BOOK REVIEW

Ignorance of law: A philosophical inquiry, by Douglas Husak, New York, Oxford University Press, 2016, 320 pp, (hardback) $85, ISBN: 9780190604684.

Douglas Husak’s book is an intelligent, wide-ranging exploration of the legal principle ‘ignorance of law is no excuse’. This principle is one of the few pieces of legal doctrine known by many regular folks, along with the criminal standard of proof ‘beyond a reasonable doubt’. Although I work on issues in criminal responsibility, I admit I had not thought much about the principle in the 20 years since law school. The traditional approach to the doctrine might be explained in this way: in some cases, ignorance of the law fails to excuse offenders from culpability because as a matter of policy we feel they ought to have known the governing their behaviour. Placing upon citizens the responsibility to know the law is good policy because it may increase both knowledge of law (by inspiring persons considering questionable action to investigate legal rules, etc.) and law-abiding behaviour (by dissuading those who discover their possible act is illegal from acting). Although many believe the criminal law’s primary purpose is state-imposed backwards-looking ‘just deserts’ for moral wrongs, the law also serves to accomplish forward-looking aims such as enhancing moral agency¹ and decreasing crime. From this perspective, the principle that ignorance of the law does not excuse contributes to rule of law and social order by encouraging awareness of legal rules.

Husak’s position on ignorance of law is sometimes difficult to discern amongst the detailed critique and commentary on competing views that occupy most of the first 100 pages. In the end, Husak bucks a forward-looking account of the principle and concludes that ignorance of the law – or more exactly, ignorance of the law related to ignorance of the morality underpinning the law – ought to serve as an excuse to criminal guilt in most cases. Further, he claims ignorance of law ought to excuse in the same way that that ignorance of an important fact regarding one’s crime excuses. That he is mistaken regarding an important fact about his crime matters to a defendant’s blameworthiness – e.g. if the defendant kills in self-defence, mistaking the toy gun their victim is carrying with a real gun. A person who honestly believes they are in immediate danger from an armed aggressor is less than fully blameworthy for killing that aggressor even if they were mistaken about the threat. Similarly, knowledge or ignorance that some act is morally wrong clearly matters to moral blameworthiness, says Husak: other things being equal, a person who is ignorant of the moral wrongness of her act is less blameworthy than someone who is aware that what she is doing is wrong.² Where ignorance that an action violates a criminal law is related to ignorance regarding the morality of the act, a person is less than fully culpable.³

Mistakes of law, mistakes of fact

To explore Husak’s position that mistakes of law and fact are importantly similar, let’s examine a classic mistake of fact case. Imagine a hunter, Tabitha – armed with the appropriate licence and taking due care – goes on a hunt for brown bear in the woods. It is a dark, rainy morning, and Tabitha spots a bear 50 yards ahead partially hidden by a tree. Tabitha takes her shot; but

¹See Manuel Vargas, Building Better Beings: A Theory of Moral Responsibility (Oxford University Press 2013) for an account of how forward-looking gains in moral agency might be grounded by backward-looking assessments of responsibility.
²Douglas Husak, Ignorance of Law: A Philosophical Inquiry (Oxford University Press 2016) 31.
³Ibid 97.
when she walks up to her kill she realises it was not a brown bear at all, but instead a local homeless man in a full-length fur coat he found in a charity shop.

Tabitha has made a tragic mistake of fact. Her mistake excuses her from responsibility for the death of the man because she did not possess the mental states required to be guilty of murder. Tabitha did commit a voluntary act that resulted in a death; however, she did not cause the death purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life (Model Penal Code § 210.2). Further, Tabitha’s mistake was reasonable, so she is not guilty under a negligence standard. A reasonable person in the same situation would have made the same mistake; thus, we cannot expect Tabitha to have known better or acted differently.¹

Now imagine that another woman, Sheila, wrongly believes that a ‘castle law’ exists in her state that allows her to apply deadly force to any trespasser on her property. Sheila also does not believe that killing trespassers is morally wrong: instead, she believes strongly that any person found on her property without permission knowingly risks their life. One day a homeless man wanders into her backyard and attempts to break into Sheila’s garage. She shoots him through the garage door, causing his death.

