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# IS IGNORANCE OF FACT AN EXCUSE ONLY FOR THE VIRTUOUS?

Dan M. Kahan\*

Professor Yeager's thoughtful response to my essay has convinced me that there is indeed a connection worth noting between the mistake of law doctrine and the mistake of fact doctrine. Yeager suggests that my position on mistake of law reduces to the view that someone who would be guilty of a "lesser wrong" were things as he perceived them to be may be punished for the "greater wrong" that he actually commits — a conception of mistake of fact that has provoked fierce denunciation from commentators. But I would in fact put things slightly differently: under both doctrines courts excuse a mistaken offender when, but only when, the offender's mistake negates the inference that he has failed to internalize society's moral norms.

*Regina v. Prince*<sup>1</sup> is an excellent example. The "elopement" statute in that case made it a crime for a man to "take . . . any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother."<sup>2</sup> Against the background of the traditional moral norms that gave rise to the statute, the critical element was not the *age* of the female but the *absence of consent* from the parents; the statute was much more concerned with protecting the "possessory rights" of fathers, who historically had negotiated the betrothal of their daughters in exchange for various kinds of commercial, social, and political benefits,<sup>3</sup> than it was with protecting teenage females from sexual predation.<sup>4</sup> Thus, the court tells us, a man who took an unemanci-

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1. 2 L.R.-Cr. Cas. Res. 154 (1875).

2. Offenses against the Person Act, 1861, 24 & 25 Vict., ch. 100, 55 (Eng.), cited in *Prince*, 2 L.R.-Cr. Cas. Res. at 154 n.1.

3. See SUSAN STAVES, *MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND, 1660-1833*, at 117-18 (1990).

4. See, e.g., *Prince*, 2 L.R.-Cr. Cas. Res. at 172 (Blackburn, J.) (observing that sixteenth-century precursor to statute "recognizes a legal right to the possession of the child"); *Prince* at 178-79 (Denman, J.) ("Her father had a right to her personal custody up to the age of twenty-one, and to appoint a guardian by deed or will, whose right to her personal custody would have extended up to the same age.").

pated "girl" he knew to be eighteen years old out of the possession of her parents without the father's consent was just as bad, morally speaking, as a man who ran off with a girl he knew to be fourteen, for both could be deemed to have "trespassed on the father's rights."<sup>5</sup> Consequently, the court reasoned, it made no sense to excuse a man who made a mistake as to whether the girl was fourteen or eighteen.<sup>6</sup> But what about a man who mistakenly believed that he had the consent of the father to take a girl he knew to be only fourteen? Depending on the circumstances, there might be reason to think of him as careless, but he could not be seen as having repudiated the norm of paternal proprietorship. And accordingly, Baron Bramwell tells us, he *would* have had a mistake of fact defense.<sup>7</sup>

This analysis generalizes. When the fact in question marks the boundary line between socially approved behavior and socially disapproved behavior, courts will likely deem a mistake as to that fact to be a defense. Whether an object that one picks up from the ground is someone else's property or instead an abandoned piece of junk, for example, can mark the boundary line between culpable misappropriation and valuable salvaging; so if someone makes a mistake about that fact, he is afforded a defense to theft.<sup>8</sup> But when, in contrast, a fact doesn't mark that moral boundary line — when even the offender's own understanding of his behavior situates him firmly within the interior of what society deems immoral — then courts will *not* afford him an excuse despite his ignorance. Whether someone is a federal officer or instead a private citizen, for example, has no bearing on the moral appropriateness of assaulting that person; for that reason, a mistake about the victim's identity is *no* defense to a charge of assaulting a law enforcement officer.<sup>9</sup>

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5. *Prince*, 2 L.R.-Cr. Cas. Res. at 170-72 (Blackburn, J.).

6. See *Prince*, 2 L.R.-Cr. Cas. Res. at 171-72 (Blackburn, J.); *Prince*, 2 L.R.-Cr. Cas. Res. at 174 (Bramwell, B.); *Prince*, 2 L.R.-Cr. Cas. Res. at 179 (Denman, J.).

7. See *Prince*, 2 L.R.-Cr. Cas. Res. at 175 (Bramwell, B.).

8. See *Morissette v. United States*, 342 U.S. 246, 276 (1952); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (permitting a mistake defense as to facts that mark boundary between legitimate market behavior and price fixing); cf. *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir. 1989) (allowing a mistake defense on the facts that separate legitimate political lobbying from "revolving door" influence peddling).

