THE MISTAKEN LAW OF MISTAKES OF LAW: MISTAKES NEGATING CULPABILITY UNDER THE MODEL PENAL CODE

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ABSTRACT

This Article examines the relationship between two core principles of American criminal law. On one hand, ignorance of the law is no excuse. On the other hand, criminal liability requires not just a guilty act but also a guilty mind. As the criminal law has become more complex, criminal offenses have increasingly raised issues about whether they require culpability as to issues of law, often bringing culpability requirements and the ignorance maxim into apparent conflict.

In 1962, the American Law Institute published the Model Penal Code ("MPC" or "the Code"). The MPC changed American criminal law significantly, and the Code's culpability provisions are commonly recognized as the project's greatest contribution to American law. The Code includes a version of the ignorance maxim, under which a defendant need not be culpable as to whether conduct constitutes an offense. Importantly, however, the Code requires culpability for each element of an offense, and the drafters recognized that offense elements can raise legal issues about laws other than offenses themselves. Hence, the Code requires culpability for countless collateral issues of law that arise under modern statutes, including offenses that require one to violate a civil statute or court order, fail to perform a legal duty, or engage in certain conduct after being convicted of a felony.

Unfortunately, the overwhelming majority of MPC states have undermined the Code's norm of requiring culpability for offense elements that raise collateral issues of law. Many MPC states decline to exculpate for mistakes of law that negate culpability requirements, and courts often impose strict liability because they confuse mistakes as to offense elements with mistakes about criminality. As a result, MPC states have thwarted some of the Code's most important provisions. This Article concludes by recommending ways to prevent strict liability for issues of law in MPC states.

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INTRODUCTION

This Article examines the relationship between two of the most revered principles in criminal law. On one hand, ignorance of the law is no excuse.[1] Put differently, the criminal law generally provides no defense for even a reasonable mistake about criminality—that is, "the meaning or existence of the criminal law itself."[2] On the other hand, it is an equally hallowed principle that criminal liability

1. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 13.01(A) (9th ed. 2022) (observing that the ignorance maxim "is deeply embedded in Anglo-American jurisprudence"); Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 342 (1998) ("The principle of *ignorantia legis non excusat*—ignorance of the law does not excuse—is perhaps the most well-rooted maxim in Anglo-American criminal law."); Paul J. Larkin Jr., *Taking Mistakes Seriously*, 28 BYU J. PUB. L. 71, 75 (2013) ("The proposition that ignorance or mistake of the law is no excuse to a crime is as firmly settled a legal doctrine as any rule could hope to be.").

2. Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Balyes*, 12 L. & PHIL. 33, 34 (1993); *see also* DRESSLER, *supra* note 1, § 13.01(A) ("[N]either knowledge nor recklessness or negligence as to whether conduct constitutes an offense, or as to its meaning, ordinarily is an element of that offense; therefore, it follows that there typically is no *mens rea* element in an offense capable of being negated by an actor's ignorance or mistake of law."). A mistake of law technically differs from ignorance of the law because a mistake requires some awareness of a law's existence. Davies, *supra* note 1, at 344 n.9; *see* Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 76 (1908); Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35, 35 (1939). Nevertheless, most courts and commentators use the terms interchangeably when discussing the ignorance

requires not just a guilty act but also a guilty mind.[3] Hence, the criminal law ordinarily frowns upon strict liability because it punishes those who lack the blameworthiness required for the law's formal condemnation.[4]

As applied to modern American criminal law, both principles have roots in English common law dating back to the High Middle Ages.[5] For centuries, the ignorance maxim—*ignorantia legis non excusat*[6]—peacefully coexisted with culpability requirements. Such harmony was possible because the criminal law, like society, was once far simpler than it is now. Indeed, English common law traditionally recognized just nine felonies: murder, manslaughter, rape, sodomy, burglary, robbery, larceny, arson, and mayhem.[7] Additionally, the common law simply required mens rea, a state of mind that varied little between offenses and demanded only a "vicious will" or an "intention to commit a crime."[8] Given the law's simplicity, the ignorance maxim made some sense, grounded as it was in the rationale that the law was "definite and knowable."[9] People were presumed to know the law's commands,[10] and thus the common law refused to provide a general defense for mistakes of law.[11]

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maxim. *See* Vera Bolgár, *The Present Function of the Maxim Ignorantia Iuris Neminem Excusat—A Comparative Study*, 52 IOWA L. REV. 626, 636 (1967); Davies, *supra* note 1, at 344 n.9; Keedy, *supra*, at 76; Perkins, *supra*, at 35. This Article generally adopts that practice.

3. DRESSLER, *supra* note 1, § 9.01(A); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.1 (3d ed. 2017); Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1548–49 (2013); Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 908 (1939).

4. Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 147–48 (1962) ("Few today cavil at strict liability in tort . . . . But the transfer of money from one pocket to another is one thing, and the judgment of community condemnation expressed in a criminal conviction is quite another. So long as that sanction is resorted to, moral blameworthiness should be the indispensable condition precedent to its application."); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 72 (1933) ("To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. Crimes punishable with prison sentences, therefore, ordinarily require proof of a guilty intent.").

5. English courts began applying the ignorance maxim in criminal cases as early as the eleventh century. Davies, *supra* note 1, at 351 n.47. According to the most popular account, English common law likely began requiring culpability around the middle of the thirteenth century. Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 655 (1993); *see* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 435–36 (1993).

6. Translated to English, this version of the ignorance maxim states that "ignorance of the law does not excuse." There are several other Latin versions of the ignorance maxim. Others include "*ignorantia legis neminem excusat*"; "*ignorantia eorum, quae quis scire tenetur, non excusat*"; "*ignorantia juris, quod quisque tenetur scire, neminem excusat*"; and "*ignorantia juris haud excusat*." Keedy, *supra* note 2, at 76 n.1.

7. Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 572 (2018); Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. STATE L. REV. 461, 464 (2009).

8. Scott England, *Default Culpability Requirements: The Model Penal Code and Beyond*, 99 OR. L. REV. 43, 44 (2020).

9. DRESSLER, *supra* note 1, § 13.01(B)(1); Davies, *supra* note 1, at 352.

10. Bolgár, *supra* note 2, at 635; Davies, *supra* note 1, at 352; Jens David Ohlin, WHARTON'S CRIMINAL LAW § 13:3 (16th ed. 2021).

11. Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 644 (1941). Commentators have offered additional rationales for the ignorance maxim. For example, Oliver Wendell Holmes

Of course, the law later became much more indefinite and unknowable, especially to the average citizen. Parliament eventually began enacting additional criminal prohibitions, and, by 1765, William Blackstone reported that England's statutes included at least 160 felonies.[12] Culpability requirements also evolved, with the common law characterizing many criminal offenses as requiring "general intent" or "specific intent,"[13] and with the introduction of a host of new culpability terms, including "willfully," "maliciously," "fraudulently," and "feloniously."[14]

As the law became more complex, criminal offenses increasingly raised issues about whether they required culpability as to collateral issues of law, occasionally bringing culpability requirements and the ignorance maxim into apparent conflict. The classic example is larceny, which the common law classified as a specific-intent offense[15] because it required stealing with the intent to permanently deprive another person of their property.[16] As discussed more fully in Section I.B, the common law recognized that an honest mistake—even a mistake about the law—could negate the specific intent required for larceny.[17] Hence, if a defendant mistakenly believed that they owned the property at issue, they lacked the intent to permanently deprive another person of their property.[18] The ignorance maxim notwithstanding, a mistake of law provided a defense.[19] Across the Atlantic, courts largely continued the English tradition when the common law was received into American law.[20]

In 1962, the American Law Institute published the Model Penal Code ("MPC" or "the Code").[21] The MPC changed American criminal law significantly, and the Code's culpability provisions are commonly recognized as the project's greatest contribution to American law.[22] The Code includes a version of the ignorance

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argued that an ignorance excuse would encourage ignorance of the law, Professor Jerome Hall maintained that an ignorance defense would undermine the legality principle, and Professor Henry Hart asserted that ignorance of the law makes one blameworthy. Davies, *supra* note 1, at 354–56; *see also* Michael Cottone, *Rethinking Presumed Knowledge of the Law in the Regulatory Age*, 82 TENN. L. REV. 137, 145–47 (2014) (explaining how *ignorantia legis* could incentivize individuals to remain ignorant of the law); Larkin Jr., *supra* note 1, at 76–77 (outlining historic rationales courts and commentators have offered for rejecting mistake-of-law defenses).

12. Ristroph, *supra* note 7, at 572; *see* Tress, *supra* note 7, at 464.

13. PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW § 4.1.1 (2d ed. 2012).

14. *See* LAFAVE, *supra* note 3, § 5.1(a).

15. *Id.* § 5.2(a).

16. DRESSLER, *supra* note 1, § 32.02(A); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1000 (1932).

17. *See infra* notes 64–65 and accompanying text.

18. *See infra* note 76 and accompanying text.

19. *See infra* notes 74–76 and accompanying text.

20. *See infra* Section I.C.

21. MODEL PENAL CODE (AM. L. INST., Proposed Official Draft 1962).

22. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 952 (1999) ("The Code's mens rea proposals dissipated . . . clouds of confusion with an astute and perspicuous analysis that has been adopted in many states and has infused thinking about mens rea everywhere."); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 691 (1983) ("Section 2.02 . . . is perhaps 'the single most important provision of the Code'

maxim, under which a defendant need not be culpable as to whether their conduct constitutes an offense.[23] Importantly, however, the Code requires culpability for each material element of an offense,[24] and the drafters recognized that offense elements can raise legal issues about a law other than the offense itself.[25] As a result, the Code requires culpability for countless collateral issues of law referred to in modern offenses, including crimes that require one to act "unlawfully," to "knowingly violate" a civil statute or court order, or to "knowingly fail" to perform a legal duty.[26] Moreover, recognizing the relationship between culpability requirements and mistakes of law, the Code provides that a mistake of law establishes a defense if it "negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense."[27] Importantly, culpability requirements are themselves offense elements[28] that the prosecution must prove beyond a reasonable doubt.[29]

Unfortunately, the overwhelming majority of MPC states have undermined the Code's norm of requiring culpability for offense elements that reference collateral issues of law.[30] Many MPC states decline to exculpate for mistakes of law that negate culpability requirements,[31] and courts often impose strict liability because they confuse mistakes as to offense *elements* with mistakes about criminality, i.e., as to the offense itself.[32] As a result, MPC states have thwarted some of the Code's most important provisions.

This Article examines the mistaken law of mistakes of law in four parts. Part I recounts the ignorance maxim's beginnings in Roman law and the common law's development of defenses for mistakes of law that negate specific intent. Part II explains the MPC's approach to culpability requirements for issues of law, including the Code's provisions governing mistakes as to offense elements and mistakes about criminality. Part III reviews statutory provisions and case law in the twenty-five states with culpability provisions influenced by the MPC; I conclude that the overwhelming majority of MPC jurisdictions depart from the Code in ways that

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and the most significant and enduring achievement of the Code's authors.") (quoting Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 601 (1963)); David Wolitz, *Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code*, 51 TULSA L. REV. 633, 669 (2016) ("The most celebrated and perhaps most influential feature of the Model Penal Code has been its articulation of the traditional *mens rea* requirement of criminal law and the hierarchy of culpable mental states it delineated: purpose, knowledge, recklessness, and negligence.").

23. MODEL PENAL CODE § 2.02(9) (AM. L. INST., Proposed Official Draft 1962).

24. *Id.* § 2.02(1).

25. *See infra* notes 202–09 and accompanying text.

26. *See infra* notes 133–38, 282–86 and accompanying text.

27. MODEL PENAL CODE § 2.04(1)(a).

28. *Id.* § 1.13(9)(b) (defining "element of an offense" to include culpability requirements).

29. *Id.* § 1.12(1) ("No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt.").

30. *See infra* Part III.

31. *See infra* Section III.B.

32. *See infra* Section III.C.

undermine the drafters' vision for criminal liability. Finally, Part IV recommends ways to prevent strict liability for collateral issues of law in MPC states.

I. HISTORIC BACKGROUND: MISTAKES OF LAW UNDER ROMAN LAW AND THE COMMON LAW

A. Roman Law

Centuries before becoming a core principle of Anglo-American criminal law, the ignorance maxim originated as an aspect of Roman civil law.[33] Importantly, the doctrine was limited to civil actions and thus did not apply to Roman criminal law.[34] Nevertheless, as would later be the case in criminal prosecutions under the common law,[35] the doctrine provided a defense for mistakes of fact but not for mistakes of law.[36] To this day, commentators debate the utility of the distinction between mistakes of fact and mistakes of law[37] and distinguishing the two remains challenging in practice.[38] In general, though, a mistake of law concerns the existence, meaning, or application of a legal rule or standard.[39] A mistake of fact, on the other hand, is any other mistake that is relevant to a case, including mistakes concerning the kinds of facts that witnesses might testify about.[40]

Roman law provided a familiar rationale for the ignorance maxim: the law was "certain and capable of being ascertained."[41] Nevertheless, Roman law recognized exceptions to the ignorance maxim for people who could not be presumed to understand more complicated law. Significantly, Roman civil law comprised both the *jus gentium* and the *jus civile*.[42] All Roman citizens were responsible for knowing the *jus gentium*, which was based on regional customs and "thought to embody the basic rules of conduct any civilized person would deduce from proper

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33. Keedy, *supra* note 2, at 77; *see* Davies, *supra* note 1, at 350.

34. Keedy, *supra* note 2, at 77–78.

35. *See infra* notes 46, 52–55 and accompanying text.

36. Keedy, *supra* note 2, at 77–79.

37. Professor Larry Alexander has argued that the law-fact distinction is untenable. *See, e.g.*, Alexander, *supra* note 2, at 48–53. Professor Kenneth Simons, on the other hand, maintains that "[t]he basic distinction between law and fact is straightforward and defensible" but sometimes "very difficult to draw." Kenneth W. Simons, *Mistake of Fact or Mistake of Criminal Law? Explaining and Defending the Distinction*, 3 CRIM. L. & PHIL. 213, 222 (2009). Similarly, Professor Douglas Husak has argued that the distinction between mistakes of law and mistakes of fact "*can* be drawn with tolerable clarity." Douglas Husak, *Mistake of Law and Culpability*, 4 CRIM. L. & PHIL. 135, 143 (2010). For an excellent discussion of various ways to define the distinction between mistakes of law and mistakes of fact, see Gerald Leonard, *Rape, Murder, and Formalism: What Happens if We Define Mistake of Law*, 72 U. COLO. L. REV. 507, 517–29 (2001).

38. PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 62(e) (1984) (noting that the distinction between mistakes of law and mistakes of fact "has proven very troublesome in practice").

39. *See* Keedy, *supra* note 2, at 77.

40. *See id.*

41. *Id.* at 78.

42. *See* Davies, *supra* note 1, at 351; Keedy, *supra* note 2, at 80; F.S.C. Northrop, *Naturalistic and Cultural Foundations for a More Effective International Law*, 59 YALE L.J. 1430, 1435 (1950).

reasoning."[43] Some citizens, however, could assert ignorance of the law as a defense for the *jus civile*.[44] That body of law was peculiar to the city of Rome and grounded less in common sense than was the *jus gentium*,[45] meaning it could not be known purely through natural reason.[46] As a result, Roman civil law did not presume knowledge of the law for those deemed to lack the capacity or opportunity to know the *jus civile*, such as minors, women, soldiers away on duty, and the poor.[47]

As Professor Sharon Davies has observed, Roman civil law thus permitted mistakes of law for some people "so as not to penalize them for failing to meet legal obligations that were, to them, either unknown or unknowable."[48] Hence, even from its beginnings, the ignorance maxim was limited to laws that were, in a sense, knowable.

B. English Common Law

During the Middle Ages, English common law revived the ignorance maxim and began applying it in criminal cases.[49] The first documented case so applying the ignorance maxim, decided in 1231, involved a defendant who was charged with trespass for entering land he mistakenly believed he owned.[50] The defendant's mistake of law was based on the advice of counsel, but the court held that the mistake provided no defense and ordered the defendant to be imprisoned.[51] As English courts originally applied it, then, the ignorance maxim was extremely rigid.

