FROM THE EDITORS, STEVEN SCALET AND CHRISTOPHER GRIFFIN

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Edition on the Berger Prize Winner

Every two years, the American Philosophical Association awards a prize for an outstanding published article in philosophy of law, in memory of Professor Fred Berger of the University of California at Davis. The winning entry is selected by the APA’s Committee on Philosophy and Law, and a special symposium is held at the APA’s Pacific Division meeting for the winning author to discuss and defend his or her views in response to commentators’ reactions. In 2011, Professor Gideon Yaffe was awarded the Berger Prize for his essay “Excusing Mistakes of Law,” Philosophical Imprint 9:2 (2009).

In this edition of the Newsletter we publish the symposium proceedings. We begin with Professor Yaffe’s summary of his article from Philosophical Imprint (pp. 1–2). Next, we include two commentaries. The first is by Professor Guerrero, “Deliberation, Responsibility, and Excusing Mistakes of Law” (pp. 2–8), and the second is by Professor Greenberg, “How Mistakes Excuse: Genuine Desert, Moral Desert, and Legal Desert” (pp. 8–16). Finally, Professor Yaffe responds to his critics in “Defending, not Excusing, ‘Excusing Mistakes of Law’: Replies to Guerrero and Greenberg” (pp. 16–21).

Professor Yaffe joins a long list of esteemed Berger Prize winners, two of whom have since been profiled for their outstanding careers in tribute editions in these Newsletters, including the first Berger Prize winner Joel Feinberg and UCLA professor Stephen Munzer.

Steven Scalet
University of Baltimore

Christopher Griffin
Northern Arizona University

Articles

Defending, not Excusing, “Excusing Mistakes of Law”: Summary of the Paper

Gideon Yaffe
Yale Law School

I am grateful to the APA for giving me the Berger Prize for “Excusing Mistakes of Law” and to the late Fred Berger’s family for having endowed the prize. It is an honor that I’m very pleased to have been given.

The paper aims to explain what is right about a claim that retains its attraction despite the fact that everyone knows that it is false—the slogan, namely, that ignorance of the law is no excuse. It is false both that false beliefs about the law do not excuse and that they shouldn’t. A defendant, for instance, who does not know some obscure rule of property law and so mistakenly takes something of someone else’s thinking it is his, is excused from criminal liability for theft and ought to be. But, still, there’s something right about the slogan. What is it?

The paper rejects one answer to this question in order to motivate a more complicated answer which comes closer to the truth. The answer rejected is this: Belief that one is breaking the law is rarely an element of a crime. It is rarely the case, that is, that the prosecution must prove that the defendant believed he was breaking the law in order to establish the case against him. Add that mistakes undermine criminal responsibility thanks to their incompatibility with beliefs that a defendant must have to be criminally responsible, and it is no surprise that mistakes of law do not readily excuse.

There are two closely connected problems with this explanation, as I see it. First, we still need to know whether we are justified in our general refusal to make the belief that one is breaking the law an element of crimes. Maybe it should be an element of every crime, or most, even though it is not under current law. So, the explanation is incomplete without saying something to address this. Second, although false beliefs often excuse thanks to their incompatibility with beliefs necessary for criminal responsibility, there is still a question as to why this is and whether it is the only route through which false beliefs excuse. Perhaps false beliefs about the law undermine criminal responsibility even when belief that one is breaking the law is not necessary for responsibility. Perhaps they bear on responsibility for some other reason besides their incompatibility with other beliefs.

So, I would not say, full stop, that this first account of the truth in the slogan is to be abandoned. I just think we need to go deeper. We need to tackle the harder philosophical questions, the answers to which are presupposed by the explanation that appeals to the irrelevance to criminal responsibility of the belief that one is breaking the law.

In what follows in the paper, I offer what I call the “Uncorrupted Deliberation Principle,” according to which a false belief excuses by showing that the agent’s wrongful conduct was generated by unobjectionable deliberative processes. In particular, false beliefs often excuse by providing an account of how wrongful conduct came about consistent with commitment on the agent’s part to correct principles for extracting reasons from facts and granting them weight. Someone, for instance, who points out that he thought the object he took was his, claims that his conduct was consistent with his taking the fact
that property belongs to another as providing him with legal reason to refrain from taking it without permission. This is significant because a failure to either recognize or weigh that reason properly would provide a ground for holding the agent criminally responsible. Assuming that such a failure is necessary for criminal responsibility for theft, if the agent shows that he did not fail in this respect, he also shows that he is not criminally responsible for theft.

The Uncorrupted Deliberation Principle provides an alternative and superior account of the grain of truth in the slogan that ignorance of the law does not excuse. It provides such an account thanks to the fact that false beliefs about the law often show that the agent failed to recognize or properly weigh a legal reason for action. This is the opposite of what false beliefs need to do in order to excuse under the Uncorrupted Deliberation Principle. Mistakes of fact, by contrast, do not typically demonstrate such a failing on the agent’s part and so more readily excuse under the principle than do mistakes of law.

In the paper, I also claim that typically the question of whether a particular mental state should be an element of a crime just is the question of whether someone possessing that mental state improperly recognized or weighed some legal reason for action in a way that is necessary for criminal responsibility for the relevant form of wrongdoing. Hence the Uncorrupted Deliberation Principle is more fundamental to the nature of excuse than is the principle according to which false beliefs excuse thanks to their incompatibility with mental states necessary for criminal responsibility.

One of the upshots of the position is that mistakes of law often ought to fail to excuse in cases of mala prohibita crimes—crimes, roughly speaking, in which the conduct is not morally wrongful independently of its prohibition, or perhaps at all. So I defend the widespread legal practice of refusing to excuse those who make mistakes of law even in these cases. Say, for instance, that it is a crime to visit a certain beach on even numbered days; the statute aims at limiting use to levels below that at which the water quality becomes unhealthy. Someone who visits the beach on an even numbered day, thinking falsely that it is a crime to visit on odd numbered days, has no excuse under the Uncorrupted Deliberation Principle. Even if there is nothing morally wrongful about failing to recognize a legal reason, someone who fails to recognize it fails in precisely the way that warrants criminal responsibility. I also think, however, that in such cases there is reason to make belief that one is acting illegally an element of the relevant crime. By doing so, we would punish fewer people who do not morally deserve it, which would be all to the good. But this is consistent with holding, as I do, that when crimes are defined without such beliefs as elements, we are justified in holding that mistakes of law do not excuse defendants from criminal responsibility for them.

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**Deliberation, Responsibility, and Excusing Mistakes of Law**

**Alexander A. Guerrero**  
**New York University**

**I. Introduction**

In *Excusing Mistakes of Law*, Gideon Yaffe sets out to “vindicate” the claim “that mistakes of law never excuse” by “identifying the truth that is groped for but not grasped by those who assert that ignorance of law is no excuse.” Yaffe does not offer a defense of the claim that mistakes of law never excuse. That claim, Yaffe argues, is false. Yaffe’s article is, rather, an effort to assess what plausible thought might be behind the idea that mistakes of law often should not excuse. (Yaffe is interested in more than just the descriptive claim that in Anglo-American legal jurisdictions mistakes of law routinely do not, in fact, excuse.) More particularly, Yaffe is interested in what plausible normative justification there might be for this asymmetric pattern:

Asymmetry: False beliefs about non-legal facts often excuse, but false beliefs about the law rarely excuse.

Yaffe offers a complex argument in support of asymmetry. This paper is organized around my reconstruction of Yaffe’s argument. I will argue that Yaffe’s argument does not succeed, but that his argument may provide a template for an argument that could succeed.

**II. Deliberation as the Root of Responsibility**

Here are the first two premises of Yaffe’s argument:

1. The capacity to deliberate is a necessary feature for the distinctive kind of moral censure that is only appropriate for persons.
2. Features of an agent’s deliberation “serve as the grounds of her responsibility”; specifically, “corruption in deliberation . . . is the root of responsibility for wrongdoing.”

Yaffe acknowledges that these claims are controversial, but he states that “they are plausible enough to warrant assuming” as true.

It is worth noting that even if one accepts (P1), one might not accept (P2). That is, one might hold that moral censure is only appropriate for those entities that deliberate without holding that the root of responsibility for wrongdoing must be corruption in deliberation. It may be that moral censure only makes sense when aimed at creatures that have control over what they do (in some sense of control), and the ability to deliberate is a necessary condition of having control of this sort. But one might still maintain that an agent is responsible for the action simply because the action was the agent’s action, that it was something that they intended to do. On such a view, it could be that the agent deliberated well, but that (in Yaffe’s terms) the inputs were faulty—the agent began with a perverse set of moral beliefs or values, or non-moral factual beliefs, and this led the agent to behave badly, and in a way for which (it is natural to say) he is responsible.

Now, in some cases, it may be that bad deliberation is what led the agent to have these misguided moral beliefs, values, or non-moral factual beliefs, and so although it is the inputs that led the agent astray, the root of responsibility is the bad deliberation that led to the agent accepting these beliefs or values in the first place. But this need not be the case. It could be that the agent deliberated well all along the way, but his evidence was such that it led him to these false or perverse beliefs and values, despite deliberating well. (Perhaps he was raised in a sheltered or warped or prejudiced environment.) Some might wish to excuse such individuals, perhaps because they accept (P2). Others might have more of a “strict liability” approach, maintaining that all that must be true for an agent to be morally responsible for an action is that the action was an action of hers—her beliefs and deliberations led her to intend to do the action, and she successfully acted on that intention. On such a view, if one has false beliefs, and these beliefs lead one—via perfectly fine deliberation—to act badly, one is still morally responsible for acting badly, even if it is not one’s fault that one had the false beliefs in the first place.
These are old and familiar issues. For any action, X, performed by some person, Q, there are a host of factors that led Q to do X. Some of these have to do with what Q believes and values, some of them have to do with how Q deliberates. And there are likely other subconscious or non-rational factors that led Q to do X. For all of these factors, there is a causal story about how they came to obtain—how one came to have these beliefs and values, how one learned to deliberate using one’s beliefs and values, how one came to be in these particular decision-making circumstances, etc. The old and familiar question is how much of all this must one have had control over, or be responsible for, or have caused, in order for one to be morally responsible for doing X? Galen Strawson, in offering what he calls the Basic Argument, pushes the line that in order to be morally responsible for what you do, you must have been ultimately responsible for being the way you are—you must have been ultimately responsible for all or almost all of these factors. According to Strawson, because it is clear that one cannot be ultimately responsible for these factors, one cannot be morally responsible for what one does.

Strawson’s argument is a skeptical one, leading to the view that no one is morally responsible for anything. To resist the argument, one must find some stopping place, some factor which can ground moral responsibility, despite it being the case that the agent is not ultimately responsible for everything that led up to that factor obtaining. In endorsing (P2), Yaffe implicitly takes how an agent deliberated to be a factor of this sort. But he offers no argument for why this factor is the appropriate one. The importance of this becomes starkly apparent with the next premise of his argument:

(P3) If one’s deliberations to perform some action X were uncorrupted, then one’s decision to do X does not deserve punishment; if one’s deliberations to perform some action X were corrupted, then one’s decision to do X does deserve (might deserve, often deserves) punishment.

This premise is the heart of his normative defense of asymmetry. Yaffe assumes that how an agent deliberated prior to deciding to do X is relevant to moral desert, and can serve as a basis for moral responsibility. Equally importantly, Yaffe assumes that an agent’s beliefs that entered into the decision to do X are not relevant to moral desert, cannot serve as a basis for moral responsibility, as long as the agent’s deliberations pertaining to doing X—using those beliefs—were uncorrupted.

These two assumptions require defense. In particular, it is not obvious, given Strawson-style concerns about moral responsibility, that how an agent deliberated is more morally central for desert than what an agent believes, particularly when those beliefs can include beliefs about morality, what is valuable, and non-moral facts related to those questions. For one, it seems that how we deliberate—and in particular how good we are at deliberation—can be equally out of our control (on some natural understanding of control) as what we believe. And both seem relevant to ordinary assessment of moral character. It is certainly not obvious that we care more, morally, about how agents deliberate than about what they believe—given that both of these play a central role in what we really care about: what agents do (outside just their heads).

III. Principled Deliberation

It is worth considering Yaffe’s view of what deliberation is, and how it can be corrupted, to see if this will help make sense of this pair of assumptions. That view is expressed in the next two premises:

(P4) Whether one’s deliberations were corrupted depends on whether one followed correct principles regarding (a) what reasons to consider (rules for extracting reasons from facts) and (b) what weight to give those reasons (rules for weighting the reasons one has extracted).

(P5) Whether a principle is correct depends on whether the principle yields correct results—that is, a principle for extracting reasons from facts is correct just in case the facts in question do indeed provide the reasons that the principle specifies.

Yaffe is explicit that by “principles” he does not mean “formal rules like the means-end principle,” but rather “general rules for extracting reasons from facts and general rules for weighting the reasons one has extracted.” Here is an example of a principle of the first sort: “If an act is likely to cause a person pain, then that is a reason against performing that act.” Here is an example of a principle of the second sort: “If one act is more likely to cause a person pain than another, then weigh the reason against performing the first more heavily than the reason against performing the second.” He notes that in the legal context, “we will be concerned only with principles of this kind confined to legal reasons . . . principles for extracting legal reasons from facts, and the principles for weighting legal reasons the agent being evaluated is committed to.” Yaffe states that “deliberation” on his account is “the norm-governed psychological process through which a person reaches a decision and so often forms an intention to act in a particular way.”

