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Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay

Kenneth W. Simons

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MISTAKE AND IMPOSSIBILITY, LAW AND FACT, AND CULPABILITY: A SPECULATIVE ESSAY*

Kenneth W. Simons**

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The criminal law doctrines of mistake and impossibility can be quicksand. To avoid intellectual quagmire, one must step lightly and briskly through a number of related issues: the culpability requirements for criminal law offenses; the actus reus and culpability requirements for attempts; the distinction between fact and law; and even the distinction between the law governing an offense and the law incorporated in an offense element. Judges and commentators struggle mightily over such questions as the following: Should "legal" and "factual" impossibility be distinguished? If so, how? Should some legal mistakes be treated in the same manner as factual mistakes? Which ones?

Under the powerful influence of the Model Penal Code (hereinafter "MPC"), modern American criminal law has apparently simplified the analysis of these issues. With respect to completed crimes, all mistakes are just a matter of logical relevance, exculpating if and only if they negate the required mens rea. With respect to attempts, all impossibility defenses are rejected, save cases in which the principle of legality controls. But, I regret to report, matters are not so simple.

The modern solution gives insufficient attention to the distinction between two different types of legal mistakes—legal mistakes concerning governing law and legal mistakes concerning an offense element.¹ It incorrectly suggests that legal impossibility (or inculpatory legal mistake) as to an offense element should excuse.² It fails to consider adequately the culpability of the actor's mistake, especially as that affects her liability for an impossible attempt.³ Finally, it assumes, without sufficient argument, that legal mistake concerning an element and factual mistake should be treated identically. I will offer a different view. Although existing law permits an unreasonable factual mistake to excuse, ordinarily only a reasonable legal

¹ See text accompanying notes 18-42 *infra*.

² See text accompanying notes 36-42 *infra*.

³ See text accompanying notes 91-127 *infra*.

mistake concerning an offense element should excuse.⁴

This essay does not simply critique existing law. More importantly, it explores and connects criminal law concepts and doctrines that have heretofore received relatively superficial, and disconnected, attention. Although the criminal law literature hardly has neglected the topics of mistake and impossibility, it has neither fully explored their symmetries and asymmetries nor fully mined the insights of modern element analysis, which, unlike traditional analysis, permits us to dig deeply into different levels of culpability.

Part I of this essay elucidates a somewhat idealized model of mistake and impossibility. I begin with six basic examples to distinguish mistakes of fact, of governing law, and of legal element. After applying the model to some classic examples, rejecting the traditional "legal" impossibility approach, and clarifying the fact/law distinction, I refine the model by considering the culpability of the actor's mistake in a manner consistent with modern element analysis and the MPC culpability categories.

Part II casts doubt on the conclusions in Part I. Part II begins by examining some of the practical difficulties in reliably ascertaining the mental states that are relevant under the model. I then reconsider the problematic distinction between legal mistakes concerning governing law and legal mistakes concerning offense element, and question whether the equal treatment of factual mistakes and legal mistakes concerning offense elements adequately serves criminal law policies. In Part III, I suggest further refinements to deal with purpose, hope, and accident, and I criticize George Fletcher's "rational motivation" test of attempt. A conclusion follows in Part IV.

Before I begin, a brief comment about the nature of the task at hand is necessary. My project is both positive and prescriptive, an effort both to identify and to criticize the existing legislative and judicial approaches to mistake and impossibility. Much of my criticism, however, is limited in scope. For example, I do not reopen the question whether all factual mistakes should be reasonable in order to exculpate, or the question whether reasonable legal mistakes concerning governing law should excuse. I do reconsider, however, the treatment of other categories of mistake and impossibility in light of these less controversial starting points. The model employs element analysis and largely follows the MPC, though it also presents some novel conclusions that the Code does not specify but plausibly would engender.

⁴ See text accompanying notes 155-168 *infra*.

I propose a general, presumptive approach for certain broad categories of mistake and impossibility.⁵ A much more particularized approach is also possible. For example, a legislature or court might carefully specify which types of mistakes, ignorance, and impossibility are relevant to criminal liability for every separate crime. These specifications would identify either the requisite mens rea or the scope of an excuse. But this approach, enunciating mens rea or excuse crime by crime, would be needlessly cumbersome, and would be warranted only in a small subset of cases. Moreover, the particularized approach might conceal important commonalities in the way the legislature or court wishes to treat criminal culpability. In this essay, I try to describe the relevance of mistake, ignorance, and impossibility more generally. However, I do not mean to suggest that legal decision-makers are never justified in articulating more specific, contrasting rules for some crimes.

I. FIRST THOUGHTS: AN IDEALIZED MODEL OF MISTAKE AND IMPOSSIBILITY

This Part presents an idealized model of mistake and impossibility. I recognize that some of the distinctions in the model might be too subtle or elusive for the criminal justice system to recognize. A later Part takes a more practical view of the efficacy of the model.⁶ Nonetheless, I begin at the theoretical level to explore some of the conceptual underpinnings of the law's treatment of these difficult topics.

⁵ I address mistake and impossibility as they relate to the material definitional elements of offenses, not as they relate to the elements of defensive justifications and excuses. For discussions of the latter, see Williams, *The Lords and Impossible Attempts, or Quis Custodiet Ipsos Custodes?*, 45 *CAMB. L. J.* 33, 81-83 (1986) [hereinafter Williams, *The Lords and Impossible Attempts*]; G. FLETCHER, *RETHINKING CRIMINAL LAW* §§ 9.2.2, 9.2.3 (1978); Fletcher, *Mistake in the Model Penal Code: A False False Problem*, 19 *RUTGERS L.J.* 649, 654-670 (1988) [hereinafter Fletcher, *Mistake*]; Patient, *Mistake of Law—A Mistake?*, 51 *J. CRIM. L.* 326 (1987) [hereinafter Patient]; P. ROBINSON, *CRIMINAL LAW DEFENSES* § 184 (1984) [hereinafter P. ROBINSON]; Arzt, *The Problem of Mistake of Law*, 1986 *B.Y.U. L. REV.* 711, 716 [hereinafter Arzt]; Ashworth, *Belief, Intent and Criminal Liability*, *OXFORD ESSAYS IN JURISPRUDENCE* 1, 26-29 (J. Eekelaar & J. Bell 3d series 1987) [hereinafter Ashworth, *Belief*]. I also do not address mistake and impossibility with respect to extrinsic elements of offenses, such as jurisdiction. For discussions, see Williams, *The Lords and Impossible Attempts*, this note, at 81; Fletcher, *Mistake*, this note, at 654-55; Dutile & Moore, *Mistake and Impossibility: Arranging a Marriage Between Two Difficult Partners*, 74 *Nw. U.L. REV.* 166, 197-99 (1979) [hereinafter Dutile & Moore]. For convenience of exposition, however, I will often use the terms "defense" or "excuse" somewhat loosely, including both true defenses and negations of the requisite state of mind for the crime.

⁶ See text accompanying notes 129-138 *infra*.

A. DISTINGUISHING FACTUAL MISTAKES, LEGAL MISTAKES
CONCERNING GOVERNING LAW, AND LEGAL MISTAKES
CONCERNING AN OFFENSE ELEMENT

1. *Six Examples of the Concepts*

Six basic examples will help to clarify the concepts of mistake and impossibility, and also will demonstrate crucial relationships between them.

Suppose it is a crime to receive property knowing that the property is stolen. Now consider two cases:

a. Alice

Alice receives stolen property but honestly believes that the property is not stolen. For example, Alice purchases a video recorder from a stranger at a large discount. Because she is quite gullible, she honestly believes his false explanation that he recently purchased it from a retail store. In fact, the stranger picked up the recorder in the course of a burglary.

Does Alice's mistake preclude liability? Clearly it does. In order to "know" that property is stolen, she must "believe" that it is stolen; yet she honestly believes that it is not.

On the other hand, what about Bob, who makes the converse mistake?

b. Bob

Bob receives some property which he believes is stolen. As it happens, the property is perfectly clean. For example, Bob purchases property under circumstances that are objectively similar to Alice's purchase. Bob then confesses his belief that the stranger had in fact stolen it; yet the stranger is telling the truth, and the property is not stolen.⁷

Bob cannot be liable for the completed crime, since the property is not stolen; but he might be liable for the crime of *attempting* to receive stolen property.

In Alice's case, the mistake would exculpate, either under a distinct doctrine of mistake or, under the more modern view, because she did not satisfy the mens rea requirement of the offense.⁸ In Bob's case, the facts render the attempt "impossible" of completion, but many jurisdictions would allow conviction because Bob

⁷ For a case inspiring this hypothetical, see *Anderton v. Ryan*, 2 All E.R. 355 (1985), discussed in J. DRESSLER, *UNDERSTANDING CRIMINAL LAW* 355 n.42 (1987) [hereinafter J. DRESSLER].

⁸ P. ROBINSON, *supra* note 5, at § 62.

acted on the basis of an inculpatory mistake.⁹

What explains these results? Alice's exculpatory mistake as she receives the nonstolen property suggests that she may be less culpable or dangerous than a person who receives such property and is not mistaken; Bob's inculpatory mistake as he receives the nonstolen property suggests that he is more culpable or dangerous than a person who receives such nonstolen property but is not similarly mistaken. The mistakes of Alice and Bob are symmetrical: Alice's mistake exculpates, even though she satisfies the *actus reus*; Bob's mistake inculpates, even though he fails to satisfy the *actus reus*.¹⁰

A strong substantive argument exists for this symmetrical result. Whether modern criminal law emphasizes retribution or deterrence, some exculpatory mistakes should diminish or preclude liability for the completed crime, while some inculpatory mistakes should create liability for an attempt.¹¹ Whether the defendant did or did not commit the *actus reus* of the offense (*e.g.*, the fact that Alice actually received stolen property, or that Bob did not) might be somewhat fortuitous, and less important than the defendant's culpability or *ex ante* dangerousness.

Before we proceed to other examples, it is important to clarify the troublesome concept of "impossibility" and its relation to mistake. In the cases of Alice and Bob, I have been describing factual rather than legal mistakes. My categorization is somewhat controversial, however, especially as applied to impossibility. Some would interpret a factual mistake about the "stolenness" of property as a mistake of law, or a mixed question of law and fact, and therefore would categorize these cases as "legal" impossibility. This view is (conceptually!) mistaken, for reasons that I will explain in a later section.¹² Readers who interpret "legal" impossibility in this way are on notice that I will use the term "legal" impossibility more strictly in this section to describe a potentially inculpatory mistake

⁹ See *id.* at § 85(b).

¹⁰ See Ashworth, *Belief*, *supra* note 5, at 8-13, 16-20; Dutile & Moore, *supra* note 5, at 167; J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 594 (2d ed. 1960) [hereinafter J. HALL]; see also Arzt, *supra* note 5, at 717-18, 721 (discussing German law). I will shortly suggest, however, that the symmetry is actually between exculpatory and inculpatory mistakes, not between mistake and impossibility. See text accompanying notes 13-17 *infra*.

¹¹ See, *e.g.*, J. HALL, *supra* note 10, at 594; J. DRESSLER, *supra* note 7, at 350, 362; Dutile & Moore, *supra* note 5, at 200; Ashworth, *Belief*, *supra* note 5; Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 741-44 (1988) [hereinafter Ashworth, *Criminal Attempts*].

¹² See text accompanying notes 82-90.

that is based on an erroneous understanding of law rather than of fact.

Another confusion is equally important to dispel. The contrast between Alice and Bob is sometimes described as a contrast between mistake and impossibility.¹³ This description is misleading for two reasons. First, while "mistake" is indeed the reason why Alice is not liable for the completed crime, "impossibility" as such is not the reason why Bob is properly liable for an attempt. Second, persons like Bob who make a culpable mistake are liable for attempt whether or not their attempt is impossible. These two points demonstrate that the contrast between Alice and Bob is really a contrast between *exculpatory* mistake and *inculpatory* mistake. Although the category of inculpatory mistake includes some cases of impossibility, it includes other cases as well.¹⁴

Consider again the first point. Alice's mistake was in believing that the required circumstance did not obtain (actually, it did—the goods were stolen), and her mistake showed that she lacked the *mens rea* for the crime. Bob's mistake was in believing that the required circumstance *did* obtain (actually, it did not—the goods were not stolen), and his mistake showed that he *satisfied* the *mens rea* for the crime. In Bob's case, when we say the attempt was "factually impossible," we mean that he made a particular kind of factual mistake—a mistake revealing that Bob could not "possibly" satisfy the *actus reus* of the offense. To be precise, we should say that the defendant's (mistaken) belief is the determinant of liability in each case: for Alice, it might exculpate, while for Bob, it might incriminate. "Impossibility" as such is not the reason that Bob might be liable for attempt. Rather, it is a superficially plausible but ultimately unpersuasive reason for *defeating* attempt liability.

Second, if Bob had engaged in a failed rather than impossible attempt, he also would be liable for attempt, so long as he had the appropriate, culpable *mens rea*. Suppose Burt fires a gun in someone's direction with the belief that he will kill her. If he is incorrect (his aim is bad), he remains liable for attempted murder because of his culpable belief that he will succeed. Yet completing the crime was not "factually impossible."¹⁵ Indeed, it was quite easy: Burt

¹³ See, e.g., Dutilleul & Moore, *supra* note 5.

¹⁴ For a lucid statement of the symmetry argument in this form, see Ashworth, *Belief*, *supra* note 5.

¹⁵ To be sure, there is a sense of "impossibility" in which all unsuccessful attempts are impossible—viz., under the precise factual circumstances that exist, defendant will not succeed. However, this view deprives "impossibility" of any meaning. One must be able to distinguish an attempt that did not succeed from an attempt that could not succeed. Roughly speaking, a "possible" attempt refers to an attempt that would have suc-

simply would have had to shoot again, only more accurately.¹⁶

When an attempt is failed instead of impossible, it typically involves failure to achieve a *result*, rather than failure to complete the crime due to a missing attendant *circumstance*. Burt was unable to cause death, while Bob was unable to receive "stolen" property because the circumstance was not satisfied. Yet some failed attempts to achieve a result are also "impossible." Suppose Biff attempts to kill a victim who, unbeknownst to Biff, is already dead. Some courts have described this as an "impossible" attempt,¹⁷ though few would

ceeded, if on that occasion the agent had tried harder or had tried again, while an "impossible" attempt refers to an attempt that would not have succeeded in those circumstances (*i.e.*, that was prevented due to factors outside of the agent's control).

Of course, no bright line distinguishes these categories. What counts as "that occasion" or "those circumstances" is ambiguous. Thus, Burt's failed attempt looks "impossible" in one sense, since he "will never kill [the victim] if he repeatedly shoots one metre to the left of [the victim]." Ashworth, *Criminal Attempts*, *supra* note 11, at 759. Moreover, the classic "impossible" attempt—poisoning someone with sugar that the defendant mistakenly believes to be arsenic—will succeed if the defendant tries again by using real arsenic. *Id.* at 758-59. See also H.L.A. Hart, *The House of Lords on Attempting the Impossible*, in H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 367, 380-83 (1983). (I thank Stan Fisher and Rick Singer for pointing out these problems.)

Under my analysis, the difficulty of distinguishing "impossible" from merely "failed" attempts is irrelevant. Only legal impossibility concerning governing law should exculpate; but all forms of legal impossibility involve true impossibility, not "failure." See *infra* note 36.

¹⁶ One complication here concerns the relevant *mens rea* for attempt. I have asserted that many impossibility cases are a subcategory of "inculpatory mistake" cases. But when Burt is found liable for his failed attempt, is it because he makes an inculpatory mistake, believing that he will succeed? Or is it simply because he intended to cause death?

The answer depends on the jurisdiction. In many jurisdictions, intent to achieve a result is required for attempt liability (though a lower *mens rea* might suffice for circumstance elements). See *infra* text accompanying notes 117-119. Thus, although Bob's mistaken belief that the property is stolen (a circumstance element) will suffice, Burt could only be liable if he intended to cause death (a result element), not if he merely believed he would cause death. Under the MPC, however, belief that one will achieve a result does suffice for attempt liability. MPC § 5.01(1). Thus, in the first type of jurisdiction, Burt's liability for the impossible attempt cannot be based simply on his inculpatory mistake, since that is only a culpable belief that he will cause harm, not an intent to do so. In an MPC jurisdiction, however, Burt's liability can rest on his inculpatory mistake alone.

In the diagrams that I will later offer, see *infra* text accompanying notes 51-53, I assume that inculpatory mistake alone can support attempt liability. This creates no problem as applied to circumstance elements, but as applied to result elements, the assumption is invalid in a traditional jurisdiction conditioning attempt liability on intent to achieve a result. Thus, liability in the right-hand column requires such intent.

¹⁷ See J. DRESSLER, *supra* note 7, at 349 n.3.

Moreover, impossibility also can arise in "incomplete" attempts, where the actor has not yet done everything he or she believes is necessary to complete the crime. For example, Biff might be apprehended just as he aims a gun intending to kill what he believes to be a human being, but it is in fact a corpse. Whether the impossible attempt is complete or incomplete should not matter under the modern approach. Thus, vary-

so describe Burt's attempt.

Thus, the law gives symmetrical treatment to exculpatory factual mistakes and inculpatory factual mistakes (some of which render the crime "impossible"). How, then, does it treat legal mistakes concerning governing law?¹⁸ Consider two more examples:

c. Cathy

Cathy mistakenly believes that it is not a crime knowingly to receive stolen property. (Suppose she has recently immigrated from a country in which this is not a crime.) She purchases a stolen video recorder, knowing that it is stolen.

Can Cathy be convicted of the completed crime? Yes, since legal ignorance or mistake as to governing law is almost never an excuse under present law.¹⁹

Now consider a contrasting case:

d. Delbert

Delbert makes the opposite type of legal mistake concerning governing law. Delbert believes that it is a crime to receive stolen property of *any value*, knowing that it is stolen. Actually, the law in this jurisdiction only prohibits knowingly receiving stolen property with a value greater than \$300. He purchases a stolen video recorder, knowing that it is stolen and that it has a value of only \$250.

Delbert cannot be convicted of receiving stolen property. Can he be convicted of the attempt? Clearly he cannot. This is a case of true legal impossibility: even if all the facts were as he believed them to be, and even if he was to accomplish all that he believed necessary to complete the crime, he nevertheless would not have committed any crime.²⁰

ing the standard account of impossibility slightly, the test is this: if the situation were as the defendant believed it to be, then the defendant would have been committing either the completed crime or the *actus reus* of the attempt.

The MPC explicitly recognizes liability for such impossible incomplete attempts. See MPC § 5.01(1)(c) (liability for "purposely [doing] . . . anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime"). See also P. ROBINSON, *supra* note 5, at § 85(d).

¹⁸ I take the phrase "mistake of governing law" from J. KAPLAN & R. WEISBERG, *CRIMINAL LAW: CASES AND MATERIALS* 165-79 (1986) [hereinafter J. KAPLAN & R. WEISBERG]. The restrictive adjective, "governing," is significant, as the reader will soon see.

¹⁹ See *infra* note 165.

²⁰ See P. ROBINSON, *supra* note 5, at § 85(d); G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 205 (2d ed. 1961) [hereinafter G. WILLIAMS, *CRIMINAL LAW*]; Ashworth, *Belief*, *supra* note 5, at 10-12; Ashworth, *Criminal Attempts*, *supra* note 11, at 761-62; Kremenitzer, *The Punishability of Impossible Attempts*, 19 ISRAELI L. REV. 340, 349-50 (1984);

The legality principle trumps both Cathy's (possibly exculpatory) legal mistake and Delbert's (possibly inculpatory) legal mistake. Cathy might think that her actual conduct does not amount to a crime, but she is wrong. Delbert might think that his contemplated and intended conduct would amount to a completed crime, but he is wrong.²¹ The actual commands of the law take precedence over Cathy's possible moral innocence and Delbert's possible moral guilt.²² As with Alice and Bob, the law treats Cathy and Delbert in a symmetrical manner, though now the result is to *convict* Cathy for the completed crime and to *acquit* Delbert for the attempt.

However, one special category of legal mistakes might deserve to be treated differently than legal mistakes concerning governing law. Consider a third pair of examples:

e. Edna

Edna buys a video recorder from a stranger who states that he found the recorder in an abandoned car. She believes that such abandoned property belongs to whomever finds it; she therefore thinks it is not "stolen." But she is mistaken: the law of the jurisdiction provides that such property belongs to the state, and that any private individual who appropriates it "steals" it.

Can Edna be convicted of receiving stolen property, knowing that it is stolen? In some jurisdictions, she cannot be convicted because "knowledge that the property is stolen" will be interpreted to require knowledge that the property is stolen in law as well as in fact.²³ Thus, a mistake as to law as well as fact might negate the

Robbins, *Attempting the Impossible: The Emerging Consensus*, 23 HARV. J. ON LEGIS. 377, 390-94 (1986) [hereinafter Robbins, *Attempting the Impossible*]. Cf. R. PERKINS & R. BOYCE, CRIMINAL LAW 633-34, 634 n.28 (3d ed. 1982) [hereinafter R. PERKINS & R. BOYCE] (defining legal impossibility rather vaguely as "cases in which the actor lacks the criminal capacity to commit the crime in question," and misapplying the distinction between law and fact).

²¹ It is difficult to describe Delbert's mistake correctly. For Bob, too, believes that his contemplated and intended conduct would amount to a crime, yet his mistake is factual rather than legal. A more precise but more cumbersome characterization of Delbert's mistake is as follows: his belief that he was committing a crime is legally mistaken, for, under the actual facts, he was not committing a crime, and, even under the facts as he mistakenly believed them to be, he would not have been committing a crime.

²² Later in this essay, I briefly examine the rationales for the so called "legality" principle in Cathy's case. See *infra* text accompanying notes 157-159. In Delbert's case, the rationales for the "legality" principle are somewhat different. For example, although we are concerned that Cathy might fraudulently claim an exculpatory legal mistake, we are hardly concerned that Delbert might fraudulently claim an inculpatory mistake; and the concern that the prosecution might make such a claim about Delbert seems fanciful.

²³ See, e.g., *Regina v. Adams*, 175 Eng. Rep. 637, 1 F. & F. 86 (1858); J. HALL, *supra* note 10, at 392-93. This result should be clear in an MPC jurisdiction, since a mistake of

requisite mens rea. The legal mistake would only be about an *element of the offense*, and not about governing law. Edna might well be aware of the law against knowingly receiving stolen property, and therefore would not be legally mistaken about governing law. Rather, she is legally mistaken about an element of the crime—namely, how the law of the jurisdiction defines “stolen.” Since the definition of the crime contains a “knowledge” requirement and plausibly requires legal as well as factual knowledge that the property is “stolen,” her legal mistake about this element exculpates. As the Model Penal Code provides, “[i]gnorance or mistake as to a matter of fact or *law* is a defense if . . . [it] negatives purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense.”²⁴

I will denominate legal mistake concerning governing law “legal mistake/GL,” and legal mistake concerning an element of the offense “legal mistake/E.” Although “mistake of governing law” and “mistake of legal element” are more concise expressions, they can mislead. Notice, for example, that every *factual* mistake that exculpates or inculpates is, in a sense, a “mistake of legal element,” since it is a factual mistake that the law makes relevant to the offense. The factual mistakes of Alice and Bob go to an element of the crime, “knowing that the property is stolen.” The expressions “legal mistake/GL” and “legal mistake/E” at least distinguish the nature of the mistake (legal or factual) from the object of the mistake (governing law or element).²⁵

Two common scenarios in which legal mistake/E defeats liabil-

fact or *law* negates the mens rea of “knowledge that the goods are stolen.” See *infra* text accompanying note 24.

²⁴ MPC § 2.04 (emphasis added). See generally G. WILLIAMS, CRIMINAL LAW, *supra* note 20, at §§ 101-17.

