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Mistake in the Model Penal Code: A False False Problem

George P. Fletcher
Columbia Law School, gpfrecht@gmail.com

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No solution seems more gratifying to the modern theorist than to claim that an apparently serious problem is not really a problem at all. By branding nonfalsifiable propositions as nonsense, the Vienna circle of logical positivists discovered that the metaphysical concerns of others were really false problems. By ridding philosophy of false problems, Wittgenstein thought that he could let the fly escape from the bottle; he could release the philosophical spirit from its confounding constraints. Brainerd Currie brought this method to the law with his justly famous theory of false conflicts in the conflicts of laws.[1] There was no need to worry about false conflicts; they were not real problems. The Model Penal Code takes the same tack toward the problem of mistake. To understand the Model Penal Code's claim that mistake is a false problem, we must first understand why judges and theorists have been confused and troubled about when mistakes about the issues bearing on liability should constitute a defense.

One of the major conundrums in the common-law approach toward mistake is why courts differ on the kinds of mistakes that should bar liability. Sometimes the courts hold that any mistake, reasonable or unreasonable, negates liability. In its recent, controversial decision in *Regina v. Morgan*,[2] for example, the House of Lords decided any mistake about whether the putative victim of rape consented to intercourse should be a complete defense.[3] In other situations, the courts insist that for a mistake to constitute a defense, it must be the kind of mistake that a

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* Professor of Law, Columbia University School of Law. B.A. University of California at Berkeley; J.D. University of Chicago, 1964; M.C.L. University of Chicago, 1965.

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1. *See, e.g.*, Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958).

2. [1975] 2 W.L.R. 913.

3. *Id.* at 926-60.

reasonable person would make under the circumstances. In *Hernandez*,[4] the California Supreme Court decided that in a statutory rape case, a mistake about the age of the girl would be a defense only if that met this standard of faultless conduct.[5] By like token, the New York Court of Appeals held last year, in the highly publicized *Goetz* case,[6] that a mistake about the factual presuppositions of self-defense should be a defense only if the mistake were one that a reasonable person would have made under the same conditions.[7] Why is it that some courts recognize every mistake as a defense and others limit the defense of mistake to reasonable misperceptions of the surrounding circumstances? Do different courts have different rules? Would the New York and California courts decide *Morgan* differently? Or is there some important theoretical distinction among the issues at stake in the cases — a distinction that would explain why in some cases any mistake will do, while in others, the mistake must be reasonable.

It is also difficult to understand why some mistakes are treated as totally irrelevant to liability. If a criminal actor is mistaken about the applicable statute of limitations, he could hardly expect much judicial sympathy. If he believes, falsely, that he is exempt from prosecution when he sniffs cocaine on his yacht because he is beyond the three mile limit of state territorial waters, his claim of mistake would hardly get far in court. Nor would he do well in escaping liability if in fact he was two miles out to sea and he thought the territorial limit of jurisdiction was only one mile. Why should these mistakes be treated as irrelevant?

Mistakes get their relevance from the actor's innocent frame of mind. By virtue of his mistake, in all of these cases, the actor thinks that his conduct is perfectly legal. So far as his own good faith effort to comply with the law controls the analysis, he should be acquitted in all of these cases. Yet he is not. Obviously, the actor's own subjective perspective on his conduct, his own good faith, cannot always be decisive. The problem is figuring out why mistakes must sometimes be reasonable in order to count, and why sometimes they are treated as irrelevant to liability, even if they are reasonable.

To the drafters of the Model Penal Code, all of these theoretical issues constitute a false problem. Under the Code, claims of mistake, like claims of accident, stand in a conceptual relationship with the culpability required for the particular offense. The basic principle that mistakes acquire their relevance from culpability is spelled out in section 2.04(1) of the Code:

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4. People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964).
5. *Id.* at 536, 393 P.2d at 677-78, 39 Cal. Rptr. at 365-66.
6. People v. Goetz, 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18 (1986).
7. *Id.* at 114-15, 497 N.E.2d at 52, 506 N.Y.S.2d at 29-30.

Ignorance or mistake as to a matter of fact or law is a defense if:

> (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or
> (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

The mechanics of this provision are best illustrated by the connection between mistake and intention. If murder presupposes "an intent to kill a human being," then a good faith belief that one is shooting at a tree rather than a human being precludes a finding of intentional killing. In general terms, the intention required for particular offenses consists of two factors: (1) the action verb that is the object of the phrase "intent to," and (2) the physical act that is the necessary object of this action. The simple insight, then, is that if the actor's mistake makes him ignorant of the necessary object of his intentions, it cannot be said that he intends to do the act required for the offense.

For example, the intention required for common-law larceny is "intent to deprive the owner permanently of his property."[8] If the defendant takes bomb casings from government land on the mistaken assumption that the government has abandoned its property interest in the casings, then he does not have the intent to deprive anyone of "property."[9] The logical relationship between mistakes and intention is immune to value judgments about the moral quality of the mistake; unreasonable mistakes negate the required intent as much as reasonable mistakes do. The analysis is that simple — provided you know what the required intent is.

For many offenses, however, the required intention is surprisingly elusive. How could the House of Lords in *Morgan* be so confident that the required intent in rape should be defined as "the intent to have intercourse with a nonconsenting woman"[10] rather than more broadly as "the intent to have intercourse with [any] woman?" It should be clear that on the former view, any mistake as to consent is a defense; on the latter view, the mistake would not negate the intent and our rule of thumb for analyzing the effect of mistake would be inapplicable. One could hardly say that every relevant factual issue in the case is included within the scope of the required intent. If it were, then the issue of self-defense would be analyzed in the same way as consent. The required intent for homicide would be "to kill a non-

8. People v. Brown, 105 Cal. 66, 38 P. 518 (1894); LARCENY ACT 1916, 6 & 7 Geo. 5, c. 50, § 1.

9. *See* Morissette v. United States, 342 U.S. 246, 276 (1952).

