third, we could continue to follow the Model Penal Code's equivalence approach and presumptively treat a M Noncrim Law the same was as a M Fact about the relevant issue; the result, in almost all cases, would be to excuse more readily for a M Noncrim Law than for a M Crim Law, insofar as only the latter would have to be reasonable. This alternative would, of course, require that we continue to distinguish between M Noncrim Law and M Crim Law.

⁹¹ See MPC §5.05(2); Simons, *supra* note 6, at 485-485. Alexander gives a similar example:

Suppose Jaffe's goods are stolen, but he claims that he didn't know they were because they were taken by the one who sold them to Jaffe from a black man, and Jaffe thought taking from a black man was not theft. And suppose this crazy belief is sufficient to defeat criminal liability under a statute that requires that defendant "know" he is receiving stolen goods. It simply does not follow that a similarly crazy inculpatory mistake as to legal status should count as an attempt.

Alexander, *supra* note 6, at 58-59.

⁹² *Bryson v. State*, 840 A.2d 631 (Del. 2003).

⁹³ N.J. Stat. §2C: 2-4 (c)(3).

Moreover, from a broader perspective, we can usually improve the criminal law by converting incorporated Noncrim Law criteria into explicit Crim Law criteria. That is, it is often quite desirable to spell out, within the language of criminal statutes, specific criteria that are now merely referenced in the criminal law and whose content is found in the civil and regulatory law, especially when these criteria are relatively obscure or difficult to access. Such specification will not always be feasible, but when it is, fair notice to defendants and what English commentators call the principle of “fair labeling”⁹⁴ support greater transparency.

The policy prescriptions in this article are tentative. My chief goal, instead, is to provide a rigorous and valuable framework for analyzing the exculpatory and inculpatory significance of M Fact, M Crim Law, and M Noncrim Law.

⁹⁴ See Simester & Sullivan, *supra* note 35=, at 30-31.

Appendix A: Some problems at the borderline between M Fact and M Law

This appendix addresses two categories where it is sometimes difficult to classify a mistake as M Fact or M Law. Other problematic categories at the borderline of M Fact and M Law also exist, but because I have addressed them elsewhere, I do not separately discuss them here.⁹⁵

1. Mistake about an explicit legal criterion: M Fact or M Law?

Although the basic distinction between a M Fact and a M Law for purposes of criminal liability is straightforward, there are some cases in which the distinction is more difficult to draw. Here I review one important category that is a common source of confusion: a material element that contains explicit legal criteria.

If a criminal statute explicitly refers to a legal element—for example, providing an exemption from bigamy liability for a “legally valid divorce” or precluding kidnapping liability if the confinement was “authorized by law”—then it is tempting to conclude that any mistake about that element must be classified as a mistake of law. Tempting, but incorrect. Every material element of a criminal offense has both a legal dimension and a (nonlegal) factual dimension. It is possible for a person to make a mistake about either dimension. And it is possible for the criminal law to make either type of mistake (or both types) legally relevant. Thus, suppose the requisite mens rea for that element is knowledge. This could be interpreted as requiring only knowledge of the facts that, in law, satisfy the legal standard, or as also requiring knowledge as to the meaning or scope of the legal standard itself.⁹⁶

⁹⁵ For more detailed discussion, see Simons, *supra* note 1, at 223-226, 230-234. The most important such categories are:

(1) Mistake as to an evaluative (rather than descriptive) criterion. When the actor is mistaken as to an evaluative criterion—e.g., mistaken about whether he has chosen the lesser evil—it can be quite difficult to determine whether his mistake is a M Fact or M Law.

(2) The notorious “Mr. Fact/Mr. Law” bow-hunting examples. The culpability of these actors seems indistinguishable. But the examples are not, despite initial appearances, a *reductio absurdum* of the distinction between M Fact and M Law.

(3) M Fact engenders a M Law. A factual misperception or mistake can lead to an error about the content or scope of the law (e.g. I pull out the Maine rather than Massachusetts criminal statutes when researching my potential criminal liability).

(4) Laws that designate a particular object or person. Another “borderline” objection is aptly named: a law might pick out a particular object, such as a geographical boundary, or person, such as the President. A mistake about such a designation can be difficult to sort into M Fact or M Law.

⁹⁶ Gideon Yaffe offers a similar account of an actor’s belief, “I thought it was mine”: if the belief is mistaken, the underlying mistake can be either a M Fact or a M Law. Yaffe, *Excusing Mistakes of Law*, 9 *Philosopher’s Imprint* 1, 4 (2009).

To be sure, some criminal law provisions seem to require only knowledge of the law, not knowledge of any nonlegal facts. For example, one section of the MPC’s bigamy offense provides a

Of course, depending on the statute and the realistic context, one type of mistake might be much more likely to occur than the other. Thus, in a murder prosecution for “knowingly causing the death of a person,” it is far more probable that a person who mistakenly kills another is mistaken about the (nonlegal) fact that he would cause the other’s death (e.g., he had no idea that V was hiding behind the target at the firing range) than about the legal definition of “death” (e.g., he had no idea that a person in an irreversible coma with negligible brain activity is still legally alive) or about the meaning of “person” (e.g., he did not realize that a fetus in a womb is a legal person). By contrast, if Jack is mistaken about whether his current spouse Jill obtained a valid divorce from her prior husband, in circumstances where she shows him an apparently valid divorce decree, he is probably mistaken about the legal validity of the divorce decree, not about the nonlegal facts. But even here, he might instead have made a M Fact. Suppose the source of his mistake was actually the nonlegal fact that Jill was lying to him about whether she even tried to obtain a divorce (and the nonlegal fact that she deceived him by creating a fake divorce decree from a form on the internet).

For an instructive example of this type of confusion, consider the law of kidnapping, which requires that the defendant “intended, without authority of law, to confine or imprison another.”⁹⁷ You might think that a mistake about “authority of law” would have to be a legal mistake, about what counts as legal authority to confine. You would be wrong. Consider the New York Court of Appeal’s hypothetical illustration of a nonculpable mistake:

A reputable citizen is approached by a man, clothed in a police uniform and wearing a police shield, who requests him to assist in the arrest of one whom he describes as a murderer. The law-abiding citizen, in good faith and in the belief that he is performing his duty, assists the uniformed stranger and participates in the arrest of one who is entirely innocent. While the citizen may be answerable in damages in a

defense to a married person who remarries when a court has entered a divorce judgment “and the actor does not know that judgment to be invalid.” §230.1(1)(c). Even here, however, the actor must have some knowledge of nonlegal facts, i.e., he must know that a court has entered a judgment of divorce. (In this statute, the mens rea requirement of “knowledge of the law” is, because it is part of a defense, stated negatively: the actor must, in order to qualify for the defense, lack knowledge of the legal invalidity of the divorce judgment).