I confess to finding this notion of principle, and the notion of principled deliberation it suggests, somewhat opaque. I have three main difficulties with Yaffe’s account of deliberation. First, the notion of deliberation via principles—in this sense of principles—is idiosyncratic. It is natural to think of deliberation as involving the formation and revision of beliefs in light of evidence and by using inductive and deductive principles of reasoning, and the judging and assigning values or weights to various options in lights of one’s beliefs, values, and preferences. Some of this is the province of epistemology, some of rational choice theory, some of ethics. How to deliberate well is a complex issue. One would expect that the relevant normative principles about such matters would be fairly general. But that is not the picture that Yaffe has in mind. He discusses the following example (throughout, my presentation of examples are slightly modified for ease of reference):

Marital Rape: A man, Williams, has non-consensual sex with his wife, falsely believing that there is a marital exemption from rape in the jurisdiction in which he lives.

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<th>Factual Beliefs</th>
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<td>Williams F1: “My wife is not consenting to have sex in this particular instance.” [True]</td>
<td>Williams L1: “One is legally permitted to have non-consensual sex with one’s wife in this legal jurisdiction.” [False]</td>
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<td>Williams L1: “I am within this legal jurisdiction.” [True]</td>
<td>Williams L2: “I am within this legal jurisdiction.” [True]</td>
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<td>Williams L3: “I am legally permitted to have non-consensual sex with my wife.” [False]</td>
<td>Williams L3: “I am legally permitted to have non-consensual sex with my wife.” [False]</td>
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Yaffe says of this man that his false beliefs about the law indicate “a commitment on his part to the following principle for extracting reasons from facts: his wife’s lack of consent provides no legal reason against having sex with her.”11 If this is a “principle” of deliberation, it is a principle of a very specific kind. It does not seem particularly well-described as a principle at all. Even if we re-describe the principle as “whether one’s wife consents to sex or not does not affect what legal reasons there are” or something of the sort, it is still a very fine-grained kind of principle. Consider another case that Yaffe discusses at length:

Child Care: Battersby entered into a contract to house and take care of a couple’s children five days a week, with the children returned to their parents on the weekends. Battersby did not have a license to provide foster care. There was a statute that required a person to be licensed if caring for children for money for more than thirty consecutive days. In Battersby’s case, a court ruled that, for the purposes of the statute, Friday and Monday are consecutive days—in effect, the court ruled that thirty consecutive weekdays of care required a license.

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<td>Battersby L1: “I am not caring for children for more than five consecutive calendar days in a row.” [True]</td>
<td>Battersby L1: “Friday and Monday are not, for legal purposes, consecutive days.” [False]</td>
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<td>Battersby L2: “My contractual arrangement with the couple does not require me to obtain a license.” [False]</td>
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Yaffe says that Battersby’s false beliefs about the law “show her to be committed to the following principle for extracting reasons from facts: the fact that one is providing care for more than thirty consecutive weekdays does not provide one with a legal reason to get a license.”12 Again, this is nothing like a general principle of deliberation, or a general principle for extracting reasons from facts. Yaffe appears to envision an incredible multitude of “principles of deliberation.” This is odd, but this might be no more than a terminological point about the use of the phrase “principles of deliberation” were it not for the next problems.

The second problem is a straightforward concern about equivocation: the notion of corrupt deliberation that emerges in (P4) and (P5) does not seem like the same notion of corrupt deliberation that might make (P2) and (P3) true. Recall that (P2) maintains that “corruption in deliberation is the root of responsibility for wrongdoing” and (P3) states that “if one’s deliberations to perform some action X were corrupted, then one’s decision to do X does deserve (might deserve, often deserves) punishment.” Whatever one might have thought of these premises with a more intuitive understanding of deliberation, they seem much harder to accept with the specialized notion of deliberation that Yaffe employs. As noted above, one might have a view of deliberation on which deliberation involves behavior governed by epistemic, prudential, and moral norms, so that one might fail to deliberate well in a number of different ways. For example, before deciding whether or not to demolish a building, one might deliberate weighing economic costs and benefits and legal zoning regulations without considering whether there are any living creatures in the building that might be harmed. This might be a moral failure of deliberation—one has failed to investigate a question relevant to the moral permissibility of one’s action prior to acting. Or one might have considered that question, but given the answer to the question insufficient weight in deciding what to do. Failures of deliberation in this respect might be the right kind of thing to make (P2) and (P3) seem plausible. It is much harder to see that “corrupted deliberation” in the sense identified above, so that the man who does not think that his wife’s consent is relevant to the legal reasons he has is deliberating badly, could ground (P2) and (P3).

This is particularly true if we limit our attention to deliberation via principles for extracting legal reasons from facts. Perhaps we think that certain generally deliberatively defective individuals deserve moral censure for their deliberative failings. Maybe they never take other people’s interests or experiences of pain into account when deciding what to do. But it is not plausible that we feel this way about faulty deliberation using these kinds of principles for extracting legal reasons from factual circumstances. Consider again the man who rapes his wife, who engaged in faulty deliberation because he accepts this principle for extracting legal reasons from facts: his wife’s lack of consent provides no legal reason against having sex with her. It is implausible that any part of the reason the man deserves punishment, or at least meets the precondition of moral desert, is that his deliberation was corrupted because he acts on this principle of extracting legal reasons from facts. He deserves punishment because he forced another person to have sex with him, or because he took what legal reasons he believed he had to exhaust the moral reasons present—not because he deliberated badly about what legal reasons he had.13

The third concern about Yaffe’s notion of deliberation and deliberative principles is that, upon closer examination, these principles of deliberation just seem to be straightforward beliefs about reasons or beliefs about value. Yaffe says that his principles are “general rules for extracting reasons from facts and general rules for weighting the reasons one has extracted.”14 But, as noted above, the principles he discusses are not general at all. Maybe that isn’t so important. What does seem important is that a distinction can be drawn between “the inputs to the deliberative machine” and “the machine itself.”15 As Yaffe puts it:

> The guiding assumption in what follows is that successful excuses sometimes operate by indicating that the agent’s deliberation was uncorrupted in itself. When we offer an excuse of this sort we admit that the agent’s conduct was objectionable; we would prefer a world that didn’t contain such conduct. But we imply that while something went wrong with the inputs to the deliberative machine, the machine itself worked as it ought. We are claiming that uncorrupted deliberation yielded a corrupted outcome; but since it is corruption in deliberation that is the root of responsibility for wrongdoing, an excuse is warranted in such a case.16

But, although the distinction is vital for his account, it is not clear that this distinction between the machine and the inputs to the machine can be drawn, or that Yaffe draws it in an intelligible way. Yaffe contends that all of the following are deliberative principles that are part of the machine rather than beliefs that are inputs to the machine:

> “his wife’s lack of consent provides no legal reason against having sex with her”17
Why are these principles part of the deliberative machine, rather than inputs to it? This concern gives additional bite to the equivocation worry: even if we can draw the distinction somehow, it is hard to see how it could ground anything as strong as (P3). In particular, there does not seem to be any normatively significant difference between our ability to control, or our responsibility for, which principles we are committed to and our ability to control, or our responsibility for, what we believe, if control or responsibility are supposed to be why bad deliberation is damning but deliberating with bad inputs is not. Nor does deliberation via principles of this sort seem more deeply connected to our character, or who we are, than what we believe. This puts additional pressure on Yaffe’s commitment to deliberation as the place where the responsibility buck stops. What is special about deliberation, if this is what we mean by deliberation?

IV. Bad Beliefs versus Bad Deliberation

Here are the next premises of Yaffe’s argument, in which he continues to place significant weight on the distinction between mistakes that result from bad deliberation and mistakes that result from bad inputs:

(P6) Some false beliefs can excuse because they imply that, although the agent performed the wrong action, her deliberation was proper and uncorrupted; the wrong action was performed because the agent had a false belief, not because the agent deliberated improperly.

(P7) If an agent has a false belief that p, and this false belief indicates that in her deliberations pertaining to doing some action X, the agent was committed to correct principles for extracting reasons from facts and correct principles for weighting reasons, then the agent is excused for doing X.

(P8) False beliefs that indicate that one is committed to incorrect principles do not exculpate; they inculpate. In the previous section, I raised a number of concerns about the distinction that Yaffe draws between deliberative inputs (beliefs) and principles of deliberation. An even more immediate problem can be raised for this approach. How, in a given case, are we to tell which of the following two situations an agent is in when an agent ends up acting wrongly?

Excusable: (false belief + fine deliberation) → wrong action

Inexcusable: (false belief + bad deliberation) → wrong action

Is Smith an excusable or inexcusable case? Consider the following mistaken principle of deliberation: the fact that one is moving a wire from behind a wall provides no legal reason to obtain permission from the landlord. Is Smith committed to this principle, so that his is an inexcusable case? Or does he act wrongly only because he falsely believes Smith L3, that “[o]ne has legal ownership over those things—even those things behind walls—which one acquires and installs,” so that his is an excusable case? If one believes Smith L3, does this belief indicate a commitment to the mistaken principle? Yaffe says that it was right to excuse Smith because of his mistaken belief about the law. But why? It seems that his false legal belief indicates a commitment to a mistaken principle of deliberation in exactly the same way that the marital rapist’s false legal belief indicates a commitment to a mistaken principle of deliberation.

Or consider the Cheek case that Yaffe discusses:

Taxes: Cheek attended seminars hosted by groups interested in dramatically reforming the American tax system. Hearing from these speakers, Cheek came to believe that wages are not income for tax purposes, and that tax laws are unconstitutional. As a result of these beliefs, Cheek failed to pay any income tax for years.
Yaffe says that Cheek should not be excused because he was committed to the following mistaken principle: “the fact that an unconstitutional statute says that a person must do something gives him no legal reason to do it.”21 But how do we know whether Cheek is committed to this principle? Why not think that he just falsely believes Cheek L3, and that Cheek L3 is serving as a bad input to perfectly fine deliberative machinery? What makes it the case that Cheek was committed to this principle (or not)? This makes all the difference on Yaffe’s account, but it seems completely arbitrary (and normatively insignificant) whether we opt for one description of his case or the other. Here is a more general way to make the point. Consider the following conjecture:

Conjecture: In every case in which an individual has a false belief, that false belief is an indication that the agent was committed to an incorrect principle of deliberation, and that her deliberation was to that extent corrupted.

Given the understanding of deliberation and principles of deliberation that Yaffe advances, it seems that conjecture is true. We can always construct an incorrect principle of deliberation that generates the false belief, for any false belief. Given that agents do not actually reason using the principles that Yaffe attributes to them (consider the cases of Battersby or the marital rapist), it is hard to see what constraint there is on this sort of construction. This is a problem for Yaffe’s account, since the final steps in his argument for asymmetry are these:

(P9) False non-legal beliefs rarely indicate that one is committed to incorrect principles.

(P10) False normative beliefs often indicate that one is committed to incorrect principles.

(P11) In particular, false legal beliefs often indicate that one is committed to incorrect principles.

(P12) False legal beliefs often, and false non-legal factual beliefs only rarely, implicate defects in our deliberative mechanisms that ground our desert of punishment.

(P13) Therefore, it is normatively appropriate that asymmetry is true; that false beliefs about non-legal facts often excuse, but false beliefs about the law rarely excuse.

But if conjecture is true, then all of (P9)–(P12) are false.22 Most significantly, the apparent difference between false legal and non-legal factual beliefs expressed in (P12) disappears.

What might Yaffe say to resist conjecture? The obvious response is to show that false non-legal beliefs do not provide any indication, or do not as regularly provide any indication, that the agent was committed to an incorrect principle of deliberation; no construction of such a principle is possible. It does not seem that such a response will work. It is certainly not obvious that we have reason to think that there is some systematic difference in what factual and legal false beliefs, respectively, reveal about our commitments to incorrect principles. Consider the following paradigmatic case of false non-legal belief.

Coffee: Adam is bringing coffee to Brianne. Unbeknownst to him, the sugar dish has been emptied and filled with arsenic. He puts a spoonful of what he believes to be sugar, but what is in fact arsenic, into Brianne’s coffee. She drinks the coffee and dies.

Adam has a false non-legal factual belief: that what is in the sugar dish is sugar. He needn’t have any false legal views about the permissibility of putting arsenic in a person’s coffee or anything of the sort. Is Adam’s false non-legal belief indication that he is committed to any incorrect principles? What about this one: the fact that one is giving a person a substance to ingest does not always provide one with a reason to make sure that the substance is safe to consume. In general, principles of this sort will be able to be constructed because one can always suggest that the person is committed to a principle that licensed the particular level of epistemic inquiry that the person engaged in, even though that level of inquiry resulted in the person making a mistake.

Is Adam committed to this principle? Again, there is the question: How would we know? But it seems no odder to say that Adam is committed to this principle than it is to say that Battersby is committed to this one: “the fact that one is providing care for more than thirty consecutive weekdays does not provide one with a legal reason to get a license.”

Is this principle correct? It seems that it is not. Recall that the standard of correctness for principles is demanding:

(P5) Whether a principle is correct depends on whether the principle yields correct results—that is, a principle for extracting reasons from facts is correct just in case the facts in question do indeed provide the reasons that the principle specifies.

In this case, the principle leads Adam astray, suggesting that he had no reason to make sure that the granular substance was safe to consume, whereas it seems that Adam does have a reason to make sure the substance is safe to consume, but that reason is (perhaps) outweighed by considerations of convenience. Of course, the question of whether he actually had such a reason is to wade into significant debates, including the internalism versus externalism debate, something that I don’t want to do here. Whatever we think about this question, it seems that the most perspicuous criticism of Adam, if any criticism is appropriate (it would depend on unspecified details of the case), is not that he deliberated using an incorrect principle. If Adam is subject to criticism, it is not because he deliberated badly, but because he (in some sense) should have known that the substance was arsenic or should have inquired into whether the substance in the sugar dish was safe to consume—he is culpable for the false belief, or culpable for acting on that false belief, given what he had done to ascertain whether or not the substance he gave Brianne was arsenic. I will pursue this line of thought in the final section.