Over the next few centuries, courts also began denying defenses for mistakes of law by distinguishing them from mistakes of fact.[52] By 1518, Christopher St. Germain noted the common law often excused defendants for "ignorance of the deed," but "[i]gnorance of the law . . . doth not excuse . . . but in few cases."[53] Mistakes of law were rarely excused, he reasoned, because "every man is bound at his peril to take knowledge of what the law of the realm is."[54] Put differently, ignorance of the law provided no defense because the law was deemed to be "definite and knowable."[55] The common law was even stricter than Roman civil law on this point, as it generally provided no exceptions for people who lacked the capacity or opportunity to know the criminal law.[56]

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43. Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 685 (1976).
44. Davies, *supra* note 1, at 350–51; Keedy, *supra* note 2, at 80.
45. *See* Keedy, *supra* note 2, at 80; Northrop, *supra* note 42, at 1435.
46. *See* Keedy, *supra* note 2, at 80.
47. *See* Davies, *supra* note 1, at 350–51; Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 16 (1957); Hall & Seligman, *supra* note 11, at 643; Keedy, *supra* note 2, at 80.
48. Davies, *supra* note 1, at 351.
49. *See id.* at 351 & n.47.
50. Bolgár, *supra* note 2, at 634–35; Keedy, *supra* note 2, at 78.
51. Keedy, *supra* note 2, at 78.
52. Davies, *supra* note 1, at 351–52.
53. CHRISTOPHER ST. GERMAIN, THE DOCTOR AND STUDENT 248–49 (Robert Clarke & Co. 1886) (1518).
54. *Id.*
55. Davies, *supra* note 1, at 352.
56. *See* Bolgár, *supra* note 2, at 635 n.29; Keedy, *supra* note 2, at 80–81.

Courts became more forgiving as the requirement of mens rea evolved. Originally, mens rea required only "general moral blameworthiness,"[57] a state of mind that varied little from one offense to another.[58] But over the centuries, the common law began requiring different mental states for different offenses,[59] an advancement often described as a shift from mens rea to mentes reae.[60] By the seventeenth century, courts and commentators used the term mens rea to require not just general blameworthiness, but rather having "a precise intent at a given time."[61] Larceny, for example, now required an intent to steal at the same time property came into the defendant's possession.[62]

Importantly, the ignorance maxim did not apply if a mistake of law negated an offense's culpability requirements.[63] Most significantly, a mistake of law could negate a requirement of specific intent.[64] Hence, a defendant did not commit larceny if they took another's property under a claim of right. For example, in 1680, Sir Matthew Hale explained in his influential treatise, *The History of the Pleas of the Crown*, that "[i]f A. thinking he hath a title to the horse of B. [seizes] it as his own, . . . this regularly makes it no felony, but a trespass, because there is a pretense of title."[65]

English common law, then, came to distinguish mistakes negating culpability, an offense element, from mistakes about overall criminality.[66] During this time, it remained true that the common law provided no general defense for mistakes of law.[67] As a result, the common law did not excuse one who mistakenly believed that larceny or robbery was not a crime. Nevertheless, a mistake of law could negate the culpability required for larceny or robbery if the defendant took property that they honestly believed was their own.[68] Hence, while English common law did not provide an excuse defense for defendants who were mistaken about whether their conduct was criminal, it did recognize that a mistake about a collateral issue of law could preclude criminal liability.[69] If a mistake of law was thought

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57. Sayre, *supra* note 16, at 988.

58. Gardner, *supra* note 5, at 667; *see* Robinson & Grall, *supra* note 22, at 687; Sayre, *supra* note 16, at 988–89.

59. Gardner, *supra* note 5, at 667; Robinson & Grall, *supra* note 22, at 687; *see* Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 8 (1995).

60. Gardner, *supra* note 5, at 667–68.

61. Sayre, *supra* note 16, at 999–1000.

62. *See id.*

63. Davies, *supra* note 1, at 353 ("Departures were . . . granted in criminal cases when the doctrine of *mens rea* required that they be, such as when particular specific intent crimes required proof of an intent that was negatived by the accused's lack of knowledge of his culpability.").

64. Bolgár, *supra* note 2, at 636 ("As shown by the doctrine of *mens rea*, in crimes that require specific intent, ignorance of law has been admitted for centuries as a defense . . . .").

65. 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 509 (Sollom Emlyn 1736) (1680).

66. Hall & Seligman, *supra* note 11, at 644.

67. *Id.* ("[F]rom the earliest cases to the time of Blackstone, no *general* defense of mistake of law was recognized.").

68. *Id.*

69. *See id.*

to negate an actor's blameworthiness, courts often protected the innocent "by requiring a specific intent" in order to commit an offense.[70]

C. American Common Law

When the common law was received into American law, courts quickly adopted the ignorance maxim.[71] In the first American edition of his *Commentaries on the Laws of England*, William Blackstone reported that the common law provided a defense for "ignorance or mistake of fact" but not "an error in point of law."[72] Mistakes of law provided no defense, according to Blackstone, because everyone was presumed to know the law.[73]

Following the practice in England, American courts soon distinguished mistakes negating culpability from mistakes about criminality.[74] Despite the ignorance maxim, a mistake of law provided a defense if it negated specific intent.[75] Hence, as under English law, a mistake of law could preclude the intent to steal required for larceny or robbery if a defendant took property they believed to be their own.[76] Over time, American courts recognized that mistakes of law could also negate the mens rea required for "embezzlement, malicious destruction of property, wilful trespasses and other similar offenses where the defendant did not know that another person's legal rights were being violated."[77]

As Professor Jerome Hall explained, mistakes negating culpability are not true exceptions to the ignorance maxim.[78] Critically, the common law does not exculpate in such cases because defendants are mistaken about the criminal law itself.[79] For example, the common law does not provide a defense to one who is mistaken about whether they are committing larceny, embezzlement, property damage, or trespassing.[80] Rather, under one view, such a defendant avoids criminal liability

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70. *Id.*

71. Davies, *supra* note 1, at 353 ("Broad and early acceptance of the maxim is found in numerous cases.").

72. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 27 (1st Am. ed. 1772).

73. *Id.*

74. *See* Stewart E. Sterk, *Accommodating Legal Ignorance*, 42 CARDOZO L. REV. 213, 235 (2020) ("Courts developed exceptions for crimes that required a mental element when ignorance of the law negated that mental element.").

75. Keedy, *supra* note 2, at 89 ("When a specific criminal intent, as distinguished from the criminal mind, is a requisite element of the offense, and such intent is negatived by ignorance or mistake, it is held that the defendant shall not be convicted, notwithstanding the maxim."); Perkins, *supra* note 2, at 45 ("[T]he maxim is held not to apply where 'specific intent is essential to a crime, and ignorance of law negatives the existence of such intent.'") (quoting United States v. One Buick Coach Auto., 34 F.2d 318, 320 (N.D. Ind. 1929)).

76. Perkins, *supra* note 2, at 45–46; Sterk, *supra* note 74, at 236.

77. Hall, *supra* note 47, at 27.

78. *Id.* at 27–28.

79. *Id.* at 28.

80. *See* DRESSLER, *supra* note 1, § 13.02(D)(1) ("[N]either knowledge nor recklessness or negligence as to whether conduct constitutes an offense, or as to the meaning of an offense, is ordinarily an element of that offense.").

because their mistake about private law—like the law of property—negates the required mens rea.[81]

Professor Joshua Dressler refers to this kind of mistake as a "different-law mistake," meaning it concerns a different law than the offense for which the defendant is prosecuted.[82] Professor Dressler provides an example involving a car owner charged with stealing her own car from a mechanic she thinks is attempting to overcharge her.[83] Under state law, the mechanic may enjoy a mechanic's lien giving him lawful possession of the defendant's car until he is paid.[84] As Professor Dressler explains, the car owner can be presumed to know that larceny is a crime, but she might have a defense if she is unaware that state law allows the mechanic to keep her car.[85] After all, such a mistake is about a different law—the mechanics' lien law—than the offense for which the defendant is being prosecuted.[86] Under the common law, even an unreasonable mistake about a collateral issue of law provides a complete defense whenever it negates specific intent.[87]

As will be discussed next, the Model Penal Code takes the common law's approach to its logical conclusion.

II. MISTAKES OF LAW UNDER THE MODEL PENAL CODE

Under the Model Penal Code, mistakes about collateral issues of law preclude criminal liability for countless offenses. The Code protects defendants primarily through section 2.02(1), which provides that one generally does not commit an offense unless they "acted purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense."[88] As under the common law, a defendant's mistake of law may negate an offense's culpability requirements.[89] However, the Code's approach is much broader, because it is not limited to offenses that require specific intent.[90] Additionally, many of the Code's offenses explicitly refer to collateral issues of law, such as by requiring that the defendant act "unlawfully," act "subject to a known legal obligation," or "knowingly violate" a legal duty.[91] Such requirements are material elements of offenses, and the Code's commentary makes clear that they work no differently than other substantive requirements.[92] Moreover, to remove any doubt on this very point, section 2.04(1)

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81. *Id.*; *see also* Leonard, *supra* note 37, at 539 (describing the "usual argument" that a mistake of law provides a defense when an offense "incorporates 'civil law' by reference").

82. DRESSLER, *supra* note 1, § 13.02(D)(1).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* § 13.02(D)(1)–(2).

88. MODEL PENAL CODE § 2.02(1) (AM. L. INST., Proposed Official Draft 1962).

89. *See infra* Section II.B.

90. *See infra* notes 169–70 and accompanying text.

91. *See infra* notes 132–38 and accompanying text.

92. *See infra* notes 141–57 and accompanying text.

(a) affirms that "[i]gnorance or mistake as to a matter of . . . law is a defense if . . . the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense."[93]

As will be discussed later, courts in MPC states often err by imposing strict liability when offense elements explicitly refer to collateral issues of law.[94] Courts err, in no small part, because they interpret the Code's version of the ignorance maxim too broadly. Like under the common law, the ignorance maxim should not apply when a defendant is mistaken about a collateral issue of law.[95] Critically, such a mistake concerns an offense element rather than whether one's conduct is a crime.[96] Moreover, as the Code's commentary makes clear, there is often good reason to require culpability for collateral issues of law.[97]

A. Requiring Culpability for Collateral Issues of Law

To understand the Model Penal Code's approach to mistakes of law, one must start with the Code's celebrated culpability provisions. Most importantly, section 2.02(1) requires culpability for "each material element of the offense,"[98] and an offense's material elements include requirements that refer to collateral issues of law. This Section begins by providing an overview of the Code's rules governing culpability requirements[99] and then explains how those rules apply to collateral issues of law.[100]

1. Overview of the Code's Culpability Rules

The MPC's drafters aimed to establish a new culpability framework that eliminated the confusion caused by vague common law concepts like general intent, mens rea, malice, scienter, and willfulness.[101] To clarify the law of culpability, section 2.02 jettisons both the common law's wide selection of culpability requirements and its distinction between general intent and specific intent.[102] Section 2.02 employs just four culpability levels: purpose, knowledge, recklessness, and negligence, defining each with respect to what the Code calls conduct, circumstance, and result elements.[103]

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93. MODEL PENAL CODE § 2.04(1)(a).
94. *See infra* Part III.
95. *See infra* notes 230–42 and accompanying text.
96. *See infra* notes 205–09 and accompanying text.
97. *See infra* Section II.D.
98. MODEL PENAL CODE § 2.02(1) (AM. L. INST., Proposed Official Draft 1962).
99. *See infra* Section II.A.1.
100. *See infra* Section II.A.2.
101. MODEL PENAL CODE AND COMMENTARIES, PART I, § 2.02 cmt. 1, at 230 (AM. L. INST. 1985) [hereinafter MPC COMMENTARIES, PART I].
102. England, *supra* note 8, at 46.
103. *See* MODEL PENAL CODE § 2.02(2).

The drafters adopted the view that "clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of a crime."[104] To that end, section 2.02(1) establishes a norm of requiring culpability for "each material element of the offense."[105] The Code enforces this norm largely through sections 2.02(3) and 2.02(4), which provide rules for interpreting offenses' culpability requirements.[106] Section 2.02(4) applies when an offense "prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof."[107] If an offense states a culpability requirement without distinguishing between multiple elements, the culpability requirement "shall apply to all the material elements of the offense, unless a contrary purpose plainly appears."[108]

Section 2.02(3) serves as the MPC's default culpability provision, covering material elements not covered by section 2.02(4).[109] Section 2.02(3) provides that when a statute fails to prescribe a culpability requirement for a material element, the element is satisfied "if a person acts purposely, knowingly or recklessly with respect thereto."[110] Importantly, the Code's culpability levels are hierarchical, such that a proof of purpose or knowledge will also satisfy a requirement of recklessness.[111] As a practical matter, then, section 2.02(3) requires at least recklessness for any material element that lacks a stated culpability requirement.

Therefore, section 2.02 usually requires at least recklessness for each material element of an offense.[112] The Code's only exception is section 2.05,[113] which the commentary describes as presenting "a frontal attack on absolute or strict liability."[114] In general, section 2.05 permits strict liability as to an element only for (1) offenses that are mere civil violations[115] and (2) offenses outside the criminal code for which "a legislative purpose to impose absolute liability . . . plainly appears."[116] Even when an offense outside the criminal code evinces legislative intent to

104. MPC COMMENTARIES, PART I, *supra* note 101, § 2.02 cmt. 1, at 231.

105. MODEL PENAL CODE § 2.02(1).

106. *See id.* § 2.02(3)–(4).

107. *Id.* § 2.02(4).

108. *Id.*

109. Scott England, *Stated Culpability Requirements*, 74 RUTGERS U. L. REV. 1213, 1219 (2022).

110. MODEL PENAL CODE § 2.02(3).

111. *Id.* § 2.02(5).

112. The only exception is if a statute requires negligence for one or more material elements. *See id.* § 2.02(1) (providing that criminal liability requires at least negligence for each material element). Because section 2.02(3) requires recklessness for any material element that lacks a prescribed culpability level, a statute must be explicit in requiring negligence, knowledge, or purpose. *Id.* § 2.02(3).

113. *See id.* § 2.02(1) (requiring culpability for each material element "[e]xcept as provided in Section 2.05").

114. MPC COMMENTARIES, PART I, *supra* note 101, § 2.05 cmt. 1, at 282. As the MPC's commentary explains, "absolute liability" is largely synonymous with "strict liability." *Id.* at 282 n.1. This Article uses the terms interchangeably.

115. *See* MODEL PENAL CODE § 2.05(1)(a).

116. *See id.* § 2.05(1)(b).

impose absolute liability, the Code automatically reduces the offense to a civil violation.[117] For example, assume that a state's liquor-control act was adopted before the state's criminal code and establishes the act of serving alcohol to a minor as a misdemeanor. If an offense definition plainly indicates a legislative purpose to impose absolute liability, section 2.05 would automatically reduce the offense from a misdemeanor to a civil violation,[118] meaning that it is not even a crime.[119]

2. Material Elements Include Collateral Issues of Law

Hence, section 2.02(1) means what it says when it requires culpability for "each material element of the offense."[120] Moreover, an offense's material elements may refer to or at least implicate collateral issues of law. As discussed earlier, common law offenses sometimes raise legal issues concerning different laws than the offenses themselves.[121] Larceny, for example, implicates property law in requiring that a defendant intend to permanently deprive another person of their property.[122] Thus, if a defendant mistakenly believes that they own the property at issue, they lack the requisite intent to steal.[123] Likewise, American common law has long required that the defendant know that they are violating another's rights for crimes like property damage and trespassing.[124]

The MPC contains similar offenses implicating collateral issues of law. For example, the Code's version of larceny—theft by unlawful taking—requires taking the property "of another with purpose to deprive him thereof."[125] Similarly, criminal trespass applies only to one who enters or remains in a place "knowing that he is not licensed or privileged to do so,"[126] and criminal mischief occurs when one recklessly damages the property of "another."[127] The Code's commentary explains that a claim of right provides a defense for theft in particular because "the property must belong to someone else for the theft to occur and the defendant must have

117. *Id.* § 2.05(2)(a) ("[W]hen absolute liability is imposed with respect to any material element of an offense defined by a statute other than the Code and a conviction is based upon such liability, the offense constitutes a violation . . . .").

118. *See id.*

119. Importantly, violations are not criminal offenses under the Code. *See id.* § 1.04(5) ("An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction or if it is defined by a statute other than this Code that now provides that the offense shall not constitute a crime. A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.").

120. *Id.* § 2.02(1).

121. *See supra* notes 81–87 and accompanying text.

122. *See supra* note 16 and accompanying text.

123. *See supra* note 76 and accompanying text.

124. *See supra* note 77 and accompanying text.

125. MODEL PENAL CODE § 223.2(1).

126. *Id.* § 221.2(1)–(2).

127. *Id.* § 220.3(1)(a).

culpable awareness of that fact."[128] The drafters emphasize that the ignorance maxim does not apply when "the circumstances made material by the definition of the offense include a legal element."[129] If a defendant makes a mistake of law about ownership, that mistake does not concern the offense of theft itself.[130] Rather, such a mistake relates to "some other legal rule that characterizes the attendant circumstances that are material to the offense."[131]

If anything, that logic applies even more clearly when the definition of an offense explicitly refers to a collateral issue of law. Such offenses are common in state statutes,[132] and the MPC itself contains numerous offenses that refer to collateral issues of law. For example, as just discussed, criminal trespass requires that the defendant know they lack license or privilege to be in a place.[133] Additionally, the offenses of felonious restraint, false imprisonment, and criminal coercion all require knowingly restraining one "unlawfully" or intending to do so.[134] To commit theft by failure to make a required disposition, one must obtain property "subject to a known legal obligation."[135] Similarly, persistent nonsupport occurs when one repeatedly fails to provide support that they know they are "legally obliged to provide."[136] Other offenses, like bribery, bribery in official matters, and threats and improper influence in official and political matters, require one to "knowingly violate" a legal duty or violate "a known legal duty."[137] As a final example, the offense of resisting arrest ordinarily requires that the defendant intend to prevent "a lawful arrest."[138]

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128. MPC COMMENTARIES, PART I, *supra* note 101, § 2.02 cmt. 11, at 250.