10. *Morgan*, 2 W.L.R. at 927-31.

aggressing human being"; even an unreasonable belief about the victim's aggression would negate the required intent and constitute a complete defense. If every relevant factual issue were intrinsic to the required intent, any mistake would be a good defense. There would never be a ruling, as there was in the *Goetz* case, that the particular kind of mistake must be reasonable under the circumstances.[11]

The drafters of the Model Penal Code also thought they had a solution to this problem of analyzing mistakes about elements extrinsic to the required intent. The drafter of every specific defense must allocate one of the four culpability elements — purposely (the Code's word for "intentionally"), knowingly, recklessly or negligently — to each "material element of the offense."[12] Hence, it would be up to the legislature to specify whether as to each element such as the age of the girl or the nonconsent of the woman, the suspected offender must act purposely or with one of the lesser modes of culpability.[13] If one of the lesser modes is specified, the problem of mistake reduces whether the mistake negates that lesser culpability element. Thus if the legislature specifies that recklessness or negligence is required as to the age of the girl, the defendant will be liable only if he disregards the risk that the girl would be under age[14] or if he is unaware of the risk[15] under circumstances in which a reasonable person would have been mindful of the risk. In other words, in those situations in which the legislature has ruled on the matter, a mistake will negate the required culpability only if the actor has conformed to the standard of a reasonable person under the circumstances. Thus, a careful reading of the statute solves the problem of mistake as to material elements that are not covered by the required intention. Further, this solution explains when and indeed why the mistake must be reasonable.

But how do we decide, on the basis of the Code's approach, whether a mistake is relevant at all? In line with the drafter's basic strategy, the legislature makes that decision in deciding which culpability requirement

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11. *Goetz*, 68 N.Y.2d at 114-15, 497 N.E.2d at 52, 506 N.Y.S.2d at 29-30.

12. MODEL PENAL CODE § 2.02(1) (1985).

13. Virtually all recent legislative revisions and proposals follow the Model Penal Code in setting up general standards of culpability. MODEL PENAL CODE § 2.02 commentary at 283.

14. MODEL PENAL CODE § 2.02(2)(c) defines "recklessly" as requiring that the actor's disregard of "a substantial and unjustifiable risk . . . involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."

15. MODEL PENAL CODE § 2.02(2)(d) defines "negligently" as requiring that the actor's "failure to perceive [a substantial and unjustifiable risk] . . . involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."

to assign to each element of the offense. If the legislature assigns knowledge as the required culpability, any mistake will be a defense; if it assigns recklessness or negligence to the particular issue, the mistake must be reasonable to escape classification as one of these levels of fault; if it expressly assigns no culpability requirement at all to the particular element, then no mistake as to that element will constitute a valid defense. Another way to express the irrelevance of mistakes on a particular issue is to say that liability is "strict" on that issue.

The strategy for rendering mistake a false problem, then, is to require that the legislature define the culpability required for the offense. Of course, deferring to the legislature does not solve the problem of mistake as a matter of principle. Should the intent required for statutory rape include the belief that the girl is under age? Or perhaps, at the opposite extreme, should liability be strict on the issue of age? Should the intent for homicide include the belief that the intended victim is not an aggressor? Or should mistakes on the factual basis for self-defense be treated as extrinsic to intent, thereby opening the way to a defense of reasonable mistake? Taking the statute as authoritative on these difficult questions merely shifts responsibility for the theoretical work to a legislative committee. The Model Penal Code renders the mistake a false problem, but only by pushing the entire theoretical conundrum under the legislative carpet.

From the treatment of this theoretical issue, one might think that the Model Penal Code avoids taking a stand on questions of principle. But this is not the case at all. The Code contains several provisions that the drafters took to be elementary in fashioning a just penal code. One of these is the principled opposition to strict liability. The official commentators to the Code proclaim their "hostility" to strict liability.[16] The general rule for interpreting statutes is that if the legislature is silent about the culpability required for a "material element of an offense," the culpability level to be inferred from the statute is recklessness.[17] If, contrary to this general rule, the legislature explicitly imposes strict liability as to one or more material elements of any offense, the offense should be treated as a "violation,"[18]

16. 1 MODEL PENAL CODE AND COMMENTARIES (Official Draft and Revised Comments) 264 (1985) [hereinafter cited as COMMENTARIES].

17. MODEL PENAL CODE § 2.02(3). Literally, this provision specifies that purpose, knowledge or recklessness is required unless the legislature clearly imposes liability for negligence or strict liability. But note MODEL PENAL CODE § 2.02(5), which ranks the four kinds of culpability in the following transitive order: purpose, knowledge, recklessness and negligence. When any one of these is required, every form of culpability to the left will suffice for liability. It follows that we can interpret section 2.02(3) as requiring at least recklessness.

18. MODEL PENAL CODE § 2.05(2)(a).

thus implying that imprisonment should be impermissible.[19] These provisions, taken together, substantiate a general aversion to strict liability in the Model Penal Code.

Taking a stand against strict liability revives the problem that the drafters thought they had dissolved by deferring to the legislative definition of the offense. If strict liability is to be avoided, whenever room for judicial interpretation permits, then serious theoretical work is required to know how far to press the principled aversion to strict liability. Does it extend to mistakes about jurisdictions and the statute of limitations? Should we say that disregarding mistakes of law is an instance of the disfavored institution of strict liability? For the Code to maintain its principled stand against strict liability, it must supply answers to these questions.