V. The Grain of Truth

Early in the paper, Yaffe suggests that whether one is culpable for having the false belief—whether legal or factual—is not relevant to his immediate project of identifying a principle of excuse that

### Table: Factual Beliefs vs. Legal Beliefs

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<tr>
<td>Cheek L2: “Federal income tax laws are unconstitutional.” [False]</td>
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<td>Cheek L3: “Unconstitutional laws are not legally binding.” [False]</td>
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<td>Cheek L4: “I don’t need to report wages for tax purposes.” [False]</td>
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<td>Cheek L5: “I don’t need to pay taxes.” [False]</td>
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satisfies his four criteria. That is because, as he puts it, “[w]e need only find a principle of excuse that meets the four criteria and which could be made true by adding the requirement that the defendant not be culpable for having made the mistake.”23 The principle that Yaffe finds is the Uncorrupted Deliberation Principle, which is basically (P7):

(P7) If an agent has a false belief that \( p \), and this false belief indicates that in her deliberations pertaining to doing some action \( X \), the agent was committed to correct principles for extracting reasons from facts and correct principles for weighting reasons, then the agent is excused for doing \( X \).

Yaffe’s suggestion is that we could modify this principle as follows:

(P7*) If an agent has a false belief that \( p \), and the agent is not culpable for believing \( p \), and this false belief indicates that in her deliberations pertaining to doing some action \( X \), the agent was committed to correct principles for extracting reasons from facts and correct principles for weighting reasons, then the agent is excused for doing \( X \).

Importantly, (P7*) has the effect of shrinking the set of cases of false belief under consideration. The question is whether (P9) and (P11) still seem true, as frequency claims, even when the set of cases has been shrunken in this way. So, suitably modified:

(P9*) False non-legal beliefs that one holds non-culpably rarely indicate that one is committed to incorrect principles.

(P11*) False legal beliefs that one holds non-culpably often indicate that one is committed to incorrect principles.

My intuition is that, whatever one might have thought of these quasi-statistical claims previously, it is very hard to defend them now. More precisely, it is hard to defend them with a notion of “incorrect principles” that grounds an assessment of morally blameworthy, bad deliberation. If (P9*) and (P11*) seem true, it is just because we think that the “non-culpable” proviso in (P9*) ensures that one is committed to using correct principles. If this is not true in (P11*), it is only because “incorrect” in that premise just means legally incorrect—not incorrect from the point of view of one’s epistemic or other deliberative obligations. But deliberation that is bad in that sense just isn’t morally bad, at least not when we have stipulated that the person holds the false legal beliefs non-culpably.

Yaffe suggests that the Uncorrupted Deliberation Principle “allows us to identify the grain of truth in the false slogan that ignorance of law never excuses.”24 What I want to suggest is that there is a grain of truth in this vicinity, but it does not have to do with deliberation, or the distinction between mistakes made because of bad deliberation and mistakes made because of bad inputs.

On the reinterpretation of the account I am offering, what we would say instead of (P6) and (P7) is this:

(*) If \( D \) has a false belief that \( p \) and (a) \( D \)’s having that false belief explains why \( D \) performed some objectionable action \( X \), (b) the fact that \( D \) believed that \( p \) is not itself grounds for finding \( D \) morally objectionable, and (c) the fact that \( D \) believed that \( p \) does not indicate that \( D \) has failed to live up to morally based epistemic obligations regarding the maintenance and formation of her beliefs, then \( D \) is excused.

Why should we prefer (*) to (P6) and (P7)? There is not space to defend (*) in detail here. One reason to prefer (*) is that it keeps us from having to draw Yaffe’s difficult to sustain distinction between principles of deliberation and beliefs that serve as inputs to deliberation. A more significant reason is that (*) seems to both deliver and explain the right results with respect to a wide range of cases. It is intuitively plausible that Battersby and Smith should be excused, that Williams (the marital rapist) should not be, and that Cheek is somewhat more in the middle. Battersby and Smith should be off the hook because their false beliefs were reasonable (satisfying (b) and (c)), and those beliefs clearly explain why they behaved badly in the relevant sense (satisfying (a)).

Williams’s false beliefs do not satisfy (a). He had false beliefs about the law, but those beliefs were irrelevant to the moral permissibility of his action, and do not explain why he had non-consensual sex with his wife. It is not as if, had the law permitted non-consensual sex, his action would have been morally permissible. Additionally, if he had the false belief that if having non-consensual sex with his wife is legally permissible, then it is morally permissible, this might well indicate that either (b) or (c) does not hold. In general, when (b) does not hold, it may be for the same reason that the fact that one is venal cannot be cited as an excuse for one’s venal actions.

Cheek is somewhat more in the middle because although (a) and (b) are satisfied (if we assume that Cheek actually had the false beliefs), the way the case is described it is not clear whether (c) is satisfied. Given that there may be a moral duty to pay one’s taxes, and given the moral significance of tax-paying, it is at least plausible Cheek may not have done enough to satisfy his moral obligations to investigate the question of whether he had a duty to pay taxes. And so it is unclear whether (c) is satisfied.

There seem to be two ways that (*) or some principle like it would vindicate asymmetry. The first would be if we endorsed something like a kind of strict liability moral requirement to have correct beliefs about the law, so that having false beliefs about the law almost always meant that condition (b) was not satisfied. This does not seem plausible. Why should we have a strict liability moral requirement to have correct beliefs about the law, particularly given the complex and arcane nature of law in modern political systems? Note that this might be true with respect to certain core moral beliefs, so that merely having false beliefs about those topics would in effect constitute being morally objectionable.

The second way that (*) would vindicate asymmetry is if the epistemic demands with respect to knowing the law (avoiding false beliefs about the law) were systematically higher than the epistemic demands with respect to knowing other factual matters—and higher not because of epistemic reasons, but because of moral ones. I argue for a related view elsewhere.25 This would mean that (c) was less frequently satisfied with respect to false legal beliefs than with respect to false beliefs about non-legal matters. There might be a story that could be told in this vicinity, perhaps based on a Waldronian story about the importance of respect for legislation and democratically created law.26 Additionally, this approach would avoid holding individuals to a standard of perfection with respect to what they must learn and know about the law, while acknowledging something of the special significance to law that is implicit in Yaffe’s (P11).

Endnotes

2. Ibid., 10.
3. Ibid., 10.
5. Later in the paper, Yaffe offers a distinction between legal desert and moral desert, and says of an individual who has “made a mistake about an arbitrary legal rule” that “she deserves [punishment] legally and does not deserve it morally,” but that what is wrong about punishing her is “not that she does not deserve the punishment she receives” (20). Yaffe says that “[t]he degree to which people legally deserve punishment for choosing to act in a way unfavored by the balance of legal reasons is the degree to which such a choice indicates a commitment to faulty principles for the recognition and weighting of legal reasons” (20). But the challenge for those who would defend Asymmetry is to say why it is morally appropriate to punish such a person—what appears to be wrong with punishing such a person is precisely that she does not morally deserve the punishment she would receive. Yaffe’s argument cannot possibly succeed if (P3) is read as being about only legal desert of punishment. The first part of (P3) is false on such a reading, and the argument as a whole would become just about what is legally appropriate, rather than about what is morally appropriate with respect to excuse and punishment for mistakes.

6. Yaffe does mention the issue of whether a person who is responsible for having a false belief can be denied an excuse on the grounds of having that false belief. He declines to engage with that issue, noting that “[w]e need only find a principle of excuse that meets the four criteria and which could be made true by adding the requirement that the defendant not be culpable for having made the mistake” (6). I think that this issue is more central than Yaffe’s response acknowledges, a point that I will make in Section V.


8. Ibid.

9. Ibid.

10. Ibid., 10.

11. Ibid., 13.

12. Ibid.

13. The somewhat obscure distinction Yaffe makes between “what rules the law establishes” and “what legal reasons the law provides” is of no help (13-14). Yaffe suggests that what is relevant for assessing whether a principle is accurate or not is whether it tracks the legal reasons, not the actual legal rule (as determined, say, by a legal authority like a court). How exactly to make out this distinction is unclear, but Yaffe says that “The fact that the statute in fact, as the court rules, directs her [to get a license] does not imply, on this view, that she has a legal reason to get one: the legal reasons on this view are supplied by the most natural interpretation of the statute and not by the facts about what rule the law establishes, when the two diverge” (14). But neither of these two possible measuring sticks for principles help to make bad deliberation, corrupted deliberation, deliberation on the basis of bad principles, look any more relevant to moral desert.


15. Ibid., 10.

16. Ibid.

17. Ibid., 13.

18. Ibid.

19. Ibid., 15.

20. Ibid., 16.

21. Ibid., 16.

22. (P10) and (P11) are false if “often” implies “often, but not always.”


24. Ibid., 12.


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How Mistakes Excuse: Genuine Desert, Moral Desert, and Legal Desert

Mark Greenberg
University of California, Los Angeles

1. Introduction

Gideon Yaffe’s “Excusing Mistakes of Law” is a rich and original discussion of the roles of mistake of fact and mistake of law as excuses in criminal law. The paper seeks to explain “the asymmetry between the excusing force of mistakes of fact and law”—or, as Gideon sometimes puts it, to identify the “grain of truth to the slogan” that ignorance of the law is no excuse (1-2). I congratulate Gideon on the award of the American Philosophical Association’s Samuel Berger Prize.

Gideon’s paper is complex, thought-provoking, and nuanced, and it contains much more than I can discuss here. I will focus on three important junctures in the overall argument that strike me as crucial and potentially problematic. In each case, I set out my understanding and then explain why, on that understanding, the argument would be problematic. It may be, of course, that I have misunderstood Gideon’s position at one or all of these junctures. In any case, my hope is that responding to my paper will give Gideon an opportunity to clarify and develop his argument.

I begin with a theme that will run through my remarks. Behind some of the specific issues concerning mistake of fact and mistake of law lie more fundamental questions about the nature of law and about the relation between law and morality. Underlying Gideon’s proposal seems to be an assumption that the legal domain has an internal structure parallel to that of the moral domain: legal reasons, legal obligations, legal excuses, and so on bear the same relations to each other that, within the moral domain, moral reasons, moral obligations, moral excuses, and so on bear to each other. In particular, Gideon relies on the assumption that just as, absent special circumstances, one who acts on morally wrong principles is, for that reason, morally blameworthy or morally deserving of reproach or punishment, so one who acts on legally wrong principles is, for that reason, legally deserving of punishment.

From my perspective, this assumption seems to ignore the problem of explaining when and why mistake of law excuses (and when and why it does not), rather than to help us toward a solution. To the extent that the law’s treatment of mistake of law is puzzling, it is in large part because, in many cases of legal mistake, the defendant does not seem genuinely deserving of punishment, whether the relevant understanding of desert is specifically moral or more general. Perhaps ironically, Gideon’s assumption that legal desert relates to legal mistake in the same way that moral desert relates to moral mistake yields a technical notion of legal desert, one on which acting on the basis of false legal beliefs makes one ipso facto deserving of punishment. Given such a notion of legal desert, however, we would not expect legal mistake to be an excuse.

To summarize the background disagreement roughly, while Gideon thinks of the legal domain as independent of the moral domain, but with a parallel structure, I think of the legal domain as closely integrated with and dependent on the moral domain. In my view, we cannot usefully understand when and why legal mistakes excuse in criminal law in terms of a technical notion of legal desert that is internal to the legal domain and independent
of moral desert (and of desert simpliciter), but modeled after it. Instead, we need to explain how legal mistakes relate to genuine desert. I will ultimately suggest that Gideon’s proposal, on one reading, relies implicitly on ordinary notions of fairness and desert. At certain points, I will return to my suggestion about background differences in the hope that it will illuminate some of the more specific issues.

Here is the plan for the paper. In section 2, I point out that, in a clear and relevant sense, legal mistakes excuse more often than factual mistakes. I suggest that a better characterization of the relevant asymmetry—or of the truth in the slogan that ignorance of the law is no excuse—is that believing that one’s conduct is illegal is not normally required for criminal liability, while understanding the nature of one’s conduct is normally so required. In section 3, I offer a straightforward explanation of this asymmetry: one who commits a malum in se crime is typically morally deserving of punishment, even if he is unaware of the illegality of his conduct. (Of course, this explanation does not purport to explain all of the legal treatment of legal mistake, especially the treatment of mistakes concerning mala prohibita crimes.)

In section 4, I explore why Gideon would not accept this explanation of the asymmetry. He maintains that the project of explaining the treatment of legal and factual mistakes concerns legal desert rather than moral desert (or desert more generally). And, on his view as I understand it, the fact that someone is morally deserving of punishment does not help to explain why he is legally deserving of punishment. I argue, however, that Gideon’s appeal to “legal desert” threatens to trivialize the project of explaining why one who is ignorant of the illegality of his conduct is in general not excused.

In section 5, I consider Gideon’s positive proposal—that a defendant is excused if his deliberation is not corrupted. This proposal is intriguing, but, as things stand, the explanatory work is done by a problematic assumption that legal mistakes (and moral mistakes) are a form of corrupted deliberation, while factual mistakes are merely inputs to deliberation.

