

# Ignorance of Wrongdoing and Mens Rea

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Suppose we believe that ignorance of wrongdoing should often absolve wrongdoers from blame, criminal liability, and punishment.<sup>1</sup> If so, how should this normative belief be reflected in the structure of criminal law? One of many possible solutions is to include ignorance of wrongdoing (when it is exculpatory) within the scope of mens rea. In other words, we might adopt the following thesis: defendants who are unaware their conduct is wrongful do not commit the mens rea of the offense that (otherwise) proscribes their conduct. In this paper I explore what can be said for and against this thesis. I expect most theorists will resist it, and I readily admit that it is likely to have implications that should give us pause. But I believe this thesis also has considerable advantages that are easy to overlook. The particular advantage I will emphasize in what follows draws from dissatisfaction with the most recent Supreme Court decision on the insanity defense. Reasonable minds will differ about whether the advantages of this thesis outweigh its disadvantages. Overall, however, I tentatively conclude that it has a great deal of merit and should probably be adopted.

I start my exploration with positive law, admittedly a curious place to begin to motivate my thesis. After all, this thesis seems clearly contrary to settled doctrine as specified in all penal codes of which I am aware. As every student of criminal law has been taught, Section 2.02(9) of the Model Penal Code (“the Code”), as well as the state codes based upon it, explicitly indicates “[n]either knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.”<sup>2</sup> Since mens rea as defined by the Code *is* an element of nearly all offenses,<sup>3</sup>

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1. For present purposes, I simply presuppose this belief in order to examine some of its probable implications for criminal theory generally and mens rea in particular. I can hardly *defend* it here; I have argued for this belief elsewhere. Most recently, see Douglas Husak, *Ignorance of Law: How to Conceptualize and Maybe Resolve the Issue*, in *THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW* 315 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019).

2. MODEL PENAL CODE § 2.02(9) (AM. L. INST. 1985).

3. *Id.* § 2.02(1).

especially those that are serious, the above statute appears to explicitly contradict the thesis I propose to support. If my reasoning is sound, and my thesis is adopted, this provision would have to be amended or even repealed in future drafts of the Code.

How, then, can positive law be construed to offer any degree of *support* for my thesis? I offer two distinct answers. First, we should recognize that settled law is not nearly as hostile to my thesis as I have suggested. Ambivalence becomes apparent when we reflect on the final clause of this provision, which adds “unless the definition of the offense or the Code so provides.”<sup>4</sup> Pursuant to this clause, ignorance of law *is* an element of the offense when particular statutes or the Code so specifies. How widespread *are* the exceptions governed by this “unless” clause? Perhaps surprisingly, quite a few statutes *do* include language that (explicitly or implicitly) makes knowledge that conduct is unlawful a statutory element. As far as I can discern, no clear principle explains why or when statutes should or should not include this language. In any event, positive law *does* recognize ignorance of law as a *mens rea* “defense” in a remarkable number of cases.<sup>5</sup> If the proposition that ignorance of wrongdoing is immaterial to mens rea were so straightforward and obvious, commentators should wonder why so many penal statutes explicitly or implicitly provide otherwise. A slightly facetious but more accurate statement of positive law would be “ignorance of law is not material to mens rea unless it is.”

The sheer number of exceptions to the generalization in Section 2.02(9) is only the first and most direct piece of evidence for my thesis.<sup>6</sup> Notwithstanding the raw quantity of offenses that fall within its “unless” clause, philosophers of criminal law should also demand a rationale for this statute. *Why* is awareness of the law typically outside the scope of *mens rea*? Why does 2.02(9) state the rule to which exceptions are governed by an “unless” clause instead of the other way around? Frankly, I do not know. Curiously, the Commentaries are nearly silent on this fundamental question. The Code’s treatment of mens rea is described as “elegant” and “innovative,”

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4. *Id.* § 2.02(9).

5. It is because they fail to satisfy a material element of penal statutes that I have called the absence of mens rea a “defense” rather than a (true) defense. See Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 226–27 (1982).

6. MODEL PENAL CODE. Federal criminal law contains many such crimes. Income tax fraud is perhaps the most well-known example. The statute specifies that the defendant must fail to pay his tax “willfully,” construed to require that he voluntarily and intentionally violated a duty he knew he had. See *Cheek v. United States*, 498 U.S. 192 (1991).

both of which are clearly true.<sup>7</sup> What the Commentaries do *not* describe, however, is the normative basis for taking this novel step.

