The Model Penal Code has become the central document of American criminal justice. It has had some effect on law reform in over 35 states.\(^1\) More significantly, it provides the lingua franca of most people who teach criminal law in the United States. Most academics think that the precise definitions of culpability states in section 2.02(2)\(^2\) are really neat, and they applaud the liberal rules that restrict the use of strict liability to administrative fines. Indeed, all things considered, for a code drafted with almost total indifference to what might be learned from European models, the Model Penal Code is an impressive achievement.

The Model Penal Code's popularity is due probably to the lack of competition. Among the materials conventionally regarded as authoritative in common law jurisdictions, there is not much of a choice. Most teachers have contempt for the cases that appear in the case books. When I ask law professors to name a case that expounds the law in a way that they admire, they throw up their hands. In most other fields—torts, contracts, constitutional law, even civil procedure—there are many judicial opinions that command respect. Not so in the criminal law. Nor do the existing codes provide much solace. The adaptations of the Model Penal Code in states like New York and Illinois lack the conceptual integrity of the model statute. And surely, no one would take a 19th century state code, such as the California Criminal Code, as the model for proper analysis.

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\(^*\) Cardozo Professor of Jurisprudence, Columbia University School of Law. © 1998 by George P. Fletcher.


One could teach criminal law on the basis of theoretical articles and books. This is the way law is taught in all Continental jurisdictions and to a large extent in England and Canada, but for Americans, the use of real books to teach the law runs contrary to tradition. Books, however good they may be, are only secondary authority. They do not have the feel of the "real thing." Faute de mieux, the Model Penal Code offers itself to law teachers as an elegant and coherent alternative to the chaotic and ill-reasoned case opinions.

The downside of the Model Penal Code's influence is that it has come to shape our understanding of what a code should do in the field of criminal justice. The resulting assumptions are what I call the dogmas of the Model Penal Code. I formulate these assumptions as propositions of ironic advice to a legislature.

**DOGMA I: DEFINE AS MANY CONCEPTS AS YOU CAN— WHETHER YOU ARE COMPETENT TO DO SO OR NOT.**

The Code ventures precise definitions on matters where many philosophers fear to tread. Nothing is more controversial than the concept of the voluntary action as a precondition of criminal responsibility. But the Model Penal Code section 2.01(2)\(^3\) claims it has the answer. It merely defines what is not a voluntary act. The negative list includes "a reflex or compulsion" and other such paradigmatic instances that we tend to exclude from the category of self-actuated action. And then section 2.01(2) sums up the exclusion with the catch-all provision: any "bodily movement that... is not a product of the effort or determination of the actor, either conscious or habitual."\(^5\) Implicitly, therefore, the Code defines action as a bodily movement produced of the will—or as willed bodily movement.

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3. Id.
4. Id. § 2.01(2)(a).
5. Id. § 2.01(2)(d).
Would that the world were so simple—that the power to legislate were the power to solve philosophical problems. Whether this conception of action is correct or not proved to be one of the most hotly debated issues in German criminal law for several decades after World War II.

The drafters of the Model Penal Code may not have been aware that they had committed themselves to a “causal” as opposed to a “teleological” theory of action, but in fact they did. And what was the great utility of tackling this philosophical conundrum? In those cases in which there might be an issue of whether, say, sleepwalking was or was not a human action, the courts have no trouble consulting the scholarly literature on the subject.

Or consider Model Penal Code section 2.03, which dares to probe the mysteries of causation:

(1) Conduct is the cause of a result when:

(a) it is an antecedent but for which the result in question would not have occurred; and

(b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

This provision, of course, does not tell you much because the problems of “proximate cause” are deferred to other code provisions. The remaining subdivisions of section 2.03 provide more detailed solutions for the problem of remote damage in cases pitched to particular modes of culpability, e.g., purpose, recklessness,

6. For an explanation of the difference between these two theories of action, see George P. Fletcher, Rethinking Criminal Law 434-39 (1978).
7. Model Penal Code § 2.03(1).
Most of the stipulations end, however, with the proviso that the defendant should be criminally liable for remote harm only if the harm is not too remote "to have a [just] bearing on the actor's liability or on the gravity of his offense."