In section 6, I examine the one case in which Gideon holds that mistake of law can excuse: a defendant who is mistaken about the law nevertheless has an excuse if he is right about the “legal reasons.” This position depends crucially on an unfamiliar distinction between legal reasons and what the law requires, and I consider different ways of understanding the distinction. First, I argue that the claim that legal reasons can come apart from what the law requires undermines Gideon’s parallel between the legal and moral domains and consequently his basis for holding that legal desert tracks mistakes about legal reasons (as opposed to mistakes about what the law requires). Finally, I consider a reading of the distinction—and of Gideon’s article—according to which the central idea is that legal mistakes excuse when it would be unfair to punish the defendant because he or she lacks reasonable notice of the relevant standards. On this reading, the argument relies after all on moral (or more general) notions of fairness and desert, and Gideon’s notions of legal reasons and legal desert are not doing the explanatory work. In addition, such a fairness-based account is problematic for a variety of other reasons. Section 7 concludes with a brief summary.

2. The Asymmetry between Mistsakes of Law and Mistakes of Fact
In this preliminary section, I want to clarify Gideon’s target in the paper. As Gideon describes it, the central explanandum of the paper is an asymmetry between factual mistakes and legal mistakes. He writes that factual mistakes provide legal excuses more often than do legal mistakes.3 That statement sounds right, on first hearing. On reflection, however, it is not so easy to specify the asymmetry in a way that is precise (and true).

First, there are indefinitely many legal mistakes that do excuse. Consider, most importantly, the legal mistakes that are sometimes called “collateral mistakes of law” (typically characterized as mistakes about a legal standard deriving from a source other than the statute under which the defendant is prosecuted). For example, a defendant’s legal mistake could lead her to believe, incorrectly, that she owns certain property, that she has authority to arrest another person, that a particular person is dead, that a certain building is not a dwelling, and so on. It is familiar that, in each of these cases, the legal mistake could excuse the defendant from criminal liability. (Gideon’s paper begins with an example of a collateral mistake of law, but he does not address them in the paper.)

Second, there are indefinitely many factual mistakes that are highly relevant to explaining a defendant’s commission of a crime, yet have no tendency to excuse. For example, a defendant might believe, incorrectly, that he will not be caught if he embezzles money; that the bank that he is planning to rob has a lot of cash lying around; that killing his rival will lead to his marrying the love of his life; and so on. Obviously, none of these factual mistakes would have any tendency to excuse. Now the reader may be impatient, for these mistakes are plainly not of the relevant kind. But the question is how to specify the relevant kind in a way that is nontrivial (not, for example, “those mistakes that excuse”) and yields an asymmetry.

The natural suggestion is that the relevant factual mistakes—the ones that excuse—are those that negate an element of mens rea. The problem with this formulation is that it undermines the asymmetry. Legal mistakes that negate mens rea also excuse. Indeed, putting things in this way brings out a way in which legal mistakes have a greater tendency to excuse than factual mistakes: factual mistakes excuse only when they negate mens rea; legal mistakes excuse whenever they negate mens rea, but also in certain other circumstances, for example, when the defendant has reasonably relied on an official statement of the law or when the relevant statute has not been properly published.

I suspect that a better understanding of the asymmetry that Gideon’s paper seeks to explain is that knowledge of the nature of one’s conduct is ordinarily part of the mens rea of a crime, while knowledge of the illegality of one’s conduct ordinarily is not. (At a crucial point, Gideon specifically puts things this way, as I will discuss in the next section.) My discussion will sometimes draw on this understanding of the asymmetry, though, in general, I will follow Gideon in using “the asymmetry” more loosely.

3. A Straightforward Explanation of the Asymmetry
As a candidate explanation of the asymmetry, Gideon considers the Mental State Principle (7): “a false belief that p excuses if believing that not p is one of the necessary conditions for criminal liability.” Gideon points out that the Mental State Principle, which he associates with the Model Penal Code, is inadequate because it fails to articulate why a belief that one has acted criminally should not generally be necessary for criminal liability (9). In other words, the Mental State Principle holds that a mistake excuses only when it negates an element, and that explains the target asymmetry if knowledge of the law is rarely an element. But it doesn’t explain why knowledge of the law should not generally be made an element.

In my view, there is a very straightforward answer to this question. With respect to mala in se crimes, being aware that one’s conduct is illegal is not necessary in order for one to deserve punishment. It is not necessary because one who commits a
malum in se crime does something that is seriously morally wrong and, typically, such a person deserves punishment.\(^5\)

By contrast, for both malum in se and mala prohibita crimes, one who is (blamelessly) not aware of the nature of her conduct—in particular of those aspects that make the conduct criminally prohibited—does not deserve punishment.\(^6\) (Consider someone who believes, and justifiably so, that he is turning on his kitchen light, but in fact is triggering a bomb that kills another person.) Together, these points explain why knowledge of the law should not generally be required for criminal liability, but knowledge of the nature of one’s conduct generally should be. They also help to explain the adage that ignorance of the law is no excuse. For they yield the result that mistakes of law about the existence of statutes creating malum in se crimes do not excuse. Especially because malum in se crimes are the stereotypical and salient ones, we can see how the adage takes hold.

My explanation purports to explain only why knowledge of the law should not generally be an element (and therefore the broad asymmetry at which Gideon gestures). It does not purport to explain the details of when legal mistakes do and do not excuse—in particular, why a mistake about the existence of a statute creating a mala prohibitum crime generally does not excuse. I imagine that, in order to explain those details, one must appeal in part to pragmatic considerations about law enforcement, and it is a good question (which I cannot address here) whether such considerations are adequate to justify the current treatment of legal mistakes. Given the naturalness and apparent effectiveness of my simple explanation, we need to ask why Gideon does not even discuss it.

4. Legal Desert versus Moral Desert

I suspect that the main reason Gideon would not accept my explanation is that he is concerned with legal desert rather than moral desert. Early on, Gideon says that it is a criterion for the success of a principle of excuse that it be justified, and it is justified “only if it identifies, in its antecedent, a condition the satisfaction of which undermines the agent’s desert of punishment” (4). Because the success of Gideon’s account is to be evaluated in terms of desert, it is important to understand the relevant notion of desert.

For much of the paper, Gideon writes in terms of desert simpliciter, and I at first assumed that he was working with a relatively standard notion of moral desert. Late in the paper, though, in order to defend his positive account of legal excuse, he notes that it seems to have the counterintuitive consequence that a person who has made a mistake about a legal rule imposing an arbitrary requirement deserves punishment. (Indeed, as we will see, it has this consequence even if the person had no reason to be aware that there was a relevant legal rule and therefore to seek legal advice.) He then deploys his notion of legal desert to defend his account, arguing that such a person legally deserves punishment (even if he does not morally deserve it) (20).

I will discuss Gideon’s view of legal reasons below, but the upshot of that view for legal desert is that the defendant who has provided childcare for a thirty-one day month legally deserves punishment simply because there is a statutory provision whose language would naturally be understood by a layperson to prohibit the relevant conduct of the defendant. In general, on Gideon’s view, acting on an incorrect understanding of the legal reasons makes one legally deserving of punishment.\(^7\)

I want to emphasize that Gideon’s account of legal desert is not his positive proposal for how to handle legal excuse, which I discuss in the next section. Rather, after making his positive proposal, he notes that it seems to have the counterintuitive consequence that a person who has made a mistake about a legal rule imposing an arbitrary requirement deserves punishment. (Indeed, as we will see, it has this consequence even if the person had no reason to be aware that there was a relevant legal rule and therefore to seek legal advice.) He then deploys his notion of legal desert to defend his account, arguing that such a person legally deserves punishment (even if he does not morally deserve it) (20).

I can now explain why Gideon would reject my explanation of why awareness of the illegality of one’s conduct is not generally required for criminal liability. The core of my explanation was that a person who commits a malum in se crime is typically deserving of punishment, even if he is not aware that his conduct was illegal, because his conduct is morally blameworthy.

Gideon would presumably reply that although a person who commits a malum in se crime is generally morally deserving of punishment, my account fails to explain why such a person is legally deserving of punishment. On his view, legal desert is independent of moral desert and does not derive from it. Therefore, pointing to moral desert does nothing to explain legal desert.\(^8\)

Gideon’s position about legal desert—that one who follows principles that do not accurately reflect the balance of legal reasons is, for that reason, legally deserving of punishment—entails that ignorance of the law does not in general excuse. After all, according to his position, acting on a misunderstanding of the legal reasons constitutes being legally deserving of punishment. (Indeed, as we will see, given this position about
legal desert, Gideon’s difficulty is to explain how ignorance of the law could ever excuse.)

From my perspective, however, Gideon has set the bar too low for an explanation of why one who acts on a misunderstanding of the law is in general not excused. By identifying legal desert with acting on a misunderstanding of the legal reasons, he makes it much too easy for his account of legal excuse to account for cases in which mistakes of law do not excuse.

One way to express my worry is to ask why Gideon’s “legal desert” is a form of genuine desert at all. Consider a defendant who engages in apparently innocent conduct that is in fact prohibited by an obscure malum prohibitum statutory provision, a provision that the defendant has no reason to be aware of. (We can stipulate that the defendant’s apparently innocent conduct is of a sort that is not ordinarily subject to regulation, so the defendant has no reason to consult a lawyer.) According to Gideon’s treatment of such cases, the defendant is legally deserving of punishment precisely because he is committed to a misunderstanding of the legal reasons. In particular, on Gideon’s account of legal reasons (discussed in section 6 below), the defendant is legally deserving of punishment if there is statutory language that would naturally be understood by a layperson to prohibit his conduct (13-14, 20). But the mere fact that the language of the statute would be understood by a layperson to prohibit the conduct does not seem sufficient to make it the case that the defendant genuinely deserves punishment, as the defendant has no reason to be aware of that language. It is worth noting that the claim that such a defendant deserves punishment cannot be supported on the ground that he has violated an obligation to know the criminal law, for there is no such obligation, not even a legal one (as Gideon acknowledges, 19).

Gideon does not elaborate on why he understands legal desert in the way that he does. I suspect that underlying Gideon’s position here is the assumption that the legal domain has an internal structure parallel to that of the moral domain. In the passage quoted above in which he explains the position, he begins by stating that, in the moral domain, people who act on principles that do not accurately reflect the balance of moral reasons are, for that reason, morally blameworthy. He moves immediately to the crucial claim that, if people act on legally wrong principles—with one exception, to be discussed shortly—they are legally deserving of punishment (20).

If Gideon’s project were to provide an account of why ignorance of the law does not generally undermine legal desert understood in this way, the project would be close to trivial. To assume that people who act on false legal principles are, for that reason, legally deserving of punishment is to assume away the problem at the heart of Gideon’s paper—the problem of explaining why knowledge of illegality is not in general required for criminality. After all, if acting on a false belief that one’s conduct is not criminal makes one legally deserving of punishment, then, a fortiori, that false belief is not a legal excuse.

As Gideon suggests, we generally think that agents who perform morally wrong actions because of their false moral beliefs are typically morally culpable. By contrast, in a large class of cases—those involving technical or malum prohibitum requirements—agents who perform legally wrong actions because of their false legal beliefs often straightforwardly lack any genuine culpability. And it is precisely because such agents lack culpability that the law’s treatment of legal mistakes is prima facie puzzling. In other words, it is precisely because legal mistake differs from (garden-variety) moral mistake in this way that there is an interesting problem about why legal mistake does not generally provide an excuse. I have suggested that Gideon would reject my simple explanation on the ground that it appeals to moral desert, or desert simpliciter, rather than specifically legal desert. And I have countered that Gideon’s way of understanding legal desert—as I understand it—threatens to trivialize the problem of explaining the asymmetry between legal and factual mistakes. I now turn to Gideon’s positive proposal—his account of when mistakes provide legal excuses.

5. The Uncorrupted Deliberation Principle

Gideon offers a principle—the Uncorrupted Deliberation Principle—that is supposed to explain when a defendant is excused. The hope is that the principle can explain the asymmetry between factual and legal mistakes. As I understand Gideon, however, a crucial piece of the argument—an account of what makes something part of deliberation—is missing. (This is the second juncture at which I am not sure that I understand Gideon correctly.) In order for the Uncorrupted Deliberation Principle to do the explanatory work it is supposed to do, Gideon needs to supply an account of deliberation that both is plausible and has the right consequences with respect to legal and factual mistakes.

Gideon’s basic idea, captured in the principle, is that there are two ways in which deliberation can lead a defendant to the wrong outcome. If the deliberation itself is corrupted, the defendant is not excused. If, on the other hand, the deliberation is not corrupted, but the wrong outcome is arrived at because the inputs to deliberation are flawed, the defendant is excused (11). This is an appealing suggestion. Given its structure, much obviously depends on how the distinction is drawn between deliberation and inputs to deliberation.

As I read the paper, Gideon seems merely to assume that factual beliefs are inputs to deliberation, whereas legal beliefs are part of the deliberation. One might expect him to defend an account of what constitutes deliberation and then to show that that account has the consequence that factual beliefs are inputs to deliberation, and legal beliefs are part of it. But he does not at any point offer a general characterization or account of deliberation. Instead, he begins by using mistakes of fact as examples of problematic inputs (11). He then turns to “input-independent features of deliberation” and identifies one’s beliefs about the law as among such features. He asserts: “whether or not one’s deliberations were acceptable is in large part the question of whether one followed the right principles in determining what legal reasons to consider and followed the right principles in granting those reasons weight” (11). (Principles of the first kind, for example, have the form: “if an act has a certain property, that is a legal reason against performing the act.”) The upshot is that Gideon equates engaging in corrupted deliberation with following a mistaken understanding of the legal reasons. Gideon’s assumptions about what is input and what is deliberation therefore have the immediate consequence that, with an important qualification to be discussed in section 6, if you make a mistake of law, your deliberation is bad, whereas if you make a mistake of fact, your deliberation has a bad input. All the work is therefore accomplished by the classification of legal mistakes as part of deliberation, rather than inputs to it.