The beginnings of an answer are found in the Code provisions on mistake and strict liability. The general provision on mistake, as noted above, applies only to mistakes that negate the culpability "required to establish a material element of the offense."[20] The same phrase "material element of the offense" circumscribes the Code's presumptive prohibition against strict liability[21] as well as the provision establishing the minimal culpability requirement of recklessness.[22]

A great deal turns, therefore, on the definition of "material elements." The Model Penal Code defines this key term by first defining the broader term "elements of the offense" to include every possible factual issue, such as the substantive and procedural circumstances that could bear on liability[23] and then approaches the definition of "material element" negatively to mean: "an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse of such conduct."[24] This provision hardly explains

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19. *See* 1 COMMENTARIES, *supra* note 16, at 282-83.
20. MODEL PENAL CODE § 2.03.
21. *Id.* §§ 2.05(1)(b), 2.05(2)(a) & (b).
22. *Id.* § 2.02(3).
23. *Id.* § 1.13(9) which provides:

(9) "element of an offense" means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as

(a) is included in the description of the forbidden conduct in the definition of the offense; or

(b) establishes the required kind of culpability; or

(c) negatives an excuse or justification for such conduct; or

(d) negatives a defense under the statute of limitations; or

(e) establishes jurisdiction or venue. . . .

24. *Id.* § 1.13(10).

why strict liability should be acceptable as to issues unconnected to the "harm of evil" or claims of "justification or excuse."[25] Intuitively, we might think that a mistake about a procedural condition for prosecution should have little bearing on the justification for liability and punishment. But this intuition demands explication and clarification.

In general terms, the distinction at work in the definition of materiality tracks the more conventional boundary between substance and procedure. The statute of limitations, for example, bears only the procedural value of prosecuting offenses after the events have become "stale" and the witnesses are likely to become relatively unreliable. Presumably, the drafters did not wish to rely on this conventional distinction. The distinction between substance and procedure has become so blurred in the conflict of laws and in post-*Erie* jurisprudence that the drafters preferred a convoluted definition that merely hinted at what they were after.

Yet, the distinction between substance and procedure is what they intended. Although the distinction has become fluid, we have no better terms to explain why some mistakes (namely, those about procedural facts) should be regarded as irrelevant. But how do we account for this distinction? Why should mistakes about substantive issues excuse the actor, but mistakes about procedural conditions for prosecution be deemed beside the point? A simple, straightforward answer might be that the procedural issues bear on the fair prosecution of a crime, not on the definition of that crime. And if procedural rules are extrinsic to the focus of the prosecution, an actor's mistake about the factual preconditions of these rules should have no bearing on the actor's substantive liability.

Underlying this distinction, however, is a conception of guilt or blameworthiness that justifies the imposition of criminal sanctions. Mistakes about procedural issues do not detract from the actor's guilt, but mistakes about substantive issues (in Model Penal Code terms: the harm or evil sought to be avoided, justification and excuse)[26] somehow undermine guilt to the point that punishment is no longer justified as a matter of principle. Implicit in the Code's reliance on the term "material element of an offense," then, is a deep, unexplicated theory of guilt as it relates to deserved punishment.

The drafters of the Model Penal Code would not readily concede that the Code incorporates theories of guilt and of deserved punishment. They sought to exhaust the analysis of guilt, blame, culpability and related

25. The commentators to the Model Penal Code do not have much to say about these definitions and their implications. *See* 1 COMMENTARIES, *supra* note 16, 210-11.

26. MODEL PENAL CODE § 1.13(10).

concepts of *mens rea* by specifying four "kinds of culpability." Two of these definitions — purposely and knowingly — proceed as though culpability were simply a matter of fact, reducible to what people believe, think and take as the object of their actions.[27] The gap is not so easily bridged between a factual description of a state of mind and the kind of moral condemnation that can support a judgment of deserved punishment. Yet the working out of this inference obviously did not engage the attention of the drafters of the Code. It is not discussed anywhere in the Code or in the Commentaries.

Rather than explicate the premises underlying their thinking, the drafters simply ruled out mistakes extrinsic to substantive issues. Though they avoided the terms "substance" and "procedure," they relied on the conventional intuition that only mistakes about substance should bear on the actor's susceptibility to liability and punishment.

The most daring stroke in the definition of "material elements" was the flattening out of the criteria of liability, so that elements of defenses (justifications and excuses) receive the same treatment as "the harm or evil, incident to conduct, sought to be prevented by the law defining the offense."[28] It does not matter whether the mistake is about the inculpatory criteria defining the relevant harm (*e.g.*, a mistake about whether the subject of an organ removal is already dead) or about the exculpatory criteria for legitimate self-defense (*e.g.*, a mistake about whether the person one violently disables was then in the process of committing aggression). Of course, there is the simple logical difference that the prosecution must assert that the victim was alive at the time of the defendant's action, while in cases of self-defense, the defendant typically bears the burden of asserting the issue and going forward with the evidence.[29] As the argument goes, however, this purely formal difference should have no bearing on the analysis of liability. There is no reason why one could not consider claims of justification simply as negative elements of the offense. The common-law definition of murder is then rewritten to cover the "killing of another human being with malice aforethought *and absent self-defense*."[30] For the time being, let us limit our discussion to the

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27. MODEL PENAL CODE § 2.02(2)(a), (b). Note that the definitions of recklessness and negligence require value judgments, respectively, about "the standard of conduct that a law-abiding person would observe in the actor's situation," *id.* § 2.02(2)(c), and the "standard of care that a reasonable person would observe in the actor's situation." *Id.* § 2.02(2)(d).

28. *Id.* § 1.13(10).

29. In some exceptional situations, the defendant must also bear the burden of persuasion on self-defense. *See* Martin v. Ohio, 107 S. Ct. 1098, 1103 (1987).