At any rate, awareness of the material *facts* is clearly within the ambit of mens rea as it is construed by commentators as well as the Code.<sup>8</sup> Moral philosophers are likely to be puzzled by this feature of orthodox law when they first confront it. To moral philosophers not steeped in criminal theory, mistake of fact typically functions as an *excuse* for wrongdoing. Indeed, mistake of fact probably serves as the *paradigm case* of an excuse. Thus an individual who lacks what the Code defines as mens rea seemingly engages in wrongful conduct but is not blameworthy for doing so. The Code, however, famously declines to follow this position.<sup>9</sup> Instead, an individual who lacks what the Code defines as mens rea does not engage in conduct the Code identifies as wrongful in the first place.<sup>10</sup> For example, an individual who takes a coat, mistakenly believing it to be his own, does not possess a legal excuse for theft. His basis of exculpation is more basic.<sup>11</sup> He needs no excuse because he has not committed the offense of theft at all. Thus criminal theorists propose a very different way than moral philosophers of conceptualizing the exculpatory significance of mistake of fact.

Moral philosophers who believe that our individual possesses an excuse for mistakenly taking someone else's coat are almost certainly committed to a contentious view about how to identify the *content* of wrongful conduct. Excuses, after all, are generally regarded as extraneous to the specification of wrongs. Thus theft is not defined as "taking someone else's property unless the taker is mistaken or otherwise excused." The content of the wrong is unqualified; theft is defined as taking someone else's property *simpliciter*. If I can safely generalize from this example, the content of moral wrongs is (usually) *strict*; it does not include mens rea. To be sure, culpable states such as mens rea are requirements of *fault*, but they are not requirements of *wrongdoing*.<sup>12</sup> Of course, the absence of excuses, too, is a requirement of fault.<sup>13</sup> So the fundamental question is why penal offenses include *some*

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7. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 329–41 (2007); Kenneth W. Simons, *Should the Model Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 180–81 (2003).

8. See MODEL PENAL CODE § 2.04(1); Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 421 (2007).

9. MODEL PENAL CODE § 2.04(1).

10. George P. Fletcher, *Mistake in the Model Penal Code: A False Problem*, 19 RUTGERS L.J. 649, 650–51 (1988).

11. I describe and challenge the sense in which this exculpatory claim is more *basic* in Douglas N. Husak, *The Serial View of Criminal Law Defenses*, 3 CRIM. L.F. 369 (1992).

12. Winnie Chan & A.P. Simester, *Four Functions of Mens Rea*, 70 CAMBRIDGE L.J. 381, 381–82 (2011).

13. H.L.A. HART, NEGLIGENCE, MENS REA, AND CRIMINAL RESPONSIBILITY 28–29 (1968).

features that are requirements of fault (viz., mens rea) and treat them as elements of offenses, but exclude *other* features that are requirements of fault (viz., the absence of excuses) and recognize their exculpatory force as wholly extrinsic to the content of offenses. Expressed somewhat differently, the basic question is why the Code departs from the approach I have said to be presupposed by most moral philosophers. For my purposes, it is instructive to divide this question into at least two parts, the components of which are not always contrasted. *First*, why make mens rea an element of offenses? *Second*, if mens rea is made an element of offenses, why define it to extend only to mistakes of fact and not to other exculpatory claims, most notably to mistakes of law?

Consider the second of these questions. If mens rea is to be construed as an element of offenses, why should ignorance of *fact* but not ignorance of *law* generally fall within its parameters? The difficulty of providing a satisfactory answer to this question can be illustrated by recalling Sandy Kadish's famous hypothetical involving Mr. Fact and Mr. Law, two persons who hunt on April 30, even though the hunting season does not begin until May 1.<sup>14</sup> If Mr. Fact believes the date to be May 1, his mistake of fact might well provide a mens rea "defense." If, by contrast, Mr. Law believes the hunting season begins April 30, his mistake of law does not provide a mens rea defense—nor, indeed, a defense of any kind. Why should mens rea be construed to allow this radically different treatment of Mr. Fact and Mr. Law? In my experience, when this example is first presented to students, nearly everyone agrees that Mr. Fact and Mr. Law should be treated *symmetrically*. I concur with this sentiment and think that criminal theorists should do so as well.<sup>15</sup>

If the substantive criminal law should treat mistake of fact and mistake of law symmetrically, reformers are likely to be left with only two options. Either (1) *both* Mr. Fact and Mr. Law should be granted a mens rea defense, or (2) *neither* Mr. Fact nor Mr. Law should be granted a mens rea defense. Most theorists will reject the second alternative out of hand; I know no living criminal theorist who argues against treating mens rea as an element of offenses when it is defined to encompass mistakes of fact.<sup>16</sup> If the need to choose between only these two options is genuine, then theorists are likely to embrace the first of the above alternatives, albeit with a great deal of reluctance. But this preference requires a defense as well. Why should

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14. SANFORD H. KADISH, STEPHEN J. SCHULHOFER & MONRAD G. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 608–09 (4th ed. 1983).