Other provisions that appear to require only knowledge of the law are better understood as also requiring knowledge of relevant nonlegal facts. See, e.g., MPC §224.13, requiring, for crime of misapplication of entrusted property, that the actor apply or dispose of the property “in a manner which he knows is unlawful.” Suppose a lawyer is charged under this provision with misappropriating client funds, and suppose he indeed did mix client funds with his own in an unlawful manner. He might nevertheless have either a defense of M Law (e.g., he mistakenly thought that he may place client funds in his own account temporarily if he intends to restore them later) or a defense of M Fact (e.g., his record-keeping was poor and he did not realize that any mixture of funds had occurred).

⁹⁷ This is a slight paraphrase of the N.Y. kidnapping law, analyzed in *New York v. Weiss*, 12 N.E.2d 514, 514 (N.Y. 1938).

civil action, he is not guilty of the crime of kidnapping, even though proof is later adduced that the uniformed stranger is an impostor and a kidnapper.⁹⁸

This mistake, not recognizing that the stranger is an imposter, is clearly a factual mistake, even though it is a mistake about a legal concept, authority to confine. Determining whether the hypothetical citizen made this legally relevant mistake requires a good private investigator, not a good lawyer.⁹⁹ The mistake would be a purely legal one only if, say, the citizen was actually helping a police officer, and knew that he was doing so, but the law (unknown to the citizen) did not authorize a private person to confine another person even pursuant to the request of the police.¹⁰⁰ Thus, although Weiss is often characterized as an unambiguous example of a M Law,¹⁰¹ the proper categorization of the case is by no means clear.

Similar examples of both types of mistake can be constructed for any material element of a crime. For example, suppose the question is whether defendant knew or was reckless about whether he possessed an “unregistered” firearm or other item: he might incorrectly believe that as a matter of fact, his office filled out the required registration forms; or he might incorrectly believe that as a matter of law, the registration required is simply that the prior owner have registered the item, when instead the law requires him to reregister it.¹⁰²

2. Mistakes about a (not explicitly legal) concept

In some cases, determining whether an actor has made a legally relevant M Fact requires determining whether he has grasped a relevant concept; and here, the distinction

⁹⁸ Id. at 514.

⁹⁹ Recall Westen’s criterion, noted above, *supra* note 17=.

¹⁰⁰ Chief Judge Crane, dissenting in Weiss, does object that the majority has improperly allowed a defense for mistake as to the law of “authorized to confine.” “Persons are supposed to know the law,” he complains, “and believing that the law gives them right to do things does not rob acts of criminal consequences.” Id. at 516. Whether this objection is accurate is unclear, for all of the illustrations in the majority opinion of the types of mistake that can exculpate seem to be (like the illustration quoted above) instances of factual mistakes about legal authority. On the other hand, the defendants in Weiss might actually have made a M Law, not a M Fact, about their authority to confine the victim, since they acted in response to the advice of an actual police detective.

¹⁰¹ See, e.g., Leonard, *supra* note 6, at 560; *People v. Marrero*, 507 N.E.2d 1068, 1069, 1072 (N.Y. 1987)(the court appears to interpret Weiss as involving a M Law, rather than a M Fact, simply because the mistake concerned “authority of law”).

¹⁰² See *United States v. Freed*, 401 U.S. 601 (1971), discussed in note 137 *infra*.

Another example is criminal trespass, which typically requires that the defendant know that he is not privileged to enter the property. Paul Robinson suggests that such a mens rea is only negated by a M Law, not by a M Fact. Robinson, *supra* note 28=, 264-265. He is of course correct that this is the far more common type of exculpatory mistake; but a M Fact can also exculpate here. For example, Tenant asks his Russian landlord if he can come back to the apartment for his belongings a few days after his lease has expired; the landlord says “Nyet” which Tenant mishears as “Yes.”

between M Fact and M Law is a bit more elusive than in standard cases (e.g. where D1 mistakenly believes that the person he is having intercourse with is seventeen when she is actually fifteen, below the legal age). For example, suppose aggravated assault requires knowingly causing serious bodily injury to another. D2 pushes the victim to the ground, which causes the victim V2 to break his arm. Suppose a broken arm counts as “serious bodily injury.” If D2 thought that the push would cause no harm at all, or only minor harm, then his M Fact should exculpate. But notice that characterizing D2’s mistake here as a M Fact or Law can be thorny. What if he realized that V2 would suffer a broken arm, but also thought that this is “minor” and not “serious” harm?

The short answer is: any mistake about the authoritative legal meaning of “serious bodily harm” is a pure M Law, while a mistake about whether, given that meaning, one’s conduct instantiates that meaning is a M Fact. So if D2 thought that his conduct would lead to no harm or to a bruise and nothing worse, he has made a M Fact (which should exculpate). But if he thought that his conduct would lead to a broken arm, but failed to recognize that the law treats knowingly causing that result as aggravated rather than simple assault, he has made a M Law (which ordinarily will not exculpate from the aggravated assault charge).

A slightly longer answer recognizes that actors very often do not employ, as their categories of thought, the actual legal criteria specified in criminal statutes when they consciously consider the effects of, or the circumstances surrounding, their conduct. D1 might well consciously consider the age of the girl with whom he is about to have intercourse. But D2 is more typical: he is likely to give no explicit thought to whether the result of his pushing the victim V2 will be “minor” as opposed to “serious” harm, or even “physical” harm as opposed to emotional harm. Assuming that he does have some beliefs about the likely result of his action, they are more likely to be of the rough form, “He might hurt his knee or get a bruise,” or “He might break his arm.” This discrepancy between the categories of the legal norm and the categories of the actor’s cognition creates a well-known matching problem.¹⁰³ How well do the two categories need to “match,” how close do they

¹⁰³ See, e.g., Albin Eser, *Mental Elements—Mistake of Fact and Mistake of Law*, in *I The Rome Statute of the International Criminal Court: A Commentary* 889, 921 (Oxford 2002); Kimberly Ferzan, *Beyond Intention*, 29 *Cardozo L. Rev.* 1147, 1159-1165 (2008); Leo Katz, *Bad Acts and Guilty Minds: Conundrums of the Criminal Law* 165-174 (1987) (analyzing whether a belief that the victim is a ghost or a witch is a defense to homicide); Michael Moore & Heidi Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 *Crim Law and Philos* 147, (2011) (discussing the “typing of risk” problem). Here is another discussion:

Consider ... *People v. Ryan* [626 N. E. 2d 51 (NY 1993)] in which New York had criminalized the knowing possession of more than 625 milligrams of a hallucinogen. The defendant knew he

need to be, in order to justify a conviction? Difficult as this problem is, however, it does not undermine the fact/law distinction.

possessed the hallucinogen, knew he possessed two pounds of it, but was unaware of the number of milligrams in a pound. Did he violate the statute? If he had said that although he knew he possessed two pounds, he did not know he possessed over 625 milligrams, would he be correct? Well, in one sense yes, in another, no.

