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Explaining the Asymmetry Between Mistakes of Law and Mistakes of Fact

Mark Greenberg*

1. INTRODUCTION

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

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

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

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1 Gideon Yaffe, 'Excusing Mistakes of Law' (2009) 9 *Philosophers' Imprint* 1. Page references to this work are given in the text.

From my perspective, this assumption seems to ignore the problem of explaining when and why mistake of law excuses (and when and why it does not), rather than to help us toward a solution. To the extent that the law's treatment of mistake of law is puzzling, it is in large part because, in many cases of legal mistake, the defendant does not seem genuinely deserving of punishment, whether the relevant understanding of desert is specifically moral or more general.[2] Perhaps ironically, Yaffe's assumption that legal desert relates to legal mistake in the same way that moral desert relates to moral mistake yields a technical notion of legal desert, one on which acting on the basis of false legal beliefs makes one ipso facto deserving of punishment. Given such a notion of legal desert, however, we would not expect legal mistake to be an excuse.

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

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

In section 4, I explore why Yaffe would not accept this explanation of the asymmetry. He maintains that the project of explaining the treatment of legal and factual mistakes concerns legal desert rather than moral desert (or desert more generally). And, on his view as I understand it, the fact that someone is morally deserving of punishment does not help to explain why he is legally deserving of punishment. I

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

argue, however, that Yaffe's appeal to 'legal desert' threatens to trivialise the project of explaining why one who is ignorant of the illegality of his conduct is in general not excused.

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

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

2. THE ASYMMETRY BETWEEN MISTAKES OF LAW AND MISTAKES OF FACT

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

First, there are indefinitely many legal mistakes that do excuse. Consider, most importantly, the legal mistakes that are sometimes called 'collateral mistakes of law' (typically characterised as mistakes about a legal standard deriving from a source other than the statute under which the defendant is prosecuted). For example, a defendant's legal mistake could lead her to believe, incorrectly, that she owns certain property, that she has authority to arrest another person, that a particular person is dead, that a certain building is not a dwelling, and so on. It is familiar that,

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

in each of these cases, the legal mistake could excuse the defendant from criminal liability. (Yaffe's paper begins with an example of a collateral mistake of law, but he does not address them in the paper.[4])

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

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

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

3. A STRAIGHTFORWARD EXPLANATION OF THE ASYMMETRY

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

In my view, there is a very straightforward answer to this question. With respect to *mala in se* crimes, being aware that one's conduct is illegal is not necessary in

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

order for one to deserve punishment. It is not necessary because one who commits a *malum in se* crime does something that is seriously *morally* wrong and, typically, such a person deserves punishment.[5]

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

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

4. LEGAL DESERT VERSUS MORAL DESERT

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

5 I set aside very difficult questions about people who do morally wrong acts because they blamelessly have incorrect moral beliefs. Gideon Rosen has argued for the controversial proposition that blameless moral ignorance exculpates 'Culpability and Ignorance' (2003) 103 *Proceedings of the Aristotelian Society* 61; 'Kleinbart the Oblivious and Other Tales of Ignorance and Responsibility' (2008) 105 *Journal of Philosophy* 591. For an opposing view and citations to other recent literature, see Elizabeth Harman, 'Does Moral Ignorance Exculpate?' (2011) 24 *Ratio* 443. Yaffe does not try to address such questions in the paper (see 5–6), so I do not take answering those questions to be necessary for the kind of account he is looking for. As Mitch Berman has pointed out to me, I also am setting aside difficult questions concerning whether anyone ever deserves punishment and whether the state is justified in imposing it.

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

For much of the paper, Yaffe writes in terms of desert simpliciter, and I at first assumed that he was working with a relatively standard notion of moral desert. Late in the paper, though, in order to defend his positive account of legal excuse against the objection that it has counterintuitive consequences, Yaffe introduces a distinction between legal and moral desert. And he explains that the paper concerns only legal desert: 'it is only legal desert that concerns us when deciding whom to punish under the law' (20).