It seems to me, however, that one could at least as naturally characterize the inputs as including one’s beliefs about the applicable legal standards. By contrast, deliberation is naturally understood as including such things as determining which facts and legal standards are relevant to the present decision and reasoning about how the legal standards apply to the facts.

Gideon gives the example of a hunter who shoots a person, falsely believing that person to be a deer. Gideon suggests that
the mistaken belief is an input to deliberation, not something wrong with the deliberation itself, so the hunter should be excused. Now consider a driver who drives off in a car, falsely believing it to be her own. Suppose the mistake is a legal one—she does not understand that, under the applicable property law, once she has defaulted on the car loan, the car becomes the property of the lender. Here the woman has made a mistake of law, yet it is just as plausible as in the case of the hunter to consider the mistaken belief an input to deliberation and therefore excusing. And, in fact, current law would standardly treat such a collateral mistake of law as excusing.

But the same point can be made of mistakes concerning the *existence* of the legal requirement that the defendant is accused of violating. (That this is so is unsurprising, for, as Larry Alexander has recently argued, it is difficult to see why anything of importance should turn on whether a definition is written into the statute under which the defendant is prosecuted or provided by a collateral statute; suppose that the driver who has defaulted on her car loan is prosecuted under a theft statute that builds in the relevant property law, i.e., defining theft to include knowingly taking property after one has defaulted on the loan.13) Consider a hiker who does not obtain a license because he falsely believes that a license is not required for hiking. On Gideon’s view, the hiker’s deliberation is corrupted because he did not understand that his hiking provided a legal reason for him to obtain a license (assuming that the statute is clearly written). But it seems as plausible as in the cases of the hunter and the driver to consider the false belief an input to the deliberation, as opposed to a corruption of the deliberation. After all, the hiker’s reasoning is impeccable; he simply doesn’t know of the existence of the legal requirement.

I have just argued that (non-collateral) mistakes of law can plausibly be treated as inputs to deliberation. Certainly, Gideon needs to justify treating them as part of deliberation. It would also be helpful to understand Gideon’s thinking about how the Uncorrupted Deliberation Principle deals with collateral mistakes of law. It might be suggested that he need not explain collateral mistakes of law with his principle since a collateral mistake excuses because it negates an element of the crime. But this suggestion will not do: as noted above, and as Gideon emphasizes with respect to the Mental State Principle, the problem is to explain what beliefs should be elements of a crime. A collateral mistake excuses by preventing a defendant from having a belief that is an element of the crime. Why should the corresponding belief not be an element if the mistake of law is not collateral? Gideon could try to argue that collateral mistakes are inputs, rather than part of deliberation. But, if the distinction between collateral mistakes of law and the kind of mistakes of law that Gideon addresses turns on whether the mistake concerns a legal standard deriving from a collateral source (one other than the statute the defendant allegedly violated), it is difficult to see how that distinction could be decisive with respect to whether deliberation is corrupted. Perhaps Gideon believes that the distinction should be drawn in a different way; at any rate, it would greatly advance understanding of his account for him to address collateral mistakes of law.13

In sum, we need an account of what makes it the case that a given belief is an input—and therefore excusing—or part of deliberation—and therefore corrupting. And, if the Uncorrupted Deliberation Principle is to do the work that it is supposed to do, this account must have the consequence that factual mistakes and collateral mistakes of law are inputs, while other mistakes of law are corrupted deliberation. As things stand, the Uncorrupted Deliberation Principle does not explain why ignorance of the law is not in general an excuse because Gideon assumes that mistakes of law are part of deliberation, rather than inputs to it, and that assumption does all the work.

6. Legal Reasons versus the Content of the Law and the Failure of the Law/Morality Parallel

Gideon cannot rest with the unqualified position that any mistake of law is a corruption of deliberation. Such a position would entail that mistakes of law can *never* excuse. In order to explain why some mistakes of law do excuse, he draws a distinction between the “legal reasons” and the content of the law, i.e., what the legal standards require, permit, and so on (13). As I will elaborate, he believes that legal reasons can come apart from the legal standards. And, according to the Uncorrupted Deliberation Principle, very roughly, if a defendant acts on mistaken beliefs about the content of the law, but accurate beliefs about the legal reasons, then the defendant is excused.

The legal reasons are standardly understood to be straightforwardly constituted by the content of the law, however, so the distinction between legal reasons and the content of the law—in particular, the notion of legal reasons with which Gideon is working—is unfamiliar. The distinction is crucial to Gideon’s account because, without it, he would be saddled with the consequence that mistake of law never excuses. We therefore need to look at the distinction carefully. (This is the third juncture mentioned in the introduction.)

As Gideon explains the notion of a legal reason, whether there is a legal reason to act in a particular way depends importantly on whether the most natural reading by a layperson of the language of a single statutory provision would suggest that the law requires such action (14):14

[The defendant] has a legal reason to get a foster care license before embarking on the scheme only if *when given its most natural interpretation* a statute directs her to get one. The fact that the statute *in fact*, as the court rules, directs her to get one does not imply, on this view, that she has a legal reason to get one: the legal reasons on this view are supplied by the most natural interpretation of the statute and not by the facts about what rule the law establishes, when the two diverge. Another way to put it: what legal reasons are supplied by a particular statute depends not just on the facts about what rule the statute lays down but also by the facts about uptake on the parts of ordinary citizens. [Emphasis in the original.]

If a statute uses a technical term without explaining it, then the legal reasons are only those that an ordinary nonlawyer would naturally take the statute to provide.15

Gideon thus explicates “legal reason” in terms of accessibility. It seems to me that there are two very different ways of understanding accessibility, depending on the work that it is supposed to do. The first understanding is suggested by Gideon’s use of the term “legal reasons.” If we take seriously the idea that accessibility is a necessary condition for the existence of a legal reason (on any recognizable way of understanding legal reasons), then the relevant kind of accessibility would be a relatively weak “in principle” accessibility. Moreover, because legal reasons are being used to explain legal desert and the excusing potential of legal mistakes, and legal desert (and Gideon’s explanation of when legal mistakes excuse) is supposed to be independent of moral notions such as desert or fairness, accessibility must not be based on moral notions.

By contrast, Gideon’s emphasis on what an ordinary layperson would naturally take a statutory text to mean suggests a very different picture. On this second way of understanding
the role of accessibility, Gideon’s basic idea is that one who violates standards that she is unaware of because, e.g., the statutory text is not clear enough, does not deserve punishment for that violation. This idea is a standard and familiar one about the unfairness of punishment without notice. It requires a very different understanding of accessibility from the “in principle” one—roughly, a legal standard is accessible if an ordinary person is reasonably taken to be on notice of it.

I address in turn the two different readings of Gideon’s argument that correspond to the two different understandings of accessibility. A preliminary point is that, on either understanding of accessibility, it is not tenable to place the great weight that Gideon does on what a single statutory provision would be understood by a layperson to say. (This may be evidence that neither understanding is what Gideon intends.) The point is obvious in the case of the “in principle” accessibility that is apt for understanding legal reasons. But even if we understand accessibility in terms of fair notice to an ordinary person, the statement of a requirement in clear ordinary language in a single statutory provision is neither necessary nor sufficient for the requirement to be accessible. It is not sufficient because there can be a perfectly clear statutory provision without an ordinary layperson having any reason to look for that provision (or to seek legal advice) or any way of finding it without expert legal help. It is also not necessary: if there is a reason for a layperson to be on notice that there may be a relevant legal requirement—for example, she is engaging in a type of activity that is often regulated (and widely known to be)—then the fact that the requirement is not something that a layperson would be able to glean from the relevant legal materials is not relevant. If she has reason to be on notice that there may be a relevant legal requirement, the reasonable thing for her to do is to consult a lawyer. In general, it is far more reasonable for an ordinary person to rely on a lawyer’s advice than to read one statute that she happens to be aware of and then to rely on her own interpretation.16

Turning to the first reading of Gideon’s argument, it is not clear to me that the content of the law and the legal reasons diverge in the way that Gideon believes. If a putative legal standard fails to provide reasons because it is inaccessible, why think that it is a legal standard?17 Thus, for example, if the relevant notion of legal reason is tied to what the law is all-things-considered most reasonably understood to be, I doubt that the legal reasons ever do come apart from what the legal standards require.

Of course, we could explicate “legal reason” in terms of a different understanding of accessibility. There would then be the question of whether the notion of a legal reason, so explicated, would be a theoretically useful notion. But the precise understanding of accessibility will not matter to my argument. What is crucial to the first reading is that it preserves Gideon’s idea that legal desert is independent of moral (or more general) notions of desert and fairness. Therefore, as noted above, accessibility must not be understood in terms of moral notions. Rather than pursuing the appropriate understanding of accessibility further, I will grant for purposes of argument that the legal reasons can come apart from the content of the law and argue that that assumption undermines Gideon’s structural parallel between legal desert and moral desert. Consequently, Gideon lacks an argument that legal desert is linked to (mistakes about) the legal reasons rather than the legal standards.

First, according to a plausible and widely held view that I assume here, in the moral domain, moral reasons and the content of morality—i.e., what morality requires, permits, and so on—do not come apart in the way that, according to Gideon, legal reasons and the content of the law come apart.18 There are no moral requirements that, because of their inaccessibility, fail to provide moral reasons.

This fact about morality raises a problem for Gideon’s explanation of why ignorance of the law generally does not excuse. As I have explained, Gideon’s central explanation of why one who is committed to wrong legal principles legally deserves punishment seems to depend on the background assumption that the legal domain in general has a structure parallel to that of the moral domain. My point is not that there is some tension between this background assumption and Gideon’s claim that, by contrast with the moral domain, legal reasons and the content of the law come apart. The problem is much more serious: once legal reasons are distinguished from the content of the law, the moral parallel provides no support for Gideon’s linking of legal desert to legal reasons, rather than to the content of the law.

Recall that Gideon supports his understanding of legal desert by appealing to a parallel with moral desert. As quoted above:

The degree to which people morally deserve punishment for choosing to act in a way unfavorable by the balance of moral reasons is the degree to which such a choice indicates a commitment to faulty principles for the recognition and weighting of moral reasons. The degree to which people legally deserve punishment for choosing to act in a way unfavorable by the balance of legal reasons is the degree to which such a choice indicates a commitment to faulty principles for the recognition and weighting of legal reasons. (20)

As long as we are not distinguishing legal reasons from the content of the law, it seems fair for Gideon to appeal to the law/morality parallel to support his understanding of legal desert. But, once Gideon draws his distinction between legal reasons and the law, the parallel no longer supports the claim that legal desert tracks (mistakes concerning) legal reasons rather than (mistakes concerning) the content of the law. Because moral reasons do not diverge from the correct moral standards, the parallel does not support Gideon’s understanding of legal desert over an opposing understanding on which the degree to which people legally deserve punishment for choosing to act in a way unfavorable by the balance of legal reasons is the degree to which such a choice indicates a commitment to incorrect legal standards. (Indeed, the most natural way of drawing the parallel between law and morality supports this opposing understanding of legal desert over Gideon’s.) But, on this opposing understanding of legal desert, ignorance of the law never excuses.

I now turn to the second reading of Gideon’s argument, on which he appeals to accessibility in order to argue that legal mistakes excuse when it would be unfair to punish defendants because of lack of notice. It is indeed plausible that one who has a mistaken legal belief because she was not provided with reasonable notice of the legal standards does not deserve punishment. I suggest that the source of plausibility here is not Gideon’s technical notion of legal desert, but rather the intuitive idea that one who violates standards that she is unaware of because they were not made available to her does not deserve punishment for that violation. This idea is a standard and familiar one about the unfairness of punishment without notice. It seems clear that the relevant notion of fairness or desert is either the ordinary, general notion or the moral notion, not Gideon’s specifically legal desert.

First, if this is the gist of the argument, casting it in terms of the Uncorrupted Deliberation Principle and the legal reasons/
legal content distinction does not seem helpful. It would be more straightforward and clear simply to argue that mistake of law should be an excuse when it is unfair to punish the defendant because the defendant lacked adequate notice of the relevant legal standards. (Gideon would still need an explanation of why legal mistakes do not excuse in other circumstances, which could be, for example, an account of why legal beliefs are part of deliberation, rather than inputs to it.) Also, the machinery may obscure a difficulty. If the argument rests on the reasons why it is unfair to punish someone without notice, we need to consider whether those reasons might be outweighed by other considerations in some circumstances.

Second, to the extent that his argument relies on fairness, Gideon would no longer have a reason for rejecting the straightforward explanation of why knowledge of the law is not generally required for criminal liability. My explanation appealed to the fact that people who commit mala in se crimes are typically morally blameworthy. Gideon’s reason for rejecting this explanation—at least according to my reconstruction—was that it depended on an intuitive notion of desert that was not relevant because not specifically legal.

