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MISTAKES WITH THE MISTAKE DEFENSE IN TEXAS CRIMINAL LAW

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When the Texas legislature enacted a comprehensive penal code in 1974, it provided specifically for the defenses of mistake of fact and mistake of law. Unfortunately, the adoption of those provisions reflects a missed opportunity to clarify the law concerning mistake as a defense to criminal liability in Texas criminal law. The predicted analytical problems spawned by that missed opportunity have come to pass. This article will review the problems the Texas courts have had to face in interpreting the code provisions and will offer suggestions concerning the proper approach to their application.

The first problem is the requirement that the mistake of fact defense is available only if it is determined to be "reasonable." This requirement is

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inconsistent with the rationale of the defense's function of negating a culpable mental state required for an offense. The alternative approaches to this problem are addressed in this article.

Secondly, since a mistaken belief as to the existence of a required circumstance or element of the offense is a defense only if an intent as to that element or circumstance is required for the offense, this article will look at the process for determining whether an offense has a culpable mental state that would be negated by a mistaken belief.

Thirdly, this article will address the confusion concerning the relationship of a criminal defendant's intent and the requirement of causation as to a required result. We will see that a defendant's mental state is a totally separate and distinguishable issue from the issue of whether his conduct has caused a result required for an offense.

Finally, the problem of distinguishing a mistake of fact from a mistake of law will be addressed. This distinction is critical because of the limited availability of the mistake of law defense. An argument will be presented that the statutes have been misinterpreted in mischaracterizing mistakes as those of law rather than of fact.

I. THE UNREASONABLE REASONABLE MISTAKE OF FACT DEFENSE

Section 8.02 of the Texas Penal Code provides:

> (a) It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense.
> (b) Although an actor's mistake of fact may constitute a defense to the offense charged, he may nevertheless be convicted of any lesser included offense of which he would be guilty if the facts were as he believed.[1]

A hunter intends to shoot a deer but mistakenly shoots another hunter. A bicyclist intends to take his bike from the bike rack but mistakenly takes someone else's. That the potential murderer of a hunter and the potential thief of a bike may be able to claim their respective mistaken beliefs as a

1. TEX. PENAL CODE ANN. § 8.02.

defense to criminal liability is well established.[2] The legal doctrine that allows a person's mistaken belief to negate a culpable mental state seems simple enough and unremarkable. As an absence-of-intent defense, it is nothing more than a claim that the State cannot prove the crime beyond a reasonable doubt because the offense did not occur. In fact, labeling a mistaken belief as a defense merely affirms what would otherwise be the case, even without it, namely, that evidence of mistaken belief is logically relevant on the issue of whether the defendant acted with the requisite culpability.[3]

But this straightforward and logical notion is complicated in Texas by a single word—"reasonable."[4] The Model Penal Code provision, which the Texas provision was based on, would make even an unreasonable but honest mistake a defense.[5] But under the Texas law, it is not enough that a mistaken belief is honestly held. [6] In other words, to have the defense of mistake, the fact finder must find the hunter who shoots a person rather than a deer not only had honestly believed he was shooting a deer but also find that a reasonable person under the same circumstance would have reached the same conclusion. Likewise, the bicyclist's mistake will be a defense to a theft charge only if a reasonable person might have made the same mistake.

In *Beggs v. State*,[7] the Texas Court of Criminal Appeals addressed the application of the then-new mistake-of-fact provision to a scenario where it was clear that the defendant was entitled to a mistake-of-fact instruction.[8] A jury convicted Beggs of injury to a child based on her helping her stepdaughter punish Beggs's granddaughter by administrating a bath that

2. *See id.* (establishing the defense of mistaken belief).

3. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 12.02 (5th ed. 2009) ("[B]ecause of a mistake, a defendant may not possess the specific state of mind required in the definition of the crime.").

4. *See* TEX. PENAL CODE ANN. § 8.02 ("[T]he actor through mistake formed a reasonable belief . . . .").

5. MODEL PENAL CODE § 2.04(1) (AM. L. INST. 1985).

6. *Compare* MODEL PENAL CODE § 2.04(1) (AM. L. INST. 1985) ("[I]gnorance or mistake negatives the purpose, knowledge, belief, recklessness, or negligence required to establish a material element of the offense . . . ."), *with* TEX. PENAL CODE ANN. § 8.02 ("[T]he actor through mistake formed a reasonable belief about a matter of fact . . . .").

7. Beggs v. State, 597 S.W.2d 375 (Tex. Crim. App. 1980).

8. *See id* at 380 ("The trial court's refusal to give a charge that applied the law of mistake of fact to the very facts of the case, over the appellant's objection and in the face of the properly requested charge, was a reversible error.").

scalded the child.[9] Beggs claimed she did not know the bathwater was hot enough to cause injury and thought the child was being given a normal bath.[10] The judge gave an instruction to the jury mirroring the language of Section 8.02, but the Court of Criminal Appeals concluded that was not enough.[11] Beggs's conviction was reversed because the trial court refused to give the defense-requested instruction that would have applied the law to the very facts of the case, namely, a reasonable belief "*that the water in question was not hot to the extent to cause serious bodily injury . . . .*"[12]

Many cases involving a claim of mistake are tried without a request for submission of the mistake of fact defense to the jury.[13] Take the case of *Alvarado v. State*,[14] for example. The defendant mother was charged with intentionally or knowingly causing injury to a child for dunking her son into scalding hot water.[15] The Texas Court of Criminal Appeals reversed her conviction because the jury charge had not applied the culpable mental states to the result of the alleged conduct, which was the injury to the child.[16] The effect of the court's opinion was that Alvarado should have had the opportunity to argue that the State could not prove her guilt beyond a reasonable doubt unless it disproved her claimed belief that the water was not hot enough to injure a child.[17]

Had Alvarado been retried, she presumably would have been entitled to a jury charge on mistake of fact, that is, her mistaken belief that the water was not hot enough to injure the child. But would she not be better off without it? Because of the court's holding, could her attorney not argue that any mistake, even a preposterous or unfounded one, would raise a reasonable doubt as to whether Alvarado either intended or knew that the child would be injured when dipped in the water? An honest, albeit unreasonable belief, would be enough. With the mistake instruction,

9. *Id.* at 376.

10. *Id.*

11. *Id.* at 380.

12. *Id.* at 378, 380.

13. *See*, *e.g.*, Alvarado v. State, 704 S.W.2d 36, 37 (Tex. Crim. App. 1985) ("In his final argument to the jury defense counsel stressed the fact that in order to find his client guilty . . . the jury must find it was her conscious objective or desire to cause serious bodily injury to the child . . . .").

14. Alvarado v. State, 704 S.W.2d 36 (Tex. Crim. App. 1985).

15. *Id.* at 37 n.2.

16. *Id.* at 40.

17. *Id.* at 39–40.

however, the State could argue that negligence (unreasonableness of the mistake) is sufficient for conviction.[18]

Therefore, it is no surprise that a case involving a claim of mistake might well be tried without any thought of submitting the mistake of fact instruction to the jury.[19] The defense may conclude that it would be better off without it. The Texas Court of Criminal Appeals acknowledged as much, albeit indirectly, in *Bruno v. State*.[20] There, the defendant, who was charged with the unauthorized use of a motor vehicle, claimed that he had been given permission to drive the car by the car's owner.[21] On appeal, the defendant argued that the mistake of fact instruction given by the trial court should have contained specific language requiring the State to prove beyond a reasonable doubt that he did not have effective consent to operate the car.[22] In his plurality opinion, Judge White concluded that a mistake of fact instruction was unnecessary in the first place, given the court's instructions on the elements of the offense, because the jury "would have necessarily been required to disbelieve appellant's story before they could find sufficient evidence to convict."[23]

The lower appellate courts adopted this notion from *Bruno*.[24] In *Traylor v. State*,[25] the defendant was charged with assault on a public servant as the result of resisting arrest. At trial, the defendant claimed "he did not know the police were police."[26] His attorney requested a mistake of fact instruction that erroneously stated the law.[27] Therefore, he was not entitled to have the instruction given, but his attempt was sufficient to put the trial

18. *See id.* at 37 n.2 (failing to reach a secondary criminal negligence count because the jury found appellant guilty of the first count).

19. Facing the prospect of both a subjective and objective component, a defendant may refuse to raise the affirmative defensive. *Compare id.* at 39–40 (requiring the jury, when no defense is raised, to establish the defendant's subjective culpability), *with* Mata v. State, 627 S.W.2d 838, 840 (Tex. App.—San Antonio 1982, no pet.) (requiring the defendant's subjective belief—once the affirmative defensive is raised—to be "a reasonable belief or a belief which could have been held by an ordinary and prudent man in the same circumstances").

20. Bruno v. State, 845 S.W.2d 910 (Tex. Crim. App. 1993).

21. *Id.* at 911.

22. *Id.*

23. *Id.* at 913.

24. *E.g.*, Traylor v. State, 43 S.W.3d 725, 731 (Tex. App.—Beaumont 2001, no pet.) ("We hold that the trial court did not err in failing to submit the 'didn't know the police were police' mistake of fact instruction because the instruction was not necessary." (citing Bruno v. State, 845 S.W.2d at 912–13)).

25. Traylor v. State, 43 S.W.3d 725 (Tex. App.—Beaumont 2001, no pet.).

26. *Id.* at 728.