129. *Id.*

130. *See id.*

131. *Id.*

132. *See infra* notes 283–85 and accompanying text.

133. MODEL PENAL CODE § 221.2(1)–(2).

134. *See id.* § 212.2(a) ("A person commits a felony of the third degree if he knowingly . . . restrains another unlawfully in circumstances exposing him to risk of serious bodily injury . . . ."); *id.* § 212.3 ("A person commits a misdemeanor if he knowingly restrains another unlawfully so as to interfere substantially with his liberty."); *id.* § 212.5(1) ("A person is guilty of criminal coercion if, with purpose unlawfully to restrict another person's freedom of action to his detriment, he threatens to . . . ."). The Code's kidnapping offense also requires removing or confining another "unlawfully." *See id.* § 212.1(1) ("A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes . . . ."). Kidnapping is less relevant because the MPC provides a special definition of "unlawful" for that offense. *See id.*

135. *Id.* § 223.8.

136. *Id.* § 230.5.

137. *Id.* § 224.8(1) ("A person commits a misdemeanor if he solicits, accepts or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject . . . ."); § 240.1(3) ("A person is guilty of bribery . . . if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another . . . any benefit as consideration for a violation of a known legal duty as public servant or party official."); *id.* § 240.2(1)(c) ("A person commits an offense if he . . . threatens harm to any public servant or party official with purpose to influence him to violate his known legal duty.").

138. *Id.* § 242.2 ("A person commits a misdemeanor if, for the purpose of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.").

For all such offenses, the defendant must know that some aspect of their conduct is unlawful. As with theft, the ignorance maxim does not apply simply because the offense raises a collateral issue of law. It remains true, for example, that a defendant can commit the offense of false imprisonment without knowing that false imprisonment is a crime. But if the offense requires the defendant to knowingly restrain another unlawfully, the defendant must know that their restraint is unlawful; that requirement is not satisfied if the defendant mistakenly believes they are legally authorized to restrain another. Likewise, a defendant need not know that persistent nonsupport is a crime. But if the offense definition requires that the defendant fail to provide support that they know they are legally obliged to provide, the statute applies only if the defendant knows they are legally required to provide support. Hence, the defendant does not commit the offense if they are mistaken about whether they have a legal obligation to support another.

In other words, such mistakes of law exculpate because they relate to elements of offenses. The Code defines an "element of an offense" to include "(i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as . . . is included in the description of the forbidden conduct in the definition of the offense."[139] The Code's commentary strongly suggests that a collateral issue of law is properly viewed as part of an offense's circumstance elements. Again, addressing the claim-of-right defense for theft, the commentary explains that a mistake of law about ownership relates to a "legal rule that characterizes the attendant circumstances that are material to the offense."[140] If that is true, it seems even clearer that an offense's circumstance elements include any explicit reference to a collateral issue of law. Hence, when an offense definition explicitly requires acting unlawfully, acting subject to a known legal obligation, or knowingly violating a legal duty, the relevant legal rules are themselves part of the attendant circumstances that make up the offense.

Lest there be any confusion on this point, such requirements also qualify as material offense elements. Under the Code, an offense element is a "material element"[141] if it "does not relate exclusively to the statute of limitations, jurisdiction, venue, or any other matter similarly unconnected with . . . the harm or evil . . . sought to be prevented by the law defining the offense."[142]

When offenses require acting unlawfully, being "subject to a known legal obligation," or knowingly violating a legal duty, such requirements help ensure that

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139. *Id.* § 1.13(9).

140. MPC COMMENTARIES, PART I, *supra* note 101, § 2.02 cmt. 11, at 250.

141. The MPC defines "element of an offense" to also include conduct that (1) negatives a justification or excuse defense, (2) relates to a statute of limitations, or (3) establishes jurisdiction or venue. *See* MODEL PENAL CODE § 1.13(9)(c)–(e). The commentary explains that this broad definition is useful for the Code's procedural provisions but "obviously too broad for the purpose of the culpability provisions." MPC COMMENTARIES, PART I, *supra* note 101, § 1.13 cmt., at 211. Hence, the drafters used the term "material element of an offense" to identify the kinds of elements for which culpability is required. MODEL PENAL CODE § 1.13(10).

142. *Id.*

offenses apply only to blameworthy conduct.[143] For example, a restraint's unlawfulness is critical in distinguishing false imprisonment[144] from lawful imprisonment. Similarly, a person cannot commit theft by failure to make a required disposition[145] without first being legally obligated to dispose of the property at issue. It is also for good reason that the offense of persistent nonsupport[146] applies only to one who is already legally required to provide another with financial support. Such language does not relate at all, much less exclusively, to procedural considerations like statutes of limitations, jurisdiction, or venue. Rather, in requiring an actor's awareness that some aspect of their conduct is unlawful, such requirements are very much connected with the harm or evil of the offense.

Therefore, an offense's material elements include any references to collateral issues of law. Moreover, section 2.02(1) applies to such requirements just as surely as it does to other material elements of offenses.[147] As a result, culpability is almost always required for collateral issues of law, a point the MPC's commentary makes quite clear. Indeed, the commentary confirms that the Code requires culpability as to issues of law for such diverse offenses as felonious restraint,[148] false imprisonment,[149] criminal coercion,[150] criminal trespass,[151] theft by failure to make a required disposition,[152] bribery,[153] embezzlement,[154]

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143. For further discussion of the relationship between culpability requirements and blameworthiness, *see infra* Section II.D.

144. *See* MODEL PENAL CODE § 212.3.

145. *See id.* § 223.8.

146. *See id.* § 230.5.

147. *See id.* § 2.02(1).

148. MODEL PENAL CODE AND COMMENTARIES, PART II: DEFINITION OF SPECIFIC CRIMES, § 212.2 cmt. 2, at 242 (AM. L. INST. 1980) [hereinafter MPC COMMENTARIES, PART II] ("[I]t should be noted that Section 212.2 requires proof that the accused acted knowingly. Thus, he must have been aware that he was restraining his victim, that the restraint was unlawful, and that it exposed the victim to physical danger.").

149. *Id.* § 212.4 cmt. 2, at 257 ("Section 212.3 also requires that the actor knowingly restrain another unlawfully and would be subject to the same analysis offered above with respect to Section 212.2. The actor must know his conduct to be unlawful.").

150. *Id.* § 212.5 cmt. 2, at 265 ("[L]iability requires proof of improper purpose. Specifically, Section 212.5 covers certain threats when made 'with purpose unlawfully to restrict another's freedom of action to his detriment.' The word 'unlawfully' means that the actor must intend to coerce conduct that he has no legal right to require.").

151. *Id.* § 221.2 cmt. 2, at 88 ("Each offense under Section 221.2 must be accompanied by the actor's knowledge that he is not privileged or licensed to enter or remain upon the property. This reflects the common requirement of criminal trespass that the actor be aware of the fact that he is making an unwarranted intrusion.").

152. *Id.* § 223.8 cmt. 2, at 268 (The offense "applies to one who takes the property upon agreement or legal obligation 'to make specified payment or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount.' It is explicitly required that any legal obligation to this effect be known.").

153. *Id.* § 224.8 cmt. 2, at 334 (Section 224.8(1) "requires conscious disregard of a known duty of fidelity.").

154. *Id.* § 224.13 cmt. 2, at 361 ("The section . . . requires that the actor know of the unlawfulness of his conduct.").

persistent nonsupport,[155] resisting arrest,[156] and contraband.[157]

There is ample evidence, then, that the Code's drafters very much intended to require culpability as to collateral issues of law. The prosecution, of course, must prove such culpability beyond a reasonable doubt.[158]

B. Mistakes of Law Negating Culpability

Under the MPC, a mistake of law provides a defense whenever it negates a culpability requirement. The key provision, section 2.04(1)(a), provides that "[i]gnorance or mistake as to a matter of fact or law is a defense if . . . the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense."[159] Importantly, section 2.04(1)(a) treats mistakes of law and fact identically.[160] When a defendant makes a mistake of either law or fact, their liability depends entirely on the offense's culpability requirements concerning the issue the defendant is mistaken about.

As discussed earlier, the common law also recognizes the relationship between mistakes and culpability requirements.[161] But the common law treats a mistake of law somewhat differently from a mistake of fact, even when a mistake relates to an offense's culpability requirements. Under the common law, a mistake of law typically provides a defense only if it negates the specific intent required for an offense.[162] A mistake of fact, on the other hand, can also exculpate for a general-intent offense when the mistake is both honest and reasonable.[163]

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155. *Id.* § 230.5 cmt. 3, at 462 ("Provision that the defendant is criminally liable for persistent default on a support obligation 'which he can provide' and which he knows he is legally obligated to provide again turns the issue on the extent of the actor's legal obligation as established by other sources of law.").

156. *Id.* § 242.2 cmt. 4, at 216–17 ("The remaining situation—and the one to which attention should be addressed—is that of the actor who resists an arrest which he believes to be unlawful and who does so in a manner that does not violate any provision of Articles 210, 211, or 250 of the Model Code. Section 242.2 excludes such conduct by virtue of the requirement that the actor have a 'purpose of preventing the public servant from effecting a lawful arrest.'").

157. *Id.* § 242.7 cmt. 3, at 280 ("The statute specifies that the defendant must know that it is unlawful for the inmate to possess the item provided.").

158. *See* MODEL PENAL CODE § 1.12(1) (AM. L. INST., Proposed Official Draft 1962) ("No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt."); *id.* § 1.13(9)(b) ("'[E]lement of an offense' means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as . . . establishes the required kind of culpability . . . .").

159. *Id.* § 2.04(1)(a). Section 2.04(1)(b) also clarifies that ignorance or mistake provide a defense when "the law provides that the state of mind established by such ignorance or mistake constitutes a defense." *Id.* § 2.04(1)(b). That provision is outside the scope of this Article because it relates to affirmative defenses. Similarly, section 2.04(3) provides an excuse defense for defendants who are mistaken about whether conduct constitutes a criminal offense. *See id.* § 2.04(3). As this Article discusses in Section II.C., section 2.04(3) provides a narrow exception to the Code's version of the ignorance maxim, which appears in section 2.02(9). *See infra* notes 205–08, 233–37 and accompanying text.

160. *See* MODEL PENAL CODE § 2.04(1)(a) (recognizing a defense for either a mistake of fact or mistake of law).

161. *See supra* notes 81–87 and accompanying text.

162. DRESSLER, *supra* note 1, § 13.02(D)(2).

163. *See id.* § 12.03(D).

In contrast, under the MPC, mistakes of law require the exact same analysis as mistakes of fact,[164] making mistake-of-law defenses more broadly available than they are under the common law. As discussed earlier, section 2.02(1) requires culpability for an issue of law when the definition of an offense either refers to or implicates another body of substantive law.[165] If an offense prescribes a culpability requirement without distinguishing between material elements, section 2.02(4) clarifies that the stated culpability level applies to all the elements.[166] If a material element lacks a stated culpability requirement, section 2.02(3) imposes a default culpability requirement of recklessness.[167] Hence, section 2.02 generally requires at least recklessness for material elements that raise collateral issues of law, just as it does for all other material elements.

Section 2.04(1)(a) is a true corollary to section 2.02 because it simply reaffirms the Code's culpability requirements for issues of both fact and law. As a result, section 2.04(1)(a) rejects the common law distinction between mistakes of law and mistakes of fact.[168] For similar reasons, the Code's mistake provision also abandons the traditional distinction between general intent and specific intent.[169] Instead, a mistake—whether it is one of law or one of fact—provides a defense whenever it negates "the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense."[170]

The Code's definitions of its culpability levels are therefore critical in determining whether a mistake of law precludes liability. Section 2.02(2) defines the four culpability levels—purpose, knowledge, recklessness, and negligence—with respect to what the Code calls "circumstance," "conduct," and "result" elements.[171] In general, purpose requires that some conduct or result be the actor's "conscious object"[172] and that the actor "is aware" of attendant circumstances or "believes or hopes" they will exist.[173] Knowledge also requires awareness for both conduct and circumstance elements;[174] for result elements, it requires awareness that the result

164. MPC COMMENTARIES, PART I, *supra* note 101, § 2.04 cmt. 1, at 270 n.2 ("There is no sensible basis for a distinction between mistakes of fact and law in this context, and, indeed, the point is often recognized in the cases by assimilating legal errors on collateral matters to a mistake of fact, or by treating such errors as exceptions to the *ignorantia juris* concept.").

165. *See* MODEL PENAL CODE § 2.02(1).

166. *Id.* § 2.02(4).

167. *Id.* § 2.02(3).

168. *See id.* § 2.04(1) (applying to both ignorance or mistake "as a matter of fact or law"); MPC COMMENTARIES, PART I, *supra* note 101, § 2.04 cmt. 1, at 269–71.

169. MPC COMMENTARIES, PART I, *supra* note 101, § 2.04 cmt. 1, at 271 ("[T]he question relates to the underlying rule as to the kind of culpability required with respect to the particular element of the offense involved. Generalizations about mistake of fact and mistake of law, or about honest and reasonable mistakes as relevant to general and specific intent crimes, tend to obscure rather than clarify that simple point.").

170. MODEL PENAL CODE § 2.04(1)(a).

171. *Id.* § 2.02(2).

172. *Id.* § 2.02(2)(a)(i).

173. *Id.* § 2.02(2)(a)(ii).

174. *Id.* § 2.02(2)(b)(i).

is "practically certain."[175] Recklessness requires that the actor "consciously disregards a substantial and unjustifiable risk" as to an element,[176] and an actor is negligent when they "should be aware of a substantial and unjustifiable risk" that a material element exists or will occur.[177]

A defendant thus lacks purpose if they are mistaken about the law in a way that prevents them from being aware of the law's requirements or from having a conscious object to violate it.[178] Similarly, a mistake can negate knowledge as to a collateral issue of law if a defendant is not at least practically certain that some aspect of their conduct is unlawful.[179] Likewise, a defendant cannot be reckless as to a matter of law unless they are recklessly mistaken. Put differently, recklessness requires consciously disregarding a substantial and unjustifiable risk that one is wrong about the law.[180] As a result, a non-reckless mistake will negate recklessness.[181] Finally, negligence may require being negligently mistaken about the law, meaning that a reasonable person would at least be aware of a meaningful risk that they are wrong.[182] Accordingly, a non-negligent mistake will negate negligence under section 2.04(1)(a).[183]

For good reason, then, most commentators have concluded that section 2.04(1)(a) is best viewed as a restatement of section 2.02's culpability requirements.[184] Indeed, the MPC's official commentary confirms as much. For example, section 2.04's explanatory note observes that the provision's application "turns upon the culpability level for each element of the offense, established according to its offense definition and the general principles set forth in Section 2.02."[185] The commentary even suggests that section 2.04(1)(a) is unnecessary because it says nothing "that would not

175. *Id.* § 2.02(2)(b)(ii).
176. *Id.* § 2.02(2)(c).
177. *Id.* § 2.02(2)(d).
178. *See id.* § 2.02(2)(a).
179. *See id.* § 2.02(2)(b).
180. *See id.* § 2.02(2)(c).
181. ROBINSON, *supra* note 38, § 62(b); Alexander, *supra* note 2, at 35 n.8.
182. *See* MODEL PENAL CODE § 2.02(2)(d).
183. ROBINSON, *supra* note 38, § 62(b); Alexander, *supra* note 2, at 35 n.8.
184. *See, e.g.*, ROBINSON, *supra* note 38, § 62(b) ("Technically, such provisions are unnecessary. They simply confirm what is stated elsewhere . . . ."); Alexander, *supra* note 2, at 35–36 ("The reform here is really nothing more than the recognition that *mens rea* requirements logically entail certain treatment of mistakes, and that therefore there is no sense in treating exculpatory mistakes under a rubric separate from *mens rea*."); Leonard, *supra* note 37, at 546 n.133 ("[A]s widely recognized, the separate mistake provision in section 2.04(1) adds nothing to the culpability structure; it simply restates the obvious point that any mistake that negatives the particular culpability required for an offense must exculpate."). Professor Kenneth Simons argues that the MPC adopts what he calls "the equivalence approach," under which a mistake of noncriminal law is ordinarily treated the same as a mistake of fact. Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. CRIM. L. 487, 497 (2012). Professor Simons concludes that section 2.04(1)(a) is not a "mere truism" because it is "not limited to statutes that *explicitly* recognize certain mistakes of law as exculpatory." *Id.* Although I conclude that section 2.04(1)(a) is largely a truism, I agree with Professor Simons that a mistake of law can preclude liability when an offense definition either refers to or implicates a collateral issue of law. *See supra* notes 120–40 and accompanying text.
185. MPC COMMENTARIES, PART I, *supra* note 101, § 2.04 explanatory note, at 268.

otherwise be true, even if no provision on the subject were made."[186] The Code's chief reporter, Herbert Wechsler, also once declared that the provision "really does not say anything" and described it as "almost tautological."[187]

Although section 2.04(1)(a) is therefore somewhat superfluous, the drafters included it to clarify that a mistake need not always be reasonable to negate a culpability requirement.[188] It is inappropriate to require a reasonable mistake, for example, when an offense prescribes a culpability level of purpose or knowledge for an element.[189] For instance, if a defendant is honestly mistaken about whether their conduct is unlawful, they lack knowledge as to unlawfulness regardless of whether their mistake is reasonable or unreasonable. Considerations of reasonableness are more relevant to recklessness and negligence because both culpability levels refer to the standard of care that a reasonable person would use.[190] But because recklessness differs from negligence in requiring the actor to be aware of a risk and to consciously disregard it,[191] it is more precise to think of mistakes as being faultless, negligent, or reckless rather than being just reasonable or unreasonable.[192] Thus, even if section 2.04(1) is technically unnecessary, it may be worth including in the Code because it helps reaffirm section 2.02's rules on culpability.

