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**RAPE, MURDER, AND FORMALISM:
WHAT HAPPENS IF WE DEFINE MISTAKE OF LAW?**

Gerald F. Leonard*

Abstract

The criminal law maxim “ignorance of the law is no excuse” represents a broad doctrine of strict liability in an area of law that usually insists on a culpable state of mind as a prerequisite for liability. For that reason, many scholars have attacked the harsh mistake-of-law rules as incompatible with basic principles of culpability. Other scholars have come to the defense of the maxim, and courts have adhered to it quite strongly even as the list of exceptions to the maxim has slowly grown. Oddly enough, however, this debate has proceeded without a definition of mistake of law. Distinguishing mistake of law, which generally does not excuse, from mistake of fact, which generally does, has proven difficult for scholars and judges alike, with the result that no serious effort to provide a definition of that distinction has yet been made. This article tries to fill that gap. It first defines the distinction by emphasizing law’s status as a special system of linguistic meaning within the larger world of fact. It then uses that definition to argue that some orthodox categories of criminal law, particularly “mistake of non-criminal law” and “unreasonable mistake of fact,” are empty concepts that serve only to obfuscate the line between mistake of law and mistake of fact, obscure the conflicts between at least two competing traditions of criminal intent, and thus impede a principled approach to the problem of whether and when ignorance of the law should excuse.

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For more than a generation now, first-year law students have annually confronted the shocking facts of *Regina v. Morgan*,¹ in which a husband orchestrated the gang rape of his own wife. According to some of the attackers, the husband invited them home to have sex with his wife, assuring them that any struggle on her part would only constitute her “kinky” way of enjoying the proceedings. In the event, she did indeed struggle prodigiously but was overpowered by her husband and his comrades. Needless to say, the resistance that these men encountered constituted the wife’s violent opposition to the attack, not pleasure or consent.

At their trial, the defendants raised the defense of mistake of fact, arguing that, if she did not consent, at least they thought she had and so never intended to rape her. More importantly for the study of criminal law doctrine, they claimed that even a grossly “unreasonable” mistake of fact should exculpate a rape defendant. Their trial judge disagreed, and their jury convicted them. The House of Lords, however, agreed with the defendants on appeal, holding that a rape conviction could not stand where the defendants believed they had the woman’s consent, no matter how unreasonable that belief. This ruling sparked a spirited debate in the press as well as in academic circles,² even though the Lords denied the defendants the benefit of their victory when they ruled that, notwithstanding the legal error at trial, no miscarriage of justice had occurred.

In all of the debate about *Morgan*, however, no one has observed how the unusual disposition of the case raises difficult questions about the conceptual relationship between the reasonableness requirement, mistake of fact, and, surprisingly,

¹ 1976 App. Cas. 182, 195 (H.L. 1976).

² See, e.g., SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 322-323 (6th ed. 1995) (indicating public and academic controversy).

mistake of law. The Lords rejected a reasonableness limitation on the mistake defense, thus opening the door for defendants generally to argue the most grossly unreasonable mistakes to juries. At the same time, however, the Lords restored something like a reasonableness limitation by the back door when they held that no jury could have acquitted in this case--in other words, that these defendants were *not* entitled to the chance to argue so gross a mistake to a jury. This disposition is usually understood as resting simply on the Lords' evaluation of the defendants' credibility in making their claim,³ but underlying that characterization is something more interesting and important than evaluations of credibility. In *Morgan*, the Lords were actually dealing in mistake of law, not mistake of fact. They allowed the reasonableness question, however, to obscure that point. As is illustrated by discussions of *Morgan* ever since, the Lords were far from alone in stumbling over the distinction between mistake of fact and mistake of law.⁴ Judges and commentators have often done so in many settings. And that is true, at least in part, because that distinction has never been supplied with an adequate definition. The purpose of this article is to rectify that surprising omission in criminal law theory.

The traditional mistake of law doctrine is summed up in the slogan "ignorance of the law is no excuse." This general (although far from universal) refusal to consider mistakes of law as defenses is, of course, a species of strict liability and so highly objectionable to many scholars of criminal law.⁵ They want, perhaps justly, to think of criminals as morally bad people, people "'confronted with a choice between doing right

³ See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 699 (1978).

⁴ As far as I can tell, the literature on *Morgan* contains no suggestions that a mistake of law is lurking in the case.

⁵ See, e.g., Richard G. Singer, *The Proposed Duty to Inquire as Affected by Recent Criminal Law Decisions in the United States Supreme Court*, 3 *BUFF. CRIM. L. REV.* 701, 704-705 (2000).

and doing wrong and choosing freely to do wrong.’”⁶ While some scholars think that we may, in fact, be moving closer and closer to restricting the notion of criminality to morally culpable conduct, at least in the formal sphere of Supreme Court opinions,⁷ there remains an awful lot of criminal law doctrine that suggests the opposite, that criminality can attach to someone for whom no fault has been found at all.⁸ Criminal liability without inquiry into morally crucial aspects of the defendant’s state of mind remains common enough,⁹ and its chief doctrinal instance remains the maxim that “ignorance of the law is no excuse.” Many have thus argued that this basic mistake of law doctrine ought to be abolished or modified as inconsistent with the fundamental,

⁶ *Morissette v. United States*, 342 U.S. 246, 250 n.4 (1952) (quoting Pound, *Introduction* xxxvi-xxxvii, in FRANCIS BOWES SAYRE, *CASES ON CRIMINAL LAW* (1927)). *See also* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1004 (1932) (supposing that criminal blameworthiness “is necessarily based upon a free mind voluntarily choosing evil rather than good”).

⁷ *See* John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999); Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859 (1999).

⁸ *See, e.g.*, John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111 (1996) (arguing that there is too much strict liability in criminal law to maintain the notion that morality and fault are fundamental to criminal law).

⁹ For example, most people would probably consider the defendant’s awareness of the age of the victim in a statutory rape case to be crucial to the moral quality of the defendant’s act, but the traditional and still very common rule is to impose strict liability on that element of the offense. *See State v. Yanez*, 716 A.2d 759, 763 (R.I. 1998) (finding that majority of courts maintain strict liability for statutory rape); *Garnett v. State*, 632 A.2d 797, 803-4, 805 (Md. 1993) (holding that statutory rape is a strict liability crime, and that a majority of states retain statutes imposing strict liability); *Commonwealth v. Knap*, 592 N.E.2d 747, 748-49 (Mass. 1992) (holding that statutory rape is a strict liability crime); *State v. Stiffler*, 788 P.2d 220, 221 (Idaho 1990) (same); *State v. Pierson*, 514 A.2d 724, 727 (Conn. 1986) (same); *State v. Elton*, 680 P.2d 727 (Utah 1984) (same); *Commonwealth v. Miller*, 432 N.E.2d 463, 464-5 (Mass. 1982) (finding that most other jurisdictions subscribe to strict liability). *See also* WAYNE R. LAFAYE & AUSTIN W. SCOTT JR., *CRIMINAL LAW* § 5.1(c) (2d ed. 1986) (discussing “nearly unanimous view that a reasonable mistake of age is not a defense to a charge of statutory rape.”); JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 11.02(c) (2d ed. 1995) (finding that “in many states” statutory rape is a strict liability crime). *But see* *People v. Hernandez*, 393 P.2d 673 (Cal. 1964) (holding that reasonable mistake of age is a defense to a charge of statutory rape).

For other examples of strict liability, see *United States v. Park*, 421 U.S. 658, 676 (1975) (holding that the Federal Food, Drug, and Cosmetic Act imposes strict liability on “responsible corporate officials who . . . have the power to prevent or correct violations of its provisions”); *United States v. Freed*, 401 U.S. 601, 607 (1971) (holding that the National Firearms Act imposes

criminal-law principle of blameworthiness.¹⁰ Others, of course, have defended the traditional ML rule or close variations on it.¹¹ Few, however, have expended much energy to define precisely what ignorance or mistake of law (ML) is, as distinct from ignorance or mistake of fact (MF). Judges confidently pronounce that one mistake is ML and, therefore, no excuse, while another is MF and, therefore, fully exculpatory. Yet neither judges nor scholars have defined these rather fundamental doctrinal categories of criminal law.

This failure is all the more remarkable when one observes that little could be more essential to maintaining the formal, objective, and thus essentially legal character¹²

strict liability for receiving or possessing a firearm which is not registered to the recipient). More generally, see, LAFAVE AND SCOTT, *supra*, §§ 3.8, 5.1(c).

¹⁰ See, e.g., Singer, *supra* note ---, at 705; GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 153-154, 167 (1998); Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. AND MARY L. REV. 671, 684-689 (1976); D. O'Connor, *Mistake and Ignorance in Criminal Cases*, 39 MOD. L. REV. 644, 644-653 (1976); Laurence D. Houlgate, *Ignorantia Juris: A Plea for Justice*, 78 ETHICS 32 (1967); Paul K. Ryu & Helen Silving, *Error Juris: A Comparative Study*, 24 U. CHI. L. REV. 421, 466-471 (1957); Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 90-96 (1908). Those who advocate significant relaxations in the basic rule include A. J. Ashworth, *Excusable Mistake of Law*, 1974 CRIM. L. REV. 652; HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 271-275 (1979); Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. (1995).

¹¹ Hardly anyone thinks that there should be a universal rule against excusing MLs. The following writers, however, have offered substantial defenses of the rule (some more equivocal than others). Dan M. Kahan, *Ignorance of Law Is an Excuse--But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997); O. W. HOLMES, THE COMMON LAW 47-48 (1881); Bostjan Zupancic, *Criminal Responsibility Under Mistake of Law*, 13 AM. J. CRIM. L. 37 (1985); A. J. ASHWORTH, PRINCIPLES OF CRIMINAL LAW 234-236 (1995); Douglas Husak & Andrew von Hirsch, *Culpability and Mistake of Law*, in ACTION AND VALUE IN CRIMINAL LAW (Stephen Shute et al., eds., 1993); Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. AND CRIMINOLOGY 447, 497-502 (1990); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 346-357 (1947); Hall and Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 646-648 (1941); Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35, 40-41 (1939).

¹² The formalist or objective quality of adjudication, the assumption that it can be and is governed by rules that meaningfully limit discretion, is what makes it distinctively legal. See, e.g., Bostjan Zupancic, *On Legal Formalism: The Principle of Legality in Criminal Law*, 27 LOY. L. REV. 369, 372-374 (1981) (contrasting social control by mere coercion with social control by law's "formal criteria"); Coleman & Leiter, *Determinacy, Objectivity, and Authority*, 142 U. OF PA. L. REV. 549, 594-601 (1993) (acknowledging the "indeterminacy" of adjudication but arguing that adjudication retains the kind of "objectivity" necessary to render it authoritative as law by separating it from what the judge subjectively thinks right); ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE

of the substantive criminal law than a reliable, formal definition of ML as distinct from MF. Without such a definition, judges are thrown on their own undisciplined discretion with respect to a doctrine that is as central to the character of criminal law as any could be. The principle that ML generally is no excuse while MF generally exculpates not only supports the most venerable maxim of criminal law and innumerable convictions and acquittals. It also explains the bedrock criminal-law principle that no crime exists without a union of proscribed conduct and some kind of intent with respect to that conduct.¹³ It purports to show what that principle really means: that the existence of a crime depends on the defendant's intention or awareness with respect to the facts of that conduct but not with respect to the law governing that conduct. If so fundamental a principle has no definition adequate to place meaningful constraints on judicial discretion, then a major prop of judges' claimed formalism and objectivity in applying criminal law is exposed as a mask for some other, hidden mode of decision.

Of course, few today would suggest that formal legal definitions can ever wholly eliminate political or moral discretion from adjudication, and there is no shortage of

JUDICIAL PROCESS, *passim* and 197-200 (1975) (identifying formalism with law--as against morality--and identifying both with control of judicial discretion); Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 608 (observing that among other things "formalism" is a name for the system of rules and rule-following that nearly everyone agrees is characteristic of any legal system); Larry Alexander, "*With Me, It's All er Nuthin*": *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 530, 543-545 (1999) (arguing that "[l]aw is essentially formalistic" and thus must take the form of rules that settle questions determinately); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638-640 (1999) (observing that formalism is hard to define but noting its emphasis on broadly applicable rules in controlling judicial discretion and thus preserving the autonomy of law from the judge's politics and morality); Frank I. Michelman, *A Brief Anatomy of Adjudicative Rule-Formalism*, 66 U. CHI. L. REV. 934, 936 (1999) (arguing that formalist adjudication requires construction of some positive legal norm as preexisting and controlling the adjudication).

¹³ From the age of Coke to the age of the student hornbook, no principle has been more hallowed. See EDWARD COKE, THIRD INSTITUTE 107 (1641) ("*Actus non facit reum, nisi mens sit rea*"); 4 WILLIAM BLACKSTONE, COMMENTARIES *21 ("[T]o constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will."); LAFAVE

critics to argue that such discretion and politics are everywhere in law and adjudication.¹⁴ If I were to conclude that the ML-MF distinction was just another mask in the charade of “law,” no one would be too shocked in this day and age. But that conclusion is not mine.¹⁵ Many judges and scholars still seem to think that the ML-MF distinction is reliable, meaningful, and useful for determining liability by law rather than by undisciplined discretion.¹⁶ And I think there is good reason for that position, the position that at least a relatively formal¹⁷ definition is available and implicitly in use. This article, then, is an effort to derive a formal statement of the ML-MF distinction and then to see what implications such an effort has for criminal law theory and doctrine.

& SCOTT, *supra* note ---, § 3.11 (describing the “concurrency” principle); DRESSLER, *supra* note ---, § 15.01 (same).

¹⁴ One version or another of this claim is routinely associated with the legal realists, critical legal scholars, or post-modernists. See the discussions in, *e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 12-13 (1987); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 SO. CAL. L. REV. 2505, 2577-81 (1992); RONALD DWORKIN, LAW’S EMPIRE 9 and n.6 (1986). Referring to the legal realists and to critical legal scholars, Dworkin says that, “Some academic lawyers . . . conclude that there is never really law on any topic or issue, but only rhetoric judges use to dress up decisions actually dictated by ideological or class preference.”

¹⁵ I join Frederick Schauer in acknowledging the power of the “realist challenge” (and the postmodernist challenge) to the formalist notion that rules can fully control decision-making while insisting on the common sense that rules nevertheless do meaningfully constrain decision-making in very many cases. See SCHAUER, PLAYING BY THE RULES 191-196 (1991).

¹⁶ Examples of judges fill the reports. See just about any case citation in this article. Examples of scholars include the many who discuss the precise scope that ML defenses do or should have, presumably on the premise that the distinction is intelligible. See, *e.g.*, Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 396-413 (1998) (arguing that courts have been too quick to read exceptions to the maxim into federal statutes); Kahan, *supra* note --- (arguing that ML defenses are made available only to those whose prohibited conduct would otherwise be judged moral); ASHWORTH, *supra* note ---, at 233-237; Husak & von Hirsch, *supra* note ---; A. T. H. Smith, *Error and Mistake in Anglo-American Criminal Law*, 14 ANGLO-AMERICAN L. REV. 3 (1985); Zupancic, *supra* note ---; GROSS, *supra* note ---, at 271-275; Cass, *supra* note --- (questioning the fairness but not the intelligibility of the doctrine).

¹⁷ What Sunstein says about formalism in statutory interpretation applies, I think, to discussions of formalism in nearly all legal contexts: “The real question is ‘what degree of formalism?’ rather than ‘formalist or not?’” Sunstein, *supra* note ---, at 640. See also Zupancic, *supra* note ---, 438 (noting that “there can be no clear line between formalism and purposive legal reasoning” but that any case may present a greater or lesser “degree of formal determinism”).

After looking at some basic examples of ML doctrine (Part I) and showing the absence of any adequate definition of the ML-MF distinction in the academic literature (Part II), I want to offer a definition that seems to me to capture what the courts are getting at when they refer to ML (Part III). The definition rests on the observation that the charging statute for any case, operating through the factfinder, creates a language or a structure of legally entailed inferences that completely govern that case. The definition then supposes that MLs are the subspecies of MF in which the defendant has failed to draw the inferences from her experience that a factfinder under the governance of that statute would have drawn. Once I have ironed out the various wrinkles in the definition, I will discuss the implications of the definition for two important concepts in criminal law, the notion of “mistake of non-criminal law” (in Part IV) and the idea of “unreasonable mistake of fact” (in Part V). This discussion should serve two purposes: it should clarify the definition of ML by showing some applications in problematic contexts; and it should expose some unrecognized or, at least, inadequately recognized cases of ML in criminal law--the *Morgan* decision being an important example. Both of these entrenched concepts of criminal law analysis turn out, in my mind, to be virtually empty and to have served, at least in part, to obscure the judgments that judges and legislators make about the proper scope of criminal liability. My hope is that the definition of the ML-MF distinction offered here will help to make discussions of criminal law more disciplined and rigorous, whether the ultimate result of those discussions is reform or retrenchment of such hard rules of liability as the ML rule.

I. BASICS

Let me start with a couple of easy cases to illustrate the basic functioning of the distinction.

The defendant possesses a cylindrical device that can mildly reduce the “report” of a pistol and is charged under the federal statute that criminalizes possession of an unregistered firearm. The device comes within the federal statutory definition of “firearm,” since “firearm” includes “silencer”¹⁸ and since “silencer” includes “any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed and intended for use in assembling or fabricating a firearm silencer”¹⁹

If the defendant argues that she had no idea that the cylinder was designed to muffle gun noise nor that it could serve that purpose, then she is probably claiming MF. She is saying that, no matter how well she might have known the details of the federal firearm laws, she could not have known she was doing anything wrong because she simply had no idea that this metal cylinder had anything to do with guns, as opposed to, say, woodworking equipment. Under this particular statute, the Supreme Court has specifically held that a conviction requires that the defendant have known the facts that make the object a firearm, so the defendant’s MF would exculpate her.²⁰ This holding was entirely consistent with conventional criminal-law doctrine, which normally considers a MF with respect to a material element a valid excuse.

There is the additional complication, however, that very often a MF must be reasonable before it can provide a defense.²¹ Thus my firearm defendant would have to

¹⁸ See 26 U.S.C. § 5845(a)(7).

¹⁹ See 18 U.S.C. §921(a)(24).

²⁰ See *Staples v. United States*, 511 U.S. 600, 619 (1994).

²¹ See, e.g., ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 1028, 1044-1048 (3rd ed. 1982).

have reasonably failed to perceive the facts that made this particular metal cylinder a silencer within the meaning of the statute. If she had, at some point, detached it from the end of the barrel of a pistol or removed it from packaging marked “FIREARM SILENCER,” then presumably her failure to perceive the facts that made the object a silencer would be deemed unreasonable. She would therefore get no defense if a reasonableness requirement were in place. As it happens, the Supreme Court appears to have interpreted federal firearms law *not* to require reasonableness in this respect;²² so my defendant would simply have to convince the factfinder that she did not know that the cylinder was designed to muffle a gun, however stupid or unreasonable she was in failing to know that.

Apart from such MF arguments, the defendant could try arguments that would properly be analyzed as ML, although, given the absence of a ML defense under this and most statutes,²³ she would be well advised to try spinning the argument as MF. Thus, she might try to argue that she made the following “MF”: that she did not know that the cylinder was a silencer because she thought the device, although obviously designed to be a silencer, would not actually muffle any gun noise. If she were correct that the statutory definition of a silencer included the requirement that the silencer actually function correctly as a silencer, then she might have a genuine MF argument akin to my example above; she would simply have to convince the factfinder that she truly believed that this device would not actually muffle gun noise. Alas, she is not correct. As at least one court has held, the cylinder *would* count as a “silencer” as long as it was designed and intended to muffle gun noise, regardless of whether it worked.²⁴

²² See *Staples*, 511 U.S. at 619.

²³ See *id.* at 602, 619. See also *United States v. Freed*, 401 U.S. 601, 609 (1971).

²⁴ See *United States v. Syverson*, 90 F.3d 227, 232 (7th Cir. 1996).

The question whether the device worked is simply irrelevant under this law, so the question whether the defendant knew whether it worked or not is equally irrelevant. Therefore, as far as the court is concerned, the defendant's claim that she did not know that the device was a silencer was a reflection of her failure to understand *the law's* definition of firearm or silencer, not a reflection of any misunderstanding as to facts that the law actually makes material. Her claim is a ML.

As a claim of ML, this argument is a loser under this statute, as its like would be under most criminal statutes.²⁵ There are, however, many exceptions to this rule. The criminal provisions of the tax code may be the best known examples, but there are many others as well.²⁶

Another illustration of the ML-MF distinction can be drawn from the case of *Idaho v. Fox*.²⁷ Fox was charged with possession of a "controlled substance" without a prescription. He had known perfectly well that he possessed quite a lot of ephedrine and nothing in the way of prescriptions. What he did not know, insisted his lawyer, was the "fact" that ephedrine was on the list of controlled substances for which Idaho required a prescription.²⁸ This mistake was, in a colloquial sense, clearly "factual," but, just as clearly, it counted as a ML for the purposes of criminal law. Fox misunderstood that ephedrine was a "controlled substance" in Idaho. He thus mistook the scope of the term "controlled substance." And the court thus held, as any disinterested criminal

²⁵ See PERKINS & BOYCE, *supra* note ---, at 1028; DRESSLER, *supra* note ---, at 147; Model Penal Code §2.02(9) also adopts the traditional rule as the Code's basic presumption.

²⁶ Just in the federal system, recent Supreme Court cases providing ML defenses include *Ratzlaf v. United States*, 510 U.S. 135 (1994) (finding an ML defense to the crime of "structuring" bank transactions); *Cheek v. United States*, 498 U.S. 192 (1991) (reaffirming the ML defense in tax crimes); and *Liparota v. United States*, 471 U.S. 419 (1985) (allowing an ML defense to the crime of unauthorized transfer of food stamps). See also Davies, *supra* note ---, which catalogues many other federal cases that have found ML defenses. Of course, many can be found outside the federal system as well.