²⁵ A fourth possibility also exists: one might make a *factual* mistake about governing law. For example, a defendant might mistakenly believe that in her state’s recent recodification of criminal law, the governor neglected to sign the “receiving stolen goods” statute. Such a defendant is under no legal misapprehensions: she knows what the statute purports to cover, and she knows that the governor’s signature is essential to rendering the statute effective. Her mistake, however, is about a matter of fact which, if she was correct, would change the governing law.

This category of “factual mistake/GL” needs little discussion. The criminal law only gives significance to factual mistakes concerning an element of the offense, since mens rea requirements ordinarily apply only to such elements. On rare occasions, however, the criminal law does require mens rea as to governing law (*e.g.*, a statute might provide a minor criminal penalty for violating a regulation, and a more serious penalty for “willfully” or “knowingly” violating the regulation). See *infra* note 140. In such a case, although the more common excuse would be a defendant’s *legal* mistake about the scope, existence, or meaning of the regulation, it is conceivable that a defendant’s *factual* mistake about the validity of the regulation would excuse. Cf. *Weco Products Co. v. Sam’s Cut Rate, Inc.*, 296 Mich. 190, 295 N.W. 611 (1941) (defendant’s good faith, mis-

ity are the following: first, in a bigamy prosecution, a defendant mistakenly believes that his prior divorce was legally valid;²⁶ and second, in a larceny prosecution, a defendant mistakenly believes that he had a legal right to take the property from the victim.²⁷

The courts and commentators have used different terms for the basic concept that I have denominated "legal mistake/E."²⁸ Some speak of this as a mistake of "civil" law,²⁹ but this characterization is incorrect, since the mistake can be a matter of criminal law as well, so long as it is only a legal mistake as to an *element* of the crime.³⁰ Fernand Dutile and Harold Moore call this a mistake of "mixed fact and law,"³¹ but that too is misleading, since the mistake is purely a matter of law.³² Joshua Dressler draws a helpful distinction between a "same law" mistake, namely, a "mistake regarding the criminal law

taken belief that legal prohibition was not yet in effect helps negative defendant's "wilful and knowing" violation).

²⁶ See G. WILLIAMS, TEXTBOOK ON CRIMINAL LAW 457 (2d ed. 1983) [hereinafter G. WILLIAMS, TEXTBOOK]. However, the mistake might have to be reasonable in order to exculpate. *Id.* See also MODEL PENAL CODE § 230.1(1).

²⁷ See W. LAFAVE & A. SCOTT, CRIMINAL LAW 413 (2d ed. 1986); G. WILLIAMS, TEXTBOOK, *supra* note 26, at 456; G. WILLIAMS, CRIMINAL LAW, *supra* note 20, at § 111.

²⁸ Surveying English law, a recent writer distinguishes ignorance of the law (which I call "legal mistake/GL") from a legal mistake as to the definitional elements of the *actus reus* (which I call "legal mistake/E"). Patient, *supra* note 5, at 331. For other discussions of English law, see J.C. SMITH & B. HOGAN, CRIMINAL LAW 71-73 (5th ed. 1983) [hereinafter J.C. SMITH & B. HOGAN]; G. WILLIAMS, CRIMINAL LAW, *supra* note 20, at §§ 107-17.

²⁹ See P. LOW, J. JEFFRIES & R. BONNIE, CRIMINAL LAW: CASES AND MATERIALS 270 (2d ed. 1986); Gross, *Mistake*, in ENCYCLOPEDIA OF CRIME AND JUSTICE 1066, 1068 (S. Kadish ed. 1983); Perkins, *Ignorance or Mistake of Law Revisited*, 1980 UTAH L. REV. 473, 475; J.C. SMITH & B. HOGAN, *supra* note 28, at 72. See also G. WILLIAMS, TEXTBOOK, *supra* note 26, at 456-63 (suggesting that ignorance of the civil law is the most important, but not the only, category in which mistake of law negates the requisite *mens rea*); Ashworth, *Excusable Mistake of Law*, 1974 CRIM. L. REV. 652, 653-54, 661-62 (similar); Ashworth, *Belief*, *supra* note 5, at 11; G. WILLIAMS, CRIMINAL LAW, *supra* note 20, at 343-44 (describing some difficulties in distinguishing civil from criminal law). For a discussion of the MPC's treatment of this issue, see *infra* text accompanying notes 141-149.

³⁰ For example, if it is a crime to possess a concealable firearm knowing that one is a felon, then a mistake about whether one is a felon may exculpate, even though it is a mistake of criminal law. See J. KAPLAN & R. WEISBERG, *supra* note 18, at 153 (discussing *People v. Bray*, 52 Cal. App. 3d 494, 124 Cal. Rptr. 913 (1975)). Or, in Edna's example in the text, the relevant definition of "stolen" property might derive from the criminal law of theft rather than the civil law of conversion.

³¹ Their definition is vague and confusing:

[T]he defendant has made a mistake as to a matter having legal implications but . . . the mistake does not relate to the statute whose violation is being considered, but rather to some other aspect. Yet, the matter is not purely factual either.

Dutile & Moore, *supra* note 5, at 176. See also *id.* at 179 (in this category, a "legal implication causes a misapprehension of the *very transaction contemplated*") (emphasis in original). Their further suggestion that such mistakes are ultimately factual, *id.* at 177, 179, 181, is simply wrong. See *infra* Section I.A.3.a.

³² For further discussion, see *infra* text accompanying notes 80-81.

for which she is being prosecuted or regarding a criminal defense thereto," and a "different law" mistake, where defendant concedes understanding of the law for which she is being prosecuted but asserts a mistake "about a different, usually a civil, law."³³ This distinction closely tracks the distinction between legal mistake/E and legal mistake/GL, for in most cases, when the criminal law under which defendant is charged requires legal culpability as to an element, the element will refer to civil law or some other criminal law (*e.g.*, whether a divorce is valid, or whether the defendant is a "felon" in possession of a concealed firearm³⁴). However, the distinction between legal mistake/E and legal mistake/GL differs from Dressler's. In my example, the criminal law of receiving stolen property might itself give the relevant definition of "stolen," but that "same law" might permit the defendant the excuse that she did not know that the goods were, in the law's contemplation, stolen. I will later explain why I believe the distinction between legal mistake/E and legal mistake/GL is preferable.³⁵

Notice that legal mistake/E is treated like factual mistake, not like legal mistake/GL. Edna is treated like Alice, not like Cathy. Edna's situation naturally points to the last piece of the puzzle: How should the law punish Fred, who has a culpable but legally mistaken belief that the goods *are* stolen?

f. Fred

Like Edna, Fred buys a video recorder from a stranger who states that he found the recorder in an abandoned car. Unlike Edna, Fred believes that a stranger has no right to take such abandoned property, but must turn it into the police; he therefore thinks it is "stolen." However, the law in Fred's jurisdiction, unlike the law in Edna's, provides that such property belongs to the finder, not to the state, so it is not "stolen" property when subsequently sold.

Of what crime can Fred be convicted? He cannot be convicted of the completed crime of knowingly receiving stolen property, for the

³³ J. Dressler, *supra* note 7, at 144. Similarly, the MPC Commentary explains that a legal mistake/E:

is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense. . . . The proper arena for the principle that ignorance or mistake of law does not afford an excuse is thus with respect to the particular law that sets forth the definition of the crime in question. It is knowledge of *that* law that is normally not a part of the crime

MPC § 2.02 commentaries, Part I at 250 (emphasis in original). See also Kelman, *Interpretive Construction in the Criminal Law*, 33 STAN. L. REV. 591, 631 (1981) [hereinafter Kelman] (denominating this a mistake of "legal fact").

³⁴ See *People v. Bray*, 52 Cal. App. 3d 494, 124 Cal. Rptr. 913 (1975).

³⁵ See *infra* Section II.B.

property was not, "in law," stolen. Can Fred be convicted of attempt?

There is a strong *prima facie* argument that he can. Although committing the crime was legally impossible, and although Fred was mistaken about the law, the "law" in question is an offense element, not governing law. Fred was legally mistaken about whether the property was "stolen," but not about whether the jurisdiction had a law prohibiting the receipt of stolen property. Such legal impossibility concerning an offense element—or "legal impossibility/E"—seems to resemble factual impossibility more than it resembles legal impossibility concerning governing law—or "legal impossibility/GL."³⁶ The structure and *mens rea* elements of the crime seem to make legal culpability as to an offense element no less important than factual culpability.³⁷ Furthermore, why is not the equation of factual mistake and legal mistake/E just as valid for impossible attempts as for completed crimes? If Edna's lack of legal culpability as to an offense element exculpates, then Fred's legal culpability as to an offense element incriminates. More generally, if Edna should be treated like Alice (*i.e.*, exculpatory legal mistake/E should be treated like exculpatory factual mistake), then perhaps Fred should be treated like Bob (*i.e.*, legal impossibility/E should be treated like factual impossibility).

Legislatures, courts, and commentators have scarcely noticed the existence, let alone the significance, of legal impossibility concerning an offense element.³⁸ Nor does the Model Penal Code ex-

³⁶ It seems appropriate to describe these inculpatory legal mistakes (whether about offense elements or governing law) simply as "legal impossibility," not as "legal impossibility" and "legal failed attempts." Unlike the situation with inculpatory factual mistakes, see *supra* text accompanying notes 15-16, all inculpatory legal mistakes seem to be impossible as well. That is, if defendant's inculpatory belief about the law is mistaken, then it seems "impossible" for his or her attempt to succeed, since it is not within his or her power to change the law. By contrast, some attempts are failed rather than impossible, since it is within the defendant's power to try again and succeed.

³⁷ I will later question this argument. See *infra* Section II.B.2.

³⁸ Paul Robinson appears to be the only scholar who has analyzed the issue explicitly. Robinson accurately distinguishes between (what I call) legal impossibility/E and legal impossibility/GL. 1 P. ROBINSON, CRIMINAL LAW DEFENSES § 85(d):

The legality principle problem does not arise in all cases where mistakes of law result in legally impossible attempts, but only where the mistake is a mistake as to the law defining the *offense charged*. Assume a woman marries, mistakenly believing that her previous divorce is invalid. The legality principle would not bar a subsequent prosecution for attempted bigamy.

However, in a footnote, Robinson states: "A similar situation arises where a person attempts to bribe someone he believes to be a juror, but who in fact is not." *Id.* at 433 n.43. Robinson is in error if he means to describe a factual mistake about whether a person is a juror, and not a legal mistake as to the governing law (*e.g.*, as to how the law defines "juror"). In the actual case he cites, *State v. Taylor*, 345 Mo. 325, 133 S.W.2d

licitly recognize the concept. The Code assesses the attempter's

336 (1939), the defendant apparently made a factual mistake about whether the juror had been sworn at the relevant date, not a legal mistake about whether it is a crime to bribe an unsworn juror.

Although Fernand Dutile and Harold Moore carefully analyze the symmetry of the first four cases, they recognize a confusing category of "mixed legal and factual impossibility," instead of legal impossibility/E. Dutile & Moore, *supra* note 5, at 184-200. With respect to mistake, similarly, they recognize the confusing category, "mistake of mixed fact and law," instead of legal mistake/E. *Id.* at 176-81. The authors define mixed legal and factual impossibility as cases in which "the transaction which the defendant contemplates is within the statute whose violation is under consideration, but, for reasons having a legal implication, the defendant's conduct fails to meet the requirements of the statute." *Id.* at 184 (emphasis in original). But they then give an (offensive) example that involves a purely factual mistake: the defendant rapes someone whom he is surprised to discover is his wife, in a jurisdiction recognizing the marital exemption from rape. *Id.* at 184-85. Many of the authors' other examples are also purely factual.

Relying on Dutile and Moore, Ira Robbins similarly recognizes a category of "mixed fact/law impossibility." Robbins, *Attempting the Impossible*, *supra* note 20, at 390, 394-97. Robbins and Dutile & Moore seem to be describing the category of traditional "legal" impossibility, a misnamed category that is not about legal mistakes at all. For my criticism, see *infra* Section I.A.3.b.

Graham Hughes, in his exacting discussion of the distinction between law and fact, does not distinguish legal impossibility concerning governing law and concerning an offense element. See, e.g., Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U.L. REV. 1005, 1018-20 (1967) [hereinafter Hughes]. See also *infra* note 67. George Fletcher, in his careful analysis of legal and factual impossibility, never discusses legal impossibility/E. Fletcher, *Constructing a Theory of Impossible Attempts*, 5 CRIM. JUST. ETHICS 52 (1986) [hereinafter Fletcher, *Constructing a Theory*].

Mark Kelman identifies a similar category of "traditional legal impossibility," where "the defendant's acts do not violate a criminal proscription," but "an existing criminal prohibition does narrowly describe the defendant's aim." Kelman, *supra* note 33, at 620 (emphasis in original). One of Kelman's examples fits what I would call legal impossibility/E—"believing that goods attained through fraud are stolen when the jurisdiction does not describe fraudulently obtained goods as stolen for purposes of the stolen goods receipt statute." *Id.* at 621.

Arzt, *supra* note 5, at 716-17, gives an example suggesting that German law would convict of an attempt in at least some "legal impossibility/E" situations, but he does not specifically address the issue.

England has recently enacted a statute allowing attempt liability despite factual impossibility. See Criminal Attempts Act, 1981, §§ 1(2) ("A person may be guilty of attempt[] . . . even though the facts are such that the commission of the offence is impossible") discussed in Robbins, *Attempting the Impossible*, *supra* note 20, at 440 n.320; A. Grubb, *The Criminal Attempts Act 1981*, 41 CAMBRIDGE L.J. 21, 25-27 (1982). The explicit reference to factual mistake might be interpreted to preclude attempt liability for legal mistakes, whether of offense element or governing law. But Glanville Williams disagrees:

On a sensible reading of [the statute], the 'facts' to which it applies are the ingredients of the crime, whether they involve questions of law or questions of mixed fact and law; the subsection does not, however, embrace mistakes purely as to the criminal law, because otherwise it would make people guilty of attempting to commit imaginary crimes.

G. Williams, *The Lords Achieve the Logically Impossible*, 135 NEW L.J. 502, 505 (1985). To my knowledge, the question has not yet been tested in English courts. For further discussion of Williams views, see his discussion of *People v. Teal* *infra* text accompanying note 67.

culpability “under the circumstances as he believes them to be,”³⁹ thus allowing liability despite factual impossibility. But does the language encompass the legal as well as factual status of an element of the offense? Although the Commentary establishes that “circumstances” do not include governing law,⁴⁰ the term might include the legal status of an offense element. After all, on the mistake side, the Code does recognize that a mistake as to either law or fact can negate the requisite mental state.⁴¹ But the matter is not at all clear.⁴²

The basic model is now largely complete. I will briefly consider how the model should address two additional issues, namely, the actor’s *ignorance* and the actor’s mental state with respect to *results*. I will then present a chart that formalizes the early arguments.

IGNORANCE. Thus far, I have discussed only mistakes— situations in which the defendant has a belief inconsistent with the actual factual or legal state of affairs. Mistakes are especially relevant in criminal law when they demonstrate a state of mind inconsistent with what the law requires. If the crime of receiving stolen property requires that the defendant believe the goods are stolen, then Alice’s belief that they are not stolen negates the required belief, since the two beliefs are logically inconsistent.⁴³

Suppose, however, that Alice has no belief, one way or the

³⁹ MPC § 5.01(1)(c) (for incomplete attempts). Similar language applies to complete attempts: “purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be.” *Id.* at § 5.01(1)(a).

⁴⁰ The Commentary explains that attempt liability is unwarranted if, were the circumstances as the actor supposed, he would not be committing a crime, “even though he firmly believes that his goal is criminal.” MPC § 5.01 commentary, Part I at 318.

⁴¹ See *supra* text accompanying note 24.

⁴² The Commentary to MPC § 5.01 does contain a hint that the Code might treat legal impossibility/E like factual impossibility. In explaining that attempt liability is unwarranted in cases of legal impossibility/GL, the Commentary states: “If, according to his beliefs as to relevant facts and legal relationships, the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal.” MPC § 5.01 commentary, Part I at 318 (emphasis added). The negative pregnant is that the actor is guilty of attempt if according to his beliefs as to legal relationships the result *would* be a crime, thereby suggesting that the Code would impose attempt liability in cases of legal impossibility/E. I would not, however, want to hang my professional reputation on this argument. (Note, for example, that the footnote to the quoted passage, discussing *Teal*, misunderstands the distinction between legal and factual mistakes. See *infra* note 68.)

⁴³ Inconsistency can be a complicated inquiry, however, especially when the requisite belief is only in a risk (as the MPC definition of “recklessness” provides). Thus, if it is a crime to possess goods while aware of a substantial risk that the goods are stolen, then believing that they are *not* stolen might or might not be an inconsistent belief, for you might or might not also be aware of the risk that they are stolen, even though you ultimately believe that they are not. By contrast, when the belief state required is a belief that they are stolen, then the belief that they are not is clearly inconsistent. For a helpful parsing of some of these difficulties, see Robinson & Grall, *Element Analysis in Defining*

other, about whether the goods are stolen. For example, she testifies credibly that when she purchased the goods, she was preoccupied with other problems, and never considered the issue.⁴⁴ Or suppose she does not even realize that she has received the goods in question, since they are secreted within some other property.

Ignorance as well as mistake can negate a legally required belief. Mistake simply refers to the formation of a belief inconsistent with the belief required, while ignorance refers to the failure to form the belief required.⁴⁵ Thus, if a positive belief is required for liability, then ignorance will defeat liability. If Alice has no beliefs about whether the goods are stolen, then it is not the case that she believes that they are stolen, and she cannot be convicted of knowingly receiving them. By the same token, if Bob has no beliefs about whether the (nonstolen) goods are stolen, then it is not the case that he believes that they are stolen, and he cannot be convicted of attempting to knowingly receive them. In the chart that follows, therefore, I place "ignorance" together with exculpatory mistake, but not together with inculpatory mistake, since ignorance ordinarily cannot inculcate.⁴⁶

RESULTS. All of my examples thus far have involved mistake or ignorance as to a circumstance. But we also need to consider result

Criminal Liability: The Model Penal Code and Beyond, 35 STAN. L. REV. 681, 726-32 (1983) [hereinafter Robinson & Grall].

Technically, a belief inconsistent with the belief that the law requires need not be "mistaken." Mistake means error, or a belief that does not comport with the state of the world. But an inconsistency between an actual and a legally required belief can be legally relevant even if the actual belief is not mistaken. Suppose the jury concluded that Bernhard Goetz was unreasonable in believing that he was about to be attacked. Yet, also suppose that they concluded he was, in fact, about to be attacked. (He was "unreasonably justified," if you will. See Simons, *Self-Defense, Mens Rea and Bernhard Goetz: Review of G. Fletcher, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial*, 89 COLUM. L. REV. 1179, 1186 n. 27 (1989) [hereinafter Simons, *Self-Defense*].) Then according to present law, the jury should probably convict Goetz, because his negligent but nonmistaken belief that he was about to be attacked would preclude him from relying on self-defense.

⁴⁴ This characterization is problematic, however, since a tacit rather than conscious "belief" might satisfy legal requirements. See Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. LAW 281, 351-58 (1981); Duff, *Caldwell and Lawrence: The Retreat from Subjectivism*, 3 OXFORD J.L. STUD. 77, 80-85, 88-89 (1983) [hereinafter Duff].

⁴⁵ As Michael Moore points out, mistake is an example of internal negation of "belief that *p*," and ignorance is an example of external negation of that proposition. If *p* is the case, then a mistake is a belief that *not-p*, while ignorance is the absence of a belief that *p*. M. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 85 (1984) [hereinafter M. MOORE].

⁴⁶ An exception is where negligence is sufficient *mens rea* for the crime or the attempt. Then negligent ignorance might exculpate. Accordingly, the refined chart includes ignorance on the inculpatory as well as the exculpatory side. See *infra* text accompanying note 128.

elements.⁴⁷ For example, suppose Alice is charged with murder, which in her jurisdiction requires that the actor knowingly cause the death of another human being. She mistakenly believes that her risky conduct will not lead to death. Does the mistake have the same exculpatory force as her mistake, in the original example, about the circumstance that the goods are stolen?

It does. The analysis of result elements is essentially the same as the analysis of circumstance elements.⁴⁸ If Alice mistakenly believes that her conduct will *not* cause death, then she cannot know and believe that it will cause death. By the same token, suppose that Bob is fond of homicide as well as receiving stolen goods. If Bob mistakenly believes that his conduct *will* cause another's death, then his inculpatory belief should permit an attempted murder conviction.⁴⁹

Does the same analysis of results apply to legal as well as factual mistakes? I believe so. Although legal mistakes are usually relevant to whether the defendant has satisfied a circumstance element, they can also be relevant to a result element.⁵⁰ For example, suppose a nurse terminates the life support system of a person he mistakenly believes is already "dead." In a homicide prosecution for purposely or knowingly causing the death of another human being, the nurse's belief that the person was already "dead" might be mistaken because the defendant misunderstood how the law defines "life" and

⁴⁷ Largely following the MPC, I will assume two categories of "objects" of mental states: "results," which are physical circumstances that the actor changes or has the power to change; and "circumstances," which are all other physical circumstances, apart from the actor's own conduct. There are some difficulties with the Code's approach, and I mainly endorse the thoughtful revision of MPC analysis recently proposed by Robinson and Grall. For their definitions of "results" and "circumstances," which I paraphrase in the text, see Robinson & Grall, *supra* note 43, at 723-24. I add "or has the power to change" to their criterion of a result so that the criterion will apply to inchoate conduct, such as attempts.

I do not separately discuss mistakes as to "conduct" elements of an offense because requiring culpability as to the actor's own conduct is both confusing and probably unnecessary. A requirement that the conduct be voluntary should suffice. For a lucid discussion, see Robinson & Grall, *supra* note 43, at 722.

⁴⁸ However, one difference emerges when we consider how the culpability of the mistake is relevant to attempt liability. See *infra* Section I.B.2.

⁴⁹ Whether Bob's attempt would be considered impossible or simply failed is unclear, but the answer is unimportant to his liability. See *supra* text accompanying notes 15-16.

Part (a) of the MPC provision concerning impossibility refers to the "attendant circumstances" as the defendant believes them to be. MPC § 5.01(1)(a). But part (b), specifically referring to results, would also create attempt liability when the defendant believes he will achieve the result, even though this is actually impossible. *Id.* § 5.01(1)(b). For a simpler approach to the various forms of impossibility, see P. ROBINSON, *supra* note 5, § 85(c), at 430-31.

⁵⁰ *Contra* P. ROBINSON, *supra* note 5, at 263 n.46.

“death” in this situation, and not simply because he misapprehended the facts. Legal mistakes about circumstance elements and about results should be treated alike.

A chart might clarify the conclusions thus far. “A” is for “Alice,” “B” is for “Bob,” and so forth.

MISTAKE AND IMPOSSIBILITY: FIRST THEORETICAL VIEW

EXCULPATORY MISTAKE OR IGNORANCE

Does the mistake or ignorance exculpate defendant from liability for the completed crime?

A. *Factual mistake*

Crime requires both X (e.g., the goods are stolen) and defendant's factual knowledge or belief that X (the goods are in fact stolen). X is the case (the goods are indeed stolen). But defendant mistakenly believes that, in fact, not-X (the goods are in fact not stolen).

Result: Not guilty of crime. *Any* factually mistaken belief that not-X exculpates, even if the mistake is culpable, i.e., reckless or negligent.⁵³

C. *Legal mistake re governing law*

Crime requires elements Y and Z. Defendant mistakenly believes that satisfying Y and Z does not amount to a crime.

Result: Guilty of crime. Although not “culpable,” in the sense that defendant thinks she is not committing a crime, the legality principle controls.

E. *Legal mistake re offense element*

Crime requires knowledge about, or belief in, X's legal status (e.g., the goods are, in law, stolen). X is the case (the goods are indeed, in law, stolen). But defendant mistakenly believes that, in law, not-X (the goods are not legally stolen).

Result: The same as A, above. Not guilty of crime. *Any* legally mistaken belief that not-X exculpates, even if the mistake is culpable.