27. *Id.* at 728–29.

court on notice and preserve his claim.[28] However, relying on *Bruno*, the court concluded, "[T]he trial court did not err in failing to submit the 'didn't know the police were police' mistake of fact instruction because the instruction was not necessary."[29] The existing jury instruction, requiring the jury to find that Traylor knew the assault victim was a public servant, was sufficient because "the jury could not have convicted [the] defendant under the charge the jury was given if they believed his story."[30]

Judge Walker's concurring opinion is instructive for its discussion of an unpublished opinion from the Court of Criminal Appeals, reversing an earlier decision of the Beaumont court dealing with an evading arrest conviction.[31] In that case, the Beaumont court found the trial court's denial of a mistake of fact instruction to be a harmful error.[32] In its unpublished opinion, the Court of Criminal Appeals held, consistently with *Bruno*, that a mistake of fact instruction was not needed because it "was encompassed in the trial court's jury charge[,] which instructed the jury to convict only if it found beyond a reasonable doubt that appellant knew the officer in question was a police officer."[33] Judge Johnson's dissenting opinion in the Court of Criminal Appeals, which was appended to Judge Walker's concurrence in *Traylor*, contended a defendant has always been entitled to an instruction on a statutory defense when the defense is raised by the evidence, even when it is not a true affirmative defense.[34] But "under the logic of the majority, so long as the jury charge properly sets out the requisite culpable mental state

28. *See id.* at 730 (preserving the error because the Court of Criminal Appeals has broadly interpreted the applicable portion of the Texas Code of Criminal Procedure).

29. *Id.* at 731 (citing *Bruno*, 845 S.W.2d at 912–13).

30. *Id.* at 730–31.

31. Judge Walker appeared surprised by the Court of Criminal Appeals' conflicting decisions. *Id.* at 731 (Walker, J., concurring). To emphasize his point, Judge Walker referenced an earlier case where the highest court reversed the Beaumont court's decision, despite its clear congruence with the current state of the law under *Bruno*. Appendix, *Traylor*, 43 S.W.3d at 732 (citing Grant v. State, No. 09-94-181CR, 1998 WL 809413, at *1 (Tex. App.—Beaumont Nov. 18, 1998, pet. granted) (not designated for publication), *rev'd*, No. 0053-99, (Tex. Crim. App. Feb. 16, 2000) (not designated for publication)).

32. *Grant*, 1998 WL 809413, at *3.

33. *See* Appendix, *Traylor*, 43 S.W.3d at 732 (internal quotation marks omitted).

34. *Id.* at 732–33 (arguing the legislature's creation of a statutory defense entitles defendants "to an instruction on mistake of fact when it is raised by the evidence" (citing Willis v. State, 790 S.W.2d 307, 314 (Tex. Crim. App. 1990); Hill v. State, 765 S.W.2d 794, 797 (Tex. Crim. App. 1989); Woodfox v. State, 742 S.W.2d 408, 409–10 (Tex. Crim. App. 1987); Lynch v. State, 643 S.W.2d 737, 738 (Tex. Crim. App. 1983); Montgomery v. State, 588 S.W.2d 950, 952–53 (Tex. Crim. App. 1979); Miller v. State, 815 S.W.2d 582, 585 (Tex. Crim. App. 1991)).

of the offense charged, any erroneous refusal to instruct the jury on the defense of mistake of fact is, *per se*, harmless."[35]

Although there is some authority for the proposition that denial of a requested mistake of fact instruction is not error at all, the Court of Criminal Appeals has stated that it had not yet resolved the issue.[36] But the better view is that the court errors in denying a mistake of fact instruction when the defendant raises the issue of a mistaken belief as to the culpable mental state element of an offense. This is consistent with the view that the defendant is entitled to any instruction on any statutory defense that is raised by the evidence.[37] But as is the case with any jury charge error, the error will not result in reversal unless there is evidence of "some harm" to the defendant.[38] It is unlikely that the denial of the mistake of fact instruction will ever reach that level of harm given the oft-repeated mantra that the defendant would be better off without it.[39]

There is no better evidence of that fact than the Court of Criminal Appeals' conclusion that counsel's failure to request the instruction does not qualify as ineffective assistance of counsel.[40] Counsel's waiver was held to not constitute ineffective assistance because the instruction would effectively "decrease[] the State's burden of proof by permitting the jury to convict him if it concluded that his mistake was unreasonable, even if it found that the belief was honest."[41] Although the court purported to limit its holding to the facts of that case, its message was clear: An ineffective-assistance-of-counsel claim based on failure to request a mistake of fact instruction will not prevail in light of a proper instruction that the State must prove each element of the crime beyond a reasonable doubt.[42] The court will consider the mistake of fact instruction superfluous and potentially prejudicial.[43] The anomaly, as noted by the court, is that the

35. *Id.* at 733.

36. Okonkwo v. State, 398 S.W.3d 689, 695–96 (Tex. Crim. App. 2013).

37. *See, e.g.*, Curry v. State, 622 S.W.3d 302, 311 (Tex. Crim. App. 2019) ("A defendant is entitled to a mistake-of-fact instruction if the issue is raised by the evidence, even if that evidence is weak or controverted." (citing Allen v. State, 253 S.W.3d 260, 267 (Tex. Crim. App. 2008))).

38. Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).

39. *See, e.g.*, Bruno v. State, 845 S.W.2d 910, 913 (Tex. Crim. App. 1993) (recognizing the defendant could not be worse off by the court's refusal to submit the mistake of fact instruction).

40. *Okonkwo*, 398 S.W.3d at 696.

41. *Id.*

42. *See id.* (extinguishing the ineffective-assistance argument for future criminal defendants in similar situations by its exposure of the contradictory standards of proof).

43. *See id.* at 695 (highlighting the unnecessary nature of a mistake in fact reasonableness standard against a beyond-a-reasonable-doubt standard).

mistake instruction in effect lessens the State's burden of proof as to an essential element of the offense.[44] No wonder counsel is reluctant to request the instruction; likewise, no wonder failure to request the instruction will not be regarded as prejudicial to the defendant.

Of course, in many situations, the distinction between a mistaken belief that is unreasonable on the one hand and a mistaken belief that is not honestly held on the other will be academic. Because a juror is likely to assume that the defendant thought what he or she—the juror—would have thought in the same situation, the juror will likely be skeptical of the defendant claiming a belief by the defendant that the juror would not have entertained. The same considerations would lead the juror to conclude the defendant's mistake was unreasonable because the typical juror no doubt perceives him or herself as the reasonably prudent person by which reasonableness is measured.[45] In other words, the jury may simply conclude that because any reasonable person would have known the water was too hot, defendant Alvarado must have known it too.[46] So, she was probably lying.

But there are some situations in which a jury could conclude a defendant did in fact make an honest mistake when the hypothetical reasonably prudent person would not. For example, suppose the defendant claims that when she shot the victim, she thought the gun was unloaded. But a reasonable person would not have been so confident the gun was unloaded and would not have pointed the gun at another person and pulled the trigger. If the jury found she actually entertained an unreasonable perception and was in fact unaware of the risk of shooting the victim, could it logically conclude she acted intentionally or even recklessly? Or take the example of a hunter who, tramping around the woods and believing no other person is around, fires his shotgun at a movement in the bushes. He claims he thought he was shooting a squirrel. If his "defense" is cast in terms of a statutory mistake defense, the jury could convict him of murder, even if the jury also believed he did not have the intent to kill or the knowledge someone would be killed by the shot. Why? The jury could

44. *See id.* at 696 (imagining the confusion of a jury faced with applying the traditional burden of proof in criminal cases alongside a reasonableness standard).

45. *See generally* Ashley M. Votruba, Comment, *Will the Real Reasonable Person Please Stand Up? Using Psychology to Better Understand How Juries Interpret and Apply the Reasonable Person Standard*, 45 ARIZ. ST. L.J. 703 (2013).

46. *See generally* Alvarado v. State, 704 S.W.2d 36, 39–40 (Tex. Crim. App. 1985) (holding reversible the trial court's error to properly instruct the jury on applicable culpable mental states).

conclude he should not have made the mistake—it was unreasonable, and therefore, he should be convicted of murder even if he did not have the requisite intent. In effect, he could be convicted of murder because he was negligent.

One final example of the potential benefit in a mistake case of not having a mistake instruction is suggested by the facts in *Dillon v. State*.[47] Suppose that when an unsophisticated couple, parents of an infant child, takes their child to the hospital emergency room for ant bites, the examining and treating physician records the examination as "normal." Two months later at a bowling alley, the father asks a nurse whether she thinks the child is "skinny." Two days later the parents take the child to the hospital where she is pronounced dead from malnutrition starvation. Suppose further, there is evidence the parents were loving parents who honestly believed the child was simply a slow-developing child, and they were unaware the child was malnourished. If the parents are charged with manslaughter of the child, should their attorney request a mistake of fact instruction arguing they had a reasonable belief their child was a slow-developing child and was not in danger of death from malnutrition? Or, should their attorney introduce evidence tending to show the parents were honestly and in good faith unaware of the risk of death without requesting the instruction, and then argue they were thus not reckless—ignorant and dumb perhaps but not reckless? If the jury is instructed in terms of the statutory mistake defense, however, the jury will be able to convict even if it finds the parents were unaware of the risk if it also finds reasonable parents would have been aware.[48]

Because the statutory defense places a limit on the evidence that might be exculpatory, a defense lawyer in a mistake case may very well raise mistake evidence to negate culpability but not request a mistake instruction.[49] However, the prosecution could request it, or the judge could give it sua sponte. The judge might give it out of concern about reversible error; the prosecution might distinguishably request it as being beneficial to the defense. What might the defense lawyer do? One notable commentator

47. Dillon v. State, 574 S.W.2d 92 (Tex. Crim. App. 1978).

48. *See Okonkwo*, 398 S.W.3d at 696 (exposing the contrast in standards for juries to decipher when considering a mistake of fact defense).