9. See *United States v. Feola*, 420 U.S. 671, 685 (1975); cf. *United States v. Yermian*, 468 U.S. 63, 75 (1984) (holding that a person who knowingly makes false or fraudulent statement is not entitled to mistake defense relating to whether recipient of the misrepresentation is the federal government rather than private actor); *State v. Gilmour*, 522 N.W.2d 595 (Iowa 1994) (denying defense as to age of female in production of child pornography), *cert. denied*, 118 S. Ct. 1066 (1998).

This account of the mistake of fact doctrine does indeed connect it to my account of the mistake of law doctrine.<sup>10</sup> Courts confine both types of mistake defenses to actors who have internalized community moral norms: if the defendant would be acting consistently with those norms were circumstances — factual and legal — as she supposed them to be, she gets a defense; if not, not. Both ignorance of fact and ignorance of law, then, are indeed excuses only for the virtuous.<sup>11</sup>

Under this formulation, neither doctrine is subject to the criticism that it conflates actors who commit “lesser” wrongs with those who commit “greater” ones. The court in *Prince* didn’t view eloping with an unemancipated eighteen-year-old as a *lesser*, albeit sufficient, wrong; rather it regarded what Prince thought he was doing as *just as wrong* as eloping with a girl he knew to be fourteen.<sup>12</sup> The same goes for those denied a mistake of law defense: Marrero was just as bad as any person who knew he was violating the firearms statute; if anything, his self-conscious attempt to loophole could be considered a morally aggravating factor.<sup>13</sup>

Why do critics of *Prince* even suggest that someone who acts in ignorance of a factual element of a crime *must* be acting “less” wrongfully than someone who was aware of all the facts? The answer is that they are assuming a variant of liberal positivism,<sup>14</sup> which insists that the law appraise a person’s culpability exclusively by the standard of conduct reflected in positive law and without recourse to extralegal moral understandings.<sup>15</sup> In my essay, I tried

10. See generally Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 478-79 (1996).

11. There can, of course, be middle ground cases in which the actor is mistaken about a fact that marks the boundary line not between socially desirable and socially undesirable conduct, but rather between types of undesirable conduct that vary in their degree of moral reprehensibility. In these types of cases, we might see courts allowing an incomplete mistake of fact defense such that the offender is convicted only of the lesser crime that he’d be guilty of were circumstances as he supposed them to be. See, e.g., *Regina v. Cunningham*, 2 Q.B. 396 (1957). For this reason, we might say that mistakes are a *complete* defense only for the virtuous but might still be a partial defense for offenders who, as a result of their mistakes, aren’t as vicious as those who commit their offenses knowingly.

12. See *Prince*, 2 L.R.-Cr. Cas. Res. at 175 (Bramwell, B.) (“[W]hat the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a *girl* . . . .”); *Prince*, 2 L.R.-Cr. Cas. Res. at 179 (Denman, J.) (“He had wrongfully done the very thing contemplated by the legislature.”).

13. See *People v. Marrero*, 507 N.E.2d 1068 (N.Y. 1987); Dan M. Kahan, *Ignorance of Law Is an Excuse — but Only for the Virtuous*, 96 MICH. L. REV. 127, 141-42 (1997) (discussing case).

14. See Kahan, *supra* note 13, at 127-28.

15. See, e.g., GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 190 (2d ed. 1961) (“The legislature has decided that it is only in the case of girls under sixteen that the act is so serious as to be made a criminal offence. Why should Prince’s knowledge [i.e., belief]

to show why liberal positivism furnishes an unconvincing basis for criticizing the selective allowance of a mistake of law defense. It furnishes no more compelling a basis for criticizing courts' decisions to consult community moral norms in deciding whether or not mistakes of fact should excuse.

Start with individual desert. Just as our intuitions don't always make blameworthiness depend on an individual's knowledge of the existence of a legal prohibition, so they don't always make it depend on his knowledge of every matter of fact that may be relevant to such a prohibition. Thus, no matter how the statute is worded, it simply isn't the case that someone who assaults a federal officer believing him to be "merely" a private citizen is less deserving of condemnation — or simply deserving of less — than someone who knows his victim is a federal officer.