30. On the common-law definition of murder, see 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 194-95 (1769).

thesis that the exculpatory elements required for a justification, such as necessity or self-defense, could be treated as negative elements of the crime. Let us call it the "negative elements" thesis. We shall take the special problems connected to claims of excuse (*e.g.*, duress, insanity) later. The first notable thing about the structure of the Model Penal Code is that there are two distinct paths for adopting the "negative elements" thesis. There is the special set of provisions for analyzing mistakes made about the conditions of justification. Before turning to these provisions, we should seriously note the Code's claim that its elements of justification and excuse are "material elements of the offense." If they are, then the general rule on mistake[31] should apply to the analysis of mistakes about the claims as well. The first step, then, is to check the definition of particular offenses to determine the "kinds of culpability" assigned to the negative elements of justification attached to that offense. Under this approach, however, one discovers a remarkable fact about the definition of particular offenses. One would expect that the definition of homicide would specify the absence of self-defense as one of the elements of the crime. But such is not the case. The only elements that matter in the definition of homicide, manslaughter and self-defense are the causing human death and culpability — not a word about self-defense.[32]

The same omission is evident in other offenses. From the definitions of assault,[33] and false imprisonment,[34] one gets no clue of the possible defenses. Perhaps this should not be a surprise. That is the way the common law treats the definition of offenses. The offense is conceptually distinct from the possible defenses — claims of justification, excuse and mitigation. Yet this is the divide that the Model Penal Code seeks to span with its all encompassing bridge of "material elements." Supposedly, there is no important difference between the inculpatory elements of the offense and the exculpatory criteria of defense. One can only be puzzled, then, that specific offenses are defined without specifying the possible defenses.

Is there any way to apply the general mistake provision in section 2.04 to the defenses without building in these criteria of justification and excuse into the definition of the offenses? Two special fail-safe rules in the Code might come to the rescue. According to section 2.02(4): "When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of

31. *See* MODEL PENAL CODE § 2.04(1).
32. *See id.* §§ 210.0-.4.
33. *Id.* § 211.1.
34. *Id.* § 212.3.

the offense, unless a contrary purpose plainly appears."[35]

One would like to interpret this provision to mean that if the drafters fail to mention possible defenses in the definition of the material elements, then the culpability specified for the offense would apply as well to the absence, say, of self-defense. One commits murder by knowingly causing the death of a human being;[36] it would follow that the requirement of "knowingly" would then apply to the absence of justificatory conditions such as self-defense. In general terms, the elements of self-defense are first, that another person is about to commit unlawful aggression against the defender, and second, that force is necessary to repel the aggression.[37] In order to be guilty of murder, then, the actor must at least know that one of these two conditions is not present.[38]

It would follow from this reading that in the case of negligent homicide, the culpability required as to the conditions of self-defense would be merely negligence rather than knowledge. There would be no reason, in the view of the drafters, to treat the elements of self-defense differently from the core elements of homicide.

The alternative provision that might apply to this problem of the Code's failure to include the absence of defense in the definition of particular offenses would be section 2.02(3), which states that in the failure to specify a culpability requirement, the minimal requirement should be recklessness — not negligence.[39] If this provision is applied, the culpability required for the conditions of self-defense would not vary with the culpability required for the core offense. Whether the prosecution was for knowing, reckless or negligent homicide, the prosecution would have to prove that the defendant was at least reckless in his belief, for example, that another person was about to attack him.

The first provision, which coordinates the culpability in the area of justification with the culpability for the core elements, is more in keeping with the effort of the Code to overcome the distinction between core elements and criteria of justification and therefore we should apply it. I have serious doubts, however, whether this reading is warranted on the face of the provision. The phrase "without distinguishing among the material

35. *Id.* § 2.02(4).

36. *Id.* §§ 210.1, 210.29(1)(a).

37. *See id.* § 3.04(1).

38. The logic of this conclusion may need clarification. Self-defense requires the proof of two conditions, A + B. The prosecution disproves (A + B) by showing either not-A or not-B. If knowledge extends to the material elements not-A or not-B, then the actor must know either not-A (he is not being aggressed against) or not-B (it is not necessary to use the degree of force in question to repel the attack).

39. MODEL PENAL CODE § 2.02(3).

elements thereof"[40] implies that the drafters were concerned about the problem of distinguishing among the elements internal to the legislative definition of an offense. Take the definition of murder: knowingly causing the death of another human being.[41] The purpose of section 2.02(4) is to make it clear that the term "knowingly" applies with equal force to all of the core elements of the offense: (1) causing, (2) death, of (3) a distinct and separate being, that is (4) human. The Commentaries do not hint that the provision might apply to the conditions of justification and excuse.[42] Also, the Commentaries strongly endorse the related New York provision,[43] but the latter clearly distinguishes between the culpability required for the "offense" (meaning the core elements of the offense) and the culpability required for a "defense," "exemption" or "justification."[44] New York rejects the "negative elements" thesis and treats claims of justification as conceptually independent of the definition of the core offense.[45] Nonetheless, as I have suggested, the better reading of the Code's general theory, articulated most clearly in the definition of material elements[46] and the adoption of the "negative elements" thesis leads us to reject section 2.02(3) and instead extend section 2.02(4) to cover the criteria of justification and excuse.

Consider how this provision would work in the analysis of the mistake that might be attributed to Bernhard Goetz: he thinks that he is about to be assaulted and robbed by four youths on the subway. Let us also suppose, for the moment, that he succeeds in killing one of the youths. Under the Model Penal Code, he could be charged with either knowing, reckless or negligent homicide. The prosecution would have to prove, depending on the level of the offense, that Goetz knew that he was not about to be attacked, that he was reckless or negligent in believing that an attack was imminent.

One reason the Commentaries may fail to discuss the extension of the general provision on mistake[47] to claims of justification is that the Code contains a special set of rules on the analysis of these mistakes. All of the

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40. *Id.* § 2.02(4).

41. *Id.* § 210.2.

42. *See* 1 COMMENTARIES, *supra* note 16, at 245-46.

43. *Id.* at 246 n.38.