49. There might be an exception. Suppose the defendant claims a mistaken belief that his lawyer thinks a jury would be inclined to regard as reasonable, i.e., one that they, the jurors, would have made in the same situation. In that case, the lawyer might want the instruction to bolster his argument that his client is not guilty because he made a mistake any reasonable person would have made.

has suggested the defendant should object on constitutional grounds—Due Process and the Sixth Amendment right to a jury trial.[50] Why? One court stated the "burden of proof . . . would be more relaxed since an unreasonable act performed without intent could result in criminal liability" contrary to the due process requirement of proof beyond a reasonable doubt of every element of the offense.[51] Counsel could also argue that since the Penal Code has made criminal negligence an exceptional basis for criminal liability,[52] the prosecution should not be allowed to lessen its burden of proof by insisting on a mistake of fact instruction when the defendant does not want it.

The ultimate question: what should defense counsel do? Counsel may elect not to request a mistake of fact instruction to which the defense is entitled, deeming it to be superfluous or possibly prejudicial.[53] If so, the failure to request it will not be reversible error.[54] On the other hand, the failure of the trial court to give the instruction if requested will not be reversible error either.[55] So, counsel must make a judgment call.

II. FINDING AN INTENT TO NEGATE

A defendant will be entitled to a mistake of fact instruction only if his allegedly mistaken belief would tend to negate a culpable mental state required by the offense.[56] In other words, the mistake is not relevant unless the statute alleged to be violated has a culpable mental state for the mistake to negate. For example, a defendant may be convicted of aggravated assault based on the victim being younger than fourteen years of age, regardless of his state of mind as to the victim's age.[57] Accordingly, his mistaken belief that the victim was older than fourteen is irrelevant. On the other hand, if

50. GEORGE DIX, CRIMINAL LAW: CASES AND MATERIALS 414 (7th ed. 2015); *see also* COMM. ON PATTERN JURY CHARGES—CRIM. STATE BAR TEX., TEXAS CRIMINAL PATTERN JURY CHARGES: CRIMINAL DEFENSES 39–42 (2015) (discussing constitutional quandaries arising from the mistake of fact defense).

51. State v. Bougneit, 294 N.W.2d 675, 678 n.4 (Wis. Ct. App. 1980).

52. TEX. PENAL CODE ANN. § 6.02(d)(4).

53. *See Okonkwo*, 398 S.W.3d at 695 (illustrating a court's skepticism towards an allegation of ineffective assistance of counsel due to failure to raise a mistake of fact defense).

54. *See id.* at 696 (denying an appellant's claim of ineffective assistance of counsel concerning failure to make a mistake of fact defense).

55. *See id.* at 697 (reversing an intermediate court's ruling that the trial court abused its discretion).

56. TEX. PENAL CODE ANN. § 8.02(a).

57. *See* Zubia v. State, 998 S.W.2d 226, 227 (Tex. Crim. App. 1999) (asserting intent and knowledge regarding a victim's age is not required for the government to prove).

requested, the failure of the trial court to give the instruction when supported by the evidence will be error but likely will not be found reversible because of the absence of harm. Accordingly, defense counsel is free to choose which course is believed to be more likely to benefit the accused.[58]

The case of *Curry v. State*[59] illustrates well the relationship between the requirement of a culpable mental state in a criminal statute and the mistake of fact defense. In *Curry*, the defendant was convicted under Transportation Code Section 550.021 for the felony of failure to stop and render aid.[60] The undisputed evidence established that the defendant struck and killed the bicyclist with this truck, but the defendant Curry claimed he did not know at the time of the collision that he had struck someone who needed his assistance.[61] Curry claimed that he thought someone standing near the road had thrown a beer bottle at his truck.[62] Accordingly, he contended that he was entitled to a mistake of fact instruction.[63] The Court of Appeals held otherwise, concluding that the recently amended stop and render aid statute required the State to prove only that the defendant knew he was involved in an accident and not that he knew a person was involved.[64] The Court reasoned because the State no longer had to prove the driver knew a person was involved, Curry was not entitled to an instruction on his claimed belief that he had not struck a person.[65] His mistake did not tend to negate the only mental state requirement—knowledge that he had been in a collision that damaged his truck. The Court of Criminal Appeals reversed, concluding that Curry was indeed entitled to a mistake of fact instruction.[66] In reaching this result, the court focused on Section 550.021 and its history.[67] The court reviewed its earlier cases interpreting the prior stop and render aid statute to require proof of the driver's knowledge, not only that he was involved in an accident but also that he knew that someone was killed or injured, notwithstanding the absence of any statutory language

58. McQueen v. State, 781 S.W.2d 600, 604 (Tex. Crim. App. 1989).
59. Curry v. State, 622 S.W.3d 302 (Tex. Crim. App. 2019).
60. *Id.* at 304; TEX. TRANSP. CODE ANN. § 550.021.
61. *Curry*, 622 S.W.3d at 304.
62. *Id.* at 307.
63. *Id.* at 306.
64. *Id.* at 307.
65. *Id.*
66. *Id.*
67. *Id.* at 308–09.

mandating such knowledge.[68] The court read in the knowledge requirement because "it would be unfair to impose strict liability on a driver who did not even know that he was involved in an accident."[69] It compared the language of the prior statute with the amended version.[70] The prior statute imposed that stop and render aid duty on "[t]he driver of any vehicle involved in an accident resulting in injury or death of any person[,]"[71] but the amended version reads, "[T]he operator of a vehicle involved in an accident that results *or is reasonably likely to result* in injury to or death of a person."[72] It is apparent that the legislature attempted, however unartfully, to eliminate the requirement imposed by *Huffman v. State*[73] that the driver who knew he was involved in an accident also had to be aware that someone involved in the accident was injured or killed. But the court concluded that even under the amended statute, the mental state of knowledge as to the circumstance that one was involved in an accident was not enough to require the driver to stop.[74] The focus of the amended statute, as with the original, was on the result of the accident. In other words, what makes the failure to stop a crime is not simply involvement in an accident but leaving the scene of the accident when someone was injured or possibly injured. So, Curry was entitled to a mistake of fact instruction based on his claimed belief that he did not know that someone was or might have been injured by the accident.

Under Texas law, it is often unclear which elements of an offense require culpability. The Practice Commentary to the Texas Penal Code, Section 6.02 noted that the "problem . . . was succinctly and properly identified" in the Practice Commentary to Penal Code, Section 6.02.[75] The 1970 proposed penal code would have incorporated a provision from the Model Penal Code that dealt with the problem of determining which

68. *Id.* at 308 (first citing Goss v. State, 582 S.W.2d 782, 783 (Tex. Crim. App. 1979); then citing Huffman v. State, 267 S.W.3d 902, 907–08 (Tex. Crim. App. 2008)).

69. *Curry*, 622 S.W.3d at 308 (citing *Goss*, 582 S.W.2d at 784–85).

70. *See Curry*, 622 S.W.3d at 308 (comparing the requirements of the former statute and its replacement).

71. *Id.* (quoting *Goss*, 582 S.W.2d at 783).

72. *Curry*, 622 S.W.3d at 309 (emphasis in original) (quoting TEX. TRANSP. CODE ANN. § 550.021(a)).

73. Huffman v. State, 267 S.W.3d 902, 907, 909 (Tex. Crim. App. 2008).

74. *Curry*, 622 S.W.3d at 309–10.

75. Lugo-Lugo v. State, 650 S.W. 2d 72, 74 (Tex. Crim. App. 1983).

elements of a crime require culpability.[76] Under that provision, unless the culpable mental state were made applicable to one or more of the specific elements of the prohibited conduct, circumstances surrounding the conduct, or result of conduct, it would be *deemed* to apply to all.[77] But the Texas Penal Code did not include that provision. In its absence, the Texas courts have decided this issue by an ad hoc interpretation of each statute defining a criminal offense.[78] The Texas Court of Criminal Appeals has viewed the issue as one of determining legislative intent, which requires a textual analysis of each statute.[79]

Obviously, legislative intent in most cases is a fiction since the court interpreting the penal statute likely will have little, if any, evidence of what the legislators thought—if they thought—when they voted to enact the statute.[80] Accordingly, courts decide what a reasonable legislators would have thought had they thought about it at all. In making that determination, the Court of Criminal Appeals has utilized an "eighth[-]grade grammar" or "common sense" approach in which it decides whether the "'gravamen or focus of the offense' . . . is the result of the act, the nature of the act itself, or the circumstances surrounding of that act."[81] Under that approach, courts will first look at the statute's language and apply "rules of grammar and common usage."[82] Other factors include "the nature of the conduct

76. *See id.* at 74 ("The section [of the 1970 proposed code] would have resolved the ambiguity, frequently encountered in criminal statutes, as to which elements of an offense the culpable mental state applies." (quoting the Practice Commentary to the then-existing version of TEX. PENAL CODE ANN. § 6.02)); MODEL PENAL CODE § 2.02(4) (AM. L. INST. 1985) (codifying provisions in a penal law that prescribe culpability "shall apply to all the material elements of the offense, unless a contrary purpose plainly appears").

77. MODEL PENAL CODE § 2.02(4).

78. *See* Celis v. State, 416 S.W.3d 419, 423 (Tex. Crim. App. 2013) ("This Court has enumerated several factors that courts may consider 'in deciding whether the legislature meant to impose liability without fault or, on the other hand, really meant to require fault though it failed to spell it out clearly.'" (quoting Aguirre v. State, 22 S.W.3d 463, 475 (Tex. Crim. App. 1997))).

79. *See Celis*, 416 S.W.3d at 423 (quoting *Aguirre*, 22 S.W.3d at 475) (recognizing the need for analysis of individual statutes in determining legislative intent).

80. *See* Karen Petroski, *Fictions of Omniscience*, 103 KY. L.J. 477, 484 (2015) (arguing legislative intent is a legal fiction because of "our inability to read minds").