Alexander, *supra* note 15, at 244-245.

The defendant's beliefs about the factual circumstances must match the legal meaning of the relevant term—for example, he must be aware of the physical characteristics of a weapon, and those characteristics must, as a matter of law, render the weapon a “firearm,” that he may not possess—but defendant's beliefs usually do not have to match the ordinary language meaning of that term (which might well differ from the technical legal meaning). See Eric A. Johnson, *Does Criminal Law Matter? Thoughts on Dean v. United States and Flores-Figueroa v. United States*, 8 Ohio St. J. Crim. L. 123, 144-147 (2010). See also *People v. Arnold*, 145 Cal. App. 4th 1408, 1416 (2006) (defendant knew that he possessed the frame or “receiver” of a rifle, but not the entire rifle; he claimed he did not know that this counted as possessing a “firearm”; the court concluded that his mistake was a legally irrelevant mistake of law).

Appendix B: The Model Penal Code's treatment of M Noncrim Law

Earlier, I asserted that the most plausible understanding of the rule that the MPC intends to announce with respect to M Noncrim Law and the interaction of §2.02(9) and §2.04(1)(a) is the "equivalence view": a M Noncrim L should presumptively be treated in the same way as a M Fact. However, this assertion is controversial.¹⁰⁴ Let me explain more fully why this is the best, though not the only plausible, interpretation.

Section §2.04(1)(a) of the MPC provides that "[i]gnorance or mistake as to a matter of fact or law is a defense if ... the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense."¹⁰⁵ But §2.02(9) recites the usual presumption that no mens rea is required as to "the existence, meaning or application" of the criminal law. How can these two provisions be reconciled?

On one view, the language "or law" in §2.04(1)(a) is a mere truism: it simply allows a defense of mistake of law when the statute otherwise so provides, as in theft statutes that explicitly give a defense of claim of right (i.e., honest belief that one owns the property one is charged with stealing, or honest belief that one is entitled to dispose of another's property as one did).

In my view, and the view of many others,¹⁰⁶ the MPC does more than this: it adopts what I have called the equivalence view, presumptively treating a M Noncrim L in the same way that the offense treats a M Fact. In other words, in Ellen's case, it is crucial that the source of the legal definition of "property" is the state's civil law. If instead "property" was

¹⁰⁴ See note 118= *infra*.

¹⁰⁵ Emphasis added.

¹⁰⁶ See Dressler, *supra* note 30=, at 180. Dressler distinguishes between a "same-law" mistake and a "different-law" mistake, explaining that in the latter case, "the claimed mistake relates to a law other than the criminal offense for which the defendant has been charged." *Id.* at 176. If "same-law" is meant to include all of the state's criminal law, not just the criminal law defining the particular offense, then his distinction is essentially the same as the distinction I discuss between M Crim Law and M Noncrim Law. However, Dressler's version of the distinction more clearly suggests that a mistake as to the criminal law of another jurisdiction would presumptively be treated like a M Fact. See *People v. Bray*, discussed in note 33=.

The equivalence view is also the interpretation explicitly or implicitly endorsed by a number of criminal law casebook authors. See Bonnie, Coughlin, Jeffries, & Low, *Criminal Law* 217 (3rd ed. 2010); Kadish, Schulhofer, & Steiker, *Criminal Law* 274-275 (8th ed. 2007); Dubber & Kelman, *American Criminal Law* 377-378 (2nd ed. 2009).

Does the Model Penal Code's equivalence view apply not only to circumstance elements, but also to result elements? (Suppose, for example, a prosecution for murder for knowingly causing the death of another person, where the defendant claims not to know that "death" includes brain death, even if the victim's heart is still beating.) It probably applies to both. Although the commentary to §2.02(9) refers only to the circumstance elements of an offense, the general language in §2.04(1)(a) that the commentary is discussing refers quite generally to ignorance or mistake as to any "matter of fact or law."

specifically and fully defined elsewhere in the state's criminal law, this equivalence rule (treating M Noncrim Law the same as M Fact) would not apply; rather, we would apply the usual presumption in §2.02(9) that ignorance or M Crim Law is no excuse.

Consider the evidence for the equivalence view. The 1985 commentary to §2.02(9) supports that view; it asserts that "or law" in §2.04(1)(a) is intended to apply to a matter of noncriminal law. The commentary states that the usual "no mens rea as to illegality" presumption does not apply to mistakes with respect to "some other legal rule that characterizes the attendant circumstances that are material to the offense," and implies that such mistakes are to be treated in the same way as corresponding mistakes of fact.¹⁰⁷ Moreover, a passage in the commentary to §2.04(1), analyzing three types of mistake with respect to the elements of rape, reinforces this "equivalence" interpretation:

One can illustrate the application of Section 2.04(1) by imagining three types of mistakes offered in defense to a charge of rape: first, that the defendant believed that his victim had voluntarily consented to sexual intercourse, even though in fact she

¹⁰⁷ MPC and Commentaries, Comment to §2.02 at 250 (1985) (emphasis added). Here is a fuller excerpt:

It should be noted that the general principle that ignorance or mistake of law is no excuse is greatly overstated: it has no application, for example, when the circumstances made material by the definition of the offense include a legal element. Thus it is immaterial in theft, when claim of right is adduced in defense, that the claim involves a legal judgment as to the right to property. Claim of right is a defense because the property must belong to someone else for the theft to occur and the defendant must have culpable awareness **of that fact**. Insofar as this point is involved, there is no need to state a special principle; the legal element involved is simply an aspect of the attendant circumstances, with respect to which knowledge, recklessness or negligence, as the case may be, is required for culpability ... [FN 50] **The law involved is not the law defining the offense**; it is **some other legal rule** that characterizes the attendant circumstances that are material to the offense.

The proper arena for the principle that ignorance or mistake of law does not afford an excuse is thus with respect to the particular law that sets forth the definition of the crime in question. It is knowledge of *that* law that is normally not a part of the crime, and it is ignorance or mistake as to *that* law that is denied defensive significance by this subsection of the Code and by the traditional common law approach to the issue.