INCULPATORY MISTAKE,⁵¹ INCLUDING IMPOSSIBILITY

Does the mistake incriminate defendant and create liability for the attempt?⁵²

B. *Factual mistake, including factual impossibility*

Crime requires X and factual knowledge or belief that X. Although not-X is the case (the goods are not in fact stolen), defendant mistakenly believes that, in fact, X (they are stolen).

Result: Guilty of attempt. Sufficiently culpable mistake.

D. *Legal impossibility re governing law*

Defendant mistakenly believes that satisfying V and W amounts to a crime.

Result: Not guilty of attempt. Although “culpable,” in the sense that defendant thinks he is committing or attempting to commit a crime, the legality principle controls.

F. *Legal impossibility re offense element*

Crime requires knowledge about or belief in X's legal status. Although not-X is the case (as a matter of law, the goods are not stolen), defendant mistakenly believes that, in law, X (they are, in law, stolen).

Result: The same as B, above. Guilty of attempt. Sufficiently culpable mistake.

The extent to which this chart describes existing law varies from

⁵¹ “Mistake” describes only a subclass of attempt liability. In some attempts, whether failed or impossible, the defendant's liability does not depend on a culpable, mistaken belief, but on a culpable intention. See *supra* text accompanying note 16; *infra* text accompanying notes 103-114.

⁵² I assume that the actus reus element of attempt is independently satisfied. If Bob merely thinks about receiving property, he cannot be convicted of the attempt; but, if he

jurisdiction to jurisdiction. Categories A, C, and D are generally accepted.⁵⁴ But some jurisdictions disallow an attempt conviction in category B or in a subcategory thereof.⁵⁵ Most jurisdictions appear to have recognized category E, at least in some form.⁵⁶ And, as noted above,⁵⁷ category F has gone largely unnoticed.

2. *Classic Chestnuts of Impossibility*

The "first view" that I have just set forth clarifies some of the classic chestnuts of the impossibility literature. At the same time, careful application of the model to these examples leaves some unsettling questions about its adequacy.

Consider the example of Lady Eldon, who believed that the lace she was smuggling into England was French and therefore subject to duty. In fact, it was English and of little value.⁵⁸ Nevertheless, she can be convicted of an attempt because the "impossibility" (or, more precisely, the mistake) is purely factual and does not negate her culpability. Similarly, although Samuel Jaffe believed that the goods he received were stolen, in fact they were not. The goods previously had been returned to their owners, and were offered to Jaffe under the owners' authority.⁵⁹ Nevertheless, Jaffe should be eligible for an attempt conviction, because the "impossibility" is purely factual.⁶⁰

On the other hand, although King Wilson believed that he was committing forgery when he changed the numbers on a check, he was *legally* mistaken, for forgery requires a material alteration that

actually receives property that he believes is stolen, he has satisfied the actus reus element.

⁵³ If the offense itself requires only recklessness or negligence, not knowledge, the analysis becomes more complex. See *infra* Section I.B.

⁵⁴ More precisely, in Model Penal Code jurisdictions category A is accepted. See P. ROBINSON, *supra* note 5, at § 62; J. DRESSLER, *supra* note 7, at 138-39. In common law jurisdictions, category A is treated somewhat differently; unreasonable mistakes of fact are a defense to specific intent but not to general intent offenses. *Id.* at 129-33. However, categories C and D are widely accepted, whether or not the jurisdiction follows the Model Penal Code to approach to mistake. See *infra* note 165; *supra* note 20.

⁵⁵ See *infra* text accompanying notes 82-87. I criticize this position in Section I.A.3.b *infra*.

⁵⁶ See R. PERKINS & R. BOYCE, *supra* note 20, at 1031-36 (any legal mistake/E negates liability for a specific intent crime, but only reasonable legal mistakes/E negate liability for a general intent crime). In Model Penal Code jurisdictions, of course, any mistake that negates the relevant mens rea will preclude liability.

⁵⁷ See *supra* text accompanying notes 38-42.

⁵⁸ See 1 WHARTON'S CRIMINAL LAW 304 n.9 (12th ed. 1932). See also Dutile & Moore, *supra* note 5, at 170; Hughes, *supra* note 38, at 1007-08, 1016-18.

⁵⁹ *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906).

⁶⁰ For an excellent discussion, see Hughes, *supra* note 38, at 1016-19.

could cause injury, which in turn requires that the forger change the words on an instrument.⁶¹ Because the mistake concerns the scope of the governing law of forgery, Wilson should not be convicted of attempted forgery.⁶² And although Margaret Teal had hired someone to give false testimony at a divorce trial about the adultery of one of the parties, the testimony was legally immaterial to the divorce.⁶³ Because Teal's mistake made it legally impossible to commit the crime of subordination of perjury, she could not be convicted of attempted subordination.⁶⁴

Finally, the model accepts the analysis in the famous Mr. Fact/Mr. Law hypothetical:

Two friends, Mr. Fact and Mr. Law, go hunting in the morning of October 15 in the fields of the state of Dakota, whose law makes it a misdemeanor to hunt any time other than from October 1 to November 30. Both kill deer on the first day out, October 15. Mr. Fact, however, was under the erroneous belief that the date was September 15, and Mr. Law was under the erroneous belief that the hunting season was confined to the month of November, as it was the previous year. . . . Mr. Fact could be convicted of an attempt to hunt out of season, but Mr. Law could not be.⁶⁵

Simple enough? But wait. Is it so clear that *Wilson*, *Teal* and Mr. Fact/Mr. Law all involve legal impossibility concerning governing law rather than legal impossibility concerning an offense element? Suppose the forgery statute in *Wilson* is interpreted as requiring the defendant to know that he is making a "material" alteration that might injure someone. Did not Wilson want to defraud someone by changing the numbers rather than words of the check? In that sense, did he not believe that his alteration was material (*i.e.*, that it might cause injury)? If so, was not his legal mistake about the of-

⁶¹ *Wilson v. State*, 85 Miss. 687, 38 So. 46 (1905). The defendant changed the figure "\$2.50" to "\$12.50," but did not change the written words "two and 50/100."

⁶² See, e.g., Hughes, *supra* note 38, at 1021-22; J. HALL, *supra* note 10, at 595. Wayne LaFave and Austin Scott assert that "it is uniformly agreed that the result in *Wilson* was correct." W. LAFAVE & A. SCOTT, *supra* note 27, at 514. Such an assertion is always perilous. See Kelman, *supra* note 33, at 620-24 (especially 620 n.75), seriously questioning *Wilson*.

⁶³ *People v. Teal*, 196 N.Y. 372, 89 N.E. 1086 (1909). The complaint in the divorce action recited a claim of adultery, while the false testimony concerned a different charge of adultery not mentioned in the complaint.

⁶⁴ See, e.g., Hughes, *supra* note 38, at 1022-23.

⁶⁵ S. Kadish, S. Schulhofer & M. Paulsen, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 608-09 (4th ed. 1983). The authors go on to criticize this distinction as "fragile and unpersuasive." *Id.* at 609. In my view, however, the example makes the distinction seem doubtful only because of the peculiarities of the example. See Hughes, *supra* note 38, at 1013 (noting "what might be a relative indifference about the dates on which hunting is permitted as long as it is only permitted for a portion of the year," and concluding that the two actors therefore differ little in dangerousness).

fense element of materiality? And if it was, why not convict him of attempt?

Teal prompts similar doubts. Suppose the subordination of perjury requires that the actor procure perjured testimony that she knows or believes is material to a legal proceeding.⁶⁶ Then *Teal*'s legal mistake might have been about an offense element—namely materiality—permitting an attempt conviction. As Glanville Williams argues:

The case does not seem to fall under the notion of legal impossibility, since D probably did not know of the pleadings in the divorce proceeding and did not know that the evidence she was attempting to manufacture would be regarded as immaterial; she intended to influence the decision of the divorce court, and must therefore have thought that the evidence would be regarded as material.⁶⁷

The Commentaries to the Model Penal Code are similarly uncertain about *Teal*.⁶⁸

Finally, Mr. Law could be either Mr. Governing Law or Mr. Offense Element, depending on the mens rea required for conviction of illegal hunting. If the crime requires knowledge that one is hunting outside the hunting season, then "Mr. Law's" legally mistaken

⁶⁶ The actual statute provided that "a person who willfully and knowingly testifies falsely, in any material matter, is guilty of perjury." *Teal*, 196 N.Y. at 376, 89 N.E. at 1087 (emphasis in original). It is not clear whether the actor must know both that she is testifying about a material matter and that she is testifying falsely. (Under the rules of construction of the MPC, the answer would be yes: the mens rea terms would "travel" down to "material matter." MODEL PENAL CODE § 2.02(4).)

⁶⁷ G. WILLIAMS, CRIMINAL LAW, *supra* note 20, § 205, at 635. Unfortunately, Williams is not clear about what category he believes this case exemplifies. Apparently, he thinks it is a case of factual impossibility, for he never explicitly recognizes any category of legal impossibility concerning an offense element. If *Teal* was unaware that the pleadings referred only to the other claim of adultery, then the case could indeed be one of factual impossibility. I think, however, that a plausible argument can be made for convicting her of attempt even if she made no factual mistake about the contents of the pleadings, and her only mistake was a legal one, about an offense element—whether testimony not relating directly to the pleadings was "material."

Robbins disagrees with Williams' criticism, but only on the ground that it is too difficult to prove whether *Teal* believed that the testimony was material. Robbins, *Attempting the Impossible*, *supra* note 20, at 392. Hughes also disagrees with Williams, which is consistent with Hughes' not recognizing the category of legal impossibility/E. Hughes, *supra* note 38, at 1032.

⁶⁸ On one view, the defendant in *Teal* might be thought mistaken as to the criminal law, if her mistake is seen as ignorance of the noncriminality of giving the solicited testimony. On another, however, her mistake might be considered one concerning the importance of the testimony, an essentially factual question that involves a circumstance element of the offense.

MPC § 5.01 commentary, Part I, at 318 n.92. But I find the second possibility, as stated, quite doubtful. The *Teal* opinion held that the testimony in question was legally immaterial, since it was unrelated to the allegations in the complaint, not that it was factually unimportant.

belief that the hunting season is only in November would warrant an attempt conviction. For if the legal status of the offense element (the scope of the hunting season) was as Mr. Law (Mr. Offense Element) believed it to be, his conduct would have constituted a crime!

I raise, but do not answer, these questions here. A later section meticulously dissects the distinction between legal mistakes concerning offense element and those concerning governing law.⁶⁹

3. Two Potential Criticisms

Having set forth and briefly applied the basic model, I turn to two potential criticisms. First, the model employs the fact/law distinction as a fundamental organizing device. Is this distinction too problematic? Second, the model ignores the traditional view of "legal impossibility." Is this unjustifiable? In the following two sections, I emphatically reject both criticisms.

a. Is the Fact/Law Distinction Problematic?

Some commentators assert that the fact/law distinction is problematic.⁷⁰ In the present context, at least, I disagree.⁷¹ Mistake and ignorance of *fact* involve perceptions of the world and empirical judgments derived from those perceptions.⁷² Mistake and ignorance of *law* involve assessment of whether, given a certain set of facts, the actor would or would not be violating the law. The difference can be tested quite readily in two different ways. First, assume that the actor knows all of the facts; if she is nevertheless mistaken about whether her conduct violates the law, then she has made a mistake of law.⁷³ Second, assume that the actor has a Herculean,⁷⁴ perfect understanding of the law. That is, she understands the legal

⁶⁹ See *infra* text accompanying notes 140-154.

⁷⁰ For example, Paul Robinson claims that the distinction between mistakes of fact and law "has proven very troublesome in practice." P. ROBINSON, *supra* note 5, § 62(e), at 265.

⁷¹ For a rigorous explication of the distinction, see Hughes, *supra* note 38, at 1016-23. For other helpful accounts, see G. WILLIAMS, CRIMINAL LAW, *supra* note 20, § 207, at 645 (factual vs. legal impossibility); J. HALL, *supra* note 10, at 376; Hall, *Comment on Error Juris*, 24 AM. J. COMP. L. 680, 684-85 (1976) [hereinafter Hall, *Error Juris*]; Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35, 66-67 (1939).

⁷² Although this definition is crude, it is adequate for our purposes. See G. WILLIAMS, CRIMINAL LAW, *supra* note 20, § 100, at 287: "Generally speaking a fact is something perceptible by the senses, while law is an idea in the minds of men."

⁷³ See, e.g., *id.* §§ 115, at 334 (implicitly applying this criterion). This is a hypothetical criterion. In an actual case, of course, a defendant need not know all the relevant facts before we can conclude that she has made a mistake of law.

⁷⁴ Cf. R. DWORKIN, TAKINGS RIGHTS SERIOUSLY 105-30 (1978). "Herculean" is an apt adjective, for the law might not be settled at the time the actor acts. Jerome Hall's definition is useful here: "'Knowledge' of the law . . . means coincidence with the subse-

consequences of any conceivable set of facts. If on a specific occasion she is nevertheless mistaken about whether her conduct violates the law, then she has made a mistake of fact.⁷⁵

Under mistake or ignorance of law, I include not only mistake or ignorance about the abstract terms of a legal prohibition, but also mistake or ignorance about whether and how the law's terms apply to a set of facts. Although George Fletcher describes "application of law to fact" as an "intermediate" category between law and fact,⁷⁶ this category falls within the category of law, under the criteria stated above. Consider two of Fletcher's examples. If a self-defense statute requires the defender to use only "proportional" force, then whether deadly force is "proportional" to apprehend a petty thief is ordinarily decided by the law of self-defense, not by the defender's subjective view.⁷⁷ Similarly, a nightclub owner who is clearly mistaken in concluding that "the safety benefits of additional fire escapes are more than offset by the financial cost and their aesthetic disadvantages"⁷⁸ might be negligent as a matter of law, even if he

quent interpretation of the authorized law-declaring official." J. HALL, *supra* note 10, at 388 (emphasis omitted); *see also id.* at 409.

⁷⁵ *See also* Dutile & Moore, *supra* note 5, at 175 (where the mistake is one of pure fact, "even if the defendant had the statute before him and fully understood it, . . . he would still be deceived").

Applying this criterion allows us to resolve examples that otherwise might appear problematic. For example, Robinson hypothesizes that an official mistakenly informs the owner of a liquor store that the store is in wet rather than dry territory. "Is his mistake one of fact—the location of the jurisdictional line—or law—the legal status of his store?" P. ROBINSON, *supra* note 5, § 181(d), at 380 n.26. To answer, we need to unpack the example carefully. If the store is in County A, which as a matter of law is dry territory, but the official mistakenly thought that County A is considered wet territory, then the mistake is clearly one of law. Suppose instead that the official mistakenly thought that the store is in dry County B, when actually it is in County A. The proper law/fact categorization depends on how he reached that mistaken conclusion. If the official transcribed incorrectly the owner's verbal description of the physical location as Main Street rather than Fain Street, then his mistake would be one of fact. But if the official knew the owner's correct address yet was mistaken about whether under the law of the state, County B extends to that address, the mistake would be one of law.

This example reveals that care is needed in determining whether a mistake is one of fact or law, not because the bases are conceptually or practically indistinguishable, but because of the different possible bases for the mistake.

⁷⁶ G. FLETCHER, *RETHINKING CRIMINAL LAW* 686 (1978).

⁷⁷ *See id.* at 685. Indeed, even if an otherwise legal question is left to the subjective opinion of a defendant, the respects in which the question is "subjective" is a question of law, not fact. Perhaps the defender is entitled to make a subjective judgment of whether the attack is imminent, or the force threatened is deadly, or the use of force is necessary on the present occasion. The law itself, however, will continue to define the meaning of "imminent," "deadly," and "necessary." For example, if defendant knows he can safely retreat, the law might not accept even an honest subjective judgment that force is "necessary" and "imminent."

⁷⁸ *Id.* at 685.

believes he is acting reasonably.⁷⁹

Some scholars speak of “mixed” questions of fact and law.⁸⁰ This classification is somewhat misleading because we can readily unmix the questions. To be sure, a mistake of fact is only legally relevant if it negates or satisfies the legal element of an offense. The legal characterization of the facts clearly matters. It hardly follows, however, that factual mistakes are really mistakes about the law. Recall Alice, who claims she honestly (though mistakenly) believed that the goods were not stolen. Her belief is significant only because the definition of the crime requires her to believe that the goods were stolen. However, she is not claiming that she was ignorant of the offense of receipt of stolen property, or that she was mistaken about how broadly or narrowly the criminal or civil law defines “property” or “stolen.”⁸¹

b. Is the Traditional View of “Legal (?)” Impossibility Persuasive?

The model I propose intentionally ignores a traditional ap-

⁷⁹ Fletcher gives two other examples of “mistake [in] . . . the application of an existing legal norm to a particular set of facts.” *Id.* at 686. If a bank teller inadvertently gives excess funds to a customer, and the customer knowingly fails to return them, the customer might mistakenly believe that he or she is not liable for larceny. *Id.* at 684. Or, a defendant might mistakenly believe that “the excuse of duress encompasses homicide as well as lesser offenses.” *Id.* at 685. In both cases, the defendant’s mistake is clearly one of law, under the criteria I have suggested.

⁸⁰ See Dutilleul & Moore, *supra* note 5, at 176-81; Patient, *supra* note 5, at 331; Arzt, *supra* note 5, at 729.

Hyman Gross asserts that legal mistakes concerning an offense element are really factual mistakes. Suppose a person believes that “he is free to take some items because under the circumstances it is not anyone else’s property,” but actually, they belong to another.

[I]f his mistake about the law is recognized as a valid defense, it will be based on a mistake of fact, not of law, even though it is rooted in a mistaken notion about the law. He will in effect then be claiming that he was mistaken about ownership (a mistake of fact), the same sort of claim he would be making if at the time he had mistaken the item he took for something similar belonging to him.

Gross, *Mistake*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1066, 1068 (S. Kadish ed. 1983). This explanation is baffling. The defendant might have been perfectly informed about the “facts” in any ordinary sense of the term; his only confusion is about the law.

⁸¹ Thus, Brian Hogan is incorrect in treating many mistakes of fact as mistakes of law. In his view, if a woman mistakenly concludes that property is stolen because she receives it from a stranger at an abnormally low price, her mistake is “one of law because from certain facts she has attached, however mistakenly, a legal label to the goods. Whether goods are or are not stolen . . . cannot be determined as a matter of fact but can only be attached as a legal conclusion drawn from such facts as are available.” Hogan, *Attempting the Impossible*, 10 *TRENT L.J.* 1, 11 (1986). The last comment is true enough, but it is entirely consistent with my point—that the defendant’s actual underlying mistake was about the facts, not about the law. See also Fletcher, *Constructing a Theory*, *supra* note 38, at 55.

proach to legal impossibility that many courts and commentators have endorsed. This approach, which I dub "legal (?)" impossibility, differs from what I have called legal impossibility concerning governing law, but is similar to such impossibility in defeating attempt liability. Two slightly different definitions of "legal (?)" impossibility have been employed. According to the first, "D's goal was illegal, but commission of the offense was impossible due to a factual mistake regarding the legal status of some factor relevant to her conduct."⁸² *Jaffe*⁸³ is the classic example of the category: although the defendant thought he was receiving stolen property, he was mistaken because, unknown to him, the goods had previously been restored to their actual owners, who had consented to their being brought to him. And the classic contrast, where the impossibility is supposedly purely factual, is the pickpocket who reaches into a pocket to steal, but the pocket turns out to be empty. Those courts that recognize traditional "legal (?)" impossibility as a defense in cases like *Jaffe* would allow a conviction in "factually impossible" cases like the pickpocket.⁸⁴

This categorization of "legal (?)" impossibility is spurious: it does not describe cases of legal mistake or ignorance at all. Rather, it captures one category of factual impossibility cases.⁸⁵ *Jaffe* was ignorant or mistaken about the facts, not about the scope of the criminal or civil law. *Jaffe* did not realize what, in fact, had happened to his goods; but he was not mistaken about whether previously-restored goods legally constitute "stolen" goods within the meaning of the criminal statute. Indeed, conceptually, every factual impossibility case might be described as a case of traditional "legal (?)" impossibility. Every case of factual impossibility involves an inability to complete a crime because the facts somehow do not permit completion; yet only facts relevant to the actual legal elements of the completed crime can have this effect. Even the would-be thief who picks an empty pocket makes a mistake about a legal element—namely, whether the pocket actually contains "property of

⁸² J. Dressler, *supra* note 7, at 353. Dressler calls this category "hybrid legal impossibility." *Id.* (I invoke Dressler only for his helpful positive definition; Dressler shares my criticism of the category.) Other writers seem to have a similar concept in mind. See Dutile & Moore, *supra* note 5, at 184 (describing as "mixed legal and factual impossibility" cases where, "for reasons having a legal implication, the defendant's conduct fails to meet the requirements of the statute"); Robbins, *Attempting the Impossible*, *supra* note 20, at 394 (describing as "mixed fact/law impossibility" cases that "involve a factual mistake relating to a legal determination").

⁸³ *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906).

⁸⁴ See J. Dressler, *supra* note 7, at 350.

⁸⁵ See *id.* at 354. See also J. Hall, *supra* note 10, at 586-91.

another."⁸⁶

Traditional "legal (?)" impossibility is sometimes defined in a second way: a defendant has personally completed all of the physical acts she believes necessary to commit the offense, yet the legal characterizations of those acts and of the surrounding circumstances are different from what she supposed, precluding liability for the completed crime.⁸⁷ This definition of "legal (?)" impossibility is also spurious. Consider *Jaffe*, the exemplar of this category. *Jaffe* was indeed surprised to discover that the law characterized the property as not "stolen," *not* because he was mistaken or ignorant about what "stolen" means in the civil or criminal law, but because he was factually mistaken about what had happened to the goods. Further, why should it matter whether one's factual mistake relates to the effectiveness of one's own physical conduct in achieving a specific end (pure factual impossibility) or to the status of some

⁸⁶ See also Williams, *The Lords and Impossible Attempts*, *supra* note 5, at 73 (emphasis in original) ("All the ingredients of a crime are factual ingredients, in the sense that they refer wholly or partly to actual events, and they are also legal ingredients, in the sense that they are ingredients required by law for the crime."); J. HALL, *supra* note 10, at 590-91; Kremnitzer, *supra* note 20, at 360-61.

Dressler disagrees, suggesting that "there is no issue of legal impossibility when D tries to fire an unloaded gun at V or puts her hand in an empty pocket." Dressler, *supra* note 7, at 354 n.36. See also Ashworth, *Criminal Attempts*, *supra* note 11, at 758. I demur. If D tries to fire an unloaded gun, believing that it is loaded and likely to cause V's death, she is mistaken about whether her act is "likely to cause the death of another human being;" and that mens rea requirement is a legal element of the crime of murder.

⁸⁷ According to Robinson's definition, "the actor may be able to perform all the conduct and cause all the results he contemplates, yet his conduct does not in fact constitute the contemplated offense." P. ROBINSON, *supra* note 5, § 85(b), at 425-26. See also W. LAFAVE & A. SCOTT, *supra* note 27, at 510 ("Legal impossibility is the situation in which the defendant did everything he intended to do but yet had not committed the completed crime . . ."); Ashworth, *Belief*, *supra* note 5, at 22-23; Ashworth, *Criminal Attempts*, *supra* note 11, at 760 ("D has done all the physical acts he set out to do, but the substantive offense has not been committed because an element in its definition is absent"); Schulhofer, *Attempt*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 91, 95 (S. Kadish ed. 1983).