²⁷ 124 Idaho 924, 866 P.2d 181 (Idaho 1993).

lawyer would agree, that Fox's misunderstanding of the meaning of the statute was a ML.²⁹

Had Fox claimed instead that, when he mail-ordered his 100,000 tablets, he had said to the order-taker "Excedrin" rather than "ephedrine" and had subsequently assumed that the pills that arrived were all aspirin, he would have had a good claim of MF. Since Idaho did not, in fact, require a prescription to buy aspirin (even in such quantities, let's suppose), such a mistake would not have suggested any misunderstanding of the law but only a misperception of the actual nature of the substance in Fox's possession. As above, such a mistake would be MF and likely would provide a good defense. As it happens, Idaho apparently requires any MF under this statute to be reasonable;³⁰ so my hypothetical Fox who claims to have ordered Excedrin would have to convince the factfinder, for example, that he had good reason to think that the order-taker understood him properly and no obvious reason to believe that the pills that arrived were something different from what he ordered.

II. PRIOR ATTEMPTS AT DEFINING THE ML-MF DISTINCTION

These examples are meant to lay out the basic structure of the criminal law of mistake and show that it is not usually too hard to make the distinction between ML and MF. But the simplicity of some cases does not mean that there haven't been significant controversies about how to categorize other cases.

In fact, both examples of legal mistake above turn out to fit a general category of mistakes that have sometimes been said to be factual or, at least, best treated as factual.

²⁸ *See id.* at 926.

²⁹ *See id.*

This category comprises those cases often labelled mistake of “civil law,” mistake of “different law,” mistake of “legal fact,” or the like. Most writers have understood that these are MLs, even if a special kind of ML, but some writers have understood them as MF or as some category independent of ML and MF.³¹ The most widely recognized example of such a mistake is the claim-of-right defense to larceny. Under that defense, a mistaken view of civil property law can exculpate if it leads the defendant to believe he has a right to the property.³² Such a mistake may look like a MF, since the defendant is claiming “I thought the property was mine.” However, where that mistake is rooted in a misunderstanding of the law of property--for example, landlord-tenant law regarding ownership of a tenant’s improvements--the mistake is manifestly a ML. Still, such a mistake of property law is always a defense to larceny, and criminal law writers have often wanted to place such mistakes of “different law” in a distinct category.³³ Fox’s mistake, being a mistake regarding the Board of Pharmacy’s categorization of substances for various regulatory purposes,³⁴ fits comfortably within this category, as

³⁰ Fox says that the offense requires proof of general intent only. *See id.* General intent usually means that only a reasonable MF is a good defense. *See* DRESSLER, *supra* note ---, at 138.

³¹ *See, e.g.*, Singer & Husak, *supra* note ---, at 898; Gunther Arzt, *Ignorance or Mistake of Law*, 24 AMER. J. OF COMP. L. 646, 649-650 (1976); Dutille and Moore, *Mistake and Impossibility: Arranging a Marriage Between Two Difficult Partners*, 74 NW. U. L. REV. 166, 176-181 (1979); Keedy, *supra* note --, at 95-96. *See also* Liparota v. United States, 471 U.S. 419 (1985), where the Court held that a defendant charged with the unauthorized transfer of food stamps could only be convicted if the government showed that the defendant knew what constituted lack of authorization under the relevant statutes. Justice Brennan wrote, “The dissent repeatedly claims that our holding today creates a defense of ‘mistake of law.’ . . . Our holding today no more creates a ‘mistake of law’ defense than does a statute making knowing receipt of stolen goods unlawful.” *Id.* at 426 n.9. Of course, the holding did create a ML defense but not of a type that Brennan thought deserved the name. *See* Bruce R. Grace, *Ignorance Of The Law As An Excuse*, 86 COLUM. L. REV. 1392, 1399-1400 (1986) (explaining why Justice Brennan’s opinion obviously did create a ML defense).

³² *See* DRESSLER, *supra* note ---, at 521.

³³ *See, e.g.*, PERKINS & BOYCE, *supra* note ---, at 1043.

³⁴ *See* Idaho v. Fox, 124 Idaho 924, 926, 866 P.2d 181, 183 (Idaho 1993).

does a mistake regarding the definition of “firearm” under federal law. Yet virtually no one would suggest that such mistakes are anything but conventional MLs.³⁵

More importantly, for this article, there are a number of scenarios that even the most careful scholars have found extremely troublesome to categorize. Such cases include, for example, so-called mixed questions of law and fact, cases involving a defendant’s total inattention to some apparently factual question, and cases where the statutory language in question establishes no general category but simply identifies some unique object as having some special legal significance. All of these trouble spots can be found together in Paul Robinson’s example of a liquor-seller who relies on the advice of a third party in concluding mistakenly that she is outside the boundary lines of a dry town. Is the location of a store relative to the boundary line a question of law, or fact, or a mixed question of law and fact? Does the defendant’s total inattention to the questions made material by the statute--since she chooses simply to rely on the judgment of a third party--make her mistake necessarily a ML or might her mistake still be classifiable as MF? Does the fact that the boundary line is a particular thing rather than a general category resolve the question, since one of the essential characteristics of a law is often said to be its generality? These are tricky questions that have prompted some scholars to dismiss the ML-MF distinction as too tenuous to be of any relevance in determining criminal liability. Robinson thus suggests that, if such a defendant’s liability turns on whether her mistake is classified as ML or MF, then the ML-MF distinction is performing no morally worthy service and should be dispensed with.³⁶ Here, Robinson joins those scholars who, relatively unconcerned with specifying any

³⁵ I had to add “virtually” to this sentence, because I have just recently come across a passing suggestion that a mistake regarding the definition of “firearm” could indeed be conceptualized as a mistake of “legal fact.” Singer & Husak, *supra* note ---, at 898.

formal distinction between ML and MF, argue that in any case there is no morally sound reason to treat MFs and MLs differently from each other when determining criminal liability.³⁷

I will put to one side, for now, the question whether anything ultimately should turn on the ML-MF distinction. Instead, I will take the continuing relevance of the ML-MF distinction as the fact of life that it is and try to respond to the difficult cases head on. My object, then, is to work towards a reliable definition of the distinction between ML and MF, a definition that appears to have eluded the generations of scholars who have discussed criminal law's mistake defenses.

What definitions of the distinction have been attempted? I will not discuss all of the ways in which writers have approached the distinction, but a review of a few common approaches will set the stage. Some quite eminent legal thinkers have tossed off unhelpful formulations of the law-fact distinction. More than a century ago, outside the criminal context, James Bradley Thayer noted the problem that law itself can be understood as a kind of fact, but it was that special kind that included "a rule or standard which it is the duty of a judicial tribunal to apply . . ."³⁸ The front half of this observation--that law is of course a kind of fact--is important, but the back half is useless. Merely equating a question of law with a question regarding a rule or standard does not help much; yet only modest progress has been made since Thayer in defining the ML-MF distinction.

Forty years ago, Glanville Williams tried to advance the ball in the criminal context with this formulation: "Generally speaking a fact is something perceptible by

³⁶ See, e.g., PAUL ROBINSON, CRIMINAL LAW DEFENSES, 380 and n.26 (1984).

³⁷ See above, n.--- and accompanying text.

³⁸ James Bradley Thayer, "Law and Fact" in *Jury Trials*, 4 HARV. L. REV. 147, 152-153 (1890).

the senses, while law is an idea in the minds of men.” But Williams immediately recognized that the world of fact must include some things that he did not think of as objects of perception, such as someone else’s state of mind, since such a fact had to be inferred from other facts rather than simply sensed.³⁹ As he recognized this difficulty with his definition of “fact,” he might also have recognized the problem with his definition of law: that, at least in some senses of his formulation, a law must be an object of sensory perception and thus, as Thayer saw, a kind of fact. Neither of these points, however, moved him to a more refined statement of the distinction. He just moved on to more manageable problems.

Some years later, an extremely careful illustration of the distinction appeared in an article by Graham Hughes, the main task of which was to analyze the impossibility defense in attempt crimes. In that article, Hughes worked carefully through the various mistakes that might count as ML or MF in a variety of cases.⁴⁰ Posing a hypothetical that turned on nice distinctions in the definition of a “dwelling” in the law of burglary, for example, Hughes clung tightly to the ML-MF distinction as a perfectly intelligible, even if not necessarily satisfactory, basis for determining guilt and innocence.⁴¹ This exercise stands out in the literature as a model of analytical rigor--except for one thing: even Hughes’s skillful detection of fine distinctions between different scenarios was carried out without an attempt at a formal statement of the distinction between MF and ML.

Had Hughes offered one, I am confident that it would have closely resembled one more recently offered by Kenneth W. Simons. Simons’s version is, I think, an

³⁹ See GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 287 (2d ed. 1961).

⁴⁰ See Graham Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005, 1016-1020 (1967).

accurate and concise statement of what I might call, in deference to Hughes, the “orthodox position.”⁴² Like Hughes, Simons’s main concern was with problems of the impossibility defense, not with providing a rigorous statement of the ML-MF distinction. His analysis did depend on the ML-MF distinction, however, so he needed a working definition to hold at bay those scholars who have questioned its reliability. Simons said: “Mistake and ignorance of *fact* involve perceptions of the world and empirical judgments derived from those perceptions. 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.”⁴³ Simons elaborated by saying that you could tell a ML simply by imagining a hypothetical actor who knew all of the facts. If this person nevertheless failed to see that her conduct violated the law, then her mistake was ML. Similarly, you could identify a MF by imagining a hypothetical actor who knew the law perfectly well in its application to any set of facts. If this person nevertheless failed to understand that her conduct violated the law, then her mistake was MF.⁴⁴ These are good descriptions, I think, of how good lawyers and judges normally think about this problem. And no case that I know of attempts a definition more rigorous than this one. Simons completed his summary of the common sense of the problem by noting explicitly that any mistake about how the law “applies” to a given set of facts is also a ML. He thus rejected the notion that there is an “‘intermediate’ category between law and fact” or a category of “‘mixed’ questions of fact and law” to muck up the basic distinction.⁴⁵

⁴¹ *Id.* at 1019-1020.

⁴² *Id.* at 1016.

⁴³ Simons, *supra* note ---, at 469 (citation omitted).

⁴⁴ *Id.* at 469-470.

⁴⁵ *Id.* at 470-471.

As a concise description of conventional practice, Simons's formulation is well done, but as a formal statement of the distinction it is inadequate. There cannot be much doubt that Simons's definition of fact, "perceptions of the world and empirical judgments derived from those perceptions," fails to exclude law. As Thayer suggested, the question whether a particular law exists or has a particular meaning certainly seems to be a factual question, a question about something in the world that can be perceived just as much as a person's state of mind, for example, can be perceived.⁴⁶ Thus it is perfectly intelligible to ask, "Is it the fact that ephedrine is a 'controlled substance'?", even though every lawyer would agree that that is a question of law rather than the question of fact that it purports to be. The conventional approach has no way of telling us why that question is "legal" rather than "factual." Thus, to follow out Simons's elaborations, you can't coherently posit someone who knows all the facts while remaining mistaken about whether her conduct violates the law, at least not without a more refined distinction between law and fact. That is because the perceptible facts "of the world and empirical judgments derived from those perceptions" include the fact that the conduct violates the law.⁴⁷ Thus, one who knows all the facts must also, by definition, know the law until we have a definition of the distinction between law and fact. Moreover, if the meaning of the law lies not just in the bare words of the governing statute itself but in how that statute applies to a given set of facts, as Simons rightly affirms, then the escape from this problem is not as readily available as it might at first

⁴⁶ See also Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Bayles*, 12 LAW AND PHIL. 33, 37-38, 52, 57-58 (1993); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 862-866 (1992); Geoffrey Marshall, *Provisional Concepts and Definitions of Fact*, 18 LAW AND PHIL. 447, 449 (1999).

⁴⁷ Alexander, *supra* note ---, at 57-58.

seem.⁴⁸ That is, if you propose that a ML just be those factual mistakes that pertain to the meaning of the statute, you still must confront the fact that the meaning of the statute lies in the statute's "application to" these facts, which just begs again the question whether the mistake as to the application of law to fact in any particular instance is a mistake with respect to the law being applied or with respect to the facts it is applied to.

If lawyers generally think they know how to distinguish ML from MF but have never been able to offer an adequate definition of that distinction,⁴⁹ one might suppose that there cannot be a reliable statement of the distinction. Many have suggested as much.⁵⁰ Long ago, adopting an attitude consistent with the legal realists' general skepticism regarding formal distinctions, Jerome Hall seemed to reject the idea that any reliable distinction between ML and MF could be drawn. He did describe some differences between law and fact, such as that law consists of propositions while fact relates to discrete qualities or events, that laws are "generalizations" and "understood in the process of cognition" while facts are "particulars" and are "directly apprehended"

⁴⁸ See *Id.* at 52.

⁴⁹ I cannot discuss all of the ML literature in detail, but my survey of that literature reveals no definition that moves meaningfully beyond those discussed in the text. See, e.g., Singer, *supra* note --- (no definition); Kahan, *supra* note --- (no definition); ASHWORTH, *supra* note ---, at 233-237 (no definition); Husak & von Hirsch, *supra* note --- (no definition); Smith, *supra* note --- (no definition); Zupancic, *supra* note --- (no definition); Cass, *supra* note --- (no definition); Ashworth, *supra* note --- (no definition); Houlgate, *supra* note --- (no definition); O'Connor, *supra* note ---, at 644-653 (no definition); Richard E. Kohler, *Ignorance or Mistake of Law as a Defense in Criminal Cases*, 40 DICKINSON L. REV. 113, 113 (1936) (distinguishing MF from ML much the same way that Simons does); Hall & Seligman, *supra* note --- (no definition); Perkins, *supra* note --- (no definition); GROSS, *supra* note ---, at 270-271 (offering an obscure distinction between an act "based on a mistake" and an act "done by mistake"); Davies, *supra* note ---, at 352 n.49 (offering no definition and noting that "attempts to differentiate between mistakes of law and fact have frequently been fraught with difficulty"); Peter Brett, *Mistake of Law as a Criminal Defence*, 5 MELBOURNE U. L. REV. 179 (1966) (no definition); Ryu & Silving, *supra* note --- (no definition); George Wilfred Stumberg, *Mistake of Law in Texas Criminal Cases*, 15 TEX. L. REV. 287 (1937) (no definition).

⁵⁰ See Marshall, *supra* note ---, at 449-450 (observing that many have suggested that there is no difference in kind between law and fact).

or “sensed,” and that knowledge of law (as “cognition of propositions”) has a kind of fundamental uncertainty about it that knowledge of fact (as simple “perception”) does not.⁵¹ But, after all this, Hall offers no definition and seems to suggest that the difference is really just a matter of degree.⁵²

The same position seems to emerge from Stephen Weiner’s efforts, in the civil trial context, to allocate questions between judge and jury. Law is a “question of identifying broadly formulated principles for judging the parties’ conduct,” whereas fact is a “question of reconstructing acts or events which have actually taken place, or conditions which have actually existed.”⁵³ This formulation would be easy enough to critique, even apart from its apparent vagueness, since it is not clear why “broadly formulated principles for judging the parties’ conduct” are not also “conditions which have actually existed.” It is also easy to find laws that seem to involve elements that are not broadly formulated principles; for example, again, laws establishing the boundaries of particular towns. But Weiner seems to recognize that he has not offered an adequate definition, since he goes on to insist that the categories of law and fact must be supplemented with a third category, called “law application,” and to argue that the allocation of questions to judge and jury does and should have more to do with questions of institutional competence than any formal distinctions between law and fact.⁵⁴ He does not really suggest that these three categories are any more definable than

⁵¹ Hall, *supra* note ---, at 344-345.

⁵² *Id.* at 346.

⁵³ Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 CAL. L. REV. 1020, 1020 (1967).

⁵⁴ *See* Weiner, *supra* note ---, at 1022-24; Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1876-1882 (1966). Endorsing this point, Endicott argues that in England it is the “consensus” that there is no analytical distinction between questions of law and questions of fact and that those labels are used in a purely pragmatic or result-oriented way. Endicott, *Questions of Law*, 114 LAW QUARTERLY REVIEW 292, 292 (1998). I use Weiner and Endicott here as exemplars of the line of civil law scholarship that grapples with the law-fact distinction not in terms of ML and MF, of course, but with respect to allocations of power between judge and jury,

the categories “law” and “fact” are. Rather, he seems to think the tripartite approach simply more useful for revealing the essentially discretionary nature of the allocation of “law” to the judge and “fact” to the jury. Moreover, whatever merit there may be in embracing a third category called “law application” or “mixed question of law and fact,” which is such a common part of the vocabulary of the law in civil cases, that intermediate category has never found a place in criminal courts where the distinction between MF and ML, however inadequately defined, has occupied the field.

There have nevertheless been academic advocates of this three-category approach even in the criminal context. George Fletcher, for example, has supposed that MFs are mistakes “based on misperceptions of the world,” that MLs are mistakes based on “a false belief about the enactment or abolition of a legal norm,” and that there is a “middle category” in which “the mistake goes to the application of an existing legal norm to a particular set of facts.”⁵⁵

But Fletcher and others have been less interested in refining such categories than in subordinating them to what they take to be more important questions. Fletcher’s discussion wastes very little ink on stating the distinction but considers at great length other factors that might render a MF or ML culpable or exculpatory.⁵⁶ Mark Kelman implies that the ML-MF distinction is entirely arbitrary and merely covers up other

between appellate and trial courts, and between courts and administrative agencies. This literature seems to have long accepted the notion that there is an intermediate category between law and fact, unassimilable to either, for which allocation questions must be matters of discretion. *See, e.g.*, Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924); Daniel B. Rodriguez, *Jaffe’s Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159, 1177-1181 (1997); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 12 (1985); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234-239 (1985); Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 SO. CAL. L. REV. 235, 284-289 (1991).

⁵⁵ FLETCHER, *supra* note ---, at 686. *See also* Dutile & Moore, *supra* note ---, at 171-181.

⁵⁶ *See* FLETCHER, *supra* note ---, at 684 and ch. 9 as a whole.

questions that the legal system hesitates to confront.⁵⁷ Paul Robinson observes that the ML-MF distinction “has proven very troublesome” and should be dispensed with, since, at least sometimes, there is no morally significant distinction between one kind of mistake and the other.⁵⁸ While his main point is the latter one, he also seems to want to point out that the distinction has not been formulated well enough to categorize all cases accurately.⁵⁹

Finally, Larry Alexander has frankly rejected the notion that any reliable distinction between fact and law can be drawn. Reprising Thayer’s approach, he notes that “all mistakes of law are mistakes regarding facts--those facts that are facts about the existence and meaning of law.”⁶⁰ For example, he suggests that a misperception of a word of a statute, just like a misperception regarding the loadedness of a gun, is obviously a “factual” mistake in any normal use of the term “factual,” even though it would routinely be regarded as ML in criminal law.⁶¹ Having suggested how any ML can be recast as MF, he then suggests how any MF can be recast as ML by rejecting any distinction between “those facts that bear on the existence and meaning of the law and those that bear on its particular application.” That line, he argues, “can be drawn at an indefinite number of places--meaning and application cannot be distinguished in a vacuum.” Alexander goes on, “If application is part of meaning--and consider whether one ‘knows’ the meaning of a law if he cannot identify any actual extensions of it in the

⁵⁷ See Mark Kelman, *Interpretive Construction in the Criminal Law*, 33 STAN. L. REV. 591, 630-633 (1981).

⁵⁸ ROBINSON, *supra* note ---, §62(e), 265.

⁵⁹ *Id.* at 380 n.26.

⁶⁰ Alexander, *supra* note ---, at 52. See also Patient, *Mistake of Law--A Mistake?*, 51 J. OF CRIM. L. 326, 326 (1987), where the ML-MF distinction is described as “illusory.”

⁶¹ See Alexander, *supra* note ---, at 38.

world--then factual mistakes are legal ones . . .”⁶² For example, I take it that Alexander would argue that if a defendant thought a gun was unloaded when in actuality it was loaded, that apparently factual mistake could be readily re-categorized as a ML, as a mistake regarding the legal proposition that the gun counted as, say, a “deadly weapon.” In sum, “all mistakes of law are mistakes regarding facts,” and “factual mistakes are legal ones”; the ML-MF distinction is an illusion, for Alexander, or at least a distinction that must be defined functionally rather than conceptually.⁶³

Alexander’s argument here and Robinson’s hypothetical regarding the location of a boundary are two of the most pointed exposures of the absence of any reliable definition of the ML-MF distinction in the legal literature. Almost any lawyer, I think, would reflexively reject Alexander’s notion that every factual mistake can be restated as a legal one. A mistake regarding the loaded-ness of a particular gun seems patently a MF, a mere misperception about a particular incident. But I think Alexander has shown that calling something a misperception is not by itself enough to take it out of the realm of ML, since the misperception may be a misperception of the existence of the statute, or of the words in the statute, or of the classes of objects or ideas denoted by those words--misperceptions that at least sometimes are obvious examples of ML. And Robinson’s boundary example refutes the notion that the vague general-versus-particular distinction does the trick,⁶⁴ at least until more precisely defined, since a legal definition

⁶² *Id.* at 52.

⁶³ *Id.* at 52-53.

⁶⁴ Schauer argues that it is in the nature of a rule (such as any criminal prohibition) to be “general.” See SCHAUER, *supra* note ---, at 17-18. That is probably right, but that does not mean that every element of the rule must be general. A prohibition on selling liquor in a particular town is general in that it prohibits not just a particular person from selling liquor at a particular time but prohibits a category of persons from selling at any of a large number of times (perhaps all times). It is, therefore, a rule rather than a mere command. But that rule has at least one element--presence in one certain town--that is particular.

of a boundary (about which at least some mistakes must be MLs) seems to establish no general principles but only a decision to give some particular object in the world a particular legal status, much like a court's decision that a particular gun has the status of "deadly weapon."

The next step I want to take is to improve on the current definitions of the ML-MF distinction to see if challenges like Alexander's and Robinson's can be met.