Including the word "just" in this proviso, of course, leaves all the difficult problems unresolved, and therefore the attempted verbal compassing of the concept turns out to be words with little constraining effect. The philosophical problem of causation turns out to be as difficult as the theory of action. With a stroke of the pen, legislators unequipped for the tasks cut through shelves of books they have never read.

One of the celebrated achievements of the Model Penal Code is the definition of the four mental states—purpose, knowledge, recklessness, and negligence—in section 2.02(2). These are highly complex definitions, hardly worth repeating here. Suffice it to say that the definitions are so complicated that one wonders whether any judge has ever mastered them. But even if they could be easily mastered, my objection is worth repeating. Are these matters really within the province of legislative wisdom and authority? After all, is there one accessible truth about the distinction between intentional and negligent conduct? Is the matter appropriately subject to legislative will?

My doubts about legislative competence in these areas—action, causation, and mental states—are nourished by a glance at the 1975 German Criminal Code. The German statute makes no effort whatsoever to define these contested concepts. Of course, German criminal liability presupposes a human action, just as American law does. But the German Code drafters saw no need to hazard a definition on a matter subject to philosophical controversy. Similarly, with causation

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8. Id. § 2.03.
9. Id. § 2.03(2)(b), (3)(b).
10. Id. § 2.02(2).
and indeed with the concepts of intention and negligence. The German Code uses all these concepts and specifies the consequences of causing harm or causing it intentionally, but the text contains no definition of these foundational elements.

Why, then, might the Model Penal Code venture definitions where the German drafters wisely abstain? The simple explanation is that the American approach to the drafting of a code proceeds on the assumption that the code must rest on its own bottom. It is not embedded in a theoretical literature that elaborates the essential concepts necessary for working with the code. We might call a code of this sort imperialistic. It seeks to displace not only the encrustation of the case law but also the teachings of scholars. It purports to be a comprehensive guide to the solution of the problems it addresses. Of course, the courts must apply the code and resolve some problems in the interstices of its provisions. Scholars are left with the residual task of writing commentary on the code and the case law.

**DOGMA II: WRITE PROVISIONS THAT SEEM PRECISE BUT THAT JUDGES COULD NEVER UNDERSTAND.**

A good example of this tendency are the provisions on culpability states already mentioned. Two provisions that could be very simple—those on purposely and knowingly committing offenses—depend on the subtle classification of each criminal act into the elements of the nature of the conduct, the consequences, and the circumstances. Each of these three categories require a different mental element for each of the two types of culpability. In all, then, the Model Penal Code uses four, perhaps five, different mental attitudes to describe two forms of culpability:

1. awareness of the element

2. practical certainty of the element
3. conscious object of the element

4. believes or hopes that the element exists

Needless to say that these four mental states could be allocated to the categories of nature, consequences, and circumstances of offenses in any number of different ways. There is nothing in the Model Penal Code to suggest that the present allocation is rational or coherent. As a result it is very difficult to remember which mental attitude goes with which category and which level of culpability. I would be greatly surprised if more than a handful of sophisticated judges actually understood and applied these overly complex provisions.

Another example of disaster in complexity is the definition of unlawful force in section 3.11(1). Recall that unlawful force is a key provision in a number of provisions on the justified use of force, particularly self-defense, which requires that the actor reasonably believe that the use of force is "immediately necessary" to counter the use of "unlawful force."

German law has a similar provision, which on its terms is very sensible. If the other side is acting lawfully, it should be improper to resist him with the use of defensive force. But the German Code would not deign to define "unlawful force." Open any German textbook and you will immediately find a clear and straightforward explanation that unlawful force is force that is unjustified but possibly excused. The German Code does not define the distinction between justification and excuse. That is something you learn by studying criminal law.

11. Id. § 3.11(1).
12. Id. § 3.04(1).
Compare the simplicity of the German approach with this prolix outpouring of words:

(1) "unlawful force" means force, including confinement, which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense (such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status) not amounting to a privilege to use the force. Assent constitutes consent, within the meaning of this Section, whether or not it otherwise is legally effective, except assent to the infliction of death or serious bodily harm.  

It is almost as though the drafters wanted the Model Penal Code to resemble a panoply of tax regulations. Criminal codes are not written for erudite specialists. They should be written so that average people and average lawyers and judges can understand their terms.