15. For insightful suggestions to the contrary, see Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. CRIM. L. 487 (2012).

16. See R.A. DUFF, *ANSWERING FOR CRIME* 203 (Sari Kouvo & Zoe Pearson eds., 2007).

mistake of fact be included within the scope of mens rea, so factually mistaken defendants do not satisfy a material element of penal statutes? What is the rationale for treating mens rea as an element of an offense rather than regarding its absence as an excuse that is extrinsic to the content of an offense?

A deep answer to this question must delve into the theoretical and normative basis for contrasting offenses from defenses. Unfortunately, commentators divide about the rationale for drawing this distinction—or whether there is anything other than a pragmatic foundation for the contrast at all.<sup>17</sup> If Antony Duff is correct, however, the commission of an offense is what suffices to authorize the community to require persons to *answer* for their conduct.<sup>18</sup> Defenses (such as excuses), in turn, are included within whatever answer a defendant might offer.<sup>19</sup> What would be objectionable about our system of criminal justice if a defendant were required to respond to the state because he had engaged in (what would otherwise be) criminal conduct despite the absence of mens rea (construed to encompass mistake of fact)? I understand Duff to respond that such a system would possess too much political power over blameless citizens to call them to account. Thus the content of criminal wrongs (which includes mens rea) differs from that of moral wrongs (which are typically strict) because the stakes of being found to be criminally blameworthy are higher than those involved in being found to be morally blameworthy. Perhaps Duff is correct. If so, however, we might raise the parallel worry about citizens who are ignorant of wrongdoing. Would a state have too much political power over blameless citizens if it could call them to answer for their conduct even though they were unaware they had done anything wrong?

I believe the foregoing is the right question to ask when evaluating this feature of our system of criminal law. Unfortunately, I am not wholly clear how it should be answered and do not even know what further considerations should be brought to bear in order to settle it. Whether alterations in the structure of the substantive criminal law would afford *too little* or *not enough* power to a state with the authority to require citizens to answer and to impose punishment is nearly impossible to decide in the abstract. To cite a more specific example, how would we purport to assess whether a state possesses too much power if it were allowed to require (as apparently is the case under existing legal doctrine) an answer from Mr. Law but no such answer from Mr. Fact? I have little but my own intuitions on which to rely. According to my intuitions, at least, state authority over blameless individuals would seem

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17. PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* 11 (1997).

18. DUFF, *supra* note 16, at 229–32.

19. *Id.* at 229.

to be significantly greater and more prone to abuse unless mistakes of fact and mistakes of law were treated symmetrically.

Reasonable minds might well disagree about where the boundaries of state power over blameless individuals should be drawn. Positive law continues to place enormous weight on the content of the specific mistake the defendant has made. The peculiar details about the nature of his mistake give rise to some counterintuitive implications that can be appreciated by turning to *Kahler v. Kansas*, the most recent pronouncement of the Supreme Court about the insanity defense.<sup>20</sup> As I hope to demonstrate, a critical examination of this case affords an excellent opportunity to test my thesis. Let me introduce my discussion with a hypothetical. Suppose Darryl is mentally ill and believes his infallible dog has assured him that the woman who appears to be his wife is really a hostile Martian bent on conquest of the earth. If he kills her, he has a mens rea defense to murder, inasmuch as the statute requires (roughly) that Darryl has intentionally killed a being he knows to be human. Suppose, however, Kevin is also mentally ill and believes his infallible dog has assured him that God's divine plan requires him to kill his wife. If he complies with his dog's instruction, he lacks a mens rea defense because (unlike Darryl) he knows his victim is a human being. In jurisdictions that have "abolished" the insanity defense, Kevin probably lacks *any* defense. I trust that most theorists concur that the mistakes of both Darryl and Kevin undermine their culpability and blameworthiness. If only Darryl's mistake negates the account of culpability and blameworthiness required by the penal law, I believe we have good reason to employ a more expansive notion of culpability and blameworthiness in our theory of criminal liability and punishment. The failure to do so produces the counterintuitive result I have described.

The above hypothetical presents much the same kind of scenario that recently confronted the Supreme Court when it decided *Kahler*, an appeal from a jurisdiction that allowed evidence of mental illness to bear on criminal liability only for the purpose of deciding whether the defendant has or lacks mens rea.<sup>21</sup> *Kahler* sought to introduce evidence of his mental illness as the basis of a defense for his horrific quadruple murder.<sup>22</sup> But Kansas had "abolished" a separate insanity defense;<sup>23</sup> unless a defendant lacked mens rea,

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20. *Kahler v. Kansas*, 140 S. Ct. 1021 (2020).