A student author has a similar definition: factual impossibility occurs if "the defendant's purpose is, from his own perspective, frustrated, for he has not obtained . . . the wallet he believed to be in the pocket." But legal impossibility occurs if the defendant has "a mistaken belief of fact that does not interfere with the accomplishment of his goal but that would, if correct, render his conduct criminal." Note, *Scope, Mistake, and Impossibility: The Philosophy of Language and Problems of Mens Rea*, 83 COLUM. L. REV. 1029, 1054 (1983) [hereinafter Note, *Scope, Mistake, and Impossibility*]. As the author explains, however, many explanations of this distinction are confusing because they rely on ambiguities in the concept of intention. Thus, it is misleading to say that legal impossibility occurs when "the attemptor's intended act, if completed, would not be a crime," or to say that factual impossibility occurs when the "intended substantive crime cannot be accomplished because of some physical impossibility." *Id.* at 1055 (quoting Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 21 (1968)). See also Fletcher, *Constructing a Theory*, *supra* note 38, at 55-57.

legal element, apart from one's own conduct (traditional "legal (?) impossibility").⁸⁸ In the formula, "if the situation were as the defendant believed it to be, she would have been committing the crime (or the actus reus of the crime)," "the situation" can refer to attendant circumstances as well as conduct or result.

The category of traditional "legal (?) impossibility" is therefore conceptually confused and essentially indistinguishable from the category of factual impossibility. Moreover, to the extent that the traditional category is designed to preclude attempt convictions where the actor's conduct is not sufficiently dangerous on its face,⁸⁹ a more general approach to objectively innocent conduct would be wiser—for example, a general requirement that the attempting actor's conduct provide significant, independent evidence of her intent.⁹⁰

B. A REFINED VIEW: CONSIDERING THE CULPABILITY OF THE MISTAKE

I have suggested a new analysis and responded to some objections. But, as complex as the analysis thus far might seem, it is not complex enough, for it does not yet account for how modern criminal codes carefully distinguish degrees of culpability.

To refine the model, we need to account for the different types of mistakes that actors might make, and for the different types of

⁸⁸ See Ashworth, *Criminal Attempts*, *supra* note 11, at 760-61.

Perhaps the implicit criterion is whether the mistake relates to a conduct or result element ("factual") or a circumstance element ("legal"). See Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665, 666-67, 669 (1969) [hereinafter Enker, *Impossibility*]; Ashworth, *Criminal Attempts*, *supra* note 11, at 759 (rejecting this criterion). But this criterion fails, for one can make either a factual or a legal mistake about any of these elements.

⁸⁹ See J. DRESSLER, *supra* note 7, at 355; Ashworth, *Belief*, *supra* note 5, at 23-24.

⁹⁰ See *infra* text accompanying notes 130-133.

Relying on the policies I have just described, Enker makes the following interesting point. If "legal" impossibility is defined as impossibility resting on mistake as to a circumstance, while "factual" impossibility includes impossibility resting on mistake as to a result, then: (a) "legal" impossibility should be a defense, because an "impossible" circumstance can never be present; but (b) "factual" impossibility need not be a complete defense, because the "objective possibility of success can vary and the court must make a separate judgment as to each particular case." Enker, *Impossibility*, *supra* note 88, at 701. This argument is problematic, however, in assuming that "objective possibility of success" is a meaningful notion. For criticism, see Williams, *The Lords and Impossible Attempts*, *supra* note 5, at 48-49, 75-76. Moreover, if the question is simply what a reasonable person in the defendant's shoes would think about the "objective" likelihood of committing a crime, we could ask whether a reasonable observer would conclude that the circumstance exists (or would conclude that the defendant so believes), just as we could ask whether a reasonable observer would conclude that the defendant's conduct would probably cause a relevant harm (or would conclude that the defendant so believes).

mental states that might be required for the completed crime or the attempt. Until now, I have supposed that knowledge was the requisite mental state for the crime. This simplification is convenient, since any mistake, no matter how unreasonable, negates knowledge.⁹¹ (If I mistakenly but honestly believe that the goods are *not* stolen, then I cannot “know” or “believe” that they *are* stolen.) But, of course, modern criminal statutes employ many mental states in addition to knowledge or belief.

Suppose a jurisdiction defines statutory rape as intercourse with an underage victim where the defendant either knows that the victim is underage or is reckless as to that possibility. Two types of problems arise. If defendant has intercourse with the victim, what kind of mistake as to age will exculpate him? We will see that modern element analysis, combined with the new model, answers this question readily. Conversely, if the defendant has intercourse with a person and is recklessly aware that she might be underage, yet it turns out that she is not underage, can he be convicted of attempt? Similar situations will occasionally arise, especially in a jurisdiction accepting the Model Penal Code's presumption that “recklessness” is the required mental state if the law does not otherwise specify.⁹² Surprisingly, however, current law gives no clear solution, and scholars have virtually ignored the problem.

This section will analyze the Model Penal Code's culpability terms of recklessness, negligence, and strict liability. A similar analysis is possible with respect to common law distinctions between specific and general intent and reasonable and unreasonable mistakes, but I will not pursue it here.⁹³ The section first addresses the relevance of these lesser forms of culpability to liability for the completed crime, and then proceeds to address the much more tangled question of their relevance to attempt liability. I next examine how culpability for attempts is analyzed differently when the state of mind concerns a result rather than circumstance element. Finally, I briefly discuss a confusion in contemporary accounts of inherently “unreasonable” attempts. The section concludes with a revised chart displaying these refinements.

⁹¹ Dutille & Moore assert in passing that the mistake should yield an acquittal if it is reasonable, but they do not carefully analyze the issue. Dutille & Moore, *supra* note 5, at 181.

⁹² MPC § 2.02(3).

⁹³ The common law analysis would be essentially the same as the analysis that follows, except that, for “general intent” crimes, the common law only recognizes a simple distinction between reasonable and unreasonable mistakes, rather than the Code's distinction between reasonable, negligent, and reckless mistakes. See J. DRESSLER, *supra* note 7, at § 12.03; Robinson & Grall, *supra* note 43, at 729.

I recognize that actual proof of the mental states described in this section will often be unavailable or unreliable. For now, however, I am interested in how an ideal criminal law would structure the analysis of mistake and impossibility. I will address more practical concerns shortly.

1. *Completed Crimes and Exculpation*

To keep matters as simple as possible, let us extend our earlier examples. Suppose that the crime of "knowing" receipt of stolen property is expanded to prohibit the receipt of stolen property when the defendant either knows that it is stolen *or is reckless* as to that circumstance. Then, under the modern "logical relevance" approach to mistake, a reckless mistake about its being stolen will no longer exculpate, since recklessness is sufficient culpability for the crime. However, a reasonable mistake will continue to exculpate, and so will a merely negligent mistake.⁹⁴ For example, suppose Alice confesses that she has some concern that the property might be stolen. That minimal awareness of risk might demonstrate that she is reckless, but she might not be sufficiently certain about the property's status to truly "believe" that it is stolen.⁹⁵ However, if it never occurred to her that the goods might be stolen, yet her unawareness is grossly unreasonable, she would merely be criminally "negligent."⁹⁶

The same analysis, of course, applies if the crime requires a lesser mental state. If it is a crime to receive stolen property, either believing that it is stolen or being reckless *or negligent* as to that circumstance, then only a reasonable (*i.e.*, nonreckless and nonnegligent) mistake will exculpate. Accordingly, a defendant's actual belief that the property is not stolen will not automatically exculpate. Moreover, if strict liability is imposed with respect to the actor's belief that the property is stolen, then no mistake will exculpate, not even a reasonable one. That is, even a reasonable belief that the property is not stolen is no defense.

The above approach is uncontroversial to modern scholars, though it seems to confuse some courts. For example, some courts

⁹⁴ See P. ROBINSON, *supra* note 5, § 62(b), at 248-49.

⁹⁵ Although "reckless mistake" might seem to be a self-contradiction, it is not. One might be conscious of a substantial risk that the goods are stolen, and therefore be reckless, while at the same time forming the final (but mistaken) belief that the goods are not stolen. *But see* G. WILLIAMS, *CRIMINAL LAW*, *supra* note 20, § 54, at 152-53 (suggesting that, under English law, mistake negates recklessness).

Under the Model Penal Code, Alice's mistake would not be reckless unless it also was grossly negligent. See § 2.02(2)(c).

⁹⁶ See MPC § 2.02(2)(d) (defining negligence).

apparently say that mistake exculpates "when, if the facts had been as the defendant thought they were, his conduct would have been innocent."⁹⁷ But this formulation fails. If Alice only needs to be negligently unaware of the risk that the goods are stolen in order to be liable, or only needs to be recklessly aware of a *chance* that they are stolen, then she can be liable even though she *satisfies* the quoted standard. Her positive belief that the goods are not stolen might not exculpate. Notice, too, that this formulation parallels the usual formulation for when impossible attempts *create* liability: "If the facts were as the defendant believed them to be, his conduct *would* constitute a crime."⁹⁸ We will later see that this impossibility formulation is also inadequate.

If this analysis properly applies to factual mistakes, then it would seem to apply to legal mistakes about an offense element as well. Thus, if the crime of receiving stolen property requires only recklessness, then Edna's recklessly mistaken belief that abandoned property is not legally "stolen" would not exculpate, while a merely negligent mistake would. Indeed, the law of bigamy sometimes specifies the mental state that the defendant must possess with respect to the legal validity of a spouse's prior divorce.⁹⁹

When an actor is ignorant rather than mistaken, essentially the same analysis of culpability applies. Ignorance, like mistake, can be reasonable or negligent. If the state prohibits receiving stolen property negligent as to its stolen status, then Alice is liable not only if she forms the mistaken negligent belief that it is not stolen but also if she is negligently ignorant of that status. There is one small difference, however. If Alice is ignorant, then in the nature of things she cannot be "reckless" in the Model Penal Code sense of the term, since a reckless actor must actually be aware of a substantial risk. Otherwise, the refined model could apply to ignorance as well as mistake, and every mention of "mistake" could be replaced by "mistake or ignorance."¹⁰⁰

⁹⁷ See Dutilleul & Moore, *supra* note 5, at 167.

⁹⁸ See MPC § 5.01(1)(a); J. DRESSLER, *supra* note 7, at 361-62; Hughes, *supra* note 38, at 1022.

⁹⁹ See, e.g., MPC § 230.1(1)(c),(d).

¹⁰⁰ An important caveat: although mistake and ignorance similarly might defeat liability with respect to elements of the offense, ignorance might *create* liability insofar as it negates the affirmative belief sometimes required for a *defense*. For example, if self-defense requires the actor to have the affirmative belief that he or she is justified, then the actor's ignorance (no matter how reasonable) precludes the defense and permits liability. If, however, the offense itself requires the actor to have the affirmative belief (say, that the goods are stolen), then the actor's ignorance points in the opposite direction, against liability. See G. FLETCHER, *RETHINKING CRIMINAL LAW* 686 (1978); Fletcher, *Mistake*, *supra* note 5, at 660-62.

2. *Attempts and Inculcation*

What about attempt? Here, the plot thickens. How do we treat mental states less culpable than knowledge when we are considering inculpatory mental states that create attempt liability, rather than mistakes that might excuse from completed crimes? Are the treatments symmetrical, as they were when the requisite mental state was knowledge? Commentators have paid almost no heed to this question¹⁰¹—perhaps because of the difficulties that we will now encounter.

Bring Bob back to the stage. Again, assume that the crime of receiving stolen property requires only reckless, conscious disregard of the risk that they are stolen. As before, assume that Bob agrees to receive some property, and, as before, it turns out that the property is not stolen. Now, to keep the possibilities clearly in mind, we need to distinguish two categories of mental states: "Mistake" and "No mistake." In the first category, as before, Bob mistakenly believes that the property is stolen. Will his incriminating belief suffice for attempt liability if the crime requires only recklessness? Indeed it will. If Bob actually has the more culpable mental state of belief, then he is liable for attempting any crime that requires a less culpable mental state, such as recklessness or negligence.¹⁰²

In the second, "No mistake" category, Bob does not actually

¹⁰¹ Paul Robinson does suggest that the MPC impossibility language, "if the attendant circumstances were as he believes them to be," should be reformulated to permit attempt liability if "the actor desired or was aware of a substantial risk that the circumstances were such that his conduct would constitute the crime." P. ROBINSON, *supra* note 5, § 85(c), at 429. In effect, he is arguing that either hope or recklessness as to the circumstance should always suffice. This argument, however, is overstated. Recklessness should suffice for impossible attempt liability only if it would suffice for liability for the completed crime. For example, if the crime of receiving stolen property requires knowledge that it is stolen, a person who is merely aware of a substantial risk that the property is stolen should not be liable for attempt if he receives nonstolen property. See *supra* notes 91, 94-96 and accompanying text. (I discuss Robinson's argument that hope should suffice at note 192 *infra*.)

Arnold Enker offers the only other discussion of which I am aware on this issue of whether mental states less than belief should suffice for impossible attempt liability. He concludes that recklessness should suffice here if it suffices for the completed crime. In so concluding, he rejects the argument that "the absence of the required circumstances is somehow balanced by requiring a higher level of mens rea, actual belief in their presence." As he points out, heightening the mens rea requirement to belief probably does not allow a firmer inference of dangerousness from the actor's conduct. Enker, *Mens Rea and Criminal Attempt*, 1977 AM. B. FOUND. RES. J. 845, 870 [hereinafter Enker, *Mens Rea*].

¹⁰² See MPC § 2.02(5).

Bob should also be liable for attempting a strict liability crime, if he actually has the more culpable mental state of belief. For example, suppose Bob would commit statutory rape if he had intercourse with a girl less than 16 years of age, notwithstanding his

believe that the property is stolen, and thus is not literally “mistaken” about its status.¹⁰³ Bob might have no beliefs about its status, or he might even believe that it is *not* stolen. Within this second category, we can distinguish several “nonmistaken” mental states—reckless, negligent, or “reasonable.”

Thus, suppose Bob confesses to a real suspicion that the goods *might* be stolen, but his suspicion does not ripen into an actual belief that they probably *are* stolen.¹⁰⁴ Bob might therefore be reckless.¹⁰⁵ Should he not then be liable for attempt, even though he does not actually believe that the goods are stolen? For the *completed* crime, remember, recklessness short of a belief that the goods are stolen is sufficient to create liability. (Recall reckless Alice from the prior section.¹⁰⁶) Why should Bob’s attempt require a positive belief that the goods are stolen? The symmetry between Bob’s reckless belief and Alice’s reckless mistake is powerful.¹⁰⁷

A corresponding analysis could apply if the completed crime requires no more than negligence. Suppose a recipient commits the crime of receiving stolen property simply by receiving stolen goods and by negligently lacking awareness that the goods are stolen. It

reasonable belief that she was older. If he has intercourse with a girl he believes is 14, but she is actually 18, a conviction of attempted statutory rape might be permitted.

I am only discussing attempt liability for a factually impossible crime (here, a crime of strict liability) when the actor’s belief is more culpable than the crime itself requires. When that condition does not obtain, such liability is much more problematic. *See infra* text accompanying notes 103-114.

¹⁰³ As Michael Moore points out, a mistaken belief is an affirmative belief inconsistent with the true state of affairs. If the proposition *p* is the true state of affairs, then a mistaken belief is a belief that *not-p*. M. MOORE, *supra* note 45, at 85. Strictly speaking, although mistake (about *p*) is inconsistent with knowledge (that *p*), it does not contradict knowledge. Rather, ignorance rather than mistake strictly contradicts knowledge. To say that one is ignorant is to say that one does not believe that *p*; and it is contradictory for a person both to believe that *p* and not to believe that *p*. *Id.* at 85 & nn. 113-17. But since the criminal law presupposes both noncontradiction and consistency of beliefs, both mistake and ignorance can be fairly described as “negating” knowledge.

¹⁰⁴ Under the MPC, knowledge or belief as to a circumstance element requires only that the actor be aware of a high probability that the circumstance exists. MPC §§ 2.02(2)(b), 2.02(7).

¹⁰⁵ For Bob to be reckless, it is not enough that he consciously disregard the risk that the property might be stolen. His disregard must also be a “gross deviation from the standard of conduct that a law-abiding person would observe in [his] . . . situation.” MPC § 2.02(2)(c). Bob would satisfy this additional element if, for example, he allowed himself to overlook obvious signs that property was stolen in order to get an excellent bargain.

¹⁰⁶ *See supra* notes 94-96 and accompanying text.

¹⁰⁷ Notice, however, that although Alice’s reckless mistake and Bob’s reckless mental state are symmetrical, Bob’s mental state is not literally mistaken, as explained above. Although Bob’s attempt remains factually impossible, the factual impossibility is no longer due to a culpable *mistake*.

seems to follow that a person who receives *nonstolen* goods and who is criminally negligent in not believing that the goods are stolen should be guilty of an *attempt* to negligently receive stolen goods—even though the goods are not stolen and the recipient correctly and honestly believes that they are not stolen!

This result is remarkable, in part, because it describes a remarkably rare concatenation of circumstances: a defendant believes in something; she is grossly unreasonable in forming that belief; yet what she believes is true. Nevertheless, the result is conceivable. The *Goetz* case is a credible example (albeit in the context of self-defense). “Based on the evidence, a juror could have drawn the following three conclusions: Goetz honestly believed he was about to be robbed; Goetz’s belief was unreasonable in light of what Goetz had seen; yet the four youths really were planning to rob Goetz.”¹⁰⁸ Closer to home, imagine this. A nervous stranger appears at Bob’s door and explains that she obtained a brand new VCR as a gift from Uncle Harvey, which she is selling for five dollars because she already has a VCR. Bob is extremely gullible and believes the implausible story. The story, however, is actually true. To paraphrase the usual factual impossibility argument, Bob’s honest belief that the property is not stolen is irrelevant: he should have believed it was stolen, and if the circumstances had been what he should have believed them to be, his conduct would have constituted a crime!¹⁰⁹

¹⁰⁸ Simons, *Self-Defense*, *supra* note 43, at 1186 n.27.

Consider the widely-reported evidence that screwdrivers were discovered in the pockets of four youths after the shooting. That evidence helps support the conclusion that Goetz was about to be robbed, but since Goetz was unaware of the existence of the screwdrivers when he fired, that evidence does not directly support his claim that he *reasonably believed* he was about to be robbed.

Id.

¹⁰⁹ Some readers will want to take the next logical step: if the crime is one of strict liability, why cannot the defendant be guilty of a factually impossible attempt? This would entail an absurd result: a defendant who received nonstolen goods always would be guilty of a factually impossible attempt to receive stolen goods, since she had the culpability required for the offense—namely, none! Or, to use the above paraphrase, if the circumstances had been as not even a reasonable person would have believed them to be (that the goods were stolen), her conduct would have constituted a crime.

The analysis breaks down here for the following reason. The rationale for punishing factually impossible attempts is that the defendant has taken substantial steps with a culpable *mens rea*. “Culpable *mens rea*,” I have argued, extends to recklessness and negligence, as well as knowledge or belief. More generally, the presumptive symmetry between mistake and impossibility (or between exculpatory and inculpatory mistake) depends on a presumptive symmetry in the treatment of culpability. This rationale, however, does not extend to strict liability, which requires no culpability at all.

On the other hand, strict liability for an *incomplete* attempt might be sensible if the reason why the attempt is “impossible” (or merely fails, see *supra* note 15) is because a circumstance element cannot exist (*e.g.*, the goods are not stolen). For example, suppose again that the completed crime is one of strict liability, prohibiting receipt of stolen

But perhaps I have been too hasty in assuming that even if Bob is not mistaken, he theoretically should be liable for a crime of reckless or negligent attempt if he formed his (correct) belief recklessly or negligently. "Believer Bob"—who is willing to receive stolen property when he actually, though mistakenly, believes that it is stolen¹¹⁰—seems more culpable than "Nonbeliever Bob"—who merely (recklessly) suspects or (negligently) should suspect that it is stolen.¹¹¹ We cannot assume that Nonbeliever Bob would have been willing to accept the property if he actually believed that it was stolen. Although Nonbeliever Bob is somewhat culpable for the way in which he formed his belief about whether the property is stolen, Believer Bob seems much more culpable.

Criminal law does have a doctrine that straddles these two forms of culpability. "Wilfully Blind" Bob might not actually believe that the goods are stolen, but if he deliberately blinds himself to that fact, then he is treated as a true "Believer."¹¹² A person who

goods, even if the actor reasonably believes they are not stolen. Bob arranges to receive goods which are, in fact, stolen, but which he reasonably believes are not. But he never receives the goods; the messenger who is supposed to deliver the goods brings an empty package by mistake. Or, to use a more familiar example, a defendant could be liable for attempted statutory rape of a girl who is younger than the statutory age (even if he reasonably believes she is older) if, when he attempts to engage in intercourse, a third party unexpectedly intervenes. See J. DRESSLER, *supra* note 7, at 341-42. But he could not be liable for attempted statutory rape simply for engaging in intercourse with a girl above the statutory age on the absurd ground that, if the circumstances had been as not even a reasonable person would have believed them to be (that she was below age), his conduct would have constituted a crime!

One reason for this difference in result might be found in a major policy behind strict liability—to ensure that citizens make extraordinary efforts to avoid criminality. In the "absurd" scenario, the licit actual status of the circumstance element gives a defendant no notice that he or she needs to make extraordinary efforts. In the incomplete conduct scenario, however, the illicit actual status of the circumstance at least gives potential notice. (Ironically, my analysis here resurrects, in a limited domain, the factual impossibility/traditional "legal" impossibility distinction that I tried so hard to inter earlier. See *supra* Section I.A.3.b.)

This "notice" argument, if taken further, would entirely prohibit strict liability for attempts, requiring instead that defendant be at least negligent or reckless as to circumstances. See Enker, *Mens Rea*, *supra* note 101, at 874-78. But I need not go so far to eliminate the "absurd" case. For the purposes of my argument, I accept the modern approach allowing attempt liability for strict liability crimes so long as the defendant purposely engages in the conduct and result elements of the crime, even if he makes a reasonable mistake as to the circumstance elements.

¹¹⁰ See *supra* note 102 and accompanying text.

¹¹¹ Note that "Nonbeliever Bob" could either believe that the goods are not stolen, or simply be agnostic or ignorant about the matter. Ignorance, I earlier suggested, can ordinarily be analyzed much like mistake. The same is true in the impossibility context: one's ignorance might be culpably negligent. In the "Uncle Harvey" hypothetical, for example, Bob believed that the property was not stolen, but the analysis would be the same if he were simply unsure or ignorant about its stolen status.

¹¹² Under the "wilful blindness" doctrine, an actor is treated as having knowledge if

shuts his eyes in order to avoid knowledge and then proceeds to receive the goods is considered just as culpable as a person who actually acquires guilty knowledge and then proceeds. This approach is quite consistent with a major rationale for treating "unknowing" actors more leniently than "knowing actors." As I suggested earlier, the negligently ignorant actor, and perhaps even the reckless actor, might have chosen not to receive stolen goods if he fully believed that the goods were stolen. In contrast, if the wilfully blind actor were to see the facts, he seems relatively more likely nevertheless to persist with the criminal conduct.¹¹³

In light of these doubts, perhaps Bob should *not* be liable for attempt if his mental state is less culpable than belief. That is, perhaps impossible and other failed attempts only should be criminalized when the defendant's conduct would constitute a crime if the circumstances were either as he believed them to be, or as he would have believed them to be if he had not wilfully blinded himself to the facts. Attempts would then *not* be criminalized when the defendant's conduct would have constituted a crime if the circumstances were as he (recklessly) suspected them to be or as he should have, but (negligently) did not, believe them to be—even if recklessness or negligence would have sufficed for conviction of the substantive crime had the crime been possible (the goods actually were stolen).

Nevertheless, I remain troubled by the glaring asymmetry between the attempt and the corresponding completed crime. If a mental state less than belief suffices for the completed crime, both Nonbeliever Bob and Believer Bob can be liable for that crime,

he "has his suspicions aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance." G. WILLIAMS, *CRIMINAL LAW*, *supra* note 20, § 57, at 157. See also W. LAFAVE & A. SCOTT, *supra* note 27, at 219-20; R. PERKINS & R. BOYCE, *supra* note 20, at 867-75; J. DRESSLER, *supra* note 7, at 106; Duff, *supra* note 44, at 92-93.