The fact is that this convoluted section 3.11(1) says exactly the same things as the German formula: unlawful force is unjustified but possibly excused force. The only difference is that in the late 1950s the drafters of the Model Penal Code could not call upon a theoretical literature in English that would have explained these elementary points to them, and the idea of looking abroad for guidance would have been an insult to the hegemony of American power and the common law.

Yet this is only partly the fault of the Model Penal Code drafters. The academic community in the United States had done nothing to develop the conceptual structures upon which codifiers could draft succinct and elegant provisions. If all the academic community does is comment on the un-wisdom of the case law, the drafters of codes must rely entirely on their wits to

15. Id.
further the progress of the law.
Section 3.11(1)\textsuperscript{16} offers us many lessons. The first is a lesson in conceptual breakdown, which occurs when there is insufficient attention paid to the building blocks—like justification and excuse—that are necessary for intelligent drafting. Second, as an unduly complex and incomprehensible provision in a model code, section 3.11(1)\textsuperscript{17} has found adoption in very few states.\textsuperscript{18} The point is that if provisions in a model code do not display their inner logic and necessity, local state drafters are likely to ignore them. This message comes, as we shall see, with regard to other proposals of the Model Penal Code.

\textbf{DOGMA III: ASSUME THAT YOU AND YOUR DRAFTING COMMITTEE ARE THE ONLY SMART LAWYERS WHO HAVE EVER LIVED.}

The Model Penal Code expresses contempt not only for European thinking about criminal law but about our own history. It does everything possible to distance itself from the common law text writers and the crystallization of concepts in the law of homicide and theft. Not even the notion of intentional crime survives. The concept is supposedly too confusing for modern lawyers. It is better to start over with the distinction between "purposely" and "knowingly" committing an offense. The term "material elements of the offense" is made to include the absence of all substantive defenses, which leaves the Code without a term to refer just to the elements that constitute the core of the prosecution's case. The Code abolishes the concept of malice and changes the name of provocation to

\textsuperscript{16} Id.

\textsuperscript{17} Id.

\textsuperscript{18} American Law Institute, Model Penal Code and Commentaries § 3.11, at 159, cmt.1, n.5, (Official Draft and Revised Comments 1985) (citing only six states that have adopted similar definitions of unlawful force).
“extreme mental or emotional disturbance.” As formulated by the Supreme Court in *Patterson*, it is perfectly sensible to think of psychological provocation not as a denial of the prosecution’s case-in-chief but as an “affirmative defense” with the burden of persuasion on the defendant.\(^{19}\)

In the field of theft offenses, the Code simply abolishes the historically crafted distinctions between larceny and embezzlement, which gave the common law offenses sharp edges, well designed to hold off zealous prosecutors seeking to punish all forms of dishonest behavior. That all European legal systems recognize this distinction is simply of no moment.

The arrogance of the Model Penal Code drafters overwhelms. The American Law Institute preempts the role of scholars and theorists by seeking to define concepts better left to philosophical deliberation. They ignore all European teaching. They abolish concepts that crystallized over time in the evolution of the common law. Yet perhaps it takes arrogance of these dimensions to create a legal monument of the influence the Model Penal Code commands.

**DOGMA IV: PRETEND TO SUBSCRIBE TO THE RULE OF LAW.**

The Model Penal Code makes a strong commitment to the principle *nulla poena sine lege* in section 1.05(1): “No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State.”\(^{20}\) Would that it were so.

Just a few provisions later, in section 2.01(3), the Code provides:

Liability for the commission of an offense may not be based on an omission unaccompanied by action unless . . . (b) a duty to perform the omitted act is otherwise im-

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20. Model Penal Code § 1.05(1).
This sounds good except that the term “law” in this provision refers to the case law. The earlier provision requires definition of all offenses either by the Code or supplementary statute. There is no reference to the possibility of common law duties to rescue others in distress. Had the drafters turned their attention to the Continent, they would have discovered that French jurisprudence prohibits this mode of judicial expansion called \textit{commission par omission}. The French, as well as virtually all other Continental jurisdictions, approach the duty to rescue by imposing a special statutory duty to render aid at the scene of accident. The violation occurs whether a harmful result ensues or not. In contrast, the Model Penal Code permits punishment for murder if the non-rescued victim dies and the court finds a common law duty to render aid. To their discredit, German courts also permit conviction for the offense in chief on the basis of a judicially imposed duty.