21. *Id.* at 1022.

22. *Id.* at 1027.

23. *Id.* at 1022, 1024. Kansas thus joined Alaska, Idaho, Montana, and Utah as states that allow only a mens rea defense, but not a general insanity defense, to exculpate in the above scenarios. ALASKA STAT. §§ 12.47.010(a), 12.47.020 (2021); IDAHO CODE § 18-207(1), (3) (2021); MONT. CODE ANN. § 46-14-102 (2021); UTAH CODE ANN. § 76-2-305 (West 2021).

the applicable statute provided that “[m]ental disease or defect is not otherwise a defense.”<sup>24</sup> Hence Kansas, unlike many states, did not exonerate a defendant (such as Kevin) on the ground that his illness prevented him from recognizing his act to be morally wrong.<sup>25</sup> Jurisdictions that accept the “moral incapacity” prong of the *M’Naghten* test, by contrast, would have been able to reach the more appropriate verdict.<sup>26</sup> Kansas, however, found Kahler guilty of a capital crime.<sup>27</sup> This verdict received a cold greeting from criminal law theorists.<sup>28</sup> Nearly all of the critical commentary arguing that *Kahler* was wrongly decided contended that a broader test of insanity is needed to ensure a just result.<sup>29</sup> Commentators disagreed on the particular details the best insanity test should include,<sup>30</sup> but nearly all contended that *some* version of an insanity test is needed and that any suitable test would have exculpated Kahler.<sup>31</sup>

I believe, however, that the thrust of this critical commentary is a bit hasty; other avenues of exculpation should have been available to Kahler without the need to retain a separate insanity defense. To be sure, Kahler was almost certainly mentally ill, a condition that led him not to recognize that his conduct was wrong.<sup>32</sup> In most jurisdictions, he would have been found not guilty by reason of insanity.<sup>33</sup> Notice, however, that applications of my thesis

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24. *Kahler*, 140 S. Ct. at 1026 (quoting KAN. STAT. ANN. § 21-5209 (2021)).

25. *Id.* at 1024.

26. *See Clark v. Arizona*, 548 U.S. 735, 746–47 (2006) (defining moral incapacity as “whether a mental disease or defect leaves a defendant unable to understand that his action is wrong”).

27. *Kahler*, 140 S. Ct. at 1027.

28. *See, e.g.*, Joshua Dressler, *Kahler v. Kansas: Ask the Wrong Question, You Get the Wrong Answer*, 18 OHIO ST. J. CRIM. L. 409, 410–11 (2020).

29. *See*, for example, the amici curiae brief of the American Psychiatric Association, American Psychological Association, American Academy of Psychiatry and the Law, the Judge David L. Bazelon Center for Mental Health Law, and Mental Health America. Brief for the American Psychiatric Association et al., as Amici Curiae Supporting Petitioner, *Kahler v. Kansas*, 140 S. Ct. 1021 (2020) (No. 18-6135), 2019 WL 2451207.

30. The pros and cons of various alternatives are canvassed in Michael S. Moore, *The Quest for a Responsible Responsibility Test: Norwegian Insanity Law After Breivik*, 9 CRIM. L. & PHIL. 645 (2015). Although Moore’s conclusion is unlike my own, we both agree with the spirit of his rhetorical question: “If [a factor such as ignorance of wrongdoing] is already a responsibility-eliminating or diminishing factor, independently of any exculpatory work done by mental disease itself, why does it matter how [ignorance of wrongdoing] came to exist in a particular case?” *Id.* at 661.

31. *See Dressler, supra* note 28, at 421.

32. I gather Kahler’s disability is cognitive rather than volitional, despite the curious emphasis the Court places upon volitional prongs of various insanity tests.

33. *U.S. Supreme Court Sides with Kansas over Insanity Defense*, A.B.A. (July 24, 2020), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2020/summer/us-supreme-court-sides-with-kansas/](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/summer/us-supreme-court-sides-with-kansas/) [<https://perma.cc/X5HZ-BX95>].

would also succeed in finding Kahler not to be guilty; no insanity defense is needed in order to reach the desired outcome. I do not deny that a separate insanity defense may be required in criminal law. Still, since Kahler did not understand his conduct to be wrong, he qualifies for a mens rea defense pursuant to my thesis (but not, of course, under existing law).