[FN 50:] This result is also assured by the provision in Section 2.04(1), which states that a mistake of fact *or law* that negatives a required level of culpability will be a defense. [Italic emphasis in original]

A word of caution: the phrase I have underlined in bold, "**of that fact**," should not be understood to refer only to mistakes grounded in nonlegal facts about property ownership. (An illustration of this type of mistake: I take Joe's backpack, mistakenly believing that I now own it, because you assured me that he gave it to me as a gift, an assurance that you knew to be false.) In context, the Commentary's meaning is clear: the Code excuses even a defendant who makes a purely legal error about the scope of his right to the property. An earlier version of the Commentary is more explicit: "It is a defense because knowledge that the property belongs to someone else is a material element of the crime and such knowledge may involve a matter of law as well as fact." Model Penal Code's Commentary to section 2.02(9), in Tent. Draft No. 4, at 131 (1955). (In the final commentary, this sentence was replaced by the sentence quoted above ending in "of that fact.")

had not; second, that the defendant believed that the woman was his wife, though in fact she was not because of the defendant's misconception of, or ignorance of the existence of a law determining his or her eligibility to remarry; and third, that the defendant believed his conduct was not rape, because he thought that securing sexual intercourse by threat to harm the victim's daughter did not amount to rape.

As to the first mistake, a material element of the offense, as to which the defendant must be at least reckless, is that the defendant "compel" the victim to engage in sexual intercourse. To the extent that the defendant's belief and the circumstances under which it was formed negated the required recklessness finding on this point, he would have a defense under Subsection (1). Similarly, it is a material element of the offense that the victim not be the defendant's wife, and recklessness likewise is the culpability level required with respect to that element. If a mistake about eligibility for marriage negated the required finding of recklessness on this point, the actor would not be guilty of rape, irrespective of whether the mistake is characterized as a mistake of "law" or a mistake of "fact."¹⁰⁸ The third mistake would be inconsequential, because it has no logical relevance to any culpability level established by the law defining the offense or by any other law.¹⁰⁹

This "three types of mistake" discussion is not without ambiguity,¹¹⁰ but I believe it supports the equivalence rule. The three categories of mistake discussed here map quite precisely onto the three types of mistakes we have been discussing—the first is a M Fact; the second, a M Noncrim Law; and the third, a M Crim Law. And the Commentary proposes treating these categories of mistake in just the way that the equivalence approach would recommend.

The most common instance of the equivalence rule, as the MPC Commentary suggests, is when the defendant asserts a claim of legal right when charged with a property crime such as larceny or some other form of theft. The MPC Commentary, as we have just

¹⁰⁸ [This is original footnote 2 from the commentary:]

There is no sensible basis for a distinction between mistakes of fact and law in this context, and, indeed, **the point is often recognized in the cases by assimilating legal errors on collateral matters to a mistake of fact**, or by treating such errors as exceptions to the *ignorantia juris* concept. See, e.g., R. Perkins, Criminal Law 935-36 (2d ed. 1969); G. Williams, *supra* note 1, at 321-27 (claim of right defense in larceny). The culpability issue is essentially the same for a given offense whatever the abstract classification of the error that is asserted, and the appropriate inquiry is simply one of logical relevance to culpability rather than the "legal" or "factual" nature of the mistake. (underlined and bold emphasis added)

¹⁰⁹ Commentaries to §2.04(1), p. 270.

¹¹⁰ The underlined language in the last paragraph of the text and in the footnote is skeptical about the value of distinguishing between M Law and M Fact in this context, a skepticism that modestly supports the "mere truism" interpretation (discussed *infra* in text). However, I view this skepticism about the value of a fact/law distinction, not as suggesting that the distinction is entirely incoherent or unintelligible, but as cautioning that some mistakes of law should indeed be treated in the same way as mistakes of fact, notwithstanding the general rule that ignorance or M Crim Law is no excuse. Note the language in footnote 2, *supra* note 108=, that I have placed in bold.

seen, also endorses applying the rule to a family law principle, whether the actor was legally eligible to remarry, in the case of a rape statute exempting the actor if the victim was his wife.¹¹¹ But given the breadth of the language "or law" in §2.04(1), and the general principle enunciated in the commentary, the presumptive equivalence rule seems to extend to every relevant legal mistake as to noncriminal law, treating such a mistake the same as a comparable M Fact. Thus, on this view, any criminal statute requiring that the actor "know that X" (e.g., know that he is a guardian, know that the other is still married, or know that he does not have lawful custody of a child) would presumptively excuse the actor if he made either a M Fact about X or a M Noncrim Law about X, but not if he made a M Crim Law about X (e.g. about how X is defined elsewhere in the criminal statutes).

This is not the only possible understanding of "or law," however. An alternative reading of the Model Penal Code language and commentary treats the mistake provision as a mere truism, one that is consistent with the Code's "logical relevance" approach to ignorance and mistake generally.¹¹² On this view, §2.04(1)'s "mistake of fact or law" language:

simply states the obvious: if a culpable state of mind is required by an offense definition and cannot be proven because of the defendant's ignorance or mistake, then the defendant cannot be convicted of the offense. Whether a mistake of law will be a defense under §2.04(1) depends upon whether a culpable state of mind as to an aspect of existing law is made a required element of the offense.¹¹³

This reading also relies on the last clause of MPC §2.02(9), which provides that culpability as to the existence, meaning, or application of the law is not required "unless the definition of the offense or the Code so provides."¹¹⁴ Thus, §2.02(9) does not eliminate any culpability

¹¹¹ See Commentaries to §2.04(1), cited at note 109= *infra* (discussing three types of mistake in a rape prosecution). The MPC also gives a defense to bigamy based on an actor's mistaken belief in the legal validity of a divorce. However, the MPC codifies this principle in a very detailed and complex way, not by means of the simple, general presumption of §2.04(1) that mistakes of divorce law should be treated the same way as mistakes of fact about whether a divorce took place. TAN 53-55= *infra*.

¹¹² Under the logical relevance approach, no distinct defense of ignorance or mistake is really necessary; rather, the question is simply whether ignorance or mistake negates the mens rea required. I agree, of course, that the Code endorses a logical relevance approach to ignorance or mistake. I do not agree, however, that this resolves the question of the meaning of "or law" in §2.04(1).

¹¹³ Robinson, *supra* note 28=, §62(b), at 245-248, §62(d), pp. 262-264. Robinson emphasizes: "Further, it is entirely for the legislature, in defining an offense, to specify when a culpable state of mind as to a legal point will be an element of an offense." *Id.* at 263. In his treatise, LaFare also endorses the truism view as the correct interpretation, not only of the Model Penal Code, but also of the common law approach. See LaFare, *supra* note 23=, at 299-300, 307. Leonard also endorses the truism view. Leonard, *supra* note 6, at 546 n. 133.