The MPC provides that "knowledge" of a fact "is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." MPC § 2.02.7; *id.* § 2.02.7 commentary, Part I, at 248. This is an awkward statement of the wilful blindness doctrine. First, it seems to eliminate the usual requirement that the actor deliberately avoid knowledge, in order to remain in ignorance. Second, the "unless" clause is problematic. How could a person be aware that it is highly probable that goods are stolen, for example, yet believe that they are not? For some discussions, see M. MOORE, *supra* note 45, at 86; W. LAFAVE & A. SCOTT, *supra* note 27, at 219-20.

¹¹³ To be sure, in some cases the wilfully blind actor avoids knowledge because she recognizes that knowledge would weaken her motivation to persist. (I thank Peter Arenella for this observation.) Notice, however, that such an actor usually has chosen to facilitate his or her own commission of the crime—unlike a merely reckless actor who also would have desisted if aware. This prior choice to disable one's conscience is almost tantamount, in culpability, to a more fully informed choice to commit the crime.

notwithstanding Nonbeliever Bob's lesser culpability.¹¹⁴

The above analysis of culpability levels with respect to factual mistake seems also to apply to legal mistake about an offense element. With respect to legal mistake about governing law, however, this analysis of types of mistakes is largely irrelevant and fails to disturb our earlier conclusion that the legality principle ordinarily trumps concern about individual culpability. If Cathy's conduct amounts, in law, to a crime, then she is guilty—even if she believes that her conduct does not constitute a crime, and without regard to whether that belief is reasonable, negligent, or reckless.¹¹⁵ Conversely, if Delbert's "intended"¹¹⁶ conduct would *not* amount, in law, to a crime, then he is *not* guilty of an attempt—even if he believes that his intended conduct would constitute a crime, and without regard to whether that belief is reasonable, negligent, or reckless.

3. *Circumstances versus Results*

One objection to my entire analysis of attempt and culpable mistakes is that the requisite mental state for attempts is sometimes higher than the requisite mental state for the corresponding completed crime. This objection, however, is only partly convincing. It is sound insofar as a mistake relates to a legally required *result* of the actor's conduct. To be convicted of attempting a result crime such as homicide, one must act with purpose to achieve the prohibited result, or at least with the belief that one will achieve the result.¹¹⁷ The mental state for such an attempt can be higher than for the corresponding completed crime, for which recklessness, negligence, or even strict liability¹¹⁸ might suffice.

For example, if Alice is driving carelessly and mistakenly believes that she can run a red light without injuring a pedestrian, and

¹¹⁴ In the completed crime context, "Believer Bob" would believe that the goods are not stolen, but could be liable if the crime only requires recklessness or negligence. "Nonbeliever Bob" might not actually believe that the goods are not stolen, but could be liable on a similar basis even if he had not formed any type of belief about the goods' stolen status.

¹¹⁵ See *infra* note 165 and accompanying text.

¹¹⁶ I use quotation marks because the precise statement of the governing law impossibility defense is more complicated. See *supra* note 21.

¹¹⁷ MPC § 5.01(1).

¹¹⁸ Attempt liability premised on no culpability as to a result element would be especially problematic. If, but for a fortuity, a felon would have caused an accidental death in the course of a felony, he should not be liable for attempted felony murder, even if he would have been strictly liable for felony murder had the death occurred. *But see* *Amlotte v. State*, 456 So.2d 448 (Fla. 1984) (allowing conviction of attempted felony murder).

if she kills the pedestrian, then she might be convicted of reckless manslaughter or negligent homicide, notwithstanding her mistake. If, however, she narrowly misses the pedestrian, then she cannot be convicted of attempted manslaughter or attempted negligent homicide. The only attempt crime for which she can be liable will be a crime requiring at least belief that she will kill; and if she has that mental state, she is liable for attempted murder.¹¹⁹

What if someone makes the converse mistake, recklessly believing that he might cause a criminal result? By parallel reasoning, if such a person (call him Bob) honestly believes that his careless driving has endangered a group of persons, the prosecution cannot obtain a conviction of attempted reckless manslaughter, because the law of attempt does not recognize such a crime.¹²⁰ Indeed, because attempt always requires at least an actual belief that one will bring about the result, Bob will be exculpated so long as he believes that he will not bring about that result, no matter how culpable his mistake.

However, this "heightened mental state for attempt" objection is usually inapposite insofar as the mistake relates to a *circumstance* element of a crime. Recall the earlier example of reckless "Nonbeliever Bob," who recklessly suspected that the property might be stolen.¹²¹ Bob can theoretically be convicted of an attempted reckless receiver of stolen property, because that crime only requires recklessness as to a circumstance, not recklessness as to bringing about a result. With respect to a circumstance element, most jurisdictions probably require no higher mens rea for the attempt than for the completed crime.¹²²

¹¹⁹ Alice might, however, be liable for reckless endangerment—a crime designed to fill the gap created by attempt law's requirement of a higher mens rea for result crimes. See MODEL PENAL CODE § 211.2. Indeed, insofar as reckless endangerment requires creation of risk, it might itself be considered a result crime. In theory, then, a person might potentially be liable for attempted reckless endangerment. However, such attempt liability would probably require a belief that one is creating, or has purpose to create, the risk. Thus, a very drunk driver who is arrested while turning on the ignition might not be liable, while a teenager who has just bragged to his friend (an undercover cop) that he wants to scare some pedestrians might be liable if arrested after turning on the ignition. (On the other hand, if risk-creation is not a result element in the reckless endangerment statute, then a higher mens rea as to that result would not be required, and the drunk might be liable as well.)

¹²⁰ However, if Bob mistakenly believes that his driving is *practically certain* to cause the death of others, then he can be convicted of attempted murder, so long as the jurisdiction follows the MPC and considers the defendant's belief that he will cause the result a sufficient mens rea for attempt.

¹²¹ See *supra* notes 103-111 and accompanying text.

¹²² See J. DRESSLER, *supra* note 7, at 341-42, 358-59. "For example, if D may be convicted of statutory rape on proof that he was reckless as to the girl's age (the attendant

4. Inherently "Unreasonable" Attempts

Before leaving the subject, we should consider a final argument about culpability and attempts—namely, that the law should not punish "inherently impossible" attempts.¹²³ This category of attempts has been analyzed in a way that displays significant confusion about the relation between culpability and impossibility.

The time-worn example of "inherent impossibility" is sticking pins in a voodoo doll in a (futile!) attempt to kill someone.¹²⁴ LaFave and Scott define "inherently impossible" attempts as those "in which the defendant employs means which a reasonable man would view as totally inappropriate to the objective sought."¹²⁵

circumstance), then he may be convicted of attempted statutory rape if he were reckless, but not if he were negligent or innocent, as to the girl's age." *Id.* at 359.

This argument, that no higher mens rea is required for attempt when the mens rea pertains to a circumstance element, runs into the following definitional problem under the MPC. (I thank Josh Dressler for pointing this out.) The Code defines "knowledge" as to a circumstance as awareness, but it defines "purpose" as to a circumstance more broadly, as awareness, belief or hope. MPC § 2.02(2)(a),(b). In a factually impossible attempt, although one can believe that nonstolen goods are stolen, one cannot be "aware" that they are stolen, since awareness implies the truth of the proposition of which one is aware. In effect, then, the Code seems to impose a higher mens rea for the attempt than for the completed crime, since only "purpose" is defined to include "belief" as well as "awareness." In our example, one could be liable for a factually impossible attempt to receive stolen goods that one falsely believed were stolen only if the substantive crime were defined as "purposely" rather than "knowingly" receiving stolen property.

However, I doubt that the drafters of the Code had this problem in mind when they defined "purpose" and "knowledge." Indeed, I doubt that they specifically intended to limit the definition of knowledge as to a circumstance to "awareness" and thereby exclude "belief." Rather, they probably used the terms "knowledge" and "awareness" because they desired a single, shorthand mental state term that would require both a cognitive state—belief—and an external circumstance element—the truth of the proposition believed. Therefore, I would not interpret the Code to require, with respect to a circumstance element, a higher mental state for the attempt than for the completed crime.

¹²³ See Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 34 (1968); Robbins, *Attempting the Impossible*, *supra* note 20, at 379 n.12, 423 n.243, 437 n.313, 441-42; Kremnitzer, *supra* note 20, at 350-52; MODEL PENAL CODE § 5.01 commentary at 316 n.88; P. ROBINSON, *supra* note 5, § 85(e); Ashworth, *Criminal Attempts*, *supra* note 11, at 763-64.

¹²⁴ The time-worn example has left the domain of law professors' minds and sprung to life. See "Voodoo Attempt? Two Face Conspiracy Charges in Failed Death Hex of Judge," 75 A.B.A. J. 48 (Sept. 1989) (defendant charged with conspiracy to commit murder after he allegedly paid a third party to send a photo and a lock of the victim's hair to a witch doctor who would conjure a death curse).

¹²⁵ W. LAFAVE & A. SCOTT, *supra* note 27, at 517; see also Robbins, *Attempting the Impossible*, *supra* note 20, at 441 (offering a similar proposal). Research discloses that no jurisdiction has adopted such language as the definition of an "inherent impossibility" exception. Although Robbins points to similar language in New Jersey's attempt statute, N.J. STAT. ANN. § 2C:5-1(a) (West 1982) ("Purposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe

I find a significant problem with the LaFave and Scott definition.¹²⁶ It seems perverse to exculpate someone for an unreasonable mistake about the efficacy of her efforts to commit a crime, but not for a reasonable mistake! For example, an actor might be so fervently obsessed with blowing up a building that she doesn't realize what a "reasonable person" would realize—that she failed to purchase appropriate materials, or simply that she failed to light the fuse. Under this definition, she might be acquitted, yet this seems to reward her culpable obsession.

The inherent impossibility exception to attempt liability is especially troubling when it takes the broad form of exculpating for unreasonable mistakes in assessing one's own dangerousness. Perhaps the proponents' point is that the mistake is "unreasonable" only in the sense of reflecting a serious and unusual mental deficiency that a "reasonable" or ordinary person would not possess. Such a mistake might diminish dangerousness and need *not* reflect personal fault, unlike a culpably unreasonable mistake.¹²⁷ But if this is their view, proponents should restrict the wording to that form of mistake.

5. *Refined Chart*

In the chart that follows, I tentatively assume a symmetrical analysis of the relevance of culpability to exculpatory mistake and

them to be") (emphasis added), he neglects to notice that New Jersey also adopted a more conventional and much less troublesome definition. *Id.* § 2C:5-4(b)(1) ("The criminal attempt . . . is . . . inherently unlikely to result or culminate in the commission of a crime."). See Robbins, *Attempting the Impossible*, *supra* note 20, at 423-24 n.243, 442 n.326. I confess, however, that the point of the first New Jersey section is obscure.

¹²⁶ The MPC, by contrast, creates a narrower exception, authorizing a court to dismiss a prosecution if the "particular conduct . . . is so inherently unlikely to result . . . in the commission of a crime" that it does not present "a public danger warranting" the usual penalty. § 5.05(2).

This provision does not reflect my earlier suggestion that persons who do not believe, but should believe, that they have violated a circumstance element (*e.g.*, received stolen goods) might be convicted of attempt if the crime is satisfied by negligence. Rather, it is intended to exculpate even the actor who does believe he will succeed, so long as that belief is unreasonable.

Apart from this definitional problem, precluding liability for inherently impossible attempts is questionable on grounds of policy. Unless the category is carefully defined to include only persons who are "cut off from reality" and "can't be convinced by rational means", Kremnitzer, *supra* note 20, at 350-52, the person who commits such an attempt might simply learn from the experience to try an inherently more potent means at the next opportunity. See P. ROBINSON, *supra* note 5, § 85(e), at 434-43; Robbins, *Attempting the Impossible*, *supra* note 20, at 423 n.243.

¹²⁷ See G. FLETCHER, *RETHINKING CRIMINAL LAW* 707-10 (1978), for a helpful explanation of this distinction between two forms of "reasonable mistakes." See also MINN. STAT. § 609.17 (1982) (allowing defense of impossibility only when "such impossibility would have been clearly evident to a person of normal understanding").

inculpatory mistake (including impossibility). In the next section, however, I will suggest some practical reasons for abjuring some of the fine distinctions between culpability levels in the inculpatory mistake category.

After considering the culpability of the actor's mistake or ignorance, we have come to this:

MISTAKE AND IMPOSSIBILITY: REFINED THEORETICAL VIEW

EXCULPATORY MISTAKE OR IGNORANCE

Does the mistake or ignorance exculpate defendant from liability for the completed crime?

A. *Factual mistake or ignorance*

Crime requires X (the goods are stolen) and either:

- (1) factual knowledge or belief that X (e.g., the goods are in fact stolen), or
- (2) recklessness as to X, or
- (3) negligence as to X.

X is in fact the case (the goods are indeed stolen). But defendant mistakenly believes that not-X (the goods are in fact not stolen).

Result: Not guilty of crime if mistake negates required mental state. Guilty of crime only if mistake is sufficiently culpable. I.e., guilty of "reckless receiving" only if mistake is reckless (aware that goods might be stolen), not if it is merely negligent (should be aware that goods might be stolen); guilty of "negligent receiving" only if mistake is negligent, and not if it is reasonable. Not every mistaken belief that not-X exculpates.

INCULPATORY MISTAKE OR IGNORANCE, INCLUDING IMPOSSIBILITY

Does the mistake or ignorance inculpate defendant and create liability for the attempt?

B. *Factual mistake or ignorance, including impossibility*

Crime requires X and either:

- (1) factual knowledge or belief that X,
- or
- (2) recklessness as to X, or
 - (3) negligence as to X.

Although not-X is in fact the case (the goods are not in fact stolen), defendant might either:

- (a) mistakenly believe that X (they are stolen); or
- (b) be wilfully blind about X; or
- (c) be reckless, negligent, or "reasonable" as to X, without being literally mistaken, as in (a).

Result: Not guilty of attempt if mental state (whether mistaken or not) negates required mental state for crime. Guilty of attempt only if mental state is sufficiently culpable for completed crime.

If (a) mistaken or (b) wilfully blind, guilty of attempt.

If (c), i.e., not literally mistaken or wilfully blind, then perhaps not guilty of attempt.¹²⁸

¹²⁸ However, if symmetry is to be preserved, then one is guilty of attempting to "recklessly receive" if reckless (believes that goods might be stolen), but not if merely negligent (should believe that goods might be stolen); and one is guilty of attempting to "negligently receive" only if negligent, but not if "reasonable."

C. *Legal mistake re governing law*

[Essentially the same as "First View," above:] Crime requires elements Y and Z. Defendant mistakenly believes that satisfying Y and Z does not amount to a crime. That belief might be reckless, negligent, or reasonable.

Result: Guilty of crime. Although might not be "culpable"—i.e., defendant might reasonably think her conduct amounts to a crime—the legality principle controls.

E. *Legal mistake re offense element*

[The same analysis as A, above, except that crime requires either: (1) knowledge about or belief in X's *legal* status (e.g., the goods are in law stolen), or (2) recklessness as to X's *legal* status, or (3) negligence as to X's *legal* status. Not every legally mistaken belief that not-X exculpates.]

D. *Legal impossibility re governing law*

[Essentially the same as "First View," above:] Defendant mistakenly believes that satisfying V and W amounts to a crime. That belief might be reckless, negligent, or reasonable.

Result: Not guilty of attempt. Although might be "culpable"—i.e., defendant might think his conduct amounts to a crime, or might even unreasonably (but correctly!) think his conduct does *not* amount to a crime—the legality principle controls.

F. *Legal impossibility re offense element*

[Probably the same analysis as B, above, except that crime requires either: (1) knowledge about or belief in X's *legal* status (e.g., the goods are in law stolen), or (2) recklessness as to X's *legal* status, or (3) negligence as to X's *legal* status.]

II. SECOND THOUGHTS

The model I have presented is airy and idealized. In this section, I will help it parachute down to reality. Practical and theoretical objections prompt a closer look at some of the model's elements.

My general conclusions are as follows. First, in answer to the practical objection that proof of some of the mental states in the model is difficult and unreliable, I believe the problem is manageable. It is less troublesome to recognize a mistake that leads to exculpation than to recognize a mistake that leads to attempt liability. Moreover, factual mistakes are much less troublesome than legal mistakes about an offense element, which should only be recognized either in limited domains or with procedural protections. Second, I acknowledge both the difficulty of distinguishing legal mistakes about offense element from legal mistakes about governing law, and the dubious wisdom, from the perspective of criminal law policy, of treating such legal mistake/E the same as factual mistake. Instead, I conclude that most legal mistakes about offense elements should only exculpate if they are reasonable. Thus, legal mistake/E would exculpate more readily than legal mistake/GL but less readily than factual mistake.

A. PRACTICAL OBJECTIONS

The most glaring practical objection to the model is the difficulty of determining reliably whether a defendant possesses some of the mental states I have described, especially in the context of mistake. How can a factfinder be sufficiently confident that Alice hon-

estly (though mistakenly) believes that the goods are not stolen (a belief that exculpates her for the crime of knowingly receiving stolen property), especially if her mistake is not one that a reasonable person would make under the circumstances? Further, how can the factfinder be convinced beyond a reasonable doubt that Bob honestly (though mistakenly) believes that the goods *are* stolen, a belief that renders him liable for attempt?

Worries about the credibility of Alice's mistake have not deterred courts from recognizing a mistake defense, probably for several reasons. A mistake negating liability inures to the defendant's benefit. Also, if the mistake was unreasonable, juries are unlikely to accept the defendant's claim unless she posits a distinct and persuasive reason for her unusual factual error (such as a credible perceptual defect or a history of gullibility).

Courts and commentators have worried more about the credibility of Bob's mistake, in part because his mistake seems to create attempt liability for "thoughts alone."¹²⁹ That characterization is overstated—after all, Bob must still satisfy the *actus reus* of the attempt, by either receiving the (nonstolen) property or taking a substantial step towards receiving it—but it does express a legitimate concern. For in Bob's case, overlooking doubts about the mistake leads in the direction of criminal liability. The problem is even more pronounced if we follow the refined model and permit Bob to be convicted based on reckless and negligent *nonmistakes*.¹³⁰

One solution is to require, as the Model Penal Code currently does not,¹³¹ that the attempting actor's conduct, considered apart from her belief or intent, provide some evidence of that intent, even in cases where she has completed the physical movements she believes necessary to accomplish the crime.¹³² This solution is a sensi-

¹²⁹ See, e.g., G. FLETCHER, *RETHINKING CRIMINAL LAW* 177 (1978); see also J. DRESSLER, *supra* note 7, at 355.

¹³⁰ Recall the argument. If the jurisdiction punishes one who receives stolen property and is merely reckless or negligent as to its stolen status, then even a nonmistaken defendant who actually receives nonstolen property might theoretically be liable for attempting to recklessly or negligently receive it—that is, if she recklessly disregards a risk that the property might be stolen, or if a reasonable person would have believed that it was stolen. Since recklessness or negligence short of a belief that the goods are stolen suffices for the completed crime, then perhaps an attempt conviction should not depend on a positive belief that the goods are stolen. See *supra* text accompanying notes 103-114.

Anderton v. Ryan, 2 All E.R. 355 (1985), is a rare case containing credible proof of a culpable mistaken belief that the goods were stolen. See J. DRESSLER, *supra* note 7, at 355 n.42.

¹³¹ See MPC § 5.01(1)(a),(b) (no corroboration requirement). Cf. *id.* at § 5.01(1)(c) (corroboration requirement for incomplete attempts).

¹³² See S. KADISH, S. SCHULHOFER & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES*

ble approach even apart from issues of factual impossibility.¹³³ Under this approach, convictions for reckless and negligent nonmistakes would be rare.

The problem of unreliable proof is even more acute when the mistake is a legal (rather than factual) mistake about an offense element. Above, I hypothesized the cases of Edna, who honestly (though mistakenly) believed that abandoned property is not legally stolen, and Fred, who, residing in a different jurisdiction, honestly (though mistakenly) believed that such property is legally stolen.¹³⁴ But how often would we actually know their mental states? To be sure, one can imagine persuasive scenarios for either mistake. Edna's open display of the goods to her law-abiding friends, or Fred's secreting of the goods, would suggest their respective states of mind. And in some situations analogous to Edna's, courts and legislatures have recognized a defense—most notably a claim of right in theft offenses and a claim that the prior divorce was valid in the offense of bigamy. Even an unreasonably mistaken belief that one has a legal right to the goods or has obtained a valid divorce can

675 (5th ed. 1989) (suggesting that Model Penal Code's strong corroboration requirement apply to complete as well as incomplete attempts); J. DRESSLER, *supra* note 7, at 362 (same). After an exhaustive survey of the literature, Ira Robbins similarly concludes: "The state should not convict an individual of an attempt crime unless his acts, viewed without reference to his underlying intent, at least raise the possibility that the defendant intended to commit a crime." Robbins, *Attempting the Impossible*, *supra* note 20, at 378; *see id.* at 400-12, 439-43. Although Robbins is addressing only the problem of "mixed fact/law impossibility" (or traditional "legal (?) impossibility), the proposal should logically apply to pure factual impossibility as well. *See also* Hughes, *supra* note 38, at 1034; G. FLETCHER, *RETHINKING CRIMINAL LAW* 150 (1978) (proposing an "aptness" test for attempts that considers whether the attempting conduct, from the perspective of an objective observer, is likely to produce harm in the long run); Fletcher, *Constructing a Theory*, *supra* note 38, at 63-67 (refining the "aptness" theory); Enker, *Impossibility*, *supra* note 88, *passim* (suggesting that "legal" impossibility, defined as impossibility as to a circumstance element, should simply be abolished because of legality and objective proof problems).

Although most criticisms of the Code for lack of a corroboration requirement focus on subsection (a) of § 5.01(1) (completed attempts where mistake is about a *circumstance* element), Robbins points out that the same problem arises with subsection (b) (completed attempts to commit crimes with *result* elements). Robbins, *Attempting the Impossible*, *supra* note 20, at 428-29. *See also* Hughes, *supra* note 38, at 1028 (suggesting a similar strengthening of subsection (c)).

For a list of jurisdictions that have imposed a stronger corroboration requirement than the Code, *see* MPC § 5.01 commentaries at 320 n.95.

¹³³ For example, if the actor used causally ineffective means to bring about a crime, the attempt would probably not be considered factually impossible, but it would be sensible to require that her conduct strongly corroborate her intent. Suppose that a woman confessed that she parked her car at the bottom of a hill because she wanted and expected her ex-husband to crash into the car and die. Under the "strong corroboration" test, she might not deserve an attempted murder conviction.

¹³⁴ *See supra* notes 23, 36-37 and accompanying text.

be a defense.¹³⁵ But a general claim of legal mistake/E might be more treacherous in other situations. For example, someone is charged with murder because he deliberately kicked a pregnant woman and killed the fetus. Suppose the jurisdiction requires, for liability, that the accused "knowingly kill another human being," and therefore "know" that the victim was, in law, a human being. How would we test the defendant's claim that he honestly believed that an unborn fetus is not, in law, a human being?¹³⁶ Claims of legal mistake/E could be asserted in a wide variety of cases. Perhaps it is wiser to recognize such claims only in a subset of cases in which they are more common and their credibility can more easily be established (such as theft and bigamy).¹³⁷

These considerations suggest even more caution is warranted before recognizing Fred's claim of legal impossibility/E, because in this case, an alleged legal mistake creates, rather than destroys, criminal liability. If legal mistakes are more difficult to evaluate reliably than mistakes of fact, and if factually impossible attempts warrant actus reus safeguards, then legal impossibility/E attempts might warrant even greater procedural and substantive safeguards. Prudence and fairness to defendants might even militate against recognizing any such cases. For every case in which a defendant boasts that she has successfully committed bigamy when she has not (because she mistakenly believes that the divorce was invalid) there may be some others in which the prosecution's claim of culpable legal mistake/E is simply too elusive for reliable proof.