Finally, it is important to note that section 2.04(1)(a) has no effect on the prosecution's ultimate burden of proof. The Code requires the prosecution to prove each offense element beyond a reasonable doubt,[193] including culpability requirements.[194] As a practical matter, a defendant will often raise any question concerning whether they lack a required mental state based on a mistake of law.[195] When that is the case, courts must remember that the real issue is whether the defendant satisfies the offense's culpability requirements. Although one might think of a mistake of law as providing a "defense," as the Code itself puts it,[196] the prosecution is required to disprove a mistake of law beyond a reasonable doubt if it would negate a culpability requirement.[197] If the prosecution fails to disprove the mistake, it also fails to satisfy its burden of proof.[198]

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186. *Id.* § 2.04 cmt. 1, at 270.

187. *Friday Morning Session – May 20, 1955*, 32 A.L.I. PROC. 141, 164 (1955).

188. *Id.*

189. MPC COMMENTARIES, PART I, *supra* note 101, § 2.04 cmt. 1, at 271.

190. *See* MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST., Proposed Official Draft 1962) (defining recklessness to require "a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation"); *id.* § 2.02(2)(d) (defining negligence to require "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation").

191. *Compare id.* § 2.02(2)(c) (defining recklessness), *with id.* § 2.02(2)(d) (defining negligence).

192. ROBINSON, *supra* note 38, § 62(b) (noting precise culpability definitions in the context of mistakes).

193. MODEL PENAL CODE § 1.12(1).

194. *See id.* § 1.13(9)(b) ("'[E]lement of an offense' means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as . . . establishes the required kind of culpability . . . .").

195. *See* MPC COMMENTARIES, PART I, *supra* note 101, § 2.04 cmt. 1, at 271; ROBINSON, *supra* note 38, § 62(b).

196. MODEL PENAL CODE § 2.04(1).

197. LAFAVE, *supra* note 3, § 5.6(a).

198. DRESSLER, *supra* note 1, § 13.02(A).

C. Mistakes about Criminality

The Model Penal Code's version of the ignorance maxim appears in section 2.02(9).[199] The provision is titled "Culpability as to Illegality of Conduct" and establishes the Code's general rule that an actor need not be culpable as to whether conduct constitutes an offense.[200] To that end, section 2.02(9) provides that "[n]either knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides."[201]

Section 2.02(9) reflects the drafters' effort to distinguish mistakes about criminality from mistakes of law that negate culpability requirements. As discussed earlier, section 2.02(1) generally requires culpability for "each material element of the offense,"[202] and a material element can implicate or explicitly refer to a collateral issue of law.[203] As a corollary, section 2.04(1)(a) recognizes that a mistake of law exculpates if it negates the culpability required for an offense element.[204]

Section 2.02(9) provides a different rule for mistakes about criminality, under which culpability generally is not required "as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense."[205] As the provision's explanatory note explains, section 2.02(9) "establishes the basic proposition that knowledge of the law defining the offense is not itself an element of the offense."[206] The commentary notes that the ignorance maxim "is greatly overstated"[207] and properly limited to "the particular law that sets forth the definition of the crime in question."[208] The drafters emphasize that "[i]t is knowledge of *that* law that is normally not a part of the crime."[209]

Many modern legal scholars agree that mistakes about collateral issues of law differ from mistakes about whether one's conduct is criminal. For example, Professor Douglas Husak observed that "mistakes of law, no less than mistakes of fact, may be about particular elements of crimes rather than about the law as a whole."[210] Along similar lines, Professor Wayne LaFave lamented the confusion caused by applying the ignorance maxim to "both the situation in which the defendant is unaware of the existence of a statute prohibiting his conduct, and that

199. MODEL PENAL CODE § 2.02(9).
200. *See id.*
201. *Id.*
202. MODEL PENAL CODE § 2.02(1).
203. *See supra* notes 120–42 and accompanying text.
204. MODEL PENAL CODE § 2.04(1)(a).
205. *Id.* § 2.02(9).
206. MPC COMMENTARIES, PART I, *supra* note 101, § 2.02 explanatory note, at 228.
207. *Id.* § 2.02 cmt. 11, at 250.
208. *Id.*
209. *Id.*
210. Husak, *supra* note 37, at 146.

where the defendant has a mistaken impression concerning the legal effect of some collateral matter."[211] As Professor LaFave notes, the two situations differ meaningfully.[212] A defendant can commit theft, for example, without knowing that it is a crime.[213] A defendant does not commit theft, however, if they wrongly believe that they own the property at issue based on a mistake of law; such a defendant lacks the requisite intent to steal another's property.[214]

The Code's commentary strongly suggests that the same analysis applies when an offense definition more directly refers to a collateral issue of law. For example, section 224.13 defines embezzlement to require disposing of entrusted property in a way that one "knows is unlawful."[215] The official commentary confirms that the offense definition "requires that the actor know of the unlawfulness of his conduct."[216] Hence, the offense requires "knowledge of the regulations that apply to the actor's conduct because of his fiduciary responsibilities," rather than "knowledge of the criminal law or the elements of Section 224.13."[217] As discussed earlier, the commentary also makes clear that the Code requires culpability as to collateral issues of law for numerous other criminal offenses. Such crimes include offenses against the person, like felonious restraint, false imprisonment, and criminal coercion; property offenses like criminal trespass and theft by failure to make a required disposition; offenses against the family like persistent nonsupport; and offenses against public administration, like bribery, persistent nonsupport, resisting arrest, and contraband.[218]

There is little doubt, then, that the drafters intended to limit section 2.02(9)'s version of the ignorance maxim to mistakes about criminality.[219] But as simple as that rule seems, it presents drafting challenges. Indeed, offenses consist of elements, and one can be mistaken about the existence or meaning of an offense element just as surely as one can be mistaken about the offense as a whole. As a matter of policy, there is no significant difference between a mistake about the existence or meaning of a specific requirement and a mistake about the existence or meaning of an offense. For example, if a defendant need not know that theft is a

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211. LAFAVE, *supra* note 3, § 5.6(a).
212. *Id.*
213. *Id.*
214. *Id.*
215. MODEL PENAL CODE § 224.13 (AM. L. INST., Proposed Official Draft 1962).
216. MPC COMMENTARIES, PART II, *supra* note 148, § 224.13 cmt. 2, at 361.
217. *Id.* at 361 n.7.
218. *See supra* notes 148–57 and accompanying text.
219. Perplexingly, the commentary suggests that section 2.02(9) might apply to a collateral issue of law for the offense of endangering the welfare of a child. Section 230.4 defines that offense to occur when one "knowingly endangers [a] child's welfare by violating a duty of care, protection or support." MODEL PENAL CODE § 230.4. As the commentary explains, the requirement of knowledge appears to apply to the requirement of violating a duty. *See* MPC COMMENTARIES, PART II, *supra* note 148, § 230.4 cmt. 3, at 451–52. Nevertheless, without further explanation, the commentary states that "the better construction is to implement the general policy stated in Section 2.02(9)." *Id.* at 452 n.35. For good reason, Kenneth Simons has described the commentary's interpretation as "surprising." Simons, *supra* note 184, at 538 n.140.

crime, it seems to follow that a defendant need not know the elements of theft. Hence, a defendant is not required to know that a theft statute applies when one "exercises unlawful control" over another's property, much less to know the meaning of the phrase "exercises unlawful control" or how it applies to particular conduct.[220] On the other hand, the offense's material elements include exercising unlawful control,[221] meaning that culpability is required as to the facts that one is exercising control and that such control is unlawful.[222] If knowledge is required as to those elements, a defendant cannot be liable if they are unaware either that they are exercising control or that their control is unlawful.[223]

To be effective, then, section 2.02(9) must apply to mistakes about the existence or meanings of specific offense elements, but not in a way that frustrates the Code's other rules on culpability and mistakes. To that end, section 2.02(9) clarifies that the Code generally does not require culpability either (1) "as to whether conduct constitutes an offense" or (2) "as to the existence, meaning or application of the law determining the elements of an offense."[224] In stating that culpability is not required as to "the existence, meaning or application of the law determining the elements of an offense,"[225] section 2.02(9) initially appears to be in tension with the Code's mistake provision. After all, section 2.04(1)(a) uses similar language in providing that a mistake of law exculpates if it negates the culpability "required to establish a material element of [an] offense."[226]

Significantly, though, section 2.02(9) provides that culpability is not required as to "the existence, meaning or application of the law" defining an offense.[227] Section 2.04(1)(a), in contrast, affirms that culpability is generally "required to establish a material element of [an] offense."[228] The Code's distinction is somewhat subtle, but section 2.02(9) ultimately applies to mistakes about criminality rather than mistakes about collateral issues of law.[229] Indeed, the commentary plainly

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220. *Cf.* MODEL PENAL CODE § 223.2(1) ("A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof.").

221. *See id.* § 1.13(10) (defining "material element of an offense").

222. *See id.* § 2.02(1) (requiring culpability for each material element of an offense).

223. *See id.* § 2.02(2)(b) (defining "knowingly").

224. *Id.* § 2.02(9).

225. *Id.*

226. *Id.* § 2.04(1)(a).

227. *Id.* § 2.02(9).

228. *Id.* § 2.04(1)(a).

229. As Professor Larry Alexander has noted, it is often difficult to distinguish between mistakes as to offense elements and mistakes as to offenses themselves. Alexander, *supra* note 2, at 38. For example, Professor Alexander criticizes Joshua Dressler's different-law approach, under which a mistake of law can exculpate if it concerns a different law than the offense for which the defendant is prosecuted. *See id.* at 38–39. As Professor Alexander notes, "[t]he same law/different law approach requires that we have a theory about how to individuate laws." *Id.* at 39. Such a theory would allow one to determine whether a collateral issue of law is truly separate from an offense that it helps to define. *Id.* As problematic as a distinction between offenses and offense elements might be, Professor Alexander agrees that the MPC embraces it. *See id.* at 36–37. Moreover, problems in this area are less likely to arise when an offense definition is "relatively clear about what mental states are required for various elements." *Id.* at 40. As discussed earlier, section 2.02 is quite clear about what culpability is required

states that section 2.02(9) is limited to "the particular law that sets forth the definition of the crime in question."[230] Again, "[i]t is knowledge of *that* law that is normally not a part of the crime, and it is ignorance or mistake as to *that* law that is denied defensive significance by this subsection of the Code."[231] Just as tellingly, section 2.02(9)'s commentary never discusses section 2.04(1)(a), much less suggests that section 2.02(9) affects the axiom that a mistake of law exculpates if it negates a culpability requirement.[232]

The MPC recognizes two narrow circumstances that may require culpability as to whether conduct constitutes a criminal offense. Specifically, section 2.02(9) provides that culpability as to criminality is not required "unless the definition of the offense or the Code so provides."[233] The commentary first explains that an offense definition may require knowledge as to criminality "by explicitly requiring awareness of a regulation, violation of which is denominated as an offense."[234] Alternatively, a criminal code may include "a general provision . . . indicating circumstances in which mistakes about the law defining an offense will constitute a defense."[235] As an example of such a defense, the commentary cites section 2.04(3),[236] which provides a narrow excuse when the defendant (1) does not know about an offense because it "has not been published or otherwise reasonably made available" or (2) "acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous."[237] The commentary notes that section 2.02(9)'s exceptions are rare and apply "only when the governing law 'so provides.'"[238]

Importantly, section 2.02(9)'s "unless" clause does not refer to mistakes about offense elements that raise collateral issues of law. Indeed, the commentary emphasizes that the ignorance maxim "has no application . . . when the circumstances made material by the definition of the offense include a legal element."[239] As a result, section 2.02(9) does not refer to section 2.04(1)(a) in stating that culpability is required as to criminality when the Code "so provides."[240] Rather, as Kenneth Simons has observed, that language simply "clarifies that mistakes as to the

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for a collateral issue of law when an offense definition refers to law other than the offense itself. *See supra* Section II.A. Such offenses are this Article's main focus.

230. MPC COMMENTARIES, PART I, *supra* note 101, § 2.02 cmt. 11, at 250.

231. *Id.* Although a subsection title is hardly determinative, it also seems significant that section 2.02(9) is titled "Culpability as to Illegality of Conduct." *See* MODEL PENAL CODE § 2.02(9).

232. *See* MPC COMMENTARIES, PART I, *supra* note 101, § 2.02 cmt. 11, at 250–51 (explaining section 2.02(9)).

233. MODEL PENAL CODE § 2.02(9).

234. MPC COMMENTARIES, PART I, *supra* note 101, § 2.02 cmt. 11, at 251. The commentary provides an example of a proposed offense that criminalized willfully violating a penal regulation; the proposed offense explicitly required "[w]illfulness as to both the conduct and the existence of the penal regulation." *See id.* at 251 n.51.

235. *Id.* at 251.

236. *Id.* at 251 n.52.

237. MODEL PENAL CODE § 2.04(3).

238. MPC COMMENTARIES, PART I, *supra* note 101, § 2.02 cmt. 11, at 251.

239. *Id.* at 250.

240. *See* MODEL PENAL CODE § 2.02(9).

governing criminal law can sometimes be exculpatory."[241] Again, under the Code's version of the ignorance maxim, mistakes as to offenses differ from mistakes about whether one's conduct is criminal.

So understood, there is nothing radical about the MPC's approach to the rule that *ignorantia legis non excusat*. Rather, as under the common law, mistakes negating culpability are not true exceptions to the ignorance maxim.[242] When a defendant is mistaken about a collateral issue of law, the MPC does not exculpate because the defendant is mistaken about the criminal law itself. Instead, such a defendant avoids criminal liability because the prosecution cannot prove culpability beyond a reasonable doubt.[243]

D. Reasons for Requiring Culpability for Collateral Issues of Law

As discussed in the preceding Sections, section 2.02(1) generally requires culpability for each material element of an offense,[244] including elements that implicate or refer to collateral issues of law.[245] As a result, the Code routinely requires that a defendant be aware that some aspect of their conduct is unlawful,[246] and the prosecution must prove such awareness beyond a reasonable doubt.[247] Section 2.04(1)(a), in turn, confirms that a mistake exculpates if it negates a culpability requirement,[248] and the Code treats mistakes of law no differently than mistakes of fact.[249] One advantage of that approach is it that it eliminates the need to determine whether a mistake is one of law or one of fact, which is often challenging.[250]

It also makes sense to treat legal and factual issues alike because they are often equally relevant to blameworthiness. For example, the MPC's definition of criminal trespass requires that an actor enter or remain in a place "knowing that he is not licensed or privileged to do so."[251] The terms "licensed" and "privileged" typically have different meanings.[252] One generally enters with license if they have permission to enter, but a privileged entry occurs when one has a legal right to enter even

241. Simons, *supra* note 184, at 533 n.125.
242. *See supra* notes 78–87 and accompanying text.
243. *See supra* notes 193–98 and accompanying text.
244. MODEL PENAL CODE § 2.02(1).
245. *See supra* Section II.A.
246. *See supra* notes 120–38 and accompanying text.
247. *See supra* notes 158, 193–98 and accompanying text.
248. MODEL PENAL CODE § 2.04(1)(a).
249. *See supra* notes 164, 168 and accompanying text.
250. ROBINSON, *supra* note 38, § 62(e) ("Another advantage of the Model Penal Code approach is that it does away with the need for the distinction between mistakes of fact and mistakes of law, a distinction that has proven very troublesome in practice."). Professor Douglas Husak agrees that the law can sidestep problems in distinguishing mistakes of law from mistakes of fact by treating them alike. *See* Husak, *supra* note 37, at 143 ("[T]he greater the difficulty of distinguishing MF from ML, the greater the appeal of the equivalence thesis. Those who favor retaining a dramatic normative difference between the exculpatory significance of ML and MF have more need to tackle the thorny problem of contrasting these two kinds of mistake.").
251. MODEL PENAL CODE § 221.2(1).
252. *See* LAFAVE, *supra* note 3, § 21.2(a).

without permission.[253] License, then, is largely an issue of fact, and privilege is largely an issue of law. The Code treats license and privilege alike because both are relevant to an actor's blameworthiness. After all, the offense of trespassing is aimed at the harm caused by an intrusion onto another person's property.[254] In requiring knowledge as to a lack of authority, the Code properly demands that "the actor be aware of the fact that he is making an unwarranted intrusion."[255] A mistake as to a legal right can negate such knowledge as easily as a mistake as to permission.