81. Stuhler v. State, 218 S.W.3d 706, 718 (Tex. Crim. App. 2015) (quoting Jefferson v. State, 189 S.W.3d 305, 315–16 (Tex. Crim App. 2006) (Cochran, J., concurring)); Robinson v. State, 466 S.W.3d 166, 176 (Tex. Crim. App. 2015) (quoting Young v. State, 341 S.W.3d 417, 424 (Tex. Crim. App. 2011)).

82. *Celis*, 416 S.W.3d at 423 (quoting TEX. GOV'T CODE ANN. § 311.011(a)).

regulated, the risk of harm to the public, and the defendant's ability to ascertain facts."[83]

When a statute states a defendant is guilty of an offense if he knowingly engages in conduct that under certain circumstances causes a particular result, the court must decide "how far down" the statute "the word 'knowingly' . . . travel[s]."[84] Deciding this issue is not always easy. In *Price v. State*,[85] the defendant was found guilty of "third-degree-felony-family-violence assault." Price claimed the offense had two gravamina as both a "result-oriented and a conduct-oriented offense."[86] The defendant also claimed the jury instruction should have tailored the culpable mental state to the "by applying pressure" part of the statute because the offense is a nature of conduct as well as a result of conduct offense.[87] The court rejected these claims, holding that domestic violence is a result-of-conduct offense only.[88] Judge Johnson, writing for the majority, concluded the portions of the statute that said "by applying pressure to the person's throat or neck or by blocking the person's nose or mouth" were "prepositional phrases that describe the manner and means by which the result . . . may be achieved" and that "[t]he immediately preceding culpable mental states do not syntactically modify those prepositional phrases."[89] Judge Yeary, concurring, found the majority's reasoning "problematic" because the statute seems to proscribe "a particular type of conduct" rather than "a particular result that is the product of undifferentiated conduct."[90] Judge Yeary added that the distinction between these prohibitions is admittedly a "hard" one to make.[91] In any event, "choking is choking" and a jury would not likely find the defendant caused the impediment to the victim's breath or blood flow without also finding he intentionally or knowingly engaged in the conduct that caused the impediment.[92] In his

83. *Id.*

84. *Id.* at 427 n.12 (quoting Liparota v. United States, 471 U.S. 419, 424 n.7 (1985)).

85. Price v. State, 457 S.W.3d 437 (Tex. Crim. App. 2015).

86. *Id.* at 439.

87. *Id.*; TEX. PENAL CODE ANN. § 22.01(b)(2)(B) ("[T]he offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth.").

88. *See Price*, 457 S.W.3d at 443 ("Therefore, the instruction properly defined the offense as solely a result of conduct and was not erroneous.").

89. *Id.* (quoting § 22.01(b)(2)(B)) (internal quotation marks omitted).

90. *Id.* at 443, 445 (Yeary, J., concurring).

91. *Id.* at 445.

92. *Id.* at 446.

dissent, Judge Meyers asserted that what makes the offense a felony is the conduct of strangling, making it a nature of conduct offense to which a culpable mental state would apply.[93]

When a culpable mental state is not expressly required as to a circumstance that merely aggravates an offense, the court typically will not require a culpability as to the circumstance.[94] A culpable mental state as to a circumstance will not be read into the statute unless the offense otherwise would prohibit innocent behavior.[95] For example, in *White v. State*,[96] awareness that the sale of a controlled substance was within a drug free zone—"within 1,000 feet of a youth center"—was not required.[97] Likewise, in *Uribe v. State*,[98] the unlawful carrying of a weapon offense was interpreted as not having an additional culpable mental state as to the circumstances making the offense a felony, i.e., carrying on any premises licensed to sell alcoholic beverages.[99] The circumstance merely aggravated an otherwise criminal act.[100] In *Fleming v. State*,[101] no culpable mental state was required as to the age of a victim for an aggravated assault based on the victim being younger than fourteen years of age.[102]

When circumstances of the conduct make criminal what is otherwise non-criminal, i.e., innocent, a culpable mental state will be required as to those circumstances.[103] For example, in *Robinson v. State*,[104] the defendant was charged with failure to comply with sex-offender registration

93. *Id.* (Meyers, J., dissenting) (quoting McQueen v. State, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989)).

94. *See, e.g.,* White v. State, 509 S.W.3d 307, 315 (Tex. Crim. App. 2017) ("We hold that, in order to obtain a conviction for the third degree felony offense of delivering less than a gram of a Penalty Group 1 substance . . . the State need not prove that the accused was aware that the transaction occurred within 1,000 feet of a youth center.").

95. *See, e.g., White*, 509 S.W.3d at 314 (discussing the culpability needed to prove the defendant committed the third-degree felony offense).

96. White v. State, 509 S.W.3d 307 (Tex. Crim. App. 2017).

97. *Id.* at 310–11.

98. Uribe v. State, 573 S.W.2d 819 (Tex. Crim. App. 1978).

99. *See id.* at 821 ("Appellant next challenges the sufficiency of the indictment charging him with carrying a firearm on a premises licensed to sell alcoholic beverages.").

100. *See id.* ("This act alone cannot be characterized as an assaultive act directed towards the victim.").

101. Fleming v. State, 455 S.W.3d 577 (Tex. Crim. App. 2014).

102. *See id.* at 581–82 (Tex. Crim. App. 2014) (clarifying the intent of the Texas legislature regarding culpable mental state requirements in certain offenses where age of the victim is an aggravating factor).

103. *See id.* at 577 (affirming the court of appeals' decision).

104. Robinson v. State, 466 S.W.3d 166 (Tex. Crim. App. 2015).

requirements.[105] The statute stated an offense is committed "if the person is required to register and fails to comply with any requirement of this chapter."[106] Because the statute does not prescribe a culpable mental state, one was required to be read in.[107] The question was then to which elements that mental state applied.[108] Judge Keasler characterized the failure to comply with Chapter 62 as a circumstance-of-conduct offense that is made unlawful by the duty to register.[109] A circumstances-of-conduct offense will contain a conduct element but that conduct "is not necessarily an additional gravamen."[110] So, in *Robinson*, a culpable mental state applied only to the circumstances.[111]

The defendant in *Celis v. State*[112] argued that the culpable mental state in the statute charged applied to circumstance elements, which thus required a mistake of fact instruction as to his beliefs concerning those circumstances.[113] Celis was charged with twenty-three counts of falsely holding himself out as a lawyer in violation of Texas Penal Code, Section 38.122(a) that reads as follows:

> A person commits an offense if, with intent to obtain an economic benefit for himself or herself, the person holds himself or herself out as a lawyer, unless he or she is currently licensed to practice law in this state, another state, or a foreign country and is in good standing with the State Bar of Texas and the state bar or licensing authority of any and all other states and foreign countries where licensed.[114]

105. *Id.* at 168 ("Robinson was indicted for the offense of failure to comply with sex-offender registration requirements.").

106. TEX. CODE CRIM. PROC. ART. 62.102(a).

107. *Robinson*, 466 S.W.3d at 176 (citing TEX. PENAL CODE ANN. § 6.02(b)).

108. *Id.* (discussing the determination for which "culpable mental state attaches" (citing McQueen v. State, 781 S.W.2d 600, 603 (Tex. Crim App. 1989))).

109. *Id.* at 170–71 ("Therefore, the failure-to-register offense is a circumstances-of-conduct offense, and the gravamen of the offense is the duty to register." (citing Young v. State, 341 S.W.3d 417, 427 (Tex. Crim. App. 2011))).

110. *Id.* at 171.

111. *Id.*; *see McQueen*, 781 S.W.2d at 603 ("[W]here otherwise innocent behavior becomes criminal because of the circumstances under which it is done, a culpable mental state is required as to those surrounding circumstances." (citing McClain v. State, 687 S.W.2d 350 (Tex. Crim. App. 1985))).

112. Celis v. State, 416 S.W.3d 419 (Tex. Crim. App. 2013).

113. *Id.* at 422 (citing Celis v. State, 354 S.W.3d 7, 27 (Tex. App.—Corpus Christi 2011)).

114. TEX. PENAL CODE ANN. § 38.122(a).

Celis was convicted of fourteen counts by a jury and was assessed a ten-year sentence for each offense, probated for ten years.[115] His claim on appeal was that he should have been given his requested mistake of fact instruction because of his mistaken belief that he was licensed to practice in Mexico.[116]

The Court of Criminal Appeals affirmed the Court of Appeals' holding that Celis was not entitled to a mistake of fact instruction because his claimed mistake did not negate any culpable mental state required for the offense.[117] Judge Alcala, in her opinion for the majority, noted the factors the court had referenced in deciding to what element or elements a culpable mental state in a statute applies.[118] When, as in *Celis*, an intent appears at the beginning of the statute, the issue is how far down the statutory language does the intent travel. Clearly, the intent modified the conduct of holding oneself out as a lawyer, but the question was whether that intent also modified the circumstance elements—not having a license and not in good standing with the bar.[119] Judge Alcala noted that typically a culpable mental state as to a circumstance is not required unless the circumstance makes an otherwise lawful act criminal,[120] as it did in *McQueen v. State*.[121] McQueen held that unauthorized use of a motor vehicle required an intent to operate the vehicle without the owner's effective consent because the conduct of operating a motor vehicle is an otherwise lawful act.[122] But is that true? Holding oneself out as a lawyer is only unlawful if the person doing it is not qualified.[123] What makes Celis's conduct unlawful is the circumstance of holding oneself out as a lawyer without a license and good standing with the bar. Moreover, the determinative issue is the juxtaposition of language—the "unless" clause introducing the circumstances making the holding out lawful. It is reasonable to conclude that the legislature "intended" criminal liability to be strict as to the nonexistence of qualifications. In any event,

115. *Celis*, 416 S.W.3d at 422.