¹¹⁴ See Robinson, *id.* at 263 n. 45 (asserting that the "special admonition" in §2.02(9) is gratuitous in jurisdictions that omit "or law" in the mistake provision, §2.04(1)). This language is not gratuitous, however, on the view that I endorse: that §2.02(9) clarifies that mistakes as to the governing criminal law can sometimes be exculpatory, while §2.04(1) clarifies that mistakes as to noncriminal law can be exculpatory.

requirement (whether as to fact or as to law) that the offense definition otherwise establishes. Moreover, advocates of the truism approach can emphasize that, on numerous occasions, the Model Penal Code quite explicitly recognizes a M Noncrim Law. Thus, they can argue, there is no need for a general equivalence view; when the Code drafters want to permit a M Noncrim Law, they know how to do so. The truism view, then, is sufficient. For example, the paradigm of a recognized M Noncrim Law, as we have seen, is a claim of legal right to the property as a defense to theft; but the Code explicitly recognizes this as a legal defense.¹¹⁵ In many other instances, too, such as the bigamy provisions discussed above, the Code very clearly recognizes a M Noncrim Law as a defense.¹¹⁶

Despite these arguments, I find the equivalence rule interpretation of the MPC more persuasive than the “mere truism” interpretation, at least if one gives weight to the 1985 Commentaries that strongly endorse the equivalence interpretation.¹¹⁷ The truism

¹¹⁵ MPC §233.1(3)(b): “It is an affirmative defense to prosecution for theft that the actor ... acted upon an honest claim of right to acquire or dispose of it as he did.”

¹¹⁶ See discussion of the bigamy provisions at notes 53-55= *supra*.

Other examples of explicit recognition of M Noncrim Law as a defense include:

- The “failure to control or report dangerous fire” provision, applying if “he knows that he is under an official, contractual, or other legal duty to prevent or combat the fire.” §220.1(3)(a);
- The “failure to prevent catastrophe” provision, applying if “he knows that he is under an official, contractual, or other legal duty to take such measures.” §220.2(3)(a);
- Affirmative defense to extortion if property “was honestly claimed as restitution or indemnification for harm done...” §223.4;
- Various offenses requiring a “known legal obligation” or “known legal duty.” E.g., §§223.8, 240.1(3), 240.2(1)(c);
- In commercial bribery, “knowingly violating ... a duty of fidelity to which he is subject.” §224.8.
- Misapplication of entrusted property “in a manner which he knows is unlawful.” §224.13. (The Commentary states: “The section further requires that the actor know of the unlawfulness of his conduct” and, in a footnote, clarifies: “The required mens rea is knowledge of the regulations that apply to the actor’s conduct because of his fiduciary responsibilities. There is no requirement of knowledge of the criminal law or the elements of Section 224.-13.” Commentary, at 361.)
- Persistent non-support: failing “to supply support ... which he knows he is legally obliged to supply...” §230.5.

¹¹⁷ Gerald Leonard has suggested to me that although the 1985 Commentaries are plausibly viewed as endorsing the equivalence view, the Commentaries might not reflect the intentions of those who drafted the Code and those who approved it in 1962. I agree that, absent the 1985 Commentaries, it is more ambiguous whether the Code should be interpreted as reflecting the truism view or the equivalence view.

Thus, the following excerpt from the 1955 ALI Proceedings provides some support to the truism view. Professor Herbert Wechsler is explaining the rationale behind the wording of §2.04(1):

We are here concerned with ignorance or mistake as a defense, and paragraph (1) I think presents no problem because it really does not say anything. It says that ignorance or mistake is a defense when it is a defense: that is, when it negates, negatives purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense (this is often true), or when the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

interpretation ignores the commentary's contrast between the "law defining the offense" (for which §2.04(1) offers no excuse) and "some other legal rule" (for which it does offer an excuse).¹¹⁸ But the only intelligible way to distinguish these two contrasting phrases is by treating the first as referring to the jurisdiction's criminal law, and the second as referring to its noncriminal law.¹¹⁹ Moreover, the truism interpretation ignores the fact that the only examples the MPC provides of exculpatory mistakes of law (in the commentary to §2.02 or §2.04) are mistakes of other or civil law, not mistakes about the definitions of a material element provided by the criminal law itself.¹²⁰

The claim of right in larceny, for example, may be an erroneous claim; but the larceny draft makes clear that the claim of right precludes theft as of course does the existing law.

I think that this formulation in (1) is conventional and almost tautological. You might say to me, "Why did you put it in?" I put it in for one good reason: because there is in the books and in the cases, and even in a few statutes, the idea that for a mistake to be a defense it must always be reasonable, and nothing is further from the law than that.

32nd A.L.I. Proc. 163 (1955).

On the other hand, in support of the equivalence view is Tentative Draft No. 4 (1955), which is worded almost identically to the 1985 Commentary language quoted at note = above. In relevant part:

It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element. So, for example, it is immaterial in theft, when claim of right is adduced in defense, that the claim involves a legal judgment as to the right of property. It is a defense because knowledge that the property belongs to someone else is a material element of the crime and such knowledge may involve matter of law as well as fact. But in so far as this point is involved there is no need to state a special principle; the legal element involved is simply an aspect of the attendant circumstances, with respect to which knowledge, recklessness or negligence, as the case may be, is required for culpability by paragraphs (1) to (3). The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense. If, on the other hand, no legal element is involved in the material attendant circumstances, there is no basis for contending that ignorance of such element has a defensive import; it is simply immaterial.

Tent. Draft No. 4, at 131 (1955) (emphasis added). The second underlined phrase might be based on the similar language in Professor Rollin Perkins' famous article about M Law:

If ... an exception is claimed solely on the absence of a required specific intent or other special mental element because of ignorance or mistake of law, the error must relate to some law other than that under which the prosecution itself is brought.

Perkins, *supra* note 30=, at 51.

¹¹⁸ See excerpt at note 107= *supra*. It also ignores the commentary's suggestion that instances in which mistakes of governing criminal law will be recognized (via the last "unless" clause of §2.02(9)) will be "exceptional." Commentary, at p. 251. (See also Tentative Draft No. 4, at 130 (also describing such instances as "exceptional.") The clear implication is that such occasions will be more rare than instances in which mistakes of "some other legal rule" will be recognized (via §2.04(1)).

¹¹⁹ The only other plausible distinction that this language could express is between governing criminal law and the law (whether criminal law or noncriminal law) pertaining to the meaning of an element of an offense. But this distinction, in the end, is untenable. See Appendix C, *infra*.

¹²⁰ Another small piece of evidence suggests that "some other legal rule" refers to a rule of noncriminal law. In the Tentative Draft, the commentary to §2.04 defends the "mistake of fact or law" language as simply a rule of logical relevance and as consistent with existing statutes, to the extent that they address the issue of mistake. The commentary then says:

Perhaps the most potent argument in the "truist" arsenal is the claim that the Code drafters knew how to recognize a M Noncrim Law explicitly when they wanted to do so. Yet I remain unpersuaded. Yes, there are many instances of such explicit recognition. But the question remains: how should we interpret a statutory culpability requirement that is not so pellucid on this precise issue? Should we interpret the mens rea requirement as applying not only to the facts that establish the element, but also to the legal meaning of the element (at least when the source of that meaning is noncriminal law)? The truism approach and the equivalence approach gives different answers.