III. A REFINED DEFINITION

A. *The Definition*

A definition of the ML-MF distinction should avoid reliance on the notion of misperception as a distinguishing feature of MF and similarly should avoid reliance on the difference between generality and particularity. Both of these seem attractive, but neither has been shown to work and I don't think that either can be made to work, for the reasons sketched above. Instead, the definition should rely centrally on the idea of law as a system of meaning. The alternative formulation that I want to test, then, is the following: Whenever a court determines that the defendant's experience of the world at the time of the offense conduct (from the defendant's perspective) would entail an inference by the factfinder that a specified statutory term had been satisfied--i.e., the D's experience would instantiate the meaning of the statutory term--then any claim by the defendant that she nevertheless failed to draw that inference (whether at the time of the conduct or later) is a claim of ML.⁶⁵ On the other hand, whenever a court determines that the defendant's experience of the world at the time of the offense conduct would

⁶⁵ It is equally a ML to suppose that a certain set of circumstances is consistent with satisfaction of a statutory term when in law that set of circumstances entails the inference that a statutory term

not, if accurate, entail an inference by the factfinder that a specified statutory term had been satisfied--i.e., would *not* instantiate the meaning of the statutory term--then, of course, the defendant's belief that the statutory term has not been satisfied in the case cannot be a ML; if the defendant has made a mistake somewhere, then it must be in one of the underlying beliefs held by the defendant at the time of the offense and must be a MF.

Less formulaically, a ML is a failure to recognize or understand accurately the meanings of the terms of the charging statute, meanings that, as Alexander says,⁶⁶ are constituted at least in part by their "applications" in particular factual scenarios. Thus a ML is a failure to draw proper inferences between particular scenarios (e.g., one in which an object has the capacity to fire bullets at high velocity) and the statutory terms (e.g., "firearm") that govern the case. Every scenario and statutory term mutually entail certain inferences and exclude others, and an inference (or failure of inference) is invalid, for legal purposes, when it is inconsistent with the meaning of a term of the charging statute. To put it another way, the meaning of a statutory term is a statement of the semantic reasons why some particular is or is not deemed to be covered by the statutory term. And the reasons offered then constitute a linguistic equivalent of the statutory term. Thus an object that can fire bullets at high velocity may be deemed a statutory "firearm" *because* it has that capacity, and so a "firearm" *is* or *means* an object that can fire bullets at high velocity, even if it can also be or mean other things.⁶⁷ And the circumstance that an object can fire bullets at high velocity entails the inference to

has *not* been satisfied. I will not treat this variation separately because I do not think it raises analytically distinct issues.

⁶⁶ Alexander, *supra* note ---, at 52.

⁶⁷ Under federal law, "firearm" includes such things as hand grenades and mere parts of guns as well. *See* 18 U.S.C.A. § 921(a)(3); 18 U.S.C.A. § 921(a)(4); 18 U.S.C.A. § 921(a)(24).

“firearm” at the same time that “firearm” entails an inference to a category of things that includes those objects that can fire bullets at high velocity.

Such statements of equivalence or mutual inference--rules of law--may be and are sometimes established in advance of a particular adjudication and then more or less mechanically “applied” to the facts of the case. More universally, however, these definitions simply appear as assertions of the equivalence between a certain set of characteristics abstracted from the facts of the case and a certain set of characteristics previously declared to have been equivalent to the statutory term. In a so-called case of first impression, the equivalence will be established directly between the abstracted characteristics of the case and the statutory term. Thus, for example, in a particular scenario under the firearms statute it may be the case that a silencer is broken. If a previous case has established that a broken silencer still counts as a silencer (i.e., “broken silencer” equals or implies “silencer”), then this court will just “apply” that established equivalence or inference to this case. But the first time the question is faced the judge simply asserts, on the basis of her skill as a reader of statutory English, that the label “broken silencer” is the equivalent of and entails the inference to “silencer”; that is, that “silencer” *means*, among other things, broken silencer.

B. Some Complications and Clarifications

This illustration immediately suggests a complication: that such a definition of “silencer” or “firearm” or anything else--such a specification of meaning--is always incomplete because whatever characteristics or circumstances or properties (like capacity to fire bullets at high velocity) might entail the inference to “firearm”--i.e.,

might give a meaning of firearm and stand as a rule of legal inference⁶⁸--will only entail that inference as long as there are no unforeseen circumstances that “disturb” the inference.⁶⁹ A future case might, for example, present an object that can fire bullets at high velocity but that does not let the bullets leave its sealed barrel. Is the object still a firearm? The previously established “general” rule that capacity to fire bullets at high velocity *means* “firearm” may turn out not to work in this case, not to define firearm after all. We can never be completely certain that any *a priori* statement of a legally entailed inference (i.e., a legal meaning or definition) will never encounter a circumstance that will defeat it.⁷⁰

Still, even if the task of distinguishing the meaning of a statutory term from the reality that it governs is complicated by this argument for the fundamental instability of all linguistic meaning, the task can be pursued in a coherent way. We can still conclude that, for a court to find a ML in any particular case, it can and must first identify the collection of beliefs--the experience of reality--actually harbored by the defendant at the time of the conduct and deemed by the court adequate to specify a meaning of the statutory term. The fact that the meaning of a particular word is never completely specified for the future does not prevent its meaning from being specified in any single

⁶⁸ See Friedrich Waismann, *Verifiability*, in *LOGIC AND LANGUAGE* 118 (Antony Flew, ed., 1st ser. 1968, orig. 1951).

⁶⁹ See *id.* at 127.

⁷⁰ See *id.* at 119-129. See also Lech Morawski, *Law, Fact and Legal Language*, 18 *LAW AND PHIL.* 461, 472 (1999) (showing that legal terms cannot be completely defined but have only “partial” definitions that are defeasible by new circumstances). The observation that there might, in any particular case, emerge a circumstance that “disturbs” the normal inference--i.e., the *a priori* statement of the law’s required inferences--may mean that every rule of law is actually particular and never general; only *a priori*, provisional, working rules of inference are general. But that does not make the inference required in any particular case, the inference entailed by the circumstances of that case and the statutory term, any less a matter of law, since the distinction between ML and MF does not depend on any distinction between generality and particularity.

case for that case, by the factfinder's specification of the aspects of the defendant's experience that give the word its pertinent meaning.⁷¹

What about MF, then? For a court to find a MF, it must go through the above process of specifying the definition or meaning of the statutory term in the context of the particular case and on that basis determine that when the term is used correctly it does *not* entail an inference from the defendant's beliefs or experience at the time of the offense to the conclusion that the term has been satisfied. Any mistake that rests on a body of beliefs that would not require a factfinder to infer the satisfaction of a statutory element is a MF. A MF, in other words, is a mistake untainted by an incorrect understanding of what characteristics or circumstances the court takes to be equivalent in meaning to a statutory term. It is a mistake not about the meaning of a statutory term but about the experience of the defendant that is used to specify the meaning of the statutory term. The ML-MF distinction is the distinction between mistakes of "meaning" under the statute (as elaborated above) and all other mistakes. The ML-MF question is always the question whether the mistaken defendant is using the statutory language correctly by drawing the same inferences under that language that a factfinder would be required to draw from exactly the same experience that the defendant believed herself to have confronted.

⁷¹ I should stop to note that there is, of course, a large literature on the philosophy of linguistic meaning, to which I cannot do justice here. In that literature, there is a vibrant debate on what it is for a word or sentence to have a meaning, and my usage of "meaning" in this article is not by any means the only usage out there. For a brief, lucid introduction to the philosophy of language or meaning, see WILLIAM P. ALSTON, *PHILOSOPHY OF LANGUAGE* (1964). For more recent discussions of ongoing debates about the theory of meaning as they relate to law, see, *e.g.*, DENNIS PATTERSON, *LAW AND TRUTH* (1996) (evaluating realist and anti-realist theories of meaning); Coleman & Leiter, *supra* note ---, at 601-607 (same). Still, I think that, for my limited purposes, my usage is defensible in its own terms.

I've been saying that, to distinguish ML from MF in a particular case, the judge must isolate the defendant's relevant beliefs about her experience at the time of the offense and determine what inferences are entailed by the combination of the statute and those beliefs. The subtleties of distinguishing ML from MF come from the difficulties in distinguishing between statutory meaning and the lived experience of a defendant that is governed (or not) by that statutory meaning, since statutory meaning cannot be specified in a given case except by asserting the statutory term's equivalence or non-equivalence to that experience or, better, to an accurate linguistic description of that experience. I've tried to indicate how to draw that distinction above, but one might wonder if the distinction doesn't collapse if the defendant's "beliefs" or "experience" at the time of the offense conduct include beliefs about or experience of statutory meaning itself. What if the defendant's experience at the time of the offense conduct includes the belief that the characteristics of the situation do not satisfy the terms of any criminal statute, whether because she is completely ignorant of the relevant statute or because she has misinterpreted that statute?

On first look, that belief might seem classifiable as MF under my definition even though it should clearly be a ML. A factfinder presented with the beliefs held by the defendant at the time of the offense, including the defendant's belief that the statute was not satisfied, might seem to have no conclusion to reach but that the statute was indeed not satisfied. Concluding that the circumstances as the defendant (mistakenly) experienced them could not constitute the statutory term since non-satisfaction of the statute was part of the defendant's "experience" of or "belief" about the statute, the factfinder might seem forced to the conclusion that the mistake was MF.

Why is that conclusion wrong? The answer, of course, is that, in an adjudication, the meaning of a statutory term--the experience that constitutes it in that case--cannot depend on what a defendant thinks it means but only on what the properly instructed factfinder thinks it means. A mistake about the existence or meaning of a term cannot change the fact that the defendant was aware of circumstances that did constitute a meaning of--entail an inference to--the term as understood by the factfinder, the ultimate arbiter of meaning in adjudication. Once the factfinder identifies beliefs or experience that entail the term, the entailing may be defeasible by other beliefs or experience that the factfinder deems relevant but not by any old belief or experience and particularly not by the defendant's failure to see the entailing that the factfinder saw--the "meaning" of the term--in the first place.

For example, if a factfinder concludes that the defendant knew some object she possessed could fire bullets at high velocity and so concluded that such an object would be a firearm, that statement of statutory meaning could be defeated by some further kinds of information but not by other kinds. It could be defeated by the further information that the defendant also believed the barrel to be securely sealed, if the factfinder⁷² concluded that such an object would not be a "firearm" after all. But, just as the original entailment (from capacity to fire bullets to "firearm") would *not* be defeasible by such irrelevant further information as that the defendant believed the sun to have been shining, so it could never be defeated by information that he did not believe that original inference to be entailed in "firearm" or did not know of the existence of the statute. Unless the statute itself declared that the term "firearm" shall

⁷² By "factfinder," of course, I always mean "properly instructed factfinder." The elaboration of statutory meaning in any particular adjudication is a kind of collaboration between judge and

mean whatever any defendant chooses for it to mean, the factfinder would have no reason to defer to the defendant's definition of firearm--the defendant's idea of correct usage of that term--but would persist in concluding that the object the defendant thought she had with the characteristic of capacity to fire bullets would count as--entail the inference to--"firearm." Any mistake as to "firearm" therefore would have to be a mistake as to meaning and so a ML. To give the defendant's belief about the inferences entailed by "firearm" any relevance in determining what inferences really were or were not entailed by that term, and thus whether the defendant's mistake was ML or MF, would be to permit the defendant not simply to convert every mistake into MF (her misreading of "firearms" or ignorance of the statute becomes a MF) but actually to give statutory terms whatever meanings she thought they had at the time of the offense, or even no meaning at all (if she thought no such statute existed).

The meanings of words may perhaps be unstable in significant degree, but their meanings do not have to depend on any old person's beliefs about their meanings. At least when there is an authoritative assigner of meaning, as in a court, the meaning of a word does not in any way depend on a defendant's knowing of the existence or meaning of the word. Through the factfinder, the statute establishes a set of meanings for its terms, a language for the legal proceedings, that is independent of what anyone governed by the statute believes about its terms. Thus, in determining whether some set of the defendant's beliefs would require an inference to *x* or to *not x*, the judge cannot consider among those beliefs any belief of the defendant's as to the meaning or existence of *x* itself without abandoning the very notion of law's establishing objective, authoritative meanings independent of the beliefs of those it is meant to govern.

jury in a jury trial but the judge's alone in a bench trial. I use "factfinder" or "properly instructed

Of course, there is a sense in which a statute can play the role of a circumstance of the offense and in which the defendant's awareness of statutory meaning is, therefore, material. This happens when a statute makes ML a good defense. A defendant may be able to get a good defense in some cases by saying that she did not know of the statute at the time of the offense or that she knew of it but misinterpreted it at the time of the offense.⁷³ But neither of those claims bears on the question of whether the defendant has made a ML, only on the question of whether the ML is a good defense in that case. Thus a taxpayer who misunderstands the meaning of "income" has a good defense in a criminal tax prosecution,⁷⁴ but that does not change the fact that "income" has a fixed meaning in her circumstances and her misunderstanding of that meaning is a ML, however exculpatory. The determination whether a particular mistake is ML or MF is done in the way argued above, and the role of the statute in that process is not that it is an object of the defendant's belief or mistake at the time of the offense but only that it is the source of the language in which the case must be discussed in the legal proceeding. A ML is a mistake in the use of that language, and it remains a ML whether or not it can support a defense under a particular statute. Thus when I say of certain beliefs or experiences that, under the law, they "entail an inference," I do not mean, of course, that there are bad consequences for getting the inference wrong; there are no bad consequences in those cases where ML is a good defense. I mean only that the statutory term--the law--has a particular meaning that reaches the set of circumstances found to have been in the awareness of the defendant.

factfinder" as shorthand for whoever is the arbiter of legal meaning in the particular adjudication.

⁷³ See above note ---.

⁷⁴ See *United States v. Cheek*, 498 U.S. 192, 202 (1991).

C. Some Applications

I want to elaborate on and test this analysis now by briefly reconsidering the challenge I take to have been raised by Alexander. In the case I posed above, the defendant thought a gun was unloaded and, therefore, argued that he did not know it was a “deadly weapon.” If a gun must be loaded to be a “deadly weapon” under this statute and if this gun was actually loaded, then it is true that, as a matter of law, this gun was a deadly weapon. One could then coherently say that the defendant made a ML when she formed her belief that this gun was not a “deadly weapon,” no matter what the reasons for her belief. One could not refute the argument and insist that this mistake is actually MF just by saying that the finding is particular to one specific object. If that were so, then a statute that, for example, gave the Rosetta Stone a certain status and protection could never give rise to a ML regarding the definition of the Rosetta Stone, since it is a unique object. Nor could one merely point out that the loaded-ness of the gun is a matter of perception or empirical judgment while its status as a “deadly weapon” is not. Both can easily be characterized as matters of perception or empirical judgment.

But I think the argument can be refuted by way of my formulation above: If the court finds that the defendant took the gun to be unloaded (and no disturbing circumstances are found), there can be no ML with respect to “deadly weapon.” That is because the statutory meaning or definition of “deadly weapon” does not entail any inference to “deadly weapon” from the defendant’s set of beliefs about the gun, preeminently her belief in its unloadedness. If the factfinder is convinced that the defendant believed that the gun was unloaded in the same sense in which the factfinder understands “unloaded,” then the factfinder concludes that there is no mistake of

meaning in the defendant's inference that the gun was not a "deadly weapon." The inference to "deadly weapon" can only be entailed by a defendant's belief in the loadedness of this gun (or perhaps some other unconsidered circumstance not present in this case), a belief which the court has no reason to attribute to the defendant. This defendant's mistake is not a mistake of inference, not a mistake of language use or meaning, and so not a ML, because the court has identified no part of the defendant's beliefs at the time of the conduct that would entail an inference to "deadly weapon"; i.e., that would instantiate the meaning of "deadly weapon."

A similar analysis can be applied to Robinson's case of the liquor-seller who does not know whether he is within the boundaries of the dry town or an adjacent wet town. In Robinson's version, he relies on the opinion of the civil engineer of the wet town.⁷⁵ Setting aside the question of whether the defendant should have a defense derived from his reliance on an appropriate official's advice,⁷⁶ I can answer the question whether the defendant's ultimate mistake is one of law or fact by first identifying all of his relevant beliefs at the time he started selling liquor and then asking whether those things entailed an inference that the store was within the boundaries of the dry town. If

⁷⁵ See ROBINSON, *supra* note ---, at 380 n.26.

⁷⁶ One of the exceptions to the rule excluding ML defenses is sometimes that reliance on a mistaken interpretation of the law by certain officials will sustain a defense. See, e.g., MODEL PENAL CODE § 2.04(3)(b) (allowing defense when the actor reasonably relies on an official statement of the law contained in (i) a statute; (ii) a judicial decision, opinion, or judgment; (iii) an administrative order or grant of permission; (iv) or an official interpretation of the officer or body charged with responsibility for interpretation, administration or enforcement of the law); N.J. STAT. ANN. § 2C:2-4(c)(2) (West 1999) (same with addition of allowing defense when the actor diligently pursues all means available to ascertain the legality of his conduct and concludes in good faith that it is not an offense in circumstances in which a law-abiding and prudent person would also so conclude); TEX. PENAL CODE ANN. § 8.03(b) (West 1999) (allowing defense only when the official statement relied upon is in a written order or grant of permission by an administrative agency charged with interpreting the law in question, or a written interpretation of the law in an opinion from a court or public official charged with interpreting the law in question); ALA. CODE § 13A-2-6(b) (1999) (allowing defense only when the official statement is

all the defendant really knew was what the engineer told him, then, of course, he was aware of nothing that would entail such an inference. If, however, he was aware of or believed something more, such as that the store was on the north side of Elm Street, then such an inference might well be entailed. If being on the north side of Elm Street necessarily places you within the boundaries of the dry town under the statute, then any failure to draw that inference is a ML. But if nothing that the defendant was aware of would entail that inference under the statute, then any failure to draw the inference that the store was within the dry town was a MF.

In the two sections that follow, I will take up some discrete problems of ML. In so doing, I mean to illustrate the utility of the definition suggested here in clarifying those problems. I also mean to clarify that definition by carrying it through some cases.

IV. MISTAKE OF “DIFFERENT LAW”

If my formulation of the ML-MF distinction is correct, then one logical consequence should be the elimination of the concept of “mistake of non-criminal law” or, as I will usually call it, “mistake of different law,” from discussions of criminal doctrine. This sub-category of mistake actually goes under quite a few names in addition to the two just mentioned: mistake of “civil law,” mistake of “legal fact,” mistake of “legal element,” and a few others.⁷⁷ There are some distinctions among the

contained in a statute or the latest judicial opinion from the highest state or federal court to have ruled upon the matter).

⁷⁷ There is a long list of scholars who have acknowledged or embraced this category of mistake under these and other names on the theory that there really is a difference in kind between these MLs and others. *See, e.g.*, Singer & Husak, *supra* note ---, at 898 (mistake of “legal fact”); KELMAN, *supra* note ---, at 66 (mistake of “legal fact”); WILLIAMS, *supra* note ---, at 332-345 (mistake of “civil law”); HALL, *supra* note ---, at 364-72 (mistake of “private law”); PERKINS & BOYCE, *supra* note ---, at 1031 (mistake of “nonpenal law”), 1043 (mistake of “non-offense law”); FLETCHER, *supra* note ---, at 739-742 (mistake “extrinsic to the criminal law”); DRESSLER, *supra* note ---, §13.02[D][1], 154-155 (“different-law mistake”); Simons, *supra* note ---, at 457 (“legal mistake concerning an element

concepts behind these labels, but for my purposes they are essentially similar in that they carve out of the category of ML an arbitrary set of cases, or so I will argue, that are said to merit treatment as MF. These cases are said to form a conceptually coherent category of mistake that is not quite ML and not usually thought to be MF but an independent category of mistake for which the MF rules of exculpation happen to be more appropriate than are the ML rules. This category is sustained by the abiding desire to excuse some of the apparently less culpable MLs, but I think that a careful understanding of the ML-MF distinction makes clear that the category is impossible to sustain conceptually and, in effect, a device for evading direct confrontation with the hard questions raised by standard ML doctrine.

A. *The Principle and Its Advocates*

The classic *Morissette*⁷⁸ case provides a nice example of how the “different law” doctrine works. I will alter the case a bit to avoid irrelevant complications. A hunter spends the day on private land which has been posted to keep hunters off but which is commonly hunted anyway. While on the land, the hunter discovers a large pile of apparently unwanted metal at the side of the private road that passes through the middle of the property. The metal has clearly been there a long time. It is beginning to rust and become overgrown with weeds. The hunter, taking the metal to be abandoned, carts it off and sells it for scrap. Much to his surprise, he is arrested and prosecuted for larceny.

of the offense” or “legal mistake/E”); Dutille & Moore, *supra* note ---, at 176-181 (mistake of “mixed fact and law”); Keedy, *supra* note ---, at 95-96 (mistake in “applying law to facts,” mistake of “mixed law and fact,” “mistake of fact,” mistake involving “an element of fact,” mistake of “private right”).

⁷⁸ *Morissette v. United States*, 342 U.S. 246 (1952).

For conviction, the larceny statute requires that the hunter have taken the metal with an intent permanently to deprive the owner of her property. Courts have universally interpreted this offense to require that the defendant know that the goods legally belong to someone else.⁷⁹ Consequently, the mens rea requirement can be negated in two different ways. First, to take an example of MF, the hunter could have failed to see the postings or other indications that he was on private property. He therefore thought he was encountering these unmarked hunks of metal on the shoulder of a state highway. As long as the property law of the state would have deemed such metal abandoned when found on a state highway but the property of the landowner when found on a private road, his mistaken belief was MF rather than ML. Nothing in his experience at the time of the offense would have entailed an inference to the statutory term “property of another.” And he would have the valid defense that he did not know the metal belonged to anyone else when he took it away.

Alternatively, he might have been perfectly aware that he was encountering the metal on private land but still thought that the metal counted legally as abandoned and available for scavenging, perhaps because the land was commonly used by the public and the scrap had lain there undisturbed for more than a year. If the law preserves the right of the landowner to the scrap to the exclusion even of regular users of her land, and even when the scrap has lain undisturbed for more than a year, then the defendant’s belief to the contrary is clearly enough a ML. But as long as the defendant genuinely held that belief, he would have a good defense to larceny in any Anglo-American jurisdiction.

⁷⁹ See DRESSLER, *supra* note ---, at 521.