My thesis has some advantages relative to that of exculpating Kahler by an insanity test. If a defendant is unaware his conduct is wrong, why should it matter whether his mistake is due to his insanity? To turn this question on its head, if the substantive penal law is generally hostile to an ignorance-of-wrongdoing defense, why do so many jurisdictions (even though Kansas is not among them) suddenly become receptive to this plea when such ignorance is a product of a mental disease? Is the assumption that persons are not *at fault* when their mistakes of wrongdoing are caused by their insanity? Surely this is true. But why are *sane* persons automatically presumed to be at fault for their mistakes about wrongdoing? Perhaps such beliefs are often *negligent*, that is, mistakes that a reasonable person in the circumstances of the defendant would not have made. Obviously, however, Kahler was not a reasonable person and should not have been held to a standard he clearly lacked the capacity to meet. Moreover, negligence is a dubious basis for holding persons to be blameworthy in general; it is no more defensible when the negligent mistake involves a proposition of law rather than a matter of fact.

Difficulties become acute when trying to limit the exculpatory force of the plea of ignorance of wrongdoing to the mentally ill. In many cases, it would be impossible to expect anything approaching a consensus on whether a mistaken belief is caused by a condition that qualifies as a mental illness.<sup>34</sup> Many a religious zealot has committed atrocities in furtherance of his belief that God has commanded him to wage a holy war against infidels. If these fanatics are captured and tried, would we be confident that their bizarre beliefs are expressions of a mental disease? Would it matter whether their beliefs were formed as a result of hearing canine voices rather than from reading scripture? I think it would be preferable to forego this line of inquiry altogether. What arguably is relevant is *what* the defendant believes, not the causal story of *why* he believes it. If the genesis of Kahler's mistake is immaterial to his blameworthiness, as my thesis would suggest, the state has good reason to judge him by my thesis rather than by a controversial test of insanity.

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34. See, e.g., Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1200–03 (2000).



To be clear, I make no *constitutional* claim about the insanity test, the exculpatory significance of ignorance of wrongdoing generally, or about my thesis in particular. I am noncommittal about whether the *Kahler* Court was correct to hold that the Due Process Clause of the Constitution does not compel the acquittal of a defendant who, because of mental illness, could not tell right from wrong when committing his crime. Under existing constitutional law, the Due Process Clause has been construed to protect only those “principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>35</sup> Although I have my suspicions, I take no explicit stance on whether my disagreement with the verdict in *Kahler* rises to that level.

Constitutional law aside, however, commentators indoctrinated in criminal theory might insist that mens rea simply *cannot* be defined to require awareness that conduct is wrongful. To my mind, this insistence reflects a failure of imagination. Admittedly, the meaning of mens rea is not entirely stipulative or infinitely elastic. Nonetheless, commentators sympathetic to my thesis might exploit an ambiguity long noted in the terms mens rea and culpability. These words can be used broadly or narrowly in criminal law discourse.<sup>36</sup> The narrow usage is what Joshua Dressler terms *elemental*: mens rea refers to “the particular mental state provided for in the definition of the offense.”<sup>37</sup> By contrast, the broad sense of mens rea refers to “a general notion of moral blameworthiness, i.e., that the defendant committed the social harm of an offense with a morally blameworthy state of mind.”<sup>38</sup> The precise relationship between the broad and narrow senses of culpability is fascinating even though it is seldom explored. The inquiry raised by the narrow sense is largely mechanical until theorists probe beneath the surface to investigate its normative basis. The issue of *why* given offenses should be defined to require their particular levels of mens rea for their various elements is rarely addressed. Perhaps the answer is that legislators endeavor to define offenses so that those who commit them are likely to be blameworthy in the broad sense, and thus (in Duff’s words) may be “called to account” for what they have done.<sup>39</sup> But whatever the answer may be, I simply point out that settling on how offenses *should* be defined is anything but mechanical.

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35. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964).

36. See Douglas Husak, “Broad” Culpability and the Retributivist Dream, 9 OHIO ST. J. CRIM. L. 449, 456 (2012).

37. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 115 (8th ed. 2018).

38. *Id.* at 114.

39. DUFF, *supra* note 16, at 37.

As should be clear, a preference for the narrow or the broad sense of mens rea is likely to be crucial in deciding cases such as *Kahler*. Before we automatically accept the narrow sense and conclude that mens rea encompasses only the culpability required by the elements of the offense charged, we should recognize that the broad sense is often reflected in the common law, which used the term mens rea to include whatever account of “general moral blameworthiness” is required for criminal liability and punishment.<sup>40</sup> Hence, as Breyer writes in his powerful dissent in *Kahler*, the common law meaning of mens rea *does* cover awareness of moral wrongdoing:

When common-law writers speak of intent or *mens rea* . . . we must examine the context to understand what meaning they ascribed to those terms. And when we do so, we see that, over and over again, they link criminal intent to the presence of free will and moral understanding.<sup>41</sup>

We should not reject Breyer’s position simply by insisting that mens rea *cannot* mean what he takes it to mean.