In the end, the practical objections are serious but not insurmountable. With respect to exculpatory factual mistake and ignorance, the good sense of the jury ordinarily can be trusted. With respect to factual mistake and other mental states creating attempt liability, actus reus requirements can be strengthened, and of course the prosecution has the burden of proof. With respect to recognizing legal mistake/E as excusing from the completed crime or creat-

¹³⁵ MPC §§ 223.1(3) (theft), 230.1(1)(c) (bigamy) (not guilty if actor does not know that a court judgment purporting to grant divorce is invalid; thus, even an unreasonable mistaken belief that the divorce is valid precludes liability). The defenses are often literally affirmative defenses to be proven by the defendant, not negations of the prima facie case. See, e.g., MPC § 223.1(3) (theft).

¹³⁶ *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617 (1970) (holding that defining "person" in the homicide statute to include a viable, unborn fetus would be an unforeseeable judicial enlargement and would deny due process); *Commonwealth v. Cass*, 392 Mass. 799, 467 N.E.2d 1324 (1984) (so defining "person," but only applying holding prospectively, because interpretation might have been unforeseeable to defendant).

¹³⁷ On the other hand, as an editor of this journal has pointed out to me, allowance of these kinds of claims might have the advantage of forcing legislatures to redefine the crime—for example, to include a more specific definition of "human being."

ing liability for the attempt, there is greater reason for caution. Methods for limiting the legal mistake/E categories could include shifting burdens of production or persuasion to the defendant,¹³⁸ and even restricting the legal mistake/E analysis to certain classes of cases.

To the extent that the practical objections will only result in a very small number of convictions or acquittals based on certain elements of the model, the model nevertheless has a direct impact in those specific cases. At a deeper level, the structure of the model has an indirect but practical impact in all categories of mistake and ignorance, for it illuminates the concepts and policies behind those doctrines.

B. LEGAL MISTAKES ABOUT AN OFFENSE ELEMENT REEXAMINED

It is time to reconsider how legal mistake/E should be treated. The modern view treats it precisely like factual mistake, allowing even unreasonable mistakes to exculpate if the relevant mens rea requirement is knowledge or belief.¹³⁹ I find this view troubling for two reasons. First, the theoretical distinction between legal mistake/E and legal mistake/GL can be elusive. Second, there are good reasons for treating legal mistake/E more like legal mistake/GL than the modern approach provides.

1. *Legal Mistake/E or Legal Mistake/GL? A Problematic Distinction*

The distinction between legal mistake/E and legal mistake/GL is much more difficult to draw than the more basic distinction between fact and law. In the first place, some offenses do require a mens rea as to governing law. For example, federal statutes that require a "wilful" violation are often interpreted to require knowledge that one is violating the governing criminal law under which the defendant is charged, and not simply a subsidiary legal element of the crime.¹⁴⁰ In the second place, the distinction between legal

¹³⁸ Whether this proposal would raise constitutional problems is unclear. See J. DRESSLER, *supra* note 7, at 52-53.

¹³⁹ See *supra* notes 23-24 and accompanying text.

¹⁴⁰ See, e.g., *United States v. Lizarra-Lizarra*, 541 F.2d 826 (9th Cir. 1976); and MPC § 2.02 commentaries, Part II, at 251. However, it is hazardous to generalize about the legal effect of introductory language such as "willfully" or "knowingly" in federal statutes. Compare *Liparota v. United States*, 471 U.S. 419 (1985) (prohibition against "knowingly" using food stamps in a manner not authorized requires that defendant know that use is not authorized) with *United States v. Yermian*, 468 U.S. 63 (1984) (prohibition against person, in any matter within federal jurisdiction, "knowingly and willfully" making a false statement does not require knowledge of federal jurisdiction) and *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971) (prohibi-

mistakes concerning governing law and concerning offense elements can become very fine—as the earlier discussion of “classic chestnuts” revealed.

Consider the Model Penal Code’s treatment of the distinction. On one hand, the Code provides that ignorance or mistake as to governing law is usually no excuse: the Code broadly presumes that culpability “as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of the offense is [not] an element of such offense,”¹⁴¹ unless this is otherwise provided. On the other hand, the Code flatly asserts: “Ignorance or mistake as to a matter of fact or law is a defense if . . . [it] negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense.”¹⁴² Suppose the defendant who deliberately kicked a pregnant woman in order to destroy the fetus is charged with murder, defined in part as “knowingly causing the death of another human being” within the meaning of the statute, and the jurisdiction actually provides that a fetus is a “human being.” Is the legal meaning of “human being” a question of *governing law*, because it is about “whether conduct constitutes an offense” or about the “meaning or application of the law determining the elements of the offense”? Or does the defendant’s legal mistake instead concern an *offense element*, because it is a “mistake as to a matter of . . . law” that negates the mens rea requirement? The choice is of great practical importance, for legal mistakes about governing law are almost never excuses, while legal mistakes about an element frequently are.¹⁴³

Consider three possible approaches to the problem. Under the broadest approach, if a culpability term (such as “knowingly” or “recklessly”) applies to an element of an offense (such as whether the goods are stolen or whether the victim is a human being), then both factual and legal mistakes that negate that culpability would exculpate.¹⁴⁴ Legal mistakes would exculpate even if they were mis-

tion against “knowingly violating” a regulation requires awareness of acts violating the regulation but not knowledge that defendant was in violation of regulation).

¹⁴¹ MPC § 2.02(9).

¹⁴² *Id.* § 2.04.

¹⁴³ For a thoughtful discussion of this issue in the context of mistakes as to justifications, see Fletcher, *Mistake*, *supra* note 5, at 663-66.

¹⁴⁴ In the German literature, the broad approach is referred to as the “equal treatment doctrine,” since it “proposes to treat knowledge of unlawfulness and knowledge of other elements (e.g. factual elements) of a crime equally.” Arzt, *supra* note 5, at 715. Although German law has rejected this approach, it treats some legal mistakes/E like factual mistakes—namely, those legal mistakes/E in which the defendant lacks proper understanding of the normative context of the prohibition. *Id.* at 717. German law essentially treats other legal mistakes/E like legal mistakes/GL—namely, as defenses if

takes about the "same law" under which defendant was charged (*i.e.*, they would otherwise be about the "meaning or application of the criminal law"). Thus, even if the criminal law of stolen property itself defined the meaning of "stolen," Edna would be acquitted by reason of her exculpatory legal mistake.

A second, intermediate approach is identical to the first except that it is narrower in one respect: it does not give exculpatory force to legal mistakes about the "same law" under which defendant was charged. Thus, Edna would be acquitted only if the civil law of the jurisdiction (or, perhaps, the criminal law of some other jurisdiction¹⁴⁵) defined "stolen," but not if the criminal law under which she was charged defined "stolen."

Finally, a third, much narrower approach might recognize exculpating mistakes of legal element only when the statute is quite explicit and specifically mentions legal mistakes.¹⁴⁶ For example, a bigamy statute might explicitly specify the mens rea required as to the legal validity of a prior divorce,¹⁴⁷ or a theft statute might explicitly recognize a claim of right.¹⁴⁸

they are reasonable. See *infra* notes 163-64. See also Arzt, *Ignorance or Mistake of Law*, 24 AM. J. COMP. L. 646 (1976).

I do not address the question how far a culpability term "travels" through the elements of a statute. A statute that punishes a person who "knowingly receives the property of another" at least requires knowing receipt, but it might or might not require knowledge that the property belongs to another. See MPC § 2.01(4). Whatever the answer to that question, I am interested in a different question: If the culpability term does "travel" through a statute and therefore makes factual mistakes relevant, does it also make legal mistakes relevant?

¹⁴⁵ See *People v. Bray*, 52 Cal. App. 3d 494, 124 Cal. Rptr. 913 (Cal. Ct. App. 1975). One might also permit acquittal if the definition of "stolen" was found elsewhere in the jurisdiction's criminal law, though not in the criminal law of "stolen property" itself. This, however, seems to be an overly narrow interpretation of "the law determining the elements of the offense." MODEL PENAL CODE § 2.02(9). That phrase probably encompasses all of the jurisdiction's criminal code.

¹⁴⁶ This seems to be Glanville Williams' view:

Mens rea words in a statute (such as "willfully") do not generally let in a defence of mistake of law. But if the statute requires knowledge or wilfulness in respect of a legal concept (as in the case of knowledge of impropriety, or knowledge of disqualification), this will let in the defence.

G. WILLIAMS, TEXTBOOK, *supra* note 26, at 463.

¹⁴⁷ See, e.g., MPC § 230.1(1)(c),(d) (a defendant is not guilty of bigamy if a divorce judgment has been entered and he does not know that it is invalid, or, more generally, if he reasonably believes that he is legally eligible to remarry).

¹⁴⁸ See, e.g., MPC § 223.1(3) (recognizing an affirmative defense).

Smith and Hogan suggest another distinction:

This principle [that a mistake of law can negate mens rea] will operate only when the definition of the actus reus contains some legal concept like "property belonging to another." It has no application where the law fixes a standard which is different from that in which D believes. If he kills a trespasser it is no defence for him to assert that he believed the law allows deadly force to be used to expel trespassers.

J.C. SMITH & B. HOGAN, *supra* note 28, at 72. I would put the matter slightly differently:

The MPC drafters probably intended the second approach, though it is quite possible that they intended the first.¹⁴⁹ As a matter of policy, however, I believe that the first approach is most sensible—with a modification that I will later defend.

The first and broadest approach is straightforward and comports with the modern “logical relevance” analysis of mistake.¹⁵⁰ If a statute says that one can only be convicted if he believes that the goods are stolen, then he cannot be convicted if he makes any mistake, factual or legal, inconsistent with that required belief. The second approach is quite similar, but it permits liability when

the principle only applies when a culpability term applies to an element of the offense, not whenever the defendant has a mistaken view of the scope of the offense. If murder requires that the defendant knowingly kill another with no privilege to do so, and if knowledge is the requisite culpability as to lack of privilege, then in Smith and Hogan’s example D would have a defense.

A legislature also can sometimes eliminate exculpatory mistakes of law by defining the scope of the prohibition more carefully and exhaustively. This technique converts (possibly exculpatory) legal mistakes/E into (nonexculpatory) legal mistakes/GL. Arzt gives a useful illustration:

If legislators use the general term “game,” . . . one can know that he kills a rabbit and not know that he hunts game. If the criminal law names all animals which are protected as “game,” it seems that P’s factual knowledge that he kills a rabbit combined with his assumption that rabbits are not protected as “game” must be a mistake of law.

Arzt, *supra* note 5, at 730. (However, Arzt’s analysis of the distinction between legal mistake/E and legal mistake/GL differs from mine.)

¹⁴⁹ The text of § 2.02(9) is in tension with the text of § 2.04(1). The former states that mens rea is not required as to the legal meaning of an offense element “unless the definition of the offense or the Code so provides,” while the latter flatly states that legal as well as factual mistakes exculpate whenever they negate requisite mens rea. The commentary to the latter is equally unilluminating:

There is no sensible basis for a distinction between mistakes of fact and law in this content. . . . The culpability issue is essentially the same for a given offense whatever the abstract classification of the error . . . and the appropriate inquiry is simply one of logical relevance to culpability rather than the “legal” or “factual” nature of the mistake.

MPC § 2.04 commentary, Part II, at 270 n.2. The commentary to § 2.02(9), however, states that § 2.04 only covers legal mistakes concerning “other” law. See *supra* note 33. This seems a fairly convincing endorsement of the second rather than first approach in the text.

On the other hand, I doubt that the drafters explicitly considered the issue. They seem to have focused on two polar cases—a mens rea requirement as to an element of the offense rebutted by a legal mistake in interpreting “other” law, and no mens rea requirement as to governing law. I am not convinced that they considered a mens rea requirement as to an element of the offense rebutted by a legal mistake in interpreting “same” law. For example, in the Tentative Draft (though not the final Commentary), this sentence follows the passage quoted in note — *supra*: “If, on the other hand, no legal element is involved in the material attendant circumstances, there is no basis for contending that ignorance of such element has a defensive import; it is simply immaterial.” MPC § 2.02 (Tentative Draft No. 4, Apr. 25, 1955). There is a “third hand,” however, which this sentence neglects, and that is the rub.

¹⁵⁰ See J. KAPLAN & R. WEISBERG, *supra* note 18, at 153-54.

defendant's legal mistake concerns an interpretation of an element given by the law defining the offense. Yet, if logical relevance is a persuasive approach, what justifies this exception permitting liability? The answer, presumably, is the "ignorance is no excuse" principle. But again, why should that principle apply when the legislature has inserted a mens rea requirement, especially since, under this second approach, some legal mistakes (namely, mistakes in interpreting "other" law) will negate that mens rea? Moreover, even under this second approach, it is the (criminal) "law determining the elements of the offense" that makes the civil law relevant. And the criminal standard might well incorporate only some aspect of the civil law of "stolen" property. Thus, the problem is not entirely avoided. I conclude that the first approach is preferable to the second.

But this first approach (and also the second, to a lesser extent) would excuse in a surprisingly large number of cases, for whenever a culpability term applies to an element of the offense, an appropriate legal mistake can negate that element. Indeed, since the presumed minimum culpability under the Code is recklessness,¹⁵¹ a legal mistake is potentially relevant with respect to every element of every offense unless strict liability is the specified culpability!¹⁵² It is hardly clear that legislatures or courts creating mens rea requirements intend this result—a result that has not been widely noticed by courts and commentators.¹⁵³ Moreover, this approach treats mistakes of fact and law as identical. In the next section, I will suggest some plausible reasons for differentiating them and for treating mistakes of legal element somewhat more like mistakes of governing law.

¹⁵¹ MPC § 2.02(3).

¹⁵² Paul Robinson takes a different view.

[I]t is entirely for the legislature, in defining an offense, to specify when a culpable state of mind as to a legal point will be an element of an offense. Such required elements are rare, even within the Model Penal Code. Offenses are generally defined to require a culpable state of mind only as to an actor's conduct in certain objective circumstances and causing certain objective results.

P. ROBINSON, *supra* note 5, § 62(d), at 263. For the reasons stated in the text, this view seems incorrect: the legal as well as factual status of a result or circumstance element is a potential issue in every case, even if a *plausible* mistake of law claim might be rare.

¹⁵³ Indeed, many jurisdictions adopting MPC § 2.04(1) have limited the defense to factual mistakes and have excluded legal mistakes. P. ROBINSON, *supra* note 5, § 62, at 262.

More generally, George Fletcher criticizes as "formalistic" the modern view considering the doctrine of mistake simply a part of the investigation of the legislatively required mens rea. G. FLETCHER, *RETHINKING CRIMINAL LAW* 692-93 (1978). "It is little credit to the legal craft to invest its faith in the fortuities of legislative drafting." *Id.* at 698. See also *id.* at 692-94; Fletcher, *Mistake*, *supra* note 5, at 653.

The third, narrow, "explicit statement" approach is viable. If I were confident that a legislature would specifically identify all of the instances in which mistake or ignorance of law is directly relevant to culpability, I would happily embrace this alternative. But the world seems too complex for that. It is doubtful that a legislature would or could be painstaking enough to implement an approach that would, for example, require it to specify the exculpatory effect of mistakes as to the legal status of a tenant's property rights, or of a fetus or a brain-dead patient as a "human being," or of the unlawfulness of the constraint in false imprisonment.¹⁵⁴ Thus, I generally favor the broader approach—with a modification I will now defend.

2. *Legal Mistake/E: A Suggested Approach*

Should legal mistake/E be treated the same as factual mistake, so that it frequently exculpates? The same as legal mistake/GL, so that it almost never does? Or should it be treated in some other manner? I conclude that a middle position is ordinarily most appropriate: only reasonable legal mistakes/E should exculpate.

The strongest argument for treating legal mistake/E like factual mistake and unlike legal mistake/GL is that this best expresses the actor's culpability, as reflected in the structure of the offense. If the legislature considers it an important condition of criminal liability that the bigamist believe that he has two wives, then the defendant's mistaken belief that he has only one exculpates whether based on fact or law. Alternatively, if, as is the usual case, the legislature is silent about culpability as to governing law, then it has not deemed the bigamist's awareness that bigamy is a crime an important condition of liability.

I find this argument overstated. Although I agree that the structure of the offense justifies treating legal mistakes/E more like factual mistakes and less like legal mistakes/GL, it does not fully justify treating legal mistakes/E and factual mistakes the same (*i.e.*, allowing even unreasonable mistakes to exculpate) for three reasons. First, we are unlikely to find a clear legislative intention to treat factual mistake and legal mistake/E the same. A legislature's choice of culpability terms is ordinarily designed to address the much more common problem of *factual* mistake or ignorance.

Second, the argument overlooks some differences between legal mistakes/E and mistakes of fact that militate against equal treatment. Factual mistakes tend to be situation-specific, often revealing either unique external circumstances or the actor's own

¹⁵⁴ See MPC § 212.3.

perceptual and judgmental inadequacies or distortions.¹⁵⁵ Legal mistakes (*e.g.*, whether a Mexican divorce is valid in Massachusetts) are more generalizable across cases. A requirement that the mistake be reasonable is therefore somewhat easier to administer in cases of mistake of law, since the mistakes are likely to fall into more predictable patterns. Moreover, actors who make legal mistakes are not suffering from inattention, perceptual weakness, gullibility or the like, so it is often easier for them to avoid error, and fairer to expect this of them. If this is so, and if a higher proportion of legal mistakes are unreasonable, then there is a greater social cost in allowing such mistakes to excuse. On a utilitarian view, at least, the criminal law can and should consider that cost, given that the legislature has not indicated clearly a desire to restrict criminal liability to those who are not mistaken.

These last arguments are not, by themselves, compelling. It is far from clear that legal mistakes are more likely to be unreasonable than factual mistakes, much less that legal mistakes are always unreasonable. Our conclusion largely depends on what we believe a "reasonable" person would do to ascertain the relevant law.¹⁵⁶ Even if legal mistakes are usually unreasonable, the question remains why unreasonable legal mistakes/E should not excuse just as unreasonable factual mistakes sometimes do. Therefore, I turn to a third, and for me the most powerful, reason for treating factual mistake and legal mistake/E differently. The modern "logical relevance" approach to legal mistake/E pays remarkably little attention to an obvious, but unsettling question: Why don't the same policies that underlie the presumptive rejection of legal mistake or ignorance about governing law similarly apply to legal mistake or ignorance about an offense element?

¹⁵⁵ See J. HALL, *supra* note 10, at 376.

¹⁵⁶ I cannot fully explore this question here, but it is quite important. Traditionally, courts may have thought that any legal ignorance or mistake concerning governing law is necessarily unreasonable, since criminal law prohibitions were largely coextensive with widely-accepted moral codes. Regulatory criminal prohibitions have undermined this traditional assumption. See Cass, *Ignorance of Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 686 (1976) [hereinafter Cass]. Nevertheless, the persistence of the "mistake of [governing] law is no excuse" maxim is probably due, in part, to a belief that reasonable persons are almost always able to ascertain the governing law, or are blameworthy for risking violation of the law.

I sympathize with the modern criticisms of this maxim. See generally Cass, this note. Indeed, as Andrew Grubb has suggested to me, as a rule legal mistakes might be *more* justifiable than factual mistakes, since legal issues are often beyond lay competence. But I am only asserting a rather limited, comparative claim: to the extent the maxim remains viable as to governing law, and to the extent it depends on a defensible view of the reasonable person's obligations, it might apply as much to legal mistake/E as to legal mistake/GL. *But cf.* G. WILLIAMS, CRIMINAL LAW § 315, *infra* note 159.

The legality, fraud, incentive, and pragmatic problems with excusing for a mistake¹⁵⁷ do seem quite similar in the two situations. If legality principles demand that the scope of the criminal law receive definitive statement from courts and legislatures rather than from private individuals,¹⁵⁸ why is it not important that the scope of the law of divorce or "stolen" property receive similar official definition? If we are concerned about citizens making fraudulent claims of ignorance of governing law, why are we not concerned about fraud with respect to the legal status of an element? If we strongly wish to encourage citizens to familiarize themselves with the content of the criminal law, why not encourage them to discover the content of the law of divorce or of "stolen" property? Finally, if we believe that very few citizens actually ever make a reasonable legal mistake/GL, will not the number of people who make a reasonable legal mistake/E also be insignificant? To be sure, legal mistake/E and legal mistake/GL might differ somewhat in these respects. It is probably more common and more understandable for a person to be confused about the validity of a divorce than about the elements of the crime of bigamy, and more difficult for him to acquire knowledge about the former. Still, the similarities remain compelling.¹⁵⁹

I conclude that legal mistake/E should not be treated just like

¹⁵⁷ For a general discussion of these problems in connection with legal mistake/GL, see J. DRESSLER, *supra* note 7, at 141-44; Smith, *Error and Mistake of Law in Anglo-American Criminal Law*, 14 *ANGLO-AM. L. REV.* 3, 16-21 (1985) [hereinafter Smith, *Error and Mistake*]; G. FLETCHER, *RETHINKING CRIMINAL LAW* 730-36 (1978); P. ROBINSON, *supra* note 5, at § 181(c); Cass, *supra* note 156, *passim*.

¹⁵⁸ See J. HALL, *supra* note 10, at 382-87. This "legality" rationale is problematic:

Hall's thesis . . . misconceives the nature of the claim of mistake of law. A legally mistaken actor does not claim, nor would her acquittal imply, that the law was (or becomes) as she believes it to be. Acquittal would not contradict the conclusion that she violated the law. . . . Rather, acquittal would occur because . . . the harm prohibited by the statute . . . was committed under circumstances in which it is morally unfair to punish the wrongdoer.

J. DRESSLER, *supra* note 7, at 142-43; see G. FLETCHER, *RETHINKING CRIMINAL LAW* 733-34 (1978); Cass, *supra* note 156, at 694.

¹⁵⁹ Glanville Williams defends the distinction between legal mistake/GL (which he calls "criminal law") and legal mistake/E (which he calls "civil law") as follows:

Citizens must be required to make themselves acquainted with the criminal law. Still, it is going beyond reasonable social requirements to expect people to assimilate also, under pain of punishment, the whole of the civil law. Although the crime of bigamy makes reference to the legal concept of marriage, that does not turn the law of marriage into a department of criminal law.

G. WILLIAMS, *CRIMINAL LAW*, *supra* note 20, § 115, at 334. Williams' argument has some force, but it is exaggerated. People need not understand "the whole of the civil law," but only that portion incorporated by reference in the criminal law. Although such incorporation does not turn that portion of the civil law into criminal law (or governing law), the legislature has decided to make that portion directly relevant to criminal liability. That, in turn, might well reflect a policy to encourage knowledge of that portion of the civil law as much as knowledge of the criminal law.

factual mistake, for it raises many of the same concerns (such as legality and fraud) as legal mistake/GL. But it also should not be treated just like legal mistake/GL, for it does reveal the defendant's culpability (legislatively defined) more directly than does legal mistake/GL. Even when the legislature has been silent on this precise issue, the legislature's structuring of the offense to require mens rea as to an element (such as "stolen" property) suggests that legal mistakes concerning that element should have some relevance.

An appropriate general compromise would be to recognize legal mistake/E, but only when the mistake is reasonable.¹⁶⁰ This solution is more stingy towards defendants than the current treatment of factual mistake, which can excuse for a crime requiring knowledge or purpose even if the mistake is unreasonable. But the solution is more generous than the current treatment of legal mistake/GL, which can excuse only in very limited circumstances.¹⁶¹

Accordingly, if Edna makes a mistake in believing that abandoned property is not legally "stolen," she should be acquitted of

¹⁶⁰ A.T.H. Smith similarly would recognize only a reasonable mistake of law. Smith, *Error and Mistake*, *supra* note 157, at 6, 21-24. Unfortunately (for my purposes), his discussion mentions but does not carefully analyze the distinction in this regard between legal mistake/E and legal mistake/GL.