The point that amazes me is that there is virtually no discussion in the English language literature of this breach of rule-of-law values. Even if we continue to violate the principles we purport to endorse, we should at least be forthright about what we are doing.

\textbf{DOGMA V: WREAK THEORETICAL CHANGES, INADVERTENTLY IF POSSIBLE.}

We turn now from general flaws in the Model Penal Code to some specific problems in the drafting of provisions in the general part. Article III, addressing the general theory of justification, had brought several significant changes to the way Americans think about claims of justification, particularly self-defense. Most

\footnotesize{21. Id. § 2.01(3).}
of my comments will focus on section 3.04, which provides:

[Subject to later exceptions], the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.\(^{22}\)

The location and the wording of this provision raises major theoretical issues. First, coming as it does after the general provision of lesser evils, section 3.02,\(^{23}\) the Model Penal Code suggests that self-defense is merely an instantiation of the general principle that conduct is justified as lesser evils, according to section 3.02(1)(a), which provides that whenever "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."\(^{24}\) Some people think that this is the correct way of interpreting self-defense, even though in fact it is appropriate to cause much more harm in the act of self-defense than is threatened against the defender. It is clearly permissible to kill to avoid a rape. In order to fit this shared understanding under the principle section 3.02,\(^{25}\) one has to gerrymander the argument by adding all sorts of interests to the side of the defense, e.g. the social utility of deterring unlawful aggression. It is not clear why the Model Penal Code should insist on interpreting all claims of justification as instances of lesser evils. Yet for good or ill, the Code has had the impact of inducing American lawyers to think of self-defense as a specific application of section 3.02.\(^{26}\) New York lawyers have even developed the practice of re-

\(^{22}\) Id. § 3.04(1).
\(^{23}\) Id. § 3.02.
\(^{24}\) Id. § 3.02(1)(a).
\(^{25}\) Id. § 3.02.
\(^{26}\) Id.
ferring to claims of self-defense as the "defense of justification." Before one brings about this kind of theoretical shift, it might be worthwhile to pause and consider whether the shift is sound. I think that it is not.

Second, the drafting of section 3.04 makes the appeal to self-defense dependent on whether the belief of the actor is "that such force is immediately necessary." Prior to the Model Penal Code, the general consensus of Western legal systems was that self-defense presupposed a subjective requirement of knowledge and belief in addition to an actual attack on the defendant. Paul Robinson has argued repeatedly that the actual attack should be sufficient to ground the defense, but apart from a few isolated aberrations, this view has never prevailed yet in practice. Yet the way the Model Penal Code is drafted, it appears to go to the extreme precisely the opposite of Robinson's objectivist approach. According to the language of the provision, all that seems to matter is the actor's belief.

If everything turns on belief (reasonable belief according to section 3.09), then we generate the paradoxical proposition that reasonable belief can justify conduct. Yet, as just pointed out, the general theory of justification turns not on subjective considerations but on the cost/benefit analysis of an actual conflict. The Model Penal Code cannot have it both ways. It cannot make the justification contingent on reasonable belief of lesser evils, and then turn around and require that the interest spared actually outweigh the interest sacrificed.

The basic question raised by collapsing the objective and subjective sides of self-defense is whether it is coherent to claim that belief alone can justify conduct—so far as justification implies that conduct is right and proper. Kent Greenawalt has argued that

27. Id. § 3.04(1).
28. Id. § 3.09.
reasonable belief can, in certain situations, justify either self-defense or necessity based on lesser evils.\textsuperscript{29} I disagree but we need not rehearse that debate here, for the wording of section 3.04 seems to imply that belief alone can justify conduct.\textsuperscript{30} The problem of unreasonable belief enters the equation as a limitation on section 3.04, but a limitation applicable only where negligence can support a conviction for causing harm under an unreasonable belief in the necessity of self-defense.\textsuperscript{31} In a case like the \textit{Goetz} case,\textsuperscript{32} where the charges are attempted murder and battery, negligent perpetration of these offenses is excluded. Therefore, under the terms of the Code, even if Goetz's belief that he was about to be mugged was unreasonable, he was justified in responding in self-defense. This strikes me as an implausible view about the nature of justification. I am not addressing here the charge of reckless endangerment.