From a deterrence point of view, too, it makes sense to afford a mistake of fact defense only when the fact marks the moral boundary line. Strict liability can "overdeter": when even reasonable mistakes do not excuse, some uncertain actors will refrain from engaging in borderline conduct that actually lies outside the reach of the law out of fear that they might be misapprehending the real facts. When such a fact sits on the boundary line between morally desirable and morally undesirable behavior, this "chilling effect" is bad, for in that case the forgone conduct would have generated licit utility: society loses out if a nervous salvager refrains from picking up what is truly abandoned junk because he worries that it might be deemed someone else's property.<sup>16</sup> However, when the fact in question *does not* sit on the moral boundary line, but is actually located within the interior of what's immoral, *then* the chilling effect of strict liability is good because any utility from the forgone activity would have been illicit: if a nervous mugger refrains from as-

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that he was committing the lesser moral wrong [of eloping with an 18 year old] make him guilty of this crime?").

16. Cf. *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 (1978) ("The imposition of criminal liability on a corporate official, or for that matter on a corporation directly, for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment."); *United States v. Nofziger*, 878 F.2d 442, 454 (D.C. Cir. 1989) (allowing mistake of fact defense for unlawful lobbying because of potential of "strict liability" to "chill[ ] speech": "[I]f the government's interpretation of [the statute] were correct, a prudent man would avoid even permissible lobbying of his former agency within one year of his departure because the existence of an unsuspected direct and substantial agency interest could convert what he believed to be a permissible communication into a felony.").

saulting a private citizen because he fears that the person could be a law-enforcement official, all the better from society's point of view.<sup>17</sup>

Of course, all of this might be thought to underscore the force of Yeager's second criticism of my essay, namely, that it neglects to spell out the moral norms that *ought* to inform the mistake doctrines. Before we sign on to the view that an excuse is due only when a mistaken offender has internalized community moral norms, shouldn't we come up with an acceptable theory of what those norms should be? Don't we need such a theory, at a minimum, to deal with hard cases, in which there is community dissensus over moral norms? Is a person who mistakenly believes that he possessed only a semi-automatic rifle and not a prohibited fully automatic one nevertheless violating community norms?<sup>18</sup> How about a man who has intercourse with a seventeen-year-old believing her to be eighteen? In our day, is the age element of statutory rape a moral boundary-line fact?<sup>19</sup> Assuming strict liability for statutory rape discourages nervous men from having casual sexual relations with women who are in fact eighteen or nineteen years old, is that a "good" or a "bad" chilling effect from society's point of view?

I'm afraid I'm going to have to disappoint Professor Yeager once more by declining to answer these questions. Of course, I have a position on the contentious moral issues underlying the mistake cases, and of course I want the law to get it right on these issues. I just happen to think there's a better way for legal academics to improve the law than to hold themselves forth as authoritative appraisers of society's norms. Morally preachy law review articles can't really make society better; only political organizing can. One impediment to organizing, however, is that morally defective legal decisions frequently cloak themselves in mystifying abstractions (like liberal positivism) that deprive members of the

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17. Cf. *Gilmour v. Rogerson*, 117 F.3d 368, 373 (8th Cir. 1997) (finding "chilling effect" in form of "the reluctance to use young-looking models in sexually explicit adult pornography" supplies no reason to allow mistake of fact defense as to age of minor in child pornography offense), *cert. denied*, 118 S. Ct. 1066 (1998).

18. Compare *Staples v. United States*, 511 U.S. 600, 614-15 (1994) (characterizing possession with such belief as "entirely innocent") with *Staples*, 511 U.S. at 633 (Stevens, J., dissenting) ("The 'character and nature' of such a weapon is sufficiently hazardous to place the possessor on notice of the possibility of regulation.").

19. See generally Colin Campbell, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 46 A.L.R. 5TH 499 (1997) (recognizing that strict liability remains the majority rule but that a growing number of states now permit a reasonable mistake defense).

public of a salient focal point for democratic deliberation.<sup>20</sup> Now it's at least conceivable that what legal academics write in law journals, and even more plausibly what they teach in law school classrooms, can persuade judges to speak in a morally transparent rather than a morally opaque doctrinal idiom. And if legal academics can do that, *then* they will be making a real contribution to the project of making the law just.

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20. See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 362-65, 373-74 (1996).