116. *Id.* (citing Celis v. State, 354 S.W.3d 7, 27 (Tex. App.—Corpus Christi 2011)).

117. *Id.* at 423.

118. *Id.* at 423 ("Factors relevant to this case include (1) the language of the statute and (2) the nature of the conduct regulated, the risk of harm to the public, and the defendant's ability to ascertain facts." (citing Aguirre v. State, 22 S.W.3d 463, 475–76 (Tex. Crim. App. 1999))).

119. *Id.* at 424.

120. *Id.* at 428 (citing McQueen v. State, 781 S.W.2d 600, 604 (Tex. Crim. App. 1989)).

121. McQueen v. State, 781 S.W.2d 600 (Tex. Crim. App. 1989).

122. *Id.* at 603.

123. *See* TEX. PENAL CODE ANN. § 38.122(a) (requiring licensure and good standing to hold oneself out as a lawyer).

Celis's mistaken belief, if any, as to his qualifications to practice law in Texas was irrelevant.[124]

So, establishing a mistaken belief is only half the battle for defense.[125] More often than not, the court will find that the mistake of fact, if it exists, is not a defense because the statute does not require an intent to which the mistake allegedly relates.[126]

III. A DETOUR BY WAY OF PENAL CODE SECTION 6.04(B)(1)

Texas Penal Code Section 6.04(b) provides:

> A person is nevertheless criminally responsible for causing a result is the only difference between what actually occurred and what he desired, contemplated, or risked, is that:
>
> (1) a different offense was committed; or
> (2) a different person or property was injured, harmed, or otherwise affected.[127]

This is the so-called "transferred intent" provision of Texas criminal law.[128] Section 6.04(b)(2) has been said to codify the historical common law view that an actor's intent to harm one victim transfers to an unintended victim.[129] In fact, the notion that the intent is transferred is fiction. The intent is not transferred, but rather it is merely sufficient, because the

124. *See Celis*, 416 S.W.3d at 432 (affirming the trial court's denial of appellant's mistake-of-fact instruction).

125. *See id.* at 430 (suggesting that not only must the defendant establish a mistake of fact, but that the mistake of fact must apply to elements that require proof of intent (citing Beggs w. State, 597 S.W.2d 375, 378 (Tex. Crim. App. 1980))).

126. *See id.* at 432 (determining that the only intent requirement present in the statute is the intent to obtain economic benefit (citing Penal § 38.122(a))); Rodriguez v. State, 538 S.W.3d 623, 630 (Tex. Crim. App. 2018) (establishing simple assault statute does not require any additional intent with respect to the aggravating elements, thereby holding mistake of fact about the aggravating element is not available as a defense (citing *Celis,* 416 S.W.3d at 432)); Fleming v. State, 455 S.W.3d 577, 582 (Tex. Crim. App. 2014) (concluding the defendant's mistake regarding the victim's age in a sexual assault case was no defense because the criminal statute did not require any additional culpability as to the victim's age).

127. TEX. PENAL CODE § 6.04(b).

128. *See* Thompson v. State, 236 S.W.3d 787, 792 (Tex. Crim. App. 2007) (stating Section 6.04 contains "transferred intent" provisions).

129. *See* Gutierrez v. State, 681 S.W.2d 698, 702 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd) (calling TEXAS PENAL CODE § 6.04(b)(1) the "common-law 'transferred intent' doctrine"); William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 650 (1967) (tracing transferred intent back to ancient common law governing trespass).

defendant need not intend to harm any particular person to be guilty of an assault or criminal homicide. Instead, his intent to harm anyone would suffice. Notwithstanding the misnomer, this provision has not posed any problems. But Section 6.04(b)(2) has.

Section 6.04(b)(2) has been condemned as a poorly and unfortunately worded statute that has engendered confusion and should be remedied by the legislature.[130] This conclusion appears to find its source the Texas Court of Criminal Appeals decision in *Thompson v. State*.[131] In that case, Thompson was charged and convicted by a jury of both the first-degree felony of injury to a child and the second-degree felony of aggravated assault.[132] On appeal, Thompson claimed the jury charge improperly allowed the jury to find him guilty of the first-degree felony of causing *serious bodily injury* to a child even if he intended to cause only *bodily injury*.[133] Applying Section 6.02(b)(1), Judge Keller affirmed the Court of Appeals' conclusion for a unanimous court that Thompson's intent to commit bodily injury "transferred" to the serious bodily injury actually committed.[134] Recognizing this holding raised a "concern that a person could be penalized far beyond his actual culpability,"[135] Judge Keller states, "Where [Section] 6.02(b)(1) permits the transfer of a culpable mental state, mistake of fact may be raised as a defense."[136] In other words, the defendant could claim he reasonably believed he was not inflicting the serious bodily injury required for aggravated assault.

The "potentially overbroad impact" of Section 6.04(b)(1) created by *Thompson* appears to have been mitigated by the court's decision in *Rodriguez v. State*.[137] Rodriguez was convicted of aggravated assault for intentionally or knowingly causing serious bodily injury to the victim.[138] The jury charge, mirroring the holding of *Thompson*, said Rodriguez was "criminally responsible for causing serious bodily injury" even if he "did not intend or contemplate that the bodily injury [was] 'serious'" so long as he

130. GEORGE DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE—CRIMINAL PRACTICE AND PROCEDURE § 43.17, at 883 (3d ed. 2011).

131. *Thompson*, 236 S.W.3d at 787.

132. *Id.* at 789–90.

133. *Id.* at 790.

134. *Id.* at 790, 800.

135. *Id.* at 800.

136. *Id.*

137. Rodriguez v. State, 538 S.W.3d 623 (Tex. Crim. App. 2018).

138. *See id.* at 624–25 (describing the defendant's charge and reason for appeal).

intended bodily injury.[139] The trial court overruled Rodriguez's objection to the jury instruction and denied his request for a mistake of fact instructions.[140] On appeal, Rodriguez claimed he was entitled to his requested mistake of fact instruction under the holding of *Thompson*, namely, he had a reasonable but mistaken belief that he was inflicting only bodily injury, not serious bodily injury.[141] The Court of Appeals agreed with Rodriguez because the trial court gave a jury instruction on transferred intent, which, per Judge Keller's opinion in *Thompson*, entitled Rodriguez to a mistake instruction.[142] But the Court of Criminal Appeals, in Judge Keasler's opinion for a unanimous court, reversed the court of appeals decision.[143] Judge Keasler delicately avoids disavowing *Thompson* but rejects the basic assumption of Judge Keller's opinion in *Thompson*, namely, that the defendant must have an intent to inflict serious bodily harm to be guilty of aggravated assault.[144] Holding otherwise, Judge Keasler states Texas Penal Code Section 22.02's definition of assault does not require a culpable mental state other than the intent to cause bodily injury; the fact of seriousness is an aggravating element for which no culpable mental state is required.[145] Thus, one could say there is no intent to transfer because the single intent to inflict bodily injury suffices for the aggravated offense. The court notes it is common for a statute to have an aggravating element for which there is no culpable mental state.[146] In those instances,

139. *Id.* at 625 (citing TEX. PENAL CODE § 6.04(b)(1)).

140. *See* Rodriguez v. State, 491 S.W.3d 379, 381 (Tex. App.—San Antonio 2016, pet. granted) ("Rodriguez objected to the transferred intent instruction, but the trial court overruled his objection. . . . Rodriquez argues he may have intended to cause bodily injury to Mr. Plaud–Acosta, but through mistake . . . caused serious bodily injury, entitling him to the requested instruction.").

141. *See id.* ("Rodriguez relies on *Thompson v. State* . . . in support of his claim that the trial court erred in refusing to include a mistake-of-fact instruction in the jury charge." (citing Thompson v. State, 236 S.W.3d 787 (Tex. Crim. App. 2007))).

142. *See id.* at 383 (holding "the trial court erred in refusing to give the requested mistake-of-fact instruction"); Thompson v. State, 236 S.W.3d 787, 800 (Tex. Crim. App. 2007) (discussing transferred intent and mistake of fact).

143. *Rodriguez*, 538 S.W.3d at 630.

144. *Id.* at 630–31 ("[I]t would be inappropriate for this Court to entirely overrule—or even to reaffirm—*Thompson* in this case . . . . In a prosecution for aggravated assault, the State need only prove the defendant harbored a culpable mental state as to the underlying assault." (citing VanDevender v. Woods, 222 S.W.3d 430, 433 (Tex. 2017))).

145. *See id.* at 629 (suggesting one with a guilty mind be held criminally responsible when succeeding to injure someone (citing Fleming v. State, 455 S.W.3d 577, 592 (Tex. Crim. App. 2014) (Keller, P.J., dissenting))).

146. *Id.* at 630 ("The greater offense in this case (aggravated assault) does not require a culpable mental state as to the additional, aggravating element (serious bodily injury), so any mistake about the

the defendant's state of mind as to the aggravating element is irrelevant. Accordingly, a mistake of fact instruction as to that element is not required.