44. N.Y. PENAL LAW § 15.20(1)(a), (b), (c) (McKinney 1987).

45. The implication of the New York position in the analysis of mistake in cases of justification proceeds independently of the culpability required for the core elements. All mistakes must be reasonable (those that a reasonable person would have made) under the circumstances. *See* People v. Goetz, 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18 (1986).

46. MODEL PENAL CODE § 1.13(10).

47. *Id.* § 2.04(1).

provisions on justification are couched in the language of belief.[48] The minimal requirement for a claim of justification, therefore, is that the actor believe that the objective factual conditions support his claim. Contrary to the recent proposal of the U.K. Law Commission, objective circumstances alone are never sufficient to make out a case of self-defense.[49]

Many lawyers and judges read this reference to "belief" as not only necessary, but sufficient for a valid claim of self-defense. This misunderstanding ran through the arguments in the *Goetz* case in which the lawyers and several of the lower court judges, pondering the problem of liability for an unreasonable mistake, described the Model Penal Code as endorsing a subjective standard of self-defense.[50] What they meant by a subjective standard is that a good faith belief in the conditions of self-defense should be sufficient for acquittal. They arrived at this mistaken reading of the Code because they looked at the basic provision in section 3.04 without attending to the exception for unreasonable belief in section 3.09(2).[51] With regard to all of the claims of justification other than necessity,[52] the defense is inapplicable if "the actor is reckless or negligent in having [his] belief . . . in a prosecution for an offense for which recklessness or negligence suffices to establish liability."[53]

Let us work through this provision as to the three relevant grades of culpability in homicide — knowing, reckless and negligent.[54] The exception in section 3.09(2) applies only if the required culpability is recklessness or negligence,[55] and therefore in the case of knowing homicide, there would be no exception to the good faith belief in the conditions of self-defense. If the defendant believed in good faith that he was about to be attacked, he would have a good claim of self-defense.

But what about the rare hypothetical situation in which the defendant had no belief one way or the other about whether he going to be attacked?

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48. *See id.* §§ 3.02-.08.

49. *See* DRAFT CRIMINAL CODE BILL § 47 (referring in "circumstances which exist or which [the actor] believes to exist") in THE LAW COMMISSION, CODIFICATION OF THE CRIMINAL LAW 195 (1985).

50. See the opinion by the majority of the appellate division, People v. Goetz, 116 A.D.2d 316, 329, 501 N.Y.S.2d 326, 334-35 (1986).

51. Although the Commentaries claim that numerous states have adopted provisions analogous to MODEL PENAL CODE § 3.09(2), 2 COMMENTARIES, *supra* note 16, at 153, Singer's research reveals that no state has both adopted this provision and applied it in an appellate case. Singer, *The Resurgence of Mens Rea: II — Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C.L. REV. 459, 505-06 (1987).

52. MODEL PENAL CODE § 3.02.

53. *Id.*

54. *Id.* § 3.09.

55. *Id.* § 3.09(2).

He knows that his action will cause death, but he has no awareness of danger from aggression. He is simply indifferent to whether he is being attacked. Absent a good faith belief in the imminence of an attack, self-defense will not apply. If the Code is to yield a defense, we would have to resort to general principles on the analysis of ignorance or mistake as to a material element of the offense. The actor would be ignorant of a material element of homicide, namely the absence of justificatory circumstances. Arguably, the general provision on mistake would apply.[56] Unlike the special regulations in the provisions on justification, the general provision encompasses ignorance as well as mistake,[57] at least if the ignorance or mistake negates the knowledge required for the particular material element. Admittedly, it is odd to resort to a general provision to solve a problem supposedly regulated by the specially hewn rules on justification. The better argument might be that the rules on justification should control, and that ignorance about the presence or absence of an impending attack would be insufficient to generate a defense to liability.

The problem of liability in cases of indifference (no belief one way or the other) arises from the logical character of defenses. The defendant asserts self-defense as a justification and therefore it falls on him to claim an active state of mind accompanying the alleged justification. It is not adequate for him to argue simply that he does not believe the contrary, *i.e.*, that he is not being attacked. Let us suppose then that section 2.04 will not apply to the indifferent defendant.

It does not follow that the indifferent defender would be guilty of knowing homicide, for if the absence of self-defense is a material element of the offense, he must know — *i.e.*, he must be aware[58] — of this absence. If he is indifferent about whether he is justified, he is not aware that he is not justified. The missing link in this argument, however, is proof that knowledge is the required culpability for the absence of self-defense. The proof can derive, it seems, only from the interpretation of section 2.02(4), developed above, that would extend the knowledge stipulated for the core elements of the offense to all the negative elements covered by the criteria of justification. It follows that ignorance or indifference about the conditions of self-defense would preclude convicting the defendant of knowing homicide.

Suppose that the actor recklessly believes that he is about to be attacked. The implication of section 3.09(2) is that self-defense would not

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56. *Id.* § 2.04(1).

57. *Id.*

58. This follows from the definition of knowledge in MODEL PENAL CODE § 2.02(2)(b).

be available in a prosecution for reckless homicide. If the actor has recklessly caused death, would it follow that he would be guilty of reckless homicide? It would seem so, though the prosecution would also have to establish that the defendant was reckless relative to the material element of justification. The same reasoning applies to negligent mistakes about the conditions of self-defense.

A significant conclusion emerges from this detailed analysis of the general[59] as well as the special provisions on mistaken self-defense:[60] *The Model Penal Code does not need the special rules on mistaken justification.* All the results generated by the special rules follow from the general rule. It is preferable, therefore, simply to rewrite the justification provisions so that they do not turn on the actor's belief of objective circumstances; eliminate the exception provided in section 3.09(2) for negligent and reckless mistakes and simply proceed on the assumption that the prosecution must prove, depending on the definition of the core offense, purpose, knowledge, recklessness or negligence as to the elements of justification. Without the encumbrance of special rules on mistaken justification, the Code would be simpler, clearer and more elegant.