In the end, then, the Model Penal Code stands for a radical and implausible innovation in our thinking about the nature of justification. Justification turns out not to be a matter of social reality, as perceived by the defendant, but solely a matter of the defendant's beliefs, however irrational. This innovation hardly invites a convincing rationale.

The third innovation of the Model Penal Code in the field of self-defense is to drop the traditional requirement of an imminent attack and to replace it with the defendant's belief that his response is "immediately necessary . . . on the present occasion."\textsuperscript{33} This is a change that turns out to have great practical significance in cases of self-defense asserted by allegedly battered women after killing a feared partner in

\textsuperscript{30} Id. § 3.04.
\textsuperscript{31} Id.
\textsuperscript{32} People v. Goetz, 497 N.E.2d 41 (N.Y. 1986).
\textsuperscript{33} Model Penal Code § 3.04(1).
his sleep. There is no sense in which an attack is imminent but the defendant might indeed believe that a response is "immediately necessary . . . on the present occasion." The same claim would apply as a basis for total acquittal in the prosecution of the Menendez brothers who claimed that they thought that killing their parents who were then watching television was "immediately necessary." The restriction offered by the term "present occasion" lends itself to expansive interpretation.

It is hard to know how deeply the drafters thought about this radical change in the structure of self-defense. There is some evidence that they did not think about it very carefully, for section 3.02 on lesser evils is also drafted to permit a violation of law without regard to whether the risk to the actor is imminent. This seems to be a clear mistake in the drafting, and one typically corrected by the few states that have adopted a provision like section 3.02. If the omission represents a careless slip, then the same is likely to be true of section 3.04.

The requirement of imminent risk, typically found in foreign codes and recognized at common law, stands for an important principle. In the context of lesser evils, an imminent risk assures that the actor has no recourse but to violate the law. There is no way to avoid the harm by appealing to democratic processes. With regard to self-defense, the requirement provides a line of demarcation between the legitimate use of force and vigilante style self-help. This is a distinction that should not be scrapped or altered without the most serious reflection. I have my doubts as to

34. Id.
36. Model Penal Code § 3.02.
37. Id.
38. Id. § 3.04.
whether the changes in the Model Penal Code are informed by deliberations of the required self-consciousness and depth.

**DOGMA VI: PRETEND THAT THE PROBLEM OF MISTAKE DOES NOT EXIST.**

The Model Penal Code tries to push the problem under the legislative rug. Section 2.04(1)(a) provides that mistake about an element of an offense is relevant only, in effect, when the culpability factor assigned to the element accommodates the mistake. If purpose or knowledge is legislatively assigned, then any mistake, even an unreasonable mistake, will negate the required culpability. If recklessness or negligence is the required mental element, then only reasonable mistakes will suffice. If no state mental is required for the particular element, then a mistake as to that element is irrelevant. The logical symmetry is sufficiently clear. In effect, it eliminates the problem of mistake as an independent arena of moral and theoretical inquiry. Read the local statute and you know how to gauge the impact of mistake.

Of course, the entire approach assumes great legislative wisdom, but the Model Penal Code’s own confusions in this area indicate how difficult it is to be consistently wise in drafting a code. The language of the Code (material elements of the offense) purports to include the absence of justification and excuse in the formula of section 2.04(1)(a):

> the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense.\(^{40}\)

Yet the drafting of the defenses in Articles 2 and 3 does not even come close to the prescribed method of

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39. Id. § 2.04(1)(a).
40. Id.
assigning a culpability level to each element of the defense. To return to the example of self-defense in section 3.04, we learn that the defendant must (reasonably) believe that the use of force is immediately necessary on the present occasion. He is mistaken if, for example, he thinks that he is being attacked when he is not. If the mistake is unreasonable, then he risks liability under section 3.09(3). Yet the logic becomes a bit confusing. If this mistake results in the loss of the justification, it will not be because the mistake negates the culpability element required for the offense. Its effect is just the opposite: the mistake establishes the negligence required for liability for another offense, with the resulting forfeiture of the justification.