In purporting not to overrule *Thompson*, Judge Keasler opines that the court is relying on "what Section 22.02 already envisions"[147] and "that Section 6.04(b)(1) was not truly implicated."[148] But is that true? Rodriguez claimed he contemplated—or intended—only bodily injury sufficient for the lesser assault offense, but his intent was sufficient to make him criminally responsible for causing serious bodily injury.[149] So, the only difference, in the words of the statute, is that "a different offense was committed."[150] In fact, the scenario presented in Rodriguez is precisely a situation in with Section 6.04(b)(1) should apply. Properly interpreted, Section 6.04(b)(1) does not make a defendant guilty of another offense that he did not desire, contemplate, or risk.[151] Section 6.04(b)(1) is a causation provision. It merely means a defendant cannot complain he did not cause the result for another offense simply because he did not specifically desire, contemplate, or risk that result.[152] Thus, a defendant who intentionally inflicts a serious bodily injury will not have a valid claim that he is not guilty of murder for committing an act clearly dangerous to human life because he intended only to injure the victim. Why? Because his intent is sufficient for the offense of murder. Or, a defendant charged for assault cannot validly claim a defense to assault to child because he believed the child was over fourteen. Why? Because the defendant's belief as to the age of a victim is irrelevant. Or, a defendant who committed a burglary of a habitation cannot validly claim as a defense that he thought the structure he burglarized was an uninhabited structure. Or, a defendant who shoots at someone to only scare a victim who dies from a misdirected gunshot cannot get off the hook for a homicide prosecution by saying he did not mean to kill the victim. The

additional element would not negate an elemental culpable mental state." (citing Celis v. State, 416 S.W.3d 419, 432) (Tex. Crim. App. 2013))).

147. *Id.*

148. *Id.* at 631.

149. *See id.* at 624 ("Rodriguez contends that, while he intended to cause some bodily injury to the victim, he did not honestly believe that his actions would result in serious bodily injury. . . . We disagree.").

150. *Id.* at 630 (citing TEX. PENAL CODE § 6.04(b)(1)).

151. *Id.* at 625, 630 (discussing the intent required under Section 6.04(b)(1)).

152. TEX. PENAL CODE § 6.04(b) ("A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that: (1) a different offense was committed; or (2) a different person or property was injured, harmed, or otherwise affected.").

point is the defendant does not have a valid defense because either his intent as to one offense is irrelevant to another, or his actual intent as to one offense is sufficient for another.[153]

The confusion Judge Keasler referred to in *Rodriguez* concerning Section 6.04(b)(1) may in part be due to the unfortunate use of the catchphrase "transferred intent" in referring to it.[154] The law would be well served if the notion of transferred intent were abandoned altogether. Section 6.04 of the penal code is not so labeled, and that phrase cannot be found anywhere else in the code.[155] It is a misnomer that tends to confuse the element of causation with the intent requirement of a criminal statute. Section 6.04(b)(1) is not about intent; it is about cause.[156] The confusion could be alleviated if the section were not viewed as transferring intent but as making the defendant a cause of result regardless of his intent.[157] The provision makes sense if it is interpreted to mean a defendant can cause a result even if he did not specifically contemplate it.

153. *See Rodriguez*, 538 S.W.3d at 630 (Tex. Crim. App. 2018) (discussing the transfer of intent as it relates to Section 6.04(b)(1)).

154. *Id.* ("The transferred-intent instruction in this case . . . .").

155. *See generally* TEX. PENAL CODE (2022).

156. *See* TEX. PENAL CODE § 6.04(b) ("A person is nevertheless criminally responsible for *causing* a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that . . . ." (emphasis added)).

157. *See id.* (referring to criminal responsibility as a result caused by a person's act).

IV. MISTAKE OF FACT OR MISTAKE OF LAW?

Section 8.03 of the Texas Penal Code provides:

> (a) It is no defense to prosecution that the actor was ignorant of the provisions of any law after the law has taken effect.
> (b) It is an affirmative defense to prosecution that the actor reasonably believed the conduct charged did not constitute a crime and that he acted in reasonable reliance upon:
>
> > (1) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or
> > (2) a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question.
>
> (c) Although an actor's mistake of law may constitute a defense to the offense charged, he may nevertheless be convicted of a lesser included offense of which he would be guilty if the law were as he believed.[158]

Section 8.03 of the Texas Penal Code, entitled "Mistake of Law," restates the venerable common law maxim that ignorance of the law is no excuse for a crime while adding a limited affirmative defense for a belief that "the conduct charged did not constitute a crime [based on] an official statement of the law . . . or . . . a written interpretation of the law [by] a court of record or . . . public official charged by law with responsibility for interpreting the law."[159] By enacting this provision, the legislature emphasized the critical characterization of a defendant's ignorance or mistaken belief as either one of fact or law.[160] Only those mistakes characterized as mistakes of fact will be available under Section 8.02 to negate the culpability otherwise required for guilt of a crime.[161] Mistakes of law will not. On the other hand, the 1970 proposed Texas Penal Code, on the other hand, borrowing from the Model Penal Code, would have made evidence of a mistake of fact *or* law

158. TEX. PENAL CODE ANN. § 8.03.

159. *Id.*

160. *Compare id.* (requiring mistakes of law to be reasonably acquired from official public sources but not mentioning any negation of culpability), *with id.* § 8.02 (allowing mistakes of fact to "negate[] the kind of culpability required for commission of the offense").

161. *Id.* § 8.02.

relevant to negate a culpable mental state of a crime.[162] Many suggest that rejection of that approach creates ambiguity by explicitly allowing refutation culpability—based on a mistake—only if it is one of fact.[163]

The analytical problems in applying the statute have been exacerbated by misinterpretation of the statute's language. The Texas courts have failed to give the mistake of law statute its literal meaning.[164] This trend can be traced to decisions such as *Green v. State*[165] where the Texas Court of Criminal Appeals stated that to be entitled upon request to a mistake of law instruction, "the defendant must establish that he reasonably believed that *his* conduct did not constitute a crime."[166] The statute, however, expressly states that the belief must be "that the *conduct charged* did not constitute a crime."[167] This interpretation of the statutory language is at the root of the courts' problems with characterizing mistakes of law. Its effect is to merge scenarios that would be distinct under a proper interpretation of the statute's language. To illustrate, suppose a defendant is charged with unlawful possession of marijuana. If the defendant claims he did not know that possession of marijuana was a crime, his claim would be a belief that the conduct charged did not constitute a crime. On the other hand, if the defendant claims that he did not know what he possessed was marijuana, his claim is not that he did not know the conduct charged was a crime, but instead a claimed belief "that his conduct did not constitute a crime." The interpretation of Section 8.03 has led Texas courts (and lawyers) to conclude that fact situations analogous to the second scenario present mistake of law issues, at least when the defendant's claimed belief may be traced to a misunderstanding of the law. The result has been difficulty in distinguishing mistakes of fact and mistakes of law.

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162. *See* MODEL PENAL CODE § 2.04(1) (allowing negation of culpability for both mistakes of fact and law); Seth S. Searcy III & James R. Patterson, *Practice Commentary*, in TEX. PENAL CODE ANN. § 8.03, 218, 219 (West 1974) (indicating the 1970 proposed code would have "treated law and fact alike").

163. Kenneth W. Simmons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. OF CRIM. L. 487, 531–32 (2012) (discussing the types of mistakes and noting the presence of ambiguity).

164. *See* Green v. State, 829 S.W.2d 222, 223 (Tex. Crim. App. 1992) (construing the words of Section 8.03 to mean a defendant must believe his own conduct did not constitute a crime, opposed to the literal words of the statute, claiming a defendant must only believe the conduct in general did not constitute a crime).

165. Green v. State, 829 S.W.2d 222 (Tex. Crim. App. 1992).

166. *Id.* at 223 (emphasis added).

167. TEX. PENAL CODE ANN. § 8.03(b) (emphasis added).

Illustrative of those difficulties is the decision in *Jenkins v. State*.[168] Jenkins was convicted of illegally voting in an election in which he knew he was not eligible to vote.[169] Under Section 64.012(a)(1) of the Texas Election Code, a person commits the offense of illegal voting "if the person votes . . . in an election in which the person *knows* the person is not eligible to vote."[170] The Election Code further provides that to be eligible to vote in an election, the person must be "a resident of the territory covered by the election for the office or measure on which the person desires to vote."[171] Jenkins admitted that he voted in an election for the Woodlands Road Utility District No. 1 in Montgomery County, Texas (the RUD), but he claimed that he did not knowingly violate the law because he reasonably believed that he did in fact reside in the RUD when he registered to vote and voted.[172] Accordingly, he contended that he was entitled to a mistake of law jury instruction under Section 8.03 of the Texas Penal Code.[173]

Jenkins argued that he reasonably relied on advisory opinions and case law to conclude that all that was needed for residence was an "intent to establish a residence combined with bodily presence" and that the law did not require him to "reside [there] for any specific length of time."[174] Therefore, defense counsel maintained that he lacked the "requisite intent to commit the offense of illegal voting."[175] The trial court "concluded that he was not entitled to a mistake of law instruction because he did not 'confess' or admit he committed the allegedly wrongful conduct."[176] Jenkins argued that because the so-called confession and avoidance doctrine applied only in the case of affirmative defenses, it did not apply here as "the doctrine does not apply when the defensive issue . . . negates the culpable mental state" required for commission of the offense.[177] The Fourteenth District Court of Appeals agreed.[178] The mistake of law defense raised by Jenkins, according to the court, did not merely provide a "legal excuse for

168. Jenkins v. State, 468 S.W.3d 656 (Tex. App.—Houston [14th Dist.] 2015) (per curiam), *pet. dism'd, improvidently granted*, 520 S.W.3d 616 (Tex. Crim. App. 2017) (per curiam) (mem. op.).

169. *Id.* at 670.

170. TEX. ELEC. CODE ANN. § 64.012(a)(1) (emphasis added).

171. *Id.* § 11.001(a)(2).

172. *Jenkins*, 468 S.W.3d at 668–70.

173. *Id.* at 673; TEX. PENAL CODE ANN. § 8.03(b).

174. *Jenkins*, 468 S.W.3d at 663.

175. *Id.*

176. *Id.* at 673.

177. *Id.* at 674 (quoting Juarez v. State, 308 S.W.3d 398, 402 (Tex. Crim. App. 2010)).