Why is such a ML defense available? The reason could be just that larceny had some ad hoc ML exception read into it hundreds of years ago, presumably reflecting some pragmatic policy decision about the best way to protect property rights. But the usual argument is that such property-law mistakes in larceny exemplify the general, exculpatory category of mistake of “different law” or some such, a category distinct from ML.⁸⁰ That is, they have been thought an instance of the general principle that, when a criminal statute incorporates “civil law” by reference, a mistake defense is available with respect to the application of that other law to the facts of the case. Thus, since larceny incorporates the independent law of property, any material mistake regarding application of the law of property is a good defense, even though a mistake regarding the law of larceny as such is not a good defense.

This aspect of the law of mistake has recommended itself to many writers as a close cousin to MF doctrine. Thus, for example, the question of who owned the scrap metal in *Morissette* has seemed renderable as a question of fact,⁸¹ even though *Morissette* appears to have had no misunderstanding of any fact except the “fact” that objects on private property do not count as legally abandoned even if they look unwanted. A similar approach appears in *Liparota v. United States*.⁸² There, the defendant knew all the facts necessary to render his conduct an unauthorized acquisition of food stamps.⁸³ He knew that he was buying food stamps, that he was paying substantially less than their

⁸⁰ See, e.g., WILLIAMS, *supra* note ---, at 332-345.

⁸¹ See, e.g., RICHARD J. BONNIE ET AL., CRIMINAL LAW 134 and n.d (1997), where the authors say that “*Morissette*’s defense was based on a mistake of fact,” although in a footnote they agree that “[i]t would be possible to characterize *Morissette*’s mistake as not one of fact but of property law.” In the actual *Morissette* opinion, there is no discussion of MF or ML but only of a requirement of “criminal intent” that the Supreme Court thought the trial court had abandoned. The Court thought so even though the jury instructions ruled out only the ML defense traditional to larceny while leaving a MF defense at least theoretically available. See *Morissette*, 342 U.S. at 275-276 (quoting and discussing the trial court’s instructions).

⁸² *Liparota v. United States*, 471 U.S. 419 (1985).

face values, that he was not in the grocery business, etc. In his defense, he claimed only that he did not know that those facts added up to lack of authorization under the statute. The Court approved this defense lest it attribute to Congress an intention to criminalize “a broad range of apparently innocent behavior.”⁸⁴ Yet, faced with the dissent’s claim that the Court thereby created a ML defense without any textual warrant, the Court insisted that, “Our holding today no more creates a ‘mistake of law’ defense than does a statute making knowing receipt of stolen goods unlawful.”⁸⁵

Among commentators (as opposed to judges), there has been somewhat less confusion about whether this defense is a species of ML,⁸⁶ but plenty of uncertainty about how to define and justify this category of defense. Glanville Williams, for example, reviewed at length the many cases in which courts indulged a defendant’s ML under the rubric of “claim of right.” Larceny was a prime example,⁸⁷ but he found many others as well.⁸⁸ He also found a number of offenses to which the defense had not been applied even though it seemed to him that in principle it should have been, offenses ranging from bigamy to serious assaults.⁸⁹ He concluded that logically the claim of right defense should be available as a “general defence” to any criminal charge that depended on an interpretation of civil law, notwithstanding the ML maxim.⁹⁰ Even if it makes sense to require citizens “to make themselves acquainted with the criminal law,”

⁸³ The relevant provision is 7 U.S.C. § 2024(b)(1).

⁸⁴ *Liparota*, 471 U.S. at 426.

⁸⁵ *Id.* at 426 n.9.

⁸⁶ Still, even sophisticated thinkers sometimes resist calling such mistakes “mistakes of law.” Fletcher says that “mistakes about whether particular factual situations fall within a prohibition of the criminal law . . . are not, strictly speaking, mistakes about the interpretation of the norm and therefore do not qualify as mistakes of law.” FLETCHER, *Basic Concepts*, *supra* note ---, at 167. On the other hand, some have taken judges to task for calling mistakes of different law mistakes of fact for the sake of results. *See* Smith, *supra* note ---, at 3, 5-6.

⁸⁷ *See* WILLIAMS, *supra* note ---, at 320-327.

⁸⁸ *Id.* at 304-331.

⁸⁹ *Id.* at 332-341.

he argued, still “it is going beyond reasonable social requirements to expect people to assimilate also, under pain of punishment, the whole of the civil law,” such as, for example, the law of marriage and divorce that is central to any bigamy prosecution.⁹¹ Williams recognized the tenuousness of the distinction between mistakes of criminal law and mistakes of civil law, but refused to give it up, offering instead this “convenient test”: “whether the rule would appear in a well-drafted criminal code.”⁹² The mere statement of this “test” was enough to send Williams into retreat, where he ultimately rested on this stout conclusion: “It is submitted that the courts must do the best they can with such problems, asking themselves whether the mistaken rule lies, so to speak, at the centre of the crime charged, or belongs only to its general legal background.”⁹³

Hall adopted a similar orientation. He asserted that “the penal law must be restricted to its distinctive field--to norms that prescribe certain punishment on the commission of certain harms,”⁹⁴ and mistakes of non-criminal law or “private right” thus should be understood as a separate category from mistakes of criminal law. Although he had a few pages earlier argued strenuously in favor of the traditional ML maxim,⁹⁵ he now said that “in some crimes opinion regarding certain private law qualifies the fact-situations. Such opinion functions as a fact, it engenders certain attitudes, and the resultant state of mind is relevant to penal law.”⁹⁶ Hall did not explain why this statement was any less true when applied to rules that are widely characterized as “criminal” rather than “private.” One might ask why the “fact-

⁹⁰ *Id.* at 332.

⁹¹ *Id.* at 334.

⁹² *Id.* at 343.

⁹³ *Id.* at 343-344.

⁹⁴ HALL, *supra* note ---, at 365-366.

⁹⁵ *See id.* at 351-364.

⁹⁶ *Id.* at 367.

situation” is not qualified by a mistake as to whether ephedrine is a “controlled substance” or not; or whether a fetus is a “human being”; or whether the conditions under which a woman “consents” to sex vitiate that consent. Why does the absence of a so-called “private right” in such examples have anything to do with whether the “fact-situation” in each case is “qualified” by the defendant’s mistake? In the end, Hall could only fall back on the Williams-esque conclusion that some mistakes of law or claims of right seemed like they should be exculpatory--seemed “not inconsistent with [the defendant’s respect for] the ethical principle” established by the criminal statute; what he could not do was offer any analytical justification for creating the category of mistake of “private right” as the indicator of *which* MLs ought to be excepted from the usual ML rules.⁹⁷

George Fletcher has carried forward in somewhat the same vein: “There may be a sensible policy in enforcing a duty on everyone to be informed about the prohibitions and commands of the criminal law, but it hardly makes sense to make people guess, at their peril, about the vicissitudes of divorce law [or other non-criminal law].”⁹⁸ Fletcher’s subsequent discussion of the fate of this principle in German law makes clear, I think, that the principle is simply that some MLs seem to make the defendant out to be morally non-culpable while others do not. Thus Fletcher discusses an incest prosecution in which the German Supreme Court declined to apply the principle in the face of an entirely plausible claim of mistake regarding the “non-criminal” law of marital affinity. The defendant had an affair with the daughter of his former wife; that is, his one-time stepdaughter. He did not know that the German civil code rendered this relationship of “marital affinity” permanent, even after the divorce. But the court denied him the

⁹⁷ *Id.*

mistake defense. It deemed this mistake an inexcusable mistake regarding the meaning of a criminal prohibition, even though it could as easily have treated it as an instance of the supposed principle that mistakes regarding private law are exculpatory. Fletcher condemns neither the Court's decision nor the supposedly general principle that the Court flouted. He only notes that the apparently "sensible" civil-criminal distinction in this area was broken down in Germany by "the weight of casuistic argument" and by recognition that "the distinction between mistakes of criminal law and mistakes of private law was not as workable and dependable as many had thought."⁹⁹ From this recognition, Fletcher, unlike Williams and Hall, draws the conclusion that the real question is not how to justify the category of mistake of private law as analytically separate from ML but why *any* particular ML (civil or criminal) should be recognized as a defense.¹⁰⁰

The only recent analytical advance in this area, I think, has come from Simons. Simons recognizes that the distinction between criminal law and civil law is inappropriate here because sometimes the "different law" at stake is, in fact, a different criminal law.¹⁰¹ He offers as an example the scenario in *California v. Bray*.¹⁰² There, Bray was charged with being a felon in possession of a concealable firearm. In his defense, he claimed that, while he knew that he had previously been convicted of an offense in another state, he did not know that that offense had made him a "felon." The court

⁹⁸ FLETCHER, *supra* note ---, at 740.

⁹⁹ *Id.* at 740-741.

¹⁰⁰ *See id.* at 742.

¹⁰¹ *See* Simons, *supra* note ---, at 458-459; *see also* DRESSLER, *supra* note ---, at 154-157.

¹⁰² *California v. Bray*, 52 Cal. App. 3d 494 (Cal. Ct. App. 1975) (discussed in Simons, *supra* note ---, at 458 n.30).

called this mistake a MF¹⁰³ and held it a good defense. Simons sensibly suggests that this mistake actually fits the category of mistake of “different law” and that the different law here was, at least arguably, a criminal law. Simons also sensibly implies that Bray’s mistake of different criminal law suggests his non-culpability at least as strongly as most mistakes of civil law suggest non-culpability. He made a mistake on a difficult question of law and gave ample evidence of his positive efforts to comply with the law. Therefore, the case nicely supports the argument that, if there is to be a defense of mistake of “different” law, it should not turn on whether that different law is civil or criminal.

More than this, though, Simons seems to recognize a basic difficulty with separating out “different law” cases at all. He suggests that the real concern underlying that category is that there is a morally important difference between the meaning of the case’s “governing law”--the general statement of the conduct to be prohibited--and the narrower, perhaps technical, meanings of particular “legal elements” within that governing law, whether the latter are defined by reference to some different law or not. *Bray* can again provide the example. One way to read the case is that the word “felony” in the possession statute was not defined in any other law but had to be interpreted from scratch for the purposes of the possession offense. Although everyone could state the basic statutory idea that felons must not possess guns, neither Bray nor his prosecutor was able confidently or easily to determine whether Bray was a “felon” simply by referring to some law of the jurisdiction in which he had previously been convicted.¹⁰⁴ There was no “different law” that settled the meaning of this element of

¹⁰³ See *Bray*, 52 Cal. App. 3d at 499. Note that in the very same case the opinion referred to the same question as a question of law when it was deciding another point. See *id.* at 498 n.2.

¹⁰⁴ *Id.* at 498.

the possession statute. Thus the “different law” principle might seem not to apply. Yet, to Simons, there seems little reason to distinguish this sort of mistake from mistakes that do involve a “different law.” Rather, the latter seem like a mere subset of the more general case of mistakes regarding the “legal elements” of the charging statute. Simons thus embraces the need to refine the distinctions among “legal mistakes” even further than Williams, Hall, and others had. His approach would altogether eliminate the requirement that the mistake relate explicitly to some other law besides the charging statute. And he would relabel mistakes of “different law” as mistakes of “legal element” (or “legal mistake/E”). He distinguishes such mistakes from mistakes regarding the “governing law” of the case (“legal mistake/GL”), which correspond to the classic category of ML.¹⁰⁵

Even after this refinement, however, Simons recognizes the continuing fragility of the distinction between a mistake regarding the reach of the governing law, on the one hand, and mistake regarding the meaning of the particular elements of that law, on the other hand.¹⁰⁶ After all, what gives the governing law its meaning and its reach but the meanings of the elements that constitute it? How does one understand the wrong expressed in the phrase “felon in possession” without an understanding or definition of the “legal element” expressed in the word “felon”? Still, Simons wants to retain his refined distinction (at least as long as the basic ML maxim remains in place), because he believes that it more nearly limits criminal liability to cases of moral culpability than would otherwise be the case.¹⁰⁷

¹⁰⁵ See Simons, *supra* note ---, at 457-459.

¹⁰⁶ *Id.* at 493.

¹⁰⁷ *Id.* at 500.

I think Simons has advanced the ball with his dismissal of the criminal-civil distinction, and I think he is right to search for a way of accommodating the dual impulses to exculpate for some MLs and yet to retain a pretty broad presumption against ML defenses.¹⁰⁸ Nevertheless, I think this review of the literature suggests that the effort to refine an analytical category of legal mistake separate from ML has so far proven unproductive.

B. Problems with the Principle and Its Rationales

I hope I have made at least a strong prima facie case that existing statements of the different-law principle are less than compelling. But now I want to deepen the critique by using a couple of examples to clarify the difficulties the different-law principle creates if taken seriously, chiefly the difficulty of distinguishing among sources of substantive law within a single criminal case. This discussion will lead naturally into a critique of the usual rationales for the principle--mainly that the citizenry cannot justly be expected to internalize the complexities of non-criminal law and that, in any case, the principle is useful as a description of the law as it has developed.

Take the firearms statutes again for a first example. Suppose the defendant says that he misunderstood the licensing requirement of the firearms laws. He knew he was selling firearms and knew that he had to have a license, but he thought that having a driver's license and a social security card would satisfy the requirement. He would be charged under 18 U.S.C. §924(d), which establishes penalties for one who "willfully violates any . . . provision of this chapter." To get a §924 conviction in this case,

¹⁰⁸ *Id.* at 499-501.

therefore, we would have to refer to another “provision of this chapter,” here 18 U.S.C. §922(a)(1)(A), which renders dealing in firearms an “unlawful act” unless done by a “licensed dealer.” But what constitutes a “licensed dealer”? To find out, we would have to refer to 18 U.S.C. §923, which details the law of licensing in this area. The §924 offense element “any . . . provision” thus takes its meaning from §922’s “licensed dealer” requirement, which, in turn, takes its meaning from §923, a provision of law separate from the charging statute itself (§924). In principle, this process of moving from the charging or criminalizing statute through one or more other sources of law to figure out whether the meaning of that criminalizing statute has been satisfied is identical to the process by which the meaning of “property” in a standard larceny statute is determined. A “different law” analysis under the firearms statutes would thus suggest that the question whether the defendant had a license, like the question whether certain objects were “property of another,” should be treated as if it were a question of fact.

Once you are committed to the “different law” principle, it may prove difficult to tell what counts as the charging statute or “governing law” in the first place. Is it just §924, the penalties provision, which is the only provision that actually links any statutory conduct to criminal process? Or is it also §922, the “unlawful acts” provision? Or does it further include §923, the arguably civil provision that lays out for §922 and for the gun industry what it is to be a “licensed dealer”? Moreover, even if we can agree how to locate the “governing law” as distinct from some “different law,” it is hard to see what significance that should have. If possession of a driver’s license and a social security card were not enough legally to constitute the defendant as a “licensed dealer,” then the defendant has made a ML as to the definition of “licensed dealer” and thus as

to the meaning of the charging statute, the circumstances that satisfy the “any other provision” element of §924. That the law of licensing in this case may have to be found somewhere other than in the code section that actually criminalizes dealing in guns without a license should not obscure that any mistake as to the legal definition of “licensed dealer” is a mistake with respect to the scope of or the definitions in the charging law. In fact, it is easy to imagine the licensing provision being formally merged into the more overtly criminal provisions of the gun-dealing statute. And it is hard to imagine why the formal location of the definition in or out of those code sections should make any difference to what counts as a ML with respect to this offense.

I suppose one could put some weight on the fact that Title 18 as a whole is called “Crimes and Criminal Procedure,” suggesting that all of those provisions in the previous paragraph, unlike the property law that larceny law depends on, obviously count both as criminal and as parts of the charging or governing statute. But, even apart from the flimsiness of any argument that relies entirely on labels without a theory of why or how those labels convey a meaningful substantive distinction, I could easily run through a similar exercise for similar statutory provisions that appear in Title 26, the Internal Revenue Code.¹⁰⁹ Section 5871 of Title 26 provides that, “Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than \$10,000, or be imprisoned not more than ten years, or both.” That

¹⁰⁹ See *United States v. Syverson*, 90 F.3d 227 (7th Cir. 1996) for a case governed by the firearms regulations in Title 26. See also, for example, Justice Stevens’s very plausible assertion that “the current National Firearms Act is primarily a regulatory measure. The statute establishes taxation, registration, reporting, and recordkeeping requirements for businesses and transactions involving statutorily defined firearms, and requires that each firearm be identified by a serial number. 26 U.S.C. §§5801-5802, 5811-5812, 5821-5822, 5842-5843. The Secretary of the Treasury must maintain a central registry that includes the names and addresses of persons in possession of all firearms not controlled by the Government. §5841. Congress also prohibited certain acts and omissions, including the possession of an unregistered firearm. §5861.” *Staples v. United States*, 511 U.S. 600, 627-28 (Stevens, J., dissenting) (1994).

chapter of the U.S. Code then includes a number of rules for record keeping, transfer, and taxation of firearms,¹¹⁰ much as other chapters of the Internal Revenue Code establish analogous rules regarding other commodities.¹¹¹ None of these provisions turns the tax code into a “department of criminal law,” to use Williams’s phrase.¹¹² They do, nevertheless, establish the scope or meaning of the statutory terms that do provide for criminal penalties for tax offenses. In that sense, all of them are indeed departments of the criminal law but only to the same extent as dictionaries and culture and every other resource of linguistic meaning becomes a “department of criminal law” when it is drafted into the service of interpretation in a criminal case.

Similarly, the fact that the law governing ownership of apparently abandoned property sometimes appears under the heading “property law” rather than “larceny law” should not obscure the fact that any mistake as to the legal criteria of ownership is a mistake as to the criteria of the “property of another” element of the larceny statute. Again, it is not hard to imagine the entire law of property as an elaboration of the word “property” in the larceny statute. In fact, it is apparently the case that property law has developed in very significant part not as an independent body of law but as a part of the

¹¹⁰ See 26 U.S.C. §5811 (imposition of tax on transferring firearms); 26 U.S.C. §5841 (requiring the registration of firearms); 26 U.S.C. §5843 (requiring importers, manufacturers and dealers to keep records of and render returns in relation to the importation, manufacture, making, receipt and sale of firearms); 26 U.S.C. §5844 (regulating the importation of firearms).

¹¹¹ See, e.g., 26 U.S.C. §4071 (establishing imposition and rate of tax on tires); 26 U.S.C. §4081 (establishing imposition and rate of tax on removal, entry or sale of fuel and gasoline); 26 U.S.C. §4101 (requiring registration by fuel terminals or refineries); 26 U.S.C. §4131 (establishing imposition and amount of tax on certain vaccines); 26 U.S.C. §4161 (establishing imposition and amount of tax on sport fishing equipment and certain bows and arrows, etc.); 26 U.S.C. §4251 (establishing imposition and rate of tax on local and toll telephone service and on prepaid telephone cards). Each of these provisions necessarily informs interpretations of the criminal provisions of the tax code. See 26 U.S.C. §7201 et seq., where a number of tax-related crimes are defined in terms that require reference to provisions such as those cited in this footnote.

¹¹² WILLIAMS, *supra* note ---, at 334.

ongoing definition of the crime of larceny,¹¹³ just as the definitions of such terms as “human being”¹¹⁴ and “deadly weapon”¹¹⁵ have been developed in large part not as independent bodies of law but simply as parts of the murder and assault statutes. If there had never been any civil law of property at all, such that the idea of property expressed rights that were to be protected entirely or predominantly by criminal rather than civil process, then presumably defendants’ mistakes as to the definition of property would be understood unambiguously as simple mistakes of law for which there is presumptively no excuse. Conceptually, the case would be identical to a case in which someone pointed an unloaded gun at another and was later surprised to learn that “deadly weapon” includes unloaded guns as well as loaded ones.

Complementarily, just about any criminal offense that involves identifiable victims will yield parallel civil suits in which overlapping legal terms will get authoritative interpretation. Thus, just as “property” turns out to be understandable simply as an element of a criminal statute (not just as a term of “civil” law), so elements of criminal statutes can become elements of civil suits. Even terms like a murder statute’s “human being” element, which no one ever seems to have thought of as implying a potential “different law” mistake, can nevertheless raise difficult problems of interpretation that are simultaneously encountered in civil cases. For example, the case

¹¹³ HALL, *supra* note ---, at 365. For some possible early examples, see J. G. BELLAMY, *THE CRIMINAL TRIAL IN LATER MEDIEVAL ENGLAND* 78-79 (1998). Bellamy discusses some refinements of the law of larceny that took out of the reach of the offense takings of beasts or trees from their natural habitat and takings of objects of no monetary value. These refinements, made in larceny cases, appear to have been made without reference to any preexisting definitions of property to these effects in civil cases.

¹¹⁴ See, for example, LAFAVE & SCOTT, *supra* note ---, at 607-611, which discusses the issue of when life begins and ends for purposes of homicide law. There is, of course, no suggestion in the discussion that a defendant’s ML regarding the definition of “human being” might be a mistake of “different law” or “legal element” or the like, and the citations unsurprisingly appear to be mostly criminal law cases.

¹¹⁵ LAFAVE & SCOTT, *supra* note ---, at 696 and n.38.

of *Massachusetts v. Cass*¹¹⁶ relied on the definition of “human being” in prior wrongful death cases to hold that a viable fetus was a human being within the meaning of the state’s criminal vehicular homicide statute.¹¹⁷ Although that court made its ruling prospective because the holding was arguably unforeseeable,¹¹⁸ it gave no hint that the rule’s origins in non-criminal law would give rise to a special ML defense.

Subsequently, in *Massachusetts v. Lawrence*,¹¹⁹ the rule from *Cass* was recognized for murder as well, and, while the defendant unsuccessfully argued that again the rule ought to be made prospective, there was no hint that anyone thought the principle of “mistake of legal element” or “different law” ought to apply just because the dispute turned on the meaning of the legal element “human being” or because the meaning of “human being” in this instance derived from the civil law of wrongful death. In this sense, the boundary between criminal and non-criminal law is quite permeable,¹²⁰ as is the distinction between the governing law of a case and the elements of that governing law. Neither of these distinctions, therefore, provides an unproblematic basis for distinguishing classic MLs and classic MFs from some third category of mistake.

In short, once one recognizes that all questions in a criminal case are generated by the meaning of the elements of the criminalizing statute, it becomes hard to see any special significance in an element’s depending for that meaning on an existing body of law (even less the happenstance that the law is denominated “civil” rather than “criminal”) rather than on common usage or a dictionary or the like. Why should that

¹¹⁶ *Massachusetts v. Cass*, 392 Mass. 799, 467 N.E.2d 1324 (1984).