The term 'legal desert' is unfamiliar, and it may be that I do not fully understand Yaffe's notion of legal desert. (His discussion of legal desert is the first of the three junctures mentioned in the introduction at which I am not sure that I am reading Yaffe correctly.) I will therefore set out the way in which he introduces the notion and my understanding of it. I will then explain why, if my reading is correct, Yaffe's appeal to legal desert threatens to trivialise the task of explaining why legal mistake does not generally excuse. Later in the paper I will suggest that Yaffe himself may not succeed in avoiding reliance on an ordinary or moral understanding of desert.

Yaffe begins his discussion of legal desert with the question of why a person who has made a mistake about a *malum prohibitum* offence is deserving of punishment (20). He considers a defendant who, without a licence, provides childcare for a 31-day month. She falsely believes that she needs a licence only if she provides care for more than a month, while, in fact, the legal rule is that one who provides care for more than 30 days must have a licence. Why would this defendant be deserving of punishment while someone who provides care for only 30 days would not be? Yaffe writes that the distinction between moral and legal desert helps to answer this question (20):

> Just as there is a distinction between legal and moral justification for the infliction of the distinctive kinds of pain involved in punishment, there is a distinction also between legal and moral desert of that pain. The degree to which people *morally deserve* punishment for choosing to act in a way unfavored by the balance of moral reasons is the degree to which such a choice indicates a *commitment to faulty principles for the recognition and weighting of moral reasons*. The degree to which people *legally deserve* punishment for choosing to act in a way unfavored by the balance of legal reasons is the degree to which such a choice indicates a *commitment to faulty principles for the recognition and weighting of legal reasons*. This by itself should serve to show that the imagined defendant legally deserves the punishment she suffers. [Emphasis added]

I will discuss Yaffe's view of legal reasons below, but the upshot of that view for legal desert is that the defendant who has provided childcare for a 31-day month legally deserves punishment simply because there is a statutory provision whose language would naturally be understood by a layperson to prohibit the relevant conduct of the defendant. In general, on Yaffe's view, acting on an incorrect understanding of the legal reasons makes one legally deserving of punishment.[7]

7 More precisely, Yaffe says that it is the fact that one is *committed to* an understanding of the relevant principles that is inaccurate that makes one legally deserving of punishment. See 20. In the article, he does not discuss the reason for the 'committed to' formulation and does not seem to make

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

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

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

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

From my perspective, however, Yaffe has set the bar too low for an explanation of why one who acts on a misunderstanding of the law is in general not excused. By identifying legal desert with acting on a misunderstanding of the legal reasons, he

use of the distinction between a defendant's being committed to an understanding and a defendant's merely acting on an understanding. Also, although he formulates his positive proposal (the Uncorrupted Deliberation Principle, see section 5 below) in similar 'committed to' language, his discussion seems to equate being committed to accurate principles with following accurate principles. See 11. The distinction could only make a difference in two kinds of case: where the defendant acts on an inaccurate understanding, but is committed to an accurate one; and where the defendant acts on an accurate understanding, but is committed to an inaccurate one. In the relevant cases for our purposes, the defendant has in fact acted on his legal mistake—indeed, he has consequently satisfied the *actus reus* of a crime—so we can ignore the latter kind of case. Thus, the relevant effect of the 'committed to' formulation is that someone who acts on the basis of a legal mistake, but is nevertheless committed to an accurate understanding, will not legally deserve punishment. (Perhaps the idea is that someone who acts without much reflection might fail to gain access to his own accurate understanding of the law.) It is not clear that this result is the right one, and, at any rate, it has little to do with the ways in which mistakes of law typically excuse. The 'committed to' formulation also does not help to explain cases in which legal mistakes do not excuse. The qualification addressed in this footnote will therefore not be relevant to the discussion, and I will generally omit it.