178. *Id.* at 671.

otherwise criminal conduct" but "may be applied to negate the culpable mental state of an alleged offense when an accused contends that he reasonably believed his conduct was not criminal based on his reasonable reliance on official statements or interpretations of the law."[179]

In *Jenkins*, the majority strained hard to find a mistake of law excuse that negated a culpable mental state.[180] One could well conclude that the court rewrote the mistake of law statute under the guise of interpreting it. Despite loose statements that the mistake of law defense as stated in the code negates a culpable mental state, it clearly does not.[181] The mistake of law defense could apply to situations in which all the elements of the offense, including a culpable mental state, exist. Moreover, the reasonable reliance mistake of law defense could apply to strict liability offenses where there is no culpable mental state to negate. In effect, a defendant making a mistake of law defense is admitting all the elements of the crime.[182] He is making what is called a true defense—he admits to the illegal conduct but also claims he is not guilty of the charged crime. This led to the state claiming the so-called confession and avoidance doctrine would apply because the mistake of law argument required the defense to admit the otherwise illegal conduct.[183] However, the court in *Jenkins* determined the confession and avoidance doctrine did not apply because of Jenkins's claim that he did not commit the offense due to lack of essential intent.[184] The majority opinion concluded:

> [T]he plain language of Penal Code section 8.03 demonstrates that the legislature intended the mistake of law defense to apply when a charged offense includes, as an element of the crime, a culpable mental state that incorporates knowledge of the law or legal concepts and the accused has presented some evidence that he reasonably believed his conduct did not

179. *Id.* at 675–76 (citing TEX. PENAL CODE ANN. § 8.03(b)).

180. *See id.* (interpreting mistake of law defense as negating culpable mental state despite lacking numerous examples).

181. *See id.* (characterizing mistake of law defense as a negation of culpable mental state). *But see* TEX. PENAL CODE ANN. § 8.03 (including no textual mention of culpable mental state in mistake of law statute).

182. Meraz v. State, 785 S.W.2d 146, 153 (Tex. Crim. App. 1990) (en banc) (acknowledging affirmative defenses, which include mistake of law, are based upon the necessity of the defendant admitting he or she committed the illegal conduct).

183. *Jenkins*, 468 S.W.3d at 674.

184. *Id.* at 675–76.

> constitute a crime because he acted in reasonable reliance on official statements or interpretations of the law as specified in the statute.[185]

So, Jenkins was entitled to his requested instructions.

In his dissenting opinion,[186] Justice Busby agreed with the majority that there are two kinds of mistakes of law, and Jenkins was relying on the mistake of law that negated a culpable mental state. One type of mistake might be called the reasonable reliance defense where the defendant claims he did not think the charge was a violation of the law.[187] This defense would apply even to a strict liability offense or where all the elements of the crime existed, as the claim is not that he did not commit the crime but instead that he did not think his conduct constituted a crime.[188] But the mistake of law of the second type is based on a claim that the crime was not committed because the required culpable mental state is absent.

Justice Busby viewed Jenkins's claim as the second type of mistake of law defense, which would negate an element of the offense. But he concluded that denying the requested instruction was neither error nor harmful. Indeed, the requested instruction would be harmful by having the effect of lessening the state's burden.[189]

The *Jenkins* majority obviously felt that fairness required the defendant to have his claim of a mistaken belief considered by the trier of fact.[190] But following the lead of Jenkins's claim of a mistake of law, the court apparently felt if he were to get relief, it would necessarily be within the context of the mistake of law defense.[191] In so doing, the court contrived a legislative intent rationale to justify the result. In fact, Jenkins's claim could more plausibly be supported as a mistake of fact.

The plain wording of the mistake of law statute provides a defense for a mistaken belief that the conduct charged did not constitute a crime.[192] But Jenkins did not claim to not know or believe voting as a nonresident was an offense.[193] Not only did he believe it was an offense, but he took elaborate

185. *Id.* at 675.
186. *Id.* at 682.
187. *Id.* at 684.
188. *Id.* at 685.
189. *Id.* at 686, 690.
190. *Id.* at 681.
191. *Id.* at 681–82.
192. TEX. PENAL CODE ANN. § 8.03(b).
193. *Jenkins*, 468 S.W.3d at 663.

steps to avoid violating the law.[194] Jenkins claimed to believe he was a resident of RUD.[195] His claim was based on a misunderstanding of what the definition of residency was under the Election Code.[196] The belief that he was a resident of RUD was a mistake of his status, or a mistake of fact. That mistake would negate the intent required to be guilty of the Election Code offense.

Another example of the confusion in distinguishing mistake of fact and mistake of law is evidenced by *Acosta v. State*.[197] Acosta was charged with producing with intent to sell a counterfeit driver's license.[198] He claimed that disclaimers on the back of the document—"not a government document," "for novelty use only," and "not for official use"—negated his intent to produce a forged or counterfeited instrument.[199] He claimed he did not think the document was a forgery or counterfeit.[200] His lawyers were not sure whether this claim was a mistake of law or a mistake of fact. Counsel decided not to raise mistake because it would constitute an admission that he committed the crime, and it would undermine his claim of no crime.[201] In fact, Acosta was not claiming he did not know that producing a counterfeit instrument for sale was a crime. He admitted that, but claimed he thought that the fact the document contained disclaimer language negated the intent required for the offense.[202] Acosta's claimed mistake did in fact relate to forgery, but similar to Jenkins, his claim was not a mistaken fact that forgery was a crime.[203] His mistake was one of fact—whether the document was in fact forged or counterfeited. But the court concluded Acosta's mistake was irrelevant because it did not negate an intent required for the offense.[204] According to the court, the law requires "intent to sell, distribute[,] or deliver a forged or counterfeit instrument"

194. *Id.* at 668.

195. *Id.*

196. *Id.* at 670.

197. Acosta v. State, 411 S.W.3d 76 (Tex. App.—Houston [1st Dist.] 2013).

198. *Id.* at 83–84.

199. *Id.* at 84.

200. *Id.*

201. *Id.* at 91.

202. *See id.* at 90–91. (outlining Acosta's unsuccessful claim of entitlement to a mistake of fact jury instruction based on his misunderstanding of the intent required for forgery and counterfeiting charges).

203. *See id.* at 90 (establishing the reasons Acosta's counsel did not request a jury instruction for mistake of fact).

204. *See id.* at 86 (reviewing the court's analysis of the culpable mental state required for counterfeiting).

while knowing that it was not made by an authorized entity.[205] Acosta needed no "intent to trick the purchaser into believing it [was] genuine" to be guilty of counterfeiting.[206] So, it made no difference how his mistake was characterized.

When Section 8.03 was adopted, the authors of the Practice Commentary, with considerable perspicacity, suggested mistakes of any law—other than the law the defendant is charged with violating—should be treated as mistakes of fact.[207] In those kinds of cases, "ignorance or mistake of law sometimes indicates that the defendant lacked *mens rea*" and, therefore, committed no offense.[208] The commentary notes that some of the older cases treated mistakes of law as a mistake of fact.[209] For example, a defendant claiming to believe he was free to marry as a defense to a bigamy charge because of a mistaken belief that his prior marriage was dissolved. The defendant's belief in such a case would be seen as a mistake of fact based on a misunderstanding of the non-governing family law. Likewise, the commentary to the Mistake of Law section of the Texas Criminal Pattern Jury Charges notes the problem of the Texas Penal Code making no explicit reference to a "mistake of (or ignorance about) law that logically tends to show the defendant lacked the required culpable mental state . . . ."[210] The commentary suggests a jury instruction could be warranted when defendants argue a "mistake of 'fact' in which 'law' becomes a 'fact.'"[211] Numerous cases lend support to this approach.[212]

Without expressly adopting this approach, the Court of Criminal Appeals appears to have embraced it. For example, in *Celis v. State*,[213] a defendant was charged with falsely holding himself out to be a lawyer and claimed that he had a license to practice in Mexico that he thought qualified him to

205. *Id.* at 86.

206. *Id.*

207. Searcy & Patterson, *supra* note 163, at 218.

208. Searcy & Patterson, *supra* note 163, at 218 (emphasis added).

209. Searcy & Patterson, *supra* note 163, at 219.

210. Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Criminal Defenses*, CPJC 29.1, at 115 (2015).

211. *Id.* at 122–23.

212. *See* Celis v. State, 416 S.W.3d 419, 429–30 (Tex. Crim. App. 2013) (examining defendant's confusion between mistake of law and mistake of fact) (citing Celis v. State, 354 S.W.3d 7, 29 (Tex. App.—Corpus Christi 2011)); Thompson v. State, 236 S.W.3d 787, 798–99 (Tex. Crim. App. 2007) (limiting the mistake of fact defense to situations negating the culpable mental state required to be convicted of an offense).

213. Celis v. State, 416 S.W.3d 419 (Tex. Crim. App. 2013).

practice in Texas.[214] Celis, who was never licensed to practice law in Texas, continuously held himself out as a lawyer in Texas for several years.[215] Celis acknowledged he did not have the documents needed to practice law in Mexico but claimed his diploma in judicial science justified his belief that he was "considered a lawyer in Mexico."[216] Additionally, "[h]e called two witnesses who testified that every Mexican citizen who was of legal age and sound mind [was] a 'licenciado,'" and thereby "authorized to practice certain types of law in Mexico."[217] Celis was charged with twenty-three counts of violating of Texas Penal Code Section 38.122.[218] A jury found him "guilty on [fourteen] counts and assessed a [ten]-year sentence for each offense, probated for [ten] years."[219] On appeal, Celis claimed that the trial court erroneously denied his request for a mistake-of-fact instruction based on his mistaken belief that he was licensed to practice law in Mexico.[220]

The Court of Appeals held Celis's belief—that he was licensed to practice law in Mexico and was in good standing with the licensing authorities in Mexico—did not raise the defense of mistake of fact because that belief would not negate the culpable mental state required to commit the offense.[221] The Court of Criminal Appeals characterized Celis's argument as a mistake of law, not mistake of fact.[222] The court concluded that Celis's claimed belief only related to the legality of his actions, not to his intent to obtain financial gain, which is the mental state required by the statute.[223] Is that a mistake of law? Celis argued that he did not think his conduct was illegal.[224] He did not argue that he did not think or know practicing law

214. *Id.* at 421.