¹¹⁷ *See id.* at 800.

¹¹⁸ *See id.* at 799.

¹¹⁹ *Massachusetts v. Lawrence*, 404 Mass. 378, 383-384 (1989).

¹²⁰ The general permeability of criminal and civil law is further illustrated by LAFAVE & SCOTT, *supra* note ---, at 610 n.45, where they point out that some of the development of the meaning of terms like “human being” occurred in civil inheritance cases.

circumstance create a rule or even a presumption that a mistake be treated as a MF rather than a ML when a mistake as to the meaning of another term in the same statute would immediately be characterized as a ML for which there is no excuse? Similarly, why should the infinitely manipulable distinction between a ML and a mistaken “claim of right” yield a rule or presumption that the former is no defense but that the latter generally is?¹²¹ If legal meaning is a matter of specifying all of the relevant inferences entailed by one or another term in that statute, then mistakes of “different law” are simply mistakes of statutory inference and thus conventional MLs, not some conceptually distinct category at all.

Simons, for one, seems prepared to drop the civil-criminal distinction and the “different law” idea as such, but he retains the idea that there is an underlying principle behind those concepts that should not be lost. Simons’s notion is that mistakes regarding the general norms embodied in “governing law” are different from mistakes regarding the “legal elements” within that law.¹²² But it is at least questionable whether

¹²¹ I take Fletcher, for one, to agree that this distinction is highly manipulable. See FLETCHER, *supra* note ---, at 741. More recently, see FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 158 (1998). In this latter work, Fletcher also makes the illuminating observation that in German law the general principles embodied in the statutes are that a defense is available where the defendant mistakes the general norm of wrongdoing but never when the mistake regards the details of statutory meaning. Without being too facile about what concepts correspond to what in American and German law, this seems at least roughly to flip the American rules discussed in the text on their head, and Fletcher himself points out that there is a pretty good argument for saying that the German statute got the culpability analysis backwards. See *id.* at 158, 169 n.27.

¹²² Fletcher relies on a similar idea, although Fletcher’s nomenclature distinguishes between “norms” and applications of those norms or “whether particular factual situations fall within a prohibition of the criminal law.” See FLETCHER, Rethinking, *supra* note ---, at 686; FLETCHER, Basic Concepts, *supra* note ---, at 167. But this analysis too seems to me little more than an argument that some MLs are non-culpable and so should be exculpatory. I do not see that he produces any particular progress on the question of how to tell when one has passed from the world of “norms” to the world of legal detail or application, nor on the question of how to tell which MLs should be excused other than by throwing the question on the moral judgment of the judiciary. Cf. Wiley, *supra* note ---, at 1023 (arguing that judges should interpret all statutes to include whatever mens rea is required to render the defendant morally guilty without regard to the ML-MF distinction); Kahan, *supra* note ---, at 128-130 (endorsing judicial authority to apportion ML

there is a meaningful difference between those two kinds of mistakes. If it is criminal for a felon (but not others) to possess a gun, that norm only has meaning insofar as “felon” has meaning, and “felon” only has the meaning courts give it in the course of applying it (or not) to specific scenarios. As in any case, the meaning of the law lies in the statutory terms as they are elaborated on the facts of cases. It is just as hard for me to see the difference between the meaning of a general norm and the meanings of the elements that constitute the norm as it is for me to see the difference between an element of a criminal statute and a point of “civil” law that gives that element its meaning. In the end, the result of the “different law” / “legal element” approach has been to obscure the conceptually stonger ML-MF distinction in a conceptually confusing, however laudable, attempt to soften the ML rules.

C. Can the “Different Law” Principle Be Salvaged?

That is not to say that there should be no softening of the ML rule. Certainly, different MLs might be evaluated differently in terms of moral culpability, whether they are labeled mistakes of governing law or mistakes of “legal element” or whatever. A general excuse for grossly unfair applications of criminal law is at least theoretically in place in American law¹²³ and is easy to love. Even apart from cases that refer explicitly to the “different law” principle, courts have found a number of ways--not always

defenses according to each statute’s relationship to general morality); *Regina v. Prince* 2 Cr. Cas. Res. 154 (1875) (op. of Bramwell, J.) (similarly relying on the moral judgment of the judiciary to determine the scope of mens rea to read into statutes).

¹²³ See *Lambert v. California*, 355 U.S. 225, 229 (1957). *Lambert* established the constitutional principle, almost never applied in actual cases, that ignorance of the existence of a law is a good defense where there is little or nothing to suggest to a defendant that her conduct might be criminal. See also Wiley’s argument that recent Supreme Court cases have established a *Lambert*-like principle at the level of statutory interpretation. He believes that the Court will now read into every statute whatever sort of mental element is necessary to prevent the criminal conviction of the morally blameless. See Wiley, *supra* note ---, at 1023.

satisfying--to read ML defenses into occasional statutes in the name of justice, while generally reaffirming a strong presumption against ML defenses.¹²⁴ And it is that impulse to find some apparently coherent way to soften the ML rule without eliminating it altogether that seems to have kept the “different law” principle alive.

One can see this impulse clearly enough in the defenders of a general “different law” principle. Without usually calling for a general departure from the ML maxim, they point to the “vicissitudes”¹²⁵ or complexities of mastering the “whole of the civil law”¹²⁶ and the consequent unfairness of expecting the citizenry to internalize all of that law or, more generally, the simply unjust results that would happen without some version of this defense.¹²⁷ One might then suppose that the “different law” principle can be salvaged by recognizing it as a stand-in for analyses of legal complexity and justice to the individual. When considering whether a statute carries a ML defense, courts often do consider questions of complexity and individual fairness; perhaps the “different law” principle has served as a useful label and analytical clue in such cases.

As a matter of fact, however, the “different law” category has not consistently served as the avenue through which courts have found exceptions to the ML rule; nor has it been a consistent stand-in for the considerations of legal complexity that scholars point to as its rationale. Once one has seen the conceptual difficulties with the defense in the first place, none of this is surprising. Rather, it becomes easy to see the empirical doubtfulness of the claim that the law of mistake has developed by the logic of the “different law” doctrine. And it becomes equally easy to doubt that the criterion of

¹²⁴ See generally Davies, *supra* note ---; Wiley, *supra* note ---.

¹²⁵ FLETCHER, *supra* note ---, at 740.

¹²⁶ WILLIAMS, *supra* note ---, at 334.

¹²⁷ Simons, *supra* note ---, at 500.

complexity distinguishes civil law from criminal law and, more generally, that “different law” defenses have been or promise to be the key to a just set of ML rules.

First, although degrees of legal complexity do seem to be considered by courts when deciding whether to read ML defenses into statutes,¹²⁸ courts have not needed to characterize a case as one of “different law” to do so. For example, in *Cheek*, the Supreme Court reaffirmed the availability of a ML defense in federal tax prosecutions by pointing to the complexity of the Internal Revenue Code and noting that “in ‘our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law.’”¹²⁹ But the Court never considered the notion that the charging statute’s dependence on the provisions of the tax code might call into play some “different law” principle.

Similarly, in *United States v. Baker*, the Ninth Circuit recognized “complex regulatory schemes that have the potential of snaring unwitting violators” as a general category of cases which justify a ML defense. The charging statute in that case, the Contraband Cigarette Trafficking Act, was not, however, sufficiently complex to justify such a defense. Rather, even though the definition of “contraband” in the federal charging statute depended in part on Washington state’s tax laws, the court held that the law in the case was “quite simple” and so did not warrant such a defense.¹³⁰ The

¹²⁸ See Davies, *supra* note ---, at 363-373.

¹²⁹ *Cheek v. United States*, 498 U.S. 192, 205 (quoting *United States v. Bishop*, 412 U.S. 346, 360-361 (1973)) (1991). In addition, see Davies’s general discussion of complexity as a flexible criterion for determining when a ML defense should be read into a federal statute. There is no indication in her discussion that any of these cases grappled with the “different law” principle but only with the complexity of the legal issues entailed by the charging statute itself, whether those legal issues included reference to different laws or not.

¹³⁰ See *United States v. Baker*, 63 F.3d 1478, 1491-92 (9th Cir. 1982) (recognizing mistake of law defense for complex regulatory schemes, but holding that Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341-46, is “quite simple”). *Baker* cites *United States v. Fierros*, 692 F.2d 1291, 1295 (9th Cir. 1982), which had previously recognized in principle a ML defense for complex regulatory schemes but had held that 8 U.S.C. § 1324(a), regarding transportation and harboring

court had plenty of opportunity to apply the “different law” principle here. The defendants apparently contended that their failure to know that taxes were owing on their cargo of cigarettes or that they needed special permission to bring unstamped cigarettes into Washington should make out a good defense. Such a claim is, of course, a claim of mistake of different law--a mistake about Washington’s tax law that would arguably negate the intent required by the federal charge. But the court, while acknowledging that such a category of ML appeared in some cases, saw no need to apply the category here but simply considered the issue of complexity on its own merits as an independent criterion for recognizing a ML defense, as any court may do in response to any ML claim.

Baker is no anomaly. Courts have often denied ML defenses in cases where the law is quite complex, even when the criminal provision required reference to such presumably “different” laws as administrative regulations. Take, for example, the regulatory cases under the Resource Conservation and Recovery Act (RCRA),¹³¹ which criminalizes mishandling of hazardous waste while also establishing a generally civil statutory scheme. These cases have held that as long as the defendants knew the facts that brought the waste products within the statute they satisfied the criminal provision’s mens rea requirement, regardless of whether they knew of the criminal provisions or the statutory definitions or the EPA regulations that defined their substances as “hazardous wastes.”¹³²

of illegal aliens, is “not so complex . . . that the unusual defense of ignorance of the law must be read into it.”

¹³¹ 42 U.S.C. §6928(d).

¹³² See, e.g., *United States v. Baytank, Inc.*, 934 F.2d 599, 612 (5th Cir. 1991) (holding that it was not necessary for defendants to have known that the waste they were storing had been identified by EPA regulations as hazardous under the RCRA in order to support conviction for improper storage of hazardous waste); *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990) (holding that

Does either the complexity of the civil law or the “different law” principle explain the difference between the treatment of larceny and bigamy? The claim of right defense is universally applicable to larceny. And, among the defenders of the “different law” principle, it seems to be an article of faith that the defense ought to apply to bigamy as well, since it would be a gross injustice to hold individuals to a knowledge of the complex details of the civil law of marriage and divorce and thus to the legality of a remarriage undertaken in good faith.¹³³ The advocates of the “different law” distinction usually take this as a paradigm case for justifying the distinction, but the courts have usually rejected the defense in bigamy cases.¹³⁴ The difference in treatment between larceny and bigamy seems to represent an ad hoc conclusion that the criminal law should not go after people who had a good faith belief in their right to a piece of property, even though it should go after people who had a good faith, although mistaken, belief in their right to remarry.

defendants “knowingly” violated the criminal provisions of the RCRA even if they did not know that violation of the RCRA was a crime or that regulations existed identifying chemical wastes as hazardous wastes under the RCRA); *United States v. Laughlin*, 10 F.3d 961, 965 (1993) (holding that knowledge of regulatory requirements is not necessary to convict defendant under RCRA for knowingly disposing of hazardous wastes without a permit). See also the cases cited by Davies, *supra* note ---, at 370 n.119.

Courts have been willing to entertain complexity-based arguments for ML defenses in a variety of other statutory and regulatory contexts as well without recourse to the “different law” principle. See *United States v. Gabriel*, 125 F.3d 89, 102 (2nd Cir. 1997) (holding that the principal liability provisions of 18 U.S.C. § 2(b) are “quite uncomplicated” and therefore do not justify a mistake of law defense); *United States v. Moran*, 757 F.Supp. 1046, 1049 (D. Neb. 1991) (holding that when the term “willfully” is used in “complex” statutory schemes, such as the criminal copyright provisions in 17 U.S.C. § 506(a), the term means a voluntary, intentional violation of a known legal duty); *People v. Weiss*, 191 Mich. App. 553, 561-62, 479 N.W.2d 30, 34-5 (Mich. Ct. App. 1991) (applying *Cheek* analysis and holding that the Campaign Finance Act, MICH. COMP. LAWS § 169.201 et seq., “like the Internal Revenue Code, is exceedingly complex and detailed,” thus warranting a ML defense); *Reisch v. State*, 107 Md. App. 464, 474, 477, 668 A.2d 970, 975, 976 (Md. Ct. Spec. App. 1995) (applying *Cheek* in a prosecution for unlicensed home improvement and holding that the charging statute requires knowledge of the law that requires licensing).

¹³³ See, e.g., WILLIAMS, *supra* note ---, at 333-335; LAFAVE & SCOTT, *supra* note ---, at 408-409.

¹³⁴ LAFAVE & SCOTT, *supra* note ---, at 408-409.

Similarly, as I have suggested that there should be no “different law” defense available as to the definition of “firearm” under the federal firearms laws, so the courts seem to have held, even though that term is defined in an extremely non-intuitive way in a provision separate from the criminalizing provisions.¹³⁵ And there is no “different law” defense as to the definition of “controlled substance” under the provisions of the federal drug laws, even though that term too is defined in a set of changeable, complex regulations separate from the sections that declare unlawful acts and establish criminal penalties.¹³⁶ One final example: in *New York v. Marrero*,¹³⁷ the defendant sought to defend against a weapons charge on the grounds that he had thought he was a “peace officer” within the meaning of the charging statute, a term that was defined by reference to a separate provision in New York’s law of criminal procedure, not in its “penal law.” But the court refused to instruct on this ML claim, which no one even thought to label a mistake of “different law” or the like.¹³⁸

These cases may or may not be unjust, but they all seem to refute the notion that the “different law” principle explains the law as it stands or the related notion that that

¹³⁵ *Staples* held that the defendant need only know the facts that bring the weapon within the statutory definition of “firearm”; conviction does *not* require that the defendant also have been aware that those facts meant “firearm” under the statute. Only very recently have I even heard of someone hazarding the idea of a mistake of “legal fact” defense in this context. Singer and Husak suggest that just such a defense may possibly be implicit in *Staples*. See Singer & Husak, *supra* note ---, at 898 and n.125. I don’t see how *Staples* can be read that way, since the opinion repeatedly says that the question at issue is whether the government had to prove awareness of the “facts” or “features” or “characteristics” that made *Staples*’s gun a statutory “firearm” or, alternatively, something less, such as mere awareness that it was a gun (which may or may not be a “firearm”). See *Staples v. United States*, 511 U.S. 600, 604, 609, 611, 613, 614-15, 619 (1994).

¹³⁶ See *Liparota v. United States*, 471 U.S. 419, 440 (1985) (White, J., dissenting) (citing 21 U.S.C. §841(a) and *United States v. Balint*, 258 U.S. 250 (1922)). Section 841(a)(1), for example, makes it unlawful to do various things with respect to a “controlled substance.” But that term is defined by 21 U.S.C. §802(6), which refers the reader to 21 U.S.C. §812, which establishes various “schedules” and places certain drugs provisionally on those schedules, and by 21 U.S.C. §811, which authorizes the Attorney General to alter the contents of those schedules through an administrative process.

¹³⁷ *New York v. Marrero*, 69 N.Y.2d 382 (1987).

principle gets at some special kind of complexity in the law. There is no reason to think that criminal law as such is somehow easier to interpret and know than any other body of law, even apart from the slippery question of how you are supposed to tell what laws are “criminal” and what laws are “civil.” In the words of the New York Court of Appeals, “There would be an infinite number of mistake of law defenses which could be devised from a good-faith, perhaps reasonable but mistaken, interpretation of criminal statutes, many of which are concededly complex.”¹³⁹ As every first-year student of criminal law knows, the criminal law does not need to look to civil law to import a complexity that it would otherwise lack. And the courts have given little evidence that the “different law” principle, informed by the supposed complexity or vicissitudes in the meaning of civil law terms, has really been a conceptually appropriate or necessary tool for identifying the instances of complexity that ought to yield a mistake defense.¹⁴⁰

D. “Different Law,” Mistake of Law and the Ambiguity of Criminal Intent

This analysis leaves something of a void. If the “different law” doctrine is conceptually unsound, then why have the larceny cases and some others embraced some strictly limited ML defenses while the bigamy cases and others have rejected ML defenses? I think that is less a question about the philosophy of criminal law than about its history. Here, I will not pretend to have a final answer to that historical question, but I would suggest that the beginning of an answer lies in recognition of the different,

¹³⁸ See *id.* at 385.

¹³⁹ *Id.* at 391-392.

¹⁴⁰ I also take the view that the MPC too has freed itself from reliance on any general “different law” principle. Rather, it has reaffirmed the basic ML maxim in its §2.02(9), while opening the door to ML defenses only on a statute-by-statute basis. See MPC §2.04(1); ROBINSON, *supra* note --, §62(d), at 262-263.

perhaps contradictory, but coexisting principles of criminal intent that have guided courts' attributions of criminality.

Criminal courts have long considered fundamental to criminal law the apparently interchangeable notions of criminal intent, mens rea, guilty knowledge, malice, and the like. But courts and commentators have also long understood that these terms have many and sometimes conflicting meanings.¹⁴¹ Each can be used to signify the basic principle that criminal law requires inquiry into a defendant's mental state during commission of the criminal conduct. When combined with the principle that ignorance of the law is no excuse, the basic doctrine seems to be that a defendant must have some level of awareness of the facts (or at least some of the facts) that constitute a crime but need not have any awareness of the law that defines that crime. But the "different law" cases, among others, suggest that the notion of "criminal intent" actually signifies, ambiguously, two conflicting principles of criminal liability. Sometimes, as suggested above and as in most formal elaborations of its meaning, criminal intent just means knowledge of the facts that constitute the crime at the time of one's conduct.¹⁴² But other times a court will pass that principle by without so much as acknowledging its existence and discuss criminal intent as a diffuse quality of mind that might be negated by ignorance or mistake of law--although, again, frequently courts will not

¹⁴¹ The classic statement is in Francis Bowes Sayre, *Mens Rea*, supra note ---, at 1026. More modern recognitions of the hazy meanings of mens rea terms can be found in, for example, DRESSLER, supra note ---, at 101-102 and ch. 10, *passim*; LAFAVE & SCOTT, supra note ---, §3,5, 216.

¹⁴² See, e.g., Bryan v. United States, 524 U.S. 184, 193 (1998) (holding that "unless the text of [a] statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense"); Boyce Motor Lines v. United States, 342 U.S. 337, 345 (1952)(Jackson, J., dissenting)(stating that the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law); American Surety Co. of New York v. Sullivan, 7 F.2d 605, 606 (2nd Cir. 1925)(Hand, J.)(stating that the term 'willful' in criminal statutes "means no more than that the person charged with the duty knows what he is doing", not that "he must [also] suppose that he is breaking the law"); PERKINS & BOYCE, supra

acknowledge that they are endorsing a ML defense but will simply speak in terms of the immediate statutory language¹⁴³ or the unexplained language of “criminal intent.”¹⁴⁴

Morissette is an excellent example of the latter approach. Justice Jackson writes in ringing terms of the fundamental role that the notion of criminal intent plays in our system of justice and concludes from that principle that *Morissette* must have a defense.¹⁴⁵ Never for a moment, however, does he advert to the fact that he is reading a ML defense into the statute.¹⁴⁶ Never does he consider that, contrary to the hoary maxim, he is embracing the defendant who would say, “Yes, I knew I was taking goods off someone else’s land, but I did not know that counted as stealing--I did not know that that was against the law.”

I do not mean to suggest that the holding in *Morissette* was wrong but only that it helps to reveal the persistent ambiguity in the meaning of criminal intent. Jackson’s holding was entirely consistent with the interpretive consensus for larceny; and that consensus may well represent good social policy. Like so many other judges, however, Jackson celebrated the requirement of “criminal intent” as if it were an unambiguous doctrine with a clear moral content and an easy capacity to dictate the result in a case like *Morissette*’s. He never acknowledged that reliance on the ML maxim, a principle about as venerable as the principle of criminal intent itself, would have turned this case in a different direction and put *Morissette* in jail. And so he never explained the

note ---, at 832-834; LAFAVE & SCOTT, *supra* note ---, § 3.5(a),(b); DRESSLER, *supra* note ---, § 10.04(a)(1).

¹⁴³ See, e.g., *New York v. Weiss*, 276 N.Y. 384 (1938).

¹⁴⁴ See ROBINSON, *supra* note ---, at 254-255 (describing such reasoning as resting on “a broad gestalt notion of mens rea”).

¹⁴⁵ See *Morissette v. United States*, 342 U.S. 246, 250-263 (1952).

¹⁴⁶ In fact, he seems positively to think he is not when he says that a defendant “must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion,” even as the rest of the opinion and the universal history of larceny law on which he so heavily depends

reasons, perhaps very compelling reasons, why someone who takes valuable property from another person's land should be allowed to defend by simply saying that he did not know there was a law against it, even though the general principle of the law is that such excuses are no excuse at all.

Another remarkable example comes from criminal conspiracy doctrine. Many courts have held that ignorance of the illegality of an act is a good defense to a charge of conspiracy to do that act, at least where the core crime can be said to be "morally innocent" (although prohibited by statute). This doctrine would make easy sense where the core crime itself provided for a ML defense, but it also holds where ignorance of law is no defense to the core crime.¹⁴⁷ The case that seems to have originated the doctrine relied on nothing more than its own understanding of the notion of "criminal intention," as entailed by the term "conspiracy." It considered the principle of criminal intent to require that a ML defense should be available on the conspiracy charge, even as it reaffirmed that no such awareness of the law, but only the facts constituting the offense, was necessary to constitute the intent required to convict for the core crime.¹⁴⁸ Similarly, in *Liparota*, the Court created a ML defense to the crime of unauthorized transfer of food stamps on the grounds that "mens rea" was a fundamental principle of criminal law, without acknowledging that an entirely conventional understanding of mens rea is mere awareness of the facts--not the law--that constitute the crime.¹⁴⁹

makes clear that he means to exculpate anyone who fails to understand that the property is someone else's, regardless of the source of that belief. *See id.* at 271.

¹⁴⁷ *See* LAFAVE & SCOTT, *supra* note ---, § 6.4(e)(5).