Certainly, any number of factors contribute to a full account of broad culpability—to a determination of whether and to what extent a defendant is morally blameworthy for his conduct—that are not a part of his narrow culpability, that is, to a finding of whether or not he possessed whatever degree of mens rea is specified by the statute he is accused of violating. Foremost (but not alone) among these factors are *justifications* and *excuses*.<sup>42</sup> In what follows, I will focus on excuses, inasmuch as they provide the most plausible alternative to my thesis that ignorance of wrongdoing might preclude criminal liability and punishment, even though it does not negate mens rea. When ignorance of law is afforded exculpatory significance under positive law, it generally does so as an excuse rather than as a denial of mens rea.<sup>43</sup> As I have indicated, however, countless exceptions to this rough generalization can be found throughout positive law.<sup>44</sup> Under what circumstances should the exculpatory significance of this factor be construed as an excuse rather than as the absence of an element of an offense?

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40. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 988 (1932).

41. *Kahler v. Kansas*, 140 S. Ct. 1021, 1042 (2020) (Breyer, J., dissenting). I make no claim with respect to Breyer’s reference to “free will.” Breyer is mistaken *if* he believes the criminal law requires free will in a contra-causal or libertarian sense.

42. Motives are also relevant to culpability but outside the parameters of narrow culpability. See DOUGLAS HUSAK, *Motive and Criminal Liability*, 8 CRIM. JUST. ETHICS 3, 3 (1989), reprinted in *THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS* 53, 53 (2010).

43. Ignorance of law is often recognized as an excuse when *notice* is somehow defective. See MODEL PENAL CODE § 2.04(3) (AM. L. INST. 1985).

44. See *supra* note 6 and accompanying text.

Answering this important question would go a long way toward deciding whether to accept my thesis.

In any event, greater justice in cases involving insanity is hardly the only advantage to be gained by adopting my thesis. If mistakes of fact and mistakes of law were to be treated symmetrically as denials of mens rea, courts and commentators would no longer be required to struggle with the enormous difficulties of distinguishing these two kinds of mistake. As courts have learned, drawing this boundary proves elusive.<sup>45</sup> If my thesis is accepted, the contrast between mistakes of fact and mistakes of law would cease to have exculpatory significance. The next best thing to solving a problem is finding a way to avoid it. We have an additional reason to accept my thesis if the contrast between these two kinds of mistake seems arbitrary or impossible to draw satisfactorily.

A second advantage of my thesis is as follows. If ignorance of wrongdoing is taken to undermine mens rea, we are able to take account of many more normative distinctions than are recognized within existing law. At present, the substantive penal law formally adopts an all-or-nothing posture toward legal ignorance: either defendants are totally exonerated, or the plea has no normative force whatever.<sup>46</sup> Since *mentes reae* come in several well-known flavors, however, it becomes easier to recognize more intermediary positions that accurately express an agent's quantum of culpability. With respect to *facts*, defendants can either knowingly commit the actus reus of an offense or do so recklessly by consciously disregarding a substantial risk that a fact may obtain.<sup>47</sup> Once we treat matters of fact and matters of value symmetrically, it becomes possible to create an analogue of recklessness for mistakes of law. Pursuant to this suggestion, a defendant who consciously disregards a substantial risk that he might be engaged in wrongdoing would be less culpable than someone who knows his act is wrongful but more culpable than someone who is wholly unaware his act is wrong. Thus it becomes easier to conceptualize blameworthiness in shades of gray if we construe the plea of ignorance of wrongdoing as the absence of mens rea. Recklessness about whether one's conduct is wrong becomes an important new category to which an intermediate quantum of blameworthiness can be assigned.

Curiously, however, some theorists deny the very possibility I have described. With respect to beliefs about moral propositions, at least, Larry

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45. See *Heien v. North Carolina*, 574 U.S. 54 (2014).

46. MODEL PENAL CODE § 2.04.

47. *Id.* § 2.02.

Alexander and Kim Ferzan insist “there is no middle ground.”<sup>48</sup> For example, if

a father must decide whether an honor killing is morally required, all he can do is reach the conclusion that it is or is not. In deciding what morality requires, there is no room left for the belief that he might be unjustifiably (recklessly) wrong as opposed to wrong simpliciter.<sup>49</sup>

I confess that I do not understand why they reach this all-or-nothing position. In my judgment, one can be uncertain of moral propositions as well as of empirical propositions. In fact, moral uncertainty is ubiquitous; philosophers write whole books and dissertations about the phenomenon.<sup>50</sup> I am uncertain, for example, about the permissibility of given ways of treating non-human animals. I have no clear idea how I would even estimate the probability, for example, whether I am correct to allow my cat to roam outdoors. I am aware of a non-trivial risk that I *might* be wrong when I do so. On some occasions I go ahead despite this uncertainty; on other occasions I desist. Why, at the end of the day, am I committed to the conclusion that I must believe a given act is either right or wrong simpliciter?<sup>51</sup>