For example, consider the many occasions in the Code special part where it is quite possible, but by no means inescapable, that a M Noncrim Law should negate the required culpability. (Keep in mind, too, that the Code is much more carefully drafted than most state criminal codes.) Arguably a M Noncrim Law could excuse in the following instances:

- Provisions that require that an aspect of the actor's conduct be "unlawful,"¹²¹ a requirement that is often satisfied by proof either that the conduct was otherwise criminal or that it violated a civil duty.¹²²
- The criminal trespass provision: "A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters ... any building ..." ¹²³

The proposed Wisconsin Code comes closest to stating the principle explicitly (339.43[1]): "An honest error, whether of fact or law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime."

Tent. Draft No. 4, p. 136 (emphasis added)(1955).

¹²¹ See §§212.2(a) (felonious restraint). The Commentary to §212.2 confirms that the actor "must have been aware ... that the restraint was unlawful." = at p. 242. See also 212.3 (false imprisonment); 212.5 (criminal coercion); 223.2 (1) ("A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another..."); §242.4 ("A person commits an offense if he purposely aids another to accomplish an unlawful object of a crime..."); §242.6 (crime of escape encompasses one who "unlawfully removes himself from official detention"); § 242.7 (crime to "unlawfully" provide escape implements; and petty misdemeanor where one "provides an inmate with anything which the actor knows it is unlawful for the inmate to possess");

¹²² See Commentaries to §212.1, p. 241 ("In the phrasing of Section 212.2, the word "unlawfully" carries its usual meaning of conduct violative of any legal duty, whether penal or civil in origin.").

¹²³ §221.2(1). Similarly, it is a crime to tamper with records "knowing that he has no privilege to do so." §224.4.

In other instances, lack of privilege or authority is an element of the offense but is not accompanied by an explicit mens rea requirement. Here, arguably a less-than-reckless M Noncrim Law would excuse. Examples:

- The burglary provision: "unless ... the actor is licensed or privileged to enter." §221.1(1).
- The interference with custody provision: Enticing a child "from the custody of its parent, guardian, or other lawful custodian, when he has no privilege to do so §212.4 (1). Subsection (2) similarly prohibits taking a committed person "from lawful custody when he is not privileged to do so."
- Obstructing a highway "having no legal privilege to do so." §250.7(1).
- Abuse of a corpse "[e]xcept as authorized by law." §250.10.
- Violation of privacy "[e]xcept as authorized by law." §250.11.

- A forgery provision: "...alters any writing of another without his authority."¹²⁴

These last examples involved either an "unlawfulness" requirement, a "duty" requirement, or a license, permission, or authority to do what would otherwise be criminal. The examples are somewhat explicit in their emphasis on the legal aspect of the mistake. But perhaps a M Noncrim Law should be treated like a M Fact even more broadly--namely, whenever (a) the actor is mistaken about a legal dimension of a material element, and (b) noncriminal law is the source of the mistake. Consider these examples:

- Sexual offenses involving a minor when "the actor is his guardian or otherwise responsible for general supervision of his welfare."¹²⁵
- Affirmative defense to burglary that the building or structure was "abandoned."¹²⁶
- Criminal homicide if the actor "causes the death of another human being."¹²⁷ Does a M Noncrim Law about the meaning of "death" excuse, if a M Fact about whether one's conduct would bring about the death would excuse?¹²⁸

This broad understanding of the equivalence rule is plausible (and draws some support from the Code commentary¹²⁹). Legislatures rarely focus on the subtleties of mens

¹²⁴ §224.1(1).

¹²⁵ §213.3(b), 213.4(7). Here is a similar category: Sexual offenses in which the victim "is in custody of law or detained in [an] institution and the actor has supervisory or disciplinary supervision over him." §213.3(c), 213.4(8).

¹²⁶ §221.1.

¹²⁷ §210.1.

¹²⁸ In the MPC, in a purposeful or knowing murder prosecution, any mistaken belief that one's conduct would not cause death will excuse; in a reckless manslaughter prosecution, any less-than-reckless mistaken belief to that effect will excuse; and in a negligent homicide prosecution, and less-than-negligent mistaken belief will excuse.

¹²⁹ Recall the rape example discussed earlier, at note =. According to the Commentary, a M Noncrim Law that causes the actor to believe that he is married brings him within the marital rape exemption. The relevant language of §213.1(1) is: "a female not his wife." This is certainly not an explicit recognition that a M Noncrim Law will excuse. A broad equivalence rule best justifies the Commentary's treatment of this example.

Another illustration is the requirement, in the first clause of the bigamy statute, that defendant be a "married person." §230.1. To be sure, other clauses in the bigamy statute are quite explicit about the types of mistakes of fact and law that excuse, as we have seen. But the Commentary makes clear that even the simple phrase "A married person is guilty of bigamy if ..." suffices to require culpability as to the noncriminal law question whether he is married:

[I]f the defendant receives legal advice that his prior relationship with another has not resulted in a common-law marriage or that his prior marriage was void because of the ineligibility of his purported spouse to marry, a recklessness standard as to whether the defendant is a "married person" should apply.

Commentary at 388.

On the other hand, in one instance, the Commentary offers a surprising interpretation that precludes a defense of M Noncrim Law when the equivalence view would recognize such a defense. §230.4 provides that one commits a misdemeanor "if he knowingly endangers the child's welfare by violating a duty of care, protection or support." The Commentary states:

rea requirements, and instead tend to select a mens rea requirement with only the paradigm cases in mind. For that very reason, the Model Penal Code provides a number of interpretive rules for determining the requisite mens rea when the legislature has not been explicit.¹³⁰ I believe that §2.04(1)'s reference to mistake of fact "or law" is intended to be a similar type of interpretive rule: if a mens rea requirement applies to a material element, such as "property of another" or "nonconsent" or "married," then it applies not only to the facts establishing that element, but also to any noncriminal law source of law relevant to that element; but it does not apply to any criminal law definition of that element provided elsewhere in the criminal statute.

To be sure, a much broader version of the truism view could excuse in the M Noncrim Law cases just noted. On this version, we would apply the relevant mens rea requirement in all three of the situations just described—to the facts establishing the legal element, to the noncriminal law sources pertinent to that element, but also to any criminal law definitions of that element. This interpretation, however, is highly problematic.¹³¹ It is extremely unlikely that the MPC drafters meant to provide such a broad defense for mistake about the meaning of criminal law terms, a defense that would virtually swallow the §2.02(9) rule that ignorance or mistake of law is presumptively no defense.¹³²

The duty itself need not be stated in the penal code but may arise from contractual obligation, from settled principles of tort or family law, or from other legal sources.