On Husak’s view Sheila is at least partially excused from criminal responsibility if her mistake of law is related to ignorance regarding whether her action is morally wrong. Husak claims law itself creates no moral duty to obey (although the way in which a law rests upon moral obligations may be complex; e.g. it may involve a promise to comply). An obligation to obey the law comes solely from the duty to obey the moral rules for which the criminal law acts as a surrogate. Thus to be fully responsible, says Husak, a defendant must know her behaviour is morally wrongful, not illegal.⁵ Because criminal law is a surrogate for moral rules, a misunderstanding of the criminal law can result in a misunderstanding of moral rules. Ignorance of the morality of an action makes a person relatively less responsible than a person who knows that their act is wrong.⁶ Indeed, a person does not merit any blame for conduct he performs ‘in complete ignorance of propositions that play no role in rational calculation’, so if a defendant who is mistaken regarding the law is completely ignorant that his act is immoral, he is not culpable for the act.⁷

Sheila sincerely did not know the act of killing the intruder was wrong, thus she was ignorant with regard to both the illegality and immorality of her act. In this case, an understanding of the moral wrongness of the act could play no role in her decision to kill the homeless man. Sheila, and persons like her, ‘lack blame for [an act] because their deliberation or practical reasoning is unassailable from the standpoint of internal rationality’.⁸ By her own lights, what Sheila did was morally correct. Husak’s position is that Tabitha’s ignorance regarding the fact that the entity she shoots is a man, and not a bear, is relevantly similar to Sheila’s ignorance regarding the moral wrongness of her shooting of the trespasser. Both Tabitha and Sheila make an important mistake that is relevant to their blameworthiness. On Husak’s theory, neither woman should be held fully culpable for failing to act in accordance with beliefs required for criminal responsibility that they just do not possess.

¹Note that in my previous example of a person who mistakenly kills in self-defence because she thinks her victim has a gun, if the mistake is reasonable, her mistake also negates the requisite mens rea for murder, but via the justification of self-defence.
²Husak (n 2) 97.
³Ibid 22.
⁴Ibid 153.
⁵Ibid.
Awareness of moral reasons

Husak is certainly right to claim that knowledge of the criminal law is related to knowledge of the morality underpinning the law. Very few citizens know much codified law. Taken as a whole, the law is an unholy tangle of (often contradictory) provisions written by lawmakers who often themselves don’t know the details of existing law but feel politically impelled to pass legislation that makes them appear tough on crime. Lon Fuller claims the law must be knowable to be law at all, but in general legal scholars have not claimed the content of codified statutes have to be actually known for responsibility (an impossible task). Husak notes that US Federal Judge Richard Posner says conscience often gives defendants notice of what is legal or illegal – or at least gives them a sense when further inquiries are needed. At least, this seems true with mala in se laws, which outlaw immoral behaviour. This seems less true of mala prohibitum laws, which dictate behaviour that isn’t necessary moral, such as which side of the road one must drive on.

The details of Husak’s position regarding the nature of beliefs about morality necessary to full culpability emerge in chapter three. (It would have been better for them to appear earlier.) In this chapter we discover Husak has adopted a subjective version of Fischer and Ravizza’s reasons-responsive theory of responsibility. This view allows Husak to claim that persons are reasons-responsive only with regard to beliefs about the morality of behaviour that they actually possess. Fischer and Ravizza’s theory is perhaps the most popular compatibilist account of responsibility; however, Husak’s interpretation of Fischer and Ravizza is unique. Husak is a subjectivist about reasons for action, but objectivist about moral wrongfulness. When a person acts against (objective) moral reasons that they themselves recognise, they are responsible. When a person acts against (objective) moral reasons of which they are unaware, they are not. Husak summarises his position by stating that judgments of moral responsibility require an ‘internal assessment of the reason-responsiveness of agents.’

The details regarding what this internal assessment looks like are quite important. No doubt very few persons who commit immoral act consciously think to themselves ‘Doing x is morally wrong. Oh well, I think I’ll do it anyway.’ If a synchronic conscious belief that the act is morally wrong is required for full responsibility, very few will ever be responsible. Husak wisely tempers his position by expanding his notion of beliefs regarding moral reasons to latent beliefs, which are ‘probably all that is needed to render the wrongdoer responsible; an occurrence belief is not required’. Latent beliefs may be thought of as dispositional, says Husak, meaning we can discover an agent’s latent beliefs by prompting self-reports regarding what a person might do or what they have already done. If a person possessed a latent belief such that it was ‘able to play a role in the practical reasoning of a wrongdoer’, then it may provide a basis for holding a person responsible on Husak’s subjectivist reason-responsive theory – even if the belief was not actually utilised in generating the criminal act.