Despite these advantages, however, I admit that several other rules and doctrines in criminal theory might have to be modified and rethought if my thesis were adopted. The conceptualization of mens rea as encompassing only awareness of the facts dovetails with any number of hallowed principles in criminal procedure. The most notable of these are the presumption of innocence and the requirement of proof beyond a reasonable doubt.<sup>52</sup> Both the sense of *innocence* to which the presumption attaches, as well as the components of criminal liability that must be proved beyond a reasonable doubt, pertain to *crime*, defined to include elements of offenses and little else.<sup>53</sup> Since mens rea is an element of each offense, those who lack it are protected by the presumption of innocence inasmuch as the state must prove

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48. LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, REFLECTIONS ON CRIME AND CULPABILITY 101 (2018).

49. *Id.*

50. See, e.g., WILLIAM MACASKILL ET AL., MORAL UNCERTAINTY (2020); Andrew Sepielli, *Moral Uncertainty and the Principle of Equity Among Moral Theories*, 86 PHIL. & PHENOMENOLOGICAL RSCH. 580 (2013).

51. See Matthew McGrath, *Being Neutral: Agnosticism, Inquiry and the Suspension of Judgment*, 55 NOÛS 463, 463 (2021).

52. *Proof, Burden of Proof, and Presumptions*, CORNELL L. SCH., <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/proof-burden-of-proof-and-presumptions> [<https://perma.cc/8C3S-PDGG>].

53. *Id.*

their mens rea beyond a reasonable doubt.<sup>54</sup> Is it sensible to extend the presumption of innocence to include those who allege to be unaware their conduct is wrongful? Should the state be required to prove beyond a reasonable doubt that defendants are aware their conduct is wrongful? To my mind, these quasi-procedural questions present the most formidable challenge to my thesis. I confess to balk at the prospect of allocating these burdens to the state, although I think the difficulties of doing so are likely to be exaggerated. If awareness of the material facts must be proved beyond a reasonable doubt by the state, it is not clear why it is significantly more onerous to require the prosecution to prove awareness of wrongdoing by the same standard.

Nonetheless, I suspect that *normative* rather than procedural worries are the true source of discomfort with my thesis to extend the scope of mens rea to cover awareness of wrongdoing. Some of these normative worries can be addressed fairly easily. The normative belief with which I began holds that ignorance of wrongdoing should *often* absolve wrongdoers from criminal liability and punishment. Apparently, then, this belief admits of exceptions, that is, cases in which ignorance of wrongdoing should *not* absolve wrongdoers from criminal liability and punishment.<sup>55</sup> Perhaps we need to attend to *why* wrongdoers are ignorant. For present purposes, however, I leave the nature of these exceptions open, as well as whether they are frequent or unusual. The important point is that their existence is unlikely to pose a serious threat to my thesis. After all, criminal theorists have long recognized (perhaps grudgingly) that some offenses should dispense with mens rea altogether.<sup>56</sup> If we can accommodate offenses of *strict liability* within our penal code, we should be able to deal with cases in which blameworthiness is compatible with ignorance of wrongdoing. If we have good reasons to enact given offenses so that defendants can be liable even though they do not know their conduct is wrong, we can conceptualize these offenses as imposing strict liability.<sup>57</sup>

An even more serious normative reservation militates against extending mens rea to awareness of wrongdoing. Again, my initial assumption is that ignorance of wrongdoing often precludes criminal liability and punishment altogether. Admittedly, moral intuitions differ radically about my thesis;

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54. Clark v. Arizona, 548 U.S. 735, 738 (2006).

55. Steven S. Nemerson, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517, 1525 (1975).

56. *Id.* at 1527.

57. Or at least a *kind* of strict liability. To my knowledge, George Fletcher was the first penal theorist to hold that the criminal law imposes a kind of strict liability when it rejects a defense of ignorance of law. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 505 (Oxford Univ. Press 2000) (1978).

disputes about the conditions that must be satisfied before an agent is blameworthy for his wrongful conduct are among the most unsettled issues in all of contemporary moral philosophy. Perhaps surprisingly, it is not even clear to every commentator that Kahler is morally blameless for committing his quadruple murder.<sup>58</sup> As the majority of the Court explains,

Kansas believes that an intentional killer is not wholly blameless, even if, for example, he thought his actions commanded by God. The dissent, in contrast, considers Kansas's view benighted (as maybe some in the majority do too). But that is not a dispute, as the dissent suggests, about *whether* morality should play a role in assigning legal responsibility. It is instead a disagreement about what morality entails—that is, about *when* a defendant is morally culpable for an act like murder.<sup>59</sup>

I regard this position as extraordinary. Those who act pursuant to commands they believe to have come from God strike me as exceptionally poor candidates for the mode of blame imposed by the criminal law.