¹⁶¹ George Fletcher has offered a theory of mistakes that bears some similarity to my proposal, but rests on an entirely different basis. Fletcher would distinguish between mistakes relating to elements of the definition of the crime and mistakes relating to justifications or excuses. In the former case, any mistake exculpates (assuming that the actor must act knowingly or intentionally with respect to the elements). In the latter case, the mistake does not affect the prohibitory norm itself, but only a justification or excuse for violating the norm. Since the latter mistake raises the narrower question whether the wrongdoing can fairly be attributed to the particular defendant, only a reasonable mistake will excuse. G. FLETCHER, *RETHINKING CRIMINAL LAW* 690-713, 730-36 (1978). See also Smith, *Error and Mistake*, *supra* note 157, at 21. On Fletcher's view, a legal mistake/GL would have to be reasonable in order to exculpate, because it does not logically negate the mens rea for the definition of the offense. See G. FLETCHER, *RETHINKING CRIMINAL LAW* 734 (1978). A legal mistake/E could exculpate, even if unreasonable, but only if it negates the violation of a prohibitory norm. Edna would undoubtedly receive the excuse even if her mistake was unreasonable, because the stolen nature of the goods is part of the prohibitory norm. (It is one of the "minimal set of criteria that, in the given society, conveys a morally significant prohibition." *Id.* at 695.) On the other hand, if Ernest was charged with kidnapping for detaining a suspect under the legally mistaken belief that he had authority to do so, the mistake would go to a justification and would have to be reasonable in order to excuse. See *id.* at 692-95 (discussing *People v. Weiss*, 276 N.Y. 384, 12 N.E.2d 514 (1938)).

While I agree with Fletcher that the formal language of the offense should not be the only basis for determining which mistakes excuse, his theory rests heavily on a difficult and problematic distinction between the prohibitory norm and justification or excuse. For example, it leads him to the surprising conclusion that nonconsent is not actually part of the definition of rape. See A.T.H. Smith, *Rethinking the Defence of Mistake*, 2 OXFORD J. LEGAL STUD. 429, 434-39 (1982); Hughes, *How to Define the Crime* (reviewing G. FLETCHER, *RETHINKING CRIMINAL LAW*), N.Y. Rev. of Books (May 17, 1979).

receiving property "knowing" that it is stolen only if her mistake is reasonable (*i.e.*, neither negligent nor reckless). Moreover, perhaps "negligence" should receive a less stringent interpretation than its modern criminal law definition as a "gross deviation from the standard of care that a reasonable person would observe."¹⁶² Given the social importance of ensuring citizens' understanding of their civil and criminal obligations, perhaps simple negligence should suffice to defeat the excuse.¹⁶³

The treatment of legal mistakes about elements and about governing law could be aligned more closely in a different manner—not by limiting the former, but by expanding the latter. A general defense of reasonable legal mistake/GL might be recognized.¹⁶⁴ Indeed, a defense of honest and unreasonable legal mistake/GL might even be recognized. Of course, these solutions would compromise the legality, fraud, incentive, and pragmatic policies discussed earlier. I do not pursue the issue in depth in this essay. But if the defense of ignorance or legal mistake/GL were expanded beyond its present limited confines,¹⁶⁵ then the same policies would require a defense of legal mistake/E to be just as broad. I then would no longer object to the law's generous allowance of the latter.¹⁶⁶

¹⁶² MPC § 2.02(2)(d).

¹⁶³ Germany, which recognizes a general defense of reasonable mistake of law, nevertheless interprets "reasonable" more stringently in this context than in the context of factual mistake. See Arzt, *supra* note 5, at 725. Arzt criticizes this differential standard. *Id.* at 730-31.

¹⁶⁴ This is the German approach. For more detailed accounts, see G. FLETCHER, *RETHINKING CRIMINAL LAW* 745-55 (1978); Arzt, *supra* note 5, *passim*.

¹⁶⁵ Currently, a defendant is excused only if she reasonably relies on certain official misstatements of law, or if the criminal statute is not made reasonably unavailable. MODEL PENAL CODE §§ 2.04(3)(a),(b). See J. DRESSLER, *supra* note 7, at 144-48, 152-54; L. Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 654-83 (1941).

For some suggested expansions of the defense, see Cass, *supra* note 153; J. DRESSLER, *supra* note 7, at 141-48.

¹⁶⁶ Jerome Hall presents yet another view of the proper treatment of mistake of law. He forcefully argues that the culpability required as to mistakes of law should depend on the "moral significance" of the relevant criminal norm, regardless of whether the mistake went to (what I call) governing law or legal element. See J. HALL, *supra* note 10, at 392-414; Hall, *Error Juris*, *supra* note 71, at 681-82. For example, he argues that ignorance about the civil law of property ownership is properly a defense to larceny, J. HALL, *supra* note 10, at 393-94, and that ignorance of the criminal law should be a defense to many modern regulatory offenses. As to the latter, he reasons: "[W]here normal conscience (moral attitudes) and understanding cannot be relied upon to avoid the forbidden conduct, knowledge of the law is essential to culpability; hence the doctrine of *ignorantia juris* should not be applied there." *Id.* at 404.

But the distinction between merely "technical" legal prohibitions and prohibitions that reflect "immorality" is extraordinarily difficult to draw. Why is the law of property incorporated into the mens rea of larceny only a "technical" prohibition? Moreover, even when feasible, the distinction is questionable. Modern regulatory crimes typically apply to businesses that might fairly be expected to investigate carefully their legal du-

By symmetrical reasoning, we might conclude that legal *impossibility* concerning an offense element should receive a similar treatment, intermediate between factual impossibility and legal impossibility concerning governing law. Perhaps Fred should not be guilty of *attempt* if his actual (though mistaken) belief that the goods are legally stolen is based on reasonable grounds!¹⁶⁷ This conclusion, however, makes little sense. Whether his belief is reasonably or unreasonably based is much less important to his culpability than his decision to receive goods in the face of his belief that they were stolen. Thus, if he actually has the positive belief that the goods are legally stolen, in theory he should be eligible for an attempt conviction.¹⁶⁸

III. AN INSTRUCTIVE TANGENT: PURPOSE, HOPE AND ACCIDENT

A final set of issues, less central than the earlier analysis but nonetheless instructive, remains to be explored. In earlier discus-

ties. Even if the duties themselves do not reflect a widespread judgment that the regulated conduct is immoral, a person in a regulated industry who fails to determine her duty might be culpable on that account. And conversely, as A.T.H. Smith explains, a person might be unaware of his legal obligations for morally good, bad, or indifferent reasons; but it is a separate question whether the violation of the legal obligation itself reflects moral culpability. Smith, *Error and Mistake*, *supra* note 157, at 20. See also Cass, *supra* note 156, at 693 n.143.

Hall also argues that recognizing ignorance of some private law, as in the crime of larceny, is acceptable because "the defendant does not challenge the moral norms represented in the criminal law." J. HALL, *supra* note 10, at 394. But this seems to beg the question. Why isn't the ownership of property one of criminal law's moral norms, if it is made relevant in the criminal offense of larceny? If the point is just that ownership does not reflect a moral norm at all, whether of criminal or civil law, again I demur. A creditor who takes a debtor's property based on a distorted and unreasonable understanding of her ownership rights plausibly violates a "moral" norm.

The germ of truth in Hall's argument is that widespread ignorance about criminality correlates with conduct that is not widely perceived to be immoral. A test requiring reasonable mistake of law might accommodate this insight, however, by presuming that such ignorance is not unreasonable. This seems wiser than examining only whether a mistake relates to a "moral norm."

¹⁶⁷ See *supra* notes 36-37 and accompanying text.

¹⁶⁸ In practice, as I have noted above, there may be reasons for caution in recognizing legal mistake/E as the basis for an attempt conviction. See *supra* Section II.A.

Suppose the actor, instead of making a mistake and actually forming an incriminating belief, has a culpable mental state less than belief (*i.e.*, recklessness or negligence). Then a reasonable basis for the belief will always preclude liability, whether the belief is a legal belief about an element or a factual belief. Thus, suppose recklessness suffices for receiving stolen property. And suppose Fred can be guilty of attempted receipt of (nonstolen) property because he recklessly believed the goods *might* be stolen, even though he ultimately concludes that they are not. If he had a reasonable basis for his belief that the goods are not stolen, then he could never be liable for attempt. A reasonable basis precludes liability for a crime requiring recklessness or negligence, whether Fred believes that the goods are factually or *legally* stolen.

sion, the model was refined according to degrees of culpability, which were understood mainly as degrees of cognitive deficiency. But we have not yet accounted for the conative form of culpability—or, in more familiar language, the culpability expressed or denied in the actor's purpose, desire, hope, or accidental conduct. Consider two examples that raise some of these issues. If Amy (incorrectly) believes that the goods are not stolen but hopes that they are, does her desire create criminal liability? If Bob (incorrectly) believes that the goods are stolen but hopes that they are not, does his desire preclude criminal liability?

We will see that there are dramatic dissimilarities between the concepts of purpose, hope, and accident and the concepts of belief and mistake that preclude any simple application or adaptation of the model to the former. In the course of exploring these dissimilarities, I will also address and criticize Fletcher's rational motivation theory of attempt, which relies on the distinction between belief and purpose.

The analysis of purpose, intention,¹⁶⁹ hope, and accident differs from the analysis of belief and mistake, though courts and commentators often do not distinguish them.¹⁷⁰ This undifferentiated approach is understandable, inasmuch as criminal statutes specifying the mental state of "purpose" are often satisfied by "knowledge" or belief as well.¹⁷¹ Nevertheless, in some cases, the law specifies a desire-state, so it is important to decide whether the analysis should be unique.

This Part will address a variety of related issues. Section A considers whether mistake, accident, or other conditions might negate the mental state of purpose. Section B analyzes the similar mental state of hope. Section C applies these lessons to attempts rather than completed crimes, and suggests that George Fletcher's motivational theory of attempt is unpersuasive. Section D ponders how we should evaluate the culpability of persons who act, or fail to act, with

¹⁶⁹ I do not distinguish between intention and purpose in this essay. A narrow distinction does exist between intending, in the sense of planning, and acting for a purpose, in the sense of motive. I might go to Australia with the intention of staying for a year, but not for that purpose. See A. WHITE, *FOUNDATIONS OF LIABILITY: AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 73-75 (1985).

¹⁷⁰ See, e.g., Robinson & Grall, *supra* note 43, at 728; G. FLETCHER, *RETHINKING CRIMINAL LAW* 696-97 (1978).

¹⁷¹ The principal exceptions, where knowledge does not suffice and purpose is required, are accomplice liability, conspiracy, attempt (at least with respect to a result element), and a very few substantive crimes, such as treason. See MPC § 2.02 commentaries, Part I, at 234 (1985).

purpose or hope. Finally, Section E considers how we should apply concepts of accident and purpose to law rather than fact.

A. PURPOSE, INCLUDING MISTAKES VERSUS ACCIDENTS

If purpose or intention is an element of a crime, then what mental states are inconsistent with it? A mistake can negate a belief. Can it negate purpose? Can an accident negate purpose? Can anything else? For example, suppose Amy intends to kill Victor, but her bullet goes astray and kills Walter instead. Her killing of Walter is accidental. Is she liable for his murder?

To answer these questions, we need to be clearer about the concepts of mistake and accident, and their relationship to belief and purpose. Beliefs can fail to satisfy the *actus reus* of a crime by being *untrue* (e.g., Bob believes the goods are stolen, but he is mistaken). By contrast, purposes can fail to satisfy the *actus reus* of a crime by being *unfulfilled* (e.g., Boris intends to kill someone, but fails).¹⁷²

In the strict sense, "mistake" pertains only to beliefs, not to desires or purpose.¹⁷³ Mistakes are erroneous beliefs. It makes little sense to speak of a "mistaken" desire, purpose, or intention,¹⁷⁴ since one can only err about what can be true or false. If a legal standard requires purpose, and if purpose has its ordinary meaning, then a mistake will usually not negate it.¹⁷⁵ For example, if treason

¹⁷² Philosopher John Searle would classify the beliefs and desires relevant to law as "directed" mental states with "conditions of satisfaction." Thus, "[m]y belief will be satisfied if and only if things are as I believe them to be, my desires will be satisfied if and only if they are fulfilled, my intentions will be satisfied if and only if they are carried out." J. SEARLE, *INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND* 10 (1983) [hereinafter J. SEARLE].

¹⁷³ For general discussions, see Robinson & Grall, *supra* note 43, at 725-32; G. FLETCHER, *RETHINKING CRIMINAL LAW* 487-91 (1978); J. DRESSLER, *supra* note 7, at 127-39.

¹⁷⁴ I can be mistaken in believing that I desire something. ("I like Japanese food;" "No, you don't. You're confusing Japanese food with Thai food, which you do like.") But here the belief, not the desire, is mistaken. See Hume, *A Treatise of Human Nature, Book II* § 5, in D. HUME, *MORAL AND POLITICAL PHILOSOPHY* 26 (H. Aiken ed. 1948) ("[A] passion must be accompanied with some false judgment in order to its being unreasonable; and even then it is not the passion, properly speaking, which is unreasonable, but the judgment.")

¹⁷⁵ There is a small exception, however, because the concept of purpose does have a limited "belief" component. To have the purpose to bring about a result, one must not only desire the result, but also believe that one's acts might possibly bring the result about. If I desire to aid the enemy by broadcasting enemy propaganda but I believe that the propaganda is completely unpersuasive, then it would be more accurate to say that I *hope* to aid the enemy than to say that that was my *purpose*. In abstract terms, hope is a pure desire-state, while purpose is a mental state combining belief and desire. See Simons, *Rethinking Mental States* 36-37, 46-48 (unpublished manuscript on file with J.

requires a "purpose" to aid the enemy in this ordinary sense, then a defendant's mistaken belief that her conduct will probably not aid the enemy will not negate liability (so long as she intends to, and believes she *might*, succeed).¹⁷⁶

By contrast to mistake, "accident" pertains to desires, purposes, and intentions. An accident occurs when one brings about a result without desiring or foreseeing it.¹⁷⁷ The result might be a deviation from one's intention or purpose; or, if one was not acting for any particular purpose, it is simply undesired.¹⁷⁸

In some cases, accident does negate the mental state of purpose. If my gun goes off and causes you injury, and I claim this was an accident, I usually mean that I did not intend to injure anyone. I simply intended to clean my gun, or watch the sunset, or perhaps I was not at that moment intending to do anything at all. In any event, my credible claim of accident negates the charge that by my actions I intended to injure another person.¹⁷⁹

CRIM. L. & CRIMINOLOGY) [hereinafter Simons, Rethinking Mental States]. Thus, a mistake that can indeed negate purpose in one narrow circumstance—where I have the *mistaken* belief that I cannot possibly succeed.

¹⁷⁶ Thus, Robinson and Grall are incorrect in suggesting that any mistake will negate "purposeful" culpability. See *supra* note 43, at 728. Another example may be helpful: a person might have both the purpose to kill another, and a mistaken belief that he will almost surely fail. I shoot at you from a great distance, thinking that I might succeed but expecting that I will not; nevertheless, if I desired your death and believed that I might succeed, then I shot at you for the purpose of killing you. (More precisely, a person's mistaken belief will only negate purpose if he or she believes he or she cannot possibly succeed. See *supra* note 175.)

My criticism of Robinson and Grall is inapposite, however, with respect to circumstances. The Model Penal Code itself defines purpose as to a circumstance essentially as belief. MPC § 2.02(2)(a)(ii). Thus, any mistake does negate "purpose" (*i.e.*, belief) as to a circumstance.

¹⁷⁷ If one foresees a result, the result is not accidental, even if one does not intend or desire it. If a doctor knows that performing a medical operation will cause a patient pain, and she regrets that result, she nevertheless has not caused the pain accidentally. Similarly, if one desires a result, the result is not accidental, even if one does not foresee it. If I aim to kill you by a means that I believe is virtually certain to fail, then my surprising success would hardly be an accident.

¹⁷⁸ Robinson and Grall suggest that accidents pertain to conduct and results, and mistakes pertain to circumstances. Robinson & Grall, *supra* note 43, at 732. This is not quite right. One might be mistaken in believing that one's conduct will cause a result, for example. The real distinction is that accidents occur when intentions or desires go astray, while mistakes are erroneous beliefs. For a slight qualification, however, see *infra* note 179.

¹⁷⁹ See P. ROBINSON, *supra* note 5, § 63, at 269-71 (noting that many jurisdictions still codify a defense of "misfortune or accident" that serves the function noted in text).

Sometimes accident can negate belief as well as desire, if the belief relates to my causal powers. Suppose I believe that my blowing up a prison wall to free a confederate will kill a guard, but my action instead unforeseeably kills the confederate. The accident, insofar as it is unforeseeable, negates any claim that I believed that I would kill the confederate.

But accident does not always negate intention. Remember awkward Amy. Her accidental shooting of Walter when she was aiming at Victor does not negate her intention to kill Victor. However, the question remains whether that intention suffices for the crime of murder when it is Walter she actually killed. Should the crime of murder be interpreted to impose liability (1) on "anyone who kills X and who intends to kill X," or instead (2) on "anyone who kills any person as a result of conduct intending to kill any person [*i.e.*, the actual victim may differ from the intended victim]?"¹⁸⁰ Traditionally, criminal law handles the problem via the doctrine of "transferred intent:" if A attempts to injure B and accidentally injures C instead, A remains liable. As Michael Moore and Joshua Dressler have pointed out, however, the doctrine is strictly unnecessary, for it is plausible to interpret the crime of murder in the second way noted above, and then to conclude that A has the required mens rea—a purpose to kill any person.¹⁸¹

As this last example shows, accident does not always negate the mental state of purpose. Accident is causal surprise: what happens is surprisingly different from what was intended or desired. Sometimes the difference may be great enough that the defendant should not be convicted of the crime;¹⁸² but if so, the defendant gains acquittal because causation is attenuated, not because she lacks the required mental state.¹⁸³

Are there other general mental state categories, apart from accident, that can negate purpose in the way that mistake and ignorance can negate belief? I think not. Accident describes only *one* way in which an actor's purpose of desire might not be fulfilled.¹⁸⁴

¹⁸⁰ For a careful parsing of this distinction using the tools of formal logic, see Note, *Scope, Mistake, and Impossibility*, *supra* note 87, at 1048-53.

¹⁸¹ See Moore, *Intentions and Mens Rea*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART* 245, 267-68 (R. Gavison ed. 1987); J. Dressler, *supra* note 7, at 108. For a detailed examination of transferred intent problems, see G. Williams, *CRIMINAL LAW*, *supra* note 20, §§ 46-51, at 126-38.

There is a somewhat analogous doctrine that we might dub "transferred belief." If a person's mistaken beliefs preclude liability for crime A, but he would be guilty of crime B if the situation were as he supposed, he can be convicted of crime B. For example, if Bob has intercourse with a 14-year-old girl whom he mistakenly believes is 16, and if it is a lesser crime to have intercourse with a 16-year-old than with a 14-year-old, then Bob can at least be convicted of the lesser crime. MPC § 2.04(2). Of course, if the greater crime of intercourse with a 14-year-old is one of strict liability, then he can be convicted of that crime.

¹⁸² Suppose Amy shoots at Victor but misses. Walter, a witness some distance away, is frightened and dies of a heart attack.

¹⁸³ See G. Williams, *CRIMINAL LAW*, *supra* note 20, § 44, at 125.

¹⁸⁴ In this respect, it is quite different from mistake, which is a broad enough concept to encompass every case in which an actor's belief fails to "fit" the world. *Cf.* Searle,

Of course, there are many specific reasons why an individual might not form a criminal intention or purpose—because of unawareness of the opportunity, because of good character, because of fear of detection, because some other activity seemed more desirable, to name only a few. Indeed, this difficulty of cataloguing simply but comprehensively the factors negating purpose is one reason why the defense of abandonment of attempt is so difficult to define clearly and persuasively.¹⁸⁵ For the abandonment of attempt involves the renunciation of criminal purpose; yet it is almost as difficult to identify why someone renounced a purpose as to identify why she formed it in the first instance.

B. HOPE

If a stranger suddenly offers Alice goods that might be stolen, and she decides to buy them, she does not act with the “purpose” that the goods be stolen, since she has no control over that circumstance. But she might well have a relevant desire state: she might *hope* that the goods are stolen.¹⁸⁶ Thus, purpose is not the only kind of conative or desire state.¹⁸⁷ One can intend to, or purposely, bring about a result, but one can only desire or hope—not intend—that a circumstance exists.¹⁸⁸ (This point is simply definitional. If one could intend that a circumstance exist, one would necessarily have some power to bring that about, but then the “circumstance” should be reclassified as a “result.”)

Sometimes the criminal law makes “hope” a relevant mental state. For example, under the Model Penal Code, a person acts “purposely” with respect to a circumstance if he is aware, believes or hopes that the circumstance exists.¹⁸⁹ With respect to our analy-

supra note 172, at 29-36. Note, too, that accident can only negate a desire or purpose to bring about a result. If an actor merely hopes that a circumstance exists (*e.g.*, Alice hopes that the goods are stolen, without any power to bring that about) then accident cannot negate hope. See *infra* Section III.B.

¹⁸⁵ See also Kelman, *supra* note 33, at 628-42 (critiquing modern abandonment tests on the similar ground that the result depends on whether the relevant exculpatory and inculpatory motivations are framed narrowly or broadly).

¹⁸⁶ Hope is a positive desire for a state of affairs, together with uncertainty about whether the state of affairs obtains or will obtain. See J. SEARLE, *supra* note 173, at 32. Thus, if Alice merely hopes that the goods are stolen, she cannot be certain that they are, nor certain that she can bring about that circumstance.

¹⁸⁷ Actually, purpose includes both a state of desire (to bring about an end) and a state of belief (that one's conduct might achieve that end). For an extensive analysis of the distinction between desire states and belief or cognitive states, see Simons, *Rethinking Mental States*, *supra* note 175.

¹⁸⁸ Recall that a circumstance is a state of affairs that the actor does not change or have power to change. See *supra* note 47.

¹⁸⁹ MPC § 2.02(2)(a)(ii). This definition is in tension with the Code's definition of

sis, hope is much like purpose. Mistake does not negate hope; whether or not the recipient is mistaken in believing that the goods are stolen (or not stolen), he can hope that they are stolen. Hope, like purpose, can be negated in many ways: it is difficult to generalize about the reasons why someone might fail to have either culpable desire state. On the other hand, although accident can negate purpose, it cannot negate hope, because hope is a pure desire state, unaccompanied by any causal or result requirement.

Of course, the practical importance of the mental state of "hope" is slight. Legislatures do not often require "purpose" as to a circumstance element. Even when they do, it will often be exceedingly difficult to determine that a defendant who does not believe that a circumstance exists nevertheless "hopes" that it does.

C. ATTEMPTS, INCLUDING FLETCHER'S RATIONAL MOTIVATION THEORY

Enough about completed crimes. How are purpose, hope, and accident relevant to liability for attempts? Suppose Ben intends to kill Judy, but she is already dead. Ben shoots a bullet into her body, believing she is alive. Is he liable for attempted murder? Does his liability depend on his wanting to be the one who kills her? What if a confederate informs him that she may already be dead, but it would be nice if Ben would empty another shot into her body, and

"knowingly" with respect to a circumstance, which requires awareness and is not satisfied by hope. *Id.* at § 2.02(2)(b)(i). Thus, because belief *or* hope suffices for acting "purposely," a larger number of defendants can be convicted of acting "purposely" with respect to a circumstance than of acting "knowingly" with respect to a circumstance. Yet, under the hierarchical structure of the Code's culpability terms, the higher mental state of "purpose" is supposed to be more difficult to satisfy. Indeed, a person who satisfies a higher mental state (such as purpose) is deemed to satisfy a lower mental state (such as knowledge). *Id.* at § 2.02(5). Perhaps this provision should override the more restrictive definition of knowledge, so that a defendant who hopes but does not believe that a circumstance exists would be deemed to be "knowing" as well as "purposeful."