It seems necessary for Husak to soften his subjective view by allowing latent beliefs about the morality of an act to ground responsibility for it. But this move also makes his theory more nebulous. Did Sheila, the woman who killed the trespasser, have a latent belief that her action

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9Lon Fuller, The Morality of Law (Yale University Press 1964).
10Husak (n 2) 90.
11J.M. Fischer and M. Ravizza, Responsibility and Control: A Theory of Moral Responsibility (Cambridge University Press 1999).
12ibid (n 2) 136.
13ibid 148.
14ibid 149.
15ibid 154.
16ibid 191.
17ibid 200.
18ibid 201.
was wrong? Well – and this is an answer that seems troubling given the overall project of attributing criminal responsibility – it is hard to say. How much prompting is allowed to claim a person has a latent belief? If we asked her why she killed the man right before, or soon after, the killing, Sheila would probably tell us that she acted with a strong sense that she was doing the ‘right thing’ or at least something she had the right to do. But if Sheila were examined by Socrates, or a good therapist, she might realise that she believes that, generally speaking, life is precious and thus killing ought to be avoided in lieu of lesser exhibitions of force. She might also admit that it would be better to avoid deadly force against a trespasser when one has the option of safely retreating and calling the police. If a good therapist could tease these inferences out of Sheila’s existent belief system, did Sheila have a latent belief that killing the trespasser was wrong or not? If Husak says yes, then it seems we might reconstruct moral knowledge that an action is wrong in almost every case where ignorance of morality is claimed via some combination of already existing beliefs. In this case, almost no one is ever morally ignorant in Husk’s sense. On the other hand, if Sheila must have a synchronic conscious belief her action is wrong, or a specific latent belief that the particular action she is performing is wrong to be fully responsible, then full responsibility for an action may turn out to be fairly rare. (Relatedly, it seems unlikely that many would possess a specific latent belief that a particular action such as *killing a trespasser* is wrong, and then not recall it in any important sense before performing that exact act.) Many would balk at making full responsibility so uncommon due to such strict criteria for responsibility.

To make matters even more complicated, it seems likely that many defendants confabulate regarding their reasons for committing a crime: they may actively limit the scope of their reasoning, or focus upon certain reasons in order to justify their action. Husak indicates those who are wilfully ignorant – who do not inquire regarding the morality of their acts due to a fear of what they might find – are fully responsible.\(^{19}\) Although Husak says there is no general duty to inquire whether an act is wrongful or illegal, he claims that if one has the *sense* he has a duty to inquire, and then does not, one is fully culpable. He also claims that defendants who mistakenly think they are justified in their actions, like Sheila, may be ‘at least reckless about whether their acts are morally justified’.\(^{20}\) Husak claims such defendants may be partially culpable (but still less culpable than those that act with knowledge that what they are doing is morally wrong).

Of course, it is entirely unclear how a court would ever know if a person had a sense that he ought to inquire regarding the law, and thus whether a person was wilfully ignorant or just ignorant. Courts often get around this epistemological problem with regard to mistake of fact by holding a defendant to an objective standard with regard to their knowledge. If a reasonable person would have known the person was not a bear, then this defendant ought to have known – it doesn’t matter if he had a sense he should look harder to see if it was a bear or not. However, Husak rejects the negligence standard regarding an offender’s understanding of the wrongfulness of their act. Because he embraces a subjectivist reasons-responsive account, Husak claims that even if an offender’s lack of moral awareness regarding their crime is *unreasonable* – even if a reasonable person in the same circumstances would have known that their act was immoral – that lack of awareness is exculpatory. This rejection of the negligence standard would require the courts to figure out what the defendant actually knew or did not know in many more cases – a difficult task.

Rejecting the reasonable person standard also seems strange given Husak’s primary claim is that mistakes of law and mistakes of fact ought to be treated symmetrically. If Tabitha had shot the homeless man with the honest belief that he was a bear, but this belief was unreasonable

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\(^{19}\)ibid 176.  
\(^{20}\)ibid 208.
(e.g. she hardly glanced up before pulling the trigger), she would be held responsible for the
death due to her violation of a reasonable standard of care. Yet, even if Sheila’s belief that
killing the trespasser was the right thing to do is unreasonable, it seems she may be fully
excused on Husak’s theory.

The details of Husak’s theory also seem odd from the perspective of a compatibilist theory
of responsibility. Compatibilist theories were developed as a way to assign responsibility even if
an actor wasn’t the ultimate author of his act, or couldn’t have done other than he did. Fischer
and Ravizza’s theory revolves around the idea that we are morally responsible for an action
when the mechanism that issues that action is moderately reasons-responsive in an appropriate
way. They do not determine whether an agent is reasons-responsive based upon his actual syn-
chronic choice or on the beliefs and desires he had at the time he acts. Instead, to be reasons-
responsive an agent must have been regularly receptive to a range of reasons such that she
manifests an intelligible pattern of responsiveness (over time) from a third person perspective.
In addition, it must be shown an agent would react to at least one sufficient reason to do other-
wise than she did in some possible scenario – that is, she might have acted differently on some
close possible world. However, it does not follow that the agent could have responded differ-
etly to the actual reasons.