Third, to the extent that the argument is based on straightforward fairness considerations, it is not clear that it yields the results Gideon wants, nor that it does a good job of preserving the data (though it may be that Gideon is happy for his proposal to be highly revisionary). For example, an argument from fairness would suggest that, contrary to current law, a defendant who has no reason to be aware that his activity is regulated by the criminal law should have an excuse if he acts on a mistake of law, even if the relevant statutes are clearly written.19 (If Gideon’s argument is ultimately based on fairness, he can no longer reject an excuse for such a defendant based on a technical notion of legal desert.)20 Similarly, fairness considerations might support an excuse for a defendant who reasonably relies on bad legal advice. This result again would be a large departure from current law, and not one that Gideon seems to intend.21

7. Conclusion
I conclude with a brief summary. First, I questioned whether it is right to hold that mistakes of law excuse less often than mistakes of fact. A mistake of fact excuses when, and only when, it negates an element of the offense. A mistake of law excuses whenever it negates an element and also in other circumstances. A better understanding of the asymmetry that Gideon seeks to explain is that understanding the nature of one’s conduct generally is and should be included in the elements of a crime, while understanding the illegality of one’s conduct generally is not (and perhaps should not be).

Second, if the appealing Uncorrupted Deliberation Principle is to do genuine work in explaining the asymmetry, we need an account of the distinction between, on the one hand, deliberation, and, on the other, inputs to deliberation that explains why mistakes of law are part of deliberation. If we assume that mistakes of fact are inputs to deliberation, and mistakes of law are part of deliberation, this assumption rather than the Principle does all the work. I suggested that collateral mistakes of law raise further important complications; for Gideon to address such mistakes would greatly advance understanding of his position.

Third, on Gideon’s view, the position that legal beliefs are part of deliberation has the consequence that, with the one exception of situations in which (according to Gideon) the legal reasons come apart from the content of the law, legal mistakes never excuse. This consequence is made to seem palatable by the deployment of the technical notion of legal desert. I raised several concerns about Gideon’s use of this notion. Most fundamentally, as Gideon explains legal desert, people who act on legally wrong principles are, for that reason, legally deserving of punishment (setting aside the qualification about legal reasons that come apart from the legal standards). In that case, the problem of explaining why knowledge of illegality is not generally required for criminality must not be understood as a problem about legal desert, on pain of trivializing the problem.

I suggested that the puzzle about the law’s treatment of legal mistake comes about because of a basic difference between legal mistake and (garden-variety) moral mistake: in a large class of cases, agents who perform legally wrong actions because of their false legal beliefs straightforwardly lack culpability. Gideon’s assumption that legal desert is parallel to moral desert—in particular, that one who is committed to acting on a legal mistake is ipso facto legally deserving of punishment—is therefore problematic in a paper devoted to explaining the law’s treatment of legal mistake.

At any rate, the comparison with the moral domain does not support Gideon’s suggestion that one who makes a legal mistake has a legal excuse when, and only when, the legal reasons do not reflect the actual legal standard. Because there is no analogue of the legal reasons/content of the law distinction in the moral domain, the case of morality cannot provide support for the idea that mistakes about the content of the law excuse only when the defendant acts on true beliefs about the legal reasons.

Finally, in order to explain how legal beliefs nevertheless can excuse in certain circumstances, Gideon must introduce the legal reasons/content of the law distinction. I suggested that the appropriate notion of accessibility for explicating legal reasons would be a weak “in principle” one that would leave extremely limited scope for mistakes of law to excuse (in fact, on my view, it would leave no scope). And the cases in which mistakes of law would excuse would not be those Gideon suggests—ones in which the law is different from a layperson’s most natural reading of a salient statutory provision.

Gideon’s emphasis on the way in which a layperson would naturally understand a statute suggests a different reading of his argument, according to which his explanation of why legal mistakes sometimes excuse is ultimately based on fairness considerations. I raised several concerns for the argument on this reading, including questions about the way in which Gideon understands fair notice. Most importantly, if fairness considerations explain why legal mistakes sometimes excuse, the Uncorrupted Deliberation Principle and Gideon’s ideas about legal reasons are not really carrying the explanatory burden. Similarly, an appeal to a technical notion of legal desert to defend the account would seem out of place if the account is ultimately based on fairness. At bottom, Gideon’s and my background disagreement about the relation between the legal and moral domains makes us understand differently both what the project of explaining legal mistakes is and what resources are available in that project.

Acknowledgments
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Endnotes
2. I believe that we have an ordinary understanding of desert that is more general than the moral. We deploy this general understanding in the moral domain and in other domains as
well, including the epistemic and the aesthetic. A philosopher who is sloppy in argumentation might deserve criticism or blame, and an artist who creates a beautiful and original work might deserve praise. And when children play games, they understand that someone who isn’t playing fairly deserves criticism. It seems plausible to me that when the issue is desert of punishment, it is moral desert that is relevant, but nothing in my paper turns on whether desert is understood morally or more generally. I will therefore not be careful about distinguishing moral desert from desert in general.

3. Gideon describes the asymmetry in slightly different ways at different points and also describes the project as identifying the truth in the adage that ignorance of the law is no excuse. See, e.g., 1-2, 4, 17.

4. Except when I am explicitly discussing collateral mistakes of law, I will mostly use “mistake of law” (and related terms) for mistakes that are not collateral.

5. I set aside very difficult questions about people who do morally wrong acts because they blamelessly have incorrect moral beliefs. Gideon Rosen has argued for the controversial proposition that blameless moral ignorance exculpates. For simplicity, I’m going to set aside issues about negligence for mistakes that are not collateral.

6. For simplicity, I’m going to set aside issues about negligence and recklessness.

7. More precisely, Gideon says that it is the fact that one is committed to an understanding of the relevant principles that is inaccurate that makes one legally deserving of punishment. See 20. In the article, he does not discuss the reason for the “committed to” formulation and does not seem to make use of the distinction between a defendant’s being committed to an understanding and a defendant’s merely acting on an understanding. Also, although he formulates his positive proposal (the Uncorrupted Deliberation Principle, see section 5 below) in similar “committed to” language, his discussion seems to equate being committed to accurate principles with following accurate principles. See 11. The distinction could only make a difference in two kinds of case: where the defendant acts on an inaccurate understanding, but is committed to an accurate one; and where the defendant acts on an accurate understanding, but is committed to an inaccurate one. In the relevant cases for our purposes, the defendant has in fact acted on his legal mistake—indeed, he has consequently satisfied the actus reus of a crime—so we can ignore the latter kind of case. Thus, the relevant effect of the “committed to” formulation is that someone who acts on the basis of a legal mistake, but is nevertheless committed to an accurate understanding, will not legally deserve punishment. (Perhaps the idea is that someone who acts without much reflection might fail to gain access to his own accurate understanding of the law.) It is not clear that this result is the right one, and, at any rate, it has little to do with the ways in which mistakes of law typically excuse. The “committed to” formulation also does not help to explain cases in which legal mistakes do not excuse. The qualification “garden-variety” is that, on some anti-positivist theories of law, legal mistake is a species of moral mistake. See Greenberg, “The Standard Picture and Its Discontents,” Oxford Studies in Philosophy of Law 1 (2011): 39-106; Greenberg, “Beyond the Standard Picture,” Oxford Studies in Philosophy of Law (forthcoming).

8. As noted above, I do not mean to insist on moral desert as opposed to a more general understanding of desert; I do not think the differences matter for present purposes. See section 1, especially note 2.

9. As noted above (note 5), it is controversial whether agents who take morally wrong action because of blameless moral ignorance are morally culpable. For purposes of this paper, I am granting Gideon’s widely held and plausible position that acting on “faulty principles for the recognition and weighting of moral reasons”, makes one morally deserving of punishment (20). Even if blameless moral ignorance exculpates, however, there are important ways in which the legal case is not parallel. For example, blameless legal ignorance is probably much more common than blameless moral ignorance. And violation of a malum prohibitum legal requirement because of epistemically blameworthy legal ignorance may often be insufficient to make an agent deserving of punishment.

10. The reason for the qualification “garden-variety” is that, on some anti-positivist theories of law, legal mistake is a species of moral mistake. See Greenberg, “Beyond the Standard Picture,” Oxford Studies in Philosophy of Law (forthcoming).

11. I want to set aside one quibble about the formulation of the Uncorrupted Deliberation Principle. According to Gideon’s formulation, the defendant is excused when “a false belief indicates that in his deliberations . . . D was committed to accurate principles . . . .” In order for a false belief to excuse, it might be sufficient for the belief, by explaining the wrong outcome, merely to leave us without evidence that the defendant was committed to inaccurate principles. I will ignore this complication throughout.

12. For an argument that the distinction between collateral mistakes and other mistakes is a matter of presentation, not substance, see Larry Alexander, “What’s Trial and Outside the Law?” forthcoming in Law and Philosophy.

13. Thanks to Larry Alexander for pressing me to say more about collateral mistakes of law. In the next section, I raise the possibility that Gideon would use his distinction between legal reasons and the content of the law to explain why collateral mistakes of law excuse.

14. In a footnote, Gideon credits Stephen Darwall for ideas related to the legal reason/content of the law distinction (14, n. 10). Gideon introduces the distinction with the example of “criminal prohibitions that are never to be enforced and are publicly acknowledged as such by legal officials” (13). I find the example confusing. If a particular statutory provision stating that certain conduct is prohibited fails to provide legal reasons, it is not clear why the provision succeeds in creating a legal standard prohibiting the conduct. In addition, there are legal duties, such as constitutional duties of branches of government, that are not enforceable, yet provide legal reasons. I do not further discuss the case of standards that are not enforced because, in conversation, Gideon suggests that the example does not in fact well illustrate the distinction he is trying to explain.

15. We may have a clue here as to how Gideon would treat collateral mistakes of law. His comments on legal reasons seem to suggest that a collateral statute defining a term does not provide legal reasons, even if the collateral statute is clearly written. For, if that were not the case, Gideon would not be able to draw conclusions about the absence of legal reasons and therefore about legal excuse from the fact that the statute under which the defendant is prosecuted is not clearly written. Collateral statutes, as well as judicial decisions, might provide the requisite clarification. The claim that collateral statutes do not provide legal reasons would enable Gideon to explain why collateral mistakes excuse: it would have the consequence that one who makes a collateral mistake of law does not get the legal reasons wrong and therefore does not have corrupted deliberation. But the claim that collateral statutes do not provide legal reasons would highlight the peculiarity of the notion of legal reasons.

16. A related problem concerns the focus on one statutory provision. On my view, the relevance of the legal materials

17. The long quotation in the third paragraph of this section (especially the second sentence) suggests that Gideon is influenced by the thought that court decisions sometimes interpret statutes differently from the most natural interpretation. First, however, if a wrong court decision, for example one decided by the highest court of the jurisdiction, succeeds in changing the law, so that the decision becomes a correct statement of the current law, the law may remain accessible because the court decision itself is accessible. Second, a decision by a court can be an incorrect statement of current law, even after it is decided. Therefore, the fact that the legal reasons are different from what a court says they are does not show that the legal reasons diverge from the content of the law. Third, because of holism (among other reasons), it does not follow from the fact that a court decision correctly holds that the legal standard is different from the most natural reading of the most salient statute that the legal standard was inaccessible before the decision was rendered. If a legal standard can be ascertained using standard methods, it is not inaccessible in the relevant sense.

On holism, see note 16 above.

18. In conversation, Gideon has indicated that he accepts this view.

19. The Supreme Court’s decision in *Lambert v. California*, 355 U.S. 225 (1957), seems to suggest a fairness argument somewhat along these lines, but the decision has largely not been followed.

20. See 19.


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**Defending, not Excusing, “Excusing Mistakes of Law”: Replies to Guerrero and Greenberg**

Gideon Yaffe  
Yale Law School

Alex Guerrero and Mark Greenberg offer very thoughtful criticisms of my position. I am very grateful to them both for their participation in this symposium. In what follows, I reply to three criticisms offered by Guerrero and three offered by Greenberg. These six criticisms overlap in various ways, and so I have broken my discussion into four sections. Section 1 concerns what Guerrero and Greenberg have to say about my account of the cases of defendants, understanding of the modes of recognition and response to reasons of particular defendants, characterizations motivated by, rather than serving to explain, prior intuitions about which defendants deserve excuses and which do not. My discussion of Guerrero’s objection on this point provides me also with an opportunity to respond to Greenberg’s request for clarification about mistakes regarding laws that bear on the definition of various legal predicates such as “being one’s own” which frequently have relevance to criminal responsibility.

1. Legal and Moral Reasons

Greenberg describes what he calls the “straightforward” explanation of the asymmetry between the excusing force of mistakes of fact and law, an explanation that he endorses. The straightforward explanation starts with the observation that it is rarely if ever the case that moral responsibility for wrongdoing requires belief that one is doing wrong. Often, in fact, wholehearted belief that one is doing the right thing, when one does wrong, increases the degree of wrongdoing of one’s conduct. If you destroy someone’s reputation in response to a minor slight issued by his relative, your conduct is worse, not better, when you also self-servingly believe that you were in the right. Since many crimes are also moral wrongs, it is no surprise that one need not know that what one is doing is illegal in order to be justifiably punished for it. Or so the straightforward explanation goes.

Notice that it does not follow from the fact that one need not know that one’s conduct is morally wrongful to be morally responsible for it that one need not know that one’s conduct is legally prohibited to be legally responsible for it. Maybe criminal responsibility requires beliefs that moral responsibility does not. So, the straightforward explanation at least requires supplementation if it is to suffice. Everyone recognizes that the criminal law bears some sort of relation of at least similarity or analogy to morality. But if the straightforward explanation is to succeed, we need an account of the nature of this relation that explains why both law and morality rarely require for responsibility belief that one is doing wrong.