...

Section 2.02 (4) generalizes [the] required level of culpability by making it applicable to all elements of the offense. This means that the actor must know of the facts giving rise to the duty of care, protection, or support, though it does not mean that he must be aware of the law that imposes the legal duty or that he must himself draw the conclusion that he is violating a legal duty. [FN 35]

[Text of FN 35:] See Section 2.02(4) supra, which provides that a stated culpability requirement (in this case knowledge) applies to every element of the offense "unless a contrary purpose plainly appears." While it thus is possible that Section 230.4 could be read to require knowledge of the legal duty violated, the better construction is to implement the general policy stated in Section 2.02(9). That construction is described in the text.

Commentary, at 450-451.

¹³⁰ See MPC §§2.02(3), (4), (5).

¹³¹ For example, suppose the crime of rape requires D to know that he is engaging in sexual intercourse with V and to know that he is doing so "without her consent." And suppose "without her consent" is defined in the sexual assault statutes as including any sexual intercourse with a person who is unconscious. Clearly D should be acquitted if he did not realize, as a factual matter, that V was unconscious. But the broad "mere truism" interpretation also suggests that if D realizes that V was unconscious but did not realize that the jurisdiction defines "without her consent" as embracing unconsciousness, D should be acquitted for this mistake about the scope of the criminal law definition.

¹³² Notice as well that in a jurisdiction adopting the MPC's default minimum mens rea of recklessness, if a criminal offense contains no mens rea terms, then, on this view, recklessness is required as to each material element, not only as to the factual aspects of each element, but also as to the legal meaning of that element—even if the source of that meaning was a definition elsewhere in the criminal statute. Thus, a

C. “Mistake of legal element”: an unfruitful approach

In an earlier article, I argued that we should distinguish, not M Crim Law from M Noncrim Law, but instead, a legal mistake as to governing criminal law from a legal mistake concerning a material element of the crime.¹³³ The latter, I claimed, should presumptively be treated like M Fact. For example, if a statute provides, “It is a crime to receive stolen goods, knowing that they are stolen,” this argument suggests that “knowing that they are stolen” permits exculpation not only when the actor is factually mistaken about whether the goods are stolen (e.g., he is gullible and honestly believes a ridiculous story about why the seller is willing to part with a truckload of new goods for a huge discount), but also when he is mistaken about whether, as a matter of law, the goods are stolen (e.g., he knows that the seller took the goods from the parking lot of a retail store but believes that if a store employee leaves merchandise outside the store, the store has given up any property right to the goods). However, my earlier argument was not limited to legal mistakes flowing from a M Noncrim Law.¹³⁴ Even if the complete definition of “stolen” is provided in the criminal statute itself—for example, in a separate definitional section—a mistake about the meaning of “stolen” would, on this approach, still qualify as a mistake of “legal element” and would presumptively be treated the same as a M Fact.

This argument, that mistake of legal element is the relevant category for isolating those mistakes of law that ought to be presumptively treated like M Fact, is just plain wrong.¹³⁵ After all, the governing criminal law consists of distinct legal elements. A criminal assault statute will require certain types of harm (such as serious physical harm, or physical harm, or fear of such harm) and certain types of causal connections. A burglary statute will require certain types of conduct (breaking and entering) and the existence of particular circumstances (a dwelling, at night time). To require that the actor be culpable as to the legal meaning of each of those elements, while purporting to respect the general rule

negligent (but not reckless) mistake about how the criminal law defined any of the elements would excuse. Again, it is highly unlikely that the drafters of the MPC intended such a radical result.

¹³³ Simons, J. Crim. L. & Crimin. at 456-462, 492-502. For a recent article that thoughtfully applies this distinction between mistake of governing criminal law and mistake of legal element to international criminal law, see Kevin Jon Heller, Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute: A Critical Analysis, 6 J. Intern. Crim. Just. 419 (2008).

¹³⁴ See 81 J. Crim. L. & Crimin. at 458.

¹³⁵ See sources cited in note 6, *supra*. “Every person who makes a mistake regarding an element of an offense also, necessarily, makes a mistake about the governing law.” Westen, *supra* note 6, at 534, n. 33.

that ignorance or mistake as to the meaning, scope, or application of the criminal law is no excuse, would largely eviscerate that rule.¹³⁶

What excuses might a criminal law scholar proffer for having asserted this untenable position? I offer three, in the hope that others will avoid similar confusion.¹³⁷

¹³⁶ Largely, but not completely. Under the “mistake of legal element” approach, although the state must prove the defendant’s culpability as to the meaning of each element of the criminal law offense, it need not prove that defendant knew that that collection of elements constituted a crime. Thus, the “ignorance or mistake of criminal law is no excuse” rule would survive, but in an enfeebled state.

¹³⁷ Other authors who have endorsed some version of the “governing law/ legal element” distinction include Heller, *supra* note 135=; Francis Dutile & Harold Moore, *Mistake and Impossibility: Arranging a Marriage Between Two Difficult Partners*, 74 Nw U. L. Rev. 166 (1979); Dubber & Kelman, *supra* note 106=, at 374-381; Kaplan, Weisberg & Binder, *Criminal Law: Cases & Materials* 234 (6th ed. 2008).

Dutile and Moore point out that Justice Brennan’s concurring opinion in the well-known Supreme Court case, *U.S. v. Freed*, seems to endorse the “legal element” approach. 74 N.W. U. L. Rev. at 180-181. Moreover, in a later case, a majority of the Court endorses Freed’s analysis. *Liparota v. U.S.*, 471 U.S. 419, 425 n. 9 (1985).

The concurring opinion in *Freed* explains:

The third element -- the unregistered status of the grenades -- presents more difficulty. Proof of intent with regard to this element would require the Government to show that the appellees knew that the grenades were unregistered or negligently or recklessly failed to ascertain whether the weapons were registered. It is true that such a requirement would involve knowledge of law, but it does not involve “consciousness of wrongdoing” in the sense of knowledge that one’s actions were prohibited or illegal. Rather, the definition of the crime, as written by Congress, requires proof of circumstances that involve a legal element, namely whether the grenades were registered in accordance with federal law. The knowledge involved is solely knowledge of the circumstances that the law has defined as material to the offense.

401 U.S. at 614-615. The opinion points out that claim of right is a recognized defense to theft, even though it involves a mistake of law, and then quotes language (discussed above) from the commentary to §2.02(9): “The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense.” *Id.* at 615-616. But the opinion concludes that Congress did not intend to require mens rea as to this legal element.