Indeed, the Code often requires culpability as to collateral issues of law to limit the criminal law's reach. The Code defines felonious restraint, for example, to apply to one who "knowingly . . . restrains another unlawfully in circumstances exposing him to risk of serious bodily injury."[256] Under section 2.02(4), knowledge is required as to unlawfulness because the offense definition prescribes the culpability requirement of knowledge without distinguishing between the offense's material elements.[257] The commentary explains that the Code requires knowledge as to unlawfulness, in part, "to guard against convicting peace officers of felonious restraint because of defects in their arresting authority."[258] The requirement also ensures that where a parent allegedly restrains a child in violation of a custody order, the offense "can be applied only to a case where the custody arrangement is clearly known to the actor."[259] The drafters emphasize that "legitimate questions can arise about the status of a custody arrangement," and the criminal law should apply only "where the custody arrangement is clearly known to the actor."[260]

Such requirements, then, often reflect policy judgments about the proper scope of the criminal law. As another example, the Code's offense of persistent nonsupport applies when one repeatedly fails to provide support that the actor "knows he is legally obliged to provide to a spouse, child or other dependent."[261] The offense requires that the defendant know of a civil legal obligation, the commentary explains, to prevent the criminal law from determining issues that are better left to family law.[262] Criminal sanctions, then, are best "reserved for cases where persistent and culpable default in settled obligations can be shown."[263] Likewise, the Code defines embezzlement to require disposing of entrusted property in a way

253. *See id.*

254. MPC COMMENTARIES, PART II, *supra* note 148, § 221.2 cmt. 1, at 87.

255. *Id.* § 221.2 cmt. 2(a), at 88.

256. MODEL PENAL CODE § 212.2(a).

257. *See id.* § 2.02(4).

258. MPC COMMENTARIES, PART II, *supra* note 148, § 212.2 cmt. 2, at 243.

259. *Id.* § 212.4 cmt. 2, at 256.

260. *Id.* Similarly, the Code's offense for false imprisonment applies when one "knowingly restrains another unlawfully so as to interfere substantially with his liberty." MODEL PENAL CODE § 212.3. The commentary explains that the offense requires knowledge as to unlawfulness for the same reasons that felonious restraint does. MPC COMMENTARIES, PART II, *supra* note 148, § 212.4 cmt. 2, at 257.

261. MODEL PENAL CODE § 230.5.

262. MPC COMMENTARIES, PART II, *supra* note 148, § 230.5 cmt. 2, at 459.

263. *Id.*

that one "knows is unlawful."[264] The commentary explains that the Code requires culpability as to a collateral issue of law, in part, "to avoid the intrusion of the criminal law into a field that is more appropriately the subject of civil treatment."[265] In short, the Code often requires culpability as to collateral issues of law to ensure that defendants are sufficiently blameworthy to warrant criminal liability.

Consequently, although there is often good reason to require culpability as to issues of law, legislative intent is rarely given weight in determining culpability requirements under the Code. Regardless of legislative intent, section 2.02(1) requires culpability for each material element of an offense,[266] and section 2.02(3) automatically reads in a requirement of recklessness for any element that lacks a stated culpability requirement.[267] Importantly, the Code's culpability provisions apply to collateral issues of law just as surely as they apply to other material elements of an offense.

III. PROBLEMS WITH MISTAKES OF LAW IN MODEL PENAL CODE STATES

With its publication in 1962, the Model Penal Code triggered a surge of criminal-code reform projects across the United States.[268] By some counts, more than thirty states have enacted criminal codes influenced by the MPC.[269] The Code's culpability provisions have been particularly influential. Indeed, twenty-five states have enacted culpability provisions influenced significantly by the MPC: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Indiana, Kansas, Kentucky, Maine, Missouri, Montana, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, and Utah.[270]

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264. MODEL PENAL CODE § 224.13.

265. MPC COMMENTARIES, PART II, *supra* note 148, § 224.13 cmt. 2, at 362.

266. MODEL PENAL CODE § 2.02(1).

267. *See id.* § 2.02(3).

268. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326–27 (2007).

269. In 1984, the Code's official reporter, Herbert Wechsler, identified thirty-four criminal codes that had been "influenced in some part by the positions taken in the Model Code." MPC COMMENTARIES, PART I, *supra* note 101, at xi. Professor Wechsler's list included Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawai'i, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, and Wyoming. *Id.*

270. *See* ALA. CODE §§ 13A-2-1 to -6 (2023); ALASKA STAT. ANN. §§ 11.81.600–.620 (West 2023); ARIZ. REV. STAT. ANN. §§ 13-201 to -204 (2023); ARK. CODE ANN. §§ 5-2-201 to -206 (West 2023); COLO. REV. STAT. ANN. §§ 18-1-501 to -504 (West 2023); CONN. GEN. STAT. ANN. §§ 53a-5 to -6 (West 2023); DEL. CODE ANN. tit. 11, §§ 251–64 (West 2023); HAW. REV. STAT. ANN. §§ 702-204 to -220 (West 2023); 720 ILL. COMP. STAT. ANN. 5/4-3 to 4-9 (West 2023); IND. CODE ANN. § 35-41-2-2 (West 2023); KAN. STAT. ANN. §§ 21-5202 to -5204, -5207 (West 2023); KY. REV. STAT. ANN. §§ 501.010–.070 (West 2023); ME. REV. STAT. ANN. tit. 17-A, §§ 32–36 (West 2023); MO. ANN. STAT. §§ 562.016–.031 (West 2023); MONT. CODE ANN. §§ 45-2-101 to -104 (West 2023); N.H. REV. STAT. ANN. §§ 626:2–:3 (2023); N.J. STAT. ANN. §§ 2C:2-2 to -4 (West 2023); N.Y. PENAL LAW §§ 15.00–.20 (McKinney 2023); N.D. CENT. CODE ANN. §§ 12.1-02-02 to -05 (West 2023); OHIO REV. CODE ANN. §§ 2901.20–.22 (West 2023); OR. REV. STAT. ANN. §§ 161.085–.115 (West 2023); 18 PA. STAT. AND CONS. STAT. ANN. §§ 302–05 (West 2023); TENN. CODE ANN. §§ 39-11-301 to -302 (West 2023); TEX. PENAL CODE ANN. §§ 6.02–.04 (West 2023); UTAH CODE ANN. §§ 76-2-102 to -104 (West 2023).

In crafting the Code's culpability provisions, the MPC's drafters took specific aim at criminal offenses that use strict liability to enforce civil law.[271] The perceived need for strict liability offenses arose as the criminal law expanded its reach during the nineteenth century.[272] As Justice Robert H. Jackson explained in *Morissette v. United States*, when society became significantly more complex beginning with the Industrial Revolution, legislatures responded by enacting new laws to protect people from new dangers.[273] These civil regulations sought to "heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare."[274] To ensure compliance, legislatures often imposed criminal sanctions for so-called "public welfare offenses" even though they differed significantly from traditional criminal offenses developed by the common law.[275] However, the MPC's drafters were adamant that the criminal law should apply only to those who are sufficiently blameworthy to warrant the law's formal condemnation, stating that principle was "too fundamental to be compromised."[276] To that end, section 2.05 "makes a frontal attack" on strict liability by generally treating any strict liability offense, regardless of where it appears in a state's statutes, as a mere civil violation.[277] Hence, under the Code, section 2.02(1) should be taken at face value in requiring culpability for each material element of an offense.[278] That requirement applies to public-welfare offenses and more traditional offenses alike.[279]

In the six decades since the Code's publication, criminal codes have only continued to expand. The United States Code now contains thousands of criminal offenses,[280] and the number of state crimes has also increased exponentially.[281] Unsurprisingly, countless federal and state offenses refer explicitly to collateral

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271. *See* MPC COMMENTARIES, PART I, *supra* note 101, § 2.05 cmt. 1, at 282.

272. Hall & Seligman, *supra* note 11, at 642.

273. Morissette v. United States, 342 U.S. 246, 253–54 (1952).

274. *Id.* at 254.

275. *Id.* at 254–56. Justice Jackson described public welfare offenses as being "not in the nature of positive aggressions or invasions, with which the common law so often dealt, but . . . in the nature of neglect where the law requires care, or inaction where it imposes a duty." *Id.* at 255. Put differently, public welfare offenses are crimes against the government's authority. *Id.* at 256.

276. MPC COMMENTARIES, PART I, *supra* note 101, § 2.05 cmt. 1, at 283.

277. *Id.* at 282.

278. *See* MODEL PENAL CODE § 2.02(1) (AM. L. INST., Proposed Official Draft 1962).

279. *See* MPC COMMENTARIES, PART I, *supra* note 101, § 2.05 cmt. 1, at 282 ("This position is affirmed not only with respect to offenses defined by the penal code; it is superimposed on the entire corpus of the law so far as penal sanctions are involved.").

280. Cottone, *supra* note 11, at 141 ("Tellingly, no exact count of the number of federal statutes that impose criminal sanctions has ever been given, but estimates from the last fifteen years range from 3,600 to approximately 4,500."); Benjamin Levin, *Mens Rea Reform and its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 514 (2019) ("There are over four thousand federal criminal laws . . . .").

281. Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 768 ("The single most visible development in the substantive criminal law is that the sheer number of criminal offenses has grown exponentially."); *see also* Levin, *supra* note 280, at 514 ("[O]ver the last fifty years, states and localities have criminalized conduct at an alarming rate.").

issues of law. As discussed earlier, the MPC itself contains numerous offenses requiring that one act "unlawfully," act "subject to a known legal obligation," or "knowingly violate" a legal duty.[282] Similarly, state statutes are replete with offenses that require one to "violate" or "knowingly violate" a statute or court order,[283] to "fail" or "knowingly fail" to perform a legal duty,[284] or to engage in certain conduct after being convicted of a felony.[285] Under a proper application of the MPC, culpability is ordinarily required for such collateral issues of law because they are material offense elements.[286]

As I have written elsewhere,[287] however, state legislatures and courts often undermine the Code's norm of requiring culpability for each material element of an offense.[288] For example, MPC states often circumvent the Code's stated-culpability provision, section 2.02(4), by reading stated culpability requirements to

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282. *See supra* notes 134–38 and accompanying text.

283. *See, e.g.*, ALA. CODE § 37-3-25(a) (2023) ("knowingly and willfully violating"); ALASKA STAT. ANN. § 11.56.740(a)(1) (West 2023) ("knowingly . . . violates"); ARIZ. REV. STAT. ANN. § 12-994(A)–(B) (2023) ("intentionally or knowingly violates"); ARK. CODE ANN. § 5-4-106(h) (West 2023) ("knowingly violates"); COLO. REV. STAT. ANN. § 18-3-304(2) (West 2023) ("violates"); CONN. GEN. STAT. ANN. § 53a-223(a) (West 2023) ("violates"); DEL. CODE ANN. tit. 7, § 6617(a) (West 2023) ("violates"); HAW. REV. STAT. ANN. § 586-11 (a) (West 2023) ("knowingly or intentionally violates"); 740 ILL. COMP. STAT. ANN. 21/125 (West 2023) (applying to a "knowing violation"); IND. CODE ANN. § 35-50-7-9 (West 2023) ("knowingly or intentionally violates"); KAN. STAT. ANN. § 50-1013(a) (West 2023) ("knowingly violates"); KY. REV. STAT. ANN. § 17.510 (11) (West 2023) ("knowingly violates"); ME. REV. STAT. ANN. tit. 32, § 11304(1) (West 2023) ("knowingly violates").

284. *See, e.g.*, MO. ANN. STAT. § 589.425(1) (West 2023) ("fails"); MONT. CODE ANN. § 46-23-507(1) (West 2023) ("knowingly fails"); N.H. REV. STAT. ANN. § 651-B:9(II) (2023) ("knowingly fails"); N.J. STAT. ANN. § 26:2C-33 (West 2023) ("knowingly fails"); N.Y. CORRECT. LAW § 168-t (McKinney 2023) ("fails"); OHIO REV. CODE ANN. § 2937.99 (West 2023) ("fail"); OR. REV. STAT. ANN. § 153.992(1) (West 2023) ("knowingly fails"); 18 PA. STAT. AND CONS. STAT. ANN. § 5502 (West 2023) ("knowingly fails"); TENN. CODE ANN. § 40-7-120(h) (West 2023) ("knowingly or willfully fails"); TEX. CODE CRIM. PROC. ANN. art. 62.102(a) (West 2023) ("fails"); UTAH CODE ANN. § 76-9-904(1)(a) (West 2023) ("failure").

285. *See, e.g.*, ALA. CODE § 13-11-72(a)(1)–(2) (effective Sept. 1, 2023) (criminalizing possession of a firearm after certain convictions); ALASKA STAT. ANN. § 11.61.200(a)(1) (West 2023) ("knowingly possesses a firearm capable of being concealed on one's person after having been convicted of a felony"); ARIZ. REV. STAT. ANN. § 13-3102(A)(1)(4) (2023) (criminalizing possession of certain weapons by a "prohibited possessor"); ARK. CODE ANN. § 5-73-103(a)(1) (West 2023) (criminalizing possession of a firearm after a felony conviction); COLO. REV. STAT. ANN. § 18-12-108(1) (West 2023) ("knowingly possesses, uses, or carries . . . subsequent to the person's conviction for a felony"); 720 ILL. COMP. STAT. ANN. 5/24-1.1(a) (West 2023) (criminalizing possession of a firearm after a felony); KAN. STAT. ANN. § 21-6304(a)(1) (West 2023) (criminalizing possession of a firearm after a felony conviction); N.Y. PENAL LAW § 265.02(5) (McKinney 2023) (criminalizing possession of a firearm after a conviction for a felony or Class A misdemeanor); OHIO REV. CODE ANN. § 2923.13(A)(3) (West 2023) (criminalizing possession of a firearm after a felony drug indictment or conviction); 18 PA. STAT. AND CONS. STAT. ANN. § 6105(a)(1) (West 2023) (criminalizing possession of a firearm after certain convictions); TEX. PENAL CODE ANN. § 46.04 (West 2023) (criminalizing possession of a firearm after certain convictions); Rhone v. State, 825 N.E.2d 1277, 1280 (Ind. Ct. App. 2005) (discussing prior offense for one who "knowingly or intentionally possesses a firearm after having been convicted of . . . a serious violent felony").

286. *See supra* Section II.A.

287. *See generally* England, *supra* note 8 (discussing problems with default culpability requirements in MPC states); England, *supra* note 109 (discussing problems with stated culpability requirements in MPC states).

288. *See* MODEL PENAL CODE § 2.02(1) (AM. L. INST., Proposed Official Draft 1962) (requiring culpability for each material element of an offense).

apply to some offense elements but not others.[289] Similarly, legislatures and courts often erode the Code's default culpability provision, section 2.02(3), by imposing strict liability when statutes are silent about mental states.[290]

Thus, it is somewhat predictable that MPC states also struggle with stated and default culpability requirements that apply to collateral issues of law. What is surprising is the extent of the problem. Reviewing the statutory and case law in the twenty-five states with culpability provisions influenced by the MPC, it is apparent that the overwhelming majority of MPC states have significant problems with statutory provisions addressing mistakes, with judicial decisions involving mistakes of law, or both. MPC states often err by failing to require culpability for issues of law,[291] by ignoring the relationship between mistakes and culpability requirements,[292] and by confusing mistakes about offense elements with mistakes about criminality.[293] In short, the law of mistakes is seriously mistaken.

A. Failing to Require Culpability for Issues of Law

Many MPC states err in their treatment of mistakes of law based on shortcomings related to their codes' culpability provisions. As discussed earlier, culpability requirements are essential in determining whether a mistake of law is exculpatory.[294] After all, under both the MPC and the common law, a mistake of law ordinarily provides a defense only if it negates a culpability requirement.[295] If an offense imposes strict liability for an element, any mistake of law is irrelevant.[296] The Code prevents such strict or "absolute" liability[297] through sections 2.02(3) and 2.02(4), which govern the interpretation of culpability requirements.[298] Most MPC states have deviated significantly from the MPC in their treatment of these critical provisions, which will be discussed in turn.

1. Problems with Stated Culpability Requirements

To begin, many MPC states have undermined the Code's stated-culpability provision, section 2.02(4).[299] The provision applies "[w]hen the law defining an

289. *See* England, *supra* note 109, at 1233–57.

290. *See* England, *supra* note 8, at 58–83.

291. *See infra* Section III.A.