But even those whose moral intuitions *do* recognize the exculpatory significance of ignorance of wrongdoing may regard my initial assumption as far too strong. Arguably, ignorance of wrongdoing does not preclude blameworthiness altogether but generally *reduces* it relative to those who understand their conduct is impermissible.<sup>60</sup> If this normative judgment were accepted, it would be harder (although not impossible) to conceptualize ignorance of wrongdoing as precluding mens rea. Notice, however, that it also makes it difficult to construe the exculpatory significance of legal ignorance as an *excuse*. No less than the absence of mens rea, excuses are typically defined as a defense that precludes blameworthiness altogether.<sup>61</sup> But the supposition that legal ignorance merely *diminishes* blameworthiness (relative to a baseline of knowledge) construes this plea as a *mitigating* circumstance rather than as a defense (or “defense”) of any kind.<sup>62</sup> In positive law, mitigating circumstances are generally conceptualized within the domain of *sentencing* rather than within the domain of the substantive criminal law itself.<sup>63</sup> Perhaps, then, the plea of moral ignorance should be given weight in sentencing rather than in the substantive criminal law. This conclusion better approximates current legal doctrine. After all, Kansas allowed Kahler's claim of mental illness to be relevant to his sentence,

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58. See *supra* notes 26–33 and accompanying text.

59. Kahler v. Kansas, 140 S. Ct. 1021, 1031 n.7 (2020).

60. Husak, *supra* note 1, at 316–18.

61. See Peter K. Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHIL. 289, 374 (2006).

62. Husak, *supra* note 1, at 323.

63. VICTOR STREIB ET AL., DEATH PENALTY IN A NUTSHELL 77–78 (5th ed. 2017).

although not to the prior question of whether he is liable.<sup>64</sup> Unless, then, we are clear about the normative significance that ignorance of wrongdoing should have—a matter about which even the best moral philosophers disagree—we cannot expect this dispute to be resolved. Here, as elsewhere, commentators must get their moral philosophy right before they can expect to make progress in reforming criminal law.

But an even more radical response to my thesis alleges that my entire project is misguided. How does my belief that ignorance of wrongdoing often precludes *moral* blameworthiness, even if correct, bear on the criminal law? If I am mistaken to hold that the criminal law is and ought to be intimately concerned with moral blameworthiness, why should I expect my belief would be reflected within the scope of mens rea—a *legal* concept? Perhaps the internal dynamic of criminal liability and punishment has no good basis for paying attention to the sense of blameworthiness adopted in moral philosophy. Obviously, I cannot begin to address this fundamental challenge here. I simply mention it for two reasons. First, I want to recognize it as yet another ground for contesting my thesis that moral ignorance should be incorporated into the scope of mens rea. Second, I want to flag the influence this radical response has actually played throughout the history of criminal theory. If one examines scholarly treatises by penal theorists who purport to explain why ignorance of wrongdoing is not generally recognized as exculpatory, one quickly discovers that few courts and commentators have even *attempted* to reconcile moral blameworthiness with normative ignorance.<sup>65</sup> Instead, the overwhelming thrust has been to emphasize the supposed difficulties of *proving* moral ignorance, or the loss of *deterrence* alleged to follow if this plea were recognized (as a denial of mens rea, or as an excuse, or in any other way).<sup>66</sup> Even theorists who generally strive to reconcile penal doctrine with moral philosophy curiously depart from this commitment when they direct their focus on the topic of ignorance of wrongdoing. Why an emphasis on evidence or deterrence is thought to be appropriate here, but not elsewhere—when examining, for example, the basis of the insanity defense—should vex those of us who aspire to bring the rules and doctrines of the criminal law into closer conformity with our best moral philosophy. In any event, I hope that those who reject my thesis do not do so by reciting the old canard that law is one thing and morality is another. In positive law, it is easy to find deviations from morality, and the existence of this deviation is bound to provide employment opportunities for legal philosophers for years to come. It is precisely because I aim to make the rules

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64. *Kahler*, 140 S. Ct. at 1024.

65. Husak, *supra* note 1, at 315.

66. Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 16–17 (1957).

and doctrines of the criminal law more closely resemble those of moral philosophy that I believe ignorance of wrongdoing should typically be regarded as wholly or partially exculpatory. And perhaps the best way to conceptualize it as exculpatory, I submit, is to accept my thesis and treat ignorance of wrongdoing as the absence of mens rea.