In addition, this simplification would cancel the infelicitous implication that someone who believes, mistakenly, that he is acting in self-defense actually is justified in what he is doing. I have done battle elsewhere with this philosophically dubious conception of justification[61] and I am reluctant to repeat myself here. It should be enough to point out that the Model Penal Code does not generally take mistake to be a justification. The whole point of section 2.04(1), located in the "General Principles of Liability,"[62] is that mistake stands in a conceptual relationship with the criteria of culpability. For example, mistaken beliefs about the legal validity of military orders are treated in the same category of general principles.[63] If mistakes generally are treated separately from the standard about which one is mistaken, it is surely wrong to treat putative justification (based on a mistaken belief) as an instance of justified conduct.

One might defend the Model Penal Code's resting claims of justification on the actor's beliefs as a necessary hedge against an objectified theory of justification — one that would be based exclusively on objective events, such as whether someone was in fact attacking the defender. But surely

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59. *Id.* § 2.04(1).

60. *Id.* §§ 3.04, 3.09(2).

61. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985).

62. MODEL PENAL CODE § 2.04(1).

63. MODEL PENAL CODE § 2.10. If the actor knows the order to be unlawful, he has no defense. If he mistakenly believes that the order is lawful, he has a good defense.

that fear is misplaced. If the criteria of justification are stated in objective terms, it need not follow that the defender can invoke a claim of justification without having had a justificatory intent. The 1975 German Criminal Code formulates its standard of self-defense and necessity without requiring that the actor know of the danger to which he is responding.[64] Yet there is no doubt in German law that the actor must at least knowingly respond to a threat or to aggression in order to claim a justificatory defense.[65]

The complex of criteria bearing on the justification of self-defense consist of objective and subjective elements: the objective factors of aggression and necessary response, and a subjective requirement of intent or knowledge. None of these factors has anything to do with mistake, which bears on the actor's culpability for acting in the absence of objective justifying criteria and not on the intent required to make out a good case of self-defense.[66] This exercise has demonstrated, I hope, that the Model Penal Code provisions on mistaken self-defense are superfluous. If they were stricken from the Code, there would be no substantive change. My argument depends on the assumption that the drafters of the Model Penal Code seriously intended in section 2.04(1) to enact a general provision on mistake that would cover all the material elements of every crime.

Yet, there are some serious implications of taking section 2.04(1) at its face value. Note, for example, that the provision covers "ignorance or mistake as to a matter of fact or law."[67] Think of the implication in a case in which the actor is mistaken about whether a particular justification exists. Suppose that he thinks, mistakenly, that he has a right to shoot every unleashed dog that wanders onto his property. Could he invoke this mistake as a defense in a prosecution for purposely destroying his neighbor's property?[68] If his purpose must include a belief that his conduct is unjustified, his mistake would negate the required culpability; he would not in fact regard his conduct as unjustified. This conclusion follows from taking section 2.04(1) seriously as a general provision covering all material elements, including, as the provision declares, questions both of fact and of law.

A contrary implication derives from section 2.02(9), which provides

64. *See* StGB § 32 (self-defense), § 34 (necessity) (22d ed. 1985).

65. *See id.* § 32 at 393-94.

66. The difference might be more easily grasped in symbolic form. Self-defense consists of the elements A and B. For a good claim of self-defense, the defendant must know both A and B. To be guilty of knowingly committing homicide (in the absence of self-defense) he must know either not-A or not-B.

67. MODEL PENAL CODE § 2.04(1).

68. *See id.* § 220.3 (criminal mischief).

that no culpability is required as to "whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of [the] offense."[69] This provision expresses the classic rule that mistake of law is no excuse. Why, then, does section 2.04(1) hold that mistake of law is a defense if it negatives the culpability required for the particular material element of the offense? With regard to a mistaken view about the existence of a justification, either of these provisions could apply. The problem with the negative rule (section 2.02(9)) is whether a mistaken perception of justification should receive classification as a mistake about whether "conduct constitutes an offense." There is no doubt in the mind of the man shooting the stray dog that the willful destruction of property is an offense, but he views his own conduct as a justified exception to the general prohibition. However, if we take seriously the Model Penal Code's commitment to treating claims of justification as negative elements of the offense, then the dog-shooter is mistaken about whether his conduct constitutes an offense and the negative rule of section 2.02(9) should rule out the defense.

But does the general rule, section 2.04(1), favoring the recognition of mistakes of law about material elements come into play? The problem is the meaning of the phrase "required to establish a material element of the offense."[70] Is justification in general a "material element" or does the Code apply only to particular, legally recognized justifications? That is difficult to fathom from the language of the Code. The definition of "material elements" hints at the latter view: it suggests, with confusing indirection, that all elements are material that are not unconnected with "the existence of a justification or excuse."[71] The use of the word "existence" in this context rather than, say, "application," supports the interpretation that justification in general is a material element of every offense. It would follow that the culpability required for the offense of destroying property should extend to the existence or non-existence of a justification. If this culpability level is purpose or knowledge, any mistake would qualify as a defense.

This is the better reading of the Model Penal Code. I have no doubt, however, that an American court would hold the mistake about the right to shoot the stray dog as irrelevant.[72] The problem is not with common-law intuitions about the relevance of mistake of law. In this situation the

69. *Id.* § 2.02(9).
70. *Id.* § 2.04(1).
71. *Id.* § 1.13(10)(ii).
72. For an older German case recognizing the mistake, see 19 RGST. 209 (1889) (hunter kills dog who strayed onto his property).

aversion to mistake of law is plausible, if not self-evidently sound. The problem is rather with a model code that designs its rules for the core elements of offense and assumes, uncritically, that the same rules apply, by extension, to criteria of justification and excuse.