292. *See infra* Section III.B.

293. *See infra* Section III.C.

294. *See supra* notes 75–87, 159–83 and accompanying text.

295. *See* MODEL PENAL CODE § 2.04(1)(a) (AM. L. INST., Proposed Official Draft 1962); DRESSLER, *supra* note 1, § 13.02(D)(2).

296. *See* LAFAVE, *supra* note 3, § 5.6(b) ("Of course, if an offense is truly of the strict liability variety, then the most obvious consequence of that fact is that there is no mental state to be negated and no mistake or ignorance of fact or law will suffice to exonerate.").

297. Absolute liability is synonymous with strict liability, and this Article uses the concepts interchangeably. The Code itself uses the term "absolute liability" to refer to offenses that fail to require culpability for one or more material elements. *See* MODEL PENAL CODE § 2.05.

298. *See* MODEL PENAL CODE § 2.02(3)–(4).

299. *See id.* § 2.02(4).

offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof."[300] If a criminal offense prescribes a culpability requirement without distinguishing between multiple elements, the culpability requirement "shall apply to all the material elements of the offense, unless a contrary purpose plainly appears."[301] For example, as discussed earlier,[302] the Code's offense of felonious restraint occurs when one "knowingly . . . restrains another unlawfully in circumstances exposing him to risk of serious bodily injury."[303] Section 2.02(4) applies because the offense definition prescribes a culpability requirement of knowledge without distinguishing between the material elements of the offense. As the commentary makes clear, the offense therefore requires knowledge for every element, meaning that a defendant "must have been aware that he was restraining his victim, that the restraint was unlawful, and that it exposed the victim to physical danger."[304]

However, as I have written elsewhere,[305] MPC states have circumvented section 2.02(4) in two main ways. First, several MPC states refuse to enforce stated culpability requirements that appear outside offense definitions.[306] Part of the problem is section 2.02(4) itself, which by its terms applies when "the law defining an offense" prescribes a culpability requirement without distinguishing between offense elements.[307] The MPC's commentary makes clear that the MPC's drafters intended for section 2.02(4) to apply more broadly, including to grading provisions that enhance liability only when additional elements are satisfied.[308] Nevertheless, courts in at least seven MPC states have declined to apply stated culpability requirements because they appear in grading provisions or even in statutes that define aggravated offenses.[309] Those states include Alaska, Colorado, Indiana, New York, Ohio, Pennsylvania, and Texas.[310]

Second, state courts in MPC jurisdictions often ignore stated culpability requirements based on purported legislative intent.[311] The problem occurs even when an offense prescribes a mental state that is followed by consecutive material elements.[312] Under a proper application of section 2.02(4), the stated culpability requirement should apply to all such elements, rather than just the one that it

300. *Id.*
301. *Id.*
302. *See supra* notes 256–60 and accompanying text.
303. MODEL PENAL CODE § 212.2(a).
304. MPC COMMENTARIES, PART II, *supra* note 148, § 212.2 cmt. 2, at 242.
305. *See generally* England, *supra* note 109 (discussing problems with stated culpability requirements in MPC states).
306. *See id.* at 1235–40.
307. *See* MODEL PENAL CODE § 2.02(4).
308. England, *supra* note 109, at 1222.
309. *See id.* at 1236–40.
310. *See id.*
311. *See id.* at 1247–54.
312. *Id.* at 1247.

immediately precedes.[313] Moreover, section 2.02(4) limits the application of a stated culpability requirement only when "a contrary purpose plainly appears."[314] In at least seven MPC states, however, courts have refused to enforce stated culpability requirements based on weak evidence of legislative intent.[315] Those states include Alabama, Colorado, Connecticut, Delaware, Illinois, Kansas, and New Jersey.[316]

A court can refuse to enforce a culpability requirement prescribed for a collateral issue of law just as easily as it can impose strict liability for other offense elements. For example, in *People v. DeWitt*, the Colorado Court of Appeals held that, for the offense of possessing a weapon by a prior offender, the government did not need to prove that the defendant knew of his prior felony conviction.[317] The statute defines the offense to occur when one "knowingly possesses, uses, or carries upon his or her person a firearm . . . subsequent to the person's conviction for a felony."[318] Under the MPC, section 2.02(4) should apply to all the elements of the offense.[319] After all, the offense prescribes a culpability requirement of knowledge without distinguishing between material elements, meaning that knowledge is required for each element.[320] Nevertheless, the *DeWitt* court held that the statute did not require the defendant to know he had been convicted of a felony.[321] The court declined to apply the state's version of section 2.02(4), based in part on the statute's apparent purpose "to limit the possession of firearms by persons whose past conduct has demonstrated their unfitness to be entrusted with such dangerous instrumentalities."[322] Hence, though the statute itself did not plainly evince a legislative purpose to impose strict liability with respect to one's felony conviction status, the defendant was prevented from presenting evidence that he did not know he was a convicted felon.[323]

Additionally, some courts simply ignore stated-culpability provisions. In Indiana, for example, courts have sometimes overlooked the state's version of section 2.02(4) when determining offenses' culpability requirements. In *Rhone v. State*, the court interpreted a former statute defining a felony for a person who "knowingly or intentionally possesses a firearm after having been convicted of and sentenced for a serious violent felony."[324] Like the Colorado statute at issue in

313. MPC COMMENTARIES, PART I, *supra* note 101, § 2.02 cmt. 6, at 245.
314. MODEL PENAL CODE § 2.02(4).
315. *See* England, *supra* note 109, at 1247–54.
316. *See id.*
317. *See* People v. DeWitt, 275 P.3d 728, 735 (Colo. App. 2011), *overruled on other grounds by* People v. Hasadinratana, 493 P.3d 925 (Colo. App. 2021).
318. COLO. REV. STAT. ANN. § 18-12-108(1) (West 2023).
319. *See* MODEL PENAL CODE § 2.02(4).
320. *See* COLO. REV. STAT. ANN. § 18-12-108(1).
321. *DeWitt*, 275 P.3d at 735.
322. *Id.* at 735–36.
323. *See id.* at 736.
324. Rhone v. State, 825 N.E.2d 1277, 1280 (Ct. App. Ind. 2005).

DeWitt, the Indiana statute required knowledge without distinguishing between offense elements.[325] At trial, the court refused a jury instruction that would have required the jury to find that the defendant knew that he was a felon.[326] The proposed instruction simply restated Indiana's version of section 2.02(4),[327] explaining that a prescribed culpability level applies to all the material elements of an offense.[328] On appeal, the Indiana Court of Appeals held that the trial court did not err in refusing the instruction because the weapons offense "merely require[d] that a person knowingly or intentionally possess a firearm after having been convicted of a serious violent felony."[329] Inexplicably, the court concluded that the statute did not require knowledge of a prior conviction without even citing Indiana's version of section 2.02(4).[330]

Such problems are surprisingly common in MPC jurisdictions. As this Article will later discuss, courts often also fail to enforce stated culpability requirements for collateral issues of law.[331] For example, some courts refuse to enforce stated culpability requirements because defendants assert mistakes of law rather than mistakes of fact.[332] Elsewhere, courts disregard stated culpability requirements because they misunderstand the ignorance maxim.[333]

2. Problems with Default Culpability Requirements

Many MPC states also impose strict liability for collateral issues of law because they fail to follow section 2.02(3) in the MPC, which serves as the Code's default culpability provision.[334] Section 2.02(3) applies "[w]hen the culpability sufficient to establish a material element of an offense is not prescribed by law."[335] When a statute is silent about the mental state required for a particular element, section 2.02(3)

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325. *See id.*

326. *Id.* at 1286.

327. *See* IND. CODE ANN. § 35-41-2-2(d) (West 2023) ("Unless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct.").

328. *See Rhone*, 825 N.E.2d at 1281.

329. *Id.* at 1286–87.

330. *See id.* The statute at issue in *Rhone* has been amended and now provides that "[a] serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon." IND. CODE ANN. § 35-47-4-5(c) (West 2023). The Indiana Court of Appeals has held that the current version of the statute also does not require that one know that they are a serious violent felon. *See* Campbell v. State, 161 N.E.3d 371, 379 (Ct. App. Ind. 2020). Courts also disregard Indiana's stated-culpability provision in imposing strict liability on one who "knowingly violates" a securities regulation. *See* Clarkson v. State, 486 N.E.2d 501, 506–07 (Ind. 1985) ("[W]here an offense consists of a violation of a statute the only intent necessary is the intent to commit actions proscribed by the statutes."); Kahn v. State, 493 N.E.2d 790, 799 (Ind. Ct. App. 1986) (following *Clarkson*).

331. See *infra* Sections III.B. and III.C.

332. *See infra* notes 374–82 and accompanying text.

333. *See infra* notes 401–18 and accompanying text.

334. *See* MODEL PENAL CODE § 2.02(3) (AM. L. INST., Proposed Official Draft 1962).

335. *Id.*

imposes a default culpability requirement of recklessness.[336] For example, if an offense definition requires acting "unlawfully" without specifying a culpability level, a defendant must be reckless as to whether the conduct at issue is unlawful.[337] Hence, the offense would require a defendant to consciously disregard a substantial and unjustifiable risk that their conduct is unlawful.[338] Importantly, section 2.02(3) does not provide a legislative-intent exception.[339]

MPC states have deviated from section 2.02(3) in four ways that permit strict liability for collateral issues of law. First, as with stated culpability requirements, courts in several MPC states refuse to apply default culpability requirements to grading provisions.[340] As a result, courts have imposed strict liability for offense elements that appear in grading provisions in Alaska, Colorado, Illinois, New York, and Texas.[341] Second, eighteen states depart from section 2.02(3) by adding legislative-intent exceptions to their default culpability rules.[342] In nearly every state with a legislative-intent exception, a statute should be interpreted to impose strict liability if it "clearly" or "plainly" indicates a legislative purpose to impose strict liability.[343] Such alterations, despite their language, have allowed courts to impose strict liability based on questionable evidence of legislative intent in at

336. *Id.*

337. For example, section 223.2(1) of the MPC defines theft by unlawful taking to occur when one "unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof." *Id.* § 223.2(1). As the official commentary explains, section 2.02(3) would ordinarily require recklessness as to unlawfulness because the offense does not prescribe a culpability requirement for that element. MPC COMMENTARIES, PART II, *supra* note 148, § 223.2 cmt. 7, at 177. The Code effectively requires knowledge as to unlawfulness, however, by providing an affirmative defense for one who acts under "an honest claim of right to the property . . . involved." MODEL PENAL CODE § 223.1(3)(b); *see* MPC COMMENTARIES, PART II, *supra* note 148, § 223.2 cmt. 7, at 177.

338. *See* MODEL PENAL CODE § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.").

339. *See id.* § 2.02(3).

340. *See* England, *supra* note 8, at 76–81.

341. *See id.* at 78–80.

342. *See* ALA. CODE § 13A-2-4(b) (2020); ALASKA STAT. ANN § 11.81.600(b)(2) (West 2023); ARK. CODE ANN. § 5-2-204(c)(2) (West 2023); DEL. CODE ANN. tit. 11, § 251(c)(2) (West 2023); HAW. REV. STAT. ANN. § 702-212(2) (West 2023); 720 ILL. COMP. STAT. ANN. 5/4-9 (West 2023); KAN. STAT. ANN. § 21-5203(a), (b) (West 2023); KY. REV. STAT. ANN. § 501.050(2) (West 2023); MO. ANN. STAT. § 562.026(2) (West 2023); MONT. CODE ANN. § 45-2-104 (West 2023); N.J. STAT. ANN. § 2C:2-2(c)(3) (West 2023); N.Y. PENAL LAW § 15.15(2) (McKinney 2023); OHIO REV. CODE ANN. § 2901.21(B) (West 2023); OR. REV. STAT. ANN. § 161.105 (1)(b) (West 2023); 18 PA. STAT. AND CONS. STAT. ANN. § 305(a)(2) (West 2023); TENN. CODE ANN. § 39-11-301(b) (West 2023); TEX. PENAL CODE ANN. § 6.02(b) (West 2023); UTAH CODE ANN. § 76-2-102 (West 2023).

343. *See* ALA. CODE § 13A-2-4(b) ("clearly indicating"); ARK. CODE ANN. § 5-2-204(c)(2) ("clearly indicates"); DEL. CODE ANN. tit. 11, § 251(c)(2) ("plainly appears"); HAW. REV. STAT. ANN. § 702-212(2) ("plainly appears"); 720 ILL. COMP. STAT. ANN. 5/4-9 ("clearly indicates"); KAN. STAT. ANN. § 21-5203(a), (b) ("clearly indicates"); KY. REV. STAT. ANN. § 501.050(2) ("clearly indicates"); MO. ANN. STAT. § 562.026(2) ("clearly inconsistent" or "may lead an absurd or unjust result"); MONT. CODE ANN. § 45-2-104 ("clearly indicates"); N.J. STAT. ANN. § 2C:2-2(c)(3); N.Y. PENAL LAW § 15.15(2) ("clearly indicates"); OHIO REV. CODE ANN. § 2901.21(B) ("plainly indicates"); OR. REV. STAT. ANN. § 161.105(1)(b) ("clearly indicates"); 18 PA. STAT. AND CONS. STAT. ANN. § 305(a)(2) ("plainly appears"); TEX. PENAL CODE ANN. § 6.02(b) ("plainly"); UTAH CODE ANN. § 76-2-102 ("clearly indicates").

least Illinois, New York, and Oregon.[344] Again, as with stated culpability requirements, offense elements that refer to collateral issues of law are as susceptible to such problems as other material elements of offenses.

Even more problematically, most MPC states undermine the Code by imposing strict liability when statutes are silent about mental states. Indeed, three states—Connecticut, Indiana, and Maine—lack default culpability provisions.[345] As a result, an offense in those states does not require culpability for an element unless the requirement is explicitly stated. Additionally, in another eleven states, default culpability requirements apply only if (1) a statute fails to require any culpability at all[346] or (2) an offense or element "necessarily involves" a mental state.[347]

In the absence of rigorous default culpability rules, courts often impose strict liability for collateral issues of law. For example, New York's default culpability provision ordinarily requires at least negligence for a material element that lacks a prescribed mental state.[348] However, the default requirement only applies "if the proscribed conduct necessarily involves such culpable mental state."[349] Exploiting that limitation, some courts have imposed strict liability for an offense that applies to "[a]ny sex offender . . . who fails to register . . . in the manner and within the time periods provided for in this article."[350] Without the "necessarily involved"

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344. *See* England, *supra* note 8, at 74–76.

345. *See* CONN. GEN. STAT. § 53a-5 (West 2023); IND. CODE ANN. § 35-41-2-2 (West 2023); ME. REV. STAT. ANN. tit. 17-A, § 34 (West 2023).

346. *See* ARIZ. REV. STAT. ANN. § 13-202(B) ("[Absolute liability applies when] a statute defining an offense does not expressly prescribe a culpable mental state that is sufficient for commission of the offense . . . ."); KAN. STAT. ANN. § 21-5202(g) ("If the definition of a crime prescribes a culpable mental state with regard to a particular element or elements of that crime, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the crime unless otherwise provided."); MO. ANN. STAT. § 562.021(2) ("If the definition of an offense prescribes a culpable mental state with regard to a particular element or elements of that offense, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the offense."); TEX. PENAL CODE ANN. § 6.02(b) ("If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element."); UTAH CODE ANN. § 76-2-102 ("Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility.").

347. *See* ALA. CODE § 13A-2-4(b) (2023); ARIZ. REV. STAT. ANN. § 13-202(B); COLO. REV. STAT. ANN. § 18-1-503(2) (West 2023); KY. REV. STAT. ANN. § 501.040; N.J. STAT. ANN. § 2C:2-2(c)(3); N.Y. PENAL LAW § 15.15(2).

348. *See* N.Y. PENAL LAW § 15.15(2) (reading in a "culpable mental state"); *id.* § 15.00(6) (defining "culpable mental state" to require at least negligence).

349. *Id.* § 15.15(2).

350. *See, e.g.*, People v. Patterson, 708 N.Y.S.2d 815, 821 (N.Y. Crim. Ct. 2000) (discussing the prior version of N.Y. CORRECT. LAW § 168-t (McKinney 2023)). *But see* People v. Manson, 661 N.Y.S.2d 773, 777 (N.Y. Crim. Ct. 1997) (holding that knowledge or intent is required because the statute "define[s] a crime of mental culpability"). The Texas Court of Criminal Appeals has also imposed strict liability for violating sex-offender registration requirements. *See* Robinson v. State, 466 S.W.3d 166, 172 (Tex. Crim. App. 2015). Under the Texas statute, a person commits an offense "if the person is required to register and fails to comply with any requirement of this chapter." TEX. CODE CRIM. PROC. ANN. art. 62.102(a) (West 2023). The court held that a

standard, New York should require that a defendant be at least negligent in failing to register as required.[351] Hence, liability would be appropriate only if a reasonable person would have known of a significant risk that their conduct was unlawful.[352]

Similarly, the Colorado Court of Appeals has imposed strict liability for an offense that applies to a parent who "violates an order" granting custody of a child to another person.[353] The court reasoned that the state's default culpability provision did not apply because the offense already requires the intent to deprive a lawful custodian of custody.[354] Under a proper application of section 2.02(3), in contrast, the prosecution would need to prove at least recklessness as to violating a court order if a statute were silent about the mental state required for that element.[355] In fact, as discussed earlier, the Code sometimes requires that one violate a custody order not just recklessly but knowingly.[356] When that is the case, criminal liability is limited to instances "where the custody arrangement is clearly known to the actor."[357] It stands to reason, then, that the Code would require at least recklessness if a statute fails to state a culpability requirement for violating an order. Colorado thus strays far from the MPC in requiring no culpability at all.