¹⁴⁸ *See* *New York v. Powell*, 63 N.Y. 88, 91-93 (1875).

¹⁴⁹ *See* *Liparota v. United States*, 471 U.S. 419, 425-6 (1985)(citing *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

A final example comes from *Bryan v. United States*,¹⁵⁰ a prosecution for dealing in firearms without a license. Bryan argued that the prosecution should have to show that he knew of the statutory provision that he violated. The Court denied his claim but accepted that the statute did contain a requirement that a defendant have knowledge that his conduct was “unlawful.”¹⁵¹ Although the Court acknowledged that criminal “knowledge” normally means knowledge only of the facts that constitute the offense¹⁵² and insisted that it would not carve out an exception to the rule that ignorance of law is no excuse,¹⁵³ it nevertheless read the statutory requirement of “willfulness” to require “bad purpose” and thus to require that the defendant have known that his conduct was “unlawful.”¹⁵⁴ What might it mean to know that some conduct is “unlawful” without knowing the specific law that makes that conduct unlawful? The Court did not enlarge on this rather central question.¹⁵⁵ Under the circumstances, the Court’s insistence that it was not creating an exception to the ML maxim suggests that the Court thought that such an exception arises only when the defendant has to have known the citation to the statute or its precise wording. But that cannot be. So why doesn’t the requirement that the defendant have known that his conduct was “unlawful” constitute an exception to the ignorance-of-law maxim? Of course, it really does. But it is an intentionally vague exception, designed--or at least destined--to fudge the meaning of the ML-MF boundary, perpetuate the ambiguities of criminal intent, and thus preserve the judiciary’s capacity to avoid the injustices of an excessively formalist criminal law

¹⁵⁰ *Bryan v. United States*, 524 U.S. 184 (1998).

¹⁵¹ *Id.* at 193.

¹⁵² *Id.* at 192-3.

¹⁵³ *See id.* at 196.

¹⁵⁴ *Id.* at 196 (1998).

without abandoning the great hallmarks of criminal-law formalism like the ML maxim.¹⁵⁶

It may be that there is a fully principled explanation for the doctrinal choices judges have made here and elsewhere, but the more likely explanation would be akin to the one offered by George Fletcher for the ambiguity of so many crucial terms in criminal law: that “the contemporary state of criminal theory is ambivalent about the role of blame and condemnatory judgment in the criminal law.”¹⁵⁷ I would go further and say that that ambivalence has been characteristic of Anglo-American criminal theory time out of mind.¹⁵⁸ The fundamental principles and purposes of criminal law are never likely to be settled. Rather the negotiation between devotees of criminal law as a system of social utility and those who want the system to be a dispenser of

¹⁵⁵ In dissent, Justice Scalia pointed this omission out with predictable vigor. *See id.* at 201-2. Some possible meanings of a knowledge-of-illegality doctrine are discussed in Ryu and Silving, *supra* note ---, at 458-466.

¹⁵⁶ There are alternative formulations that might have avoided some of these ambiguities. The Court could have held not that the defendant had to have known his conduct to be unlawful but only that he had to have been indifferent as to the unlawfulness of the conduct when he chose to do it. *See* Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1028-1031 (1998). An even easier alternative would have been to dispense with the word “unlawful” and use the standard that many writers attribute to the common law--that is, simply that the D have acted with an “evil” or “immoral” purpose. *See, e.g.*, Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 654-667 (1993) (arguing that the essence of common law mens rea was “evil motive”); George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 412-418 (1971) (arguing that common law mens rea was not a matter of specific mental states but of the moral quality of the defendant’s conduct); Gerhard O. W. Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1060, 1101 (1958) (same). In fact, I think that is where Justice Stevens’s opinion in *Bryan* was heading, but he insisted on defining “bad purpose” as a purpose to violate the law rather than simply a purpose to act out of some generally immoral motives. *See Bryan*, 524 U.S. at 191-2, 193.

¹⁵⁷ FLETCHER, *supra* note ---, at 400.

¹⁵⁸ Recent historical accounts of Scottish and English criminal law suggest that no single philosophy of crime has or is ever likely to explain the criminal justice system as a whole. Rather the system always performs multiple functions; unitary philosophies of criminal law only obscure some of those functions in order to highlight others; and all such philosophies of crime and definitions of crime are historically contingent. *See* LINDSAY FARMER, *CRIMINAL LAW, TRADITION AND LEGAL ORDER: CRIME AND THE GENIUS OF SCOTS LAW, 1747 TO THE PRESENT* (1997); ADEKEMI ODUJIRIN, *THE NORMATIVE BASIS OF FAULT IN CRIMINAL LAW: HISTORY AND THEORY* (1998).

transcendently deserved punishment, not to mention those who seek a synthesis of those two perspectives,¹⁵⁹ will persist indefinitely. As that negotiation persists, the multiple meanings and discourses available to judges may well be the tools necessary to the administration of “criminal justice” within unsettled bounds. Scholars who lack the ambition to put an end to that age-old negotiation might do well simply to delineate as clearly as possible the multiple discourses of criminality available to the judges, whether simply to describe as accurately as possible the ways in which discretionary judicial choices get made¹⁶⁰ or to help clear the path to sensible doctrinal development.

V. UNREASONABLE MISTAKES: LAW OR FACT?

The ambiguities of criminal intent suggested above are not confined, of course, to the doctrinal niche of the “different law” mistake. The perspective provided by this article’s understanding of ML suggests at least one other doctrinal area--“unreasonable MF”--in which those ambiguities have been obscured by inadequate attention to the meaning of ML. What is an “unreasonable MF”? For one thing, it is an unquestioned category of analysis in criminal law. At the same time, however, it is a contradiction in terms, or so I think the definition of ML in this article suggests. An implication of the ML-MF distinction as defined here is that the concept of ML extends to any material unreasonableness on the part of the defendant. More precisely, any time a mistake is actually found to have been unreasonable, even where the mistake is conventionally

¹⁵⁹ See Robinson and Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997) (describing the debate and proposing a synthesis); Alan Brudner, *Agency and Welfare in the Penal Law*, in ACTION AND VALUE IN CRIMINAL LAW (Stephen Shute, et al., eds., 1993) (arguing that retributive and utilitarian models of crime are subsystems within a unified whole).

¹⁶⁰ This is the general approach of Kelman to criminal law: All formal categories are manipulable and are given meaning by a fairly arbitrary process of “interpretive construction.” See Kelman, *supra* note ---.

understood as a MF, the mistake is really a ML. This claim runs contrary to well entrenched ways of talking about criminal law, but I think the point seems obvious: whenever the law requires a person to make the inferences that a reasonable person would have made in the situation, then any mistake resulting from a failure to draw those inferences is ML. To allow a criminal intent defense in such a situation without acknowledging that one is indulging a ML defense is, again, to obscure the meaning and ambiguity of criminal intent.

This point illustrates and strengthens the larger point of this article: that whenever a factfinder would infer the satisfaction of a statutory element from the defendant's own experience of the offense conduct and circumstances, then the defendant's failure to draw that same inference is a failure to understand the meaning--in perhaps a special legal sense of "meaning"--of the statutory term and is, therefore, a ML. Perhaps the word "meaning" takes on a special legal sense in this article, since the "meaning" of a statutory term is determined exclusively by, or at least given effect exclusively by, the factfinder. The factfinder determines the function or effect of any particular statutory term in any particular scenario and thereby controls its operational meaning. If a certain body of experience would, for the factfinder, mean satisfaction of a statutory term, then that experience or evidence instantiates the meaning of the statutory term, at least for purposes of determining criminal liability. And if the defendant nevertheless believed in the legality of her conduct--failed to draw the inference that the statutory term is satisfied by that body of experience--then she has made a ML. Only if the defendant's experience would not entail an inference to the statutory element would the defendant's mistake count as MF.

What I want to suggest in this section is that, given this understanding of ML, the notion of an unreasonable MF is a contradiction in terms. A finding of unreasonableness can only happen when the law makes reasonableness a standard of guilt or innocence. If the law has made the question of reasonableness material to liability, then the failure to draw the inferences that a reasonable person would draw from known evidence is a ML.

I do not mean, however, to say that the line between reasonableness and unreasonableness is always the *same* as the line between ML and MF. Rather, I will suggest that, while any materially “unreasonable” mistake must be a ML, the implication does not run the other way; a ML may be “reasonable” or “unreasonable.” Thus a “reasonable” mistake may be ML (as long as it is a mistake about meaning) or it may be MF (if it is not a mistake about meaning), even though a finding of unreasonableness always implies a mistake of meaning or a ML. An unreasonable mistake must be a ML because the finding of unreasonableness implies that, given the things of which the defendant was aware, the defendant should have carried out the chain of inferences entailed from those things to the statutory term; that is, the defendant should have seen that the meaning of the statutory term was instantiated in the things of which she was aware.¹⁶¹ There is no reason, however, why some MLs,

¹⁶¹ There may possibly be the following objection to my argument here (although in the end I think it fails). Take the case suggested in Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Liability*, 88 CALIF. L. REV. 931 (2000), where a distracted parent is momentarily “unaware” of his infant’s being in a filling bathtub even though he put her there himself only a few minutes before. The distraction is only the arrival of dinner guests who the career-obsessed parent is intent on impressing, but it is enough to put the child out of the parent’s mind and result in the child’s drowning. In such a case, one might suppose that a factfinder could find that a particular circumstance (the infant’s presence in a running tub) is indispensable to giving the meaning of the statutory term (“unjustifiable risk”) in the situation--so it is a “fact” in my understanding of things--and then might find the defendant’s unawareness of that fact culpably “unreasonable.” The parent’s mistake would therefore be an “unreasonable MF,” the very thing that I have called a contradiction in terms. But I am not sure that a factfinder *could*

some instances of ignorance or misuse of statutory language, cannot be deemed “reasonable” enough to exculpate, as they sometimes clearly are¹⁶² and as MFs usually are.¹⁶³ Reasonable mistake, thus, may be ML or MF, because a finding of reasonableness under the statute implies that, whatever inferences the defendant failed to make, those failures were insufficient to sustain a conviction, whether the inferences were entailed by the statutory term (a ML) or not (a MF).

When is this analysis pertinent? There are many instances in which criminal law makes reasonableness material. For example, in most jurisdictions, a rape defendant who claims he thought the victim had consented to sex has no defense unless the

find such a parent unreasonably unaware. After all, the very basis of culpability here must be the parent’s awareness at some crucial point of the necessary facts. If this is a clear case of criminally negligent behavior (and I’m not so sure everyone would say it was), that is presumably because it seems clear that such a parent’s leaving an infant in a running tub under such circumstances is the very definition of a “substantial and unjustifiable risk” of death. And, if you prefer (arbitrarily, I think) to focus on the moment a few minutes later when the danger is at its height and he has completely forgotten about the child, there is still a real sense in which he “knows” that his child is in the running tub. I see no decisive reason why such “latent” knowledge cannot be counted among the known facts that can entail an inference to a statutory term. (A nice discussion of “latent” knowledge in a slightly different context is in R. A. Duff, *Caldwell and Lawrence: The Retreat from Subjectivism*, 3 Oxford J. of Legal Stud. 77, 88-93 (1983).) If at any point in the sequence the parent has failed to draw the inference of “unjustifiable risk” from the facts the world has presented to him, then he can be said to have failed to see the definition of that statutory term and made a ML, not a MF. Of course, I do not pretend to have dealt with this objection in all of its potential complexity, and I will not do so in this article, but I hope I have said enough to justify my going forward with the positive argument in the text and leaving for another day all the complexities of the meaning of (un)reasonableness.

¹⁶² Although rarely applied, there is a constitutional rule in the United States that requires exculpation for ML where the ML was especially hard to avoid. *See Lambert v. California*, 355 U.S. 225, 229 (1958). And many American jurisdictions provide for ML defenses where the defendant has made sufficiently reasonable efforts to comply with the law. *See supra* note ---. Similarly, Germany has a general rule that exculpates for unavoidable MLs. *See Gunther Arzt, The Problem of Mistake of Law*, 1986 B.Y.U. L. Rev. 711, 728.

¹⁶³ Although a MF is usually exculpatory, even entirely reasonable MFs sometimes are not. In addition to the examples mentioned above in note ---, strict liability with respect to at least some fact questions applies in the category of cases known as “public welfare offenses.” *See Staples v. United States*, 511 U.S. 600, 606-18, 628-635 (Stevens, J., dissenting) (1994); *Morissette v. United States*, 342 U.S. 246, 255-60 (1952); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

mistake was reasonable.¹⁶⁴ Similarly, a negligent-homicide defendant must have been reasonable in thinking, for example, that her gun was unloaded; that is, that any risk to life she created was not “substantial and unjustifiable.”¹⁶⁵ And, in most jurisdictions, a murder defendant who claims self-defense must have been reasonable in thinking, for example, that her victim had been attempting to kill her.¹⁶⁶ In such cases the law must define which beliefs are reasonable and which are not. It does so by taking the defendant’s most basic experience of the offense, those beliefs at the time of the offense which seem most manifestly reasonable, and then determining which further beliefs are within the range of reasonable extrapolations from those understandings and which are not. The underlying facts establish a range of reasonable inferences as to other facts that the statute makes material. Complementarily, they establish what inferences are outside the range of reasonable inferences. Insofar as the law defines what inferences are beyond reason, it defines a class of legally mistaken inferences or MLs. Thus any “unreasonable” mistake as to consent or as to the substantiality of a risk or as to the nature of a threat, to take the examples above, must be a ML.

A. Why an “Unreasonable Mistake of Fact” is Really a Mistake of Law

Let me begin with an example from rape law. A particular set of facts might, depending on the state of the law, leave open inferences of either consent or nonconsent to sexual intercourse. For example, to adapt the case of *MTS*,¹⁶⁷ suppose that a woman

¹⁶⁴ See DRESSLER, *supra* note ---, at 545.

¹⁶⁵ See, e.g., MODEL PENAL CODE § 2.02 (2) (d) (1964) (defining culpable mental state of negligence); MODEL PENAL CODE § 210.4 (1) (1964) (defining negligent homicide); N.Y. PENAL LAW § 15.05 (b) (McKinney 1999) (defining culpable mental state of negligence); N.Y. PENAL LAW § 125.15 (McKinney 1999) (defining negligent homicide).

¹⁶⁶ LAFAVE & SCOTT, 5.7(c), at 457.

¹⁶⁷ *In re M.T.S.*, 129 N.J. 422, 609 A.2d 1266 (1992).

has invited a man into bed, both of them undressed. They engage in kissing and other sexual touching, but the woman believes she has indicated that intercourse is out of the question. The man genuinely thinks otherwise and penetrates her; she immediately pushes him off and tells him to leave. Let me suppose that the precise details of this encounter, as known to the man, are consistent with either consent or nonconsent in the eyes of the law (until she pushes him off, anyway). That is, the facts do not mean nonconsent, but neither are they enough to preclude a finding of nonconsent should supplementary facts (beyond those available to the defendant) be introduced. A factfinder might accept that the defendant had believed that the woman had “consented” to intercourse. I am not discussing credibility here but statutory meaning. Thus, if a completely credible defendant said that he took all the voluntary sexual activity to indicate affirmative “consent” to intercourse, a jury would have little reason to think that he misunderstood the meaning of “consent” and misused the term but only that he was unaware of the limits that the woman had meant to impose, facts that would help to constitute her “consent” or “nonconsent” in the situation. The defendant’s mistake, therefore, would be a MF, since it would not be a mistake about the meaning of the relevant statutory term, about the inferences entailed by that term, but only about aspects of the situation independent of the meaning of the term.

None of the reasoning in the previous paragraph depended on the existence of a reasonableness requirement. I did not need a reasonableness requirement in order to conclude that the defendant’s mistake was a MF. I only needed a way of knowing the objective limits of the meaning of “consent” in given circumstances and thus a way of determining whether the defendant’s mistake with respect to that term constituted a misunderstanding of its meaning (ML) or only an unawareness of certain circumstances

that were necessary to instantiate the term's meaning in that scenario (MF). If I then suppose that this jurisdiction, like most, does require reasonable mistake for exculpation, then the very same reasoning as in the previous paragraph suggests that the defendant's MF would count as reasonable. The man's mistaken inference of consent reflects no misuse of the language in those particular circumstances and so must be deemed at least as reasonable as another man's inference of nonconsent would be. Aware of nothing in the situation that could constitute "nonconsent"--entail an inference to "nonconsent"--within the meaning of the law, his failure to infer the woman's nonconsent must be reasonable, and, for the very same reasons, it must be a MF. Reasonableness requirement or no reasonableness requirement, the judge would take the defendant's claim to be that the circumstances as he understood them did not entail an inference to nonconsent because the woman's invitations to sexual contact should be understood to have expressed an invitation to intercourse. If the court has no grounds on which to find the inference from his experience to "consent" inconsistent with the statutory meaning of "consent," then the mistake cannot be a ML but must be a MF--and, for the very same reasons, must be reasonable.

If the reasoning that is necessary to conclude that a mistake is a MF will always imply that the mistake was "reasonable," then every MF is "reasonable," and the idea of "unreasonable MF" is a contradiction in terms. Let me explicate this conclusion by taking an example of "unreasonable MF" from the facts of the famous *Morgan*¹⁶⁸ case, still supposing (although contrary to the actual holding in *Morgan*) that a reasonableness requirement is in effect for mistakes regarding consent. Several defendants had intercourse with the victim at the instigation of the victim's husband, who had assured

¹⁶⁸ Regina v. Morgan, 1976 App. Cas. 182 (H.L. 1976).

them that his wife's struggling against them would only reflect her enjoyment of the sex. They went through with the act even though the victim's resistance and calls for help were in fact quite violent. Given such circumstances, the law would certainly require an inference of nonconsent, and I have never encountered any expression of doubt that the defendant's claimed mistake as to consent was anything but grossly unreasonable.¹⁶⁹ A non-nullifying jury with no other facts at its disposal would have had to find the element of nonconsent satisfied, and a defendant's mistaken inference from those very facts to a belief in consent would constitute a ML because based on the legally erroneous premise that a woman who is violently resisting can be taken to be consenting just because her husband has said that she likes it that way. Such a collection of evidence cannot signify consent. Such an experience cannot mean consent.¹⁷⁰ Rather, it must be taken by any court to constitute nonconsent and must require any person in the position of the *Morgan* defendants or their jury to draw the inference of nonconsent.

The possibility that a jury might also have other facts, unknown to the defendants at the time of their conduct, with which to reinforce the finding of nonconsent would not change the fact that the defendants' actual knowledge itself included enough to constitute "nonconsent," to require a finding of nonconsent by defendants and jury alike. Nor would further facts, also unknown to the Ds, that

¹⁶⁹ See, e.g., R. A. Duff, *Recklessness and Rape*, 3 LIVERPOOL L. REV. 49, 62-63 (1981). Duff refers to the facts of *Morgan*, among other scenarios, and asks, "Can such grounds as these make his beliefs reasonable? Surely not." See also Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431, 437 (1998) ("Clearly it was unreasonable for [the *Morgan* defendants] to act on such a representation . . .").

¹⁷⁰ See Duff, *supra* note ---, at 59, 62-63 (identifying the "meaning" of consent with conduct that expresses consent rather than with some wholly internal state of mind); Alan Wertheimer, *What Is Consent? And Is It Important?*, 3 BUFF. CRIM. L. REV. 557 (2000) (arguing that the meaning of consent is "performative" rather than "subjective").

showed that the woman really was consenting, after all, change the fact that the defendants made a ML by indulging in an illegitimate inference, by misusing the word “consent” when they claimed on these facts that they thought she consented. The defendants would not be convicted of rape, of course, because the element of nonconsent would, in the end, be missing, but they would still have made a ML, just as surely as someone who, mistakenly believing a gun to be loaded, would make a ML in concluding that it would not be “murder” to point the gun at a sleeping stranger and shoot to kill.¹⁷¹

In effect, the law would have defined nonconsent in terms of characteristics that the defendants knew were present in the scenario they encountered. It would have said that the only attitude of mind that could have been inferred from the victim’s conduct and other relevant circumstances was “nonconsent,” whereas any “consent” the defendants inferred must have been something other than what the law recognizes as “consent,” something for which they simply misappropriated the term.¹⁷² If the defendants’ mistake was, therefore, a mistake as to the meaning of “consent,” then the mistake was a ML.

That the *Morgan* defendants’ claimed mistake did, in fact, constitute a ML is shown, I think, by the actual, peculiar disposition of the case. While the House of Lords held that the trial judge had misinstructed the jury by attaching a reasonableness

¹⁷¹ In this latter case, the defendant could be prosecuted for attempted murder, since her only defense is ML in thinking that it’s okay to shoot an innocent person. Similarly, in the former case, there should be no obstacle to prosecution for attempted rape, since there was no exculpatory MF regarding nonconsent.

¹⁷² I express no opinion whether it can be said in some discourse or other that active resistance might consist with “consent” to sex, but I feel safe enough in saying that most courts today would find that persistent active resistance precludes any inference of consent unless there is really sufficiently strong evidence that the “resistance” was just a kind of play-acting, i.e., not resistance at all. In *Morgan*, any such evidence (the husband’s assurances were the sum of it) was wholly

requirement to the mistake defense, it nevertheless upheld the convictions on the statutory grounds “that no miscarriage of justice has actually occurred.”¹⁷³ Since the trial jury had already rejected the defendants’ evidence of reasonable mistake, the defendants’ lawyers had to argue that, if the jury had been properly instructed, it might have at least found an unreasonable mistake. They argued that the jury could have concluded that the defendants thought the victim was consenting even as she resisted, since the husband had told them that her resistance would only signify desire.¹⁷⁴ All members of the *Morgan* tribunal considered such an argument too preposterous to require detailed refutation, and they all agreed that no reasonable jury could have accepted any such argument because the argument was, in the end, simply “not conceivable.”¹⁷⁵ Why? Because “consent” cannot mean anything a lawyer wants it to mean, not even if the lawyer’s client was the very model of sincerity in using the word that way. And the most that the lawyers could make out of the evidence was not enough to come within the meaning of “consent.” Violent resistance simply could not consist with consent as the judges understood that term. Thus, although the Lords never put it precisely this way, the defendants’ mistake claim was rejected because it was a misuse of the statutory language and thus a ML, not the unreasonable MF that they claimed it was and that the Lords’ main holding purported to accommodate.