So far the analysis has been limited to problems in the field of justification. Before we turn to the complexity of mistakes about excusing conditions, let us summarize the results so far. The following schema illuminates the kinds of mistakes about material elements that require individualized analysis:

Mistakes about Material Elements

	fact	law
core elements	1	2
justification	3	4
excuse	5	6

The basic problem in the theory of mistake — the real problem that the Model Penal Code took to be a false problem — is whether all six categories of mistakes are to be treated like mistakes of type 1. The Model Penal Code theorists supposed they could extend the model set by type 1 to type 2 and 3 without particular difficulty. The easy cases in category 2 would be a mistake, say, about whether bomb casings are or are not the "property" of another or whether one is still "married" at the time of entering into a second marriage. Though "property" and "married" are attributes raising legal issues, they still function as elements of their respective offenses to which the actor's knowledge and intention are obviously relevant. They are to be distinguished from mistakes about whether bigamy is a crime or whether bigamy requires that one engage in a second religious as opposed to a second civil marriage. These latter mistakes are the type the negative rule in section 2.02(9) seeks to banish from consideration in assessing criminal guilt.

If we assume that claims of justification are simply negative elements of the offense, extending the principles of type 1 to type 3 follows easily. Problems begin, however, when we seek to extend the same principles to type 4. Arguably, there are some easy cases in type 4, closer in structure to type 2 than the case of a hunter mistaken about the existence of a justification for shooting stray dogs. Let us suppose there really is a justification that permits every property owner to shoot dogs that wander

onto his property. The hunter now shoots a dog on the sidewalk in front of his house on the assumption that this is legally part of his "property" (after all, he has to keep the sidewalk clear of snow during the winter). This looks like a mistake in category 2, except that it is transplanted into the realm of justification. The logic of the Code seems to say: treat it just like a mistake about whether allegedly abandoned bomb casings are the property of another. Again, I doubt whether any American court would recognize this mistake, however reasonable under the circumstances, as a good excuse. The analogy between type 1 and type 4 simply does not carry.

Now let us turn to the more difficult problems posed by categories 5 and 6, namely mistakes both about fact and law in the context of excuses as material elements of the offense. The first problem is figuring out the defense that the Model Penal Code classifies as an excuse. This is no place to rehearse the general discussion about the distinction between a claim that conduct is objectively right (justification) and an argument that though the conduct is wrong, it is not blameworthy (excuse).[73]

Although the Model Penal Code makes no effort to clarify this distinction, it obviously incorporates it in the organization of the general principles of liability. Article 3 explicitly specifies the domain of justification, and Article 2, covering "General Principles of Liability," includes most of the issues that both the general principles and the general practice of Western legal systems would treat as excuses.[74] We can be relatively sure that duress in section 2.09 and involuntary intoxication in section 2.08(4) qualify as excuses. The Code also seems to treat mistake about the unlawfulness of a military order as an excuse[75] and, I shall argue below, it recognizes a limited excuse of mistake of law.[76] Entrapment[77] is a borderline case. The issue bears on criminal responsibility; it relates to duress just as seduction relates to intimidation. However, the Code's decision to have the matter tried by a judge rather than by a jury would be constitutional only if the Code's conception of entrapment is extrinsic to the substantive criteria of liability — analogous, therefore, not to duress,

73. For recent work, see J. DRESSLER, UNDERSTANDING CRIMINAL LAW (1987); D. HUSAK, THEORY OF CRIMINAL JUSTICE (1986); P. ROBINSON, CRIMINAL LAW DEFENSES (1984).

74. The Model Penal Code treats insanity, generally recognized as an excuse, as sufficiently complex to warrant a separate chapter. *See* MODEL PENAL CODE art. 4. Also, the drafter made one obvious blunder. There is no warrant for including consent in Article 2. *See* MODEL PENAL CODE § 2.11. The whole point of consent is to render nominally invasive conduct an expression of a joint will and therefore right.

75. *Id.* § 2.10.

76. *Id.* § 2.04(3).

77. *Id.* § 2.13.

but to the Fourth Amendment exclusionary rule.

Let us focus, then, on duress as undisputed in instances of an excuse under the Model Penal Code. A mistake of type 5 would be a mistake about whether one faces "a threat to use unlawful force against his person or the person of another."[78] Someone approaches the actor and threatens to kill him unless he strikes a third party in the face; he complies and is charged with battery. The threat, however, was merely a research project in the susceptibility of ordinary people to intimidation; the threatening party had no intention of carrying it through.

Though one would think that a provision on duress would address itself to the actor's subjective condition, the wording of section 2.09 requires us to assess whether the actor is in fact coerced by a threat. The result is unclear if the actor merely feels coerced by a mistaken perception of a threat. True, the provision adds a requirement that "a person of reasonable firmness in his situation would have been unable to resist"[79] the threat, but there is no suggestion that if the actor mistakenly thought he was under threat, the mistake must be one that a reasonable person would have made. There is no hint of a solution within Article 3 and therefore we have to seek the guidance of section 2.04(1). Before we do that, however, let us consider what a sensible solution would be to the problem of a mistaken perception of a threat.

Basically, the question is whether the criteria for duress should depend on the crime the actor seeks to excuse. The basic rationale for duress is that the external coercion undermines the actor's blameworthiness in committing the offense. If he could not fairly be expected to resist the threat, he cannot be fairly blamed and punished for the violation. If he is culpable in responding to the coercion, he cannot plausibly claim that the coercion negates his culpability. The strong connection between culpability and duress is borne out by the requirement that the threat be one that a person of "reasonable firmness" not be able to resist. This conclusion is buttressed by an additional provision rendering the defense unavailable if the actor "recklessly placed himself in a situation in which it was probable that he would be subjected to duress."[80] The analogous treatment of a mistaken perception of a threat would lead to the conclusion that the actor culpably, made a mistake about whether he was threatened, and he should not be able to invoke the defense.