In fact, I myself accept the straightforward explanation. As I see it, it is not an alternative to my position; rather, I put the meat on the bones. I offer tools for explaining the similarity between morality and criminal law thanks to which the straightforward explanation goes through. To see this, note that we need an explanation for the moral fact that belief that one’s conduct is wrongful is not generally necessary for moral responsibility. Why doesn’t moral responsibility require belief that you are doing wrong? I have an answer: moral responsibility requires that among the contributors to one’s wrongful conduct is a failure to recognize or properly respond to a moral reason for action. But the fact that conduct is morally wrongful is not itself among the reason-giving facts that one must fail to recognize or respond to in order to be responsible. And this itself is easily explained, for the wrongfulness of conduct is not part of what makes that conduct wrongful. Its wrongfulness is constituted, instead, by, for instance, the fact that someone is severely injured at another’s hand. So, when I insist that mistakes of law often fail to excuse because they fail to show that the defendant is recognizing and responding to legal reasons as he ought, I am really exploiting exactly the parallel between the moral and the legal that Greenberg points to. I am giving the very same explanation for why legal ignorance does not excuse from criminal responsibility that, I believe, ought to be given in explanation of why moral ignorance does not excuse from moral responsibility.

The point here links to Guerrero’s first criticism which focuses on my conceptualization of the case of the man who rapes his wife falsely believing that there is a marital exemption to rape. A fixed point of the discussion is that the marital rapist’s false belief does not provide him with an excuse. My explanation for why it does not is this: The belief indicates that the marital rapist did not take his wife’s lack of consent to give him any legal reason to refrain from having sex with her. Since, in fact, anyone’s lack of consent does indeed provide such a reason, there is something wrong with the way in which the marital
rapist recognizes legal reasons. He fails to see the reason-giving force of another’s lack of consent.

Guerrero, as I see it, disputes only one part of this explanation: the emphasis on legal reasons. If the failure to recognize the wife’s lack of consent as providing a reason to refrain is explanatory of the failure of the false belief to excuse, it is because the man also has a moral reason to refrain given her lack of consent. Guerrero’s worry is that the legal status of the reason in question is, at best, an idle wheel. The real explanatory work is done by the fact that the reason in question is moral; it is a reason that he would have even if there were a marital exemption to rape (as the man believes).

Of course, lack of consent provides a moral reason to refrain from sex quite independently of what the law happens to say. But, still, it would be inappropriate for the state to punish the marital rapist if, indeed, there were a marital exemption. This is just the commonplace point that the Principle of Legality—stating, roughly, that punishment is never to be issued to those who did not break the law, no matter how morally objectionable their behavior—is valid. Precisely what it is that makes the Principle of Legality valid is far from clear. However, there is one way of thinking about that question that provides support for the position that I advocate.

To see this, start by noticing that one might think (and I do think) that criminal prohibitions express our view of what is wrongful; they express the deliverances of social conscience. Social conscience, like individual conscience, can be deeply mistaken, objectively speaking. We might think some wrongful behavior is not wrongful, and we might think wrongful some behavior that is not. And, like the committee’s opinion, which is often different from the opinion of every member of the committee, our conception of what is wrongful is often different from what any one of us thinks is wrongful. Further, and importantly, what we think and what we say we think are very closely related. Arguably, in fact, provided that our expression of our opinion has come to pass through procedures for expressing it that we endorse—by, say, being published following passage by a majority vote of an elected legislature—there is no difference between what we think and what we say we think. What we think often just is what we say we think.

Now the appealing idea that criminal punishment should be issued only for wrongful behavior is ambiguous. The ambiguity of note here is between the claim that criminal punishment should only be issued for truly morally wrongful behavior, and the claim that criminal punishment should only be issued for behavior that we have deemed wrongful, for behavior, that is, that is condemned by our social conscience. I think both claims may be true, but the second certainly is. I take the Principle of Legality to be entwined with that second idea. The reason that we should punish behavior only if it is illegal (and criminal, at that) is that in a properly devised criminal code, a code that has been established through procedures that we endorse, that which is illegal corresponds with that which social conscience condemns. To punish behavior that is not illegal would be to sin in a more fundamental way: it would be to punish behavior that is not wrongful—that is, behavior that is not condemned by our social conscience. The Principle of Legality, that is, is derived from the claim that we ought to punish only that which is condemned by social conscience, given some subsidiary and plausible premises.

So my reply to Guerrero’s challenge regarding the marital rapist who falsely believes that there’s a marital exemption is this: The legal status of the reason to refrain provided by his wife’s lack of consent is essential to the explanation for the failure of his false belief to excuse. The legal status of the reason is no idle wheel. Rather, it shows that the marital rapist is failing to recognize a reason that we take him to have. Since it is we who will punish him—that is part of what criminal punishment is, in contrast to the sort meted out, for instance, by parents to children—his failure to recognize or properly weigh a reason that we take him to have is part of what justifies our punishment of him. The fundamental logic of moral desert is mirrored in the logic of criminal punishment. Just as no one morally deserves punishment in the absence of moral wrongdoing, nobody legally deserves punishment in the absence of legal wrongdoing, that is, in the absence of conduct that is condemned by social conscience.

Invoking, as I just did, a necessary condition on legal desert does not provide an adequate elucidation of the concept. Greenberg quite reasonably asks for more detail about this idea than I supplied in the paper. He also worries that if the idea is fleshed out, it will be exposed to be either no different from moral desert, or else empty of explanatory value. If it isn’t just moral desert, then to be legally deserving of punishment, he worries, will turn out to be just a name for what we are seeking to understand better, namely, that which is blocked by certain mistakes of fact but not by certain mistakes of law. The worry is in some ways parallel to Guerrero’s: both are concerned that my appeal to the legal version of a familiar moral notion (reasons, desert) is a blind.

But I don’t think this is right. Consider the following idea. When someone refrains from wrongdoing for the right reasons, he recognizes sufficient reason to refrain and responds to that reason. Now consider someone who fails to refrain from wrongdoing, and fails thanks to a failure to recognize or respond to the reasons for refraining. What does that person deserve in response to this failing? Perhaps what he deserves is treatment that has the following property: Had he recognized that such treatment would result from his conduct he would have treated the idea of performing the act in something very close to, or analogous to, the way in which the person who refrained treated that idea. That is, what people deserve is treatment that places them in the space of reasons in a position very similar to the position occupied by those who act as they ought for the right reasons.

I do not claim, full stop, that this is an adequate account of desert. (Among other things, for it to be adequate we would need to know in what ways the two “positions in the space of reasons” must be similar.) Rather, it is a hypothesis about what desert consists in. I think it’s an appealing hypothesis, but that’s all it is. Still, if it is correct, a first observation is that nothing in the account of desert just offered specifies the nature of the reasons at issue. If the reasons are moral, then the kind of desert in question is moral desert. If the reasons are legal, then legal. What you are legally deserving of is what would lead you to consider the act you performed as supported and unsupported by reasons in something analogous to the way in which the person who responds properly to legal reasons would consider it to be. If this is right, then the notion of legal desert is as distinct from the notion of moral desert as legal reasons are from moral reasons. And if this is right, then the notion of legal desert is as capable of explaining what it is that makes certain forms of treatment appropriate as the notion of moral desert is. Legal and moral desert are just species of a larger genus.

To bring the discussion of this section full circle, return to the straightforward explanation of the fact that mistakes of law do not excuse as readily as mistakes of fact: morality does not require for responsibility belief that one is doing wrong. I claim that the reason that this is also true of law is that both criminal law and morality employ a notion of responsibility that is linked to desert, and desert does not require a failure to recognize or respond to the reason-giving force of wrongfulness itself, but,
instead, a failure to respond to the reason-giving force of the wrong-making features of conduct. This invites the worry, then, that what matters to law is moral desert. And to this worry I respond that crucial to law, in contrast to morality, is also the idea that punishment is unjustified unless the conduct for which it is issued is in violation of social conscience, an idea that finds expression in the Principle of Legality. To explain the grain of truth in the slogan that ignorance of law does not excuse, we need to appeal to the idea that those who make mistakes of law are often, still, legally, and not just morally, deserving of punishment.

2. The Inputs and the Fundamental Workings

In my paper, I use an analogy to get at an idea that is difficult, although not impossible, to articulate without its aid. I analogize an important distinction between two kinds of causal contributors to bad behavior to the distinction between the inputs to a machine and the workings of the machine itself. You pick up the calculator to help you to answer your question: what does $2 + 2$ equal? The calculator might answer “5” either because you entered a 3 when you intended to enter a 2, or because there’s something amiss with its addition algorithm. If the problem is of the former sort, the calculator is unworthy of criticism; you should just be more careful when you press the buttons. If the problem is of the latter sort, you might try to get your money back, or toss the thing in the trash. And, similarly, I claim, if by citing a false belief one is able to make the case that one’s bad behavior is due to the first sort of problem, then one has earned an excuse, and not so in the case of the second (which isn’t to say that one couldn’t earn an excuse on independent grounds). The right question to ask, and both Greenberg and Guerrero ask it, is how, exactly, the distinction in contributors to bad behavior, the distinction that is analogous to that between inputs to the machine and its fundamental workings, is to be drawn. Guerrero thinks that it cannot be drawn in a principled way. And so he thinks that my explanation of the asymmetry in the excusing force of mistakes of fact and law is fundamentally unprincipled. Greenberg expresses less skepticism than Guerrero, but he shows that under one natural way of reconstructing my position on this point, the position is inadequate.

Let me start with Greenberg. Greenberg takes me to hold the view that beliefs about the law are parts of the fundamental workings of the deliberative machine, while beliefs about the fact are inputs to deliberation. He then shows that this is indefensible, noting that, among other things, such a view has false implications concerning so-called mistakes of “collateral law.” More about mistakes of collateral law in section 3. For now the central point is that I do not hold that beliefs about the law are fundamental features of deliberation while beliefs about the facts are inputs to deliberation. Rather, I hold that all beliefs, whether about the facts or the law, whether about what is legally prohibited or what the legal definition of a term is, are (at most) inputs to the deliberative machine. What a person believes is not, itself, that fact about him that is crucial for his responsibility for wrongdoing. What is crucial are his modes of recognition and response to reasons. Often, a person’s beliefs tell us a great deal about what his modes of recognition and response to reasons are. But they are not themselves such modes. This is perhaps most clearly illustrated by deeply mistaken normative beliefs. Consider someone who believes that it is permissible for white people to enslave black people. This is not itself the fact about him that might turn out to be crucial to his responsibility for, for instance, giving money to the Ku Klux Klan. The fact of relevance to his responsibility for such conduct is his failure to recognize that a person’s humanity provides sufficient reason not to enslave him. His belief provides us with excellent evidence that this person possesses this fault. But it is the failure to recognize the relevant reason, and not the belief, that is a fundamental feature of his deliberations.

Now let me consider how Guerrero develops his concerns about the distinction between the inputs and the fundamental workings of the deliberative machine. As it turns out, the issues here are intertwined with some deep issues about the nature of responsibility. Guerrero mentions Galen Strawson’s argument against the very possibility of responsibility, and although he does not come out and endorse it, he seems sympathetic. I am not. As I see it, Strawson fails to recognize that there are some contributors to bad behavior that make the agent responsible for that behavior despite the fact that the agent is not responsible for the existence of those contributors. In fact, I take agents’ modes of recognition and weighing of reasons to be contributors of this sort. The idea here is the intuitive one that one cannot deflect responsibility for, for instance, lighting a cat on fire by noting that one doesn’t give a damn about how much pain the cat was in. And the plea is just as lame when it is discovered that one’s not giving a damn is a product of genetics and upbringing which were, in turn, the inevitable result of the state of the universe at the moment of the Big Bang. Failing to take a creature’s pain as a reason not to do something is, sadly, a contributor to much bad behavior. But it is not a contributor that one needs to be responsible for the existence of in order to be responsible for the bad behavior to which it contributes. If that’s the way you are, then that’s part of the reason why you are responsible for the bad behavior that that way of being contributes to, even if it is entirely not your fault that that’s the way you are.

This idea, or ideas of similar stripe, is fundamental to compatibilist conceptions of responsibility, conceptions that I find very appealing. However, the view of mistakes of law developed in the paper is intended to be neutral with regard to disputes between compatibilists and incompatibilists. What I hope is that something illuminating can be said both from a compatibilist and incompatibilist point of view about the distinction between contributors to bad behavior that I analogized to the distinction between the inputs and the fundamental workings of the machine. Since if I can convince an incompatibilist that there is a principled way to draw this distinction, I can also convince a compatibilist, I’ll tackle the issue from the incompatibilist point of view.

Now, incompatibilists will allow that there are contributors to bad behavior that must be present for the agent to be responsible for that bad behavior. Incompatibilists agree, crucially, that agents are not responsible for their bad behavior if that behavior is not a product of the way in which the agent recognizes and responds to reasons. Incompatibilists like Galen Strawson, however, add that the presence of such a contributor has no bearing on responsibility unless the agent is responsible for its presence. To be responsible, on this view, it’s not enough that one lit a cat on fire in part due to the fact that one did not give a damn about its pain; it must also be the case that one is responsible for the fact that one did not give a damn. Notice that many contributors to bad behavior are in no way necessary for responsibility for that bad behavior. A contributor to lighting the cat on fire is the cat’s birth. But had the cat been cloned in a lab, and never actually born, the agent might still be responsible for lighting it on fire. The point is that incompatibilists can and do recognize that there is a distinction between contributors that are necessary for responsibility and those that are not; they just add that responsibility for the bad behavior also requires responsibility for the presence of some, or even all, of the contributors.