The argument that the mistake was *not* ML would have to go as follows, I suppose: once the defendants embraced the belief that the victim expressed a desire for

inadequate to justify an inference of consent in the face of the victim’s active resistance. See Duff, *supra* note ---, at 62-63.

¹⁷³ Criminal Appeal Act, 1968, ch. 19, § 2(1) (Eng.).

¹⁷⁴ See *Regina v. Morgan*, 1976 App. Cas. 182, 195 (H.L. 1976).

¹⁷⁵ The quotation is taken from the principal opinion, that of Lord Hailsham. *Id.* at 207. See also *id.* at 204 (Lord Cross of Chelsea), 206 (Lord Hailsham), 221 (Lord Simon), 235 (Lord Edmund-Davies), 239 (Lord Fraser).

intercourse, that belief obviously and reasonably entitled them to the inference that she had consented. They may have been mistaken that the victim actually desired intercourse, but that just meant that they were mistaken about what she wanted, not that they misunderstood the meaning of consent. Such an argument depends, however, on the capacity of the legal term “consent” to accommodate the idea that violent resistance could somehow indicate desire. If “consent” really could accommodate such an idea, then the defendants’ mistake would indeed turn out to be a MF. But to suppose such an expansive definition is not far from supposing a definition of red in the traffic laws that could encompass green as well. Since we know the underlying beliefs on which the belief “she expressed a desire for intercourse” is based--i.e., her struggling and calls for help and the husband’s bald assurances--and since those underlying facts as known by the defendants were unambiguous evidence of the reality that the law is trying to get at with the requirement of “nonconsent,” they legally entail an inference contrary to the defendants’. It was “not conceivable” to the Lords that a properly instructed jury could have accepted the claim argued by the defendants on appeal because the factual scenario they offered simply could not mean consent as the word is used in rape law. Thus, although the *Morgan* defendants have usually been assumed to have made a claim of unreasonable MF,¹⁷⁶ I think the proper characterization is that they made a claim of ML, because the gist of their claim was that they did not understand what the law meant by “consent.”¹⁷⁷

¹⁷⁶ See, e.g., Richard Singer, *The Resurgence of Mens Rea: II--Honest But Unreasonable Mistake of Fact in Self-Defense*, 28 B.C. L. REV. 459, 460 (1987); DRESSLER, *supra* note ---, §12.06[D]; ASHWORTH, *supra* note ---, at 340-342.

¹⁷⁷ I might add here that, if we wanted to persist with conventional usage and call the *Morgan* defendants’ claimed mistake an “unreasonable MF,” we would certainly want a theory or a definition that tells us why the mistake is factual rather than legal. As indicated in the opening

Part of the point here is to say that any “unreasonable” mistake is necessarily a ML, but it is easy to slip from that claim into the erroneous supposition that it is the reasonableness standard itself, the reasonable-unreasonable line, that determines what mistakes are MF and ML. It is easy to suppose that the reasonableness standard is what justifies a court’s going behind the defendant’s honest statement of belief that, for example, the victim expressed a desire for intercourse. After all, where a reasonableness standard is in place, courts do generally resort to the language of that standard rather than the language of ML and MF. They simply say, for example, that the *Morgan* defendants’ belief that the victim expressed a desire for intercourse was unreasonable in the circumstances, and so they were not entitled to hold or proffer that belief. But why did the circumstances make a belief in “consent” unreasonable? Because the circumstances that the *Morgan* defendants encountered simply do not mean consent. Calling their inference unreasonable is no advance on saying that they misunderstood the meaning of the term “consent” in all the circumstances. And no reasonableness requirement is required to equip a factfinder to reach that conclusion; the language of reasonableness may prove convenient, but it is in no way necessary to determining whether the defendants’ mistake was one of meaning or of experience. What is necessary is simply the factfinder’s determination of whether the defendant’s experience was or was not sufficient to instantiate the term. Thus in *Morgan* the Lords did ultimately abjure any reasonableness requirement but still found that the defendants’ argument was “not conceivable,” that it was, in effect, simply a misuse of the statutory term, a ML, apparently because the circumstances of which the defendants claimed to be aware necessarily instantiated “nonconsent” in the eyes of the court.

sections of this article, I have found no such theory in the literature and have been unable to

In sum, it is true that an actual finding that a mistake was “unreasonable” is sufficient to constitute a finding of ML, since a mistake that is not a ML--one that involves no misuse of statutory language¹⁷⁸ in describing the scenario as the defendant experienced it--must be reasonable. But a finding of unreasonableness is not necessary to a finding of ML. That is obviously true in cases where there is no reasonableness requirement and so no opportunity for a formal finding of unreasonableness. It is equally true when a reasonableness requirement is in place, since even a ML might be deemed reasonable, in the sense of exculpatory, in relatively rare cases. The basic limit on what beliefs a defendant can proffer as “factual” or MF is not the rape statute’s reasonableness requirement as such but the bare fact that a statutory requirement like “nonconsent” must have an objectively limited scope of meaning. A defendant cannot claim MF just by distorting the meanings of words; he cannot get a MF defense by asserting a belief that resistance means consent any more than by asserting a belief that red can mean green. In either case, the defendant shows only that he misunderstood the meanings of material terms in a particular situation, not that he mistook the real nature of the situation. To misunderstand the meaning of a material term is to make a ML, and one does not need a reasonableness requirement to authorize the court to question the defendant’s claim of “MF” when that claim constitutes a misuse of, misapplication of, or misinference with respect to that term.

B. What Does a Reasonableness Requirement Do?

construct one myself.

¹⁷⁸ Note that this phrase, “statutory language,” really is a redundancy here, since one of the important points of this article is that all language in a criminal adjudication is statutory language. It is all either the words of the statute, or elaborations of the words of the statute, or else it is

So, if a reasonableness requirement is unnecessary to defeat the “MF” claims made by such as the *Morgan* Ds, what is the effect of requiring that a mistake be reasonable? It is not, as is often supposed, that it inserts an objective standard into the MF inquiry where there would otherwise be none.¹⁷⁹ Even without a reasonableness standard the defendant is normally held to uses of terms that are within some objectively, legally defined meanings of those terms. Nor is a reasonableness requirement simply a stand-in for the ML-MF distinction, for the reasons offered above. The reasonable-unreasonable line is independent of the ML-MF line, and the more general effect of the reasonableness standard is simply to limit the scope of MLs that will be deemed exculpatory (under the guise of MF). The reasonableness requirement neither separates one kind of MF from another (as is usually supposed) nor separates ML as such from MF but separates all MFs and some (excusable) MLs from the remaining (non-excusable) MLs. The ML-MF line is determined by the factfinder’s essentially semantic analysis of the terms of a statute on the facts of the case, but the reasonable-unreasonable line is determined by analyzing culpability, an analysis that can and sometimes does cut across the ML-MF line.

It may seem that, in using *Morgan* as an example above, I have been making my argument on the basis of an extreme case, one in which the defendants’ claims were just wholly implausible. So let me illustrate the function of the reasonableness requirement

irrelevant to any substantive question of liability and thus not really in the substantive adjudication at all.

¹⁷⁹ See, e.g., Singer, Resurgence, *supra* note ---, at 460; Celia Wells, *Swatting the Subjectivist Bug*, 1982 CRIM. L. REV. 209, 210-211 (1982) (stating that “[w]here mistakes are required to be reasonable . . . an element of . . . objectivism is retained”); ASHWORTH, *supra* note ---, at 341 (arguing for a negligence standard in rape and acknowledging that that would be a “a departure from the general subjective principle of criminal liability”); David Cowley, *The Retreat from Morgan*, 1982 CRIM. L. REV. 198, 198, 208 (1982) (contrasting *Morgan’s* raising of “the banner of subjectivism” with later cases that “herald[] an alarming and unwelcome return to an era of objective criminal liability”).

here and at the same time reinforce the argument above with an example in which the defendant has a somewhat more intuitively plausible claim of consent than did the *Morgan* defendants. Suppose that a man with a history of violence towards his girlfriend reacts to her rejection of him on one occasion by threatening violence if she does not agree to intercourse. She calms him down and the immediate crisis passes. But just a little later in the evening he again presses her to agree to intercourse, this time without any overt threats. If she agrees this time--and let me suppose that there is no other evidence available--the law could well conclude that this body of evidence alone necessarily proves nonconsent. Then, if the defendant thought or thinks that this body of evidence does not constitute nonconsent, he has made a ML. The law has defined consent relatively narrowly, and the defendant has failed to draw the inferences entailed by that definition.

But, in such a case, courts are likely to treat the mistaken belief in "consent" as MF, perhaps an "unreasonable MF" but still a MF. After all, if the mistake in *Morgan* has generally been labeled a MF, this one would seem no less "factual." And courts conventionally would apply the reasonableness standard to this "MF" to determine whether it was a reasonable MF or an "unreasonable MF." If I am right that it is actually ML, however, then the difference made by a reasonableness requirement is not to divide the set of MFs into culpable and non-culpable mistakes but, in fact, to divide the set of MLs into culpable and non-culpable. Or, to put it another way, the effect of inserting a reasonableness requirement where the standard would otherwise be honest mistake is to reduce the scope of legally mistaken inferences (MLs) that the courts will indulge in the name of MF.

Thus, an *honest*-mistake standard (no reasonableness requirement) would very likely indulge the boyfriend's usage of "consent," even though it is contrary to the legal meaning of the term, since the standard would presumably exculpate any legally mistaken but "conceivable" usage of the term--any usage more intelligible than, say, that of the *Morgan* defendants. A *reasonable*-mistake standard, on the other hand, would be somewhat less likely to accommodate the boyfriend's usage. Whether the factfinder would indulge the defendant's usage as reasonable--exculpatory--would not necessarily depend on whether the defendant's usage was consistent with the law's usage, since misunderstanding legal meaning is not necessarily culpable (although getting legal meaning right is necessarily non-culpable). The factfinder's decision regarding liability might depend, instead, on whether the defendant's usage was sufficiently plausible as colloquial usage or sufficiently close to legal usage to merit indulgence as "reasonable" or exculpatory.

Just to keep the picture complete, let me rehearse quickly what a MF would look like in this scenario. Suppose, in contrast to my hypothetical above, the factfinder has evidence that proves the nonconsent element when the defendant did not have such evidence. For example, here the factfinder might decide that the evidence in the defendant's awareness--threats followed by a period of calm before the woman agreed to intercourse--does not quite constitute nonconsent but that other evidence of the victim's fear does. Then the defendant's failure to draw the inference of nonconsent (from the same body of evidence that left the factfinder similarly short of finding nonconsent) cannot reflect a failure to understand statutory meaning. Rather, it must be a MF, and, since a MF reflects no failures of inference in the eyes of the law, it must be

deemed reasonable whenever a reasonableness requirement is in place.¹⁸⁰ The effect of a reasonableness requirement with respect to MF, then, is only to provide an occasion to slap the exculpatory lable of “reasonable” on a mistake that would have been exculpatory anyway (as long as the relevant standard is not strict liability). In the absence of a reasonableness requirement, any MF is exculpatory, and in the presence of a reasonableness requirement any MF is still exculpatory, because every MF must be reasonable.

Now let me run *Morgan* through this structure. My discussion of the *Morgan* scenario in the previous subsection proceeded from the supposition that a reasonableness requirement was in place, but, in actuality, the holding of *Morgan* was a rejection of any reasonableness requirement with respect to consent. It has since been characterized, therefore, as a decision that chose a subjective standard of MF over an objective standard of MF.¹⁸¹ I have made clear, however, that I think it actually was a case of ML rather than MF. The defendants were aware of circumstances that legally constituted nonconsent,¹⁸² and so the question really was whether *any* honest mistake as to the *meaning* of consent or only a reasonable mistake could exculpate them. Either way, the claim was ML, since it was a mistake of meaning.

Had the Lords read a reasonableness requirement into the statute, they would have been saying that only a limited range of mistakes would be allowed to exculpate: all MFs and perhaps a limited range of MLs. When, instead, they refused to read a

¹⁸⁰ In this structure, the only options for MF standards are strict liability versus complete indulgence for MF. If a MF can exculpate at all, then every MF can exculpate for the relevant element since every MF is fully reasonable. A MF can fail to exculpate only if strict liability applies to the relevant element.

¹⁸¹ See *supra* note --- (citing Singer, Dressler, Ashworth to this effect).

reasonableness requirement into the statute, they seemed to say that any mistake at all regarding consent would exculpate, since they rejected the only handy standard for limiting such a defense. Of course, the Lords would have said that the defense was limited to MFs, but I have already argued that their willingness to contemplate defenses based on unreasonable mistakes meant that they were necessarily opening the door to ML defenses. Without a reasonableness limitation, defendants would seem to have an unbounded ML defense. Nevertheless, in applying their non-standard, the Lords unanimously deemed the defendants' claimed mistake not just non-credible but "not conceivable." They treated the defendants' usage of "consent" as if the defendants were speaking a foreign language. The Lords thereby implicitly recognized that consent, like any term, must have an objective, legal meaning, that any misuse or ignorance of that term is not MF (which would have excused) but ML, and that a sufficiently gross misuse of the term may be culpable even when more plausible MLs are not. A reasonableness requirement would have been a signal to factfinders to be relatively intolerant towards those who misunderstand law--not facts--and would have given them a standard (however vague) to apply in that task, perhaps even limiting the mistake defense strictly to MF. Elimination of the reasonableness requirement, on the other hand, was a signal to be relatively indulgent, excusing misuses of statutory terms just as long as the misuse was, perhaps, "conceivable" but refusing to excuse utter ignorance of the existence or meanings of a term. Only a full ML defense could have saved the *Morgan* defendants by truly abandoning all objective standards and effectively making the law in any case

¹⁸² All the judges agreed that the circumstances had to be taken to show nonconsent, since they all agreed that no reasonable jury could have believed that the defendants in these circumstances genuinely believed that the victim was consenting. *See supra* note ---.

whatever the defendants had thought it was at the time of their conduct.¹⁸³ All of this should suggest that the question of what standard to apply to a claim that amounts to ML raises some knotty questions, but the main point of this exercise is to show that the effect of applying a reasonableness standard is to divide the category of MLs into the exculpatory and the non-exculpatory, not to divide the category of MFs at all.

There are, then, two cases, those in which the mistaken defendant was aware of evidence that constitutes the relevant statutory element (ML) and those where he was not (MF). When a reasonableness requirement applies to the mistake, all cases of the latter sort must be non-culpable while the former category will be divided by that requirement into culpable and non-culpable mistakes. In a case of the first type, any mistake must be a ML. The defendant knows everything except the proper legal label to put on the situation. His ML is not necessarily unreasonable, however, because not necessarily culpable; it may yet be deemed reasonable (or unreasonable) if the statute leaves open a defense for reasonable MLs. If the case is of the second type, where the defendant lacks the necessary evidence from which to infer satisfaction of the element, then the reasonableness requirement is essentially superfluous--all genuine mistakes of that sort are necessarily reasonable and are necessarily MFs. The failure to know the situation reflected no material failures of inference because the defendant simply did not have information that entailed those inferences; that failure must, therefore, be deemed reasonable. A finding that the defendant's mistake was *un*reasonable would

¹⁸³ Needless to say, such a defense does not deprive the courts of their power to say what the authoritative meaning of the law is and in that sense to preserve the objectivity of the law. See Fletcher's critique of Hall in *RETHINKING CRIMINAL LAW*, *supra* note ---, at 733-735. But that does not change the fact that, for any particular case of exculpatory ML, there is a very real sense in which the law truly is whatever the defendant thought it was. See Leonard, *Comment on Frederick Schauer's Prediction and Particularity*, 78 B.U. L. REV. 931, 934-935 (1998); Susan P. Koniak, *Whose Word is Law?* (unpublished manuscript).

necessarily represent a conclusion that the defendant could at least theoretically have evaluated the situation more accurately--thus that the case was of the first type, in which all of the information necessary to a proper legal evaluation was known, *and* that the failure to so evaluate was culpable. But, if the defendant's mistake is found reasonable, that does not necessarily mean that the mistake is a MF. Where the defendant is aware of the evidence that constitutes the element, any mistake is ML but may yet be deemed reasonable if such a ML is thought non-culpable under that statute. The reasonableness requirement for "MF" simply limits, diffusely, the scope of MLs--not MFs at all--that will be permitted to exculpate.

C. Some Homicide Examples and the Unacknowledged Erosion of the Mistake of Law Rule

The mistake structure elaborated in the rape examples of the previous subsections can be fruitfully applied to any area of criminal law, including the law of homicide and self-defense. And sometimes that application reveals surprising, unacknowledged erosions of the ML maxim in modern law.

For example, in MPC jurisdictions, negligent homicide and reckless manslaughter share the common element that the defendant must have taken a substantial and unjustifiable risk of causing the death of another. The only difference between the two offenses is that manslaughter requires conscious awareness of the risk, while negligent homicide does not.¹⁸⁴ If the defendant is acquitted of manslaughter but

¹⁸⁴ See, e.g., MODEL PENAL CODE § 2.02 (2) (c), (d) (1964) (defining culpable mental states of recklessness and negligence); MODEL PENAL CODE §§ 210.3 (1) (a), 210.4 (1) (1964) (defining manslaughter and negligent homicide); N.Y. PENAL LAW § 15.05 (a), (b) (McKinney 1999) (defining culpable mental states of recklessness and negligence); N.Y. PENAL LAW §§ 125.1, 125.15 (McKinney 1999) (defining manslaughter and negligent homicide); ALA. CODE § 13A-2-2 (3), (4) (1999) (defining culpable mental states of recklessness and negligence); ALA. CODE §§ 13A-6-3 (a) (1), 13A-6-4 (a) (1999) (defining manslaughter and negligent homicide); TEX. PENAL CODE § 6.03

convicted of negligent homicide, then the implication is that the defendant mistook the risk of death under circumstances where such mistake was unreasonable. Maybe she knew that a gun had been loaded earlier in the day but was told by her ten-year-old son that he had unloaded it. She then assumed that there was no risk of death when, without checking for bullets herself, she pointed the gun at passing traffic and pulled the trigger. She made a ML in failing to infer from known facts that aiming at traffic and pulling the trigger constituted an “unjustifiable risk.” Such a mistake would nevertheless be a good defense to manslaughter, although not to negligent homicide.¹⁸⁵ That mistake’s capacity to defeat a charge of manslaughter shows that the MPC’s definition of manslaughter incorporates a requirement of knowledge of illegality and thus a ML defense.¹⁸⁶

The MPC suggests at least one other ML defense to a homicide charge, as well, when it adopts the doctrine of “imperfect justification.” It does not label that doctrine a ML defense. Nor does it acknowledge that it might be departing thereby from the basic ML rule (which the MPC itself reaffirms in its section 2.02(9)). Here is the doctrine:

When charged with murder, a defendant can seek acquittal by arguing that she killed to defend herself from a threat of deadly force (among other threats). Traditionally, if the

(c), (d) (West 1999) (defining culpable mental states of recklessness and negligence); TEX. PENAL CODE §§ 19.04, 19.05 (West 1999) (defining manslaughter and negligent homicide).

¹⁸⁵ For an example from a real case, take *Arizona v. Olsen*, 157 Ariz. 603 (1988). There, the defendant appears to have been fully aware that he was across from a motel swimming pool when he shot at a pair of fleeing felons. He missed the fugitives but hit one of the motel patrons, killing her. His only mistake, apparently, was his failure to infer that the risk he took in firing his gun was “unjustifiable” (that is, a gross deviation from the standard of care) under the circumstances. But that mistake on the legal question of which risks are “unjustifiable” and which are not was enough to prevent a manslaughter conviction (or perhaps even a manslaughter charge) and limit his liability to the level of negligent homicide.

¹⁸⁶ One objection to this reasoning might be that failure to perceive a risk can sometimes rest not on failure to infer properly from known facts but from failure to keep in mind--to continue to know--facts that would have made the risk clear. I’ve discussed this briefly above at note ---

defendant's belief in the existence of such a threat was unreasonably mistaken, then the defense disappeared altogether, and she would likely be convicted of murder since she intentionally caused the death of another without lawful justification.¹⁸⁷ The Model Penal Code (MPC) and some state courts, however, have viewed this result as inconsistent with basic principles of culpability.¹⁸⁸ The view of the MPC is that an honest but unreasonable--that is, negligent--belief in the existence of justifying circumstances renders the killing merely negligent homicide rather than murder.

To illustrate the distinction, I want to take the case of *Kansas v. Simon*.¹⁸⁹ There, an elderly white man claimed to have had a fear of his young Asian neighbor, rooted in a belief that the neighbor must be a dangerous martial artist simply because he was of Asian extraction. As a result, he responded to an essentially non-threatening situation by firing a gun at the neighbor. Simon was both wrong and wildly unreasonable to think that he faced any threat at all. Under the traditional rule, therefore, if the victim had died, he should have been convicted of murder. Nevertheless, if that belief was sincere, as the actual jury in *Simon* seems to have concluded,¹⁹⁰ then the MPC would consider Simon innocent of murder and guilty of no offense worse than negligent homicide.

(citing Alexander, *Insufficient Concern: A Unified Conception of Criminal Liability*, 88 CAL. L. REV. 931 (2000)).

¹⁸⁷ See, e.g., DRESSLER, *supra* note ---, at 207; Singer, *Resurgence*, *supra* note ---, at 482-486, 503. Singer finds that a reasonableness requirement was in place for self-defense almost everywhere in America by the late nineteenth century. If one's mistake was not reasonable then one was liable for murder, not just manslaughter. Singer seems to think that even an unreasonable MF had been a good excuse before that time, but the paucity and ambiguity of the available evidence, which he acknowledges, seems to me to make any such claim very tenuous.

¹⁸⁸ There is more than one brand of "imperfect" self-defense. See, e.g., DRESSLER, *supra* note ---, at 207. But the particular doctrine being discussed here gained impetus from the publication of the MPC in 1961 and has been adopted by several states since then. See the accounts in Singer, *Resurgence*, *supra* note ---, at 503-507; LAFAVE & SCOTT, *supra* note ---, §5.7(i).

¹⁸⁹ *Kansas v. Simon*, 646 P.2d 1119 (1982).