Of course, someone who hopes but does not believe that a circumstance exists might be considered more culpable than someone who believes but does not hope that the circumstance exists. Desire states, such as hope, generally reflect culpability more directly than cognitive states such as belief. *See* Simons, *Rethinking Mental States*, *supra* note 175. Thus, there is some sense to including hope as one of the mental states for "purposely," the most culpable mental state. If, however, we take the Code's hierarchical order seriously, then it would make even more sense to define purposely as meaning knowingly plus something extra. Perhaps "knowingly" as to a circumstance could mean "belief *or* hope," while "purposely" could mean belief *and* hope." Alternatively, "knowingly" could mean "belief *or* culpable indifference," while "purposely" could mean "belief *or* positive hope."

A radically different approach is to give up the assumption that purpose, knowledge, recklessness, and negligence are properly ranked in a single hierarchical ordering. This is my view. *See generally id.*

Ben complies? Is Ben's indifference to whether she is alive a defense to attempted murder?

Mistake and accident often have a similar exculpatory force with respect to attempt liability—namely, none. If circumstances turned out to be different from what you culpably believed them to be (the goods were not stolen, but you believed they were), then you can still be liable for an attempt. Similarly, if the result was different from what you culpably intended (you tried to kill Victor, but he was wearing a bulletproof vest), then again you can be liable for an attempt, despite the accident or misfiring purpose.¹⁹⁰ Whether the attempt is viewed as a failure or as factually impossible, modern criminal law treats each as an attempt.

Moreover, just as exculpatory mistakes (negating liability for the crime) and inculpatory mistakes (creating liability for an attempt) often deserve symmetrical treatment, so too do exculpatory and inculpatory purpose or hope. If murder requires purpose to cause another's death, then obviously Alice is not liable if she lacks such purpose, and Bob should be liable for a failed or impossible attempt if he does have that purpose.¹⁹¹ Less obvious is the symmetrical treatment of hope. Suppose Alice would be liable for "purposefully" receiving stolen property simply for hoping that the goods are stolen, even if she does not affirmatively believe that they are. If Alice does not so hope, then she is not liable. But it then follows that Bob should be liable for an impossible (or failed) attempt if he hopes that (nonstolen) goods are in fact stolen.¹⁹² Note, finally, that in all of these examples, liability might not depend on any of the actor's beliefs. Purposeful murder might not require a belief that one will succeed, and "purposeful"/hopeful receiving might not require a belief that the goods are stolen.

In one sense, attempt invariably requires purpose—one must

¹⁹⁰ I use the phrase "misfiring purpose" rather than "accident" because the first phrase is ordinarily more apt when the result is less severe than you intended. In my example, it would be odd to say that you "accidentally" failed to kill Victor simply because you expected and intended him to die. But this is probably due to the exculpatory force of the term "accident." By contrast, if the criminal who employed you angrily asked why you failed to kill Victor, you might more plausibly respond, "It was an accident," since your response is exculpatory from this new perspective.

¹⁹¹ See Ashworth, *Belief*, *supra* note 5, at 13-20.

¹⁹² Paul Robinson has argued that attempt liability should be possible in this type of situation. His example is a pickpocket who hopes, but does not believe, that a pocket is full. P. ROBINSON, *supra* note 5, § 85(c), at 428, 431. See also Robinson & Grall, *supra* note 43, at 730-31. Unfortunately, Robinson does not rest such attempt liability on corresponding completed crime liability. I do not believe that attempt liability should be premised on hope unaccompanied by belief unless completed crime liability could be so premised.

purposely engage in the conduct required for the offense. However, modern criminal law does not require desire or purpose as to circumstances, or even as to result.¹⁹³ Yet this modern view has come under sharp challenge. According to the "rational motivation" view of intent and attempt championed by George Fletcher,¹⁹⁴ one does not intend to commit a crime unless one intends or desires all of the results and circumstances required for the crime. On this view, a culpable (though mistaken) belief that a circumstance exists is not sufficient for attempt liability.

For example, Bob should not be guilty of attempting to receive stolen property, even if he believes it is stolen, unless its "stolenness" was part of his motivation for receiving it. If he is indifferent about whether it is stolen, then he should not be deemed to have attempted to receive stolen property. Or, in my recent example, Ben should not be liable for attempting to kill Judy, even if he believed she was alive, unless her being alive was one of his motivations for shooting at her. If he is indifferent about that—for example, if he agreed to empty his pistol into her body at the request of a confederate who indicated that she might or might not be

¹⁹³ See *supra* text accompanying notes 119-122. Strictly speaking, "hope" or "desire" rather than "purpose" is the relevant mental state for a circumstance element. See *supra* Section III.B.

¹⁹⁴ Fletcher proposes that "[m]istaken beliefs are relevant to what the actor is trying to do if they affect his incentive in acting. They affect his incentive if knowing of the mistake would give him a good reason for changing his course of conduct." G. FLETCHER, *RETHINKING CRIMINAL LAW* 161 (1978). Fletcher recently published a more detailed statement of his views. Fletcher, *Constructing a Theory*, *supra* note 38.

Leo Katz has recently restated the theory. L. KATZ, *BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW* 286-88 (1987). For an endorsement by an English scholar, see Gold, "To Dream the Impossible Dream": *A Problem in Criminal Attempts (and Conspiracy) Revisited*, 21 *CRIM. L.Q.* 218, 235-43 (1979). Gold argues that this interpretation explains why even culpable mistakes as to legal categories properly result in acquittals: "[t]he accused's mistake is irrelevant because legal categories are not part of one's motivation except in the most implausible of hypothetical cases which only appear on law school examinations." *Id.* at 240.

In an imaginative interpretation, a student author equates traditional "legal (?) impossibility, see *supra* Section I.A.3.b, with cases where defendant does not intend or desire that the circumstances exist—in effect, where defendant does not satisfy the "rational motivation" test. She equates factually impossible attempts with attempts where a defendant does intend or desire that the circumstances exist, but his purpose is frustrated.

For example, if the actor shot a deer that he believed to be alive but that in fact was stuffed, he would not have committed the completed crime of poaching. Whether his attempt was legally or factually impossible will depend on what his goal in shooting was. If he had wanted to shoot a live deer, his purpose would have been frustrated, and the attempt would be factually impossible. Had his purpose been to shoot the body of a deer, whether dead or alive, his attempt would be legally impossible.

Note, *Scope, Mistake and Impossibility*, *supra* note 87, at 1059. See also *id.* at 1036-37 n.22.

alive—then he should not be deemed to have attempted to kill her. As Glanville Williams sarcastically puts it, “the test question is: are the occupiers of our rogues’ gallery crestfallen or still cock-a-hoop when they discover the facts?”¹⁹⁵

I disagree with this view. Although it might be a plausible interpretation of the ordinary language concepts of trying, intending, and attempting,¹⁹⁶ as a conception of criminal law “attempt” it is

¹⁹⁵ Williams, *The Lords and Impossible Attempts*, *supra* note 5, at 77.

¹⁹⁶ However, I do have some problems with Fletcher’s detailed statement of the argument. First, he claims that “the question is whether I would change my course of conduct were my beliefs to change.” Fletcher, *Constructing a Theory*, *supra* note 38, at 61. Or, to put the point directly in causal terms, the question is whether, but for the belief, one would not engage in that conduct. *Id.* However, the “but for” criterion is too stringent. Specifically, it should suffice that the actor would be disappointed if the circumstances in which he believes were not true, even if he would not act differently.

For example, suppose a male has sexual relations with a sixteen year old female, believing that she is sixteen (which is under the age of consent). Fletcher would say that he intends, tries, or attempts to have intercourse with a sixteen year old only if, had she been older, he would have chosen *not* to have intercourse with her. Let us explore the counterfactual more carefully. Suppose that, if informed that she was nineteen, the male would have been somewhat disappointed but would have made the same decision to have sexual relations. Then, I think it is still fair to say that, in the actual case, he was attempting to have intercourse with a sixteen year old. Perhaps we should be satisfied if her age counted as a reason in favor of his conduct—either because it was a sufficient but not a necessary reason for his conduct, see Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563, 1582 n.59 (1980), or simply because it was one of the reasons for his conduct, even if it was neither necessary nor sufficient. See also Moore, *Intentions and the Mens Rea*, *supra* note 181, at 261 (suggesting that intention A is different from intention B if, among other things, the person holding them finds the language describing the object of A more important or “vivid” than the language describing the object of B).

Second, Fletcher claims that something like the rational motivation test implicitly explains the *exculpatory* force of mistakes. He gives the example of a male having intercourse with a sixteen year old, believing her to be nineteen (above the age of consent).

Should this belief excuse my conduct? The relevance of this belief depends on whether I would change my course of conduct if I happened to learn that the girl is under age. If I would not, it is hard to see why my incidental belief should generate an excuse. In conventional legal analysis, the causal relevance of exculpatory mistakes is generally assumed.

Fletcher, *Constructing a Theory*, *supra* note 38, at 61. This, I am afraid, is wishful thinking. The law does not generally require that exculpatory beliefs be causally relevant in this way. See, e.g., G. WILLIAMS, *CRIMINAL LAW*, *supra* note 20, § 70, at 199-202. Moreover, Fletcher continues: “But if there is good reason to believe that the mistake is irrelevant to me, the case would probably be classified as reckless or intentional conduct.” Fletcher, *Constructing a Theory*, *supra* note 38, at 61. Again, I have my doubts. Common law standards of recklessness and intent do not clearly support this classification, and the modern Model Penal Code standards clearly do not support it. However, I do agree with Fletcher that such a view of recklessness might be a salutary improvement in existing law.

Third, Fletcher states: “so far as I know, no legal system in the Western world would convict of an attempt simply on the basis of a failed, indirect intent”—such as where a prisoner blows up a wall to escape, believing (“indirectly intending”) that a guard is highly likely to die, but not directly intending his death. *Id.* But Fletcher need look no farther than the Model Penal Code, which permits attempt liability when the

indefensibly narrow and does not convincingly serve criminal law policies.

Why should the "ordinary language" meaning of "trying," "attempting," and similar words govern the scope of the criminal law? Criminal law "attempt" should simply be a term of art for behavior short of a completed crime that nevertheless deserves punishment.¹⁹⁷ (Perhaps it would help to use a term other than "attempt"—for example, "incomplete crime" or "unsuccessful crime"—in order to avoid confusing jurors and other legal actors.) After all, if the completed crime had occurred, we would not care whether the defendant's belief was part of his motivation for acting. If the property that Bob received had in fact been stolen, then he would be guilty of knowingly receiving stolen property, even if he would have received it had it *not* been stolen. So why should his motivation matter to an attempt conviction?¹⁹⁸

One possible answer is that, since modern law only imposes a minimal actus reus requirement for attempt, it should require a stringent mens rea, to avoid arbitrary and overly expansive enforcement of the criminal law.¹⁹⁹ This answer is convincing in the abstract, but it does not justify Fletcher's rational motivation test. We could accommodate this concern merely by narrowing the mens rea requirement for attempt as the Model Penal Code does: in result crimes, require at least belief that one is causing the result; in all cases, require purpose to engage in the underlying conduct; and for circumstance elements, such as whether goods are stolen, require merely whatever mental state the completed crime would require.²⁰⁰

D. CULPABILITY

The refined model analyzed the culpability of a defendant's

actor has the purpose *or the belief* that his conduct will bring about a prohibited result. § 5.01(1)(b). (Apparently, some recent revisions have followed the Code on this point. MPC § 5.01 commentary at 305.)

See also Kelman, *supra* note 33, at 623-24 (generally criticizing Fletcher's broad and narrow characterizations of intention as resting on hidden assumptions); Krennitzer, *supra* note 20, at 372-80 (recording a series of objections to Fletcher's views).

¹⁹⁷ Fletcher never gives a clear theoretical explanation for why the ordinary usage of terms such as "attempt" and "try" is so important here.

A similar "ordinary language" objection to the modern rejection of factual impossibility is the argument that "attempt" often presupposes an extensional object. On this view, I cannot "attempt" to pick your pocket unless there was something in your pocket that I could have picked. For a lucid criticism of this view, see H.L.A. Hart, *supra* note 15, at 376-80.

¹⁹⁸ See Williams, *The Lords and Impossible Attempts*, *supra* note 5, at 78.

¹⁹⁹ See generally Enker, *Impossibility*, *supra* note 88.

²⁰⁰ See *supra* text accompanying notes 117-122.

mistake or ignorance. Specifically, it investigated the nature of the defendant's cognitive error to determine why it was legally significant. Recall the analysis: If the statute does not require the most culpable state of belief, then Alice's liability does not depend on her believing that the goods were stolen. She might be liable if she was recklessly aware of that possibility, if she negligently should have been aware, or even if her lack of awareness was reasonable.²⁰¹ Does a similar hierarchy of culpability help us to evaluate the relevance of the noncognitive states of purpose, hope, and accident?

In a word, no. There are important dissimilarities that make it difficult to assess the culpability of desire-states. But the explanation is a bit tricky.

Consider why Alice is exculpated: the crime requires a certain belief, which she lacks due to mistake or ignorance. If the crime only required that she negligently lack awareness of a circumstance when a reasonable person would be aware, then only a reasonable mistake or reasonable ignorance will preclude liability.

Now consider a crime requiring only a desire-state such as purpose or hope. Suppose Allison is accused of treason, which requires a purpose to give aid to the enemy. If she lacks that purpose, then obviously she is less culpable than if she possesses it. Up to this point, the analysis of her culpability precisely parallels that of Alice: someone who receives property in the belief that it is stolen is more culpable than one who does so lacking that belief.

The fog sets in, however, when we consider a person's culpability for *lacking* a mental state. Even though Alice does not believe that the property is stolen, she might nonetheless be culpable, if a reasonable person would have such a belief.²⁰² What is the analogous argument for Allison? Is it that, even though she does not desire to aid the enemy, she might be culpable because a reasonable person would have such a desire? Hardly not. Although Alice might be at fault for not appreciating that the property is stolen, Allison is not at fault for *not* desiring to aid the enemy. The asymmetry is fundamental.²⁰³ In sum, in the context of culpability for lacking a mental state, it is much more intelligible to criticize an ac-

²⁰¹ See *supra* notes 94-96 and accompanying text.

²⁰² I oversimplify here for convenience of exposition. Modern criminal law's definition of negligence is more stringent. See *supra* note 96.

²⁰³ Some symmetry can be restored by recognizing a desire-state less culpable than purpose. Suppose treason could be satisfied by aiding the enemy either purposely or with reckless indifference to whether one's conduct had that result. Then Allison might be liable despite lacking the purpose to aid—not because a reasonable person would have such a purpose, but because a reasonable person would show much more concern than she did about the results of her conduct. For a discussion of the problematic con-

tor for unreasonably lacking a belief that would have been incriminating than for unreasonably lacking an incriminating desire or purpose.²⁰⁴

What explains this difference between belief and desire? I have two possible answers. First, most ordinary persons in the same factual setting will, absent unusual circumstances, arrive at the same incriminating belief, but ordinary persons will not similarly converge in their purposes. The wellsprings of incriminating purposes are more diverse and idiosyncratic. If two persons are presented with stolen goods in similar factual settings, they often will reach the same conclusion about whether the goods are stolen. However, if two persons face the same opportunity to steal, or injure, or kill, one can be much less confident that they will form the same intention or purpose.

The second answer notices that mental states of desire express culpability more directly than states of belief do. Anyone who forms a purpose proscribed by the criminal law is for that reason alone somewhat culpable, and persons who fail to form that purpose ordinarily are somewhat less culpable. But forming or failing to form a belief—say, that the goods are or are not stolen—does not express culpability so directly. Whether one forms the belief that goods are stolen is, by itself, of little moral consequence. What is of consequence is whether one then chooses to receive the goods in light of that knowledge. A criminal justice system should not simply assume that if the ignorant person who caused criminal harm was aware of the relevant facts, he would have chosen to cause that harm.²⁰⁵ By

cept of reckless indifference, see Simons, *Rethinking Mental States*, *supra* note 175, at 39-41, 92-106.

²⁰⁴ Consider another perspective. Alice's lack of belief exculpates in part because, if Alice *had* been aware, she might have avoided the criminal injury. But the following analogous argument about Allison is obviously *not* true: "Allison's lack of intent exculpates because, if she had had the intent, she would have avoided the crime"(!). See *infra* text accompanying notes 205-206.

²⁰⁵ Fletcher, however, has argued that an actor who has an exculpatory belief (*e.g.*, that the goods are not stolen) should not be excused unless that mistaken belief was causally relevant. If he would have acted in the same way even if he had not been mistaken, he should be convicted. See *supra* note 196. Presumably Fletcher would approach ignorance in the same manner, inquiring whether the actor, if aware, would have acted the same way.

Enker thoughtfully extends the argument in the text, claiming that criminal liability for inchoate negligent conduct that has not yet caused harm is unfair. Suppose someone is about to enter and drive a car that, unknown to him, has faulty brakes. If the actor was warned of the dangerous situation, Enker explains, he might well choose to conform to the law. "The presumption of innocence, understood in its broadest sense, seems to require that we assume he will desist." Enker, *Mens Rea*, *supra* note 101, at 875.

On its face, this argument fails to distinguish the completed crime from the attempt (as Enker acknowledges, *id.*). If the completed crime is satisfied by negligence or strict

contrast, the "reasonable" person would not even have formed the desire or intention to cause harm or receive stolen property; and once someone does form that desire or intention, he is more likely than the merely "believing" actor to try to effectuate his plan.²⁰⁶

E. PURPOSE, ACCIDENT, AND LAW RATHER THAN FACT

Thus far, I have discussed accident and purpose with respect to facts. What about law? Should a defendant be acquitted if she did not intend to violate the law? Should she be convicted of attempt if she did intend to violate the law, even though, as it turns out, her actions were legal? We do not usually distinguish these questions from the analogous questions about mistaken beliefs: Should a defendant be acquitted if she did not know that she was violating the law? Should she be convicted if she believed that she was violating the law, although she was not? The legality principle would ordinarily control, so a distinction is largely unnecessary. And to the extent that a limited defense of mistake or ignorance of law is recognized for reliance on official advice,²⁰⁷ the defense implicitly presupposes that the actor has the intent not to violate the law. Thus, reasonable mistake about law will often coincide with a blameless intent.

Do legal intent/accident as to an offense element have the same significance as legal belief/mistake as to an offense element? That is, are they properly treated similarly to factual intent/accident? I think not, because I do not believe that criminal law ever does, or sensibly should, require that the defendant *intend* that she not legally satisfy an offense element (as opposed to *believing* that she is legally not satisfying the element). Let me explain.

The issue only arises in pure form in those few instances where

liability, then we should have the same concern about violating the "presumption of innocence." If the actor who is actually driving with bad brakes had been warned of the defect, she, too, might well have desisted. Enker offers two further explanations: the marginal deterrent effectiveness of attempt is doubtful, and the "ignorant" actor is often "indifferent" and therefore "reckless" in a sense. *Id.* at 375-76. The first explanation seems weak, however, and the second rather contrived. Neither seems sufficient to overcome the unfairness of treating completed crimes and attempts so differently.

²⁰⁶ Even misfiring intentions are not strictly analogous to mistaken beliefs. If Amy intends to kill Victor and accidentally kills Walter instead, Walter is an unintended victim. We would not describe this "accident" or unintended result as reasonable or unreasonable, at least not in the same way that a mistake is reasonable or unreasonable. To be sure, when Amy brings about an accidental or unintended result, the underlying conduct that causes it might be either negligent or non-negligent. Further, she can have either negligent or reasonable beliefs about what the results of her conduct will be. But the reasonableness of her desires or intentions is not directly at issue in either case.

²⁰⁷ See e.g. MPC § 2.04(3)(b).

purpose is the requisite mental state *and* knowledge is insufficient. One such example is the crime of treason, which requires that the actor provide aid or comfort to an enemy nation with the intention of aiding the enemy and betraying the United States.²⁰⁸ If Jones assists a badly wounded enemy soldier to reach shelter, and the soldier suddenly recuperates and begins firing on Jones' squad, Jones has only accidentally aided the enemy. Intention to aid is negated in the factual sense.

Consider a variation that directly poses our issue. Jones helps the wounded soldier return to the soldier's military hospital, and believes that this does not constitute aiding the enemy. He is mistaken, however. As a matter of law, "aiding" includes returning an enemy soldier to any enemy facility. This might be considered a legal mistake as to an offense element, one that would negate "knowing" aid as a matter of law.²⁰⁹ Would the mistake also negate "intentional" aid? Only if the "intent to assist the enemy" includes an intent that one's assistance be against the law! Yet it is doubtful that a purpose or intention to act contrary to law—either governing law or offense element—is ever a sensible criminal law requirement. Although it is sometimes plausible to require that defendant know that her conduct legally satisfies an element of a crime, it is hard to imagine a context in which the criminal law should require a person to act with the desire or purpose of legally satisfying an element. It is one thing to require knowledge that the goods are legally stolen, or knowledge that a prior marriage is invalid; but why would we want to require an intention or desire that the goods be legally stolen, or an intention that the prior marriage be invalid?²¹⁰ It should always suffice that the defendant intentionally performed the *acts* that he (legally) knows are in violation of the offense.²¹¹

I hope the reader will forgive me for not offering yet another diagram, this time charting purpose/accident/fact/law. Such a diagram, it should now be obvious, is impossible—in the conceptual sense.

²⁰⁸ See *Tomoya Kawakita v. United States*, 343 U.S. 717 (1952).

²⁰⁹ Whether this is a legal mistake/E or legal mistake/GL is a difficult issue. See *supra* Section II.B.1.

²¹⁰ The corrupt motive doctrine in conspiracy might seem to be an exception, but it is not. "When the criminal object is an offense *malum prohibitum* the corrupt-motive doctrine serves as an exception to the usual rule that ignorance of the law is no excuse." J. DRESSLER, *supra* note 7, at 388. This doctrine only requires that the conspirator know that he is violating the law, not that he intend to be doing so.

²¹¹ In this respect, the analysis of hope should track the analysis of purpose. For the situations will be exceedingly rare in which criminal liability depends on the actor *hoping* that a legal rather than factual circumstance element exists, or hoping that he is violating the law.

IV. CONCLUSION

The modern approach to mistake and impossibility has the apparent virtue of symmetry and simplicity. Factual mistakes can exculpate from completed crime liability, while factual impossibility creates attempt liability. Mistakes about the governing law neither exculpate nor inculpate. This summary, however, is both incomplete and misleading. It also conceals a variety of serious normative and conceptual problems, including the following. Factual "impossibility" is not actually the source of attempt liability; rather, it describes a subcategory of inculpatory mistakes or inculpatory intent. Presumptively, legal mistakes/E should be treated like factual mistakes; but this suggests that inculpatory legal mistakes/E, including legal impossibility/E, should permit an attempt conviction. The culpability of the actor's mistake (reckless, negligent, or blameless) might affect both completed crime and attempt liability. Legal mistakes/E and legal mistake/GL are important, but difficult, to distinguish. On second thought, it is not clear that legal mistake/E should really be treated the same as factual mistake. Finally, despite the tug of symmetry, purpose, hope, and accident should not be treated the same as belief and mistake.

This article's elaborate examination of the problems of mistake and impossibility reveals powerful symmetries together with surprising asymmetries, challenging difficulties in applying culpability concepts methodically, daunting practical problems in implementing the theoretical conclusions, a clear need to consider anew how the law should treat legal mistake/E, and striking differences between mental states of belief and desire.

Though I do not propose a simple approach to mistake and impossibility, I do reach two fairly simple conclusions—that legal impossibility/E should not preclude attempt liability, and that legal mistake/E should ordinarily preclude liability for a completed crime only if the mistake is reasonable. These conclusions, however, are much less important than my proposed frameworks and multiple speculations. I have tried, not to achieve certainty, but to transform the potential quicksand of mistake and impossibility into a varied but more solid terrain.