Thus, on Fischer and Ravizza’s view, there would seem to be no principled difference with
regard to moral responsibility between latent moral beliefs that the agent has and moral beliefs
he might acquire in some possible scenario. If it can be shown that an agent would have acted
otherwise had she been consciously aware of a latent belief regarding the morality of the action,
or had acquired a belief prior to the act regarding its morality, then he was reasons-responsive
when he acted and is responsible. That is, it doesn’t matter to a person’s moral responsibility
whether they failed to understand an act was wrong due to a failure to consider a latent belief,
or due to their failure to acquire a certain belief. Either way, the actor could not have con-
sidered that reason such that he acted differently. The only way in which a person with a
latent belief that his action is wrong might have acted differently given a latent belief is in a
counterfactual sense – the same sense in which a person might have responded to a reason
they do not actually hold had the situation been different. Thus, on a reasons-responsive
account, it would seem to be equally unfair, or fair, to hold a person responsible for failing
to act in accord with a belief he is not aware of at the time of the act, or a belief a reasonable
person might have easily acquired if the circumstances had been slightly different. And, on
Fischer and Ravizza’s theory, in both cases the actor is responsible for his wrongful act if he
was reasons-responsive at the time of the action, meaning he could have responded to a
belief the action was wrongful.

The aims of criminal law

Husak’s position that the two types of mistake ought to be treated symmetrically primarily
rests upon his belief that the sole purpose of criminal law and punishment is to address
moral wrongs by delivering just deserts. That is, Husak believes criminal law ought to be
purely backward looking: forward-looking aims, such as decreasing crime, or enhancing citi-
zens’ capacity to be law-abiding, ought not to play a role in the structure of criminal offences or
punishments. As discussed above, mistakes of law and mistake of fact can look similar from a
purely backward-looking perspective. A purely retributivist theory of criminal law assessments
criminal guilt and punishment based upon assessment of features of the offender and criminal
act.21 In general, considered, intentional acts done with the purpose of causing serious criminal

21ibid 21.
harm are more blameworthy than reckless, impulsive acts where the offender didn’t intend criminal harm. If the sole function of law is to track the moral blameworthiness of an offender, a person who is ignorant of a law she breaks may be considered less blameworthy than a person who is aware she is breaking a law, just as a person who makes a mistake of fact relevant to their crime is less blameworthy than a person who does not make such a mistake.

Mistakes of fact and mistakes of law come apart, however, with regard to forward-looking aims of criminal law. In part due to the relative accessibility of information about what’s legal and illegal, mistakes of law seem to be within a person’s control in a way that mistakes of fact usually aren’t, which means that persons can be incentivised to avoid them. Mistakes of fact are often perceptual mistakes that a reasonable person would make under the circumstances. The threat of punishment is unlikely to make reasonable persons more careful in their perceptions of the world; and further, it probably isn’t fair to ask people to be more than reasonably careful with regard to their factual understandings. However, it is likely that the threat of punishment will encourage people to be more aware of the content of the law as it applies to conduct they are considering. For example, persons considering using a tax haven can investigate the ins and outs of tax law, and persons found guilty of tax evasion may be motivated to be vigilant regarding tax laws. Similarly, an understanding that ignorance of the law is not an excuse may motivate people who keep guns in their homes for protection to investigate state castle laws.

Conclusions

Readers who believe the law has multiple functions, and free will sceptics who believe backward-looking responsibility is a fiction, are unlikely to be persuaded by Husak’s arguments. However, that does not mean they cannot learn from them. This book is an important contribution to the field. Husak successfully challenges many traditional assumptions about criminal responsibility, and may inspire even his critics to think more deeply about the role an offender’s subjective reasoning ought to play in an assessment of his responsibility.

The principle ‘ignorance of the law is no excuse’ has permeated American culture. This fact is important with regard to an attempt to justify the principle via the forward-looking function of decreasing crime. The principle must be known in order to successfully motivate those with a suspicion that their potential action may be illegal to seek information, and to indicate citizens ought to steer a wide berth around illegal behaviour. In cases where mistake of law is reasonable – where a reasonable person who wanted to be law-abiding couldn’t have avoided breaking the law – then ignorance ought to be considered exculpatory. In this way I agree with Husak’s call for symmetry between mistake of law and mistake of fact: I think both ought to utilise a negligence standard. However, Husak’s subjective standard with regard to the beliefs that underpin a mistake of law flies in the face of the forward-looking aims of law to make persons better moral agents, increase their agency, and to encourage them to be law-abiding.