This example informs us that the general formula of the Model Penal Code is oversimplified. You cannot simply argue that the problem of mistake is resolved as soon as you specify the culpability requirements for the elements of every offense. Mistakes about the circumstances of justification function differently from mistakes about core elements of the offense. For one, according to the scheme of the Model Penal Code, the mistake simply transforms the defendant’s state of mind from knowledge to belief. In itself, this has no effect on the availability of the justification. If the mistake is unreasonable, then it continues to justify the act but it also generates a basis for charging the justified actor with negligently or recklessly committing a subsidiary offense. Mistake in the field of justification, therefore, is a double-edged sword. It has a blunt edge with regard to the problem of justification and a sharp edge for generating additional liability.

Mistakes with regard to excusing are equally complicated. The Model Penal Code seems to be oblivious to the problem of mistake in making a claim.

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41. Id. § 3.04(1).
42. Id. § 3.09(3).
say, of duress as a excuse. Section 2.09(1) provides:

It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

Let us suppose the threat is to kill the actor’s child who is missing, allegedly kidnapped by the threatener. A person of reasonable firmness would presumably give in to the threat, at least if the act required were not outrageously costly to human life. But suppose that the actor thinks that he has received this threat (he misreads the letter) when in fact he has not. This is a mistake about the conditions of duress. Is he still excused if a reasonable person would have engaged in the same misreading of the letter? The Model Penal Code fails to supply an answer. It is also clear that section 2.04(1) has no traction in this case. Though the absence of duress is technically “a material element of the offense,” the drafters have no answer to the problem.

There are other more serious problems in applying the theory of mistake to the Model Penal Code. What if the actor thinks that, in line with the defense created in section 2.04(3), he is proceeding in reliance on a “judicial decision” that authorizes his conduct? In fact, just before his acting, the decision is overruled. Had the decision been in force, his reliance would have been reasonable and, let us say, his mistake about the existence of the decision is also reasonable. Does it follow that he can act in reasonable reliance on a nonexistent source of law? Again, the Model

43. Id. § 2.09(1).
44. Id. § 2.04(1).
45. Id.
46. Id. § 2.04(3).
Penal Code does not give us a clue on how to proceed in this case.

These examples illustrate the theoretical difficulties that haunt the theory of mistake. If the drafters of the Model Penal Code had been the slightest bit humble in their theoretical pretensions, they might have recognized that there were areas of criminal responsibility that they themselves were not in a position to resolve in black letter rules.

The fact is that even today deep problems in the theory of mistake remain unresolved. One of the nagging issues is the treatment of mistakes about consent in rape cases. The problem is typified by the shameful decision in *D.P.P. v. Morgan*, in which the House of Lords held that any mistake about whether a protesting women in fact consents to intercourse negates the intention required for rape and therefore precludes liability.47 This decision is still followed in England (despite corrective legislation to the contrary), Canada, Israel, and it expresses the dominant view in the German theoretical literature.

The basic problems in this case are first, how should we treat mistakes about factual presuppositions about claims of justification? And second, how should we classify consent in rape cases? Is it a claim of justification or is absence of consent properly regarded as a core element of the prosecution's case? The House of Lords just assumed, without any theoretical reflection, that the required intent in rape encompassed the absence of consent. If this is true, then it follows that even unreasonable mistakes are a defense to liability. The problem is whether this classification of consent is correct. Though I think it is better to treat consent as a justification, I concede that problems attend this view as well.

With regard to the *Morgan* problem, the Model Penal Code proves to be inadequate for two reasons.

First, it provides no classificatory or theoretical treatment of consent at all. Second, if the general principle of justification based on belief in Article III were applied, it would lead to an acquittal based on the simple, possibly irrational belief in consent in rape cases. Since in the absence of special legislation, negligent rape is not punishable, a negligent or unreasonable mistake about consent would lead to a total acquittal.

It is clear that the fair and sensible answer in this area would lead to liability for negligent mistakes about the consent of a sexual partner. How one generates the theoretical structure to lead to this result remains unsolved. That the problems in this area are so difficult makes one wonder how the drafters of the Model Penal Code could believe that the problems did not exist at all.