215. *Id.*

216. *Id.* (internal quotation marks omitted).

217. *Id.* (first internal quotation marks omitted).

218. *Id.*; *see* TEX. PENAL CODE ANN. § 38.122(a) ("A person commits an offense if, with intent to obtain an economic benefit for himself or herself, the person holds himself or herself out as a lawyer, unless he or she is currently licensed to practice law in this state, another state, or a foreign country and is in good standing with the State Bar of Texas and the state bar or licensing authority of any and all other states and foreign countries where licensed.").

219. *Celis*, 416 S.W.3d at 422.

220. *Id.* at 429 (citing Celis v. State, 354 S.W.3d 7, 29 (Tex. App.—Corpus Christi 2011)).

221. *Id.*

222. *Id.* at 429–30.

223. *Id.* at 422–23.

224. *Id.* at 421.

without the necessary qualifications is a crime.[225] He merely claimed that he did not think he was violating the law.[226]

The Court of Criminal Appeals upheld the Court of Appeals' holding that defendant Celis was not entitled to a mistake of fact instruction because his claimed mistaken belief "did not negate the kind of culpability required for the offense."[227] Judge Alcala, writing the plurality opinion, did not reference the distinction the court of appeals made but merely noted that Celis's claimed mistake according to the Court of Appeals, "may have been a mistake of law, but appellant did not request that type of instruction."[228] Judge Alcala and two other judges writing concurring opinions proceeded to consider his claim as a mistake of fact.[229] Indeed, there was considerable discussion in three separate opinions concerning the scope of the mistake of fact defense.

Celis's claimed mistaken belief was correctly treated as a mistake of fact, albeit based on an alleged misinterpretation of the law.[230] Celis did not claim he was unaware practicing law without the necessary qualifications constituted a crime. He claimed a mistake as to his status, albeit based on a misinterpretation of the law other than the one he was charged with violating.[231]

Similarly, in *Thompson v. State*,[232] Judge Keller "suggested" that the defendant charged with aggravated assault could raise the mistake of fact defense with respect to the element of serious bodily injury. Again, Thompson's mistake, if there was one, would not be of the law he was charged with violating. It would be a mistake as to whether he was inflicting serious bodily injury—a fact based on a definition in the penal code.

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225. *Id.* at 421.

226. *Id.* at 421.

227. *Id.* at 432.

228. *Id.* at 429–30.

229. *See id.* at 435 (Keller, P.J., concurring) ("I write separately to respond to Judge Cochran's contention that the mistake-of-fact defense applies to elements of an offense other than the culpable mental state."); *id.* at 441 (Cochran, J., concurring) (citing Celis v. State, 416 S.W.3d 419, 421 (Tex. Crim. App. 2013)) ("But I do, however, respectfully disagree with the plurality that appellant 'was not entitled to an instruction of a mistake-of-fact defense because his requested instruction did not negate the culpability required for the offense.'").

230. *Id.* at 430–31.

231. *See id.* at 429 (analogizing the false-lawyer statute to other statutes the Court had previously interpreted, the defendant argued his mistake as to non-lawyer status indicated a lack of requisite intent, which should be considered a mitigating circumstance).

232. Thompson v. State, 236 S.W.3d 787 (Tex. Crim. App. 2007).

The significance of the *Thompson* case can hardly be overstated. All judges on the Court of Criminal Appeals agreed that the defendant's claimed belief was one of fact based on his understanding of the law.[233] Thompson did not claim that assault causing serious bodily injury was not a crime. He claimed that he did not think he committed the crime because he believed the injury he caused was not a "serious bodily injury."[234] Of course, that claim would not be a defense now that the court has held the defendant's mental state as to the nature of the injury irrelevant.

The Court of Criminal Appeals' recognition that a mistake of fact may be the result of a misunderstanding or misinterpretation of the law undermines previous decisions interpreting Section 8.03 of the Penal Code.[235] An example of one of those decisions is *Zarsky v. State*.[236] Zarsky was convicted of criminal trespass after being arrested in the parking lot of an abortion clinic while demonstrating against the clinic.[237] At his trial, Zarsky requested an instruction to the effect that he should be found not guilty if the jury decided he formed a reasonable belief that he was in a public place and thus did not have the culpability required for the offense of criminal trespass.[238] The Corpus Christi Court of Appeals held Zarksy was not entitled to a mistake-of-fact instruction due to his claimed belief that the location was a public place, finding a mistake of law rather than a mistake of fact.[239] This conclusion is inconsistent with *Thompson*.[240] Zarsky claiming his belief he was in a "public place" is analogous to Thompson's claim in which he thought the injury he caused was not a "serious bodily injury."[241]

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233. *See id.* at 793, 800 ("[Defendant] would have a defense, so long as his mistaken belief about the type of injury he was inflicting was *reasonable*.").

234. *Id.*

235. *Compare id.* at 800 (allowing mistake-of-fact instructions), *with* Zarsky v. State, 827 S.W.2d 408, 414–15 (Tex. App.—Corpus Christi–Edinburg 1992) (denying mistake-of-fact instruction).

236. Zarsky v. State, 827 S.W.2d 408 (Tex. App.—Corpus Christi–Edinburg 1992).

237. *Id.* at 410.

238. *See id.* at 413 ("[C]ontend[ing] in support of his position that because he was arrested in a public place as defined by the Texas Penal Code his speech was protected.").

239. *See id.* at 415 (concluding Zarksy's mistaken belief insufficient to render an entitlement to a mistake of law jury instruction).

240. *See generally* Thompson v. State, 236 S.W.3d 787 (Tex. Crim. App. 2007) (holding a mistaken interpretation of law entitles defendant to a mistake of fact instruction).

241. *Compare Zarsky*, 827 S.W.2d at 413 (mistaking whether defendant would be arrested for trespass), *with Thompson*, 236 S.W.3d at 793 (mistaking whether defendant was inflicting great bodily harm).

Another case with a now questionable holding is *Austin v. State*.[242] Austin was convicted of promoting an endless chain scheme under Texas Penal Code Section 32.48.[243] To convict the defendant the prosecution's burden was to prove that Austin intentionally and knowingly promoted a scheme whereby participants purchased a chance to receive compensation for recruiting new participants. Austin claimed he had been informed the business was not an illegal chain scheme by the founder and CEO of the business.[244] The court held Austin was not entitled to a mistake-of-fact instruction because he "was relying on another's mistake of law and was, thus, not entitled to an instruction under" Texas Penal Code Section 8.02 (Vernon 1974).[245] The court gave neither authority nor reasoning to support its statement. In fact, there is no reason why a defendant cannot base a mistake of fact on another's mistake of law. Of course, even if the defendant is mistaken, his mistake must be reasonable and will be a defense only if it negates an intent required for the offense.

The point is that a defendant's belief should not be characterized as a mistake of law simply because the belief results from a misunderstanding of the law. In other words, what a defendant thinks is a *fact*, even if it is the result of a misunderstanding of the law. It is a fact whether one is a resident of a particular place, authorized to practice law, standing in a public place, producing a counterfeit document, or inflicting serious injury. It is now time for the other shoe to drop. The Court of Criminal Appeals should make clear that Section 8.03 has been misinterpreted. The mistake of law provision of Section 8.03 should be limited to a claimed belief that the statute on which the prosecution is based either did not exist or for some reason was unenforceable.

Claims of this sort will be rare. The limited availability of this defense is consistent with the overriding principle that ignorance of the law is no excuse. It makes sense that an exception to the general principle is limited to those instances in which the defendant has been led to believe that the crime he is charged with does not exist. A defendant who claims, not that he thought there was no crime as charged, but instead that he did not commit it, is left with the mistake of fact defense. In other words, he will have a defense only if his claimed belief that he was not committing a crime

242. Austin v. State, 769 S.W.2d 369 (Tex. App.—Beaumont 1989).
243. *Id.* at 370.
244. *Id.* at 372.
245. *Id.*

is based on the absence of a culpable mental state required as an element to the crime. A claimed mistaken belief as to an element of a crime without a culpable mental state requirement will not be a defense. Suppose, for example, a defendant is charged with violation of the cruelty to animals statute[246] after shooting and killing dogs trespassing on his property. He claims he did not know that homeowners were privileged under the law from shooting trespassing dogs only if the dogs were causing or threatening harm. His mistaken belief will not be a defense. It has been said that omission of a culpable mental state for an element of a crime indicates a legislative intent to cast the attendant risk on the actor as to that element.[247] But his state of mind could nevertheless be considered as a mitigating circumstance by the prosecution in the decision to charge, or by the judge or jury in a trial.[248]

246. TEX. PENAL CODE § 42.092.

247. *See* Schultz v. State, 923 S.W.2d 1, 3 (Tex. Crim. App. 1996) (attaching a mental state to the definition of abandonment in case involving children would render the statute meaningless).

248. It is not uncommon in the case of strict liability offenses—such as code or ordinance violations—for violators to be given notice and an opportunity to conform their conduct to the law before the initiation of prosecution. Prosecution after failed compliance will be facilitated since the fact of prior notice will negate any claim of lack of knowledge of, or intent to violate, the law.