Finally, some states undermine the Code's culpability provisions by continuing to employ common law culpability concepts. For example, Connecticut's criminal code lacks a default culpability rule.[358] Without a provision like section 2.02(3), Connecticut courts routinely analyze culpability requirements using the common law distinction between general and specific intent. As discussed earlier, the Code abandons that distinction, especially in section 2.04(1)(a)'s approach to mistakes of fact and law.[359] Nevertheless, Connecticut courts continue to determine whether an offense requires specific intent, requires only general intent, or imposes strict liability.[360] Using that framework, the Connecticut Court of Appeals has characterized a statute requiring violation of a protective order as a general-intent crime; as a result, a defendant need only intend "to perform the activities that constituted the violation."[361] Similarly, Kansas has a default culpability provision,[362] but Kansas courts continue to employ the concept of general intent in ways that permit strict

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defendant must be culpable only as to having a duty to register because that is "the gravamen of the offense." *Robinson*, 466 S.W.3d at 170–72.

351. *See* N.Y. PENAL LAW § 15.15(2).

352. *See id.* § 15.05(4) (defining negligence).

353. *See* People v. Metcalf, 926 P.2d 133, 137–38 (Colo. Ct. App. 1996) (discussing COLO. REV. STAT. ANN. § 18-3-304(2) (West 2023)).

354. *Id.*

355. *See* MODEL PENAL CODE § 2.02(3).

356. *See supra* notes 256–60 and accompanying text.

357. MPC COMMENTARIES, PART II, *supra* note 148, § 212.4 cmt. 2, at 256.

358. *See* CONN. GEN. STAT. § 53a-5 (West 2023).

359. *See supra* notes 101–03, 168–70 and accompanying text.

360. *See, e.g.*, State v. T.R.D., 942 A.2d 1000, 1019–20 (Conn. 2008); State v. Larsen, 978 A.2d 544, 547–48 (Conn. App. Ct. 2009).

361. *Larsen*, 978 A.2d at 548.

362. *See* KAN. STAT. ANN. § 21-5202(g) (West 2023).

liability. Recently, the Kansas Court of Appeals held that the state's felon-in-possession statute required no culpability as to one's status as a felon because it is a general-intent offense.[363] As a result, the defendant could not admit evidence showing that he did not know that he was a felon.[364] The Kansas Supreme Court later adopted the appellate court's decision, concluding that it could not "improve upon the panel's thorough and well-reasoned analysis."[365]

A truly thorough analysis by a court would consider the MPC's culpability scheme, which renders the traditional distinction between general and specific intent obsolete. Many MPC states make such mistakes because they simply do not respect the Code's norm of requiring culpability for each offense element. As a result, MPC states often impose strict liability for both collateral issues of law and other offense elements, contrary to the Code's direction.

B. Ignoring the Relationship Between Mistakes and Culpability Requirements

MPC states' mistake provisions further demonstrate the confusion surrounding culpability requirements for issues of law. As discussed earlier, section 2.04(1)(a) of the MPC provides a corollary to section 2.02 under which a mistake of fact or law exculpates if it negates a culpability requirement for a material element of an offense.[366] Significantly, section 2.04(1)(a) departs from the common law by treating mistakes of law the same as mistakes of fact.[367] Hence, a mistake of law is relevant to liability whenever an offense definition implicates or refers to a collateral issue of law, as innumerable statutes do. For example, an honest mistake of law can negate a requirement of purpose or knowledge as to lawfulness, a non-reckless mistake can negate a requirement of recklessness, and a non-negligent mistake can negate a requirement of negligence.[368]

Unfortunately, most MPC states fail to appreciate the relationship between mistakes of law and culpability requirements. Of the twenty-one states with provisions like section 2.04(1)(a),[369] only eight follow section 2.04(1)(a) by confirming that a mistake of either fact or law provides a defense if it negates a culpability requirement.[370] In contrast, twelve states provide defenses for mistakes of fact that negate

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363. *See* State v. Howard, 339 P.3d 809, 822 (Kan. Ct. App. 2014), *aff'd*, 389 P.3d 1280 (Kan. 2017).

364. *Id.* at 823.

365. *Howard*, 389 P.3d at 1284.

366. *See supra* Section II.B (discussing MODEL PENAL CODE § 2.04(1)(a)).

367. *See supra* notes 159–68 and accompanying text.

368. *See supra* notes 178–83 and accompanying text.

369. Four states lack provisions like section 2.04(1)(a), meaning that they do not confirm that mistakes of either fact or law provide defenses if they negate culpability requirements. *See* MONT. CODE ANN. §§ 45-2-101 to -104 (West 2023); N.D. CENT. CODE ANN. §§ 12.1-02-02 to -05 (West 2023); OHIO REV. CODE ANN. §§ 2901.20–.22 (West 2023); OR. REV. STAT. ANN. §§ 161.085–.115 (West 2023). In such jurisdictions, mistakes should be analyzed mostly in terms of offenses' culpability requirements, which will often require at least recklessness as to collateral issues of law.

370. *See* ALA. CODE § 13A-2-6(a), (d) (2023); ARK. CODE ANN. § 5-2-206(a), (c), (e) (West 2023); 720 ILL. COMP. STAT. ANN. 5/4-8(a) (West 2023); KAN. STAT. ANN. § 21-5207(a) (West 2023); KY. REV. STAT. ANN.

culpability requirements, but they are silent about mistakes of law that might preclude a mental state.[371] Arizona goes even further by explicitly denying defenses based on mistakes of law.[372]

Hence, most MPC states are ambiguous about mistakes of law that negate culpability requirements.[373] In at least three states, courts have imposed strict liability based on the codes' failures to provide defenses for mistakes of law. For example, the Hawai'i Supreme Court affirmed a conviction for a defendant who was mistaken about whether a protective order prohibited him from serving his wife with divorce papers.[374] The offense required the defendant to "knowingly or intentionally violate[]" a protective order issued under the Family Code,[375] but the court held that the defendant had no defense because he made a mistake of law rather than a mistake of fact.[376]

Similarly, Texas courts have repeatedly held that the offense of evading arrest does not require a defendant to know that an arrest is lawful.[377] Courts have imposed strict liability as to an arrest's lawfulness even though the statute requires the defendant to flee "from a person he knows is a peace officer . . . attempting lawfully to arrest or detain him."[378] In *Miller v. State*, the defendant argued that he resisted an arrest because he believed the arresting officers were acting on behalf of a drug cartel and intended to kill him rather than to lawfully arrest him.[379] On appeal, the court held that the trial court properly denied a mistake-of-fact defense because "the lawfulness of a detention or arrest . . . is a question of law, not fact,

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§ 501.070(1)(a) (West 2023); ME. REV. STAT. ANN. tit. 17-A, § 36(1) (West 2023); MO. ANN. STAT. § 562.031(1) (West 2023); N.J. STAT. ANN. § 2C:2-4(a) (West 2023).

371. *See* ALASKA STAT. ANN. § 11.81.620(b) (West 2023); COLO. REV. STAT. ANN. § 18-1-504(1) (West 2023); CONN. GEN. STAT. ANN. § 53a-6(a) (West 2023); DEL. CODE ANN. tit. 11, § 441 (West 2023); HAW. REV. STAT. ANN. § 702-218 (West 2023); IND. CODE ANN. § 35-41-3-7 (West 2023); N.H. REV. STAT. ANN. § 626:3(I) (2023); N.Y. PENAL LAW § 15.20(1) (McKinney 2023); 18 PA. STAT. AND CONS. STAT. ANN. § 304 (West 2023); TENN. CODE ANN. § 39-11-502(a) (West 2023); TEX. PENAL CODE ANN. §§ 8.02–.03 (West 2023); UTAH CODE ANN. § 76-2-304(1) (West 2023).

372. *See* ARIZ. REV. STAT. ANN. § 13-204(B) (2023).

373. The Code's official commentary notes the ambiguity caused by states' omissions of mistakes of law from their versions of section 2.04(1). *See* MPC COMMENTARIES, PART I, *supra* note 101, § 2.04 cmt. 1, at 271–72 ("Many create an unfortunate ambiguity about mistakes of law that are relevant to the elements of an offense by explicitly allowing a defense of lack of culpability based on mistake only if the mistake is one of fact.").

374. *See* State v. Schneidewind, No. 27160, 2006 WL 2829832, at *2–3 (Haw. Oct. 4, 2006).

375. *See* HAW. REV. STAT. ANN. § 586-11(a) (West 2023).

376. *See Schneidewind*, 2006 WL 2829832, at *2–3; *see also* State v. Williams, No. CAAP-17-0000021, 2018 WL 1940214, at *3–4 (Haw. Ct. App. Apr. 25, 2018) (denying mistake defense for burglary based on mistake about authority to enter a building). Two justices dissented in *Schneidewind*. *See* 2006 WL 2829832, at *4–9 (Acoba, J., dissenting). As the dissent pointed out, the real question was whether the prosecution presented sufficient evidence to establish knowledge of a violation. *Id.* at *4–5. The dissent concluded that the prosecution failed to establish knowledge because it never refuted evidence that the defendant believed his conduct was lawful. *Id.* at *7.

377. Nicholson v. State, 594 S.W.3d 480, 484 (Tex. App. 2019) ("[M]any Texas cases have come to the conclusion that it is not necessary for the State to prove that the defendant knew that the detention was lawful.").

378. TEX. PENAL CODE ANN. § 38.04(a) (West 2023).

379. Miller v. State, 605 S.W.3d 877, 882 (Tex. App. 2020).

and thus cannot serve as a basis for a mistake-of-fact defense."[380] Hence, the defendant could not request special instructions about culpability based on the prevailing interpretation of the offense's requirements, and he could not request instructions about a mistake of law based on Texas' mistake provision. Finally, the Arizona Court of Appeals imposes strict liability for an offense that criminalizes "knowingly . . . [p]ossessing a deadly weapon . . . if such person is a prohibited possessor."[381] In doing so, the court relies on the Arizona Criminal Code's harsh and thoughtless rule that "[i]gnorance or mistake as to a matter of law does not relieve a person of criminal liability."[382]

My own view is that courts should enforce culpability requirements at least when mistake provisions are silent about mistakes of law, if not also when codes seemingly deny defenses for such mistakes. As Professor Paul Robinson has noted, such variations on section 2.04(1)(a) are "no doubt due to the reaction of legislators who . . . are familiar with the common law maxim that 'ignorance of the law is no excuse.'"[383] However, the maxim does not apply when an offense requires culpability for an issue of law.[384] It seems questionable at best to impose strict liability based on legislatures' misconceptions about their own criminal codes. In Section IV.B, this Article will offer some suggestions on how to resolve the apparent tension between many states' culpability rules and their mistake provisions.

C. Confusing Mistakes as to Elements with Mistakes about Criminality

As discussed earlier, the MPC's version of the ignorance maxim provides that an actor need not be culpable as to whether conduct constitutes a criminal offense.[385] Under section 2.02(9), "[n]either knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides."[386] The official commentary explains that section 2.02(9) does not apply "when the circumstances made material by the definition of the offense include a legal element."[387] The commentary observes that the ignorance maxim is "greatly overstated" and properly applies only to the statute that defines the offense at issue.[388] As a result, section 2.02(9)

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380. *Id.* at 883.

381. *See* State v. Goodson, No. 2 CA–CR 2014–0019, 2015 WL 1469039, at *2 (Ariz. Ct. App. Mar. 31, 2015) (discussing ARIZ. REV. STAT. ANN. § 13-3102(A) (2023)).

382. *Id.* at *2 (discussing ARIZ. REV. STAT. ANN. § 13-204(B) (2023)); *see also* State v. Holmes, 478 P.3d 1256, 1260–61 (Ariz. Ct. App. 2020) (explaining that ignorance as to a matter of law is not a defense to the charge of possession of a deadly weapon by a prohibited possessor).

383. ROBINSON, *supra* note 38, § 62(d).

384. *See supra* notes 202–09 and accompanying text.

385. *See supra* notes 199–201 and accompanying text.

386. MODEL PENAL CODE § 2.02(9) (AM. L. INST., Proposed Official Draft 1962).

387. MPC COMMENTARIES, PART I, *supra* note 101, § 2.02 cmt. 11, at 250.

388. *Id.*

does not disturb the Code's norm of requiring culpability for offense elements involving collateral issues of law.[389]

Given the increasing complexity of the criminal law, it is more important than ever to distinguish mistakes as to elements from mistakes about criminality. Consider, for example, an offense that applies to one who "knowingly violates" a court order. Under section 2.02(9), a defendant need not know that violating a court order is a crime or know that they are committing the offense.[390] A defendant must know, however, that their conduct violates a court order. After all, violating a court order is a material element of the offense[391] for which the statute requires knowledge.[392] Similarly, if a statute defines an offense for one who knowingly possesses a firearm after being convicted of a felony, the statute does not require the defendant to know that it is a crime for an ex-felon to possess a firearm. The defendant must, however, know that they have been convicted of a felony. As a final example, a defendant need not know that failing to register as a sex offender is a crime. But if the governing statute requires a sex offender to "knowingly . . . fail to register . . . under this chapter,"[393] the defendant must know that they are legally required to register and have failed to do so.

Most MPC states are at least as clear as the MPC itself in limiting the ignorance maxim to mistakes about criminality. As just discussed,[394] the Arizona Criminal Code purports to deny defenses for all mistakes of law.[395] The Texas Penal Code also overstates the ignorance maxim in providing that "[i]t is no defense . . . that the actor was ignorant of the provisions of any law after the law has taken effect."[396] But elsewhere, state criminal codes make clear that the ignorance maxim is limited to mistakes about criminality. For example, New Jersey and Pennsylvania have enacted section 2.02(9) verbatim; hence, both states provide that culpability is not required "as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense."[397] Seven other states follow section 2.02(9) closely but clarify that culpability is not required concerning a statute "defining an offense" rather than the law determining the elements of an offense.[398] Even more clearly, nine states limit the

389. *See supra* notes 205–18 and accompanying text.

390. *See* MODEL PENAL CODE § 2.02(9).

391. *See id.* § 1.13(10) (defining "material element of an offense").

392. *See id.* § 2.02(4) (applying a stated culpability requirement to all elements when a statute does not distinguish between requirements).

393. IND. CODE ANN. § 11-8-8-17(a)(1) (West 2023).

394. *See supra* notes 372, 381–82 and accompanying text.

395. ARIZ. REV. STAT. ANN. § 13-204(B) (2023).

396. TEX. PENAL CODE ANN. § 8.03(a) (West 2023).

397. *See* N.J. STAT. ANN. § 2C:2-2(d) (West 2023); 18 PA. STAT. AND CONS. STAT. ANN. § 302(h) (West 2023).

398. *See* ALASKA STAT. ANN. § 11.81.620(a) (West 2023); ARK. CODE ANN. § 5-2-203(d) (West 2023); 720 ILL. COMP. STAT. ANN. 5/4-3(c) (West 2023); MO. ANN. STAT. § 562.021(5) (West 2023); MONT. CODE ANN. § 45-2-103(5) (West 2023); N.H. REV. STAT. ANN. § 626:2(V) (2023); OR. REV. STAT. ANN. § 161.115(4) (West 2023).

maxim to mistakes about whether conduct constitutes an offense,[399] mistakes about penal statutes,[400] or mistakes about "the statute under which the accused is prosecuted."[401]

Nevertheless, courts in several MPC states have erroneously applied the ignorance maxim to mistakes about collateral issues of law. In *Lee v. State*, for example, the Alabama Court of Criminal Appeals affirmed convictions of two prison inmates for escape.[402] The alleged escape occurred when the defendants left a worksite for a work-release program to which they had been assigned.[403] Alabama's escape statute provides that first-degree escape occurs when the defendant has been convicted of a felony and "escapes or attempts to escape from custody imposed pursuant to that conviction."[404] Under Alabama law, a statute normally requires culpability in the absence of clear legislative intent to impose strict liability.[405] In *Lee*, the defendants were unsupervised when they allegedly escaped, and they argued that they did not know they were prohibited from leaving the worksite.[406] The court held that it did not matter whether the defendants knew they could not leave because "[i]t is well-settled that ignorance of the law is no defense."[407] But the defendants in *Lee* did not argue that they did not know that escape was a criminal offense. Rather, they argued that they did not know that they were escaping from custody.[408] Both defendants were sentenced to life imprisonment as habitual offenders.[409]

The Illinois Appellate Court made a similar mistake in *People v. Caetano-Anolles*.[410] In that case, the defendant was convicted for violating a no contact order under Illinois' stalking statute.[411] The governing statute requires a "knowing violation" of a court order.[412] In *Caetano-Anolles*, the defendant was ordered "to

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399. *See* ALA. CODE § 13A-2-6(b), (d) (2023); COLO. REV. STAT. ANN. § 18-1-504(2) (West 2023); CONN. GEN. STAT. ANN. § 53a-6(b) (West 2023); KY. REV. STAT. ANN. § 501.070(3) (West 2023); ME. REV. STAT. ANN. tit. 17-A, § 36(4) (West 2023); N.Y. PENAL LAW § 15.20(2) (McKinney 2023); N.D. CENT. CODE ANN. § 12.1-02-02(5) (West 2023).