This is not the result, however, of applying the instructions of the

78. *Id.* § 2.09(1).

79. *Id.*

80. *Id.* § 2.09(2) (note that defense is forfeited for negligence as to crimes that can be committed negligently).

Model Penal Code. The only provision leading to a result is the general provision on mistake.[81] Offenses under duress are typically committed purposely or at least knowingly because the actor chooses to commit an offense rather than suffer personal harm. In these situations, the implication of section 2.04(1), together with section 2.02(4), is that the actor must at least know of the absence of duress as a material element of the offense. If he thinks that he is under threat, however unreasonable his assumption might be, he cannot know or be aware of the absence of coercion. The implication is that the Model Penal Code would acquit in those cases in which the actor concludes that he must violate the interests of an innocent person in order to avoid an imagined threat.

This conclusion flies in the face of what we took to be the sensible solution to the problem of mistaken duress. More significantly, for the purposes of this essay, it highlights the internal contradictions in the Code. Excusing the unreasonably mistaken actor runs afoul of the general principle of not excusing unreasonable actors for other excesses such as unreasonably responding to the threat, or recklessly placing himself in the situation. Also, because the characteristic offense under duress is intentional, there is no way of holding the actor accountable for a lesser offense, as suggested by the compromise in section 2.09(2). There is no way of escaping the conclusion that extending section 2.04(1) to all material elements, including excuses like duress, represents a deep flaw in the structure of the Code.

This is not the only evidence of this flaw. Additional problems crop up in the analysis of type 6 mistakes. Suppose that someone is mistaken about the legal scope of duress. He thinks that the term "unlawful force to his person" includes the threat of damage to his car. A defendant in a criminal case threatens to blow up the actor's car unless he commits perjury. Confident that he will have a good defense of duress, the actor submits to the threat. It turns out that he is wrong about the scope of the statutory defense. Can he assert a good claim of mistake?

The problem is similar to the conundrum posed above in the analysis of type 4 mistakes,[82] but there are some new twists. First, it is not clear that section 2.02(9) should have any relevance. Is a mistake about the scope of duress about "whether conduct constitutes an offense"?[83] True, the mistake is about a material element of an offense, but it is hard to believe that drafters used the term "offense" to encompass all material elements,

81. *Id.* § 2.04(1).
82. *See supra* text accompanying notes 73-74.
83. MODEL PENAL CODE § 2.02(9).

including excuses. The heading to section 2.02(9) is *Culpability as to Illegality of Conduct*. The better interpretation seems to be that duress would not be included within the issues bearing on illegality.[84] It follows that section 2.02(9) would not preclude recognition of the mistake about duress as a mistake of law.

The Code contains a general principle on mistake of law[85] which conceivably would apply in the case of mistake about the scope of the duress. Suppose that the actor came to his view about cars and persons by relying (or his lawyer's relying) on a judicial decision that treated banging on a car as a battery against the driver inside. It would be fair to call this "reasonable reliance upon an official statement of the law" that led him to the conclusion that duress included threats to his car. All section 2.04(3) requires is "a belief that conduct does not legally constitute an offense."[86] This phrase is more encompassing and therefore more tolerant to the inclusion of excuses, it would seem, than the reference to illegality in 2.02(9). The implication is that the mistake of law provision could well apply in a type 6 mistake. This strikes me as counter-intuitive. Individuals are not expected to govern their conduct by the legal criteria of excusing. These provisions are designed not as "conduct rules" to guide human behavior, but as "decision rules" for judges adjudicating liability for unlawful behavior.[87] Therefore, it seems wrong to treat the rules of excusing as rules about which individuals are entitled to reasonably rely in planning their conduct. Type 6 mistakes should be irrelevant to liability.

Of course, there is no clear indication in the Code that mistakes about the law of excuse would defeat liability. The basic concepts of "offense" and "illegality" are simply too vague to permit any clear conclusions.

This exercise could continue. I could pose the question: Does section 2.04(1) apply to mistakes about the scope of section 2.04(3)? Suppose the actor is mistaken about whether a lawyer's advice is included within the scope of legal sources on which an individual may reasonably rely. In fact, lawyers are not included in section 2.04(3).[88] But the latter provision sets out a general excuse of mistake of law, and if the actor is mistaken about its scope, it would seem that he would be mistaken about a material element of

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84. Note section 3.11(1) which defines "unlawful force" for purposes of self-defense so that conduct under duress is nonetheless unlawful. Therefore, so far as "unlawful" and "illegal" are interchangeable, a good claim of duress does not negate the illegality of conduct.

85. MODEL PENAL CODE § 2.04(3).

86. *Id.*

87. *See* Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

88. MODEL PENAL CODE § 2.04(3)(b) commentary at 277-80.

an offense. If this is a type 5 mistake, merely believing that lawyers are included in the provision would be sufficient for any offense that must be committed knowingly or purposely. If it is a type 6 mistake, the conclusion might be different — or at least it would be seem that section 2.04(1) and section 2.04(3) would be in conflict. There is no point, however, in pressing the attack with questions of this theoretical refinement. It is obvious that the drafters of the Code have never thought about any of these problems.

Important consequences follow from the structure of issues that bear on liability. For some purposes, the Code recognizes these consequences: issues of justification are treated separately, excusing criteria are excluded from the definition of "unlawful force."[89] This is not the place, unfortunately, to develop an alternative theory of mistake. My task has been simply to critique the Model Penal Code's erring so profoundly. Six types of mistakes cannot be reduced to one. The legislature should not be expected to solve the problem of mistake in all six categories simply by stipulating criteria of culpability for the core elements. The Model Penal Code is wrong. Mistake is not a false problem.

89. *Id.* § 3.11(1).