**DOGMA VII: RECOGNIZE BUT DO NOT RECOGNIZE MISTAKE OF LAW AS AN EXCUSE.**

Our last dogma is a modest complaint. The Model Penal Code proposes to correct a basic inadequacy in the common law by recognizing a defense of mistake of law in section 2.04(3). The basic idea is that the actor has an "affirmative defense" if he has acted in reasonable reliance on any one of a number of official sources of listed sources of law. At the conclusion of the provision we learn that the defendant must prove this defense without a name by a "preponderance of the evidence." Now why, it is fair to ask, does the Code shift the burden on this issue but not on self-defense or duress or insanity?

As a matter of legislative politics, the answer is that this is a relatively new defense. It is a version of mistake of law, which was supposed to be a defense at

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49. Id. § 2.04(4).
common law. Recognizing something new, the drafters understandably thought they should tread carefully and hedge the new possibility of acquittal by requiring the defendant to prove the issue.

Does this argument carry as a matter of principle? The first thing we should try to figure out is why add this encrustation to a criminal code? Why should someone be acquitted simply because he acted in reasonable reliance on an official statement of the law? As Jerome Hall once argued, does this not mean that he is able to substitute his own opinion of what the law is for the law itself?

If we look at the location and the drafting of the provision, we get only minimal clues to the nature of the claim. The provision appears in Article II rather than Article III. This means that it is not a justification and that it bears, as the title of Article II indicates, on the "general principles of liability." It is in the nature of a mistake, and it appears in section 2.04 along with other provisions on mistake.\(^5\) It is something like duress, regulated in section 2.09, also a defense and not a justification.\(^6\) This is not much to go on. The basic problem of the Code is that it provides no conceptual point of contact between its inherent structure and this provision on reasonable reliance on official statements of law.

The provision in section 2.04(3) appears to be something like a gift to the defendant, a gift that can be compromised by making the defendant pay for it by bearing the burden of persuasion.\(^52\) The only provision in the Code in which the drafters shift the burden is entrapment in section 2.13, a defense that functions like an exclusionary rule designed to discipline police for improper behavior.\(^53\) Perhaps the proper interpretation of the reasonable reliance provision is that by

\(^{50}\) Id. § 2.04.
\(^{51}\) Id. § 2.09.
\(^{52}\) Id. § 2.04(3).
\(^{53}\) Id. § 2.13.
analogy to entrapment, it is designed to discipline state agencies for issuing misleading statements of the law. If that is the correct reading, a state legislature might well decide that it is not in the business of disciplining state agencies and therefore it should be free to delete provisions so designed.

The better reading of section 2.04(3), however, seems to be that a reasonable mistake of law negates moral culpability for violating the law and no one should be punished who has acted culpably and wrongfully and in violation of the statutory law. This is a relatively simple proposition that has adherents in all legal systems that follow, more or less, the German model of liability. It even enjoys constitutional status in Germany, Italy, and to some extent, in Canada. The Model Penal Code's rejection of strict liability for offenses posing a threat of imprisonment shows that the drafters also understood this basic principle of justice.

If the drafters had explicitly grounded mistake of law in its logical relationship to moral culpability, state legislators would have seen that by eliminating this provision, they were striking at the heartland of the Code. It would have been like adopting the Model Penal Code but striking the provision on insanity or duress. Of course, if the drafters had clearly recognized that the new defense was simply a natural extension of the requirement of moral culpability, they would not have been able to shift the burden of persuasion on the issue—at least the contradiction would have been more apparent.

The unfortunate fate of section 2.04(3) instructs that a sensible design of excusing conditions, including mistake of law, cannot proceed without acknowledging up front that punishment by imprisonment presupposes morally culpable, wrongful conduct in
violation of the statutory law. To have done this correctly, the Model Penal Code would have had to avoid the typical common law mistake of reducing the concept of culpability to subjective mental states, such as purposely and knowingly committing offenses. But if the Model Penal Code had been able to recognize the role of moral culpability in crime, they could have drafted the problematic definition of unlawfulness in section 3.11(1) more clearly and directly. A simple definition of excuse as a denial of moral culpability would have enabled them to say that unlawful force simply means force that is unjustified but possibly excused.

Now, nearly 30 years after the drafting of the Model Penal Code, Herbert Wechsler and his innovative colleagues are hardly responsible for the mistakes that persist in the draft. The responsibility has shifted to the academic profession that continues to study and teach the Code. If we repeat the mistakes of the founders, we are the ones who deserve the blame.

56. Id. § 3.11(1).