400. *See* UTAH CODE ANN. § 76-2-304(2) (West 2023).

401. *See* KAN. STAT. ANN. § 21-5204(a) (West 2023).

402. Lee v. State, 512 So. 2d 826, 828 (Ala. Crim. App. 1987).

403. *Id.* at 826.

404. ALA. CODE § 13A-10-31(a)(2) (2023).

405. *Id.* § 13A-2-4(b). Under Alabama's default culpability provision, "an appropriate culpable mental state" is required for an element that lacks a stated culpability requirement "if the proscribed conduct necessarily involves such mental state." *Id.*

406. *Lee*, 512 So. 2d at 827.

407. *Id.*

408. Under Alabama's version of section 2.02(9), a defendant need not be culpable as to whether conduct constitutes an offense. ALA. CODE § 13A-2-6(b). A mistake of law can negate a culpability requirement, however, if the mistake does not concern "the existence or meaning of the statute under which the defendant is prosecuted." *Id.* § 13A-2-6(d).

409. *Lee*, 512 So. 2d at 826, 828.

410. People v. Caetano-Anolles, No. 4–15–0053, 2016 WL 2930821 (Ill. App. Ct. May 18, 2016).

411. *Id.* at *1.

412. 740 ILL. COMP. STAT. ANN. 21/125 (West 2023).

stay at least 100 feet away from [the] petitioner's workplace at 600 S. Mathews."[413] On appeal, the defendant argued that he did not knowingly violate the order because he thought it required him to stay at least 100 feet from the petitioner's office, rather than 100 feet from the building.[414] Relying on Illinois' version of section 2.02(9), the court held that the statute imposed liability "even if [the] defendant did not know his conduct violated the stalking no contact order."[415] In doing so, the court imposed strict liability although the statute requires a "knowing violation" and although Illinois provides a defense for mistakes of law that negate culpability requirements.[416]

Courts have also erroneously applied the ignorance maxim to mistakes about collateral issues of law in other MPC states, including Delaware,[417] Montana,[418] and New Jersey.[419] Unfortunately, such states are hardly outliers in imposing strict liability for offense elements that refer to collateral issues of law. As discussed in the preceding sections, strict liability for issues of law is all too common in MPC states.

IV. AVOIDING MISTAKES ABOUT MISTAKES OF LAW

This Part recommends ways to prevent strict liability for collateral issues of law in MPC states. As discussed in Part III, legislatures and courts err by failing to require culpability for issues of law, by disregarding the relationship between mistakes and culpability, and by confusing mistakes about offense elements with mistakes about criminality. MPC states could avoid many such mistakes by amending their criminal codes to follow the MPC more closely. For example, many MPC states could prevent strict liability for issues of law by explicitly requiring culpability for every element of an offense. Elsewhere, I have proposed culpability rules that better enforce the Code's norm of requiring at least recklessness for each offense element.[420] Additionally, most MPC states could amend their codes to clarify that a mistake of law, like a mistake of fact, provides a defense if it negates a culpability requirement. To do that, states need only fully adopt section 2.04(1)(a).[421]

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413. *Caetano-Anolles*, 2016 WL 2920821, at *1.

414. *Id.* at *6.

415. *Id.*

416. *See* 720 ILL. COMP. STAT. ANN. 5/4-8(a) (West 2023).

417. *See* Wien v. State, 882 A.2d 183, 190–91 (Del. 2005) (holding that the defendant "knowingly violated" a statute protecting wetlands even if he did not know his conduct violated the statute).

418. *See* State v. Payne, 248 P.3d 842, 845–46 (Mont. 2011) (holding that sex-offender registration offense did not require knowledge of a duty to register because the defendant was "presumed to know the law of Montana").

419. *See* State v. Rowland, 933 A.2d 21, 23–25 (N.J. Super. Ct. App. Div. 2007) (holding that the defendant did not need to know the law even though the statute applied to one who "knowingly violates any of the provisions of this act").

420. *See* England, *supra* note 109, at 1257–63 (recommending provisions to replace MPC sections 2.02(1), 2.02(3), 2.02(4), and 2.05).

421. *See* MODEL PENAL CODE § 2.04(1)(a) (AM. L. INST., Proposed Official Draft 1962).

Even if legislatures do not amend their criminal codes to follow the MPC more closely, courts can avoid imposing strict liability in three ways. First, courts should begin with an offense's culpability requirements when determining whether a mistake of law provides a defense. Second, if a criminal code's mistake provision seems to conflict with its culpability rules, a court should err on the side of enforcing culpability requirements. Finally, courts should apply the ignorance maxim only to mistakes about criminality.

A. Starting with Culpability Requirements

As discussed earlier, section 2.04(1)(a) essentially restates section 2.02's culpability rules in providing that a mistake of fact or law exculpates if it negates a culpability requirement.[422] Courts often conceive of mistakes as possible defenses, given that it is the defense that usually raises questions about them. As the Code's commentary emphasizes, however, the critical issue remains whether a defendant satisfies the offense's culpability requirements.[423] Hence, courts must always frame questions about mistakes of law as questions about culpability.

Defense counsel should also be mindful that questions of mistake and culpability are interchangeable, especially in the many MPC jurisdictions that fail to explicitly recognize defenses for mistakes of law that negate culpability requirements.[424] For example, in a state that has modified section 2.04(1)(a) to cover only mistakes of fact, a court will likely refuse to instruct the jury about mistakes of law. As a result, the defense should always request special jury instructions about culpability requirements when a mistake of law would negate the culpability required for an issue of law. In states that have fully adopted section 2.04(1)(a), the defense should request additional instructions about mistakes of law.

Under states' culpability rules, courts should treat collateral issues of law no differently than other offense elements. Hence, if a stated culpability requirement applies to a collateral issue of law, the code's definitions work the same as they do for any other offense element. For example, if an offense definition requires that a defendant "knowingly violate a court order," the defendant must be practically certain that their conduct violates a court order.[425] A defendant lacks such certainty if they are honestly mistaken about an order's existence, meaning, or application to specific conduct. Put differently, a mistake of law may negate the requirement of a knowing violation. Although the United States Supreme Court often interprets the phrase "knowingly violates" differently for federal statutes,[426] state courts must follow their own criminal codes' culpability rules when determining offense

422. *See supra* notes 184–87 and accompanying text.

423. MPC COMMENTARIES, PART I, *supra* note 101, § 2.04 cmt.1, at 271.

424. *See supra* notes 370–72 and accompanying text.

425. *See* MODEL PENAL CODE § 2.02(2)(b)(ii) (defining "knowingly" for result elements); *id.* § 2.02(4) (applying a prescribed mental state to all material elements of an offense).

426. *See, e.g.*, Bryan v. United States, 524 U.S. 184, 193 (1998) ("[U]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense.").

requirements. Under those rules, a knowing violation does not occur when one is unaware that they are violating a court order unless they are willfully blind to that fact.[427]

Similarly, default culpability requirements apply to collateral issues of law under the same conditions they apply to other offense elements. For example, if an offense requires a defendant to fail to register as a sex offender as required, the MPC would require that a defendant be reckless as to failing to register as required.[428] To be reckless, a defendant must consciously disregard substantial and unjustifiable risks that they are legally required to register and have failed to act as required.[429] Hence, a defendant would not satisfy the offense definition unless they were aware of a risk that they were required to register and aware of a risk that their conduct was unlawful.

Importantly, culpability requirements are themselves offense elements[430] required nationwide to be proved beyond a reasonable doubt.[431] When a defendant asserts a mistake of law, a court must always recast the issue as one of culpability to ensure the prosecution sustains its burden of proof. Defense counsel should remind courts of that critical task.

B. Resolving Apparent Ambiguity about Mistakes of Law

Courts should err on the side of enforcing culpability requirements when a criminal code's mistake provision seems to conflict with its culpability rules. As discussed in Section III.B, twelve MPC states depart from the Code by omitting mistakes of law from their versions of section 2.04(1)(a).[432] Such states thus confirm that mistakes of fact provide defenses when they negate culpability requirements, but their criminal codes fail to reaffirm culpability requirements for issues of law. Additionally, Arizona goes so far as to explicitly deny any defense based on a mistake of law.[433]

A defendant may attempt to circumvent such restrictions by characterizing a mistake as being one of fact rather than one of law. For example, a court could treat a defendant's mistake about whether they were previously convicted of a felony as a mistake of fact.[434] However, the analysis will take a different path if the court

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427. *Cf.* MODEL PENAL CODE § 2.02(7) ("When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.").

428. *See id.* § 2.02(3) (requiring recklessness for any material element that lacks a prescribed culpability requirement).

429. *See id.* § 2.02(2)(c) (defining "recklessly").

430. LAFAVE, *supra* note 3, § 1.8(b) n.14 (stating that, with the exception of strict liability crimes, offense elements include culpability requirements).

431. *Id.* § 1.8(b) ("It is everywhere agreed that the prosecution has the burden of proving . . . the existence of each element [of the offense] beyond a reasonable doubt.").

432. *See supra* note 371 and accompanying text.

433. *See* ARIZ. REV. STAT. ANN. § 13-204(B) (2023).

434. For an interesting discussion of California case law on this issue, see Simons, *supra* note 184, at 501–02 n.39.

concludes the defendant's error is a mistake of law. In the latter case, a mistake instruction is probably inappropriate under a statute that recognizes a mistake defense only for mistakes of fact.[435]

Nevertheless, courts should enforce culpability requirements at least when mistake provisions are silent about mistakes of law that preclude mental states. As the Code's official commentary explains, section 2.04(1)(a) adds nothing to the MPC's culpability rules.[436] Hence, states create, at most, a slight ambiguity by failing to explicitly reaffirm culpability requirements for issues of law. Many states probably acted deliberately in limiting their mistake provisions to mistakes of fact, but they almost certainly did so because they were confused about the ignorance maxim.[437] Moreover, legislative intent to impose strict liability ordinarily must be plain to overcome a code's culpability rules.[438] A criminal code's silence about mistakes of law hardly evinces a clear legislative intent to impose strict liability for all collateral issues of law. For example, it falls far short of explicitly denying such a defense and even shorter of imposing strict liability for material elements that raise issues of law. Strict liability should not rest on such a slender reed.

Arizona's code presents a closer call, but courts in that state should probably still enforce culpability requirements for collateral issues of law. The Arizona Criminal Code purports to deny all defenses based on mistakes of law.[439] However, it is difficult to take such a broad rule at face value. After all, recognizing the relationship between culpability requirements and mistakes, Anglo-American criminal law has exculpated for mistakes of law since the seventeenth century.[440] Surely the Arizona state legislature did not intend to deny a claim-of-right defense for a defendant who takes another's property, believing it to be their own. Such a result would be absurd, as would disregarding an offense definition that explicitly requires culpability for a collateral issue of law. Arizona's mistake-of-law rule is most likely just a misguided effort to codify the ignorance maxim. Despite its

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435. *Cf.* State v. Schneidewind, No. 27160, 2006 WL 2829832, at *2–3 (Haw. Oct. 4, 2006) (holding that defendant lacked mistake defense because he asserted a mistake of law).

436. *See* MPC COMMENTARIES, PART I, *supra* note 101, § 2.04 cmt. 1, at 270.

437. *See* ROBINSON, *supra* note 38, § 62(d) (stating that omissions of mistakes of law from mistake provisions are "no doubt due to the reaction of legislators who . . . are familiar with the common law maxim that 'ignorance of the law is no excuse'").

438. *See* MODEL PENAL CODE § 2.02(4) (AM. L. INST., Proposed Official Draft 1962) (applying a stated culpability requirement to all elements "unless a contrary purpose plainly appears"); *see also* ARIZ. REV. STAT. ANN. § 13-202(A); COLO. REV. STAT. ANN. § 18-1-503(4) (West 2023); CONN. GEN. STAT. ANN. § 53a-5 (West 2023); DEL. CODE ANN. tit. 11, § 252 (West 2023); HAW. REV. STAT. ANN. § 702-207 (West 2023); KAN. STAT. ANN. § 21-5202(f) (West 2023); ME. REV. STAT. ANN. tit. 17-A, § 34(2), (4) (West 2023); MONT. CODE ANN. § 45-2-104 (West 2023); N.H. REV. STAT. ANN. § 626:2(I) (2023); N.J. STAT. ANN. § 2C:2-2(c)(1) (West 2023); N.Y. PENAL LAW § 15.15(1) (McKinney 2023); N.D. CENT. CODE ANN. § 12.1-02-02(3) (West 2023); 18 PA. STAT. AND CONS. STAT. ANN. § 302(d) (West 2023); TENN. CODE ANN. § 39-11-301(b) (West 2023); TEX. PENAL CODE ANN. § 6.02(b) (West 2023); UTAH CODE ANN. § 76-2-102 (West 2023).

439. ARIZ. REV. STAT. ANN. § 13-204(B).

440. *See supra* notes 57–65 and accompanying text.

sweeping language, the provision should probably be limited to mistakes about whether conduct constitutes a criminal offense.

If a legislature wants to dispense with culpability requirements for a collateral issue of law, it can easily do so by providing that the offense imposes strict liability. Otherwise, courts should generally enforce culpability requirements for issues of law using the same principles that govern other offense elements.

C. Limiting the Ignorance Maxim to Mistakes about Criminality

Finally, courts can avoid strict liability by limiting the ignorance maxim to mistakes about criminality. Section 2.02(9) is titled "Culpability as to Illegality of Conduct"[441] for good reason: it clarifies that a defendant need not be culpable as to whether they are committing a criminal offense.[442] As a result, section 2.02(9) simply does not apply when a defendant is mistaken about a collateral issue of law.[443] If it did, the provision would undermine section 2.02(1), which requires culpability for an issue of law just as it does for any other material element of an offense.[444]

Most MPC states have adopted some version of section 2.02(9), and state codes' ignorance provisions are at least as clear as the MPC in applying only to mistakes about criminality.[445] If there is any doubt about the MPC's meaning, courts may consult the official commentary as persuasive authority.[446] The commentary makes it quite clear that section 2.02(9) applies only to "the particular law that sets forth the definition of the crime in question."[447] It, therefore, does not apply when an offense requires culpability for a collateral issue of law.

CONCLUSION

Despite its broad pronouncement that ignorance of the law is no excuse, the ignorance maxim has been limited since its inception under Roman civil law.[448] When the common law revived the ignorance maxim centuries later for use in criminal cases, the maxim eventually yielded to culpability requirements.[449] For centuries, criminal law has distinguished mistakes negating culpability from mistakes about offenses themselves.[450] Hence, even under the common law, the ignorance maxim simply did not apply when a defendant's ignorance or mistake negated a culpability requirement.[451]

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441. *See* MODEL PENAL CODE § 2.02(9).
442. *See supra* notes 199–201 and accompanying text.
443. *See supra* notes 205–09 and accompanying text.
444. *See* MODEL PENAL CODE § 2.02(1).
445. *See supra* notes 394–400 and accompanying text.
446. *See* 2B NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 52:5 (7th ed. 2008).
447. MPC COMMENTARIES, PART I, *supra* note 101, § 2.02 cmt. 11, at 250.
448. *See supra* Section I.A.
449. *See supra* notes 57–65 and accompanying text.
450. *See supra* notes 66–70, 75–77 and accompanying text.
451. *See supra* notes 78–87 and accompanying text.

The MPC continues that tradition, but it takes much stronger measures to prevent strict liability for issues of law. Most significantly, section 2.02(1) requires culpability for each material element of an offense.[452] That requirement is central to the Code's vision for criminal liability and applies to collateral issues of law just as surely as to other offense elements.[453] Unfortunately, the overwhelming majority of MPC states have largely undermined the Code's norm of requiring culpability for offense elements that raise legal issues.[454] State legislatures and courts may correct most problems, however, by simply following the MPC more closely.[455]

452. *See* MODEL PENAL CODE § 2.02(1) (AM. L. INST., Proposed Official Draft 1962).
453. *See supra* notes 125–57 and accompanying text.
454. *See supra* Part III.
455. *See supra* Part IV.