8 As noted above, I do not mean to insist on moral desert as opposed to a more general understanding of desert; I do not think the differences matter for present purposes. See section 1, especially note 3.

makes it much too easy for his account of legal excuse to account for cases in which mistakes of law do not excuse.

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

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

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

As Yaffe suggests, we generally think that agents who perform morally wrong actions because of their false moral beliefs are typically morally culpable. By contrast, in a large class of cases—those involving technical or *mala prohibita* requirements—agents who perform legally wrong actions because of their false legal beliefs often straightforwardly lack any genuine culpability.[9] And it is precisely

9 As noted above (n 5), it is controversial whether agents who take morally wrong action because of blameless moral ignorance are morally culpable. For purposes of this paper, I am granting Yaffe's widely held and plausible position that acting on 'faulty principles for the recognition and weight-

because such agents lack culpability that the law's treatment of legal mistakes is *prima facie* puzzling. In other words, it is precisely because legal mistake differs from (garden-variety) moral mistake in this way that there is an interesting problem about why legal mistake does not generally provide an excuse.[10]

I have suggested that Yaffe would reject my simple explanation on the ground that it appeals to moral desert, or desert simpliciter, rather than specifically legal desert. And I have countered that Yaffe's way of understanding legal desert—as I understand it—threatens to trivialise the problem of explaining the asymmetry between legal and factual mistakes. I now turn to Yaffe's positive proposal—his account of when mistakes provide legal excuses.

5. THE UNCORRUPTED DELIBERATION PRINCIPLE

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

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

As I read the paper, Yaffe seems merely to assume that factual beliefs are inputs to deliberation, whereas legal beliefs are *part of* the deliberation. One might expect him to defend an account of what constitutes deliberation and then to show that

ing of moral reasons' makes one morally deserving of punishment (20). Even if blameless moral ignorance exculpates, however, there are important ways in which the legal case is not parallel. For example, blameless legal ignorance is probably much more common than blameless moral ignorance. And violation of a *malum prohibitum* legal requirement because of epistemically *blameworthy* legal ignorance may often be insufficient to make an agent deserving of punishment.

10 The reason for the qualification 'garden-variety' is that, on some anti-positivist theories of law, legal mistake is a species of moral mistake. See Greenberg, 'The Standard Picture and its Discontents' (2011) 1 *Oxford Studies in Philosophy of Law* 39; Greenberg, 'The Moral Impact of Law' (2014) 123 *Yale Law Journal* 1288.

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

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

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

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

But the same point can be made of mistakes concerning the *existence* of the legal requirement that the defendant is accused of violating. (That this is so is unsurprising, for, as Larry Alexander has recently argued, it is difficult to see why anything of importance should turn on whether a definition is written into the statute under which the defendant is prosecuted or provided by a collateral statute; suppose that the driver who has defaulted on her car loan is prosecuted under a theft statute that builds in the relevant property law, ie, defining theft to include knowingly taking property after one has defaulted on the loan.[12]) Consider a hiker who does not obtain a licence because he falsely believes that a licence is not required for hiking. On Yaffe's view, the hiker's deliberation is corrupted because he did not understand

12 For an argument that the distinction between collateral mistakes and other mistakes is a matter of presentation, not substance, see Larry Alexander, 'What's Inside and Outside the Law' (2011) 31 *Law and Philosophy* 213.

that his hiking provided a legal reason for him to obtain a licence (assuming that the statute is clearly written). But it seems as plausible as in the cases of the hunter and the driver to consider the false belief an *input* to the deliberation, as opposed to a corruption of the deliberation. After all, the hiker's reasoning is impeccable; he simply doesn't know of the existence of the legal requirement.

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

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

6. LEGAL REASONS VERSUS THE CONTENT OF THE LAW AND THE FAILURE OF THE LAW/MORALITY PARALLEL

Yaffe cannot rest with the unqualified position that any mistake of law is a corruption of deliberation. Such a position would entail that mistakes of law can *never* excuse. In order to explain why some mistakes of law do excuse, he draws a distinction between the 'legal reasons' and the content of the law, ie, what the legal

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

standards require, permit, and so on (13). As I will elaborate, he believes that legal reasons can come apart from the legal standards. And, according to the Uncorrupted Deliberation Principle, very roughly, if a defendant acts on mistaken beliefs about the content of the law, but accurate beliefs about the legal reasons, then the defendant is excused.