Brennan’s analysis is ambiguous. Does he simply mean that Congress can require culpability as to a M Law when it sees fit to do so? Or is he drawing a distinction between culpability requirements as to governing law and as to a legal element? Or instead a distinction between culpability as to Crim Law and as to Noncrim Law? Part of the problem is that the registration requirement at issue is in a separate, noncriminal statute, 26 U.S.C. §5802, which is part of a tax and registration section of the Internal Revenue Code. As we have seen, it is a difficult question whether this should count as “noncriminal law.” *Supra* at notes 67=-74=.

Moreover, Brennan’s assertion that “a requirement [that the defendant know that the grenades were unregistered] would involve knowledge of law” is incorrect. The required knowledge that the grades were “unregistered” requires knowledge both of law and of fact, as earlier discussion explains. Suppose the defendant in *Freed* did not make a M Law of any sort: he was fully aware of all the criminal law and registration requirements, but mistakenly believed that his employee had filled out the forms; actually, the employee forgot to do so, or lied to defendant about having done so. This would be an example of a M Fact. See also *People v. Flumerfelt* (1939) 35 Cal. App. 495, 497-498, 96 P.2d 190 (allowing a M Fact defense to knowingly selling corporate securities without a permit, when defendant believed that her attorney had obtained the permit; the court correctly distinguishes such a M Fact from a M Law based on erroneous advice by an attorney about what counts as a security).

First, the language of the Model Penal Code and the culpability structure of many offenses lend themselves to this error. As we have seen, section §2.04(1)(a) provides that “[i]gnorance or mistake as to a matter of fact or law is a defense if ... the ignorance or mistake negatives the [culpability] required to establish a material element of the offense.”¹³⁸ Moreover, many statutes are structured in this general way: “It is unlawful to do X, knowing that Y.” Putting these features together, it is natural to conclude that if Y has a legal dimension as to which defendant could be mistaken, we must excuse a defendant who makes a mistake as to that legal dimension as readily as we would excuse a defendant who makes a mistake about the facts which, as a matter of law, constitute Y. Suppose, for example, that a rape statute explicitly provides that the defendant must know that the victim does not consent, and suppose that “lack of consent” is defined elsewhere in the criminal statute. This statute obviously permits a defense when the actor makes any M Fact about consent. So it might seem that the statute also must permit a defense when the actor makes a M Law about what counts as legal consent in the jurisdiction. (Suppose, for example, that the legislature has recently changed the definition of nonconsent from “submission after the victim has engaged in physical resistance” to a version of “NO means NO.”)

But this argument places too much emphasis on the language of §2.04(1)(a) in isolation, and also on contingencies about how mens rea terms are employed within the structure of certain offenses. Just because “knowing that Y” is an explicit clause in an offense definition, it does not follow that all legal mistakes about Y should be treated the same as factual mistakes about Y.¹³⁹ Y might be defined elsewhere in the state’s criminal provisions,¹⁴⁰ or might even be defined within the specific offense. Yet neither criminal law policies nor plausible interpretive principles for divining legislative intent dictate that we presumptively give less weight to the “ignorance or mistake of criminal law does not excuse” principle here than elsewhere. In the example just given of an actor’s mistake as to the new

¹³⁸ Emphasis added.

¹³⁹ For analogous reasons, we should not assume that a statute requiring “knowing that one will cause Z” (or “knowing that one is doing X”) must require knowledge both as to the fact that one will cause Z (or that one is doing X) and knowledge as to what Z (or X) means, as a matter of law. Also, the assumption that equivalent culpability is required as to all issues of fact and law is equally invalid when the requisite mens rea as to X, Y, or Z is recklessness or negligence rather than knowledge.

To be sure, the Code commentary does support the broad equivalence view, that legal mistakes about the meaning of statutory elements are presumptively exculpatory whenever the source of the mistake is noncriminal law. But it does not support the much broader view that all legal mistakes about the meaning of a statutory element are presumptively exculpatory, even when they refer to definitions within the criminal statute itself.

¹⁴⁰ And it is implausible to distinguish for these purposes between the charging statute and the definitional sections of a criminal statute. See Leonard, *supra* note 6, at 548-549.

legal definition of nonconsent in rape, it is highly unlikely that a court would require that the defendant know this legal definition.

Moreover, a number of jurisdictions follow the Model Penal Code position on default mens rea terms. In cases where the legislature has been entirely silent about the requisite mens rea for any of the material elements, they automatically supply a presumptive mens rea requirement of recklessness (or in some jurisdictions negligence) for every material element.¹⁴¹ This practice means that the statute should be read as if an explicit mens rea term of recklessness were attached to each material element. But on the “legal elements” approach, the state would then have to prove recklessness as to both fact and law for every material element of an offense.¹⁴² At this point, the distinction between legal mistakes as to governing law and as to an offense element all but collapses: for on the suggested approach a legal mistake as to the meaning or application of any element of the crime might exculpate.¹⁴³

The mistake of legal element approach is superficially appealing for a second reason: it seems to be an apt generalization from the claim of right theft cases, in which courts have long accepted M Law as exculpatory and have treated even an unreasonable M Law about property rights as a defense. In this context, courts require equivalent treatment of a defendant’s M Fact and M Law about whether he had a right to the property that he alleged stole. It is then tempting to jump to an overly broad generalization: whenever satisfying a material element of an offense requires that the actor have a certain mens rea, a M Law as to that element must be treated in the same way as a M Fact. But this does not follow, either as a plausible interpretation of legislative intent or as sound criminal law policy.

Third, there is a genuine, though slight, distinction between typical cases in which one makes a mistake about the scope or meaning of the governing criminal law and those in which one makes a mistake only about the scope or meaning of a material element of a criminal law. Suppose D1 has no idea that a criminal statute exists that governs his conduct, while D2 knows that a statute exists but isn’t certain of its terms, or of their precise definitions (provided elsewhere in the statute). Often, D1 is more blameworthy than D2 for his ignorance or mistake; for often, one who is engaged in a particular type of conduct (e.g., selling liquor, discharging pollutants, or sexual activity) is at least expected to know that the

¹⁴¹ See MPC §2.02 (3).

¹⁴² For example, suppose a criminal statute simply prohibits “Possession of a firearm unless one is a peace officer,” and suppose “Firearm” and “Peace officer” are comprehensively defined elsewhere in the criminal code. On this approach, the defendant would be acquitted if he made a less-than-reckless mistake (i.e. a reasonable or merely negligent mistake), not only about the nonlegal facts establishing that he possessed a “firearm” and was not a “peace officer,” but also about how those terms were defined.

¹⁴³ See Simons, *supra* note 6, at 496.

conduct is subject to criminal regulation, while it is often more burdensome to learn the details of the definitions of the prohibited conduct. But this argument is not compelling. If the state has a legitimate interest in imposing strict liability, or in requiring only negligence, with respect to the broad outlines of the governing law, that interest is almost as strong with respect to the meaning of each of the material elements of that law.