Now, among those contributors to bad behavior that are necessary for responsibility for it there are those that are
necessary in themselves (call those “fundamental”) and those that are necessary merely because they always accompany those contributors that are necessary in themselves. To be responsible for a theft one must fail to recognize as a reason, or fail to sufficiently weigh the reason, to refrain from taking an object provided by the fact that the taken object is not one’s own. This is fundamental to responsibility for theft. Such a failure is invariably accompanied by some mental state pertaining to that fact, such as a belief that the object is not one’s own, or awareness of a good chance that it’s not, or even the absence of awareness that it’s not in circumstances in which someone who cared would have been aware of that. The relevant mental state is necessary for responsibility for theft. But it is not the fundamental necessary condition; rather it accompanies the fundamental necessary condition, which is the agent’s failure to recognize or properly weigh the reason to refrain provided by the fact that the object is not one’s own. Incompatibilists should allow for this distinction, too, with the proviso that even the fundamental necessary contributors to bad behavior are things for which one must be responsible if one is to be responsible for the bad behavior to which they contribute. Compatibilists will deny the proviso, but there is, or should be, agreement here on the distinction that I seek.

Now this allows us to say something rather more illuminating about the distinction between contributors to bad behavior that I analogized to the fundamental workings of the machine, and those analogized to the inputs to the machine. The former sort of contributors to bad behavior are those that are both necessary for responsibility for bad behavior and fundamental; the latter are all the other contributors to bad behavior, including those that are necessary but not fundamental. So, it is because I take an agent’s modes of recognition and weighing of reasons to be fundamental to responsibility that I would analogize them to the workings of the machine. And it is because I take mental states of various sorts to accompany that which is fundamental, but not to be, themselves, fundamental, that I would analogize them to inputs to the machine. Is this a principled way of drawing the distinction between “workings” and “inputs”? I think it is. But it must be acknowledged that how illuminating one finds it will depend on how easy one finds it to classify particular contributors to bad behavior as fundamental to responsibility for that behavior. People probably differ in this regard.

Now consider a remark of Guerrero’s:

[It is not obvious, given Strawson-style concerns about moral responsibility, that how an agent deliberated is more morally central for desert than what an agent believes, particularly when those beliefs can include beliefs about morality, what is valuable, and non-moral facts related to those questions. For one, it seems that how we deliberate—and in particular how good we are at deliberation—can be equally out of our control (on some natural understanding of control) as what we believe. (Guerrero, §II)]

This remark begins as a challenge to the claim that modes of recognition and weighing of reasons are fundamental where beliefs are not. And, to be sure, I have not defended that claim; the truth is that while I think it’s true, I don’t have an argument for it. But the passage continues by suggesting that a reason to doubt the distinction is that both kinds of contributors are equally out of (and, we might add, equally in) our control. Fair enough, but the point is not relevant to the issue. What I require is only that modes of recognition and response to reasons are fundamental, while beliefs are at most necessary concommitants of what is fundamental. This can be true even if a further necessary condition on responsibility is the incompatibilist condition that one, or both, must be something for which we are responsible, a condition that might, in turn, require some kind of control over the presence or absence of the contributor to bad behavior.

My central claim is that false beliefs about the law frequently accompany objectionable modes of recognition and weighing of reasons, where false beliefs about the facts often explain bad behavior in a way that is consistent with perfectly acceptable such modes. This claim is of interest, however, only if modes of recognition and weighing of reasons are fundamental to an agent’s responsibility for bad behavior in a way that beliefs are not. Since, as Guerrero points out, there is probably no difference in the degree to which each is under our control, a difference in control cannot be what makes the one and not the other so important to responsibility. So, what does account for this difference? The truth is that I don’t know (although I very much wish I did). But nor do I need to know for my purposes in the paper. It need only be true.

So, I hereby acknowledge that the distinction between those contributors to bad behavior that are fundamental to responsibility and those that are merely necessary for responsibility is undertheorized. I feel confident, however, about three things about this distinction. First, beliefs are not fundamental while modes of recognition and weighing of reasons are. Second, the distinction is not to be drawn on the basis of which contributors to bad behavior are under the agent’s control. Control over the contributors to bad behavior might or might not matter for responsibility, or might matter sometimes and not others—this is an issue to be settled between compatibilists and incompatibilists. But the debate is orthogonal to the distinction that I seek to make. And, third, there simply has to be something to this distinction. It’s just obvious that some of the contributors to bad behavior are irrelevant to responsibility and others matter to it. And the intuitive pull of the idea that modes of recognition and response to reasons are fundamental to responsibility is too strong to ignore. Whether more can be said to illuminate the distinction, I don’t know.

3. The Contributors to Bad Behavior and “Collateral” Mistakes of Law

Guerrero offers an interesting objection concerned with the proper characterization of the contributors to bad behavior in cases like Smith and Cheek. Guerrero’s worry is that Smith could, consistent with all the facts, either be characterized as improperly failing to grant reason-giving weight to the fact that the wire he takes is installed behind the wall, or as properly granting reason-giving weight to the fact that an object is his in his deliberations about whether or not to take it. If characterized in the first way, Guerrero takes me to be committed to denying Smith’s excuse. While if characterized in the second, Guerrero takes me to be committed to granting it. And, further, Guerrero wonders whether there is a fact of the matter about how to properly characterize the case.

It seems to me, however, that both things are true: Smith does not recognize the legal reason not to take the wire without permission and there is, indeed, such a reason. And, Smith does recognize the legal reason to refrain from taking things that are not his and there is, indeed, such a reason. The question is which failure, or both—a failure to recognize the reason not to take something from behind a wall, or the failure to recognize a reason not to take something that is not yours—is necessary for criminal responsibility for theft. It’s obvious that the latter failure is necessary. Perhaps the former is also, but that’s neither here nor there. If Smith shows that he fails to satisfy a necessary condition for responsibility for theft, then he’s not responsible for theft even if he meets other necessary conditions. In citing his mistake of law, Smith shows that he granted adequate reason-giving weight to the fact that an object belongs to someone.
This kind of case is nicely contrasted with the hypothetical Battersby case described in the paper. In the hypothetical, more than 30 days of care of another’s children for money requires a license. Battersby thinks that the rule is one month, rather than 30 days, and cares for another’s children for a single 31-day month without a license, in violation of the statute. So, Battersby fails to recognize that providing 31 days of care gives one a legal reason to either refrain or get a license. Now in Smith various properties of the wire the defendant took—in particular, that it was installed behind a wall in someone else’s building—entailed, given the law, that the wire had another salient property: it belonged to someone else. In the hypothetical Battersby case, there is a property of the act that is analogous to the property of being installed behind a wall in another’s building: the property of lasting for 31 days. But there is no property analogous to belonging to another. If there are risks to children involved in 31 days of care provided by someone unvetted by the state, there are also such risks when the care only lasts 30 days. The 30-day cutoff is a way of avoiding use of a vague notion—the notion of “too much” unlicensed care—while still properly classifying many cases in the way that that vague concept would classify them. Perhaps the defendant in a case like this is responsible only if she recognizes that she has a reason to refrain from giving too much unlicensed care. But the hypothetical Battersby’s ignorance about the legal rule does not tell us that she was unaware that she was providing too much unlicensed care, and so it does not tell us that she granted adequate reason-giving weight to that consideration. She may have been entirely aware that she was providing too much care while at the same time thinking that that gave her no legal reason to refrain. (And, in fact, had that been what she was thinking, she would have been right, for even those who are giving too much care while providing only 30 days of care have no legal reason thereby to refrain. The law has not given legal status to the reasons provided by excessive care.) Unlike in Smith, in which the defendant’s legal mistake results in his failure to recognize the presence of a property that he takes to give him legal reason, Battersby’s legal mistake does not show her to have been recognizing, weighing, and responding properly to facts that provided legal reason to refrain from the conduct in which she engaged. So, I stand by the result that her mistake of law does not excuse.

Contained in the remarks just made about Smith, Cheek, and the hypothetical Battersby are the seeds of a response to Greenberg’s request for a discussion of so-called “collateral” mistakes of law. Traditionally, as Greenberg notes, mistakes about non-criminal law, “collateral mistakes of law,” have been treated differently from mistakes about criminal law. Mistakes about collateral law are far more likely to excuse, as a matter of positive law, than are mistakes about criminal law. As commentators have noted, there is no principled reason to treat mistakes differently depending on whether the title of the section of the code about which the defendant is mistaken includes the word “criminal.” And more sophisticated ways of drawing the line between criminal and collateral law provide a no better rationale for this practice. However, I believe that there is good reason for distinguishing between mistakes about laws that establish the boundaries of certain predicates—such as “is one’s own,” or “consecutive days,” or “consented to,” or even “is alive”—and mistakes about what well-defined forms of conduct are legally prohibited. And mistakes of the former sort often concern non-criminal law.

Take the predicate “is one’s own.” Responsibility for theft requires that one fail to recognize or properly weigh the reason that the fact that property is not one’s own gives one not to take it without permission. But someone may recognize that one has such a legal reason and fail to recognize that a particular piece of property is not one’s own. Someone who acts badly by taking something that belongs to someone else thanks to this failure is not criminally responsible for his act precisely because he has proper modes of recognition and response to reasons. If this happens to be due to a mistake of law, as in Smith, then the relevant mistake excuses. In bearing on the boundaries of a legally defined predicate, the mistake functions in just the same way that a mistake of fact functions. The distinction in treatment of mistakes of collateral and criminal law is, as I see it, the law’s groping effort to capture the truth that some mistakes of law operate in exactly the same way as mistakes of fact. Many, although not all, such mistakes are mistakes of collateral law. But it is not this feature of them that supports treating them the same way as mistakes of fact. It is, instead, the further feature that when such a mistake contributes to bad behavior it often does so consistent with the operation of perfectly acceptable modes of recognition and response to reasons.

So, as I see it, although I did not emphasize the point in the paper, there is one set of mistakes of law that excuse for the very same reason that mistakes of fact excuse. Virtually none of these mistakes of law, however, concern what is legally prohibited; they concern, instead, the definitions of legal terms or the boundaries of legally relevant properties. As Greenberg notes, I also hold, and do emphasize in the paper, that there is a class of mistakes about what is legally prohibited which excuse because, although the defendant is mistaken about what is prohibited, he responds correctly to his legal reasons. To make good on this idea, I distinguish between what is prohibited and what a defendant has legal reason to refrain from doing. These can come apart, I claim, because of the following pair of facts: (1) There is a legal reason to refrain from conduct of type C only if properly situated citizens would recognize such a reason, and (2) Conduct of type C can be prohibited even if properly situated citizens would not recognize any legal reason to refrain from it. I take (1) to be true because, as Greenberg explores in his paper, of some fact about fair notice. I take it, rather, to be true because of the very nature of legal reasons. Perhaps they are, as Stephen Darwall suggests, second-personal reasons: reasons that are generated through acts of address—in the legal case, acts of the state addressing its citizens. The generation of such reasons requires something like uptake on the part of properly situated citizens; without such uptake, there is no legal reason. But I think it is much easier to prohibit a type of conduct than it is to generate a legal reason to refrain from it. To prohibit it you just need to pass a statute that prohibits it. There is no uptake condition. The result is that if someone makes a mistake about what is prohibited—he thinks conduct is not prohibited even though it is—he may lack a legal reason to refrain from the act due to failure of the uptake condition. In the paper, I suggest that this takes place when a statute defining an offense uses an ordinary term in some technical way that no ordinary citizen, maybe not even an ordinary lawyer, could possibly hope to figure out.

Greenberg doubts that there are ever cases in which a form of conduct is prohibited without there being a legal reason not to perform it. This implies that in cases of the sort that I have in mind, where a statute says that conduct is prohibited, but uptake conditions are not satisfied, one of two things is true: either the conduct is not really prohibited, or else it is prohibited but uptake is not required for the generation of a legal reason. Although I’m not entirely sure, I think that Greenberg prefers the former analysis of such cases. However, if this is right, then the
relevant kinds of cases do not involve any mistake of law. When
the agent thinks his conduct is not prohibited he is correct. And
so in such cases, there is, trivially, no mistake excuse since
there is no mistake. If that is right, then I am wrong not about
which mistakes of law succeed and fail to excuse and why but,
instead, about where you find them and how prevalent they are.
Given that my goal in the paper is to understand the conditions
under which mistakes of law do and do not excuse, I am not
too concerned about being wrong only about the frequency
with which the relevant conditions are actually satisfied. If,
alternatively, in such cases the conduct is prohibited and
there is a legal reason not to perform it, despite the absence of
uptake, then I am committed to saying that the legal mistake
does not excuse. After all, it fails to show that the defendant
is responding to legal reasons as he ought. In defense of this
result, all I can do is reiterate the remarks made in section 1:
legal desert of punishment requires a failure which we find in
such cases despite the defendant’s false legal belief, namely, the
failure to recognize or properly weigh a legal reason for action.
I am content with these results, and so on this point I am also
inclined to stick to my guns: I really think that legal reasons are
hard to generate, they require uptake, while legal prohibitions
are easy to generate, they merely require statutes or other
pronouncements that have been given legal force through the
implementation of proper procedures.

Conclusion
The beauty of a small symposium of this kind, which, in this
case, is taking place several years after I wrote the paper that
the symposium concerns, is that it gives you the opportunity
to revisit and rethink earlier work. While I continue, hopefully
not merely due to stubbornness, to endorse the views that I
offered in “Excusing Mistakes of Law,” I also see now, thanks
to Guerrero and Greenberg, a variety of deeper philosophical
positions that are assumed by the views that I endorse and for
which I have not provided independent argument. But you
have to start somewhere. And I am very grateful to Guerrero
and Greenberg for giving me the opportunity to reexamine
my efforts to flatten one bubble in the rug, even if I now see a
variety of ways in which the bubble has popped up elsewhere.