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

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

> [The defendant] has a legal reason to get a foster care license before embarking on the scheme only if *when given its most natural interpretation* a statute directs her to get one. The fact that the statute *in fact*, as the court rules, directs her to get one does not imply, on this view, that she has a legal reason to get one: the legal reasons on this view are supplied by the most natural interpretation of the statute and not by the facts about what rule the law establishes, when the two diverge. Another way to put it: what legal reasons are supplied by a particular statute depends not just on the facts about what rule the statute lays down but also by the facts about uptake on the parts of ordinary citizens. [14; emphasis in original]

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

Yaffe thus explicates 'legal reason' in terms of accessibility. It seems to me that there are two very different ways of understanding accessibility, depending on the

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

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

work that it is supposed to do. The first understanding is suggested by Yaffe's use of the term 'legal reasons'. If we take seriously the idea that accessibility is a necessary condition for the existence of a legal reason (on any recognisable way of understanding legal reasons), then the relevant kind of accessibility would be a relatively weak 'in principle' accessibility. Moreover, because legal reasons are being used to explain legal desert and the excusing potential of legal mistakes, and legal desert (and Yaffe's explanation of when legal mistakes excuse) is supposed to be independent of moral notions such as desert or fairness, accessibility must not be based on moral notions.

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

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

16 A related problem concerns the focus on *one* statutory provision. On my view, the relevance of the legal materials to the content of the law is pervasively holistic. See Greenberg, 'How Facts Make Law' (2004) 10 *Legal Theory* 157, reprinted in Scott Hershovitz (ed), *Exploring Law's Empire* (Oxford University Press, 2006) 225–64; Greenberg, 'The Standard Picture and its Discontents' (2011) 1 *Oxford Studies in Philosophy of Law* 39. Given this feature of the law, it is especially difficult to understand how to draw the intended distinction between cases in which the legal reasons track the actual legal standards and cases in which they do not.

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

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

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

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

17 The long quotation in the third paragraph of this section (especially the second sentence) suggests that Yaffe is influenced by the thought that courts sometimes interpret statutes differently from the most natural interpretation. First, however, if a wrong court decision, for example one decided by the highest court of the jurisdiction, succeeds in changing the law, so that the decision becomes a correct statement of the current law, the law may remain accessible because the court decision itself is accessible. Second, a decision by a court can be an incorrect statement of current law, even *after* it is decided. Therefore, the fact that the legal reasons are different from what a court says they are does not show that the legal reasons diverge from the content of the law. Third, because of holism (among other reasons), it does not follow from the fact that a court decision correctly holds that the legal standard is different from the most natural reading of the most salient statute that the legal standard was inaccessible before the decision was rendered. If a legal standard can be ascertained using standard methods, it is not inaccessible in the relevant sense. On holism, see n 16 above.

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

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

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

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

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

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

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

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

7. CONCLUSION

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

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

Third, on Yaffe's view, the position that legal beliefs are part of deliberation has the consequence that, with the one exception of situations in which (according

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

20 See 20.

21 See 15.

to Yaffe) the legal reasons come apart from the content of the law, legal mistakes never excuse. This consequence is made to seem palatable by the deployment of the technical notion of legal desert. I raised several concerns about Yaffe's use of this notion. Most fundamentally, as Yaffe explains legal desert, people who act on legally wrong principles are, for that reason, legally deserving of punishment (setting aside the qualification about legal reasons that come apart from the legal standards). In that case, the problem of explaining why knowledge of illegality is not generally required for criminality must not be understood as a problem about legal desert, on pain of trivialising the problem.

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

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

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

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