¹⁹⁰ See *id.* at 1121.

The drafters of the MPC consider this a common sense result,¹⁹¹ but of course it opens the door to a ML defense to the charge of murder since even an unreasonable inference can exculpate. Simon's claim, after all, would have to be that, even though the law requires an inference from the facts he knew to the conclusion that his victim was not going to attack him, he failed to make that inference and that failure provides a good defense to the murder charge. We can be confident that the law entails that inference--defines "imminent use of unlawful force"¹⁹² to exclude the collection of circumstances known to Simon at the time--for at least two reasons. For one thing, we know that the law of negligent homicide would reach him, by way of its requirement that the defendant have been reasonable in determining that he faced an "imminent use of unlawful force." Since he would certainly have been convicted of negligent homicide and thereby found to have made "unreasonable" inferences with respect to that element, his mistake was ML. Imperfect justification doctrine thus provides a ML defense to murder.

Note further, however, that, as argued previously, the reasonableness requirement is unnecessary to any of this analysis. The law of self-defense defines "imminent use of unlawful force" through the factfinder's giving meaning to that phrase in cases. Even without the reasonableness requirement, therefore, the law would

¹⁹¹ The Commentaries to the MPC suggest that it makes no sense to convict someone for a crime of intention where the individual "labored under a mistake that, had the facts been as he supposed, would have left him free from guilt." Where the crime requires culpability greater than negligence, "it is neither fair nor logical to convict when there is only negligence as to the circumstances that would establish a justification." Thus the Code considers purposeful killings not to be crimes of purpose or knowledge at all, even in the absence of justification, as long as they are "imperfectly" justified; rather, they are crimes of recklessness or negligence. *See* MODEL PENAL CODE AND COMMENTARIES § 3.09 comment 2 (1985). Mark Kelman argues that this justification is actually entirely arbitrary and that it makes just as much sense to emphasize the intention to kill (under bad circumstances) as it does to emphasize the mere negligence in the defendant's evaluation of the circumstances. Kelman, *supra* note ---, at 616-618.

¹⁹² K.S.A. § 21-3211.

certainly determine that Simon's experience entailed an inference that there was no "imminent use of unlawful force." His inference to the contrary, therefore, was a ML.

D. Further Ambiguities of Criminal Intent

These ML defenses to murder and manslaughter constitute, for better or worse, modern, unacknowledged erosions of the rule against ML defenses. In that sense, they are akin to the phenomenon discussed in Part --- above: the modern elevation of the claim of right defense from ad hoc ML defense to the supposedly general principle that mistakes of "different law" somehow "function as" MF. These homicide doctrines, then, like mistake of "different law" and "unreasonable MF," are not unproblematic manifestations of foundational principles of criminal law. They are significant departures from at least one important, continuing, and perhaps dominant approach to criminal law. That approach emphasizes the distinction between MF and ML as central to maintaining the objectivity of the law even at the expense of what might appear to be individualized justice. These homicide doctrines, on the other hand, show some of the ways in which that approach is in constant but often hidden tension with another equally important approach, in which the distinction between ML and MF seems unimportant or irrelevant to the assertedly more fundamental question of individual moral guilt.

As noted above, the doctrine of imperfect justification is a relative novelty. Traditionally, the absence of reasonable belief in circumstances that constituted justification under the law eliminated the defense completely. One might suppose that that was because, without much analysis, the courts recognized the defense for the ML defense that it was. I'm inclined to think that that is so, although I am not aware of any

court putting it that way. But, in any case, the contrast between the traditional rule and the new doctrine helps to illustrate the tensions in the use of mental-state doctrines.

On the one hand, courts in self-defense cases could always have required the sort of “criminal intent” that in many traditionalist cases incorporated a ML defense.¹⁹³ That is, they could have sided with those who emphasize intentional moral wrongdoing as an essential prerequisite to criminal liability and thus required acquittal where the claimed self-defender genuinely thought she was legally justified. Simon, for example, would deserve an acquittal since he really thought his circumstances threatened him with an “imminent use of unlawful force.” And a logical extension of the argument would give him an acquittal even if he just thought killing was justifiable to prevent a relatively petty wrong, like an act of vandalism on his car. As the modern popularity of the doctrine of imperfect justification suggests, the use of a version of criminal intent that smuggles a limited ML defense into self-defense law might seem highly appropriate, since, even though the killing is intentional, the frame of the typical defendant’s mind is arguably non-criminal or at least less culpable or “corrupt” than that of most other intentional killers.¹⁹⁴ We may not approve of killing to prevent mere vandalism, but one who kills in the genuine belief that he is legally justified can certainly be said to deserve acquittal, since he chose to do only what he understood the law positively to endorse.

On the other hand, however, the traditional, harsh approach to the imperfect-justification scenario is consistent with a Holmesian approach to criminal doctrine that survives in many respects to this day. This Holmesian tradition rejects the MPC’s fine distinctions among levels of unlawful homicide on the basis of measures of subjective

¹⁹³ See the discussion of *Powell*, *Morissette*, and similar cases above at nn. ---.

awareness. Instead it prefers a grading structure that focuses on measures of objective risk inferable from known facts. Thus Holmes himself, while agreeing that conscious awareness of a risk of death was enough to justify criminal liability should the death eventuate, said that the common law's more basic "test of murder is the degree of danger to life attending the act under the known circumstances of the case."¹⁹⁵ The law does not, according to Holmes, "inquire whether [the accused] did actually foresee the consequences or not" but only whether "a man of reasonable prudence would have foreseen" them.¹⁹⁶ Thus, while manslaughter comes in more than one variety, "[o]ne great difference" between murder and manslaughter "will be found to lie in the degree of danger attaching to the act in the given state of facts," not necessarily in the accused's having actually been aware or unaware of the risk of death.¹⁹⁷ Such an approach to homicide tends to eliminate any ML defense by refusing to indulge any unreasonable inferences in any scenario for any purpose. If the known facts entail an inference of unjustifiable risk, then the result is at least manslaughter. But the result could even be murder if the facts known to the defendant entail an inference of a quite high risk of death, even if no such risk ever crossed the mind of the defendant.

Moreover, as I have suggested, this approach to criminal homicide has hardly disappeared in the generations since Holmes wrote. In Massachusetts, for example, the grading structure for homicide elevates an unlawful killing to murder not just when the defendant intended to kill but whenever a reasonable person in the situation would have been aware of a "plain and strong likelihood of death."¹⁹⁸ Massachusetts affirms

¹⁹⁴ See Ashworth, *supra* note ---, at 655-656.

¹⁹⁵ HOLMES, *supra* note ---, at 57.

¹⁹⁶ *Id.* at 54.

¹⁹⁷ *Id.* at 59.

¹⁹⁸ See *Mass. v. Vizcarrondo*, 427 Mass. 392 (Mass. 1998).

that this standard is “purely objective”¹⁹⁹ and that it calls simply for the factfinder to measure the objective quantity of risk created by the known circumstances.²⁰⁰ Similarly, in the famous English case of *D.P.P. v. Smith*,²⁰¹ the defendant’s murder conviction was affirmed on appeal even without a finding of any conscious awareness of risk of death. Smith knew that a policeman was hanging on the side of his car as he put his foot on the gas and fled along a busy two-way street. The policeman lost his grip and was killed by an oncoming car. Obvious as the danger of death would have been to a reasonable person, Smith claimed that in his panic he just never thought about the danger involved and therefore lacked the “knowledge” supposedly required for a murder conviction.²⁰² The court held that the test of murder was not whether the accused had actually known that death would result from his actions but whether a reasonable person or “ordinary responsible man would, in all the circumstances of the case, have contemplated [death] as the natural and probable result.”²⁰³ And the court then concluded that, even if Smith’s testimony were believed, the facts were such as to justify an imputation of knowledge to Smith under this test.²⁰⁴ If the known facts are such that any reasonable person would have inferred a high probability that death would occur, then in this tradition the necessary “knowledge” is proven. To hold other than these cases have held would be to indulge a ML defense, to say that even though a defendant knew everything necessary to entail an inference of high risk of death we will let him defend

¹⁹⁹ *Mass. v. Reed*, 427 Mass. 100, 106 (1998)

²⁰⁰ *See Vizcarrondo*, 427 Mass. at 396 (stating that the difference between the elements of the third prong of malice that will sustain a murder conviction, and wanton and reckless conduct amounting to involuntary manslaughter, lies in the degree of risk of physical harm that a reasonable person would recognize was created by particular conduct).

²⁰¹ *D.P.P. v. Smith*, 3 All E. R. 161 (H.L. 1960).

²⁰² *See id.* at 163-167.

²⁰³ *Id.* at 167.

²⁰⁴ *See id.* at 172.

by saying he did not understand the meaning of the situation or the meaning of the statutory term in that situation.

An even more common instance of this objective approach to homicide law lies in the doctrine of depraved-indifference murder, which is in effect in virtually every jurisdiction. Convicting someone of murder on the basis of conduct that evinces a depraved indifference to the value of human life could rest on a theory that that phrase expresses a certain kind of conscious awareness of practical certainty of death--e.g., that the accused did not know or care exactly who or how he would kill but was practically certain that his actions would kill someone, somehow. But this doctrine might, alternatively, rest on a theory that, even when an accused lacked the requisite awareness that death was the certain result of his conduct, still his conduct might occur under circumstances that would have indicated the high likelihood of death so clearly to an objective observer that the defendant must be held responsible for murder rather than manslaughter or less.²⁰⁵ At least in some states, this latter theory holds.

In New York, for example, when death is caused “recklessly” the accused is guilty of manslaughter,²⁰⁶ but the offense is elevated to murder when the “recklessly” caused death occurs “[u]nder circumstances evincing a depraved indifference to human life.”²⁰⁷ In *New York v. Register*,²⁰⁸ the Court of Appeals held that that the statutory language does not modify the mens rea of recklessness. Rather, it simply contemplates that some sets of circumstances and conduct will objectively evidence such a high level of risk as to justify a conviction of murder for one who does that conduct in those

²⁰⁵ See generally LAFAVE & SCOTT, *supra* note ---, § 7.4 (discussing the general uncertainty as to the basis of the doctrine and a split among jurisdictions).

²⁰⁶ See N.Y. PENAL LAW § 125.15 (McKinney 1999).

²⁰⁷ See N.Y. PENAL LAW § 125.25 (McKinney 1999).

²⁰⁸ *New York v. Register*, 60 N.Y.2d 270 (1983).

circumstances. “[T]he Legislature structured the degree of risk which must be present in nonintentional killings by providing that in a depraved mind murder the actor's conduct must present a grave risk of death whereas in manslaughter it presents the lesser substantial risk of death.”²⁰⁹ The accused need not have known of the level of risk. Rather, the court held “that depraved mind murder is distinguishable from manslaughter, not by the mental element involved but by the objective circumstances in which the act occurs.”²¹⁰ “[T]he focus of the offense is not upon the subjective intent of the defendant, as it is with intentional murder . . . , but rather upon an objective assessment of the degree of risk presented by defendant's reckless conduct”²¹¹ Formally, the defendant need only have known of the substantial and unjustifiable risk of death that would convict him of manslaughter, and the difference between manslaughter and murder then became, as Holmes would have it, nothing more or less than the objectively measured “degree of danger attaching to the act in the given state of facts.”²¹²

²⁰⁹ *Id.* at 276.

²¹⁰ *Id.* at 278.

²¹¹ *Id.* at 277.

²¹² HOLMES, *supra* note ---, at 59. See also *New York v. Word*, 689 N.Y.S.2d 36, 37, 260 A.2d 196 (1999), *on reconsideration*, 94 N.Y.2d 799 (holding that whether a particular act was committed under “circumstances evincing a depraved indifference to human life” is not a mens rea element which focuses upon the subjective intent of the defendant but an objective assessment of the degree of risk presented by defendant’s reckless conduct); *Maine v. Dodd*, 503 A.2d 1302, 1305 (Me. 1986) (finding that “depraved indifference” murder requires conduct which objectively viewed by a reasonable person manifests a depraved indifference to the value of human life) (citing *State v. Goodall*, 407 A.2d 268, 279-80 (Me. 1979)); *Wisconsin v. Blanco*, 125 Wis. 2d 276, 281, 371 N.W.2d 406, 409 (Wis. 1985) (finding that a defendant's objective conduct is sufficient to demonstrate the element of a depraved mind); *New Mexico v. Brown*, 122 N.M. 724, 728, 931 P.2d 69, 73 (N.M. 1996) (holding that second degree depraved-mind murder requires only objective knowledge of the risk); *Marasa v. Florida*, 394 So.2d 544, 546 (Fla. 1981) (holding that depraved-mind murder involves an “unintended death” caused by an evil act that a reasonable person would know would kill). Some jurisdictions are less clear about the applicable standard but may take the objective approach as well. See *South Dakota v. Laible*, 594 N.W.2d 328, 333 (S.D. 1999) (holding that “whether conduct is imminently dangerous to others and evincing a depraved mind regardless of human life is to be determined from the conduct itself and the circumstances of its

The facts known by the defendant in these categories of cases are understood by the law in both traditions to entail an inference of an objectively unjustifiable risk of death. A defendant's claim that she failed to make that inference would constitute a claim of ML, which is not normally thought available for most offenses and certainly not for murder or manslaughter. Even in justification cases under the MPC, ML is not indulged where the mistake is a mistake as to the formal categories of justification even though it is indulged where the mistake relates to whether that category has been satisfied in the circumstances. That is, even though modern jurisdictions disagree on questions such as whether a threat to rob is a good justification for deadly force in self-defense,²¹³ the ML maxim holds defendants strictly to a knowledge of the local law on that point.²¹⁴ Meanwhile the imperfect justification doctrine excuses them for failure to

commission"). See generally LAFAVE & SCOTT, *supra* note ---, § 7.4 (discussing a split among jurisdictions as to whether subjective awareness is required); DRESSLER, *supra* note ---, § 31.05(b).

Note further that even the level of conscious awareness supposedly mandated by the requirement of recklessness went out the window in *Register* itself, since New York follows the MPC in allowing recklessness to be inferred even where it might well be absent because of intoxication. See N.Y. PENAL LAW § 15.05 (McKinney 1999). Once Register's trial judge had concluded that the formal mens rea for depraved-indifference murder was only recklessness, Register's jury was not permitted to consider his intoxication as evidence that he lacked the necessary mens rea for murder, since the relevant New York statute precludes evidence of intoxication to negate recklessness. See *Register*, 60 N.Y.2d at 275. The Court of Appeals endorsed this result. See *id.* at 279-281. The result, then, was that Register's jury was permitted to convict him of murder even if it concluded that he had lacked conscious awareness of any risk of death.²¹³ Compare, e.g., N.Y. PENAL LAW § 35.15(2)(b) (McKinney 1999) (allowing use of deadly force to defend against a robbery), with 18 PA. CONS. STAT. ANN. § 505(b)(2) (West 1999) (deadly force justifiable only in response to threat of death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat).

²¹⁴ Section 3.04(b) of the MPC says that "use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or [rape]," and §3.09(1) makes clear that imperfect justification is not available when the mistake relates to "provisions of the Code." The Commentaries spell out the point further: "Mistake as to the scope of the penal law, such as the belief that deadly force is justifiable to prevent trespass, is declared to be immaterial by Section 3.09(1)." MODEL PENAL CODE AND COMMENTARIES § 210.03 comment 6 (1980). This rule is merely an instance of the Code's general embrace of the principle that ML is no excuse unless a local provision of the Code so provides. See MPC §2.02(9). Beyond the MPC itself, cases raising the issue of mistake as to the statutory categories of justification for the use of defensive force are so hard to find as to suggest that it does not even occur to lawyers that such a defense might be available. Take, for example,

understand what circumstances make for a threat to rob, rape, kill or whatever the case may be. Thus, if you live in Pennsylvania and you kill someone who attempts to rob you, you are better off saying that you mistakenly thought the robber was going to kill you, even if such a fear would have been totally unreasonable, than saying that you thought it was justifiable to use deadly force to stop a robbery. The latter is a completely unexcusable ML that leaves you open to a murder charge, while the former is an excusable ML that defeats the murder charge²¹⁵ even though these two self-defense MLs hardly seem distinguishable in culpability--or perhaps even conceptually.²¹⁶ In either case, after all, the defendant kills under belief that society and its law endorse such killings, even though in fact--or, rather, in law--they do not.

MPC defenses like imperfect justification may or may not embody the humane approach to homicide law, but it should not be obscured that the MPC achieves its results by sneaking a ML defense into a doctrinal home where it did not traditionally

Pennsylvania v. French, 531 Pa. 42 (1992), in which the question was whether the use of force against a police officer was justifiable whenever the officer used unlawfully "excessive force" or only when the officer used "deadly force." The court held the latter, and there was no hint that the defendant might possibly have a defense based on her entirely plausible misapprehension of what categories of unlawful force would justify the use of force in return. Similarly, in California v. Ceballos, 12 Cal.3d 470, 526 P.2d 241 (Cal. 1974), no mistake defense as to the available categories of justification appears to have been argued or considered even though the defendant might quite reasonably have mistaken those categories and thus acted under the impression that his use of deadly force was entirely justified. Ceballos had constructed a spring gun in his garage, which severely injured a young boy who tried to break in. A California statute provided that deadly force was justifiable to prevent a felony, which the court, looking to common law, read to include only "atrocious crimes," which, according to the court, did not include the general category of burglary. *Id.* at 245-246. Before this decision, Ceballos could hardly have been blamed for thinking that "burglary" was a category of justification for the use of deadly force, but it does not seem to have occurred to anyone in the case to argue for a ML defense on those grounds. In a more recent case, Connecticut v. Harrison, 32 Conn. App. 687, 631 A.2d 324 (Conn. 1993), the issue was whether robbery was, as a matter of law, a justification for the use of deadly force. Connecticut law provides that deadly force is justifiable only to prevent the use of deadly force or great bodily harm. The defendant claimed that robbery was within the "class of crimes in prevention of which a man may . . . repel force by force," but he made no argument as to mistake regarding that class of crimes.

²¹⁵ Of course, under imperfect-justification doctrine, you remain subject to lesser homicide charges.

belong and into a doctrinal neighborhood where ML is still mostly unwelcome. By now, it should be clear that, for better or worse, criminal courts have done a good deal of this smuggling of ML defenses into cases in the name of criminal intent while in other cases announcing the continuing integrity of the ML maxim. So the ambiguities of criminal intent survive along with the ad hoc judgments they require of judges, all for the ironic preservation of such formalism limits on criminal-law discretion as the distinction between ML and MF and the maxim that ignorance of the law is no excuse.

CONCLUSION

This article has proposed a definition of the distinction between mistake of law and mistake of fact. I have argued that that distinction, which is so central to the whole structure of criminal law, is indeed susceptible to definition and thus capable of controlling judicial decision-making where it applies. I am agnostic on the question whether the distinction *should* be thought useful or relevant in any particular case or under any particular statute. Instead, I am content to offer what I think is a compelling definition and to expose the common misuse of mistake doctrine.

And there has been misuse, in my judgment, of at least two general kinds. These categories of misuse, moreover, help to illuminate two doctrinal traditions of criminal intent that have equipped judges to seize on ML doctrine when it fit their sense of justice in the case and pass it by when it did not. First, the claim of right defense and other variations of mistake of “different law” are simply exceptions to the usual mistake of law rule, but that fact has often been obscured by the scholarly and sometimes judicial transformation of that defense into a general principle of criminal intent,

²¹⁶ ROBINSON, *supra* note ---, at 414-420 and nn.55 and 67, discusses this problem at some length.

regardless of the unrepudiated principle that mistake of law is presumptively no excuse. I have no settled position on when a court should read a mistake of law defense into a statute that does not plainly authorize one, but it does seem to me that the “different law” doctrine is a conceptually unsound device for allowing judges to evade that question. Second, the notion of “unreasonable MF” turns out to be a contradiction in terms, not a natural subdivision of mistake of fact. As with the “different law” concept, the notion of “unreasonable mistake of fact” seems to me a device that allows judges and legislative drafters to create exceptions to the usual mistake of law rule without acknowledging that that is what they are doing. The coexistence of these categories with the ignorance of law maxim illustrates the persistence of two different concepts of criminal intent, one in which criminal responsibility depends only on knowledge of the facts of one’s conduct and one in which responsibility depends on one’s willingness to defy the law (or, more likely, the public morality that is most persons’ best guide to the law²¹⁷).

I do not mean to suggest that one of these two traditions must triumph over the other. In particular cases, of course, they overlap quite a bit. Moreover, it is just as possible to have a system in which different crimes are governed by different theories of intent as it is to have a system with a single overarching theory. Either way, a crucial concept like the distinction between mistake of law and mistake of fact should be as well defined as possible.

This article is only a first effort to define an important concept. I resist the idea that the distinction between mistake of law and mistake of fact is ultimately

²¹⁷ See Kahan, *supra* note ---; Guyora Binder, *Meaning and Motive in the Law of Homicide*, 3 BUFF. CRIM. L. REV. 755, 766-770 (2000) (surveying the recent wave of criminal theory that reemphasizes bad motives rather than awareness of risk as central to criminal intent).

undefinable, a mere matter of degree, but I can hardly claim to have settled the matter. It is certainly possible that there remains a way to preserve the category of mistake of “different law” as a conceptually reliable category that really does inform the interpretation of criminal laws in a more than ad hoc way. Similarly, the notion of “unreasonable MF” may prove to have a validity that I do not now detect. In some senses, it must be true that the relationship between law and fact, between the reality around us and the system of legal meaning, between factfinding and the verdict the factfinder ultimately declares, is too subtle and too indefinite to be captured in a definition or an algorithm. Undoubtedly, some readers will insist that there remains a material distinction, which I have resisted for my formalizing purposes in this article, between the legal “meaning” of a term and the circumstances that legally constitute that meaning from case to case.²¹⁸ In this first exploration of the problem, I conclude otherwise, but the complexities of the problem are far from exhausted. I look forward to further investigation.

²¹⁸ This would seem to be the presumption underlying the distinction between a “norm” and the application of that norm to a particular case. *See, e.g.*, FLETCHER, *Rethinking*, *supra* note ---, at 686; FLETCHER, *Basic*, *supra* note ---, at 158, 167.